ORIGINAL

SUPREME COURT OF FLORIDA

CASE NO. 90,150

FILED
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AUG 7 1997
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CONTAINER CORPORATION
OF AMERICA,

Petitioner,

v.

MARYLAND CASUALTY COMPANY,

Respondent.
_____/

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

INITIAL BRIEF OF PETITIONER

FOLEY & LARDNER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL HISTORY

Defendant/Petitioner, Container Corporation of America ("Container"), appeals from an Opinion rendered by the First District Court of Appeal (the "First District"), on January 6, 1977 (the "Opinion"). Appendix ("A") 1. The Opinion resulted from the appeal of a final order titled Final Summary Judgments in Favor of Maryland Casualty Company and Orders on Container Corporation of America's Motion for Summary Judgment and Motion for Rehearing and/or for Clarification, which was rendered on March 29, 1996 (the "Judgment"). Record Index ("R.") 199-213; A.2. The Judgment arose out of a declaratory judgment action filed by the plaintiff/respondent Maryland Casualty Company ("Maryland"), the counterclaim of Container and cross motions for summary judgment. R.1-51, 54-56, 199-213, 90-92, and 99-103. After the entry of a Final Summary Judgment in favor of Maryland, Container timely filed a Motion for Rehearing and/or for Clarification (the "Motion for Rehearing"). R.155-56, 157-164. After a hearing on that Motion, the trial court entered the Judgment and the appeal to the First District followed. R.199-213, 214-230.

The First District affirmed the Judgment in Container Corporation of America v. Maryland Casualty Co., 687 So. 2d 273, 274 (Fla. 1st DCA 1997). Because Container contended that the Opinion expressly and directly conflicted with Florida Power & Light Co. v. Penn America Ins. Co., 654 So. 2d 276 (Fla. 4th DCA 1995), Container filed a Notice to Invoke the Discretionary

Jurisdiction of this Court. This Court accepted jurisdiction of this cause on that basis.

B. FACTUAL BACKGROUND

On or about November 1, 1991, Container and Southern Contractors, Inc. ("Southern") entered into a contract whereby Southern was to "install vacuum pump reclaim piping on Fernandina No. 2 Paper Machine ... ." R.1-51, 54-56; A.3. The Contract required Southern to install the pipe on Container's property in Fernandina Beach, Florida. A.3. In addition, the Contract included two separate and distinct provisions, one obligated Southern to provide Container with indemnity and another required Southern to provide Container with additional insured insurance coverage. A.3. The pertinent Contract provisions read:

> 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. ...
>
> 6. Contractor [Southern] will, at its own expense procure and maintain in full force and effect during the performance of work under this Agreement, through companies and agencies satisfactory to Company the following insurance:
>
> ... (b) Comprehensive General Liability Insurance, including Contractual Liability Insurance, Contractor's Protective Liability in Contractor's name and Broad Form Property Damage, with not less than One Million ($1,000,000) per occurrence Combined Single Limit. Exclusions for explosion, collapse and underground property (X, C, and U) shall be deleted. Such policy shall name Company [Container] as an additional insured.

R.1-51, 54-56; A.3. Container agreed to pay Southern $19,658 for the pipe installation under the Contract. A.3.

Approximately 10 months before the execution of the Contract, Maryland issued a commercial general liability insurance policy with Southern as the named insured (the "Policy"). R.1-51, 54-56; A.4. Southern paid a $23,832 premium for the Policy. R.1-51, 54-56; A.4. The Policy provided coverage to the insureds for "bodily injury" or "property damage" caused by an "occurrence" in the "coverage territory" during the Policy period. A.4. The Policy defines "coverage territory" to include the United States of America. A.4. In addition, the Policy defines "occurrence" to include an accident, but the term "accident" is not defined. A.4.

Later, Maryland and Southern amended the Policy to include an endorsement identifying Container as an additional insured in the "interest for operations at operations site by Southern Contractors, Inc." (the "Endorsement"). R.1-51, 54-56; A.4.[1] The Endorsement did not change the scope of the coverage provided by the Policy, it merely limited Container's coverage to occurrences on the "operations site." A.4. At the issuance of the Endorsement, Southern paid an additional $250 in consideration for the inclusion of Container as an additional insured. R.1-51, 54-56; A.4.

On or about November 15, 1991, David Raker ("Raker") slipped and fell on Container's premises in Fernandina Beach, Florida. R.1-51, 54-56. The record is not clear as to exactly where Raker fell on Container's premises. See Deposition of Robert Ryan ("Ryan

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[1] The Endorsement and the Policy will be referred to collectively as the "Policy," unless a need for a distinction between them arises.

Dep."), pp. 53-56; A.5. Raker was, however, employed by Southern at the time of his injuries. R.66-67, 68-69, 81-89. Also, Raker was in the course and scope of his employment when he fell. R.66-67, 68-69, 81-89.

Raker sued Container for his personal injuries. R.1-51, 54-56. Consequently, Container demanded that Maryland defend it against Raker's claim and fully cover it for any resulting damage award. R.1-51, 54-56. Ultimately, Maryland took over Container's defense under a reservation of rights. R.1-51, 54-56. Maryland then settled with Raker for $225,000. R.1-51, 54-56.

Thereafter, Maryland instituted a declaratory judgment action against Container to obtain a determination as to whether Container was entitled to coverage under the Policy and, if not, to obtain reimbursement from Container for the settlement monies paid to Raker on Container's behalf. R.1-51. Container filed an Answer and Counterclaim. R.54-56. With leave of court, Container amended its answer to plead the affirmative defenses of waiver and estoppel. R.59-62, 64-65. Container alleged that if Maryland knew at the time it settled Raker's claim that Container was not covered under the Policy, then Maryland was a mere volunteer and, therefore, either waived its right to seek reimbursement from Container or was estopped from doing so. R.157-164. Maryland denied the affirmative defenses. R.63.

In its Counterclaim, Container alleged that, at first, Maryland improperly refused to defend the Raker claim and, as a result, Container was entitled to recover the attorney's fees and

costs it incurred in its own defense. R.54-56. In addition, as an insured under the Policy, Container sought the attorney's fees and costs it incurred in the defense of the declaratory judgment action. R.54-56. Maryland denied the Counterclaim. R.57-58.

Thereafter, Maryland scheduled the deposition of Robert A. Ryan, a Container employee ("Ryan"). R.73-75. Ryan works in Container's risk department and is Container's casualty claims manager. Ryan Dep., pp. 6 and 7. He oversees Container's claims operation. Ryan Dep., pp. 6 and 7. Maryland noticed Ryan for deposition as an individual fact witness; it did not serve a corporate notice of taking deposition pursuant to Fla.R.Civ.P. 1.310(b)(6). R.73-75. Thus, Container did not produce Ryan for deposition as a corporate representative on any particular subject.

