



IN THE COURT OF APPEALS

FOR THE STATE OF GEORGIA

J. SMITH LANIER & CO.,	)	
	)	
Appellant,	)	Case No. A04A2138
	)	
v.	)	On Appeal from the Superior
	)	Court of Gwinnett County
ACCEPTANCE INDEMNITY	)	Civil Action File No.
INSURANCE COMPANY,	)	02-A-10795-7
	)	
Appellee.	)	

**BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE COMPANY**

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	)	
Appellee.	)	

**BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE COMPANY**

COMES NOW Appellee Acceptance Indemnity Insurance Company (“Acceptance”) and, pursuant to Georgia Court of Appeals Rule 27, files this, its Brief in Response to Appellant J. Smith Lanier & Co.’s (“JSL”) Appeal Brief. In support thereof, Acceptance shows this Honorable Court the following:

**PART ONE**

**I. INTRODUCTION.**

The Trial Court’s grant of summary judgment to Acceptance was proper because the liability of Acceptance and JSL is necessarily mutually exclusive. Plaintiff Southeastern Forge, Inc. alleges that Defendant JSL omitted a wrongful

death, near-beheading claim from the loss history of an insurance application it submitted on Southeastern Forge's behalf. (See Complaint, ¶¶ 12, 13, R-I-3-8). Southeastern Forge further alleges that this omission was material to the underwriting of this policy, and therefore caused it not to have the insurance protection it paid for and expected when it retained JSL to obtain such a policy. (See Complaint, R-I-3-11-12, ¶¶ 39-50).<sup>1</sup> JSL asserts that the omission of the wrongful death claim was not material to the application or, in the alternative, the omission was the fault of the wholesale broker, Leverett Insurance Group ("Leverett"). (See JSL Answer, ¶ 12, R-I-10-46; Third-Party Complaint, R-I-11-55-121). JSL, however, also filed a Third-Party Complaint against Acceptance alleging that if it is held liable, Acceptance should bear that liability under a theory of contribution or indemnity. (See Third-Party Complaint, ¶¶ 32-39, R-I-11-63-64).

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<sup>1</sup> Acceptance had previously filed a declaratory judgment action, and obtained judgment, declaring the policy arranged by JSL to be void ab initio due to the omission of the prior claim. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002). See also footnote 9, infra.

The Trial Court's grant of summary judgment was proper because JSL and Acceptance cannot be joint tortfeasors. Any liability of Acceptance and JSL to Southeastern Forge is, factually and legally, mutually exclusive. The logical inconsistency of JSL's Third-Party Complaint is clear on the particular facts of this case. If JSL is found liable, it is because its omission in the application was, indeed, material to the risk underwritten, and the insurance policy is void ab initio. No recovery can be had against Acceptance, either by JSL (claiming through contribution or indemnity) or by Southeastern Forge, because the policy is void ab initio. Acceptance cannot be liable for any or all of the damages Southeastern Forge may recover against JSL, as the factual predicate for liability on JSL's part has already been determined in Acceptance's favor. If, on the other hand, JSL's omission was not material, then JSL obtained exactly what it was contractually obligated to obtain – a valid policy of insurance. JSL will not be found liable, will owe Southeastern Forge nothing, and no claim for either contribution or indemnity will arise. On these facts, impleader of Acceptance is improper, and the Trial Court's decision is factually and logically appropriate.

JSL argues that a finding of materiality is not an element of any claim against JSL, nor is it conclusive as to either JSL's or Acceptance's liability. JSL is

simply incorrect. The Trial Court properly found that materiality is the central element of any of Southeastern Forge's claims against JSL. The validity of the insurance policy JSL was to procure rests upon the materiality of the wrongful death claim JSL failed to identify in the application, and JSL's negligence and contract breach are in turn founded upon its failure to obtain a valid policy of insurance.

JSL's alternative theories of joint liability derive from strained attempts to reform and/or enforce the policy of insurance between Acceptance and Southeastern Forge, a contract to which it is a stranger and in which it has no legal interest – a point already established in the prior federal action and which JSL is collaterally estopped to challenge. JSL erroneously argues that it may assert and enforce duties allegedly flowing from Acceptance to Southeastern Forge, but does not articulate any scenario, under these facts, in which it and Acceptance can logically be held liable for the same damage. The Trial Court properly found JSL's "alternate scenarios" impossible under the particular facts presented here.

JSL applies an improper standard in its appeal, consistently asserting that the "claims and allegations pled in Plaintiff's Complaint" determine Acceptance's

potential liability to JSL, either in contribution or indemnity.<sup>2</sup> On a Motion for Summary Judgment, however, the burden lies with the non-movant to show that a genuine issue of material fact exists sufficient to preclude summary judgment; allegations in a pleading are not facts. JSL has presented no material facts sufficient to overcome the Trial Court's logic and summary judgment.

## **II. STATEMENT OF FACTS.**

Southeastern Forge recites the following facts to supplement, and in some cases dispute, JSL's Statement of Facts:

Southeastern Forge manufactures, among other products, replacement blades for "bush hog" cutting machines. (Compare Complaint, R-I-3-6, with JSL Answer, R-I-10-43, ¶ 1). JSL is an insurance agency that represents insureds in obtaining insurance coverage. (Compare Complaint, R-I-3-7, with JSL Answer, R-I-10-43, ¶ 6). JSL holds itself out as being an expert in the field of insurance, and preparing insurance applications to be forwarded to various carriers for quotations is within

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<sup>2</sup> Referring to both Southeastern Forge's Complaint in this action and Southeastern Forge's allegations against Acceptance in the now concluded federal action.

the scope of JSL's business. (Compare Complaint, R-I-3-11, with JSL Answer, R-I-10-49-50, ¶¶ 39-40).

