

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC05-2220
Lower Tribunal No. 3D05-376

EAST FLORIDA HAULING, INC.,

Appellant, Petitioner

v.

LEXINGTON INSURANCE COMPANY,

Appellee, Respondent.

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

The Third District Court of Appeals of Florida affirmed the Eleventh Judicial Circuit Court's final order granting Lexington Insurance Company's ("Lexington") motion for summary judgment, finding that under the specific language of the Lexington policy, it owed no duty to defend East Florida Hauling, Inc. ("EFH"), and that Lexington's liability, if any, was limited by the "limitation on certain commodities" clause ("target commodities endorsement") contained in the subject insurance policy.

The Third District carefully reviewed the trial court's interpretation of the insurance policy and the Circuit Court's final order de novo. It carefully analyzed Florida decisions, as well as decisions of other courts, and secondary legal treatises, such as Couch on Insurance, in order to reach its conclusions. Moreover, the Third District specifically determined that the language of the policy provision in Rad Source Techs. Inc. v. Essex Ins. Co., 902 So. 2d 264 (Fla. 4th DCA 2005), cited by EFH, was different from the EFH policy provision in the instant case because the EFH policy provision was not ambiguous as to the duty to defend. It further agreed with the Circuit Court that the policy was not ambiguous in its target commodities exclusion, and therefore the coverage was limited.

SUMMARY OF ARGUMENT

Petitioner has failed to cite any decision that conflicts with the Third District’s decision when it found the policy language in the instant case was not ambiguous and was not susceptible to more than one interpretation concerning the duty to defend.

The petitioner has failed to cite to any appellate opinion that holds that the “targeted commodities endorsement” in the Lexington policy was ambiguous. Nor has petitioner cited to any Florida appellate case that conflicts with the Third District Court of Appeals holding that the burden of proof as to an exception to a restrictive endorsement is on the insured, and such ruling is consistent with the greater weight of authority and logic, and does not conflict with any other Florida appellate case.

ARGUMENT

Standard of Review

In order to invoke the discretionary jurisdiction of the Florida Supreme Court, Fla. R. App. P. 9.030(a)(2) provides:

Discretionary Jurisdiction. The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

* * *

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.

Fla. R. App. P. 9.030(a)(2)(A)(iv).

The key words here are “expressly and directly conflict.” “[T]here can be no actual conflict discernible in an opinion containing only a citation to other case law...unless the citation explicitly notes a contrary holding of another district court or of this Court.” Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). Petitioner has failed to cite any decisions of another district court of appeal or of the Supreme Court that expressly and directly conflict with the decision in the instant case. Therefore, this court should decline to exercise its discretionary jurisdiction. See, e.g., Florida D.O.T. v. Millender, 796 So. 2d 536 (Fla. 2001); K.C. v. State, 889 So. 2d 71 (Fla. 2004). Petitioner has not satisfied its burden of proof as required by the rule under which it filed its petition. Fla. R. App. P. 9.030(a)(2)(A)(iv).

(a) Duty to Defend

On the Duty to Defend issue, petitioner asserts that the Fourth District case of Rad Source Techs. v. Essex Ins. Co., 902 So.2d 264, 267 (4th DCA 2005) expressly and directly conflicts with the Third District decision in the instant case. Petitioner also asserts that the Florida Supreme Court case of Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003) expressly and directly

conflicts with the instant case. Yet petitioner has completely failed to carry its burden of proof so as to invoke the discretionary jurisdiction of the Florida Supreme Court, as neither the Fourth District case nor the Florida Supreme Court case conflict with the Third District finding that the duty to defend the insured in EFH's Lexington policy was not ambiguous and therefore Lexington did not owe EFH any duty to provide it with a defense. (Opinion, p. 8.)

The Third District recognized that either a statute or a contract may confer on the insurer a duty to defend. (Opinion, p. 6.). Its opinion cites to the case of PT Indonesia Epson Indus. v. Orient Overseas Container Lines Inc., No. 99CV3373, 2002 WL 561376, at *3 (S.D. Fla. 2002); (Opinion, p. 9.); decisions of other courts, (Opinion, p. 10.); as well as secondary legal authority, such as Couch on Insurance (Opinion, p. 7.), when analyzing the duty to defend clause in finding it not to be ambiguous.