At Ryan's deposition, the question of Ryan's capacity became an issue between the attorneys for Container and Maryland. Ryan Dep., pp. 54-55; A.5. The pertinent exchange reads:

> Q Was it your understanding that Mr. Raker was working at the time of this accident?
>
> A My understanding, yes.
>
> Q Did his injury occur at the C.C.A. [Container] plant itself or in some other location?
>
> A I believe it was at the C.C.A. plant itself.
>
> Q You indicated he was walking down a ramp. What did this ramp lead to or from?
>
> MR. WERBER [counsel for Container]: Let me make an objection to the hearsay aspect of this. I mean, we've got much better people that can tell you these kind of things. Everything he knows is from -- on a hearsay basis, and I have no problem as long as that's made clear. He's not appearing here as a representative of

Container Corporation speaking for the corporation. He's appearing as Bob Ryan, so . . .

MR. RAMSEY (counsel for Maryland]: Well, that last sentence troubles me. I want to make sure we know what we're talking about here. I'm not suing Bob Ryan.

MR. WERBER: I understand that. And I think that his testimony insofar as the things he knows are one thing. But what I may have reported to him in a letter or what Lance House may have told him about Mr. Raker's accident is hearsay, and I don't think he can bind Container Corporation with those facts.

MR. RAMSEY: I admit to you that what he says based on this is likely hearsay. Whether he can bind the corporation or not is probably something that can't be decided by you or me.

MR. WERBER: I agree. I don't want to interrupt you. If you give me a standing objection to --

MR. RAMSEY: I will.

MR. WERBER: -- perform on that --

MR. RAMSEY: I will, I will.

MR. WERBER: Okay.

BY MR. RAMSEY:

Q. All right. You indicated that he was injured at the C.C.A. plant, and I had asked you where did this ramp that he fell on lead to or from.

A. You know, I can't be specific on that, but I believe it was in an area where he was working, and if I recall, he was going to get some kind of equipment out of a delivery truck or something. (Emphasis added.)

Ryan Dep., pp. 53-56; A.5. Mr. Werber's standing objection was never resolved by the trial court.

Later, Mr. Werber made another objection during Ryan's deposition. Ryan Dep., pg. 76; A.5. That abjection occurred as follows:

Q Are you aware of anything, any act or failure to act by Maryland Casualty which constitutes a waiver of its rights to reimbursement of the settlement proceeds?

MR. WERBER: I object to any legal conclusions as to what constitutes waiver.

MR. RAMSEY: Okay.

Q Your answer was no?

A No.

A.5. Although it never resolved this objection either, the trial court relied upon Ryan's answer in issuing the Judgment in favor of Maryland. **R.199-213;** A.2.

On October 23, 1995, Maryland filed, its Motion for Final Summary Judgment. **R.90-92.** Maryland's motion contended only that Container was not an additional insured under the Policy and, therefore, that Container must reimburse Maryland for the settlement money paid to Raker. **R.90-92.** In support of its motion, Maryland filed the Affidavits of James Zager, Southern's President, and Hamilton Tillman, the insurance agent who drafted the Endorsement language on behalf of Maryland. **R.81-89.** In their affidavits, Mr. Tillman and Mr. Zager each opined about the meaning and intent of the Policy. **R.81-89.** In addition, they both stated that Raker's accident did not occur on Southern's operationa site, but they did not state specifically where the accident physically occurred. **R.81-89.** Mr. Zager also admitted that Raker was in the course and scope of his employment with Southern at the time of the accident. **R.81-89.**

Container filed its own Motion for Summary Final Judgment. **R.99-103.** Container's motion focused primarily upon the issue of

its right to coverage under the Policy. R.99-103. Other than the evidence already of record, Container did not file any independent affidavits in support of its motion. The issues presented by Container's motion, however, were matters of law for the court. R.99-103, 140-153. Container and Maryland filed legal memoranda related to the cross motions for summary judgment. R.107-139, 140-153.

After a hearing, the trial court entered a Final Summary Judgment granting Maryland's motion and denying Container's. R.155-156. Even though the order stated that it was a Final Summary Judgment, it did not resolve all of the issues between the parties, nor did it give the parties any guidance as to how to proceed with respect to it. R.155-156, 157-164. As a result, Container filed the Motion for Rehearing. R.157-164. After rehearing, the trial court entered the Judgment. R.199-213; A.2.

In the Judgment, the trial court found that the Endorsement was clear and unambiguous and did not provide any coverage for Container for Raker's injuries. R.199-213; A.2. The trial court further found that at the time of his injuries, Raker was not engaged in Southern's operations or on the "operations site." R.199-213; A.2. The court defined "operations site" as just that discrete portion of Container's property upon which the Contract work was being performed. R.199-213; A.2.

The trial court found further that since the Contract did not expressly require Southern to indemnify Container for its own negligence, the Endorsement in the Policy provided Container with

coverage only for its vicarious liability. R.199-213; A.2. The court based this finding directly and indirectly upon the self-serving affidavits of Tillman and Zager and its perception of insurance industry custom. R.199-213; A.2.

The trial court also held that Maryland met its burden of proof as to Container's affirmative defenses. R.199-213; A.2. In so doing, the court stated:

> . . . the only record evidence pertaining to the issue of waiver or estoppel filed with the Court comes in the deposition testimony of R. Ryan, CCA's representative. Mr. Ryan testified in deposition that he was not aware of any act or failure to act by Maryland Casualty which constituted a waiver of its right to reimbursement of the settlement proceeds. (See Mr. Ryan's deposition at page 76, lines 14-22). The failure of CCA [Container) to demonstrate the existence of such an issue, either by countervailing facts or justifiable inferences from the facts presented, carries *with* it the conclusion that as the opposing party, CCA has not met its burden of proof to support their claim of the existence of a genuine issue on their affirmative defenses.

R.199-213; A.2. In addition, the court believed that regardless of Container's defenses, equity should *work* in Maryland's favor because Container was unjustly enriched by Maryland's payment on its behalf. R.199-213; A.2. The court stated that it was "persuaded that equitable principals mandate the granting of" Maryland's motion. R.199-213; A.2.

Based upon its findings, the court concluded that Container was not entitled to *coverage* under the Policy. R.199-213; A.2. The court also decided that if Container was not entitled to coverage, it was not entitled to a defense. R.199-213; A.2. Consequently, the court entered the Judgment in favor of Maryland

and denied Container's counterclaims. R.199-213; A.2. Container appealed. R.214-230.

On appeal, a majority of the First District affirmed the Judgment. A.l. In doing so, the First District ignored the insurance procurement provision of the Contract and the Policy language. A.1. The First District interpreted only the indemnification provision of the Contract rather than the Policy. A.l. As a result, the court ruled that because the indemnification provision of the Contract required Southern to provide indemnity to Container only for Southern's negligence, the Policy could not be interpreted to provide *coverage* to Container for Container's own negligence. A.1. Thus, the majority of the First District affirmed the trial court's erroneous Judgment. A.l.

Judge Wolf filed a dissenting opinion that indicated that he would have reversed rather than affirmed the Judgment. A.l. In the dissent, Judge Wolf concluded that the Endorsement was vague and did not limit Container's coverage to vicarious liability. A.l. Judge Wolf further opined, however, that material issues of fact existed as to whether Raker's injuries *arose* out of Southern's operations and what constituted the operations site. Id. As a result, Judge Wolf would have reversed the Judgment on that basis. Id,

Because Container contended that the First District's Opinion was in error and because the Opinion conflicted with the Florida Power & Light case, a decision from the Fourth District Court of Appeal (the "Fourth District"), Container invoked the discretionary

jurisdiction of this Court. This Court granted review and this appeal follows.