Southeastern Forge and JSL had an oral contract under which JSL agreed to obtain, on Southeastern Forge's behalf, a \$1 million primary layer general liability insurance policy from Colony Insurance Company ("Colony") and a \$2 million excess layer general liability insurance policy from Acceptance. (Compare Complaint, R-I-3-13, with JSL Answer, R-I-10-52, ¶ 66). To obtain such coverage, JSL prepared and sent Southeastern Forge's insurance applications to an intermediate broker and Third-Party Defendant here, Leverett, who would in turn obtain premium quotations from various carriers. (See Commercial Insurance Application, R-I-3-15-19). JSL admits in its Answer that it was the agent of, and owed fiduciary duties to, Southeastern Forge when it undertook these tasks. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶ 52-56).

On August 19, 1998, Southeastern Forge notified JSL of an accident in Mississippi involving one of its bush-hog blades (the "Mississippi Incident"). (See R-VI-30-384-388). On August 4, 1998, a bush-hog blade flew from its mount and into a minivan traveling in an oncoming lane of traffic, nearly beheading the

driver, a young mother with her children in the backseat and her own mother in the passenger seat. The driver was killed. Id.

In October, 1998, two months after JSL received notice of the Mississippi Incident, JSL prepared an application for excess liability insurance on Southeastern Forge's behalf<sup>3</sup> but failed to include that incident in the loss history of the application. (Compare Complaint, R-I-3-8, with JSL Answer, R-I-10-45, ¶ 12). As the agent of Southeastern Forge, JSL assumed a duty to correctly and accurately prepare this application and submit it to the insurance market. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶55-56). Southeastern Forge neither withheld any information from JSL nor did Southeastern Forge direct JSL to omit any information from the 1998 and 1999 applications for insurance. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶ 57-58). Although JSL pleads, in its Third-Party Complaint, that Leverett had assumed the duty to complete the loss history portion of the application pursuant to a "custom and practice," Leverett denies that it assumed any such duty, and denies that any such custom and practice existed in either the insurance industry as a whole or as between JSL and Leverett. (See JSL Brief at 1; Compare

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<sup>3</sup> Without Southeastern Forge's knowledge or involvement.

JSL's Third-Party Complaint, R-I-11-57, 59, 61, 62, with Leverett's Answer, R-I-23-322-323, 325-326, 328, ¶¶ 10-12, 16-17, 23-26, 28-31).

On September 21, 1999, another Southeastern Forge mower blade allegedly broke free from a bush-hog mower and traumatically amputated the leg of Judd Eddins, a roadside worker ("the Texas Incident"). On March 27, 2000, Judd and Crystal Eddins filed a Complaint regarding this injury, naming Southeastern Forge as a defendant. (See Eddins Complaint, R-II-30-503-518). On March 23, 2000, the plaintiffs in the Texas Incident made a "policy limits" settlement demand on Southeastern Forge totaling \$3 million. (See March 24, 2000 Correspondence from G. Adams to L. West, R-II-30-478-479). On April 6, 2000, Colony<sup>4</sup> tendered

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<sup>4</sup> Regarding the investigation of the Mississippi Incident by Colony, JSL states that Colony concluded that operator error was the cause of the accident. (See JSL Brief at 6). While it is correct that this was Colony's initial impression, Colony's corporate representative testified that Colony had not yet even examined the blade for any structural, manufacturing, or design defect. That testing occurred several months later and indicated a defect in the Southeastern Forge blade. As a result of that exam, Colony immediately increased its "reserve" from the nominal, interim

its \$1 million policy limits to the Texas Plaintiffs. (See April 6, 2000 Correspondence from A. Wright to G. Adams, R-II-30-488-491). Southeastern Forge sent parallel settlement demands to both JSL and Acceptance, requesting that they pay the remaining \$2 million; both refused. (See correspondence exhibits to W. Tucker deposition, Southeastern Forge's demand and JSL's refusal, R-VII-115-3397-3408; April 3, 2000 correspondence from W. Tucker to M. Anderson, Acceptance demand, R-II-30-485-487; April 28, 2000 correspondence from L. West to G. Adams, R-II-30-537-540). On July 7, 2000, Acceptance filed a successful<sup>5</sup> Declaratory Action, contending that the 1998–1999 policy was void ab

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figure of \$50,000 to the policy limit of \$1 million. (See Affidavit of Alton Wright, R-VI-30-378-382; Colony Adjuster's Report, R-IX-127-4159, 4146-4147).

<sup>5</sup> JSL inexplicably states that “[t]he evidence shows that JSL procured an insurance policy of the type and amount requested by Plaintiff” when JSL knows that the United States District Court for the Middle District of Georgia has entered judgment declaring that policy void ab initio due to JSL's material omission of the prior near-beheading wrongful death claim. (Compare JSL Brief at 20 with Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga.

initio due to the failure of Southeastern Forge to disclose the August 4, 1998 loss in its October 5, 1998 application for excess liability insurance. (See Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., et al., USDC, Middle District of Georgia, Columbus Division, Civil Action File No. 4:00-CV-103, Acceptance Complaint, ¶¶ 6-7, R-I-14-149-152).<sup>6</sup>

In October 2000, the Eddins again offered to settle all claims against Southeastern Forge, and fully indemnify and protect it from any claims by any other party in exchange for payment of the primary and would-be excess policy limits. (See October 17, 2000 correspondence from G. Adams to L. West, R-II-30-549-551). Southeastern Forge, again, demanded that either JSL or Acceptance pay

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2002); Rule 68 Offer of Judgment, R-II-33-571-574; and Rule 68 Judgment, R-II-33-569-570).

