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A35051-7/SHL/vsc/358013

FILED
SID J. WHITE
AUG 27 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE FLORIDA SUPREME COURT
CASE NO. 90,150
CASE NO. 96-1445

CONTAINER CORPORATION OF AMERICA,

Petitioner,

vs.

MARYLAND CASUALTY COMPANY,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT MARYLAND CASUALTY COMPANY

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STATEMENT OF THE CASE AND FACTS*

Container Corporation of America, Inc. ("Container") appeals from a decision of the First District Court of Appeal which held that Container is not entitled to insurance coverage as an additional insured on a policy issued to Southern Contractors ("Southern") based on the specific facts of this lawsuit. The First District affirmed a summary final judgment entered in favor of Maryland Casualty Company ("Maryland") in a Declaratory Action to determine the rights and liabilities of the parties under an insurance policy. (R. 1-51, 199-213)

Container manufactures paper products, packaging, and plastics. (Ryan depo. p. 5, 9). Container is part of the Jefferson Smurfit Group located in Dublin. (Ryan depo. p. 5, 9) The corporation employs approximately 17,000 workers and maintains approximately 165 to 170 plants or paper mills throughout the United States. (Ryan Depo. p. 17-18). Container entered into a contract with Southern for the installation of "vacuum pump reclaim piping on Fernandina No. 2 paper machine" on the premises of Container's operation site in Fernandina Beach, Florida. (R. 20) The Contractor's Agreement for Southern's work was a standard contract that Container uses with all of its contractors. (Ryan depo p. 64). This contract, which was drafted by Container, obligated Southern to indemnify Container for liability of rising from Southern's performance:

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*The symbol "R" refers to the Index to the Record on Appeal. Mr. Ryan's deposition, which was filed under separate cover, is independently referenced.

> 5. Contractor [Southern] shall indemnify, defend, save and hold Company [Container] harmless from any and all costs, damages and liabilities incurred or arising as a result of the performance by Contractor of its duties hereunder. . . (R. 20)

No provision of the Contract states or suggests that Southern had any obligation to indemnify Container for any active negligence by Container or in situations where Southern & Container might be jointly responsible. Nothing in this contact obligated Southern to perform any maintenance on the Container premises. The contract provided a total payment of $19,658 to Southern for the pipe installation. (R. 20)

In keeping with Southern's contractual obligation to indemnify Container for any claims resulting from the performance of Southern's duties, the Contractor's Agreement also required Southern to procure insurance adding Container as an additional insured for Southern's operations. Southern was required to maintain coverage for:

> 6. Contractor [Southern] will, at its own expense, procure and maintain in full force and effect during the performance of work under this Agreement . . . the following insurance:
>
> a. Workers compensation and employer's liability insurance in contractor's [Southern's] name . . .
>
> b. Comprehensive general liability insurance, including contractual liability insurance, contractor's protective liability in contractor's [Southern's] name . . .
>
> c. Automobile liability insurance with an employer's non-ownership liability endorsement in contractor's [Southern's] name . . .

d. . . . owners protective liability insurance with company [Container] as the named insured . . . (R. 21)

In accordance with the terms and conditions of the contract between Southern and Container, Southern purchased a commercial general liability insurance policy from Maryland. This insurance policy contained a narrow additional insured endorsement indemnifying Container/Jefferson Smurfit as an additional insured with coverage extending to Container for:

"Interest for operations at operations site by Southern Contractors, Inc." (R. 7)

The insurance policy issued by Maryland had an aggregate limit of Two Million Dollars, with One Million Dollars provided for each occurrence. Southern Contractors paid in excess of $23,000.00 in premium for this coverage as the named insured. The cost for addition of Container as an additional insured for "interest for operations at operations site by Southern Contractors, Inc." was only $250.00. In addition to Container's status as a restricted additional insured under the Maryland policy, Container was insured through National Union Insurance Company under a policy that provided Container with coverage above the first two million dollars of potential liability for which Container was self insured. (R. 107-131)

David Raker, a Southern employee, was injured when he slipped and fell on the Container's premises in Fernandina Beach. Mr. Raker sued Container for negligent maintenance of the premises. The suit asserted, and discovery established, that Mr. Raker slipped on a foreign substance on a ramp which was

maintained by Container in a portion of the premises which was totally separate and distinct from where Southern was installing the piping. (Ryan Depo. 53-55) The risk manager for Container, Mr. Robert Ryan, acknowledged in deposition that he was not aware of any acts of negligence by Southern Contractors which caused Mr. Raker's injuries.[1] (Ryan Depo. p. 58) Mr. Raker's suit did not contain any allegations of any type against Southern Contractors, nor did his claim involve either the operations or the operation site of Southern Contractors.

