IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2524

MARIA N. GARCIA,

Appellant,

vs.

FEDERAL INSURANCE COMPANY,

Appellee.

ON QUESTIONS CERTIFIED FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, CASE NO. 05-14720-FF

ANSWER BRIEF OF APPELLEE

Irene Porter, Esq.
Mark Hicks, Esq.
Hicks & Kneale, P.A.
Attorneys for Appellee
799 Brickell Plaza, Suite 900
Miami, Florida 33131
(305) 374-8171 (phone)
(305) 372-8038 (fax)

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STATEMENT OF THE CASE AND FACTS

This case is before this Court on questions of law certified by the Eleventh Circuit Court of Appeals. The citations to the record are to Appellant's Record Excerpts dated October 17, 2005, which the Eleventh Circuit transmitted to this Court. The record is cited by the designation "DE" for "docket entry", followed by the docket number and page number, *e.g.* "DE___:___". References to the Eleventh Circuit's certification order are cited "CO:___".

Maria N. Garcia ("Garcia") filed a diversity jurisdiction lawsuit against Federal Insurance Company ("Federal") for declaratory relief and damages, claiming to be an insured person under a Masterpiece Personal Liability Policy issued to named insured, Laura Anderson, for an underlying lawsuit filed by the Archers. (DE1). Federal filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Fed.R.Civ.P. 12(b)(6). (DE10). The District Court dismissed Garcia's Complaint against Federal with prejudice, on the ground that assuming for the sake of the motion the truth of the factual allegations, she did not qualify as a "covered person." (DE22). The facts stated in the Eleventh Circuit's decision are those alleged in Garcia's complaint against Federal.

Garcia alleged that although Federal properly performed its obligations to its named insured by negotiating an early settlement of the lawsuit, paying its policy limits, and securing a release of the named insured (DE1:4-5, ¶¶ 25, 27; DE1:7, ¶

47), Federal failed to also protect Garcia for her liability. (DE1:5, ¶ 27). According to Garcia's complaint, she entered into negotiations with the plaintiffs which led to an assignment and transfer of claims, and joint stipulation for the entry of judgment against her in the amount of $7 million, subject to certain conditions including credit for sums paid by other sources. (DE1:5, ¶¶ 28-29). According to Garcia's complaint, prior to the entry of the final consent judgment, Progressive Insurance Company, which insured the Volvo Garcia was driving, attempted to intervene and prevent Garcia the entry of the judgment. (DE1:5, ¶ 30). Incident to these efforts, counsel for Progressive asked whether Garcia was an insured or additional insured under Mrs. Anderson's policy with Federal. (DE1:5, ¶ 30).

The Masterpiece Personal Liability Policy was issued by Federal to Laura Anderson ("Anderson") as the policyholder and named insured ("Policy"). (DE10:Exhibit B, p. 2). The underlying tort action involved an accident in which Garcia was driving a 1994 Volvo owned and insured by Mrs. Anderson's son-in-law, Harry Vieth. (DE1:13, ¶ 21; DE1:5, ¶ 30). The Volvo was not insured by Federal; it was insured by Progressive Insurance Company. (DE1:5, ¶30).

In the underlying tort action, plaintiffs sued numerous defendants including Garcia and Anderson for personal injuries sustained by one of the plaintiffs, Mrs. Archer, when she was struck by the vehicle driven by Garcia while standing at an

ATM machine in front of a Publix Super Market. (DE1:12-14). Garcia was a caregiver of Anderson who, because of her poor health, needed assisted care. (DE1:3, ¶ 15). The underlying action alleged that Garcia was on an errand for Laura Anderson at the time of the accident and was acting within the scope of her employment at that time. (DE1:11-12, ¶¶ 8, 20). "Garcia was employed by and working for Defendant Anderson as a result of an agreement between Defendant Anderson and Defendant Garcia's employing agency, Defendant Job Depot." (DE1:12-13, ¶ 20).

The underlying plaintiffs alleged at paragraph 23 that as "Garcia approached the parking space, she negligently operated the car in that she drove up onto the sidewalk, collided with Gale Archer, and continued to depress the accelerator, pinning Gale Archer to the ATM machine until bystanders removed Defendant Garcia from the car and backed it off the sidewalk, releasing Gale Archer." (DE1:13, ¶ 23). They also alleged at paragraph 24 that "[i]n addition to Defendant Garcia's negligent operation of the car, Defendant Veith, Anderson and Defendant Garcia negligently failed to maintain the car in ways that include but are not limited to allowing the brake pedal to become worn down the [sic] bare metal so that the operator's foot would be allowed to slip off and prevent braking under foreseeable circumstances. Defendants Garcia, Vieth and Anderson also failed to

adequately maintain the vehicle so as to keep it in a safe condition." (DE1:13, ¶ 24).

Count I against Garcia, Veith, and Anderson alleged that Garcia was actively negligent, Veith (the owner of the Volvo) was actively negligent in failing to maintain it, and Anderson, Federal's named insured, was vicariously liable for Garcia's negligence. "Garcia breached her duty ... by failing to use reasonable care in operating and/or maintaining her motor vehicle when she accelerated up onto the sidewalk, colliding with Gale Archer, and continued to depress the accelerator, further injuring and disabling Gale Archer." (DE1:14, ¶ 30). "Garcia was acting within the course and scope of her employment, agency, apparent agency, representative capacity or servitude with Defendant Anderson, who is therefore vicariously liable for Defendant Garcia's negligence." (DE1:14, ¶ 31).[1] "Garcia was operating the 1994 Volvo with the full knowledge, consent and permission of its owner, Defendant Vieth, who is therefore, vicariously, liable for Defendant Garcia's negligence under the dangerous instrumentality doctrine and also directly negligent for failing to properly maintain the subject vehicle." (DE1:15, ¶33).

Garcia is a stranger to the Federal Policy. The named insured did not purchase an endorsement adding her as an additional insured. The 1994 Volvo

[1] All emphasis by underlining herein is supplied unless otherwise noted.

driven by Garcia and owned by Vieth was not insured by Federal. (DE10:Exhibit B, pp. 12-27). The Federal Policy, in pertinent part, provides:

> **Personal Liability Coverage**
>
> We cover damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime during the policy period and are caused by an occurrence, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in **Exclusions.**
>
> A "covered person" means:
> - you or a family member;
> - any other person or organization with respect to liability because of acts or omissions of you or a family member; or
> - any combination of the above.
>
> *** * ***
>
> **Definitions**
>
> * * *
>
> **You** means the person named in the Coverage Summary, and a spouse who lives with that person.

(DE10:Exhibit B, 44, 28).

The federal district court held that the plain and unambiguous language of the "covered person" definition – "with respect to liability because of the acts or omissions of you" – "means, in this case, that Garcia is covered under the Policy if Garcia could be liable for striking the pedestrian because of Anderson's [the named insured's] failure to maintain the brake pedal of the automobile in a safe condition." (DE22:4).

The district court then recited the factual allegations of the underlying complaint which demonstrated that Garcia could not be liable because of the named insured's failure to maintain the brake pedal: "The relevant factual allegations in paragraphs 23 and 24 of the underlying complaint are that: (1) Garcia negligently operated the car and collided with the pedestrian; (2) Garcia and Anderson negligently failed to maintain the brake pedal; and (3) Garcia and Anderson negligently failed to maintain the vehicle in a safe condition. Count 1 asserted a claim against Garcia for negligence and against Anderson because Garcia was acting within the course and scope of her employment with Anderson at the time of the accident. The complaint stated a direct negligence claim against Garcia, a vicarious liability claim against Anderson for Garcia's negligence, and sought relief jointly and severally from Garcia and Anderson for their respective negligence." (DE22:4).