<sup>6</sup> JSL incorrectly states in its brief that Acceptance “has treated the policy as void.” (See JSL Brief at 2). The record clearly reflects that Acceptance, upon learning of the Mississippi Incident – during its investigation of the Texas Incident – promptly reserved its rights and sought a declaration that the subject policy, underwritten without knowledge of the Mississippi claim, was void ab initio.

the \$2 million policy limits demand. (See correspondence from W. Tucker to R. Sumrall, R-VII-115-3411-3419, 3423-3429). Each again refused.<sup>7</sup> (See July 31, 2002 correspondence from R. Sumrall to W. Tucker, JSL refusal, R-VII-115-3430-3431). The Texas lawsuit was settled with the claimant at mediation for a total amount of \$5 million, \$1 million of which was paid by Southeastern Forge's primary layer insurer and the remaining \$4 million by co-defendants East Texas Mill Supply, Inc. ("ETMS"), Southern Marketing Affiliates of Dallas, Inc., and Southern Marketing Affiliates, Inc. (collectively "SMA"). (See Pleadings in

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<sup>7</sup> Regarding the Texas Incident, JSL states that the Texas Plaintiffs notified Acceptance and Colony of their policy limits settlement demand of \$3 million (\$1 million from Colony; \$2 million from Acceptance). (See JSL Brief at 7). JSL fails to inform the Court that Southeastern Forge also notified JSL of the settlement demand. (See W. Tucker Depo. and correspondence exhibits, R-VII-115-3305-3312, 3318-3319, 3394-3431). JSL further fails to inform the Court that Southeastern Forge, now recognizing JSL's error on the application, made parallel demands for protection to both Acceptance and JSL (or its errors and omissions carrier). Id.

Intervention of ETMS and SMA, R-VI-106-2763-97). By final judgment, the Court ordered Southeastern Forge to indemnify ETMS and SMA for their liability to the Texas Plaintiffs in an amount totaling \$4,457,676.68. (See Texas Judgment, R-II-30-552-558).

On August 29, 2002, after almost two years of litigating the validity of the Acceptance policy, Southeastern Forge offered judgment to Acceptance indicating the policy was void ab initio due to the omission of the prior Mississippi Incident from the application sent to Acceptance. (See R-II-33-571-574).

JSL emphasizes the testimony of Kenneth Smith, an employee of Acceptance, that he would not have questioned Fred Gaunce's<sup>8</sup> pricing of the premium for the Acceptance policy even if JSL had informed him of the Mississippi wrongful death claim. (See JSL Brief at 5). However, Mr. Gaunce actually underwrote the policy and made all premium determinations under this

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<sup>8</sup> Mr. Gaunce was the Senior Underwriter for Commercial Services and Protection, Inc. ("CSPI"), an underwriting agent acting on behalf of Acceptance. Acceptance assigned Mr. Smith to administratively monitor CSPI's underwriting under this program.

program, not Mr. Smith. (See K. Smith July 12, 2002 Depo., R-V-102-2170, 2203-2204). Mr. Smith did not testify that Acceptance would have agreed to insure Southeastern Forge for the original premium. A careful reading of that testimony reveals that Mr. Smith actually testified that if Mr. Gaunce had been made aware of the claim before quoting the premium amount, and Mr. Gaunce had determined to charge the same figure, he would not have countermanded that decision. (See K. Smith July 12, 2002 Depo., R-V-102-2169, 2203-2204). Mr. Gaunce unequivocally testified that had he known of the Mississippi Incident, he would have charged a higher premium for the policy. (See K. Smith July 12, 2002 Depo., R-V-102-2007-2008, 2012-2013; F. Gaunce Dec. 17, 2001 Depo., R-V-104-2449-2452; R-VI-104-2623). In fact, both Messrs. Smith and Gaunce agree that knowledge of the Mississippi Incident would have substantially altered Acceptance's evaluation of the risk it was asked to insure. (See K. Smith July 12, 2002 Depo., R-V-102-2196-2198). Mr. Smith also testified that, had he known of the Mississippi Incident, he might not have even issued the policy at all. (See K. Smith July 12, 2002 Depo., R-V-102-2172).

## **PART TWO**

### **ARGUMENT AND CITATION OF AUTHORITIES**

#### **I. SUMMARY JUDGMENT STANDARD.**

To prevail at summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. Shaffer v. State Farm Mut. Auto. Ins. Co., 246 Ga. App. 244, 540 S.E.2d 227 (2000), citing Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). Southeastern Forge claims injury as a result of JSL's 1) negligence (failure to obtain adequate insurance coverage); 2) breach of contract; and 3) breach of fiduciary duties. (See Complaint, Counts I-III, R-I-3-12-14). Because of the nature of contribution and indemnity claims, JSL's claims against Acceptance must therefore arise from a) at least one of Southeastern Forge's claims against JSL; or b) any claim Southeastern Forge may have against Acceptance. In this matter, however, Southeastern Forge has made, and can make, no further claims against Acceptance. The prior federal action disposed of all claims between Southeastern Forge and Acceptance. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002).