After suit was filed, Container demanded that Maryland defend and fully indemnify Container for this claim. Maryland undertook Container's defense under a reservation of rights, and ultimately settled Mr. Raker's lawsuit for $225,000.00. (Ryan depo. p. 51-52; R. 107-131)

During the course of discovery, affidavits were submitted by Mr. Hamilton Tillman, the insurance agent who procured the Maryland policy and the additional insured endorsement, and Mr. James Zager, president and owner of Southern. (R. 81-89) These uncontradicted affidavits established that "it was never the intent of the parties to have [Container] be held harmless by Southern Contractors Insurance Carrier, Maryland Casualty, for Container Corporation of America's own negligence." (R. 81-89) Rather, the parties intended for Container to be held

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[1]Mr. Ryan was deposed pursuant to a notice of deposition duces tecum to produce various documents from Container's files. In his capacity as a casualty claims manager at this deposition, Mr. Ryan searched for Container's documents which were responsive. (Ryan depo. p. 18-28, 50-52)

harmless as an additional insured only for its own potential vicarious liability due to active or direct negligence by Southern.

After all relevant discovery was complete, both parties moved for summary judgment. (R. 90-92, 99-103) In a detailed opinion, the trial court granted summary judgment for Maryland. (R. 199-213) The trial court found that the parties never intended to provide insurance coverage for active negligence by Container and, in compliance with the goal to insure Container only where it was vicariously, passively or technically liable for the acts of Southern, no coverage was owed by Maryland to Container under the facts of this case.

Container unsuccessfully challenged the summary judgment ruling on an appeal to the district court. (R. 214-230) A majority of the appellate court agreed that "the policy did not provide coverage for Container's own negligence," and that the underlying contract between Container and Southern made it "clear that the scope of the insurance coverage was limited to acts or omissions by Southern, not Container. The endorsement adding Container was intended to insure a risk for which Container might be vicariously liable, and it cannot be interpreted to provide coverage for Container's own negligence." Container's motion for rehearing, rehearing en banc and/or certification was denied. The instant petition for discretionary review followed.

ISSUES

I. WHETHER THE DISTRICT COURT PROPERLY AFFIRMED THE SUMMARY FINAL JUDGMENT THAT NO INSURANCE COVERAGE WAS AVAILABLE TO AN ADDITIONAL INSURED UNDER THE CLEARLY LIMITED AND UNAMBIGUOUS TERMS OF THE INSURANCE CONTRACT. THE DECISION FOLLOWS ALL RULES OF CONTRACT CONSTRUCTION AND DOES NOT CONFLICT WITH THE CASE OF *FLORIDA POWER AND LIGHT CO. V. PENN AMERICA INS. CO.*, 654 SO.2D 276 (FLA. 4TH DCA 1995).

1. The *Florida Power and Light* case does not conflict with the decisions of the trial court and district court. The instant case should not be reversed because the Maryland policy includes all necessary language required to limit Container's coverage to vicarious liability.

2. The district court's opinion should be affirmed because Container is covered only for vicarious negligence under the express terms of the insurance policy and the settled law of contract construction.

3. The conclusions of the trial court and district court that the instant policy provides coverage only for Container's vicarious liability were based on correct interpretations of the policy and a correct understanding of the insurance industry customs. Therefore, the opinion should be affirmed.

4. The trial court correctly applied *University Plaza Shopping Center, Inc. v. Stewart,* 272 So.2d 507 (Fla. 1973) and cases which followed it when holding that Container was not entitled to insurance coverage for its own negligence under the facts of this case

II. WHETHER THE TRIAL COURT AND DISTRICT COURT PROPERLY DETERMINED THAT CONTAINER IS NOT ENTITLED TO COVERAGE UNDER THE POLICY IN ISSUE AND THEREFORE PROPERLY DENIED JUDGMENT IN FAVOR OF CONTAINER ON ITS COUNTERCLAIM.

III. WHETHER THE JUDGMENT IN FAVOR OF MARYLAND SHOULD BE AFFIRMED BECAUSE MARYLAND MET ITS BURDEN OF PROVING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO CONTAINER'S AFFIRMATIVE DEFENSES AND/OR THAT CONTAINER'S DEFENSES WERE LEGALLY INSUFFICIENT AS A MATTER OF LAW.

1. Maryland submitted competent and admissible evidence to support its motion for summary final judgment

2. Principals of equity support the ruling in favor of Maryland, who paid a claim on behalf of Container in the absence of any indemnity obligation and must be reimbursed.

SUMMARY OF ARGUMENT

The First District's opinion should be affirmed because both the trial court and the district court properly applied the law to the facts of this case and determined that insurance coverage is not available to container for this claim. The provisions of the insurance policy clearly limit the scope of coverage available to Container. The policy terms are capable of only one interpretation: Container is not covered by Maryland's policy for this loss and must therefore look to its own insurance for coverage for its active negligence. Consideration of the underlying contract between Southern and Container reinforces the propriety of the coverage decision reached by both the trial court and the district court. The terms of the contract between Container and Southern clearly and unambiguously provide that Southern has no responsibility to ever indemnify Container for Container's active negligence. This contract further describes the intended scope of insurance coverage to be provided to Container. A clear and unambiguous policy endorsement was issued in compliance with the plain meaning of the underlying contract. The insurance policy was obviously acceptable to Container, which never complained that the Maryland endorsement was not issued in compliance with the contractual requirements.

