OA 10-7-97

SUPREME COURT OF FLORIDA

DISTRICT COURT OF APPEAL
FIRST DISTRICT - NO. 96-1448

CASE NO. 90,150

CONTAINER CORPORATION OF AMERICA,
Petitioner,

vs.

MARYLAND CASUALTY COMPANY,
Respondent.

AMICUS CURIAE BRIEF
IN SUPPORT OF THE PETITIONER

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AMICUS CURIAE

The Amicus Curiae, the Florida Associated General Contractors Council, Inc. ("AC""), represents approximately 850 general contractors, subcontractors, vendors and suppliers in the State of Florida. The **First** District Court of Appeals decision in this case could seriously threaten the ability of AGC members to protect themselves and the owners of construction projects with whom they contract from third-party liability exposure and attendant litigation expense by having relied upon the protections normally afforded by "additional insured" liability coverage. The decision of the District Court of Appeal that an "additional insured" endorsement is limited by a separately entered into contractual indemnification agreement, not expressly incorporated by reference in the insurance policy or in the endorsement, undermines the reasonable commercial expectations of AGC members who have secured such additional insured coverage or who have been named as additional insureds in such policies.

The District Court of Appeals decision has major implications for the AGC and for all owners, contractors, subcontractors, suppliers and other parties involved on construction projects who have risk shifting devices in place, such as additional insured liability coverage and separate contractual indemnity agreements. In addition to thwarting the reasonable expectation that the additional insured, if sued for tort liability, will be defended and indemnified by the primary insured's carrier, the District Court of Appeal's decision also directly contravenes long standing principles of insurance contract interpretation. If affirmed, the

decision of the District Court of Appeal would be a persuasive precedent which could be utilized to hold that all additional insured commercial liability endorsements only provide liability coverage for vicarious liability of the additional insured but not for the additional insured's own negligence even though the primary insured under the same policy is covered for both its own negligence and for vicarious liability. Such precedent could not only complicate the enforcement of final judgments in cases where litigation over additional insured liability coverage has been completed, but could also effect the outcome of cases where litigation is still pending and for future litigation, not yet filed.

STATEMENT OF THE CASE AND THE FACTS

The Amicus Curiae basically adopts the Statement of the Case and the Facts set forth by the petitioner, Container Corporation of America, in its initial brief. However, a brief synopsis of those facts especially pertinent to the issue of insurance coverage is set forth below. Hereinafter, petitioner shall be referred to as "Container", the respondent, Maryland Casualty Company shall be referred to as "Maryland" and Southern Contractors, Inc. shall be referred to as "Southern". References to the record shall be given as "R. _____." References to the appendix to this brief will be referred to as "A._____"

The construction agreement between Container as owner and Southern as contractor, required Southern to procure general

liability insurance naming Container as an additional insured. The same construction agreement also had a separate indemnity agreement which required Southern to indemnify, defend, save and hold Container harmless from any and all costs, damages and liability incurred or arising as a result of the performance by Southern of its duties under the construction agreement. A. 3.

Prior to southern commencing work on the project for Container at its Fernandina Beach, Florida, plant, Container was named as an additional insured by issuance of an endorsement to Southern's pre-existing general liability policy. An additional premium of $250.00 was charged by Maryland, Southern's carrier, for this endorsement. Neither the policy, nor the endorsement adding Container as an additional insured, contained any language which limited Container's coverage to liability assumed pursuant to the construction indemnity agreement between Container and southern. Further, neither the policy nor the additional insured endorsement specifically referenced the construction agreement or the indemnity agreement contained therein. The only language limiting Container's coverage as additional insured was contained in the additional insured endorsement as follows: "Interest for operations at operations site by Southern Contractor's, Inc." A. 4. The same endorsement at the bottom thereof also expressly provided as follows: "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, limits or conditions of the policy, except as herein set forth." A. 4.