II. SUMMARY OF ARGUMENT

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 CONTRACT CONSTRUCTION.

The First District's Opinion should be reversed and judgment should be entered in favor of Container on the issue of coverage. Maryland failed to use the policy language necessary to limit Container's coverage to vicarious liability. The "in the interest of" language in the Endorsement is ambiguous and must be construed against Maryland and in favor of Container for coverage. Also, because both the trial court and the First District relied upon the Contract rather than the Policy to determine the extent of Container's coverage, they violated the most basic rules of contract construction and their opinions should be reversed. Further, nothing in industry custom in Florida indicates that additional insured provisions automatically insure only for vicarious liability or that they are limited to the extent of the indemnity provision contained within an extrinsic contract to which the carrier is not even a party. Because both the trial court and the First District ruled to the contrary, their opinions are clear error and they must be reversed* Likewise, the conflict with Fl 'da Power & Light should be resolved in favor of the Fourth District's opinion under these circumstances.

B. **BECAUSE CONTAINER IS ENTITLED TO COVERAGE UNDER THE POLICY, CONTAINER IS ENTITLED TO THE RELIEF REQUESTED IN ITS COUNTERCLAIM AND, THEREFORE, UPON REVERSAL OF THE JUDGMENT AS TO COVERAGE, THE TRIAL COURT SHOULD BE INSTRUCTED TO ENTER A JUDGMENT IN FAVOR OF CONTAINER ON ITS COUNTERCLAIM.**

The duty to provide a defense is substantially more broad than the duty to provide coverage. If a policy provides coverage, then it necessarily provides a duty of defense. Consequently, if this Court determines that **Container is entitled to coverage under the** Policy, it must likewise hold that Container is entitled to the attorneys' fees and costs that it incurred in the defense of Raker's claim and in the declaratory judgment **action.** Therefore, if the judgment is reversed, this **case** should be remanded with instructions for the First District to remand to the trial court with instructions to enter judgment in favor **of** Container *on* **the** declaratory judgment action and on the counterclaim.

C. **THE JUDGMENT IN FAVOR OF MARYLAND SHOULD BE REVERSED BECAUSE MARYLAND DID NOT MEET ITS BURDEN OF PROVING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO CONTAINER'S AFFIRMATIVE DEFENSES OR THAT THE DEFENSES WERE LEGALLY INSUFFICIENT AS A MATTER OF LAW.**

Although the First District did not specifically rule on evidentiary matters or the sufficiency of **Container's** affirmative defenses, it nevertheless affirmed the trial court's opinion. The trial court erred by concluding that Container had **the burden of** producing evidence to support its affirmative **defenses.** Container had no such burden, however, until Maryland presented **sufficient** competent evidence to establish that Container's affirmative defenses were legally insufficient or that no genuine **issue** of material fact existed as to the defenses. The only evidence

Maryland offered on this subject was incompetent and inadmissible. As a result, the trial court should not have considered #at evidence for the purposes of holding that Maryland met its burden Of proof with respect to Container's affirmative defenses. No other admissible evidence satisfied Maryland's burden and, therefore, the judgment should be reversed. Likewise, the opinion, which affirms the judgment, should be reversed as well.

III. ARGUMENT

A. THE OPINION SHOULD BE REVERSED BECAUSE THE FIRST DISTRICT ERRONEOUSLY INTERPRETED THE POLICY 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 CONTRACT CONS-

The First District's Opinion should be reversed. This case is directly analogous to the Florida Power & Light case where, on essentially the same facts, the Fourth District ruled that the additional insured was covered for its own negligence. Also, the First District violated the most basic rules of insurance contract construction when it denied coverage to Container based upon the language in the Contract rather than the Policy and *held* that the Policy could not be interpreted to provide coverage to Container for its own negligence. Because the Policy should be interpreted to provide coverage to Container for its own negligence, the case should be remanded to the First District with instructions for the case to be remanded to the circuit court for the entry of a judgment in favor of Container on the issue of coverage.

1. The Lower Courts' Ruling8 That Conflict With The **Florida Power & Light** Case Bhould Be Reversed **Because** Maryland Did **Not** Iaalude In The **Endorsement** Thr **Language** Required To Limit **Container's** Coverage To **Container's Vicarious** Liability And, Am A **Result, The** Confliat Should Be **Resolved** In Favor Of The **Fourth District's Opinion.**

The Opinion and the Judgment should be reversed because the facts of this case are nearly identical to those in **Florida Power & Light** co., but they nevertheless reach a contrary result. In **Florida Power & Light,** the Fourth District properly concluded that an additional insured under **circumstances** such as **those in this** case is covered for its own negligence. Because the facts of these two cases are essentially the **same** and because the Fourth District reached the correct result, the conflict should be resolved in favor of the Fourth District.

In Florida Power & Light, an employee (Raker) of an independent contractor (Southern) was injured while working on **FPL's** (Container's) property (operations site) as a result of **FPL's** own negligence. Florida Power & Light, 654 So. 2d at 277. FPL sought coverage as an additional insured under a policy which existed as a result of **FPL's** agreement with the independent contractor. **Id.** Just as in this case, the trial court affirmed the carrier's denial of coverage for **FPL's** own negligence. **Id.**

In reversing the trial court, the Fourth District noted that no Florida cases on point existed. As a result, it relied upon cases from other states and said:

> **[i]n** Casualty Ins. Co. v. Northbrook Property **&** Cas. **Ins.** co. [sic], 150 **Ill.App.3d** 472, 103 **Ill.Dec.** 495, 501 **N.E.2d** 812 **(1986),** a subcontractor obtained a general liability policy **from** Casualty which named the general contractor as an additional insured. The policy provided

that the general contractor was an additional insured 'but only with respect to liability arising out of operations performed for the additional insured by the named insured. ' The Illinois court held that the language employed in the policy required Casualty to defend and indemnify the general contractor because there was no specific reference in the endorsement necessitating that liability arise out of the fault of the subcontractor. The court reasoned:

> If Casualty had intended to limit its obligation to [general eontractor] to those situations where the negligent acts or omissions of (subcontractor] had been established, it could have done so by using language similar to that found in Consolidation Coal (Co. v. Liberty Mutual Ins. co., 406 F.Supp. 1292 (W.D. Pa. 1976)] [wherein additional insured endorsement provided' that Consolidation Coal was an additional insured, 'but only with respect to acts or omissions of the named insured in connection with the named insured's operations at the applicable location designated.']. However, such language was not used. The language that was employed requires only that (general contractor's] liability arise out of operations of [subcontractor].

Id. at 278. The court also noted that no language in the policy required negligence by the independent contractor before FPL could be considered an additional insured. Id. At best, the court stated, the provision was ambiguous. Therefore, the court reasoned as follows:

> [t]he language that was employed by Penn America required only that FPL's liability arise out of the operations of Eastern. Obviously, Haywood's injuries and subsequent lawsuit arose out of some type of "operations" of Eastern as Haywood was employed by Eastern working at the FPL station. Therefore, because Penn America did not utilize specific language limiting coverage to the vicarious liability situation and because the language actually utilized is ambiguous at best, the 'additional insured' provision must be construed against Eastern [sic] and in favor of FPL, the insured. (Emphasis added.)