A tortfeasor is generally entitled to assert a claim for contribution or indemnity from a joint tortfeasor. A necessary predicate to recovery, however, is that the parties are jointly liable to the plaintiff for the same damages. An alleged joint tortfeasor who cannot be held liable on the underlying tort claim cannot be held liable for contribution or indemnity. Georgia Ports Auth. v. Andre Rickmers Schiffsbeteiligungsges MBH & Co. KG, 262 Ga. App. 591, 585 S.E.2d 883 (2003), citing O.C.G.A. § 51-12-32 (1987); Southern Ry. Co. v. Brewer, 122 Ga. App. 292, 176 S.E.2d 665 (1970). See also City of Albany v. Pippin, 2004 WL 1757762, \*2-3 (Ga. App. Aug. 6, 2004), quoting Maxwell Bros. of Athens, Inc. v. Deupree Co., 129 Ga. App. 254, 257, 199 S.E.2d 403 (1973) (“contribution among joint tortfeasors must originate in the first instance on the interconnection of acts of negligence on the part of each resulting in damage to the plaintiff.”) (emphasis added).

The Trial Court properly found that it is factually and legally impossible for JSL and Acceptance to be jointly liable to Southeastern Forge for the same damages. If JSL’s omission was material, then JSL breached its duties to Southeastern Forge and it is liable for the resulting damage. Necessarily, then, the Acceptance policy is void ab initio. Since the policy is void from inception,

Acceptance cannot also be liable for those same damages. If, however, the omission was not material, then JSL obtained the insurance it was obligated to obtain, fulfilled each of its duties to Southeastern Forge, and will not be found liable. Without liability to Southeastern Forge, no third-party cause of action – in contribution or indemnity – arises against Acceptance or any other party. Since Acceptance cannot be held liable to Southeastern Forge on the “underlying tort claim,” due to both the nature of the claims alleged against JSL and the prior judgment, JSL’s Third-Party Complaint fails as a matter of law.

## **II. SIMPLE LOGIC SUPPORTS THE TRIAL COURT’S DECISION.**

The Trial Court applied simple logic to the straightforward facts here and granted summary judgment. (See Feb. 24, 2004 Order, R-IX-134-4236-4237). The liability of JSL and Acceptance is mutually exclusive. O.C.G.A. § 33-4-6(a) (2001) sets forth the manner in which an insurer can be liable for an insured’s damages and attorney’s fees, and specifically precludes that possibility in this case:

In the event of a loss which is covered by a policy of insurance and the refusal of an insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has

been made that such refusal was in bad faith, the insurer shall be liable to pay such holder . . . [].

If the omission on the application was material to Acceptance's underwriting, then the policy is void ab initio,<sup>9</sup> and the policy would not "cover"

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<sup>9</sup> A material misrepresentation or omission in an application voids an insurance policy from its inception, or ab initio.

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent recovery under the policy ... unless: (1) Fraudulent; (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) The insurer in good faith would ... not have issued the policy ... if the true facts had been known to the insurer as required either by the application for the policy ... or otherwise.

O.C.G.A. § 33-24-7 (1982). JSL cites to this very statute in its brief. (See JSL Brief at 23-24). A misrepresentation or omission is material if it would influence a prudent insurer in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance. Thompson v.

the loss; Acceptance could not be liable under the contract or under O.C.G.A. § 33-4-6 (2001) to either Southeastern Forge or to JSL in contribution or indemnity. That finding would, however, lead to the conclusion that JSL is liable to Southeastern Forge for its negligence, breach of fiduciary duties, or breach of contract with Southeastern Forge for failing to submit an accurate application for insurance. Conversely, if it is established that the omission on the application was not material to Acceptance's underwriting, then JSL obtained a valid policy of insurance for Southeastern Forge and would have no liability to pass on via a third-party complaint. With no finding of liability against it, JSL has no claim for contribution or indemnity from anyone, much less Acceptance.

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Permanent Gen. Assurance Corp., 238 Ga. App. 450, 451, 519 S.E.2d 249, 250 (1999), citing Georgia Int'l Life Ins. Co. v. Bear's Den, 162 Ga. App. 833, 838, 292 S.E.2d 502, 507 (1982).

The omission in this case was already found to be material in the prior federal action. (See Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002); Rule 68 Judgment, R-II-33-569-570).

The Trial Court properly found that the simple, straightforward question in this case is whether JSL's omission of the Mississippi Incident was material to Acceptance's underwriting. Regardless of the answer to that question, the liability of JSL and Acceptance is mutually exclusive. (See Feb. 24, 2004 Order, R-IX-134-4236-4237).

The undisputed record clearly supports that conclusion. Fred Gaunce, the actual underwriter of this policy, testified that had he known of the Mississippi claim, he would have charged a higher premium and evaluated the risk differently. (See F. Gaunce Dec. 17, 2001 Depo., R-V-104-2449-2452; R-VI-104-2623). JSL's citations to Ken Smith's and Kim Fincher's testimony are a red herring, in that neither Mr. Smith nor Ms. Fincher underwrote the 1998/1999 policy. (See K. Smith July 12, 2002 Depo., R-V-102-2170, 2203-2204; K. Fincher Dec. 18, 2001 Depo., R-IV-101-1841). In fact, each testified that Mr. Gaunce actually underwrote this policy and each deferred to his greater experience in setting the premium and assessing the risk. (See K. Smith July 17, 2002 Depo., R-V-102-2007-2008, 2012-2013, 2196-2198; K. Fincher Dec. 18, 2001 Depo., R-IV-101-1841, 1914-1915, 1918-1921). Mr. Smith actually testified that, had he personally underwritten the policy and been informed of the Mississippi claim, he might not

have even issued the policy at all. (See K. Smith July 12, 2002 Depo., R-V-102-2172).