The trial court correctly found that no coverage was available to Container for Mr. Raker's accident because (1) Mr. Raker's accident did not occur on the operation site of Southern's work, (2) Mr. Raker's accident was wholly unrelated to any aspect of Southern's business and was not due to any misfeasance or

nonfeasance by Southern, (3) Mr. Raker's accident was due solely to the active negligence of Container, as the premises owner, in allowing a dangerous, slippery foreign substance/dangerous condition to exist on its property, (4) the contract was unambiguous and capable of only one interpretation, (5) the minimal insurance premium ($250.00 for Container versus $23,000.00 for Southern) further confirmed the restricted scope of coverage even if one assumes, *arguendo*, that an ambiguity existed in the express terms used in the insurance contract itself, and (6) Container presented no facts or evidence to contradict the undisputed record as established by Maryland.

No conflict exists with the case of *Florida Power and Light Co. v. Penn America Insurance Co.*, because the insurance policies involved in the two cases (1) have different definitions of "who is an insured," and (2) have different provisions controlling the scope of coverage for the additional insured -- the *FPL* policy did not specifically limit coverage to the additional insured to its "interest for operations at operations site" of the named insured like the policy in issue does.

Because Container is not entitled to coverage under Maryland's policy, it is not entitled to recover costs and attorneys fees associated with this case. Both the trial court and district court properly determined that Maryland presented sufficient, competent, uncontradicted evidence to support the summary final judgment on this declaratory relief action.

ARGUMENT

I. THE DISTRICT COURT PROPERLY AFFIRMED THE SUMMARY FINAL JUDGMENT THAT NO INSURANCE COVERAGE WAS AVAILABLE TO AN ADDITIONAL INSURED UNDER THE CLEARLY LIMITED AND UNAMBIGUOUS TERMS OF THE INSURANCE CONTRACT. THE DECISION FOLLOWS ALL RULES OF CONTRACT CONSTRUCTION AND DOES NOT CONFLICT WITH THE CASE OF *FLORIDA POWER AND LIGHT CO. V. PENN AMERICA INS. CO.*, 654 SO.2D 276 (FLA. 4TH DCA 1995).

1. The *Florida Power and Light* case does not conflict with the decisions of the trial court and district court. The instant case should not be reversed because the Maryland policy includes all necessary language required to limit Container's coverage to vicarious liability.

Container ignores the factual and contractual distinctions between the instant case and the case of *Florida Power & Light Co. v. Penn America Insurance Co.*, 654 So.2d 276 (Fla. 4th DCA 1995). In the *FPL* case, Hayward, an employee of Eastern Utility, was injured during the course of his employer's work for FPL. Eastern Utility had entered into a contract with FPL to renovate certain electrical substations. While actually performing this work, Hayward was injured when he came into contact with an energized feeder by conductor on the job site where he was working. The district court ruled that FPL was entitled to insurance coverage as an additional insured under Eastern's insurance with Transamerica Insurance Company because the policy broadly covered FPL "with respect to operations by or on behalf of the Name Insured [Eastern] or to facilities used by the Named Insured." The decision was based on the particular wording of the additional insured provision, the fact that the injury occurred on the job site during

the course of employment, and the lack of any definition or restriction of the term "operations" in the policy.

The instant case presents entirely different facts and contractual provisions. In the instant case, the employee's injury occurred off the job site of the named insured on a slippery ramp that was not part of Southern's work to install vacuum pump reclaim piping. The facts clearly show that Southern's employee, Raker, was not performing any operation relative to installation of this vacuum pump reclaim piping when he was injured -- he was simply walking down a slippery ramp that Container had negligently maintained. The trial and district courts properly determined that Raker was not acting in the interest of Southern's operation at the time of this injury -- in a scenario wholly unlike the work related injury in Hayward in the *FPL* case. Further, the contractual language of the insurance is issue is different from what was presented in the *FPL* case. Additionally, the decision in the *FPL* case does not ever reference or explain the provisions and terms of the underlying contract. Finally, the undisputed evidence in the instant case established that Container, Southern, and Maryland Casualty all intended the additional insured coverage for Container to be limited to those situations where Container was only vicariously liable due to the active or direct negligence by Southern. This was borne out by the fact that Container purchased its own coverage, the premium for naming Container as an additional insured on Southern's policy with Maryland Casualty was only $250 (as compared to Southern's own

premium in excess of $23,000), the testimony of the witnesses, and the terms and conditions of both the insurance contract and the underlying contract.