Id. at 279. As a result of this reasoning, the court ruled that it was error to deny FPL coverage for its own negligence.

Likewise, this Court should reverse the Judgment and the Opinion because it was error for the lower courts to deny coverage to Container for its own negligence. Neither the Policy *nor* the Endorsement utilizes the specific language necessary to limit Container's coverage to vicarious liability. In fact, the Florida Power & Light policy may more readily be interpreted to be applicable only to vicarious liability than is the Policy in this case. FPL's policy read that coverage applied "but only with respect to operations by or on behalf of the Named Insured," the independent contractor. The "but only" language is more limiting than the "in the interest of" language in the Endorsement. If FPL's more restrictive policy was not sufficient to limit coverage to vicarious liability, then Maryland's more broad language should not be interpreted to deprive Container of coverage for its own negligence either.

Also, just like the FPL employee, Raker was engaged in Southern's operations *on* the operations site at the time he fell. "Operation" is the nominal derivative of the verb "to operate." "To operate" means to work, perform, or function, as a machine does" or "to perform some process of work or treatment." Stein, Jess, The Random House College Dictionary, Revised Edition (Random House, Inc., N.Y., 1982), pg. 931. "Operation" means the "act or an instance, process, or manner of functioning or operating." Id. The simple application of these definitions to the trial court's

factual findings compels the conclusion that Raker was acting in the interest of Southern's operations at the time of his accident.

The trial court specifically found that Raker was Southern's employee and that he was acting in the course and scope of his employment when he slipped and fell on Container's property. Even Southern's president admitted in his affidavit that Raker was in the course and scope of his employment with Southern at the time of the accident. Like the FPL employee, *if* Raker was in the course and scope of his employment and performing work for Southern, but was not engaged in Southern's operations, whose interests or operations was he pursuing? He had to have been furthering Southern's interests and operations. Therefore, the trial court's and Judge Wolf's conclusions in this regard are erroneous and should be reversed. Compare this case with McRae Fire Protection v. McRae, 493 so. 2d 1105, 1107 (Fla. 1st DCA 1986) (where the court affirmed an award of worker's compensation benefits because it interpreted "operations" broadly and in the *manner* Container now suggests).

Further, "site" means "the position or location of a town, building, etc." especially "as to its environment." Stein, Jess, id. at 1230. "Operations site" must mean the environment in or location upon which the work is to be performed. Whether this includes just an isolated portion of Container's property or the entire plant is unclear, however. Thus, the only remaining question is whether Raker was on the "operations site" at the time

of his accident. That term, however, is ambiguous and, therefore, it should be construed against Maryland.

The contract between Southern and Container required Southern to install vacuum pump piping on Container's property in Fernandina Beach, Florida. Container contended below that Container's property is the "operations site". R.107-139. Maryland, on the other hand, argued that the "operations site" was limited to just that small portion of Container's property upon which Southern was installing pipe. R.140-153. Although neither interpretation is necessarily ridiculous or unreasonable in light of the skill and experience of an ordinary person, the trial court accepted Maryland's more limited definition. The majority of the First District did not even reach this question. Because Maryland specifically chose not to define "operations site" to include only that specific portion of Container's property, however, Maryland should suffer the consequences of the ambiguity it created. Thus, lower courts should have adopted the meaning which would have provided the widest amount of coverage to Container. Excelsior Ins. Co., Inc. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979). Because the trial court chose the most restrictive connotation and the First District did not even reach the issue, the lower courts should be reversed and this Court should rule that the term "operations site" is ambiguous. Therefore, it must be construed in favor of Container for coverage. Compare this case with National Merchandise Co., Inc. v. United Service Automobile Ass'n., 400 So. 2d 526, 530 (Fla. 1st DCA)

(where the court concluded that the term "auto accident" was ambiguous and, therefore, had to be construed against the carrier).

Moreover, if the trial court was correct that the Endorsement was unambiguous, it should not have resorted to any extrinsic evidence of the parties' intent. Lee v. Montgomery, 624 So. 2d 850, 852 (Fla. 1st DCA 1993). Even if the Policy is held to be ambiguous, the Tillman and Zager Affidavits should not have been considered; the Policy must be construed against Maryland. See Ace Electric Supply Co. v. Terra Nova Electric, Inc., 288 So. 2d, 544, 547 (Fla. 1st DCA 1973) (where the court held that extrinsic evidence is not admissible to explain a patent ambiguity, which is one that appears on the face of the instrument and arises from the defective, obscure, or insensible language used) National Merchandise Co., Inc. v. United Service Automobile Ass'n, 400 So. 2d 526, 530 (Fla. 1st DCA 1981) (where the court held that an ambiguous policy had to be construed against the drafter). Furthermore, even if it *were* proper to consider the Affidavits, which Container denies, the Affidavits do not satisfy Maryland's burden of proof.

Further, for summary judgment purposes, the court must decide as a matter of law what "operations site" means and Maryland must have established that the accident occurred there. Zager and Tillman merely conclude that the accident did not occur on the "operations site." They do not explain what the term was intended to include (which would invade the trial court's province) nor do they state where the accident physically occurred. Thus, even if

the trial court were correct that the operations site was limited just to a discrete area, nothing in the record demonstrates that the accident did not occur there. All that is clear from the record is that the accident occurred somewhere on Container's property and that, through hearsay, it was on *a* ramp near where Raker was working. Accordingly, if the trial court's definition is correct, an issue of fact exists as to whether the accident occurred in the operations site as defined by the trial court. If the broader interpretation of "operations site" is accepted; however, no issue of fact remains.. The parties do not dispute that Raker fell on Container's premises. In either case, Maryland's summary judgment motion should have been denied. Thus, the First District erred by not reversing it.

The First District's error is *even* more obvious because the Opinion is directly contrary to its own opinion rendered only nine months before in Container Corporation of America v. McKenzie Tank Lines, Inc., 680 So. 2d 509 (Fla. 1st DCA 1996). That case involved a contract with an insurance procurement provision too. The contract required the independent contractor, McKenzie Tank Lines, Inc. ("McKenzie"), to secure $1,000,000 of automobile and liability insurance that named Container as an additional insured. McKenzie, 680 So. 2d at 510. After the Contract was signed, one of McKenzie's employees, Edwards, injured himself while in the course and scope of his employment with McKenzie and while delivering caustic material to Container's plant pursuant to the contract

between McKenzie and Container. Id. Edwards sued Container for strict liability and negligence. Id.

The trial court concluded that under the plain language of the policy, Container was not entitled to coverage for its own negligence. Id. at 512. The trial court found that the certificate of insurance "only provides coverage for any negligent acts or omissions of McKenzie which directly cause a lose to Container." Id. The certificate of insurance provided, however, that "[Container] and affiliates are named as add'l [sic] insured regarding operations performed by insured."