While the Trial Court has not yet determined whether the prior federal court judgment collaterally estops JSL from arguing the materiality of its omission,<sup>10</sup> there is no disputed issue of material fact that alters the Trial Court's conclusion on this motion. JSL and Acceptance cannot be joint tortfeasors. A finding by the jury that JSL's admitted omission on Southeastern Forge's application was material will necessarily lead to the conclusion that the Acceptance policy is void ab initio. Acceptance has no obligations and cannot be liable, to either Southeastern Forge or JSL, on a non-existent policy. The Trial Court properly found that JSL cannot avoid this simple logic.

### **III. ACCEPTANCE CANNOT BE LIABLE TO JSL IN INDEMNITY.**

The right to indemnification arises either from a contract between the parties or by operation of law. Fidelity & Deposit Co. of Md. v. Williams, 699 F. Supp. 897, 899 (N.D. Ga. 1988). Neither basis for indemnification exists here. First, it is

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<sup>10</sup> As outlined in greater detail in Acceptance's original Motion for Summary Judgment. (See R-II-74-77-913-1035).

undisputed that JSL and Acceptance had no contractual relationship. Indeed, JSL is a third-party stranger to the insurance contract between Acceptance and Southeastern Forge. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697, 700 (M.D. Ga. 2002) (coverage action in which court dismissed JSL from case because JSL lacked an interest in the subject matter of the litigation:

The Court finds that JSL has never had an interest in the subject matter of this [declaratory judgment] litigation that would have been impaired or impeded by the disposition of this action. JSL's only interest in this litigation arises from the possibility that Southeastern [Forge] may seek indemnification from JSL in a later suit based upon JSL's alleged failure to secure the insurance coverage in question).

One court has already prohibited JSL from seeking enforcement of the insurance contract between Acceptance and Southeastern Forge because JSL did not have a legal interest in the contract. Right or wrong, JSL did not appeal that decision.<sup>11</sup>

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<sup>11</sup> JSL is collaterally estopped from relitigating the question of its legal right to enforce the policy of insurance between Southeastern Forge and Acceptance. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga.

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2002). “[T]he doctrine of collateral estoppel precludes relitigation of an issue when there is: 1) an identity of parties; 2) a previous determination of same or similar issues in a previous court with competent jurisdiction; and 3) precludes only those issues actually litigated or by necessity had to be decided for the judgment to be rendered.” Cincinnati Ins. Co. v. MacLeod, 259 Ga. App. 761, 765, 577 S.E.2d 799, 803 (2003) (insurer estopped from retrying the amount of damages from the default judgment because it had already defended the insured and obtained a verdict that the insured was not negligent; therefore, all of the damages were attributable to the insurer’s failure to defend timely); Copelan v. Copelan, 261 Ga. App. 726, 728, 583 S.E.2d 562, 564 (2003).

Here, all three elements of collateral estoppel are present. First, both JSL and Acceptance were parties to the Middle District action. Second, the Middle District Court decided the question of whether JSL had an independent right to seek an interpretation of the Acceptance insurance policy in the negative. Southeastern Forge, 209 F.R.D. at 700. Third, it was necessary to the action that the court decide the issue of whether JSL had an independent right to seek an interpretation of the policy:

JSL nonetheless urges this Court to grant it a “second bite” and allow what the federal court in the coverage action refused it. The federal court found that JSL did not have a sufficient legal interest to seek an interpretation of or to enforce the contract between Acceptance and Southeastern Forge. Id. Here, JSL urges the Court to go beyond that and allow it to actually enforce that same contract by requiring Acceptance to indemnify JSL. Such a result is unsupported by the contract itself and the law.

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[T]he Court finds that in order for final judgment to be entered in this case pursuant to the offer of judgment, all of the parties must agree to it or any objecting party must be dismissed from the case prior to the entry of the final judgment.... The Court further finds that allowing JSL to remain as a permissive intervenor will unduly delay and prejudice the adjudication of the rights of the original parties, and therefore, the Court finds that JSL should now be dismissed as a party to this lawsuit without prejudice.... The Court finds that JSL has never had an interest in the subject matter of this litigation....

Id. (emphasis added). This Court cannot permit JSL to argue this issue once again.

Alternatively, JSL must demonstrate that its right to indemnification arises by operation of law. In that case, JSL must prove that its liability to Southeastern Forge “can be considered as damages naturally, legally and proximately flowing” not from its own wrongful acts, but from the wrongful acts of Acceptance. Southern Nitrogen Co. v. Stevens Shipping Co., 114 Ga. App. 581, 584-85, 151 S.E.2d 916, 920 (1966). As pointed out in detail above, it is factually and legally impossible for a jury to conclude that JSL is liable for any damages arising from the “wrongful acts” of Acceptance. If JSL is found liable, it will be because it failed in its duty to properly complete an insurance application on Southeastern Forge’s behalf, causing the Acceptance policy to be void from its inception.<sup>12</sup> Acceptance will not be the wrongdoer. (Compare Complaint, R-I-3-8-9, 12, with JSL Answer, R-I-10-45-46, 51, ¶¶ 13, 21, 55-56).