In summary, the *FPL* case is factually distinguishable from the instant action because (1) the injury in the *FPL* case arose on the job site and during the performance of the employee's job, whereas the Southern employee was injured off the job site, (2) the terms and conditions of the two insurance policies are different, and (3) the instant case specifically discusses and references the underlying contract which required procurement of insurance coverage but the *FPL* case is silent on this point.

The First District's opinion should be affirmed. Both the district court and the trial court correctly followed all applicable law regarding interpretation of insurance contracts and granting of summary judgment. The courts were guided by the well settled Florida law which holds that the construction and effect of a written contract of insurance is a matter of law for determination by the court and is therefore appropriate for summary judgment. *Dahl Eimers v. Mutual of Omaha Life Insurance Co,* 986 F.2d 1379, 1381 (Fla. 11th Cir. 1993); *Lee v. Montgomery,* 624 So.2d 850, 851 (Fla. 1st DCA 1993). The trial court properly relied upon standard principles of insurance contract construction in determining whether Container was covered for this loss under the Maryland policy. *South Carolina Insurance Co. v. Heurer,* 402 So.2d 480, 481 (Fla. 1st DCA 1981). The trial court specifically acknowledged that it was obligated to employ ordinary rules of construction to provide a reasonable, practical, and sensible interpretation consistent

with the intent of the parties. *U.S. v. Peppers Steel & Alloys, Inc.*, 823 F.Supp. 1574, 1581 (S.D. Fla. 1993). The trial court acknowledged that it could not rewrite the contract, add meanings to the contract which were not present, or reach results which were contrary to the intentions of the parties. *Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla. 1979). Further, the trial court acknowledged that the insurance provisions should be read by the trial court in light of the skill and experience of ordinary people with common meanings and without contextual distortion. *Morrison Assurance Co. v. The School Board of Suwannee County,* 414 So.2d 581 (Fla. 1st DCA 1982).

As Container notes, the contract between Southern and Container required Southern to install "vacuum pump reclaim piping on Fernandina No. 2 paper machine". This specific, discrete operation site is capable of only one reasonable interpretation which is accurately reflected in the additional insured endorsement.

The uncontradicted evidence in the record established that Mr. Raker's claim did not occur on Southern's operation site, but rather that Mr. Raker was simply walking on Container's property when he slipped and fell on a slippery ramp that was under the control and maintenance of Container. The term "operations site" as used in the Maryland policy is not ambiguous. Southern was hired only for the limited purpose of installing vacuum pump reclaim piping on a particular machine at this plant. Its operation site would include only the isolated section of Container's property where this work was performed. To argue that Container should be covered for any injury anywhere else, whether a cafeteria,

parking lot, or some other portion of its plant beyond Southern's operation site, is ludicrous. Maryland charged a premium of $23,000 to cover Southern's potential active liability on a discreet, small portion of Container's premises. Container suggests that it should be covered for its active negligence in a vastly larger area -- the entire plant -- for $250, which is approximately 1/100 of the initial premium, for an even greater risk.

Container reaches the conclusion that Mr. Raker was involved in Southern's operations at the time of his accident only through the most tortured logic. Container's position is akin to the "logic" that this is a car, this car is green, therefore, all cars are green." The trial court correctly determined that Mr. Raker was not on Southern's premises at the time of his accident, that Mr. Raker was not injured because of any action or negligence of Southern, noted the undisputed facts established that Mr. Raker was on premises which were in the exclusive control of Container, and that Mr. Raker was injured because of Container's defective maintenance of this area.

Because the policy was clear and unambiguous as to the scope of coverage afforded to Container, the trial court did not need to consider extrinsic evidence. However, consideration of extrinsic evidence (i.e., the underlying contract between Container and Southern) reinforces the propriety of the decision reached in this case and was not error. *Ace Electric Supply Co. v. Terra Nova Electric, Inc.*, 288 So.2d 544 (Fla. 1st DCA 1973). (Extensive evidence is admissible to explain a latent ambiguity; in construing a contract the leading object is to ascertain and

effectuate the intention of the parties.) The unrefuted affidavits of Tillman and Zager were also properly considered to determine the parties' intent. *Ace, supra.*

The case of *McRae Fire Protection v. McRae*, 493 So.2d 1105 (Fla. 1st DCA 1986) is irrelevant to the trial court's determination of the term "operation" because the McRae case arose in a workers compensation setting and, further, it involved a "job wrap up policy" which was issued pursuant to specific State guidelines.

Container's citation to the case of *Container Corporation v. McKenzie Tank Lines, Inc.*, 680 So.2d 509 (Fla. 1st DCA 1996) is readily distinguishable. That decision focuses on the interpretation of an auto policy and whether coverage is available where an accident is related to the ownership, maintenance or use of a vehicle. The case has no bearing on the instant action which does not involve a dangerous instrumentality, does not involve the same type of insurance coverage, and does not involve the policy language construed in the *McKenzie* case.