The district court explained that "[t]he plaintiff in the underlying suit sought to hold Garcia liable for failing to operate and maintain the vehicle in a safe condition, but there is no allegation or claim that Garcia was responsible for Anderson's [the named insured's] failure to safely maintain the vehicle; nor in the factual scenario presented could there reasonably be such a claim. Moreover, Garcia can point to nothing in her relationship with Anderson [the named insured] that would permit Garcia to be held legally responsible even if Anderson was

negligent. Thus, there is no basis for Garcia to be held liable to the plaintiff 'because of the acts or omissions' of Anderson. On the facts of this case, nothing is ambiguous about the wording or the application of the provision at issue. Applying the ordinary rules of construction, it is clear that Garcia is not a 'covered person' under the Policy." (DE22:4).

The district court found its conclusion was supported by this Court's analysis in *Container Corp. of America v. Maryland Cas. Co.*, 707 So. 2d 736 (Fla. 1998), and decisions from other courts around the country. "The conclusion that Garcia is not covered under the policy is supported by the analysis in *Container Corp. of America v. Maryland Cas. Co.*, 707 So. 2d 733, 736 (Fla. 1998). In that case, Southern Contractors ('Southern') had entered into an agreement with Container Corporation ('Container') to install a pump at Container's plant. The contract provided that Southern would indemnify Container from liabilities incurred or arising from Southern's performance of its duties. Southern secured a liability policy from Maryland Casualty. The policy identified Container as an additional insured under an endorsement that stated 'Interest for operations at operations site by [Container].' The endorsement did not limit coverage for Container because of acts or omissions by Southern. When a Southern employee suffered injuries at the plant as a result of Container's negligence, Maryland Casualty filed a declaratory judgment action to determine if Container was insured for the claim under

Southern's policy. *Id*. at 735. Maryland Casualty argued that the endorsement was intended to limit an additional insured's coverage to situations where the additional insured would be vicariously liable for Southern's negligence. *See id*. at 736. Rejecting this argument, the court found that Container was entitled to coverage for its own negligence if, on remand, the trial court found that Container's liability arose out of Southern's operations at Container's plant. *Id*. at 736.

"In reaching the decision in *Container*, the Florida Supreme Court emphasized that policy language purporting to limit coverage to vicarious liability must be clear, citing with approval *Liberty Mut. Ins. Co. v. Consolidation Coal Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), a case construing language as providing coverage for an additional insured only for vicarious liability. *Id.* In *Consolidation Coal*, the policy stated that 'Consolidation was added as 'an additional insured but only with respect to the acts or omissions of the named insured in connection with the named insured's operations' on Consolidation's premises.' 406 F. Supp. at 1294. [Emphasis on the words "acts or omissions" by the district court]. The *Consolidation Coal* court concluded that the words 'act or omission of the named insured' stated a clear intent to cover an additional insured for the negligence of the named insured but not for the additional insured's own negligence.

"Even though the Florida Supreme Court[] in *Container* applied the analysis in *Consolidation Coal* to find coverage for the additional insured's own negligence, the analysis is instructive in this case. The provision in Federal's Policy providing an additional insured coverage 'with respect to liability because of the acts or omissions of' the named insured, is stronger, clearer language of limitation than was at issue in *Consolidation Coal*, which held a similar provision limited coverage to vicarious liability. [Emphasis on the words "because of" by the district court]. *Consolidation Coal* is thus persuasive authority for concluding that Garcia would be covered only if she is liable because of the acts or omissions of Anderson.[FN2]

> [FN2] This conclusion is further supported by decisions from other courts across the country, *see* Motion to Dismiss at pp. 9-15, and some courts that have expressly agreed with the Florida Supreme Court's holding that the provision in *Consolidation Coal* ('with respect to acts or omissions of the named insured') is clear policy language that limits coverage to vicarious liability. *See* Motion to Dismiss at pp. 8-9.

(R22:4-6).

Garcia appealed to the Eleventh Circuit which has deferred ruling and certified the following questions of law to this Court:

> 1. Is an insurance policy that defines a covered person as "any other person with respect to liability because of acts or omissions" of the insured ambiguous?
>
> 2. Does an insurance policy providing coverage for an additional insured "with respect to liability because of acts or omissions" of the named insured limit coverage to

> instances in which the additional insured is vicariously liable for acts of the named insured?

(CO:12).

The Eleventh Circuit recognized that in *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1988), this Court "pointed to *Consolidation Coal Co. v. Liberty Mutual Insurance Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), as a case in which an additional insured clause stated a clear intent to cover an additional insured for the named insured's negligence, but not for the additional insured's negligence." (CO:6). It noted that in *Consolidation Coal* the party seeking coverage had been added to the policy as an additional insured, but limited by the following "acts and omissions" clause: "but only with respect to acts or omissions of the named insured in connection with the named insured's operations." (CO:6). However, the Eleventh Circuit was uncertain as to the interpretation this Court would give the Federal policy language because it is not identical to the language in *Consolidation Coal* and because of this Court's limited discussion of *Consolidation Coal*, along with this Court's decision in *Taurus Holdings, Inc. v. United States Fidelity & Guaranty Co.*, 913 So. 2d 528 (Fla. 2005), interpreting the phrase "arising out of." (CO:10-11).

SUMMARY OF THE ARGUMENT

The additional insured definition in the Federal policy is clear and unambiguous. It confers additional insured status on a person who incurs "liability

because of acts or omissions" of the named insured or a family member. Garcia was sued as an actively negligent driver for her own negligence in driving the vehicle and her own negligence in failing to maintain the brake pedal. The underlying lawsuit did not seek to impose liability upon her because of any act or omission of the named insured. As a matter of law, any liability Garcia incurred was because of her own acts or omissions. Garcia has it backwards, it was the named insured who was sued for liability because of the acts or omissions of Garcia under the doctrine of respondeat superior. Garcia was sued for her own acts or omissions.

This Court has already pointed to similar, albeit less restrictive, language -- "but only with respect to acts or omissions of the named insured" -- as "clear policy language" which limits the coverage granted to an additional insured, even when coverage for that additional insured was specifically purchased, to the additional insured's vicarious liability for the named insured. Numerous courts around the nation agree. In this case, Federal's named insured did not purchase coverage for Garcia, nor was she under any contractual requirement to do so.

The language in the Federal policy -- "with respect to liability because of acts or omissions of [the named insured]" -- is even more clear in its limitation of coverage to vicarious liability. This language has been interpreted by numerous courts around the nation as limited to vicarious or secondary liability incurred

when the negligent acts or omissions of the named insured are imputed to another person because of a special relationship. These courts properly reject the notion that a person or organization which is liable for its own negligence can incur "liability because of" the acts or omissions of the named insured in cases where the named insured is also alleged to be negligent. As a matter of law, liability in cases of two or more active tortfeasors is only imposed upon a tortfeasor because of its own negligence. Negligence on the part of the named insured (even if it were found to exist) is not, as Garcia contends, "in part a cause of [Garcia's] liability." (Initial Brief p. 6).

The strained construction urged by Garcia would impermissibly require this Court to write language into the policy that does not exist, such as:

> Any other person or organization with respect to liability <u>arising out of an accident or injury which arises out of acts or omissions of the named insured and acts or omissions of that other person or organization</u>.

Tellingly, Garcia has cited no case interpreting the phrase "liability because of acts or omissions" of the insured (Initial Brief, p. 15), and attempts to import nonexistent language -- "arising out of" – into the analysis. She also inexplicably, and incorrectly, states that in *Taurus Holdings, Inc. v. United States Fidelity & Guar. Co.*, 913 So. 2d 528 (Fla. 2005), this Court "held, the phrase should be read to include those whose liability merely 'has a connection' with the acts or

omissions of the named insured." (Initial Brief. p. 7). This court made no such holding.