#### **IV. ACCEPTANCE CANNOT BE LIABLE TO JSL IN CONTRIBUTION.**

Similarly, contribution is unavailable to JSL because, within the framework of Southeastern Forge’s Complaint, JSL is a single tortfeasor. Contribution is the method by which a recoverable loss is pursued against joint tortfeasors. Defendants are joint tortfeasors when their separate and distinct acts of negligence

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<sup>12</sup> As has already been determined in the prior federal action.

concur to proximately produce an injury. O.C.G.A. § 51-12-32 (1987); City of Albany v. Pippin, 2004 WL 1757762, \*2-3 (Ga. App. Aug. 6, 2004); Travelers Indem. Co. v. Liberty Loan Corp. of Poplar, 140 Ga. App. 458, 461-462, 231 S.E.2d 399, 401-02 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977); Maxwell Bros. of Athens, Inc. v. Deupree Co., 129 Ga. App. 254, 257, 199 S.E.2d 403 (1973); Crockett v. Uniroyal, Inc., 772 F.2d 1524, 1529 (11th Cir. 1985).<sup>13</sup> As correctly noted by the Trial Court, JSL can only cause harm to Southeastern Forge if it alone is negligent, and not in combination with any alleged negligence of Acceptance, and therefore JSL and Acceptance can never be joint tortfeasors.

JSL's contribution claim ignores the principle that a defendant cannot use contribution as a means of establishing a third party's liability in contravention of the rules of law which would prevail if the plaintiff had himself sued that third

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<sup>13</sup> The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

party. Georgia S. & Fla. Ry. Co. v. Odom, 152 Ga. App. 664, 668, 263 S.E.2d 469, 473 (1979). In other words, JSL's contribution claim does not make Acceptance liable to JSL, indirectly or otherwise, because of Acceptance's relationship with Southeastern Forge, particularly where a court has already held that Acceptance is not liable to Southeastern Forge. O.C.G.A. § 51-12-32 (1987); Georgia Ports Auth., 262 Ga. App. at 596, 585 S.E.2d at 888 (an alleged joint tortfeasor who cannot be held liable on the underlying tort claim cannot be held liable for contribution or indemnity).

JSL cites to no authority, in statute or common law, that supports its position that both it and Acceptance can be joint tortfeasors. The cases JSL does cite are inapposite to this issue on appeal. See Scott v. Rakestraw, 252 Ga. App. 408, 411, 556 S.E.2d 492, 494 (2001) (defendant entitled to contribution from a motorist in a passenger's personal injury action even where defendant was previously found liable to motorist; prior court found motorist "also negligent to a certain extent", leaving open the possibility, unlike here, that motorist and defendant could be joint tortfeasors); Tenneco Oil Co. v. Templin, 201 Ga. App. 30, 410 S.E.2d 154 (1991) (whether contribution claim must be brought as a compulsory counterclaim or as a cross-claim); Marchman & Sons, Inc. v. Nelson, 251 Ga. 475, 478, 306 S.E.2d

290, 293 (1983) (dismissal with prejudice of underlying suit does not bar action for contribution by one joint tortfeasor against another joint tortfeasor). While these cases demonstrate that a party can bring a third-party complaint prior to adjudication of the underlying liability, they do not advance JSL's argument that it and Acceptance can be joint tortfeasors in the first instance.

**V. JSL BASES ITS ALTERNATIVE THEORIES OF JOINT LIABILITY BETWEEN ACCEPTANCE AND JSL IN AN ATTEMPT TO RELITIGATE THE VALIDITY OF THE ACCEPTANCE POLICY.**

JSL argues that “[a] third party complaint ‘should be allowed to stand if, under some construction of the facts which might be adduced at trial, recovery would be possible.’” Register v. Stone’s Indep. Oil Distribs., 122 Ga. App. 335, 345, 177 S.E.2d 92, 98-99 (1970), rev’d on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971). JSL then concocts a number of scenarios that bear no relation to the facts or law here. These “alternatives” are the only genuine issues of material fact JSL raises to survive summary judgment.

JSL’s first alternative simply argues Southeastern Forge’s rights under the insurance policy with Acceptance, despite the fact that JSL is a third-party stranger to that policy. JSL contends that Acceptance waived “its right to rescind the policy

by failing to promptly notify Southeastern Forge of its intent to do so.” (See JSL Brief at 23). The record clearly and indisputably reflects, however, that Acceptance both properly reserved its rights and successfully prosecuted a declaratory judgment action to prove no waiver or coverage exists. Further, the prior federal court determined, through final judgment, that no waiver exists and that JSL is collaterally estopped from asserting any legal interest sufficient to argue waiver or enforcement of the policy. (See Section III, supra).

JSL’s second alternative also asserts a contract defense, but with a faulty premise. JSL contends that, even if the jury finds that the omission is not material, the jury could find that Acceptance wrongfully rescinded the policy based on JSL’s failure to include a valuation date and applicant’s signature on the application. (See JSL Brief at 25). First, if the Trial Court determines that the omission was material, then no policy exists for any party to enforce, much less a third-party stranger to the contract. Second, JSL raises a breach that Southeastern Forge has not even alleged: the failure to include a valuation date and signature. JSL cannot be found liable on a claim of negligence that Southeastern Forge has not even raised.

JSL's final alternative rests on a theory of indemnity. JSL claims that Southeastern Forge's damages flow solely from Acceptance's negligence:

[t]o the extent that JSL is found liable for negligence, the negligence of Acceptance in denying coverage based on a non-material omission from the application and its bad faith refusal to settle the claim were active and primary, while any negligence of J. Smith Lanier in omitting a non-material loss from the applications for insurance was passive and secondary.