The case of *Apol v. Shaw*, 647 So.2d 139 (Fla. 1st DCA 1994) case is distinguishable because there was a broader obligation in the underlying contract to provide insurance coverage than in the instant case. The *Apol* contract placed no restriction on the scope of coverage to be obtained for the additional insured. In contrast, the contract between Container and Southern obligated Southern only to obtain coverage to indemnify Container for vicarious liability.

Container's reliance on the case of *Excelsior Insurance Co., supra*, is based upon a misinterpretation of the *Excelsior* case. Container overlooks the fact

that the *Excelsior* court adopted the carrier's view of coverage and declined to adopt the view of the insured that urged the disregard of a specific provision of the insurance contract.

Container's reliance on the case of *National Merchandise Co., Inc. v. United Service Automobile Association*, 400 So.2d 526 (Fla. 1st DCA 1981) is similarly misplaced. The *National Mutual* case focused on an automobile insurance policy and considered the public policy regarding the scope of insurance for such a dangerous instrumentality. The *National Mutual* court also recognized the "virtual parade of Florida auto insurance cases dealing with clauses insuring against injury 'arising out of the ownership, maintenance or use' of an automobile. *Id.* at 530. This decision has no relevance to the instant case where (1) no automobile is involved, (2) no dangerous instrumentality is involved, (3) the court was not considering the scope of coverage as in this case, where there was a limited, additional insured endorsement issued upon payment of a minuscule additional premium. *Harbor Insurance Co. v. Lewis*, 562 F.Supp. 800, 803 (E.D. Pa. 1983) (the absence of significant additional premium establishes that the additional insured coverage is limited to vicarious liability for acts of the named insured).

Reliance on case law interpreting the term "auto accident" does not provide any guidance to this court in considering a policy where coverage is afforded for a specific "operations site." Indeed, an automobile insurance policy is particularly irrelevant because of the long standing public policy to provide the broadest coverage possible for a dangerous instrumentality, coupled with the myriad of cases

which afford coverage for claims which even tangentially arise out of the ownership, maintenance or use of an automobile.

2. The district court's opinion should be affirmed because Container is covered only for vicarious negligence under the express terms of the insurance policy and the settled laws of contract construction.

The case law is well settled that the intention to indemnify one's self against liability for one's own negligence must be clearly and unequivocally expressed. *Allianz Ins. Co. v. Goldcoast Partners, Inc.*, 684 So.2d 336 (Fla. 4th DCA 1996); *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla. 1993). It is equally well settled that an indemnity provision will be construed strictly against providing indemnification to the indemnitee for his own negligence. *University Plaza, supra.* As the United States Supreme Court has stated, "a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated is accepted with virtual unanimity among American jurisdictions." *United States v. Seckinger,* 397 U.S. 203 at 211, 90 S.Ct. 880 at 885 (1970). Only where contract provisions explicitly refer to losses arising from the negligence of the indemnitee will indemnification be permitted. *University Plaza, supra.* Just as in the *University Plaza* case, because there was no agreement between Container and Southern which obligated Southern to indemnify Container for its active negligence, Southern's insurer also has no legal obligation to extend coverage for

this loss. *See, also: Consolidation Coal co., Inc. v. Liberty Mut. Ins.*, 406 F. Supp. 1292, 1300 (W.D. Pa. 1976) ("it is apparent that the language of the indemnity provision in the basic contract in this case does not satisfy the standard required by the above cases, and therefore it could not be construed to require [Maryland] to indemnify [Container] for loss due to [Container's] negligence.")

The terms and conditions of the underlying contract between Container and Southern have been recited by both parties. At no point in its brief does Container ever argue that this underlying contract is ambiguous in its terms or scope. When this initial contract is read, it is plain to see that Container -- who is the drafter of this contract -- never expresses any intent to be indemnified for losses due to its own negligence. Accordingly, as a matter of law and policy, the insurance policy which was procured pursuant to this underlying contract cannot include indemnification for Container's own negligence. In the *Allianz* case, *supra*, insurance was procured as a result of duties set forth in an underlying contract. The court ruled that because the underlying contract did not contain an agreement to indemnity the franchisee for his own negligence, that the insurance coverage was similarly limited. The same result should occur here.

As fully explained in Section I.1, supra, the provisions of the insurance policy itself clearly and unambiguously establish that coverage is not available to Container under the facts and circumstances of this case. Not only is it clear that the accident was not the result of Southern's operations, it is equally clear that the accident did not occur at Southern's operation site at this plant (the premises where

Southern was to install vacuum pump reclaim piping on Fernandina No. 2 paper machine). While the trial court did not need to resort to extraneous documents or actions to interpret this clear and unambiguous insurance contract, the correctness of the trial court's decision is reaffirmed when the intent of the parties (as established by the unrefuted affidavits of Tillman and Zager and/or the provisions of the underlying contract) are considered.