Garcia's contention that "various appeals courts have interpreted the provision in contrary ways" (Initial Brief, p. 7), is likewise inexplicable in that she has cited no cases interpreting the Federal Policy language, but relies primarily upon appellate decisions in other states which interpret totally different language – "liability arising out of" the named insured's work or operations – as insufficient to limit coverage to vicarious liability (Initial Brief, p. 10, *citing Acceptance Ins. Co. v. Syufy Enterprises*, 81 Cal. Rptr. 2d 557 (Cal. App. 1999) and *Merchants Insurance Co. of New Hampshire, Inc. v. U. S. Fidelity. & Guar. Co.*, 143 F.3d 5 (1st Cir. 1998)). These cases, like this Court's decision in *Container Corp. of America v. Maryland Casualty Co.*, 707 So. 2d 733 (Fla. 1998), point to the language – "with respect to acts or omissions of the named insured" – as clear policy language which limits coverage to vicarious liability.

Finally, her contention that the phrase "but only" or "only if" is somehow necessary to restrict coverage for "any person or organization" to coverage "with respect to liability because of acts or omissions of" the insured (Initial Brief, pp. 10, 18), is without merit. This is not a case like *Consolidation Coal*, where coverage was purchased for a specifically identified party, in which the phrase "but only" was then used to introduce the limitations of the coverage extended to that

party. Moreover, Garcia does not explain how the words "but only" would materially change the meaning of the Federal provision, nor does she cite any supporting authority.

For the foregoing reasons, this Court should answer the first certified question – Is the definition of covered person as "any other person with respect to liability because of acts or omissions" of the insured ambiguous? – in the negative; and answer the second question – Does the policy limit additional insured coverage to instances of vicariously liable for acts or omissions of the named insured? – yes.

STANDARD OF REVIEW

The questions of law certified by the Eleventh Circuit concerning the interpretation of the insurance policy are reviewed de novo because "the construction of an insurance policy is a question of law for the courts." *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153, 1157 (Fla. 1985).

ARGUMENT

I. THE POLICY LANGUAGE CLEARLY AND UNAMBIGUOUSLY LIMITS COVERAGE TO VICARIOUS OR SECONDARY LIABILITY FOR THE ACTS OR OMISSIONS OF THE NAMED INSURED OR A FAMILY MEMBER.

"Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U. S. Fidelity and Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). "Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be

ambiguous." *Id.* "[I]nsurance contracts are interpreted according to the plain language of the policy except 'when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.'" *Id.* "[C]ourts may not 'rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.'" *Id.* "Moreover, 'if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision.'" *Id.*

In *Taurus Holdings*, the insured argued that the phrase "arising out of", in an exclusion for "all bodily injury and property damage occurring away from premises you own or rent and *arising out of* your product," was ambiguous, so that the exclusion should only apply to injuries and damage arising out of the insured's defective products. 913 So. 2d at 532, 538. This Court rejected the insured's interpretation which was more favorable to the insured as it would have provided coverage, holding that the phrase was not ambiguous, notwithstanding that other jurisdictions had limited the exclusion to defective products, and a minority of jurisdictions had held the phrase "arising out of" was ambiguous. *Id.* at 536, n. 4, 537.

This Court looks to dictionary definitions to determine the plain and ordinary meaning of terms used in an insurance policy. See *Government Employees Ins. Co. v. Novak*, 453 So. 2d 1116, 1117 (Fla. 1984) (using Webster's

Third New International Dictionary and Black's Law Dictionary to define the term "accident"). The prepositional phrase "because of" is defined as "on account of; by reason of." *The American Heritage Dictionary of the English Language, Fourth Edition* (2000). The word "liability" is defined as "something for which one is liable; an obligation, responsibility or debt." *The American Heritage Dictionary of the English Language, Fourth Edition* (2000). Thus the policy, by its plain language, provides additional insured status to a person whose liability, obligation, responsibility or debt is on account of, or by reason of, the acts or omissions of the named insured. There is nothing in the underlying complaint which seeks to impose liability on Garcia by reason of, or on account of, the named insured's acts or omissions. Her liability was by reason of, or on account of, her own acts or omissions. "Liability because of" the named insured's acts or omissions does not mean, as Garcia contends, liability for an accident which merely "has a connection with" the acts or omissions of the named insured. (Initial Brief at p. 12).

Garcia seeks to import the phrase "arising out of" -- which has a broad meaning of "originating from," "having its origin in," "growing out of," flowing from," "incident to" or "having connection with"[2] – into a policy definition which does not use that phrase. (Initial Brief, pp. 12-14). Construing the policy as

[2] *Taurus Holdings*, 913 So.2d at 532-533.

including language which it does not contain would require this Court to rewrite the policy language and add meaning which is not present, which it may not do. *Taurus Holdings*, 913 at 532.

A. Courts Around the Nation Interpreting the Policy Language hold that in Cases of Joint Tortfeasors an Actively Negligent Party is not Liable Because of the Insured's Acts or Omissions, But is Liable Because of its Own Acts or Omissions.

According to Garcia, the phrase "liability because of acts or omissions" should be read as meaning the same thing as "arising out of", and given a more broad definition than its plain and ordinary meaning, because "the parties in this action" have not "unearthed any authority directly interpreting 'because of' in the context in which it is used in the Policy." (Initial Brief, p. 15). Garcia is mistaken. This language has been interpreted by numerous courts around the nation as limited to vicarious or secondary liability incurred when the negligent acts or omissions of the named insured are imputed to another person because of a special relationship. These courts reject the notion that a person or organization which is liable for its own negligence can incur "liability because of" acts or omissions of the named insured in cases where the named insured was also negligent. *See Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F. Supp. 1263, 1265 (N.D. Ill. 1989); *Long Island Lighting Co. v Hartford Acc. and Indem. Co.*, 350 N.Y.S.2d 967, 971 (N.Y. Sup. Ct. 1973); *Sentry Ins. Co. v. Pacific Indem. Co.*, 345 So. 2d 283 (Ala. 1977); *Transportation Ins. Co. v. George E. Failing Co.*, 691 S.W.2d 71

(Tex. App. 1985); *Canal Ins. Co. v. Earnshaw*, 629 F.Supp. 114 (D. Kan. 1985); *Neihaus v. Southwestern Groceries, Inc.*, 619 P.2d 1064 (Ariz. App. 1980); *Sprouse v. Kall*, 2004 WL 170451 (Ohio App. 2004); *Canal Ins. Co. v. T.L. James & Co., Inc.*, 911 F. Supp. 225 (S.D. Miss. 1995).

In *Transportation Ins. Co. v. George E. Failing Co.*, 691 S.W.2d 71 (Tex. App. 1985), a manufacturer was sued for furnishing and maintaining a defective drilling rig truck, which was operated by two employees of the named insured. One of the named insured's employees backed the truck into a high voltage power line, injuring the other employee. The manufacturer sought additional insured status under a provision defining insured as "any person or organization but only with respect to his or its liability because of acts or omissions of an insured," on the ground that it would not have become liable "but for" the alleged negligent operation of the truck by the named insured and its employees. The Texas Court of Appeals rejected this argument:

> Failing contends that it is covered under Section II(d) of the policy as an omnibus insured. Failing argues that it would not have become liable to [the injured plaintiff] "but for" the alleged negligent operation of the truck by [the named insured] and its employees. Failing further contends that the policy language is subject to a construction which affords coverage and we are bound by it. We disagree.
>
> Failing is not potentially liable because of the acts or omissions of Southwestern or its agents. <u>If Failing is liable at all, it is liable for its own acts of negligence</u> in furnishing and maintenance of the drilling rig truck. <u>The omnibus clause expressly restricts coverage under</u>

> Section II(d) to liability incurred because of acts or omissions of persons insured under subsections (1), (b), or (c), and such is not the situation presented here. Failing has not articulated any legal theory, nor has it so attempted, under which it is liable for the negligence of such insured persons.