The determination made as to the interpretation of the duty to defend clause does not in any way conflict with the holding of the Fourth District in Rad Source Techs. Inc. v. Essex Ins. Co., 902 So. 2d 264, 267 (Fla. 4th DCA 2005). The Third District concluded, after reading both policies' language, that based on different language in the policy which the Fourth District Court found to be ambiguous, that the Rad Source case was distinguishable from the instant case. (Opinion, p. 8.)

The clause analyzed in Rad Source reads, in pertinent part, as follows:

...this Company reserves the right as its sole option to defend such action in the name of and on behalf of the Insured ...

Id. at 265.

The Fourth District distinguished that policy provision from PT Indonesia, supra, based on that policy having language employing the term “as its sole option.” The Fourth District agreed with the holding of PT Indonesia in interpreting the Intrastate Maritime Trucking policy, but distinguished its holding in Rad Source based on the difference in language between the two policies.¹

In that case, [PT Indonesia] the Southern District of Florida granted partial summary judgment in favor of a motor truck cargo insurer where the policy expressly stated that the insurer reserved the right “at its sole option” to defend the claim on behalf of its insured. The court held that under the plain meaning of the policy the insurer had the option not to provide a defense for an action against its insured. The provision under review in PT Indonesia was different than the policy in the instant case because the PT Indonesia clause used the word “at” where the Essex’s clause says “as.”

Rad Source, 902 So. 2d at 266.

The Third District thoroughly analyzed the language of the Lexington policy and concluded it was consistent with the PT Indonesia insurance provision which stated, in relevant part “. . .and this [c]ompany reserves the right at its sole option to defend such action.” (emphasis added) (Opinion, p. 9.) The Rad Source case

¹ “The relevant clause in this case is different from that in PT Indonesia, and therefore this opinion should not be construed as conflicting with Judge Jordan’s opinion in that case.” Rad Source, 902 So. 2d at 267, n. 3.

noted that the use of the word “as” versus “at” in the PT Indonesia policy made a difference in determining whether the clause was ambiguous. Rad Source, 902 So. 2d at 266. The term “...the right at its sole option to defend...” was unambiguous, comporting with the holding in PT Indonesia, and which holding the Fourth District agreed with. Therefore, there is no express and direct conflict between Rad Source and the instant case, as the Third District followed the logic and holding of the Fourth District in arriving at its conclusion in the instant case.

An ambiguous provision is construed in favor of the insured and strictly against the drafter. Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003). However, the Third District determined that the relevant policy language was not susceptible to more than one reasonable interpretation. That is why it was determined that the language was not ambiguous. The Florida Supreme Court in Swire also concluded that no ambiguity existed. Id. at 166. The court “address[ed] the specific contract and specific facts before [them] to render [their] analysis.” Id. at 169. Similarly, the Third District held that no ambiguity existed in the clause analyzed in the instant case, addressing the specific contract and specific facts to render its analysis, consistent with the analysis of the Fourth District in Rad Source, not in conflict with it.

(b) Burden of Proof

On the Burden of Proof issue, petitioner asserts that State Farm Fire & Cas. Co. v. Tippet, 864 So. 2d 31, 34 (Fla. 4th DCA 2004) and Swire, supra, directly and expressly conflict with the instant case.

However, EFH fails to provide evidence that such a conflict exists. The Tippet case, supra, does indeed state that exclusionary clauses in liability insurance policies are always strictly construed. Tippet, 864 So. 2d at 34. Despite that fact, the Tippet court found that “[T]he policy specifically excludes coverage for bodily injury which is expected or intended, or willful and malicious.” Id. at 33-34. The trial court’s entry of final judgment for the insured was reversed, and the matter was remanded for entry of summary final judgment in favor of the insurer. Id. at 36. Likewise, in the instant matter, the Third District held that the exclusion clause was clear and unambiguous; hence, the exclusion applied. (Opinion, p. 12.)