The cases cited by Container in this section of the brief which outline the rules for policy and contract construction reinforce the propriety of the decisions of the trial court and district court on the issue that Container has framed: Whether Container should be entitled to insurance coverage for its own negligence. The answer to this simple question is a resounding "NO." All of the facts and contract documents, whether considered in whole or in part, or singly or in combination, establish that Container is not entitled to insurance coverage for the instant loss.

3. The conclusions of the trial court and district court that the instant policy provides coverage only for Container's vicarious liability were based on correct interpretations of the policy and a correct understanding of the insurance industry customs. Therefore, the opinion should be affirmed.

The trial court and district court properly understood the relationship between the insurance policy, the "additional insured" endorsement, and the underlying contract between Container and Southern.

The undisputed record established that there was no intent for Southern Contractors or Maryland Casualty to provide indemnity for the act of negligence

of Container. First, the terms and conditions of both the insurance policy and the underlying agreement are susceptible to only one reasonable, practical, and sensible interpretation, which is the one reached by the trial court. *American Manufacturer's Mutual Insurance Co. v. Horne,* 353 So.2d 565, 568 (Fla. 3d DCA 1978).

Secondly, the customary practices in the insurance industry serve as evidence of the insurer's obligations. *National Merchandise Co., Inc. v. United Service Automobile Association,* 400 So.2d 526, 530 (Fla. 1st DCA 1981). The case law establishes that an additional insured provision is viewed by the insurance industry as intending to protect the parties who are not named insureds from exposure to vicarious liability for acts of the named insured. *Harbor Insurance Co. v. Lewis,* 562 F.Supp. at 803, *supra.*

Third, the testimony of Mr. Tillman, Mr. Zager, and Mr. Ryan establish that the intent of the parties was only to provide insurance coverage to Container for vicarious liability due to negligence of Southern. The circumstances of Mr. Raker's accident fall far outside the parameters of the scope of coverage afforded to or intended by Container. As the court noted in the case of *Ace Electric Supply Co. v. Terra Nova Electric, Inc.,* 288 So.2d 544, 547-548 (Fla. 1st DCA 1973),

> in construing a contract the leading object is to ascertain and effectuate the intent of the parties. Where, under a latent ambiguity which is presented the intent may have been for one of two things, it is permissible, and is the duty of the court to receive and consider extrinsic evidence bearing thereon. This may include evidence of the circumstances surrounding the parties and of the purpose and object to be obtained, and declarations of

> intent, or bearing on their intent, made by the parties prior to or at the time of the execution of the instrument and evidence as to the interpretation which the parties may appear to have placed thereon by their actions and the manner of their dealings thereunder.

The application of this case law fully supports the trial court's consideration of the testimony from Mr. Tillman, Mr. Zager and Mr. Ryan in interpreting the insurance contract.

Container relies on case law which is readily distinguishable and wholly inapplicable to the matters before this court. The case of *Firemens Fund Insurance Co. v. Pohlman,* 485 So.2d 418 (Fla. 1986) is yet another automobile insurance case. Further, the *Pohlman* court was concerned with the effect of a change in the anti-stacking law on uninsured motorist coverage. This case is further distinguishable because it arises from an incident involving a single named insured who had personally paid premiums on the various auto policies under which he sought to stack UM coverage.

The parties' intent to provide coverage to Container, as an additional insured, only for vicarious liability and not for Container's own negligence is in full accord with the custom and practice in the industry. *Harbor Insurance Co. v. Lewis, supra.* This intent and result is unaffected by the case of *Philadelphia Electric Co. v. Nationwide Mutual Insurance Co.,* 721 F.Supp. 740 (E.D. Pa.), which involved not only different language in the policy (covering the additional insured for "any work performed by the Davie Tree Expert Company on their [the additional insureds] behalf") but also different, broader terms in the underlying

contract (Davie Tree agreed to "indemnify and defend PECO from and against liability arising out of the acts of Davie Tree except where PECO is solely negligent"). The parties to the contract therefore agreed that indemnification -- and hence insurance coverage -- could not be summarily determined because the scope of available coverage could not be resolved until a jury determined whether the underlying accident was due to joint negligence (in which case coverage would be available) or the sole negligence of PECO (in which case no coverage would be afforded). This scenario is not present in the instant action, where the underlying contract contains no provision indicating any intent to provide indemnity or a defense for any active negligence of Container. The *Harbor Insurance* case remains controlling based on the facts and circumstances of the instant action.

4. The trial court correctly applied *University Plaza Shopping Center, Inc. v. Steward*, 272 So.2d 507 (Fla. 1993) and cases which followed it when holding that Container was not entitled to insurance coverage for its own negligence under the facts of this case.