691 S.W.2d at 73.

Similarly, in *Vulcan Materials Co. v. Casualty Ins. Co.*, 723 F. Supp. 1263, 1265 (N.D. Ill. 1989), the court considered a case in which an employee of a delivery company, J.H. Sandman & Sons, was killed in the course of delivering scrap metal to Vulcan Materials Company; the employee had finished unloading the truck, and was in the process of cleaning out debris, when a magnet fell from Vulcan's crane, killing him. When Vulcan was sued by the employee's estate, Vulcan tendered its defense to Casualty Insurance Company which had issued a comprehensive automobile liability policy insuring Sandman. The policy defined insured persons as, *inter alia*:

> (d) any person or organization but only with respect to his or its liability because of acts or omissions on an insured under (a), (b) or (c) above.

723 F. Supp. at 1264. Vulcan contended it was an insured pursuant to this provision because the named insured "negligently failed to train [the employee], and that failure caused the accident." "Thus, says Vulcan, its liability arises 'because of acts or omissions of an insured under (a).'" *Id.* In rejecting this argument, the *Vulcan* court stated:

> What does it mean to say that Vulcan's liability arises "because of" Sandman's acts or omissions?
>
> If Sandman [the insured] had not sent Giguere to Gary that day (and sending him was surely an "act … of an insured"), there would have been no accident (at least not involving Giguere), and of course Vulcan [the party seeking coverage] would not have been sued. But surely *that* kind of causal nexus cannot be the "because of" relationship between Sandman's acts and Vulcan's potential liability of which the Policy speaks. Under such a reading, Casualty would have to provide coverage to *all* parties concerned in any accident involving a Casualty-insured vehicle. No such reading is rational – the common legal usage of "causation" stems from just such considerations.

Id. at 1265 (emphasis by italics in original, added by the court) (footnote omitted).

In its interpretation of the language, "liability because of the acts or omissions of an insured," the *Vulcan* court held:

> In the normal sense of the language employed by the Policy, Vulcan's [the party seeking coverage] liability "because of" Sandman's [the insured's] acts or omissions can exist only if Vulcan bears some legal responsibility for Sandman's acts. In the legal (and sensible) sense only Vulcan's own acts, or the acts of others from whom Vulcan is viewed as responsible, can "cause" (that is, give rise to) liability on Vulcan's part. Paragraph (d) is plainly a vicarious liability provision and is nothing more: It insures all those who may be vicariously liable for acts or omissions of the named insured (or of other persons insured under the other paragraphs not involved in this case – paragraphs (b) and (c)).
>
> Nothing provided to this Court even hints at any basis for finding Vulcan [the party seeking coverage] vicariously liable for Sandman's [the insured's] acts. Sandman was not employed by or acting as an agent for Vulcan, nor was there any other legal relationship between the two that would offer an alternate basis of vicarious liability.

Id. at 1265.

Likewise, in the case of *Long Island Lighting Co. v. Hartford Accident and Indem. Co.*, 350 N.Y.S.2d 967 (N.Y. Sup. 1973), the court held that the phrase "liability because of the acts or omissions" of an insured does not extend coverage to a party which is itself negligent in connection with the accident, but which is not vicariously liable for the acts of omissions of the insured. In *Long Island Lighting*, the court construed the meaning of a provision defining persons insured as:

> (d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above.

In that case, an employee of the named insured, McGovern Sod Farms, Inc., was electrocuted when a truck he was driving negligently came into contact with the high tension wires owned and maintained by Long Island Lighting Company ("the power company"). The administrator for the estate of the employee brought suit against the power company, alleging its faulty maintenance and safety control of the wires.

The power company sought a declaration that it was an insured under the above-quoted provision, arguing that because the named insured's employee had negligently driven the truck into its wires, his act led in sequence to the accident which resulted in a claim against the power company for its direct negligence. In effect, the power company asserted that "but for" the insured driver's negligent driving, the accident for which the power company was charged with negligence

would not have occurred. The power company argued that it was an organization being held liable "because of the acts or omissions" of the employee. The New York court rejected this argument, stating:

> LILCO [the power company seeking coverage] rests its case on a broad construction of the words in Section II (d), "liability because of acts or omissions of an insured under (a), (b), or (c) above." It contends that any organization is insured with respect to its liability occasioned Because [sic] of acts or omissions of an insured. Says [the power company], in effect, "McGovern's employee, an insured, drove the truck into the wires, and therefore his act led in sequence to the accident and the resulting claim against [the power company]." This position is that "but for" McGovern's acts, there would have been no loading, no accident, no [power company] liability.
>
> However, the Court believes that there is a more circumscribed meaning to the term "because of" than merely being a sequential link in the chain of events. The words imply a relationship connecting the culpable acts of persons using the vehicle to liability of another, who then becomes an "insured." The phrase appears to include persons or organizations held in by way of vicarious liability for derelictions of McGovern, its employees, or a consensual user of the vehicle.

350 N.Y.S at 971-972. The Court went on to explain that the power company was a torfeasor who was being charged with its own separate negligence; the liability of the power company resulted from its own "acts or omissions," not from those of the insured or its employees even if there was joint and several liability. The Court stated:

> Finally, [the power company] falls back on an ingenious twist. It argues if both it and McGovern [the named insured] are found to have been negligent in causing the accident, their respective liabilities as joint tortfeasors, however related, would be joint and several. [The power company] is then potentially exposed to the whole liability,

> including any portion attributable to McGovern [the named insured] which arose "because of" its "acts or omissions" in operating the truck. [The power company] urges, this possibility brings it within the definition of 'insured' in subsection II(d) of McGovern's policy.
>
> ...[T]he practicalities of apportionment or collection as between presumed joint tortfeasors does not affect the substance of legal liability. The ultimate practicality here lies in third party liability and impleader practice. [The power company] can upon proper pleading and proof, be left with a net liability only for its relative share of the damages in proportion to its own separate fault in contributing to it. While its gross liability to Zirk's estate may conceivably extend to the full damages found on trial if its negligence is established, still it can cross and counter-claim for percentages of damages caused by others. Therefore, its net 'liability' would be limited to exposure resulting from its own 'acts or omissions,' not from those of the insured's employees or any others in operating the truck.

Id. at 973 (internal citations omitted). The court further held that even if the power company could not obtain contribution from the named insured for its negligence, by reason of worker's compensation immunity (that issue was undecided in New York at that time), a joint tortfeasor's liability for the whole of the damages is because of his own negligence, not the negligence of the insured:

> He becomes liable for the whole Because [sic] of his own negligence, not the negligence of an insured. His own separate act activates his exposure.

Id. at 973-974.[3]

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[3] *See also,* Appleman, *Insurance Law and Practice, Casualty Insurance* (1979) § 4355 at p. 95 ("It has been stated that words 'because of' in provision of omnibus clause of automobile liability policy insuring any person or organization with respect to his or its liability 'because of' acts or omissions of an insured under other provisions of the omnibus clause did not mean merely a sequential link in chain of events leading to accident but implied a relationship connecting culpable

The point that, as a matter of law, an active tortfeasor's liability for damages is because of his own acts or omissions applies with equal, and even greater, force in Florida. Liability because of the acts or omissions of another exists in Florida when a person's liability is based on the legal imputation of responsibility for the tortious acts of another. *See, e.g., American Home Assur. Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 467-468 (Fla. 2005) ("The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. ... [T]he doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another."). This liability cannot exist in the absence of a special relationship between the active tortfeasor and the vicariously, derivatively, constructively or technically liable defendant. *See e.g. Houdaille Industries, Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979).

The underlying plaintiffs sued Garcia for her own active negligence in the operation of the vehicle and for her own active negligence in failing to maintain the brake pedal. There are no allegations seeking to hold Garcia liable because of

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acts of persons using vehicle to liability of another, who then would become an 'insured'; the phrase included persons or organizations held by way of vicarious liability for derelictions of the named insured or a consensual user of the insured vehicle." (*citing Long Island Lighting, supra*)).

any acts or omissions of the named insured, Anderson. If Garcia was not negligent, she was not liable for any damages.