In light of that language, the First District cited to Florida Power & Light and said:

> Florida Power & Light holds that, where an insurance policy defines "persons or entities insured" as "any . . . organization . . . to which the named insured is obligated by virtue of a written contract . . . 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," an organization is entitled to coverage as an additional insured despite that the named insured committed no negligence. Florida Power, 654 So.2d at 278. The Florida Power court reasoned that courts must construe ambiguous terms "against the insurer and in favor of coverage," and if the insurer intended to limit coverage to only instances of accidents caused by the named insured, then the insurer could use the limiting language employed in Consolidation Coal that is, the language: "but only with respect to a c t s the named insured." Florida Power, 654 So.2d at 278.

Id. at 512. (Emphasis original). Based upon the reasoning in Florida Power & Light, the First District concluded that the trial court erred as a matter of law when it interpreted the phrase "regarding operations performed by [McKenzie]" in favor of the insurer and against coverage. Id. The First District stated that

if the carrier had intended to limit coverage to negligence of the named insured, then it could have used the proper language to do so. Id. (citing to Hertz Corn. v. Pugh, 354 So. 2d 966 (Fla. 1st DCA 1978)(where the court rejected the argument that the parties did not intend to cover an accident where the named insured committed no negligence and noted that the policy contained no specific exclusion to that effect).

That is the same result this Court should reach in this case and that the First District should have reached below. No language in the Policy limits Container's coverage "but only with respect to the acts or omissions of the named insured." The Policy covers Container "in the interest of operations at the operations site by Southern Contractors, Inc." This is not the type of limiting language that was used in Consolidation Coal, but is the type of language that was interpreted to cover the additional insureds for their own negligence in the Florida Power & Light and McKenzie cases. Therefore, because it is ambiguous, the Policy should be construed against Maryland and in favor of coverage for Container.

Maryland's coverage obligation through the Policy is a separate and distinct obligation from Southern's obligation to indemnify Container under the Contract. Maryland was neither a party to, nor a third party beneficiary of, the Contract. Consequently, because the Policy provides coverage to Container for its own negligence, this Court should reverse the Opinion. The court should further remand with instructions to reverse the

Judgment and to enter summary judgment in favor of Container on the issue of coverage.

a. The Opinion Should Be Reversed Because In Ruling That Container Was Not Entitled To Coverage For Its Own Negligence, The Trial Court Violated The Most Basic Rules Of Contract Construction Under Florida Law.

By reaching the contrary conclusion, however, which was based not on the Policy language, but on a separate and independent contract to which Maryland was not even a party, the First District violated the most basic rules of contract construction. Therefore, the First District should be reversed.

The interpretation of a contract or an insurance policy is a matter of law for the court. Lee, 624 So. 2d at 851. As a result, this Court is on the same footing as the lower courts; it is not restricted by those courts' interpretation of the contract or policy at issue. Id. It may reach a different conclusion. Florida Board of Regents v. Mycon Corp., 651 So- 2d 149, 153 (Fla. 1st DCA 1995); Geiger v. Geiger, 632 So. 2d 693, 695 (Fla. 1st DCA 1994); and Lee, 624 So. 2d at 851.

This entire case hinges upon the interpretation of the Policy, which defines Container's coverage, not the Contract. As a result, this Court should construe the Policy by reading it as a whole. Excelsior Ins. Co., 369 So. 2d at 941); American Manufacturers Mutual Ins. Co. v. Horn, 353 So. 2d 565, 568 (Fla. 3d DCA 1977), cert. den., 366 So. 2d 885 (1978). Every provision of the Policy should be given meaning and effect. Id. If the provision of the insurance policy to be construed relates to coverage, rather than to an exclusion, the policy must be construed liberally in favor of

coverage. National Merchandise Co., Inc., 400 So. 2d at 532; and see Excelsior Ins. Co., Inc., 369 So. 2d at 942 (where this Court concluded that it must accept the interpretation that will provide the widest range of coverage). Also, the language in the Policy should be read in light of the skill and experience of ordinary people. Morrison Assurance Company v. The School Board of Suwannee County, 414 So. 2d 581 (Fla. 1st DCA 1982).

If the Policy is clear and unambiguous, the court must ascertain the parties' intent from the words used in the contract, without resort to extrinsic evidence. Lee, 624 So. 2d at 851 (citing to Providence Square Ass'n v. Biancardi, 507 So= 2d 1366 (Fla. 1987)). Because the insurer is in control of the language in a policy, if the carrier wants to restrict the scope of coverage, it must use the clear and unambiguous language necessary to obtain that result. Id. Nevertheless, just because a term in a policy is not defined does not automatically mean that it is ambiguous. Old Dominion Ins. co. v. Elysee, Inc., 601 So. 2d 1243, 1245 (Fla. 1st DCA 1992). If an insurer fails to define a term, however, it may not then insist that the undefined term be given a narrow or restrictive interpretation. National Merchandise Co., Inc., 400 So. 2d at 530.

Additionally, if the policy language is ambiguous, it must be construed against the insurer because the insurer drafted the policy. Id. Therefore, even if a policy contains ambiguous language, the court must resolve the conflict without resorting to

extrinsic evidence. The court must simply construe the ambiguity against the insurer and in favor of coverage. **Id.** at 530.

By interpreting the Policy through the use of the Contract, without first finding that the Policy was ambiguous, the First District violated each and every one of these rules of contract construction and, therefore, the Opinion should be reversed. The court did not interpret the Policy, it interpreted the Contract, which is extrinsic evidence of the parties' intent. The court, however, did not find the Policy to be ambiguous; it simply ignored the Policy in favor of the Contract. Even if the Opinion could be interpreted to hold that the First District found the Policy to be ambiguous, the Opinion still should be reversed because, in insurance cases, rather than resorting to extrinsic evidence of the parties' intent (arguably, the Contract), the First District **should** have construed the Policy against Maryland and in favor of coverage for Container. **National Merchandise** Co., **Inc.,** 400 So. 2d at 530.

Moreover, the Contract is not even evidence of the parties' intent because Maryland was not a party to the Contract. The Contract is evidence only of Southern's and Container's intent related to the pipe installation. The Contract is not evidence of anyone's intent as it relates to the coverage actually provided by the plain language of the Policy. The Policy itself is the best evidence of the parties' intent on that issue. **See Lee,** 624 So. 2d at **850-851** (parties' intent must be determined from language of contract). Maryland is merely the insurer that was selected by Southern when Southern was required to perform under the insurance

procurement provision of the Contract. Consequently, the First District's Opinion, which violates the most basic rule that ambiguous insurance policies must be construed against the carrier is clear error and should be reversed.

3. The Lower courts' Coaalusions That Thm **Policy Provides** Coverage only **For Container's Vicarious** Liability **Were Based** Upon **Erroneous Interpretations Of The Policy** And, Am To The Trial Court, A **Misunderstanding** Of **Insurance** Industry Customs **And, Therefore, The** Judgment And The Opinion Should **Be Reversed As A Matter** Of Law.