As the trial court correctly noted, because Southern did not agree to indemnify Container for acts of Container's own negligence, it logically follows that the insurance company has no obligation to cover such act of negligence. *University Plaza Shopping Center, Inc. v. Stewart,* 272 So.2d 507 (Fla. 1973). In the *University Plaza* case, the contract between the tenant and landlord required the tenant to indemnify the landlord "against any and all claims". When a gas line exploded beneath the premises and the landlord was sued for wrongful death, the landlord initiated a third party indemnity claim against the tenant. The Florida

Supreme Court held that the agreement to indemnify the landlord "against any and all claims" did not include an intention to indemnify the landlord for injuries which arose solely from the landlord's negligence. The identical scenario is presented in the instant case, where Mr. Raker's injuries were due solely to the negligence of Container in the faulty maintenance of its premises.

The Florida Supreme Court reiterated this same position in the case of *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627 (Fla. 1992). In the *Cox Cable* case, Gulf Power contracted with Cox to attach cables and wires to Gulf's utility poles. The contract also required Cox to indemnify Gulf against claims for personal injury and property damage. A lawsuit was filed against Gulf when a worker who over-tightened a guy wire suffered electrical burns. The court ruled that the indemnity provision in the contract was legally insufficient to provide indemnification of Gulf power. Similarly, in the instant case, the indemnity language does not "clearly and unequivocally" require indemnification of Container for its own negligence. Rather, the provision states only that Southern must indemnify Container as a result of Southern's performance. Because of this, Southern and its carrier did not intend to indemnify Container for acts of Container's own negligence.

In attempting to support its contention that Container should be entitled to indemnification under the insurance policy even where the underlying contract expresses no intent to indemnify Container for its own negligence, the case of *Hertz Corp. v. Pugh,* 344 So.2d 966 (Fla. 1st DCA 1978) is cited by Container. Once

again, non-dispositive case law is referenced. This is yet another claim arising out of an automobile accident and, further, the truck lease service agreement evidenced a specific intention to indemnify the lessor for its sole negligence.

The intent of the parties through the testimony of Mr. Tillman, Mr. Zager and Mr. Ryan is clear -- no coverage for direct negligence of Container. The intent of the parties is the central concern in the law of insurance contracts. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla. 1979).

II. THE TRIAL COURT AND DISTRICT COURT PROPERLY DETERMINED THAT CONTAINER IS NOT ENTITLED TO COVERAGE UNDER THE POLICY IN ISSUE AND THEREFORE PROPERLY DENIED JUDGMENT IN FAVOR OF CONTAINER ON ITS COUNTERCLAIM.

Maryland agrees that the duty to provide a defense is broader than the duty to provide insurance coverage, and that attorneys fees are available by statute whenever a judgment is rendered in favor of an insured or when the insured prevails on appeal.

The trial court correctly determined that because no coverage was available to Container under the express terms and conditions of the policy in issue, that Maryland owed no duty of defense. All cases cited by Container acknowledge that there is no obligation to provide a defense in the absence of any insurance coverage. Accordingly, the trial court properly denied Container's motion for summary final judgment and granted summary final judgment in favor of Maryland.

III. THE JUDGMENT IN FAVOR OF MARYLAND SHOULD BE AFFIRMED BECAUSE MARYLAND MET ITS BURDEN OF PROVING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO CONTAINER'S AFFIRMATIVE DEFENSES AND/OR THAT CONTAINER'S DEFENSES WERE LEGALLY INSUFFICIENT AS A MATTER OF LAW.

1. Maryland submitted competent and admissible evidence to support its motion for summary final judgment.

Maryland clearly met its burden of proof of establishing the absence of any genuine issues of material fact and that Container's affirmative defenses were legally insufficient as a matter of law. The trial court had everything available for its consideration that was necessary to the disposition of this case: The clear and unambiguous contract between Southern and Container; the clear and unambiguous insurance policy between Southern and Maryland; the affidavit of Mr. Tillman (owner and president of the Tillman Insurance Agency who procured the insurance policy in issue); the affidavit of Mr. Zager (president and owner of Southern Contractors); and the deposition of Mr. Ryan (casualty claims manager for Container) and the documents from Container which were produced pursuant to his deposition duces tecum. Absolutely no evidence was submitted by Container to oppose the summary judgment motion. Any of the evidence submitted by Maryland, independently or in concert, fully and completely supported the trial court's decision establishes the complete absence of any question of fact as to the scope of coverage.

Container offered no more than paper issues which are wholly insufficient to avoid summary judgment. *Colon v. Lara*, 389 So.2d 1070 (Fla. 3d DCA 1980).