Moreover, under the version of Florida's comparative fault statute in effect at the time of the April 18, 2003 accident (DE1:12, ¶18), the judicially created doctrine of joint and several liability was abrogated for all non-economic damages. *See* § 768.81 (3), Florida Statutes (2003). Thus, Garcia would be responsible to the plaintiff only for those non-economic damages attributable to her percentage of fault. Under this version of the statute, joint and several liability for economic damages was also partially abrogated for damages over a certain amount, depending on the percentage of negligence attributable to each tortfeasor. §768.81(3), Fla. Stat. (2003). Additionally, as the *Long Island Lighting* court noted, an active tortfeasor has a right of contribution against another actively negligent joint tortfeasor and its net liability is limited to damages attributable to its percentage of fault. *See* §768.31, Florida Statutes (Uniform Contribution Among Tortfeasor's Act). Finally and in any event, an active tortfeasor becomes liable for all damages because of its own acts or omissions; not because of the acts or omissions of another joint tortfeasor. *See Walt Disney World Co. v. Wood*, 515 So. 2d 198, 200 (Fla. 1987) (Under the judicially created doctrine of "joint and several liability" an active tortfeasor was held "liable for the whole of an indivisible injury

when his negligence is a proximate cause of that damage."), *quoting Coney v. J.L.G. Industries, Inc.*, 454 N.E.2d 197 (1983).

In another insurance coverage case on point, *Sentry Ins. Co. v. Pacific Indem. Co.*, 345 So. 2d 283 (Ala. 1977), the plaintiff sued both the named insured and another party. The Alabama Supreme Court held that the party being sued for its own negligence had liability based on its own acts or omissions, and did not qualify as additional insured as a person or organization with respect to "liability because of acts or omissions of an insured:"

> To qualify as an insured under II(d), McWane's [the party seeking coverage] liability must have been based on 'acts or omissions' of K&K [the insured]. The allegation in [the plaintiff's complaint] upon which McWane's liability is based is as follows:
>
> "14. Plaintiff avers that the defendants MCWANE CAST IRON PIPE COMPANY negligently loaded the said motor vehicle which JERRY DAVID AGENT was operating. ... Plaintiff further avers that said defendant negligently failed to have the load securely fastened or braced ...."
>
> There is nothing in this allegation which indicates that McWane is being charged with liability for acts or omissions of K&K or any other insured under the Sentry policy. McWane's alleged liability is based on its own acts or omissions.

345 So. 2d at 287. The Alabama Supreme Court then cited and agreed with the holding of *Long Island Lighting Co. v. Hartford*, *supra*, that "there is a more circumscribed meaning to 'because of' (as used in II(d) of the Sentry policy) than merely being a sequential link in the chain of events. The words imply a

relationship connecting the culpable acts of persons using the vehicle to liability of another, who then becomes an 'insured.' The phrase appears to include persons or organizations held by way of vicarious liability for derelictions of [insureds]." *Id.*

Likewise, in *Canal Ins. Co. v. Earnshaw,* 629 F. Supp. 114 (D. Kansas 1985), an individual sued for his own negligence while assisting the injured plaintiff in moving a beam, claimed that he had "liability because of the acts or omissions of" the insured in failing to properly supervise and direct the operation. The named insured was sued in the same case for the named insured's negligence which contributed to the accident. The court rejected this argument, holding that there was no additional insured status because the individual was "being sued for his own negligent acts and no claims of liability are based on the relationship between defendants Starks [the individual seeking coverage] and Earnshaw [the named insured]." 629 F. Supp. at 120.

Again, in *Sprouse v. Kall*, 2004 WL 170451 (Ohio App. 2004), an organization sued for negligence argued that it was entitled to additional insured status under the same provision because of the named insured's negligence in failing to notify it that lift equipment needed repair. Again, this argument was rejected:

> Sunoco [the party seeking coverage] has adopted mistaken views of both the negligence count and the nature of secondary liability. As noted supra, an "additional insured" provision is intended to protect the additional party from liability for the acts or omissions of the

> primary insured – that is, Sunoco is protected in situations where it is secondarily liable for Kall's conduct. Secondary liability arises when one party is held responsible based solely on its relationship with the responsible actor. However, secondary liability is distinguishable from joint liability, which arises when two or more parties are held liable for actions causing injury. When a party commits or participates in an act causing injury, its liability is no longer passive and secondary, but becomes active and primary. A party held secondarily liable has an action for indemnity; a joint actor must resort to an action for contribution.
>
> * * *
>
> Sunoco contends that Kall [the named insured] is responsible for the defective condition of the lift and that its [Sunoco's] alleged "failure to notice" the condition is secondary to Kall's more egregious act. Such an argument, however, implies the parties were joint actors, rather than arguing that Sunoco is liable solely for Kall's actions. A less serious act is still grounds for alleging active, rather than secondary, liability. Sprouse's complaint necessarily alleged that Sunoco had an independent duty to notice and correct the condition of the lift, and that claim was outside Motorist's duty to defend.

2004 WL 170451 * 5-6 (internal citations omitted). *See also Neihaus v. Southwestern Groceries, Inc.*, 619 P. 2d 1064 (Ariz. App. 1980) (alleged negligent entrustment by named insured did not create liability for driver sued for negligence, thus driver was not an additional insured as "any other person ... with respect to ... liability because of acts or omissions of an insured."); *Canal Ins. Co. v. T.L. James & Co., Inc.*, 911 F. Supp. 225, 227 and n. 2 (S.D. Miss. 1995) (general contractor was an additional insured as "any other person or organization but only with respect to his or its liability because of acts or omissions of an insured," for a claim against it for vicarious liability, but not for the claim that the

general contractor itself was negligent); *Aetna Cas. & Sur. Co. v. Security Forces, Inc.*, 347 S.E.2d 903, 907 (S.C. App. 1986) (organization was an additional insured as "any other ... organization but only with respect to ... its liability because of acts or omissions of any insured," "to the extent that it is vicariously liable for Greer's [an insured's] acts or omissions.").

B. Florida Courts, Along with the Majority of Jurisdictions, Hold that Less Restrictive Language – "With Respect to Acts or Omissions of the Insured" – Limits Additional Insured Coverage to Vicarious Liability.

The federal district court properly concluded that Florida courts, including this Court, have pointed to the language - "with respect to acts or omissions" of the insured - as clear and unambiguous language which limits an additional insured's coverage to vicarious liability. *See Container Corp. of America v. Maryland Cas. Co.*, 707 So. 2d 733, 736 (Fla. 1988); *Florida Power & Light Co. v. Penn America Ins. Co.*, 654 So. 2d 276, 278-79 (Fla. 4th DCA 1995); *Koala Miami Reality Holdings Co., Inc. v. Valient Ins. Co.*, 913 So. 2d 25 (Fla. 3d DCA 2005).

In *Container Corp*., the named insured was Southern Contractors ("Southern"), an entity which had entered into a contract with Container Corporation ("Container") to install a pump at Container's plant. 707 So. 2d at 734. By contract, Southern had agreed to indemnify Container from liabilities incurred and arising from Southern's work. *Id.* Southern obtained a liability policy from Maryland Casualty Company, wherein Container was identified by an

endorsement that stated, “Interest for operations at operations site by [Container].” *Id.* The endorsement did not limit Container’s coverage to liability because of acts or omissions of Southern.