Southern's employee was working within the scope of his

employment for Southern on Container's property when the injury giving rise to the employee's subsequent personal injury suit against Container occurred. R. 54-56, 67-69, 81-89; A. 2. Maryland took over Container's defense of the personal injury suit under reservation of rights and settled the claim for **$225,000.00.** Maryland thereafter filed suit against Container in the trial court below to recover the settlement monies and defense costs incurred, alleging that Container was not covered as an additional insured under Southern's policy. The trial court granted Final Summary Judgment in favor of Maryland holding there was no insurance coverage and awarding to Maryland **$274,508.36.** A. 2. On appeal, the First District Court of Appeal affirmed the trial court's judgment. Container Corporation of America v. Maryland Casualty co., 687 **So.2d** 273 (Fla. 1st DCA 1996). A.l. On Container's Notice To Invoke Discretionary Review, this Court granted jurisdiction.

SUMMARY OF **THE ARGUMENT**

Neither the policy nor the additional insured endorsement specifically referenced the construction contract document **or** the indemnity agreement contained therein. The only language limiting Container's coverage as additional insured was contained in the additional insured endorsement as fallows: "Interest for operations at operations site by Southern Contractors, **Inc."** The same endorsement at the bottom thereof also expressly provides as follows: "Nothing herein contained shall be held to vary, alter,

waive or extend any of the terms, limits or conditions of the policy, except as herein set forth." This language does not limit Container's coverage to damages caused by actual omissions of Southern but not by Container's own negligence. Even if the language is determined to be ambiguous, it should be construed strictly against Maryland and in favor of coverage for the additional insured, Container.

Southern's employee was working within the scope of his employment for Southern on Container's property when the injury giving rise to this litigation occurred. Therefore the injury must have arisen out of the operations of Southern at the operation site. In any event, since the terms "interest for operations at the operation site by Southern Contractors, Inc." are not defined anywhere in the insurance policy or the endorsement adding Container as additional insured, those terms should be strictly construed against Maryland and in favor of coverage for Container. Therefore, the District Court's affirmance of the trial court's grant of summary judgment on this issue was also clearly erroneous.

The District Court of Appeal's decision directly conflicts with the Fourth District Court of Appeal's decision in Florida Power and Light, and is also contrary to and out of step with other Florida District Courts of Appeal decisions and decisions from other states on substantially similar facts.

Although not cited in the District Court of Appeal's opinion, the trial court below and the District Court of Appeals erroneously applied this Court's decision in University Plaza Shopping Center,

Inc. v. Stewart, 272 So.2d 507 (Fla. 1973). There was no dispute in University Plaza that the primary insured's general liability policy only guaranteed the tenants' contractual liability to indemnify the landlord. Interpretation of the insurance policy was, therefore, not at issue in that case. Rather than erroneously relying upon University Plaza Shopping Center, the District Court of Appeal should have applied the decision of the Fourth District Court of Appeal in Florida Power and Light, and other Florida appellate decisions which uniformly hold that an insurance policy, especially one which does not define terms being used, should be interpreted as liberally as possible to protect the insured. E.g Hartnett v. Southern Insurance Company, 181 So.2d 524 (Fla. 1965).

ARGUMENT

The First District Court of Appeal opinion below specifically addresses only the scope of additional insured coverage and how that insurance coverage should be interpreted. Other issues raised in the trial court, such as the affirmative defenses of Container, are not discussed in the First District's opinion. As perceived by AGC, the adverse precendential impact of the First District's decision upon AGC members is limited solely to the Court's interpretation of additional insured liability coverage. Therefore, AGC will limit its argument to coverage and related insurance policy interpretation issues only, which are argued in point A of Petitioner's Brief. Also, if coverage exists, then the carrier's duty to defend and indemnify the additional insured will

automatically follow, thereby mooting other issues involved in these proceedings.

A. THE OPINION SHOULD BE REVERSED BECAUSE THE FIRST DISTRICT ERRONEOUSLY INTERPRETED THE POLICY IN CONFLICT WITH FLORIDA POWER & LIGHT CO. V. PENN AMERICA INS. CO., 654 So.2d 276 (FLA. 4TH DCA 1995) AND IN VIOLATION OF THE MOST BASIC RULES OF INSURANCE CONTRACT CONSTRUCTION.