Once a party tenders competent evidence to support a summary judgment motion, "the opposing party must come forward with counter evidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist." *Landers v. Milton,* 370 So.2d 368, 370 (Fla. 1979), *citing*: *Harvey Building, Inc. v. Haley,* 175 So.2d 780 (Fla. 1965); (emphasis added) *Farrey v. Bettendorff,* 96 So.2d 889 (Fla. 1957); *see also,* Fla. R. Civ. P. 1.510. Accordingly, the summary judgment was properly entered.

2. Principals of equity support the ruling in favor of Maryland, which paid a claim on behalf of Container in the absence of any indemnity obligation and must be reimbursed.

Container's argument regarding Ryan's status as a deponent is an attempt to place form over substance. Ryan's testimony was fully competent and admissible evidence and was properly considered when ruling on Maryland's motion for summary judgment. Ryan testified that he is the casualty claims manager in Container's risk management department. He appeared for deposition pursuant to a Third Amended Notice of Deposition Duces Tecum to produce ten categories of Container's documents. Ryan, in fact, searched Container's corporate offices for these documents in advance of this deposition, and they were discussed during the course of his testimony. (Ryan depo p. 18, 21-25, 47) If, as Container now contends, Ryan was merely an independent fact witness, he certainly would not have searched Container's corporate records to locate documents to bring to his deposition, nor would he have appeared for deposition without a subpoena.

Ryan was also capable of binding Container for the separate and distinct reason that he was employed as the casualty claims manager for Container. As a managerial employee, Ryan's testimony was binding on his employer. *Poitier v. School Board of Broward County,* 475 So.2d 1274 (Fla 4th DCA 1985) (mere employee may make an admission against the interest of the employer. There is no requirement that admissions against interest of the employer be made only by officials or persons in authority). *Thee v. Manor Pines Convalescent Center, Inc.*, 235 So.2d 64 (Fla. 4th DCA 1970) (hearsay statement of unidentified person in a uniform, who was not even proven to be an employee of the defendant, should have been admitted into evidence as an admission against interest).

Ryan gave factual testimony as to the location of Raker's accident. This information came to Ryan during the normal course and scope of his employment in Container's risk management department and was an appropriate subject for his testimony. The waiver argument raised by Container's brief is irrelevant and immaterial to the factual testimony that Ryan gave.

Under well settled Florida law, Container must reimburse Maryland for the settlement funds paid on its behalf because there was no coverage for Container's act of negligence. *Allstate Insurance Co. v. Alterman Transport,* 465 F.2d 710 (Cir. 1972).

Container's citation to case law regarding "voluntary payment" is wholly inapplicable because that decision did not involve an insurance claim. Until there

was a determination of an absence of coverage, Maryland had an obligation to protect the interest of its insured or risk a determination that it acted in bad faith.

The remaining cases cited by Container for the proposition that a claim of equitable subrogation is waived where a carrier does not obtain a specific agreement reserving any indemnification claim in advance of the settlement are equally inapplicable. The case of *Lumbermen's Mutual Casualty Co. v. Foremost Insurance Co.*, 425 So.2d 1158 (Fla. 3d DCA 1983) arose from a dispute between two insurance carriers which each had an independent obligation toward a common insured. The *Layman Eastern Auto Rentals, Inc. v. Brooks,* 370 So.2d 14 (Fla. 3d DCA 1979) case is also irrelevant because that case focused on an automobile claim where there were multiple layers of insurance and the court focused on the rights of respective insurance carriers. The instant case is governed by the *Allstate Insurance Co. v. Alterman Transport* decision, where the court held that a carrier is entitled to reimbursement from the negligent insured where the policy does not afford coverage for the particular loss. *See, also*: *Henry v. Eckers*, 415 So.2d 137, 140 (Fla. 5th DCA 1982).

Principles of equity are offered by Container's assertion that as an additional insured for its "interest for operations at operations site by Southern Contractors, Inc." (installation of vacuum pump reclaim piping on Fernandina No. 2 paper machine) that Container should be entitled to full insurance coverage for its actual plant -- and all for the paltry insurance premium for $250, when Southern paid a $23,000 premium for its own insurance coverage.

Principles of equity are in jeopardy when one considers the windfall Container is attempting to secure. Container itself drafted the contract language that requires indemnification for vicarious liability only. Container alone caused injury to the claimant (Mr. Raker). Container never objected to the language of the additional insured endorsement. Container demanded a defense from Maryland. Container now argues that the $225,000 payment was made by Maryland on Container's behalf as a "volunteer." To the contrary, the court correctly found it would be inequitable to allow Container to reap the windfall of $225,000 payment to Ryker when Container -- through active, not vicarious, liability -- caused the injury and where it was undisputed that there was never any intent among the principals for coverage under this scenario.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the district court properly affirmed the summary final judgment entered in this cause. It is respectfully requested that this Honorable Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed August 25, 1997, to: Steven A. Werber, Esq., Foley & Lardner, The Greenleaf Building, 200 Laura Street, P.O. Box 240, Jacksonville, Florida 32201-0240, Attorney for appellant.

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