Following injuries sustained by a Southern employee resulting from Container’s negligence, Container sought coverage for its negligence through the Maryland Casualty endorsement. 707 So.2d at 734. Maryland Casualty argued that the endorsement did not provide coverage to Container because the endorsement limited coverage to instances of Container’s vicarious liability. *Id.* This Court rejected the argument because the endorsement in that case lacked clear language -- “acts or omissions” of the named insured -- limiting coverage to vicarious liability. 707 So.2d at 736. This court then pointed to the language in *Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), as "clear policy language" limiting an additional insured's coverage to its vicarious liability for the named insured:

> Had Maryland wished to limit Container’s coverage to vicarious liability, it could have done so by clear policy language. *See Consolidation Coal Co. v. Liberty Mut. Ins.* Co., 406 F. Supp. 1292 (W.D. Pa. 1976) (construing coverage language as insuring the additional insured only for vicarious liability); *see also Liberty Mut. Ins. Co. v. Capeletti Bros., Inc.*, 699 So. 2d 736 (Fla. 3d DCA 1997).
>
> Because the endorsement in the instant case contains no limiting language, we hold that Container was entitled to coverage under the Maryland policy for its own negligence arising out of “operations at operations site” by Southern Contractors.

Container Corp., 707 So.2d at 736. In *Consolidation Coal*, the policy stated that "Consolidation was added as 'an additional insured but only with respect to the acts or omissions of the named insured in connection with the named insured's operations' on Consolidation's premises." 406 F. Supp. at 1294. It is this clear policy language, "acts or omissions," which this Court pinpointed as unambiguously limiting an additional insured's coverage to its vicarious liability for the named insured. 707 So.2d at 736.

Florida's view that "acts or omissions" language is "clear policy language" which limits an additional insured to coverage for its vicarious liability for the named insured's negligence is also evident in *Florida Power & Light Co. v. Penn America Ins. Co.*, 654 So. 2d 276, 278-279 (Fla. 4th DCA 1995), a case cited by this Court in *Container Corp.* and properly relied upon by the federal district court. In *Florida Power & Light*, the Fourth District Court of Appeal found that the language in that case, "but only with respect to operations by or on behalf of" the insured, was not limited to vicarious liability. *Id.* at 278, However, like *Container Corp*., the *Florida Power & Light* court cited to the same "acts or omissions" language as language which would have limited coverage of an additional insured to its vicarious liability. *Id*. *Florida Power & Light* quoted the case of *Casualty Ins. Co. v. Northbrook Property & Cas. Ins. Co.*, 501 N.E.2d 812 (Ill. App. 1986), as follows:

> 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 the additional insured endorsement provided that Consolidation 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].

Florida Power & Light, 654 So.2d at 278, *quoting Northbrook Property & Cas. Ins. Co.*, 501 N.E.2d at 815 (emphasis by italics and bracketed inserts by the *Florida Power & Light* court).

Similarly, in *Koala Miami Realty Holding Co., Inc. v. Valient Ins. Co.*, 913 So. 2d 25 (Fla. 3d DCA 2005), the Third District found that the language "with respect to liability arising out of your ongoing operations performed for that insured" was insufficient to limit coverage to vicarious liability. However, the Third District pointed to the "with respect to acts or omissions" of the named insured language, as language which limits coverage to vicarious liability for the name insured's negligence:

> Even though the policies contained the phrase "arising out of," or an analogous phrase, coverage for the direct negligence of the additional insured would not have been provided had the policies contained specific language limiting coverage to only the named insured's direct negligence. *See Fla. Power & Light Co.*, 654 So.2d at 278 ("but only with respect to acts or omissions of the named insured").

913 So. 2d at 27.

Garcia incorrectly states that in *Oliver v. United States Fid. & Guar. Co.*, 309 So. 2d 237 (Fla. 2d DCA 1975), the Second District held that a policy definition of "person insured", as "any other person or organization but only with respect to his or its liability because of acts or omissions of the Named Insured or an Insured under (a) above," was ambiguous. (Initial Brief, pp. 18-19). In *Oliver*, the owner of a vehicle entrusted to a parking company sought coverage as an insured under a liability policy issued to the parking company, whose employee negligently drove the vehicle into a pedestrian. 309 So. 2d at 238. The definition of an "insured" as "any other person or organization but only with respect to the acts or omissions of the Named Insured or an Insured under (a) above", was deemed to afford coverage to the owner of the vehicle who, as owner of a dangerous instrumentality was held vicariously liable for the acts or omissions of the insured employee driver. *Id.*[4] The *Oliver* court did not find this definition ambiguous. What the *Oliver* court found to be "hopelessly irreconcilable and inconsistent" was a second provision which purported to exclude the owner from coverage because it removed from coverage "any person or organization ... with respect to any automobile ... owned by such person or organization" – hence the

[4] *See, e.g., Lewis v. Enterprise Leasing Co.*, 912 So. 2d 349, 351 (Fla. 3d DCA 2005) ("Florida's dangerous instrumentality doctrine imposes strict vicarious liability upon motor vehicle owners when a non-owner, who is driving the vehicle with the owner's permission, negligently causes injury."), *rev. den.* 925 So. 2d 1030 (Fla. 2006).

vicariously liable owner. 309 So.2d at 238. Garcia omits from her quote of *Oliver* (Initial Brief, p. 19) the portion of the decision, underlined below, which demonstrates that the *Oliver* did not find the definition of "insured" ambiguous:

> To paraphrase a well known saying, the small print giveth, and the small print taketh away. As defined in paragraph IV(3)(a), Valet's driver was an insured. Therefore, Oliver was an insured under paragraph IV(3)(b) because his liability occurred as a result of the acts of Valet's driver. On the other hand, Oliver is excluded from coverage under paragraph IV(iii)(a) because he owned the automobile involved in the accident and he was not the named insured.
>
> We submit that the language of these paragraphs is hopelessly irreconcilable and inconsistent with each other. In such circumstances, courts have adopted the construction which provides the most coverage.

309 So. 2d at 239.

Garcia also incorrectly contends that when the *Consolidation Coal* court interpreted the phrase "but only with respect to acts or omissions of the named insured" as limited to vicarious liability, it failed to follow the c*ontra proferentem* rule that ambiguities are construed against the drafter. (Initial Brief, p. 17). This is not so. The *Consolidation Coal* court correctly explained that the rule that ambiguities are construed against the drafter when there is doubt as to what the parties themselves intended, "can only be invoked when, upon a full consideration of the facts, the intent of the parties is still obscure." 406 F. Supp. at 1296. The court then went on to determine the parties intent from the language of the policy itself, finding that to construe the phrase "but only with respect to acts or omissions

of the named insured," as meaning the same as "arising out of the operations or use" would "require the court in effect to delete the qualifying phrase from the endorsement," and "violate the rule of contract construction that 'an interpretation which gives effect and meaning to a term is preferred over one which makes such term surplusage or without effect.'" 406 F. Supp. at 1297-1298.

Florida follows these same rules of construction. "Only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule [that ambiguities are construed against the drafter] apposite." "It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Excelsior Ins. Co. v. Pomano Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003); *Taurus Holdings, Inc. v. U. S. Fidelity and Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). As the *Consolidation Coal* correctly held, one of the ordinary rules of construction which must be considered is that "in construing insurance policies, courts should read every policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Swire Holdings*, at 144; *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). "[N]o word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and

consistent with other parts can be given to it." *Royal American Realty, Inc. v. Bank of Palm Beach and Trust Co.*, 215 So. 2d 336 (Fla. 4th DCA 1968).

As discussed above, this Court, the Fourth District and the Third District hold that the language "with respect to acts or omissions" of the named insured, used in the policy in *Consolidation Coal*, is clear and unambiguous language which limits coverage to vicarious liability. It is significantly different than the phrase "arising out of" or "with respect to" the named insured's work or operations. To accept Garcia's construction would impermissibly require this Court to rewrite the language of the policy and give no effect to the phrase "liability because of acts or omissions" of the named insured; a phrase which is even stronger in its limitation to vicarious liability than "with respect to acts or omissions" of the named insured.