(See JSL Brief at 26-27). JSL then goes on to say, in the next sentence, that "Acceptance would only be authorized to rescind its insurance policy with Southeastern Forge if the omission was found to be material." Id. This is exactly the point. JSL could only be found liable for negligence (or breach of fiduciary duty or breach of contract) if the omission was material. If the omission was material, then Acceptance, as JSL acknowledges, rightly (and successfully) sought to have the policy declared void ab initio.

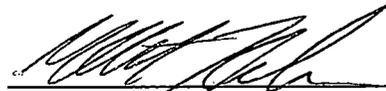
A simple syllogism dictates the Trial Court's grant of summary judgment to Acceptance. As much as JSL would like to place the blame upon Acceptance, it is

not a question of “active” or “passive” negligence. It is a question of the result of JSL’s negligence: a void, non-existent policy of insurance.

**CONCLUSION**

The damages Southeastern Forge seeks are for its uninsured loss, statutory interest, and costs. If JSL had fulfilled its duties, then Southeastern Forge would be insured, and would have incurred no loss at all. If the policy is void due to JSL’s failure to fulfill its duties, then no recovery can be had against Acceptance, either by JSL or by Southeastern Forge because the policy is non-existent.

Respectfully submitted this 23 day of August, 2004.

  
\_\_\_\_\_  
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IN THE COURT OF APPEALS

FOR THE STATE OF GEORGIA

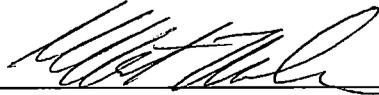
J. SMITH LANIER & CO.,	)	
	)	
Appellant,	)	Case No. A04A2138
	)	
v.	)	On Appeal from the Superior
	)	Court of Gwinnett County
ACCEPTANCE INDEMNITY	)	Civil Action File No.
INSURANCE COMPANY,	)	02-A-10795-7
	)	
Appellee.	)	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE COMPANY** upon all parties to this matter by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

**Counsel for Appellant J. Smith Lanier & Co.**  
Roger S. Sumrall, Esquire  
Hall, Booth, Smith & Slover  
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This 23 day of August, 2004.



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SUPREME COURT OF GEORGIA



IN THE COURT OF APPEALS

FOR THE STATE OF GEORGIA

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INSURANCE COMPANY,	)	02-A-10795-7
	)	
Appellee.	)	

**BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE COMPANY**

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**BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE  
COMPANY**

COMES NOW Appellee Acceptance Indemnity Insurance Company (“Acceptance”) and, pursuant to Georgia Court of Appeals Rule 27, files this, its Brief in Response to Appellant J. Smith Lanier & Co.’s (“JSL”) Appeal Brief. In support thereof, Acceptance shows this Honorable Court the following:

**PART ONE**

**I. INTRODUCTION.**

The Trial Court’s grant of summary judgment to Acceptance was proper because the liability of Acceptance and JSL is necessarily mutually exclusive. Plaintiff Southeastern Forge, Inc. alleges that Defendant JSL omitted a wrongful

death, near-beheading claim from the loss history of an insurance application it submitted on Southeastern Forge's behalf. (See Complaint, ¶¶ 12, 13, R-I-3-8). Southeastern Forge further alleges that this omission was material to the underwriting of this policy, and therefore caused it not to have the insurance protection it paid for and expected when it retained JSL to obtain such a policy. (See Complaint, R-I-3-11-12, ¶¶ 39-50).<sup>1</sup> JSL asserts that the omission of the wrongful death claim was not material to the application or, in the alternative, the omission was the fault of the wholesale broker, Leverett Insurance Group ("Leverett"). (See JSL Answer, ¶ 12, R-I-10-46; Third-Party Complaint, R-I-11-55-121). JSL, however, also filed a Third-Party Complaint against Acceptance alleging that if it is held liable, Acceptance should bear that liability under a theory of contribution or indemnity. (See Third-Party Complaint, ¶¶ 32-39, R-I-11-63-64).

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<sup>1</sup> Acceptance had previously filed a declaratory judgment action, and obtained judgment, declaring the policy arranged by JSL to be void ab initio due to the omission of the prior claim. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002). See also footnote 9, infra.

The Trial Court's grant of summary judgment was proper because JSL and Acceptance cannot be joint tortfeasors. Any liability of Acceptance and JSL to Southeastern Forge is, factually and legally, mutually exclusive. The logical inconsistency of JSL's Third-Party Complaint is clear on the particular facts of this case. If JSL is found liable, it is because its omission in the application was, indeed, material to the risk underwritten, and the insurance policy is void ab initio. No recovery can be had against Acceptance, either by JSL (claiming through contribution or indemnity) or by Southeastern Forge, because the policy is void ab initio. Acceptance cannot be liable for any or all of the damages Southeastern Forge may recover against JSL, as the factual predicate for liability on JSL's part has already been determined in Acceptance's favor. If, on the other hand, JSL's omission was not material, then JSL obtained exactly what it was contractually obligated to obtain – a valid policy of insurance. JSL will not be found liable, will owe Southeastern Forge nothing, and no claim for either contribution or indemnity will arise. On these facts, impleader of Acceptance is improper, and the Trial Court's decision is factually and logically appropriate.

JSL argues that a finding of materiality is not an element of any claim against JSL, nor is it conclusive as to either JSL's or Acceptance's liability. JSL is

simply incorrect. The Trial Court properly found that materiality is the central element of any of Southeastern Forge's claims against JSL. The validity of the insurance policy JSL was to procure rests upon the materiality of the wrongful death claim JSL failed to identify in the application, and JSL's negligence and contract breach are in turn founded upon its failure to obtain a valid policy of insurance.