The relationship between the Policy and the Endorsement must be understood to avoid the error committed by the lower tribunals. The Policy provides coverage to the **insureds, generally,** for occurrences within the coverage territory (the United States) during the Policy period. The Endorsement reduces the coverage territory applicable to Container's right to coverage under the Policy to the **"operations** site." If the location of Raker's accident is ignored for the moment, what language in the Policy itself (as opposed to the Contract) states that Container is covered only for its vicarious liability and not for its own negligence? No such language exists. Therefore, the lower courts should have found that Container **was** covered even for its own negligence.

Also, *in* considering the custom and usage in the industry to determine the parties' intent under the Policy, the trial court incorrectly relied upon a Pennsylvania case which does not even provide the rule of decision for Pennsylvania. Based solely upon the holding in **Harbor** Ins. Co. v. **Lewis,** 562 F. **Supp.** 800 (E.D. Pa. **1983),** the trial court held that it is the custom in the insurance

industry that an additional insured provision provides coverage only for vicarious liability. In **Philadelphia Electric** Co, v. **Na nwide** Mutual **Ins.** Co., 721 **F.** Supp.. 740 (E.D. Pa. **1989),** however, the very same court held that **Harbor Ins.** Co. did not establish a rule that additional insured provisions cover only the vicarious liability of the additional insured and not the additional insured's own negligence. Instead, that court stated that courts must look to the language in the policy and the circumstances **of** its acquisition to determine the extent of coverage provided to an additional insured. **Id.**

The language of the Policy and the **circumstances** of its acquisition in this case are totally distinguishable from the policy in the **Harbor Ins.** Co. case. **In Harbor,** the insurance carrier received no consideration for the additional insured provision. 562 **F.Supp.** at 802. In this case, Maryland received $250 to provide coverage to Container under the Policy. Nevertheless, the trial court concluded that because Container did not pay the $250 directly, it was not entitled to full coverage under the Policy. The trial **court's** conclusion is illogical and should not be sustained.

First, the Contract required Southern to provide Container with the additional insured coverage. Container paid *for* that coverage as part of the Contract price. The insurance coverage was part of the consideration flowing to Container from Southern. Therefore, unlike the court in **Harbor** Ins. Co., this Court **can** reasonably infer that Container relied upon the existence of that

coverage and made its other insurance-related decisions with the expectation of that coverage. Container should receiver the benefit of its bargain.

Second, because Maryland received an additional premium for the additional insured endorsement, a separate and distinct contract of insurance was created for Container's benefit. Compare this case with Fireman's Fund Ins. Co. v. Pohlman, 485 So. 2d 418, 420 (Fla. 1986) (where this Court held that the payment of *an* additional premium to include an additional vehicle under the policy created a separate and severable contract of insurance). From the perspective of the Policy, it does not matter which party paid Maryland the additional premium; it only matters that Maryland was provided with additional consideration to *increase* its risk under the Policy. Cf. Harbor Ins. Co., 562 F.Supp. at 803 (where the court found that the policy covered only vicarious liability because no additional premium was paid to increase the insurer's risk of having to provide coverage for the additional insured's own negligence). Maryland agreed to the price set for the Endorsement. Consequently, Maryland should not be heard to complain that it should have asked for more money or that the risk assumed is disproportionate to the consideration received. Maryland was in control. Thus, because Maryland obtained the benefit of the Policy and the premiums paid for it, it should now be required to bear the burden.

Third, the language of the additional insured provision in Harbor Ins. co. is different and, arguably more specific, than the

Endorsement in this case. In Harbor Ins. Co., the additional insured provision [illegible] that additional insureds would have coverage, "but only to the extent of liability resulting from occurrences arising out of negligence of Reading Company [the primary insured] and/or its wholly owned subsidiaries." (Emphasis added). 562 F.Supp. at 802. This language, as opposed to the Policy language in this case, is a more specific attempt to limit coverage to damages arising from the primary insured's negligence. Neither the Policy nor the Endorsement use the words "but only," nor do they make any other attempt to limit coverage to damages resulting only from Southern's negligence. As a result, the Harbor Ins. Co. case is inapposite. Consequently, Container is entitled to coverage for its own negligence under the Policy.

4. The Trial Court Erred When It Applied University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973) And The Cases Whiah Followed It To Hold That Container Was Not Entitled To Insurance Coverage For Itr Own Negligence And, Therefore, The Trial Court Must Be Reversed.

To hold that Container was not entitled to coverage for its own negligence under the Policy, the trial court relied upon Cox Cable Corp. v. Gulf Power Co., 591 So. 2d 627 (Fla. 1992) and University Plaza Shopping Center, Inc. v. Stewart, 272 So. 2d 507 (Fla. 1973). Although the Opinion does not 'expressly indicate that the First District took the same approach, the Opinion, by implication, seems to indicate that the First District also had this line of cases in mind when it interpreted the Contract rather than the Policy. Those cases are inapplicable to this case. The rule that a party may not obtain indemnity for its own negligence,

unless the contract is clear and unequivocal in that regard, does not apply to insurance contracts. **See Hertz Corp. v. Pugh,** 354 so. 2d 966, 969 (Fla. 1st DCA 1978) (where the First District determined that **University Plaza Shopping Center, Inc.** was not dispositive in a case involving an additional insured provision in an insurance policy); **Apol v. Shaw,** 647 So. 2d 139 (Fla. 1st DCA 1994) (same); and **Heat & Power Corp. v. Air Products & Chemicals, Inc.,** 578 A.2d 1202 (Md. 1990) (where the court held that "the policy consideration against implying agreements to indemnify one for one's own negligence are inapplicable to liability insurance contracts which generally have as their primary purpose indemnification against one's own negligence"). This exact same argument was made and rejected by the First District in the **Hertz Corp.** case. **See Hertz** Corn,, 354 So. 2d at 968 (where the First District held that an additional insured was entitled to indemnity under an insurance policy for its own negligence); **see also Container** Coraoration **v. McKenzie Tank Lines,** Inc., 680 So. 2d 509 (Fla. 1st DCA 1996) (where, on rehearing and under similar circumstances, the First District applied **Hertz** to hold that Container was entitled to coverage for its own negligence under an automobile liability policy). As argued previously, the Policy covers Container for its own negligence because it does not express an intent to do otherwise.

Also, Container is not seeking coverage under the indemnity provision of its Contract with Southern;' instead, Container is seeking coverage under the Policy purchased pursuant to the

insurance procurement provision. The Policy does not exclude coverage for Container's own negligence. The Policy also does not limit Container's coverage only to those claims which are based upon Southern's negligence. Moreover, the Policy and tha Contract are separate contracts, executed by different parties, and supported by distinct consideration. Thus, the University Plaza Shopping Center case does not apply in this case any more than it did in Apol. See Apol, 647 So. 2d at 140-42; see also Hertz, 354 So. 2d at 968-69; and Container Corporation v. McKenzie, 680 So. 2d at 512. Therefore, the terms of the Contract are irrelevant to the interpretation of the terms of the Policy. As a result, the First District's reliance upon the terms of the Contract to affirm the Judgment was clear error and it should be reversed.