Courts around the nation agree with this Court and Florida's Third and Fourth District Courts of Appeals that the language, "with respect to acts or omissions of the named insured" is clear policy language that limits coverage to vicarious liability. In the following cases, the courts held that language such as "liability arising out of the named insured's work or operations" did not limit coverage to vicarious liability, but pointed to the "with respect to acts or omissions" language as clear policy language which would do so. *See Acceptance Ins. Co. v. Syufy Enterprises*, 81 Cal. Rptr. 2d 557, 562 (Cal. App. 1999)

("Insurance companies are free to, and commonly have, issued additional insured endorsements that specifically limit coverage to situations in which the additional insured is faced with vicarious liability for negligent conduct by the insured. (*See, e.g., Consolidation Coal Co., Inc. v. Liberty Mut. Ins.* (W.D.Pa. 1976) 406 F.Supp. 1292, 1294 [additional insured covered 'only with respect to acts or omissions of the named insured']...We believe the better view is that when an insurer chooses not to use such clearly limited language in an additional insured clause, but instead grants coverage for liability 'arising out of' the named insured's work, the additional insured is covered without regard to whether injury was caused by the named insured or the additional insured."); *Merchants Ins. Co. of New Hampshire, Inc. v. U.S. Fidelity and Guar. Co.*, 143 F. 3d 5, 10 (1st Cir. 1998) ("After all, if USF&G had really intended to limit coverage under the additional insured Endorsement to those situations in which an added insured such as D'Agostino was held to be vicariously liable only for the negligence of a principal insured such as Great Eastern, USF&G was free to draft a policy with qualifying language that expressly implemented that intention (*see, e.g., Consolidation Coal Co. v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), pointing to the phrase 'but only with respect to acts or omissions of the named insured' in the additional-insured endorsement as limiting the coverage of an additional insured to situations where it was the named insured's negligence that exposed the additional insured to

liability.)"); *Cas. Ins. Co. v. Northbrook Prop. & Cas. Ins. Co.*, 501 N.E.2d 812, 815 (Ill. App. 1986) ("If Casualty had intended to limit its obligation to Schal [the additional insured] to those situation where the negligent acts or omissions of Mid-American [the named insured] had been established, it could have done so by using language similar to that found in *Consolidation Coal.*"); *Sun Co., Inc. v. Brown & Root Braun, Inc.*, 2001 WL 8864 (E.D. Pa. 2001) (the additional insured provision, provision 16, "specifically limits coverage to an additional insured only with respect to the acts or omissions of" the named insured. "Thus, provision 16 by its plain and unambiguous terms, only affords coverage to B&R and/or Sun for the vicarious liability that they may have had for [the named insured's] acts or omissions...").

C. The Prepositional Phrase, "But Only" or "Only If" is Not Necessary in This case.

In her quest to avoid the unambiguous restrictive language of the "covered person" definition, Garcia makes much to do about the fact that the prepositional phrase "but only" or "only if" does not appear in the definition. (Initial Brief, pp. 16-19). This is nothing but a red herring. Garcia does not explain how the words "but only" or "only if" would materially change the meaning of the provision in this case, nor does she cite any supporting authority which holds that those words are necessary.

The lack of the words "but only" do not alter the critical words of limitation, "liability because of acts or omissions" of the named insured. This point is evident from the cases construing additional insured provisions which contain the words, "but only," but lack the limitation imposed by the words "acts or omissions" of the insured. For example, in *Florida Power & Light Co. v. Penn. Am. Ins. Co.*, 654 So. 2d 276 (Fla. 4th DCA 1995), the provision found ambiguous and not limited to vicarious liability contained the words “but only,” as in “but only with respect to operations by or on behalf of the Named Insured.” There, the words “but only” did not cure the language which standing alone, and lacking the words “acts or omissions of the named insured,” was insufficient to limit coverage to vicarious liability. Since the words “but only” do not impart limitation which is otherwise absent, there is no logical reason to conclude that these words are necessary to confer the meaning of limitation.

None of the cases cited by Garcia consider the language “but only” determinative. In *Consolidation Coal v. Liberty Mut. Ins. Co.*, 406 F. Supp. 1292 (W.D. Pa. 1976), the court concluded that the endorsement in question did not provide coverage to the putative insured because of the “acts or omissions” language, stating:

> Primarily, the court is moved to this conclusion by the interpretation given to the words “acts or omissions” in the cited cases. ... To interpret the endorsement in the manner proposed by the plaintiff would require the court to ignore the “but only” phrase and treat the

> endorsement as falling within the "arising out of" language of the cases cited by plaintiff. This would be an inappropriate construction. The most likely meaning of the subject phrase is that it attempts to limit coverage to those instances where the acts or omissions -- the negligence -- of Long [the insured] leads to Consolidation's [the putative insured's] liability.

Consolidation Coal, 406 F. Supp. at 1300. *See also Hartford Cas. Ins. Co. v. Travelers Indemnity Co.*, 2 Cal. Rptr. 3d 18, 23-24 (Cal. App. 2003) (observing that the focus of the court's analysis in *Consolidation Coal* lay with the meaning of the words "acts or omissions" and holding that the phrase "but only with respect to" is not in itself determinative in additional insured provisions, but rather, the language which follows it imparts the determinative meaning).[5]

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[5] The *Hartford v. Travelers* court explained:

> The *Consolidation Coal* case involved an endorsement that added an additional insured, "'but only with respect to the acts or omissions of the named insured in connection with the named insured's operations.'" (*Consolidated* [sic] *Coal , supra*, 406 F. Supp. at p. 1294) The focus of the court's analysis in *Consolidation Coal* was the meaning of the words "acts or omissions." (*Id.* at p. 1298.) The court held that unless the additional insured's liability was the result of an act or omission of the named insured there was no coverage. (*Id.* at pp. 1298-1299). In that case, the sole cause of the injury was the act of the additional insured's employee. (*Id.* at p. 1294) The underlined language that narrowed the meaning of the endorsement in *Consolidation Coal* is not present in Hartford's policy.
>
> * * *
>
> Significantly, none of the cited cases focused on the meaning of "but only with respect to," or contrasted that phrase with "arising out of," but each relied on interpretation of the language following those phrases to ascertain the meaning of the policy. The policy in this case does not restrict its coverage to operations, but employs more expansive language.
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> 2 Cal. Rptr. 3d at 23-24.

Furthermore, basic grammatical principles demonstrate that the words “but only” in the context of the provision at issue are unnecessary. Garcia is a stranger to the insurance contract. The named insured did not purchase an endorsement naming her as an additional insured; nor was there any contract requiring the named insured to provide coverage to Garcia. Therefore, there was no reason to add the preposition "but only" to the definition of covered persons. The phrase - "any person or organization with respect to liability because of acts or omissions of" an insured,” is not different than the phrase "any other person or organization but only with respect to liability because of acts or omissions of" the insured. There is no need for the conjunction “but only” because the phrase “with respect to liability because of acts or omissions of an insured” imparts limitation.

By contrast, in additional insured provisions such as that considered in *Florida Power & Light Co. v. Penn. Am. Ins. Co.*, 654 So. 2d 276 (Fla. 4th DCA 1995), where the additional insured provision first defined an entire class of insureds, “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,” the words “but only” serve as a limiting conjunction which defines the scope of those person's coverage, “but only with respect to operations by or on behalf of the Named Insured.”

Similarly, in *Consolidation Coal*, Consolidation Coal was specifically added and named as an additional insured under an endorsement to the policy. 406 F. Supp. at 1294. Where a party is named as an additional insured, the phrase "but only" is used to qualify the extent of coverage provided to that party. Thus, the *Consolidation Coal's* observation that,

> The effect of the words 'acts or omissions' and the accompanying language of the cases was to qualify the extent of coverage provided. Similarly, the use of the words 'but only' with respect, etc. in the endorsement in this case appears to be an attempt by defendant to qualify the extent to which plaintiff is an additional insured under the policy

was merely an observation that the additional insured's coverage purchased by the named insured was not unlimited.

