A35051-7/SHL/cyb/vsc/337489

IN THE SUPREME COURT OF THE STATE OF FLORIDA

90,150

CASE NO. 96-1448
L.T. Case No. 94-1677-CA

CONTAINER CORPORATION OF AMERICA,

Petitioner,

vs.

MARYLAND CASUALTY COMPANY,

Respondent,

RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF CASE AND FACTS*

Petitioner, Container Corporation of America, Inc. ("Container"), asks this Court to review 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 upon the specific facts of this lawsuit.

Container employs approximately 17,000 workers and maintains approximately 165 to 170 plants throughout the country. Southern was hired by Container to install vacuum pump reclaim piping on the premises of Container's operations site at Fernandina Beach, Florida. The contractors agreement for Southern's work, which was drafted by Container, obligated Southern to indemnify Container only for liability arising from Southern's performance of its work and to include Container as an additional insured for Southern's operations:

> 5. Contractor [Southern] shall indemnify, defend, save and hold Company [CCA] 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)
>
> 6. Contractor 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 . . .

*The symbol "R" refers to the Index to the Record from the District Court.

> 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 [CCA] as the named insured . . . (R. 21)

As required by the contract with Container, Southern purchased a commercial general liability insurance policy from Maryland Casualty Company ("Maryland") which included Container as an additional insured for

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

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 $2 million of potential liability for which Container was self insured. (R. 107-131)

Raker, a Southern employee, was injured when he slipped and fell on the Container premises in Fernandina Beach. Raker slipped on a foreign substance on a ramp which was maintained solely by Container in a portion of the premises which was totally separate and distinct from where Southern was installing the piping. Discovery established that there was no negligence by Southern which caused Raker's injuries, Raker's suit did not join Southern, nor did his claim involve either the operations or the operations site of Southern. Discovery also established that it was never the intent of the parties to have Container held

harmless by either Southern or Maryland Casualty for Container's own negligence. Rather, the parties intended for Container to be held harmless as an additional insured only for its own potential vicarious liability due to active or direct negligence by Southern.

Insurance premiums for the named insured's and additional insured's coverage further supported the parties' intent. Southern paid a premium in excess of $23,000 for its coverage as the named insured yet the cost of adding Container as an additional insured for "interest for operations at operations site by Southern Contractors, Inc." was only $250.

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, passably, or technically liable for the acts of Southern, no coverage was owed by Maryland to Container under the facts of this case. (R. 199-213) The district court affirmed. This petition follows.

SUMMARY OF THE ARGUMENT

This court lacks jurisdiction to review this case because there is no conflict between the district court's decision in this case and the opinion stated in the case ***of Florida Power & Light v. Penn America Insurance*** Co., 654 So.2d 276 (Fla. 4th DCA 1995). The ***FPL*** case involved a different definition of "who is an insured". Further, the ***FPL*** case did not involve a specific limitation that the additional insured was covered for its "interest for operations at operations site" of the named insured. Because the two cases are factually distinguishable, they are not in conflict.

ARGUMENT

THIS HONORABLE COURT LACKS JURISDICTION TO REVIEW THIS PETITION BECAUSE NO CONFLICT EXISTS BETWEEN THE DECISIONS OF THE DISTRICT COURTS,

In an attempt to create a conflict, 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 performing this work, Hayward was injured when he came into contact with an energized feeder bay conductor on the job site. 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 Named 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. Further, the contractual language in 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.

Container's reference to an earlier decision of the First District cannot form the basis of conflict jurisdiction. Fla. R. App. P. 9.030(a)(2)(iv). In any event, the two decisions of the First District are not in conflict. The earlier case of ***Container Corporation*** *of* ***America v. McKenzie Tank Lines, Inc., 680*** So.2d 509 (Fla. 1st DCA 1996) rev. *dism'd*. 679 So.2d 774 (Fla. 1996) focused on the

interpretation of an automobile policy and whether coverage was available where an accident was related to the ownership, maintenance, or use of a vehicle. That case is irrelevant to the instant action which did not involve a dangerous instrumentality, did not involve the same type of insurance coverage, and did not involve the same policy language that was construed in the McKenzie case.

The instant decision does not alter Florida law in any fashion. The First District has ruled in this case in accordance with governing law regarding interpretation and construction of language in an insurance policy.

It is hornbook law that conflict certiorari is available only where there is a direct conflict between two decisions. Review is limited to those situations because of the need for uniformity in decisions as precedent rather than the adjudication of the rights of particular litigants. ***Mystan Marine, Inc. v. Harrington***, 339 So.2d 200 (Fla. 1976). Because the cases claimed to be in conflict are easily distinguishable on their facts, certiorari review on the grounds of conflict is not available. ***Wilson v. Southern Bell Telephone & Telegraph Co., 327*** So.2d 220 (Fla. 1976); ***Department of Revenue v. Johnston,*** 442 So.2d 930 (Fla. 1983). Further, jurisdiction cannot be created based upon the contents of the dissenting opinion. ***Golden Loaf Bakery, Inc. v. Charles W. Rex Construction Co., 334*** So.2d 585 (Fla. 1976).

CONCLUSION

For the reasons set forth herein, no direct conflict exists between the decisions of the district courts of appeal and this court does not have jurisdiction to review this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of April, 1997, to: Steven A. Werber, Esq., Foley & Lardner, The Greenleaf Building, 200 Laura Street, P.O. Box 240, Jacksonville, Florida 3220 1-0240, Attorney for Appellant.

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