Although Maryland may try to argue to the contrary, the Fourth District's opinion in Allianz Ins. Co. v. Goldcoast Partners, Inc., 684 So. 2d 336 (Fla. 4th DCA 1996) does not change this result. In Allianz, an insurance carrier appealed an order determining that a Burger King franchisee was entitled to coverage under a liability policy issued to a chair manufacturer for an accident in which the franchisee's customer was injured by the chair. Id. at 336. The court concluded that the contract between the manufacturer and Burger King itself did not indemnify the franchisee for its own. negligence, so it held that the franchisee was not entitled to coverage. Id.

The injured customer sued the franchisee, Goldcoast, and the chair manufacturer, Decor. Id. at 336. Allianz, Decor's carrier,

settled with the plaintiff and obtained releases for all of the defendants. Id. Litigation then began between Decor, Goldcoast, and Allianz, Id. The question was whether coverage existed for Goldcoast under the Allianz policy that was issued to Decor, the primary insured. Id.

The Allianz policy provided liability coverage for bodily injury assumed by Decor through "insured contracts" with third parties. Id. at 336-37. The policy defined an "insured contract" as:

> [t]hat part of any other contract or agreement pertaining to your [Decor's] business . . . under which you [Decor] assume the tortious liability of another party to pay for 'bodily injury' or @property damage' to a third person or organization.

Id. at 337. Decor, in a contract with Burger King (not the franchisee), assumed liability to indemnify Burger King and its franchisees, unless the injury was caused by Burger King or its franchisees. Id. at 337.

The plaintiff alleged that Goldcoast was negligent because it failed to repair the chair even though it knew the chair needed it. Id. Thus, the question became whether Decor, under its contract with Burger King, was obligated to indemnify Goldcoast for Goldcoast's active negligence. Since the Allianz policy expressly provided that it extended coverage only to the extent that Decor agreed to indemnify third parties in other contracts, the court had to interpret the Burger King/Decor contract to determine whether coverage existed under the policy. Id. Consequently, because the court found that the Burger King/Decor contract did not clearly and

unequivocally express an intent that Burger King or the franchisees be indemnified against their own active negligence, the court held that the policy did not cover Goldcoast's independent active negligence that resulted in the plaintiff's injuries. Id. at 337.

Further, the court rejected Goldcoast's argument that the insurance procurement provision and the indemnity provision of the Burger King/Decor contract were separate and distinct and, therefore, Goldcoast was entitled to coverage under the policy as an additional insured. Id. at 337. In contrast to this case, the trial court was correct in its rejection of that contention because the Allianz policy specifically limited coverage to the liability Decor assumed in third party contracts. Decor's assumption of liability was limited to Decor's negligence.

The Allianz case is totally distinguishable from and inapplicable to this case. The Allianz policy only covered bodily injuries for which Decor contractually agreed to indemnify Burger King and its franchisees. The Burger King/Decor contract expressly stated that Decor would indemnify Burger King and its franchisees, unless the injuries were caused by Burger King or the franchisees. Because the plaintiff alleged that it was Goldcoast's negligence that resulted in the plaintiff's injuries, the court properly held that the carrier, Allianz, would have no obligation to cover Goldcoast under the circumstances. The plaintiff's injuries were outside the scope of the Burger King/Decor contract and the Allianz policy.

To the contrary, Raker's injuries were squarely within the coverage provided to Container in the Policy. The Policy did not expressly or impliedly limit Container's right of coverage to the extent of the indemnity granted to Container by Southern in the Contract. The Policy did not even refer to the Contract in any way. Therefore, because the plain language of the Policy covers Container "in the interest of operations at operations site by Southern Contractors, Inc." and because, as demonstrated earlier, operations site is ambiguous, Container is entitled to coverage under the Policy for Raker's injuries. Raker slipped and fell on Container's premises (the operations site) while in the course and scope of his employment with Southern (while engaged in Southern's operations). Consequently, Container is entitled to coverage and the lower courts' contrary decisions should be reversed.

B. **BECAUSE CONTAINER IS ENTITLED TO COVERAGE UNDER THE POLICY, CONTAINER TO A DEFENSE OF RAKER'S CLAIM AND, THEREFORE UPON REVERSAL, THE TRIAL COURT SHOULD BE INSTRUCTED TO ENTER A JUDGMENT IN FAVOR OF CONTAINER ON ITS COUNTERCLAIM**

Finally, if this Court reverses the Opinion with instructions that the trial court's decision on coverage be reversed, then it should also order the reversal of the trial court's decision that Container had no right to recover for any portion of its counterclaim against Maryland. The duty to provide a defense is substantially more broad than the duty to provide coverage. **Psychiatric Associates v. St. Paul Fire & Marine Insurance Company**, 647 So. 2d 134, 137 (Fla. 1st DCA 1994). If a policy provides coverage; then it necessarily provides a duty of defense. **See**

Louisville Title Insurance Company v. Guerard, 409 So. 2d 514, 516 (Fla. 5th DCA 1982) (citing to Tropical Park, Inc. v. U.S. Fidelity & Guarantv Co., 357 So. 2d 253 (Fla. 3d DCA 1978) to state the rule that where the insurer is obligated under the policy to pay the insured for a judgment arising out of the claim, it is obligated to defend the suit). Consequently, if this Court determines that Container is entitled to *coverage* under the Policy, it should likewise hold that Container is entitled to the attorneys' fees and costs it incurred in the defense of Raker's claim during the time that Maryland refused to provide that defense and in the defense of Maryland's declaratory judgment action. State Farm Fire & Casualtv Co. v. Palma, 629 So. 2d 830, 832-33 (Fla. 1993); §627.428 Fla. Stat. (1995).

C. THE JUDGMENT IN FAVOR OF MARYLAND SHOULD BE REVERSED BECAUSE MARYLAND DID NOT MEET ITS BURDEN OF PROVING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO CONTAINER'S AFFIRMATIVE DEFENSES OR THAT THE DEFENSES WERE LEGALLY INSUFFICIENT AS A MATTER OF LAW.

In its motion for summary judgment, Maryland contended only that Container was not an additional insured under the Policy and, therefore, that Container must reimburse Maryland for the money paid to Raker. Neither Maryland's motion, the affidavits, or other evidence filed in support of the motion addressed the issues presented by Container's affirmative defenses. Thus, Maryland's summary judgment motion should have been denied regardless of whether the coverage issue was resolved correctly.