In sum, Garcia's suggestion that the lack of the words, "but only," in the Federal provision somehow alters its clear meaning is without merit.

D. Garcia's Reliance on Cases With Different Language Fails.

In section III. C of her brief (pp. 22-26), Garcia argues that "courts elsewhere find similar provisions ambiguous," and thus this Court should find that the Federal language is ambiguous. This argument is without merit because Garcia cites to cases which (1) interpret the language arising out of the named insureds

work or operations (or similar language);[6] and (2) cases which adopt a minority view not followed in Florida that the language "with respect to acts or omissions" of the named insured is not limited to vicarious liability, the reasoning of which do not apply in this case.

In any event, the language in the Federal policy is even more clear in its limitation to vicarious liability in that it states "liability because of acts or omissions" of the named insured. Furthermore, the fact that a minority view differs from that of the majority does not make a policy provision ambiguous. *See Taurus Holdings*, 913 So. 2d at 536, n. 4, 537 (Fla. 1995) (holding that the phrase

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[6] *See* Acceptance Ins. Co. v. Syufy Enterprises, 81 Cal. Rptr. 2d 557, 562 (Cal. App. 1 Dist. 1999) (holding that language "but only with respect to liability arising out of" the named insured's work did not limit coverage to vicarious liability, but pointing to *Consolidation Coal* language as that which would limit coverage to vicarious liability: "Insurance companies are free to, and commonly have, issued additional insured endorsements that specifically limit coverage to situations in which the additional insured is faced with vicarious liability for negligent conduct by the insured. (*See, e.g., Consolidation Coal Co., Inc. v. Liberty Mut. Ins.* (W.D.Pa.1976) 406 F.Supp. 1292, 1294 fn. 2 [additional insured covered 'only with respect to acts or omissions of the named insured"]...); *Florida Power & Light Co. v. Penn America Ins. Co.*, 654 So. 2d 276, 278-279 (Fla. 4th DCA 1995) (holding that language, "but only with respect to operations by or on behalf of" the insured, was not limited to vicarious liability, but pointing to the language "with respect to acts or omissions of the named insured" as language which would have limited coverage of an additional insured to its vicarious liability); *McIntosh v. Scottsdale Ins. Co.*, 992 F. 2d 251 (10th Cir. 1993) (interpreting the language "with respect to liability arising out of operations performed ... by or on behalf of the named insured."); *Virginia Electric and Power Co. v. Northbrook Prop. and Cas. Ins. Co.*, 1995 WL 1055940 (Va. Cir. Ct 1995), *reversed on other grounds* 475 S.E.2d 264 (Va. 1996) (interpreting the language "with respect to liability out of your work.").

"arising out of" in a products exclusion was not ambiguous, notwithstanding that other jurisdictions had limited the exclusion to defective products, and a minority of jurisdictions had held the phrase "arising out of" was ambiguous).

Garcia cites to *Dillon Companies, Inc. v. Royal Indemnity*, 369 F. Supp. 2d 1277 (D. Kan. 2005), in which the court disagreed with *Consolidation Coal.* In *Dillon*, the court found persuasive *Consolidation Coal's* point that reading the additional insured endorsement as providing coverage for the additional insured's own negligence would make the "but only with respect to acts or omissions" language surplusage. 369 F. Supp. 2d at 1285. However, the *Dillon* court felt the rule that "each term should be read to have meaning, and not as mere surplusage" to be inapposite in that case because it felt the rule "applied equally to either interpretation of the contract." *Id.* at 1286. The *Dillon* court reasoned that an interpretation of the endorsement, limiting coverage to vicarious liability, "renders the entire endorsement mere surplusage," because "the additional insured already has an action for indemnity against the primary wrongdoer," and "[t]hus, an endorsement that provides coverage only for the additional insured's vicarious liability may be illusory and provide no coverage at all." "In this light, it is obvious that additional insureds expect more from an endorsement clause than mere protection from vicarious liability." 369 F. Supp. 2d at 1286.

The *Dillon* court's reasoning is based on the reasonable expectations of an additional named insured for whom coverage was specifically purchased. 369 F. Supp. 2d at 1281. Similarly in *U.S. Fire Ins. Co. v. Aetna Life and Cas.*, 684 N.E. 2d 956 (Ill. App. 1997) and *Maryland Cas. Co. v. Regis Ins. Co.*, 1997 WL 164268 (E.D. Pa. 1997), also cited by Garcia, the named insured had purchased an endorsement specifically naming the additional insured. In the instant case, Federal's named insured did not purchase coverage for Garcia, was not required by contract to insure Garcia, and Garcia was not named as an additional insured. Therefore, the *Dillon* court's reasoning does not apply here.

Additionally, *Maryland Cas. Co. v. Regis Ins. Co.*, involved different language -- "but only with respect to liability sought to be imposed upon the Additional Insured as the result of an alleged act or omission of the Named Insured or its employees." That court distinguished *Consolidation Coal* on the ground that "[t]he Additional Insured Endorsement in the instant case requires only that Plaintiff show that liability is 'sought to be imposed' as the result of an 'alleged' act or omission, and thus is much broader than the language before the court in *Consolidation.*" 1997 WL 164268 *4.

Finally, in section III. C of her brief, Garcia cites *Fircrest Poultry Farms Co. v. State of Oregon*, 728 P.2d 968 (Or. App. 1986) for the proposition that both a driver and his employer were covered under a liability policy issued to the vehicle's

owner where the policy covered "[a]nyone liable for the conduct of an insured described above is an insured but only to the extent of that liability." (Initial Brief, p. 25). Garcia's parenthetical is misleading. The *Fircrest* court first found that the driver was an insured under the owner's policy as a permissive driver of the vehicle, and therefore, the driver's employer, who was vicariously liable for the driver's negligence, was an additional insured as "anyone liable for the conduct of an insured described above ... but only to the extent of that liability." This case does not support Garcia's position that Federal's policy covers her.

CONCLUSION

For the foregoing reasons, this Court should answer the first certified question – Is the definition of covered person as "any other person with respect to liability because of acts or omissions" of the insured ambiguous? – in the negative; and answer the second question – Does the policy limit additional insured coverage to instances of vicarious liability for acts or omissions of the named insured? – yes. There are no facts alleged in the underlying complaint which seek to hold Garcia, a stranger to the contract, liable because of the acts or omissions of the named insured. Rather, Garcia was sued for her own acts or omissions and the underlying complaint sought to hold the named insured vicariously liable for Garcia's acts or omissions. Thus, the federal district court properly dismissed Garcia's complaint against Federal for failure to state a claim upon which relief could be granted.

Respectfully submitted,

HICKS & KNEALE, P.A.
799 Brickell Plaza, Suite 900
Miami, Florida 33131
Telephone: (305) 374-8171
Facsimile: (305) 372-8038
Attorneys for Appellee,
Federal Insurance Company

BY: _____
IRENE PORTER
Fla. Bar No.: 567280

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail on this **12th** day of **February, 2007** to:

R. Hugh Lumpkin, Esq.,
Michael Huber, Esq.
Ver Ploeg & Lumpkin, P.A.,
100 SE Second Street, #2150
Miami, FL 33131
Telephone: (305)577-3996
Facsimile: (305)577-3558
Counsel for Plaintiff/ Appellant

Jorge L. Guerra, Esq.,
Rodríguez, Tramont, Guerra
& Nunez, P.A.
2100 Ponce de Leon Blvd-Penthouse II
Coral Gables, FL 33134
Telephone: (305)350-2300
Facsimile: (305)350-2525
Co-Counsel for Plaintiff/ Appellant

BY: _____
IRENE PORTER
Fla. Bar No.: 567280

CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Rule 9.210(2), Fla.R.App.P. It is typed in Times New Roman 14 point, proportionately spaced type.

BY: _____
IRENE PORTER
Fla. Bar No.: 567280