1. Reasons for Requiring Additional Insured Coverage.

There are several reasons why an owner, general contractor, subcontractor, sub-subcontractor, vendor or supplier on a construction project would want to obtain the benefits of additional insurance coverage:

1. It gives the additional insured direct rights under the policy of the primary insured;
2. It may avoid the effect of standard exclusions in the additional insured's own commercial general liability policy;
3. It provides a safety net for the primary insured's obligations to the additional insured under a separate indemnity agreement in the event the primary insured becomes insolvent, or the indemnity agreement is invalidated by the Courts;
4. It generally prohibits the primary's insured's carrier from obtaining subrogation rights against the additional insured if the primary insured experiences a loss caused by the additional insured; and
5. It provides the additional insured with personal injury coverage not available to the additional insured under

the primary insured's contractual liability coverage. See The Additional Insured Book, D. Malecki & J. Gibson, pages 23-32, (International Risk Management Institute, Inc. 1991). Such additional insurance coverage serves as the primary coverage for the additional insured which coverage requires the primary insured's carrier to not only indemnify in the event of covered loss but also to defend such covered claims at the carrier's expense. E.g. Tropical Park, Inc. v. U.S.F. & G., 357 so.2 253 (Fla. 3rd DCA 1978).

The many parties that are involved on a typical construction project are subject to numerous potential claims, some of which are covered by other insurance, such as worker's compensation insurance, but many of which must be covered under some type of general liability policy. In this case, the employee of the contractor (Southern), who was working within the scope of his employment, could not sue the contractor due to worker's compensation immunity, so instead sued the owner, Container. See Fla. Stat. §§440.10, 440.11. Similar potential claims on a construction project could be made by employees of one subcontractor against another subcontractor or the owner, by employees of sub-subcontractors versus other subcontractors or other sub-subcontractors and the owner, and by authorized visitors to the construction site who are not employees of the owner, the general contractor, subcontractor, or sub-subcontractors.

Due to the high probability of being exposed to third party tort claims, it is customary in the construction industry for

parties from the top down to require tiers of players on the project underneath them to name those parties above as additional insureds. See Insurance Coverage of Construction Disputes, S. Turner, at page 391, (Shepard's/McGraw-Hill, Inc. 1992); Construction Industry Insurance Handbook, Deutsch, Kerrigan & Stiles, at pages 98-99 (John Wiley & Sons, Inc. 1991). It is also customary to require indemnity clauses in construction agreements. See The Additional Insured Book, supra. at pages 24, 29-30. The indemnity agreement is one type of risk shifting device. Additional insurance coverage, a distinct risk shifting device, unless expressly limited otherwise, gives the additional insured the same coverage that the primary insured has under the policy. See Florida Power & Light Co. v. Penn American Insurance Co., 654 So.2d 276 (Fla. 4th DCA 1995); The Additional Insured Book, supra. at page 32-33.

2. Conflict with Florida Power & Light and Basic Rules of Insurance Contract Interpretation.

AGC has no quarrel with the proposition that an insurance carrier can tailor additional insured endorsements to specifically limit coverage to vicarious liability situations or that specific liability imposed under an indemnity agreement. See, e.g., St Insurance Co. of Hawaii v. State, 665 P.2d 648, 655-56 (Hawaii 1983); Harbor Insurance Company v. Lewis, 562 F.Supp. 800, 802 (E.D. Pa. 1983); Chesapeake & P. Tel. Co. of Md. v. Alleghenv Const. Co., 340 F. Supp. 734, 747 (D. Md. 1972). However, when such limitations are not expressly set forth in the endorsement or

