IN THE SUPREME COURT OF FLORIDA

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| BECHTEL JEWELERS, INC., Petitioner, v. INSURANCE COMPANY OF NORTH AMERICA, etc., et al, Respondents. | ) | CASE NO. 64,023 |
| ANN SLOAN, Petitioner, v. INSURANCE COMPANY OF NORTH AMERICA, etc., Respondent. | ) | CASE NO. 64,022 |

# PETITIONER, BECHTEL JEWELERS, INC.'S BRIEF ON THE MERITS

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## INTRODUCTION

This is petitioner, BECHTEL JEWELERS, INC.'S reply brief. T means transcript of testimony. PX means plaintiff's exhibit.

## STATEMENT OF THE CASE AND THE FACTS

Bechtel supplements its statement by mentioning the evidence on which the jury found INA covered the loss. INA's insuring agreement is:

* * *

> "5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:
>
> * * *
>
> (B) . . . damage sustained while the property is being actually worked upon and directly resulting therefrom . . . "

The property insured is:

> "(A) Pearls, precious and semi-precious stones, jewels, jewelry, watches and watch movements, gold, silver, platinum, other precious metals and alloys and other stock usual to the conduct of the Assured's business, owned by the Assured;
>
> (B) Property as above described, delivered or entrusted to the Assured by others who are not dealers in such property or otherwise engaged in the jewelry trade;
>
> (C) Property as above described, delivered or entrusted to the Assured by others who are dealers in such property or otherwise engaged in the jewelry trade, but only to the extent of the Assured's own actual interest therein because of money actually advanced thereon, or legal liability for loss of or damage thereto."
>
> PX6

INA denied coverage to Bechtel under the policy because it claimed the damage to the sapphire was excepted under the exception in paragraph 5(B) for damage sustained while the property is actually being worked upon and directly resulting therefrom.

The jury answered an interrogatory in the verdict:

> "3. Was the incident complained of covered by the INSURANCE COMPANY OF NORTH AMERICA policy to BECHTEL JEWELERS, INC.?
>
> Yes." R 1123

INA maintained its denial of coverage through the time it filed its notice of appeal, R 1156 - 1157, from the amended final judgment, R 1150 - 1151, and from the order awarding Bechtel attorney's fees and costs against INA, R 1148 - 1149.

The amended final judgment recites that the jury found ". . . that the incident complained of was covered by the Insurance Company of North America policy issued to Bechtel Jewelers, Inc...", and awards Bechtel recovery over against INA for all sums recovered against it by Sloan, and its reasonable attorney's fees and taxable costs. The order awarding attorney's fees and taxing costs awards Bechtel a reasonable attorney's fee and costs.

INA abandoned its appeal from the order awarding attorney's fees and costs and from the judgment finding

coverage and awarding indemnity and attorney's fees and costs against INA by not arguing those points on appeal.

Arthur V. Lynch, a professor of insurance law, formerly claims supervisor, claims manager and general counsel for Hartford Accident and Indemnity Company, testified:

> "A. I think very definitely it covers, or it is covered under the terms of the policy. When you look at this policy you will find that this is not an exclusion, it's an exception. And, of course, the reason for exceptions is to determine what the nature of the risk is.
>
> Now, in this particular case, they could have very easily -- and I reason it this way -- they could have very easily used the words 'in work', but they went out of their way to use the word 'actually in work'.
>
> And I reason from that, that when they mean, when they say 'actually in work' they mean real work, the exercise of a professional skill to change the pattern of a particular article.
>
> And I think the intent of this policy was to cover anything but that which was the exercise of professional skills such as the cutting of stones, such as the changing of the format of whatever they are working on.
>
> This is an all risk policy and it must be given a very broad interpretation for that reason." T 405 - 406.

Robert L. Bechtel, a gemologist, testified:

"Q. What do you consider actually working upon some piece of jewelry? What do you consider 'working upon'? What does that mean to you, Mr. Bechtel?

A. Well, to me it means you have to manipulate it in some way. Cut the shank to size it, or restore a prong, set a stone or whatever." T 170.

The judgment is divisible. Defining coverage under the policy is severable from finding liability for the incident covered under the policy and awarding damages.

## QUESTIONS FOR REVIEW

I.

IF A MARY CARTER AGREEMENT IS ENTERED INTO AND NONPARTICIPATING DEFENDANTS REQUEST THAT THE JURY BE SO ADVISED, MUST THE ENTIRE AGREEMENT ALWAYS BE PUT IN EVIDENCE.

