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SUPREME COURT OF FLORIDA
CASE NO. 90,150

CONTAINER CORPORATION
OF AMERICA,

Petitioner/Defendant,

v.

Lower Case No.: 96-1448

MARYLAND CASUALTY COMPANY,

Respondent/Plaintiff.

ON APPEAL FROM THE
FIRST DISTRICT COURT *OF* APPEAL
STATE *OF* FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE CASE AND FACTS

A. Procedural History.

The Respondent Maryland Casualty Company ("Maryland"), an insurance carrier, prevailed in a declaratory judgment action pertaining to the scope of insurance coverage to which the Petitioner, Container Corporation of America ("Container") was entitled, A.1. The main issue in that action was whether Container was entitled to insurance coverage for its own negligence under a general liability policy issued by Maryland (the "Policy"), or whether Container's coverage was limited to its vicarious liability. A.l. Both the trial court and the First District Court of Appeal (the "First District") ruled that Container's coverage was limited to its vicarious liability. A.l; A.2. Container timely seeks to invoke this Court's conflict jurisdiction to hear this case on the merits.

B. Factual Background.

Container contracted with Southern Contractors, Inc. ("Southern") for Southern to install a vacuum pump on a paper machine at Container's plant (the "Contract"). A.l; A.3. The Contract required Southern to: 1) indemnify Container for Southern's negligence; and 2) acquire insurance that listed Container as an additional insured. A.l; A.2. Southern purchased the Policy from Maryland. A.l, A subsequent endorsement to the Policy added Container as an additional insured in the interest "for operations at operations site by Southern Contractors, Inc."

(the "Endorsement"). A.1; A.2. The Policy did not incorporate the Contract by reference. A.4.

Subsequently, Raker, Southern's employee, sued Container for injuries he suffered while working at Container's plant. A.l. Raker was in the course and scope of his employment with Southern at the time of his accident. A.2. Maryland initiated the declaratory judgment action to determine the extent of Container's additional insured coverage for Raker's injuries. A.l. The trial court ruled that the Policy did not cover Container for its own negligence and granted summary judgment in favor of Maryland. A.l. The First District Court of Appeal (the "First District") affirmed. Both of the lower tribunals went outside the Policy language and based their interpretations of the Policy upon extrinsic evidence of the parties' intent. A.l; A.2.

The First District relied upon the terms of the Contract between Container and Maryland's primary insured, Southern, rather than upon the plain language of the Policy itself. A.l. In so doing, the First District stated:

> [t]he agreement [the Contract] between Southern and Container required Southern to 'indemnify, defend, save and hold [Container] harmless from any and all costs, damages and liabilities incurred or arising as a result of the performance by (Southern) of its duties (under the agreement).' This provision makes 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.

A.l, p.2.

SUMMARY OF ARGUMENT

The district court's opinion expressly and directly conflicts with Florida Power & Lisht Company v. Penn America Insurance Company, 654 So. 2d 276 (Fla. 4th DCA 1995). Therefore, this Court may accept jurisdiction of this cause to resolve the issue on the merits. Both cases involved the same policy language and the same points of law. Nevertheless, the two district courts reached opposite conclusions as to the scope of coverage to which additional insureds were entitled. The First District's opinion cannot be reconciled with the Fourth District's. Therefore, because the First District's decision expressly and directly conflicts with the decision of another district court of appeal, this Court has jurisdiction to hear this appeal. Moreover, because this case has statewide importance, this Court should exercise its discretion in favor of hearing this case on the merits.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH FLORIDA POWER & LIGHT V. PENN AMERICA INSURANCE COMPANY, 654 SO. 2D 276 (FLA. 4TH DCA 1995) AND, THEREFORE" THIS COURT HAS JURISDICTION TO HEAR THIS APPEAL ON THE MERITS AND IT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF DOING SO.

The First District interpreted the plain language in the Policy to provide Container, the additional insured, with coverage only for Container's vicarious liability, but not for Container's own negligence. That interpretation of the Policy directly and expressly conflicts with the Fourth District's interpretation of a virtually identical policy under directly analogous facts and based upon the same points of law. Consequently, this Court has

jurisdiction to hear this appeal and Container respectfully requests the court to do so.

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Art. V. §3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv); see also Excelsior Insurance Company v. Pomona Park Bar & Package Store, 369 So. 2d 938 (Fla. 1979) (accepting jurisdiction to review a district court's decision construing insurance contract language where it directly conflicted with another district court's decision on identical language in another insurance contract). Consequently, because the First District's opinion conflicts with the Fourth District's decision, this Court may exercise its jurisdiction in favor of hearing this appeal.

In the lower tribunal, the First District contradicted, without distinguishing, its own prior opinion in Container Cornoration of America v. McKenzie Tank Lines, Inc., 680 So. 2d 509 (Fla. 1st DCA 1996), rev. dism. 679 So. 2d 774 (Fla. 1996), and affirmed the trial court's conclusion that because of the indemnity provision of the Contract, Container was entitled to coverage under the Policy only for its vicarious liability and not for its own negligence. The First district ruled that the indemnity provision of the Contract 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.

The First District reached this conclusion based solely on the language of the Contract and without regard to the Policy language, which contained no such limits on Container's right to coverage. Instead, the Endorsement stated that Container was insured in the "interest for operations at operations site by Southern Contractors, Inc." No other language in the Policy limited Container's right of coverage. Nevertheless, the First District held that the Policy limited Container's right to coverage to its vicarious liability.