otherwise in the policy, the named additional insured should reasonably expect that its coverage will be identical to the primary insured's coverage, including coverage for the additional insured's own negligence. The Fourth District Court of Appeal in Florida Power & Light Co. v. Penn American Insurance Co., 654 So.2d 276 (Fla. 4th DCA 1995) reaffirmed that reasonable expectation in finding that coverage existed under facts substantially similar to those involved here. Also see, McIntosh v. Scottsdale Insurance co., 992 F.2d 251, 253-55 (10th Cir. 1993). In Florida Power & Light, the insurance policy defined an additional insured as " . . . any person, . . ." to which the named insured is obligated by virtue of a written contract or permit to provide insurance such as is afforded by the terms of this policy, but only with respect to operations by or on behalf of the named Insured or to facilities used by the named Insured and then only to the extent of the coverage required by such contract and for the limits of liability specified in such contract . . . " Id. at 278. An employee of Eastern Utilities Construction, Inc., a contractor employed by Florida Power & Light ("FPL") was seriously injured when he came into contact with an energized feeder bay conductor at an FPL substation. Eastern Utilities' policy, quoted above, was procured from Penn America Insurance Company which denied coverage claiming that the coverage was limited to vicarious liability situations only. In the personal injury suit Eastern's employee claimed that FPL was negligent. The Fourth District held that since Penn America did not utilize specific language limiting coverage to the

vicarious liability situation and because the language actually utilized was ambiguous at best, the additional insured provision must be construed against the carrier and in favor of FPL, the additional insured. In reaching its decision, the Fourth District was not doing anything novel. It merely applied long standing principles of insurance contract construction. For example, if the contractual language is clear and unambiguous, there is no need for judicial construction and the contractmustbe enforced as written. 654 So.2d at 278. Even if the terms of the insurance policy are ambiguous, courts must strictly construe the agreement against the insurer and in favor of coverage as long as such construction gives reasonable meaning to the terms of the policy as a whole. See Excelsior Insurance Company v. Pomona Park Bar & Packase, 369 So.2d 938 (Fla. 1979); Hartnett v. Southern Insurance Company, 181 So.2d 524 (Fla. 1965).

The Fourth District in Florida Power & Lisht, also followed the rationale of cases from other states interpreting similar additional insured's policy language. See e.g. Casualtv Insurance Company v. Northbrook Property & Cas. Ins. Co., 150 111. App. 3d 472, 501 N.E.2d 812 (1986). Also se&, J.A. Jones Construction Co. v. Hartford Fire Insurance Co., 269 Ill. App. 3d 148, 645 N.E.2d 980 (Ill. First District 1995) where the Illinois Appellate Court held that coverage for a general contractor as additional insured under subcontractor's primary policy was not limited to claims arising from the subcontractor's negligence. The language adding the general contractor as an additional insured in that case read

as follows: Who Is An Insured . . . is amended to include as an insured any person or organization with whom you have agreed, because of your written contract or agreement, to provide insurance such as afforded under this policy, but only with respect to your operations . . ." The carrier in that case, just as in this case, contended that there was no coverage because the subcontractor only contracted in its construction agreement with the general contractor to indemnify the general contractor for the subcontractor's negligence, In the suit filed by the subcontractor's employee against the contractor, the claimant alleged only the **contractor's** negligence. The Illinois Appellate Court, in finding coverage noted that: " . . . if Hartford (carrier) had intended to limit its coverage to that required by contract, it could have done so by stating that the level of insurance provided to additional insureds is only that level which is required under the contract between the additional insured and the named insured. It did not do so. The policy endorsements identify who is an additional insured, not the level of coverage. Their focus is on whether the named insured contracted to obtain insurance, not what level of insurance the named insured contracted to obtain. Jones (general contractor) is entitled to the level of coverage Hartford provides under the policy (to its primary insured)." 645 **N.E.2d** 982-83. Also see, Florida Power & Light, supra., 654 **So.2d** at 278-79.

A different panel of the First District in Container Corp. v. McKenzie Tank Lines, 687 **So.2d** 509 (Fla. 1st DCA 1996) correctly

