ORIGINAL

FILED
SID J. WHITE
SEP 22 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA
CASE NO. 90,150

CONTAINER CORPORATION OF AMERICA,

petitioner/Defendant,

v.

MARYLAND CASUALTY COMPANY,

Respondent/Plaintiff.

Lower Case No.: 96-1448

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

PETITIONER'S REPLY BRIEF

FOLEY & LARDNER

Steven A. Wsrber
Florida Bar No. 086466
Tracy S. Carlin
Florida Bar No. 0797390
200 Laura Street
Jacksonville, FL 32202
(904) 359-2000

Attorneys for Petitioner
Container Corporation
of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

I. STATEMENT OF THE CASE AND FACTS

Maryland's Statement of the Case and Facts is incorrect or misleading in two respects: 1) Container is not "self insured" for the first two million dollars; and 2) the record is not clear as to where Raker's accident occurred.

First, to contend that Container is self insured, Maryland inappropriately cites to its own Memorandum in Support of its Motion for Summary Judgment as record authority. Respondent's Brief, p. 3. Maryland's own arguments that are not based upon record facts is insufficient support for Maryland's current position. Moreover, Container has no insurance for the first two million dollars of liability other than the Policy provided by Maryland. Ryan Depo., pp. 27-36. National Union Fire Insurance Company of Pittsburgh, PA. is Maryland's excess insurance carrier over and above the first two million dollars of Container's liability. Ryan Depo., pp. 51-52. At some point, Container made a policy decision not to carry insurance for the first two million dollars, but to require contractors *working* on its property to name it as an additional insured, so that it would have full coverage for that first two million dollars. Ryan Depo., pp. 27-36. That is why Southern was required to provide the Policy with an aggregate limit of two million dollars.

Second, contrary to Maryland's assertion, Mr. Ryan's testimony does not establish that Raker's accident occurred on a "portion of the premises which was totally separate and distinct from where Southern was installing the pipe." Respondent's Brief, p. 4.

Instead, Mr. Ryan testified that he believed the accident occurred near where Raker was working. Ryan Depo., pp. **54-55; A.** 5.

Finally, in response to facts argued in the argument section of Maryland's Respondent's Brief, the court should note that all of the parties agreed that Raker was in the course and scope of his employment with Southern at the time of his accident. R. 66-67; 68-69; and 81-89.

II. ARGUMENT

A. THE LANGUAGE OF THE CONTRACT BETWEEN CONTAINER AND SOUTHERN IS IRRELEVANT BECAUSE THE ONLY ISSUE IN THIS CASE IS THE EXTENT OF MARYLAND'S OBLIGATION TO PROVIDE COVERAGE TO CONTAINER UNDER THE POLICY, WHICH IS THE ONLY AGREEMENT AT ISSUE IN THIS DECLARATORY JUDGMENT CASE.

Maryland sought a declaratory judgment as to its **coverage** obligations under the Policy, not the Contract, and therefore, the provisions of the Contract are irrelevant and **should** not have been considered by the trial court or the First District Court of Appeal (the **"First** District"). Maryland sought a declaration that Container was not an additional insured under the **Policy;** it did not seek a declaration that the Contract did not clearly and unequivocally require Southern to indemnify Container for Container's own negligence. Container does not contend **that Southern** is required to indemnify Container for Container's own negligence. Container does contend, however, that, under the Policy, **Maryland** must insure Container for Container's own negligence. Consequently, even though the Contract did not clearly and unequivocally obligate Southern to indemnify Container for its own negligence, Container is still entitled to **coverage** from

Maryland for its own negligence under the Policy. The indemnity provision of the Contract was separate and independent from the insurance procurement provision.

Likewise, the Policy is a separate and distinct agreement from the Contract. Maryland must provide the coverage granted under the Policy even if that coverage were greater than the coverage Southern was obligated to procure under the Contract, but that is not what happened here. Southern purchased the exact insurance that the contract required at a price set by Maryland. If the price was too low for the risk assumed, Maryland should suffer the consequences, not Container. Maryland was in control.

B. **THE CONTRACT IS INAPPROPRIATE, EXTRINSIC EVIDENCE OF THE PARTIES' INTENT AS TO THE COVERAGE PROVIDED BY THE POLICY AND, THEREFORE, THE LOWER COURT'S OPINIONS THAT WERE BASED ON THE CONTRACT SHOULD BE REVERSED.**

Additionally, the Contract is not appropriate extrinsic evidence as to what the parties intended with respect to coverage under the Policy. The Policy is not like thr one discussed in Allianz Ins. Co. v. Goldcoast Partners, Inc., 684 So. 2d 336 (Fla. 4th DCA 1996), which is discussed at pages 31-34 of the Petitioner's Brief and cited at pages 17-18 of the Respondent's Brief. The Policy does not limit coverage to "insured contracts" with third parties. The Policy also does not incorporate the Contract by reference. Thus, the language of the indemnity provision of the Contract is irrelevant to the coverage to which Container is entitled under the Policy actually purchased and provided to Container pursuant to the insurance procurement provision of the Contract. Consequently, Maryland's and the lower

courts ' reliance upon the Contract language to hold that Container is not entitled to coverage under the Policy is incorrect.