The Third District was fully aware that an ambiguous provision in an insurance policy is construed in favor of the insured, and cited to the Swire case, among others, in its opinion. (Opinion, p. 7.) However, “[w]hen the language of an insurance policy is clear and unambiguous, a court must interpret it according to its plain meaning, giving effect to the policy as it was written.” (Opinion, pp. 6-7.), citing Swire, 845 So. 2d at 165. Again, the Florida Supreme Court’s decision in Swire presents no conflict with the instant decision by the Third District,

because the Third District specifically followed its statement and holding on the law.

EFH's further assertion that the Court imposed the wrong evidentiary burden on it as the insured is not correct, and can cite to no Florida case which conflicts with the holding of the Third District. Indeed, the Court correctly stated the majority view rule of law that if there is an exception to an exclusion, the burden of proof is placed on the insured to demonstrate the exception to the exclusion. LaFarge Corp. v. Travelers Indem. Co., 118 F.3d 1511, 1516 (11th Cir. 1997). (Opinion, p. 11.)

Florida law places on the insured the burden of proving that a claim against it is covered by the insurance policy. Hudson Insurance Co. v. Double D Management Co., Inc., 768 F. Supp. 1542 (M.D.Fla.1991). The burden of proving an exclusion to coverage is, however, on the insurer. Id. Neither the Florida Supreme Court nor this court appears to have addressed the question of which party bears the burden of proving an exception to an exclusion, such as the "sudden and accidental" exception to the pollution exclusion clause at issue in this case. In Hudson Insurance, however, the United States District Court for the Middle District of Florida concluded that the burden was on the insured. Id. This appears to be the majority view. See Aeroquip Corp. v. Aetna Casualty and Surety Co., Inc., 26 F.3d 893, 894-95 (9th Cir.1994).

LaFarge at 1516.

Here the petitioner must fail because it cites to no District Court or Supreme Court decision which expressly and directly conflicts with the Third District's decision. Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). The burden of

proving an exclusion to coverage is on the insurer. Hudson, supra. In this case, it was Lexington's burden to prove that the target commodities exclusion for audio and video equipment applied. The Third District held that Lexington had met its burden of proof by submitting an affidavit and three commercial invoices submitted by the insured in support of its claim, reflecting that the cargo contained "Sharp . . . Viewcam, 16X Zoom, . . . JVH SVHS-C Camera w/ . . . LCD-Light-Stabilizer, . . . Panasonic VHS-C Camcorder." (Opinion, pp. 11-12.) "EFH failed to present evidence demonstrating that there is a genuine issue of material fact as to whether an exception to the exclusion exists, or to dispute that it was transporting these items." (Opinion, p. 12.)

Lexington, as the movant for summary judgment in the trial court, had the initial burden of demonstrating there was no genuine issue of material fact, and once it provided competent evidence to support the motion, the opposing party was obligated to come forward with adequate counter evidence that presents a genuine issue, or indicate it needed more time to obtain more evidence, which it did not do. It was not enough for the opposing party to merely assert that an issue does exist. Landers v. Milton, 370 So. 2d 368 (Fla. 1979).

CONCLUSION

Petitioner has failed to sustain its burden of proof in order to invoke the discretionary jurisdiction of the Florida Supreme Court, because it could cite no

District Court of Appeals or Supreme Court case that expressly and directly conflicts with the Third District, and therefore its application for discretionary review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. mail on this ____ day of February, 2006 to Richard B. Austin, Esq., attorney for petitioner, P.O. Box 830310, Miami, Florida 33283-0310; and Mark G. Keegan, Esq., attorney for Trial Forum plaintiff, 1104 Datran Center, 9100 South Dadeland Boulevard, Miami, Florida 33156-7866.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in compliance with the font requirements of Fla. R. App. P. 9.210. The undersigned certifies this computer-generated brief was prepared in Times New Roman 14-point font on a Microsoft Word format.

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