applied the Fourth District Court of Appeal's decision in Florida Power & Licrht, in finding liability coverage under an automobile insurance policy naming Container as an additional insured on a policy obtained by one of Container's vendors, McKenzie Tank Lines. In that case the additional insurance coverage was applicable "regarding operations performed by the insured", McKenzie Tank Lines. There the Court rejected the carrier's contention that insurance coverage only applied for negligent acts or omissions of McKenzie reasoning that the Courts must construe ambiguous terms against the insurer and in favor of coverage, and, if the insurer intends to limit coverage to only those acts caused by the named insured, then the insurer must use express limiting language to that same effect. 687 So.2d at 512. Since Maryland here did not expressly limit coverage to vicarious liability situations in its policy, or the endorsement naming Container as additional insured, Container is entitled to exactly the same coverage that Southern, the primary insured had under the policy. This conclusion is re-enforced by the language at the bottom of the additional insured endorsement which states: "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, limits or conditions of the policy, except as herein set forth." A. 4. At best, utilization of the term "interest for operations at operations site by Southern . . . " is ambiguous and as a matter of law must be construed in favor of coverage. See Hartnett v. Southern Insurance Co., 181 So.2d 524, 528 (Fla. 1965); Hodses v. National Union Indemnity Co., 249 So.2d 679 (Fla. 1971). Also see,

McIntosh v. Scottsdale Insurance Co., 992 F.2d 251, 255 (10th Cir. 1993); Orpiry Insurance Co. v. National Steel c , 382 N.W.2d 753, 755 (Mich. App. 1985).

Even insurance publishers and commentators, heavily relied upon by insurance agents, claims and risk managers, have noted that if additional insured endorsements are intended to limit coverage of an additional insured to its vicarious liability, . . . "the endorsement should be worded clearly to that effect. And, in the event of any lack of clarity, the additional insured should be given the benefit of the doubt . . . " See e.g., The Additional Insured Book, by Malecki and Gibson at pages 34, 106, (International Risk Management Institute, Inc. 1991). This negates any valid argument that it is customary in the insurance industry to view an additional insured endorsement as only providing for vicarious liability coverage. Also see, Fireguard Sprinkler Systems v. Scottsdale Insurance Co., 864 F.2d 648, 653 (9th Cir. 1988) [holding that insurance industry publication's interpretation of coverage issue is strong, though not controlling, evidence of intent].

Although the First District did not specifically mention this Court's decision in University Plaza Shopping Center, Inc. Stewart, 272 So.2d 507 (Fla. 1973), the First District, following the lead of the trial court below (A. 2), erroneously applied that decision in concluding there was no insurance coverage for the additional insured's own negligence. A. 1. In finding no coverage existed, the District Court referred to the separate construction

contract between Southern and Container where in one separate paragraph of the contract Southern agreed to indemnify, defend, save and hold Container harmless from any and all costs, damages and liabilities incurred or arising as a result of the performance of its duty under the agreement. The First District concluded that this separate contractual provision " . . . makes it clear that the scope of the insurance coverage was limited to acts or omissions by Southern, not Container . . . it cannot be interpreted to provide coverage for Container's own negligence . . , " 687 So.2d at 274. A. 1. The sole issue in University Plaza Shopping Center was the interpretation of an indemnity agreement which stated in general terms that the indemnitee was indemnified from "any and all claims". This Court held that the indemnity language did not provide indemnity resulting from the sole negligence of the indemnitee since it did not expressly spell this out. The Court did not interpret, and was not asked to interpret, the general liability insurance policy involved in that case since the landlord who required his tenant to obtain additional insurance contended that the insurance coverage only guaranteed the tenant's contractual liability to indemnify the landlord. 272 So.2d at 512.

Not only is a contract of indemnity viewed separately from a contract of insurance, the separate promises contained within the construction agreement, one for the procurement of insurance and the other for indemnity, are also separate and distinct contract obligations. See Apol v. Shay, 647 So.2d 139 (Fla. 1st DCA 1994); Hertz Corp. v. Pugh, 354 So.2d 966, 969 (Fla. 1st DCA 1978)

[holding that University Plaza, was not applicable in a case involving an additional insured provision]. Also see Cone Bros. Contracting v. Ashland-Warren, 458 So.2d 851, 855-56 (Fla. 2nd DCA 1981) holding that limitations upon interpretation and enforcement of the indemnity agreement have no application to a separate contract promise to procure insurance. Also see, Container Corp. v. McKenzie Tank Lines. Inc., supra.; Saavedra v. Murphy Oil U.S.A., Inc., 930 F.2d 1104, 1109-10 (5th Cir. 1991); Woods v. Dravo Basic Materials Co., Inc., 887 F.2d 618, 621-22 (5th Cir. 1989) ; The Additional Insured Book, supra., at pg.43.