Although this decision contradicts the existing law of insurance contract construction, it also expressly and directly conflicts with the decision of another district court of appeal. See e.g. Lee v. Montgomery, 624 So. 2d 850, 851 (Fla. 1st DCA 1993) (citing to Providence Square Ass'n v. Biancardi, 507 So. 2d 1366 (Fla. 1987) to hold that if an insurance policy is clear and unambiguous, the court must ascertain the parties' intent from the language in the policy, without resort to extrinsic evidence); and National Merchandise Co., Inc. v, United Service Automobile Ass'n., 400 So. 2d 526, 530 (Fla. 1st DCA 1981) (holding that where the policy is ambiguous, it must be construed against the insurer and in favor of the insured). Thus, this Court has jurisdiction over this case.

The First District's decision directly and expressly conflicts with Florida Power & Light Company v. Penn America Insurance Company, 654 So. 2d 276 (Fla. 4th DCA 1995). In Florida Power &

Light Company, an employee (Raker) of an independent contractor (Southern), while acting within the course and scope of his employment (operations), was injured while working on FPL's (Container's) property (operations site) as a result of FPL's sole negligence. Id. at 277. FPL sought coverage as an additional insured under a policy that the contractor procured as a result of its agreement with FPL. Id. The independent contractor's policy read:

> (2) Each of the following is an insured under this policy to the extent set forth below:
>
> (a) any person, organization, trustee or estate to whom or to which the named insured is obligated by virtue of a written contract or permit to provide insurance such as is afforded by the terms of this policy, but only with respect to operations by or on behalf of the Named Insured or to facilities used by the Named Insured . . .

Id, at 278. (Emphasis added.) Just as in this case, the trial court interpreted the policy not to cover FPL for its own negligence. Id. at 277.

In reversing the trial court, the Fourth District noted that there were no Florida cases on point. 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 contractor] 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. (Emphasis added). 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 that:

> [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 [sic] as Haywood was an employee of 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.

Id. at 279. (Emphasis added). As a result of this reasoning, the Fourth District ruled that it was error to deny FPL coverage for its own negligence.

The First District's opinion expressly and directly conflicts with the Fourth District's, even though both cases involve the same policy language, identical facts, and the same points of law.

Container was an additional insured in the "interest for operations at operations site by Southern Contractors, Inc." FPL was an additional insured "but only with respect to operations by or on behalf of the Named Insured or to facilities used by the Named Insured." The policies are virtually the same; no material difference exists between them. Both policies cover the primary insured's operations. Additionally, both employees were involved in their employers* operations at the time of their accidents because they were each in the course and scope of his employment when the accident occurred. Neither policy requires any negligence by the named insured before coverage will be provided to the additional insured. Nevertheless, the two district court's reached exactly opposite results based upon the same facts, virtually identical policies, and identical points of law. One ruled in favor of coverage and the other ruled against it. This conflict cannot be reconciled. The First District did not even try.

Nevertheless, Maryland may try to argue that the cases are distinguishable because the First District based its interpretation of the Policy on the Contract language; whereas, the Fourth District focused only on the policy and not the FPL contract that required the policy to be procured. Although such an argument tends to highlight the First District's error, it is irrelevant. The First District used its interpretation of the Contract to reach a conclusion about the meaning of the Policy and that decision expressly and directly conflicts with the Fourth District's decision interpreting the same policy language. The two opinions

are in conflict. Thus, this Court has jurisdiction over this case, and it should accept that jurisdiction to hear this case on the merits.

This Court should exercise its discretion in favor of accepting jurisdiction and resolving this conflict on the merits because it has statewide importance. This case has essentially changed the law of insurance contract construction by permitting courts to resort to extrinsic evidence to determine the parties' intent. The policy, if ambiguous, no longer must be construed against the insurer. Thus, this decision has exposed all additional insureds to unanticipated limitations on their contracted for coverage. Carriers are no longer bound by the policy language; they can simply rely upon extrinsic contracts to which they were not a party to alter the policy's express language after the fact.

In addition, the First District has imposed a limitation on insurance coverage that has heretofore existed only in the context of contractual indemnities. In the First District, an additional insured is covered only for vicarious liability, unless the applicable insurance policy clearly and unequivocally provides coverage for the additional insured's own negligence. This new rule of law is directly contrary to the public policy behind insurance and the long standing precedent that insurance coverage provisions will be construed broadly and in favor of coverage. See Excelsior Ins. Co., Inc., 369 So. 2d at 942 (holding that the court must accept the interpretation that will provide the broadest

coverage); National Merchandise Co., Inc., 400 So. 2d at 523 (holding that if the provision to be interpreted relates to coverage, rather than an exclusion, the policy must be construed liberally in favor of coverage). Thus, this conflict deserves this Court's intervention and resolution. As a result, this Court should exercise its discretion in favor of taking jurisdiction of this appeal and hear the matter on the merits.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and it should exercise that jurisdiction to consider the merits of Container's argument.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Shelley H. Leinicke, Wicker, Smith, Tutan, O'Hara, McCoy, Graham, & Ford, P.A., One East Broward Boulevard, Suite 500, Post Office Box 14460, Ft. Lauderdale, Florida 33302, this 2nd day of April, 1997.

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