Moreover, had Maryland wanted to limit the Policy coverage provided to Container to the indemnity given by the indemnity provision of the Contract, it could have done so. **See Lee v. Montgomery,** 624 So. 2d 850, 851 (Fla. 1st DCA 1993) (where the First District held that because the insurer is in control of the language of a policy, if it wants to limit coverage to certain conditions, it must use the clear and unambiguous language that will accomplish that result). Because it failed to limit the coverage in that way, however, Maryland is required to provide the broad coverage provided by the language of the Policy.

Maryland's and the lower courts' reliance upon the Contract terms must also be reversed for two other reasons. First, 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 as to coverage. **See Lee,** 624 so. 2d at 850-851 (parties' intent must be determined from the language of the contract). Second, reliance upon the Contract language to interpret the Policy violates the most basis rules of insurance contract construction. If the Policy is clear and unambiguous, the court must interpret the contract based upon the language contained within its four corners and without resort to extrinsic evidence. **Lee,** 624 So. 2d at 851. Thus, if Maryland is correct and the

Policy is unambiguous, the lower courts' reliance on extrinsic evidence of the parties' intent must be reversed. If the language is ambiguous, however, the trial court must strictly construe the coverage providing provision against the *insurer* (Maryland) and in favor of the insured (Container). **Florida** Power **& Light Company** v. **Penn Insurance Company,** 654 So. 2d 276, 278 (Fla. 4th DCA 1995). Therefore, if the Policy is ambiguous, Container still wins. Either way, the lower courts' resort to extrinsic evidence, the Contract, was error and this Court should reverse it.

Even if the lower courts' were permitted to consider the extrinsic evidence of the parties' intent, they missed one fact that Maryland pointed out in its Respondent's Brief. Container had no insurance of its own for the first two million dollars of liability to which it might be exposed. Container had only an excess policy with National Union. Mr. Ryan testified that it was Container's policy not to carry any of its own insurance **for** the first two million dollars, but to have the contractors it hired obtain that insurance for it. As this is Container's policy, then surely Container expected to be covered for its own negligence. Thus, at least one of the parties intended for Container to be covered for its own negligence. As a result, as extrinsic evidence of the parties' intent goes, there is, at the very least, a conflict in the evidence and, therefore, the ***summary*** judgment ***in*** favor of Maryland should be reversed.

Finally, the fact that Container drafted the Contract between Container and Southern, a contract to which Maryland is not a

party, is irrelevant to this dispute between Maryland and Container under the Policy. The Policy is the agreement that must bs interpreted to determine the extent of the coverage Maryland owes to Container. Because Maryland drafted the Policy and the Endorsement, any ambiguities *in* those documents must be construed against Maryland and in favor of coverage for Container. **Florida Power & Light Company,** 654 So. 2d at 278. Because the Policy provides coverage to Container for Mr. Raker's accident, the lower courts ' contrary rulings must be reversed.

C. THE PUBLIC POLICY THAT INSURANCE CONTRACT PROVISIONS MUST BE CONSTRUED BROADLY AND IN FAVOR OF COVERAGE APPLIES REGARDLESS OF THE TYPE OF INSURANCE AT ISSUE.

Maryland is incorrect when it argues that certain of the cases Container relied upon in its Petitioner's Brief are inapplicable because they relate to different types of insurance policies than the one at issue in this case. The public policy that insurance contract provisions which are intended to provide coverage must be interpreted broadly and in favor of coverage is applicable regardless of the type of insurance provided. **Cf. Prudential Property and Casualty Insurance Company v. Swindal,** 622 So. 2d 467 (Fla. 1993) (homeowner's insurance); **Grissom v. Commercial Union Insurance Company,** 610 So. 2d 1299 (Fla. 1st DCA 1992) (liability insurance); **McRae** Fire Protection v. **McRae,** 493 So. 2d 1105 (Fla. 1st DCA 1986) (workers' compensation insurance); and **National** Merchandise **Company,** Inc. v. **United Service Automobile Association,** 400 So. 2d 526 (Fla. 1st DCA 1981) (automobile insurance); **see also** Appleman, 13 **Insurance Law and Practice, §7401** (West Publishing Co.

1976), pp. 197-269. The purpose of this public policy is to give the insured the benefit of its bargain; i.e., to provide it with the very thing it contracted to receive. Appleman, 13 Insurance Law and Practice, §7386 (West Publishing Co. 1976), pp. 138-167. This policy applies regardless of the reason for which the insurance was purchased. Id. Therefore, notwithstanding Maryland's unsupported assertions to the contrary, cases interpreting automobile liability insurance or workers' compensation insurance are sufficiently analogous to serve as authority for this Court to reverse the lower courts' erroneous opinions.

III. CONCLUSION

The cases cited and the arguments made in Container's Petitioner's Brief and herein demonstrate that Container is entitled to coverage under the Policy. Petitioner's Brief, pp. 13-34. The lower courts' erred when they reached a contrary conclusion. Therefore, this Court should reverse the First District and remand with instructions for the First District to remand with instructions for the trial court to enter judgment in favor of Container on the issue of coverage.

FOLEY & LARDNER

By: _____
Steven A. Werber
Florida Bar No: 0865466
Tracy S. Carlin
Florida Bar No: 0797390

The Greenleaf Building
200 Laura Street
Post Office Box 240
Jacksonville, FL 32201-0240
(904) 359-2000
Attorneys for Petitioner

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 8th day of September, 1997.

Gary S. Cal
Attorney