Here, Container does not seek coverage under the indemnity provision of the contract. A. 3. Instead, it is seeking coverage as an additional insured under a separate insurance contract. A. 4. Since the insurance contract and the endorsement issued pursuant thereto do not limit Container's coverage strictly to claims which are based upon Southern's negligence, the District Court erred in incorporating by reference vicarious liability limitations of the separate indemnity agreement which was not specifically incorporated in the insurance endorsement. Comware with Allianz Insurance Co. v. Goldcoast Partners, Inc., 684 So.2d 336 (Fla. 4th DCA 1996) where the Fourth District limited coverage to the scope of the indemnity contract because the indemnity contract was expressly incorporated by reference in the insurance policy.

3. **"Operations At Operations Site" - Causation.**

Southern's employee, slipped and fell on Container's premises while in the course and scope of his employment with Southern while Southern was performing work for Container. A. 2. The injury clearly occurred "in the interest of operations at operations site by Southern." The terms "operations at operation site" by Southern is not defined in the policy. Therefore, if there is any ambiguity involved in the application of those terms, that ambiguity should be construed strictly against the insurer and in favor of coverage. See e.g. Florida Power & Light co. v. Penn America Insurance Co., supra.; Container Corp v. McKenzie Tank Lines, Inc., supra. Also see, Hartnett v. Southern Insurance Co., supra.; Hormel Foods Corp. v. Northbrook Prowertv & Casualty Insurance Co., 938 F.Supp. 555 (D. Minn. 1996); Consolidated Edison v. Hartford Insurance Co., 610 N.Y.S.2d 219 (S.Ct.NY. 1994); Aetna Casualty & Surety Company v. Ocean Accident & Guarantee Corw., 386 F.2d 413 (3rd Cir. 1967).

To find that Southern's employee was working in the scope of his employment on the premises where the employment was being conducted, and to also find the employee was not involved in an accident arising from the "operations" of Southern at the operations site is not only illogical, it is contrary to long established principles of insurance causation law. A. 2, at p. 4. For example, the ownership, maintenance or use of an automobile need not be the proximate cause of the auto accident. What is required is only some form of causal relationship between the insured vehicle and the accident in order to invoke coverage. See

e.g. Container Corn. v. McKenzie Tank Lines, supra., 687 So.2d at 511. Also see pace v. Nationwide Mut. Fire Ins. Co., 542 So.2d 347, 349 (Fla. 1989); National Merchandise Co. v. United Serv. Auto Asso., 400 So.2d 526, 532 (Fla. 1st DCA 1981). But for Southern's employee being engaged in the scope of his work for Southern on Container's property, the resulting injury to the employee would never have happened. The trial court, as affirmed by the First District, therefore erred when it determined there was no causal connection between Southern's employee injury and the operations of Southern at the operation site. Container Corp. v. McKenzie Tank Lines, supra, at 512, Also see McIntosh v. Scottsdale Insurance Comsanv, supra., 992 F.2d at 255; Hormel Foods Corp. v. Northbrook Property & Casualtv Co., supra., 938 F.Supp. at 557-58 and Aetna Casualty & Suretv Co. v. Ocean Accident & Guarantee Corp., supra., 386 F.2d at 415 [all of the foregoing holding, in accord with Florida decisions, that liabilities "arising out of the use or operations" are satisfied by "but for" rather than proximate causation].

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First District and remand with instructions for the trial court to reverse the Final Summary Judgment in favor of Maryland and to enter Summary Final Judgment in favor of Container on the issue of coverage and Container's Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Shelley H. Leinicke, Wicker, Smith, Tutan, O'Hara, McCoy, Graham, & Ford, P.A., One East Broward Boulevard, Suite 500, Post Office Box 14460, Ft. Lauderdale, Florida 33302 and Steve A. Werber and Tracy S. Carlin, The Greenleaf Building, 200 Laura Street, Post Office Box 240, Jacksonville, Florida 32201-0240, by U.S. Mail, this 18th day of August, 1997.

Attorney