II.

IF A POINT IS NOT URGED FOR REVERSAL IN AN APPELLANT'S BRIEF, IS IT PRESERVED.

## ARGUMENT

### QUESTION I

IF A MARY CARTER AGREEMENT IS ENTERED INTO AND NONPARTICIPATING DEFENDANTS REQUEST THAT THE JURY BE SO ADVISED, MUST THE ENTIRE AGREEMENT ALWAYS BE PUT IN EVIDENCE.

INA does not argue the certified question whether an entire Mary Carter Agreement must always be put in evidence. INA says on page 5 of its brief, "We respectfully submit that the time has come for this court to re-examine its ostensible ruling in Ward v Ochoa 284 So. 2d 385 (Fla. 1973) that this type of settlement agreement is valid".

INA's brief is devoted to an effort to persuade this court to recede from its ruling in Ward v Ochoa. Aside from the consideration that this court invited the litigants to argue a different question, the decision is sound and this court has already rejected the arguments advanced by INA.

INA does not answer Bechtel's argument that this court has already decided the certified question in Ward v Ochoa where this court said that if the defendants not directly affected by the Mary Carter agreement move for a severance because of possible prejudice to them, the court should exercise its sound discretion in granting or denying the motion. The nonparticipating defendants' remedy is to move for a severance.

When part of a writing is introduced by a party, an adverse party may require him at that time to introduce the other part of the writing that in fairness ought to be considered contemporaneously. F.S. Sec.90.108 Discovery and admission of Mary Carter agreements is allowed because they

are relevant to the credibility and demeanor of the witnesses and their interest in the outcome of the case as well as to the conduct of counsel.

The other parties would have been prejudiced if INA had been permitted to excise those portions of the agreements which it felt were against its interest. The jury would have known of the agreements and evaluated the parties accordingly, but the jury would have been denied an opportunity to assess the parties' reasons for entering into the agreements.

If it were not required that the whole agreement be received in evidence, the party obtaining disclosure of the agreement would have the benefit of the jury knowing about the agreement without the jury getting to know what motivated the agreement.

## QUESTION II

IF A POINT IS NOT URGED FOR REVERSAL IN AN APPELLANT'S BRIEF, IS IT PRESERVED.

Coverage was established on Bechtel's crossclaim against INA. The jury answered a separate special interrogatory that there was coverage.

The amended final judgment recits that the jury found, ". . . the incident complained of was covered by the Insurance Company of North America policy issued to Bechtel Jewelers, Inc."

INA did not argue on appeal the question of coverage under the jeweler's block policy as determined by the amended final judgment, and did not argue the validity of the order awarding fees. INA made no point on appeal arguing reversal of the amended final judgment because the jury's answer to the special interrogatory finding coverage was incorrect or that the judgment was incorrect so far as it found coverage.

INA tells the court at page 13 of its brief, "The error complained of on appeal, which formed the basis of the decision on appeal, tainted the entire verdict and the judgments entered thereon and mandated reversal. This was called to the attention of the Fourth District Court of Appeal at argument and in the conclusion of appellant's brief."

Questions cannot be presented to an appellate court for the first time during oral argument. There is an implication from INA's argument that it did argue the coverage question in its brief. It did not. All it said in its brief was, "Admission of the entire settlement agreements between Sloan, McCabe and Bechtel Jewelers was highly prejudicial to INA."

## CONCLUSION

The district court's decision should be reversed and the trial court's amended final judgment and order awarding fees should be reinstated.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to JONES & FOSTER, P.A., Attorneys for Insurance Company of North America, P. O. Drawer E, West Palm Beach, Florida 33402, MONTGOMERY, LYTAL, REITER, DENNEY & SEARCY, Attorneys for Ann Sloan, P. O. Drawer 3626, West Palm Beach, Florida 33402, EDNA L. CARUSO, Attorney for Ann Sloan, 1615 Forum Place, Suite 4B, West Palm Beach, Florida 33401, BERNARD CONKO of BRENNAN, McALILEY, HAYSKAR, McALILEY & JEFFERSON, Attorneys for Terence F. McCabe, Inc., P. O. Box 2439, West Palm Beach, Florida 33402, and PATRICK FOGARTY, 501 South Flagler Drive, West Palm Beach, Florida 33401 by mail this 17th day of October, 1983.

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Attorney