1. **Maryland** Did **Not Meet** Its Burden Of Proof Regarding **Container's** Affirmative **Defenses Because** The **Only Evidence** It Offered **Was Incompetent** And **Inadmissible And, Therefore, Incapable Of** Being **Considered** For **Summary** Judgment **Purposes.**

Maryland had the burden of establishing that no genuine issue of material fact existed as to Container's affirmative defenses or that the defenses were legally insufficient **as** a matter of law. The Race, Inc. v. Lake & River Recreational Properties, Inc., 573 So. 2d 409, 410 (Fla. 1st DCA 1991). Container had no obligation to make any showing related to its **affirmative** defenses **unless** Maryland had, by affidavit or otherwise, completely negated all allegations and inferences raised by Container in its affirmative defenses. Berenson v. Southern Baptist Hosp. of Florida, Inc., 646 So. 2d 809, 810 (Fla. 1st DCA 1994). **Because** Maryland did not meet its burden of proof in this regard, Maryland's motion should have been denied and the Judgment should not have been **entered.**

The trial court found that Maryland met its burden **because** Container did not introduce any record evidence as to the affirmative defenses and because Maryland prsssnted **deposition** testimony to refute them. The Judgment reads:

> . . . the only record evidence pertaining to the issue of **waiver** or estoppel **filed** with ths Court comes in the deposition testimony of Mr. Ryan, **CCA's** [Container's] representative. Mr. Ryan testified in **deposition** that he was not aware of any act or failure to act by Maryland Casualty which constituted a waiver of its right to reimbursement of the settlement proceeds. (See Mr. Ryan's deposition at page 76, lines 14-22). The failure of CCA [Container] to demonstrate the existence of such an issue, either by countervailing facts **or** justifiable inferences from the facts presented, carries with it the conclusion that as the opposing party, CCA has not met its burden of proof to support their claim of the

existence of a genuine issue on their affirmative defenses.

This statement ignores the fact that Ryan's testimony was not competent or admissible evidence and, therefore, it did not form the proper basis for a summary judgment.

Evidence supporting a motion for summary judgment must be admissible. Harvey Building, Inc. v. Haley, 175 So. 2d 780, 793 (Fla. 1965); Fla.R.Civ.P. 1.510 (e) (1996). "If the evidence presented to the trial judge as part of his consideration of a motion for summary judgment is incompetent and would be inadmissible during trial, that evidence should not be considered in ruling on the motion." Palmer v. Liberty National Life Ins. Co., 499 So. 2d 903, 904 (Fla. 1st DCA 1986). Ryan's testimony about Container's affirmative defenses was not admissible and, therefore, it should not have been considered.

First, although the trial judge refers to Ryan as Container's representative, nothing in the *record* establishes that Ryan was capable of binding Container as to the application of the Policy or the issues of waiver and estoppel. Maryland noticed Ryan for deposition as a fact witness. Container did not produce him pursuant to a corporate notice of taking deposition under Fla.R.Civ.P. 1.310(b)(6) (1996). Thus, Container did not designate Ryan to be someone who was authorized to bind Container on any particular subject.

In fact, Container's counsel requested and Maryland's counsel granted a continuing objection as to whether Ryan was appearing as "Bob Ryan" or as a corporate representative. The trial court did

not resolve this objection. Nothing in the record even suggests that Ryan has the roquisite knowledge or authority to opine about legal matters or whether certain conduct could amount to a waiver or result in an eatoppel. Thus, Maryland failed to meet its burden of proof in this regard and the court should not have accepted Ryan's testimony on those matters.

Second, even if Ryan had the requisite authority to bind Container on this issue, which Container flatly denies, the specific testimony relied upon by the trial court is inadmissible for summary judgment purposes in any event. Container's attorney objected to Maryland's questions on waiver because they required Ryan to reach legal conclusions. A.5. Again, the trial court did not resolve Mr. Werber's objection, as it must, before relying upon Ryan's testimony for summary judgment purposes. Cf. Jones v. Seaboard Coastline Railroad Company, 297 So. 2d 861, 864 (Fla. 2d DCA 1974) ("the oral examination of any deponent shall proceed to completion, subject to recorded objections subsequently to be resolved by the court"); and Fla.R.Civ.P. 1.330.

Even if the trial court's grant of summary judgment is interpreted to be a resolution of the objection in Maryland's favor, the summary judgment still must be reversed because such a finding would be clear error as a matter of law. What Maryland may or may not have done to constitute a waiver is a legal conclusion. Legal conclusions are not sufficient to support a motion for summary judgment. Hurricane Boats, Inc. v. Certified Industrial Fabricators, Inc., 246 So. 2d 174, 175 (Fla. 3d DCA 5971); and

Deerfield Beach Bank v. C.P. Mager, 140 So. 2d 120, 122 (Fla. 2d DCA 1962). Moreover, Ryan is not a lawyer. Even if he were, he still could not properly render testimony in the form of legal conclusions; that determination is reserved for the trial court. Palm Beach County v. Town of Palm Beach, 462 So. 2d 1063, 1070 (Fla. 4th DCA 1983). Ryan simply was not (and could not be) qualified to give testimony on the issue of waiver.

Other than Ryan's inadmissible testimony, Maryland offered no evidence to refute Container's affirmative defenses. Ryan's inadmissible evidence is tantamount to no evidence. Therefore, since Maryland did not meet its burden of proof, Container had no burden to present any evidence related to those defenses. Berenson, 646 So. 2d at 810. Thus, the trial court was incorrect in expecting Container to do so. Accordingly, the summary judgment entered based upon Ryan's testimony was improper and should be reversed.

a. Equitable Principals Cannot Be Applied To Eliminate Or Reduce Maryland's Burden of Proof Or To Hold That Container's Affirmative Defenses Are Legally Insufficient.

Furthermore, the trial court's ruling should be *reversed* because it inappropriately applied equitable considerations to reduce Maryland's burden of proof or to interpret the Policy. In the Judgment, the trial court stated that notwithstanding Container's affirmative defenses, it was "persuaded that equitable principles mandate the granting of" Maryland's summary judgment motion. This conclusion is incorrect for two reasons.

First, as set forth above, Container is entitled to coverage under the Policy. As a result, Container has not received the benefit of anything to which it was not entitled. Thus, Container has not been unjustly enriched.

Second, if the decision regarding coverage is affirmed, but Container ultimately prevails on its affirmative defenses, the equitable principals relied upon by the trial court operate in Container's favor, not Maryland's. In that case, Maryland would not be entitled to reimbursement because it was a mere volunteer. See e.g., Goodwin v. Schmidt, 5 So. 2d 64 '(Fla. 1941) (holding that if a person makes a voluntary payment without legal obligation to do so, that person is a volunteer and not entitled to subrogation); Lumbermens Mutual Casualty Company v. Foremost Insurance Company, 425 So. 2d 1158 (Fla. 3d DCA 1983) (holding that claim of equitable subrogation is waived if the insurer does not obtain an agreement reserving its claim for indemnification or contribution (emphasis added)); and Lehman-Eastern Auto Rentals, Inc. v. Brooks, 370 So. 2d 14' (Fla. 3d DCA 1979) (holding that if an insurer assumes the defense of an insured and enters into settlement with knowledge of the facts taking the accident or injury outside of coverage without disclaiming liability, the insurer is thereafter precluded from denying liability). If Maryland knew Container was not entitled to coverage, it should have tendered the defense back to Container to permit Container to defend or to settle based upon its own judgment. If it failed to do this, Maryland forfeited any reimbursement rights it might otherwise have had. Thus, regardless

of the so-called equitable principals relied upon by the trial court, because Maryland did not fully refute Container's affirmative defenses, the Judgment should not have been entered. Likewise, the Judgment should now be reversed.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the Opinion and remand with instructions for the First District to reverse the Judgment and remand with instructions to the trial court to enter judgment in favor of Container on the issue of coverage and Container's counterclaim.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing has been furnished by U. S. Mail this 6th day of August, 1997, 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.

_____
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