JSL's alternative theories of joint liability derive from strained attempts to reform and/or enforce the policy of insurance between Acceptance and Southeastern Forge, a contract to which it is a stranger and in which it has no legal interest – a point already established in the prior federal action and which JSL is collaterally estopped to challenge. JSL erroneously argues that it may assert and enforce duties allegedly flowing from Acceptance to Southeastern Forge, but does not articulate any scenario, under these facts, in which it and Acceptance can logically be held liable for the same damage. The Trial Court properly found JSL's "alternate scenarios" impossible under the particular facts presented here.

JSL applies an improper standard in its appeal, consistently asserting that the "claims and allegations pled in Plaintiff's Complaint" determine Acceptance's

potential liability to JSL, either in contribution or indemnity.<sup>2</sup> On a Motion for Summary Judgment, however, the burden lies with the non-movant to show that a genuine issue of material fact exists sufficient to preclude summary judgment; allegations in a pleading are not facts. JSL has presented no material facts sufficient to overcome the Trial Court's logic and summary judgment.

## **II. STATEMENT OF FACTS.**

Southeastern Forge recites the following facts to supplement, and in some cases dispute, JSL's Statement of Facts:

Southeastern Forge manufactures, among other products, replacement blades for "bush hog" cutting machines. (Compare Complaint, R-I-3-6, with JSL Answer, R-I-10-43, ¶ 1). JSL is an insurance agency that represents insureds in obtaining insurance coverage. (Compare Complaint, R-I-3-7, with JSL Answer, R-I-10-43, ¶ 6). JSL holds itself out as being an expert in the field of insurance, and preparing insurance applications to be forwarded to various carriers for quotations is within

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<sup>2</sup> Referring to both Southeastern Forge's Complaint in this action and Southeastern Forge's allegations against Acceptance in the now concluded federal action.

the scope of JSL's business. (Compare Complaint, R-I-3-11, with JSL Answer, R-I-10-49-50, ¶¶ 39-40).

Southeastern Forge and JSL had an oral contract under which JSL agreed to obtain, on Southeastern Forge's behalf, a \$1 million primary layer general liability insurance policy from Colony Insurance Company ("Colony") and a \$2 million excess layer general liability insurance policy from Acceptance. (Compare Complaint, R-I-3-13, with JSL Answer, R-I-10-52, ¶ 66). To obtain such coverage, JSL prepared and sent Southeastern Forge's insurance applications to an intermediate broker and Third-Party Defendant here, Leverett, who would in turn obtain premium quotations from various carriers. (See Commercial Insurance Application, R-I-3-15-19). JSL admits in its Answer that it was the agent of, and owed fiduciary duties to, Southeastern Forge when it undertook these tasks. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶ 52-56).

On August 19, 1998, Southeastern Forge notified JSL of an accident in Mississippi involving one of its bush-hog blades (the "Mississippi Incident"). (See R-VI-30-384-388). On August 4, 1998, a bush-hog blade flew from its mount and into a minivan traveling in an oncoming lane of traffic, nearly beheading the

driver, a young mother with her children in the backseat and her own mother in the passenger seat. The driver was killed. Id.

In October, 1998, two months after JSL received notice of the Mississippi Incident, JSL prepared an application for excess liability insurance on Southeastern Forge's behalf<sup>3</sup> but failed to include that incident in the loss history of the application. (Compare Complaint, R-I-3-8, with JSL Answer, R-I-10-45, ¶ 12). As the agent of Southeastern Forge, JSL assumed a duty to correctly and accurately prepare this application and submit it to the insurance market. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶55-56). Southeastern Forge neither withheld any information from JSL nor did Southeastern Forge direct JSL to omit any information from the 1998 and 1999 applications for insurance. (Compare Complaint, R-I-3-12, with JSL Answer, R-I-10-51, ¶¶ 57-58). Although JSL pleads, in its Third-Party Complaint, that Leverett had assumed the duty to complete the loss history portion of the application pursuant to a "custom and practice," Leverett denies that it assumed any such duty, and denies that any such custom and practice existed in either the insurance industry as a whole or as between JSL and Leverett. (See JSL Brief at 1; Compare

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<sup>3</sup> Without Southeastern Forge's knowledge or involvement.

JSL's Third-Party Complaint, R-I-11-57, 59, 61, 62, with Leverett's Answer, R-I-23-322-323, 325-326, 328, ¶¶ 10-12, 16-17, 23-26, 28-31).

On September 21, 1999, another Southeastern Forge mower blade allegedly broke free from a bush-hog mower and traumatically amputated the leg of Judd Eddins, a roadside worker ("the Texas Incident"). On March 27, 2000, Judd and Crystal Eddins filed a Complaint regarding this injury, naming Southeastern Forge as a defendant. (See Eddins Complaint, R-II-30-503-518). On March 23, 2000, the plaintiffs in the Texas Incident made a "policy limits" settlement demand on Southeastern Forge totaling \$3 million. (See March 24, 2000 Correspondence from G. Adams to L. West, R-II-30-478-479). On April 6, 2000, Colony<sup>4</sup> tendered

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<sup>4</sup> Regarding the investigation of the Mississippi Incident by Colony, JSL states that Colony concluded that operator error was the cause of the accident. (See JSL Brief at 6). While it is correct that this was Colony's initial impression, Colony's corporate representative testified that Colony had not yet even examined the blade for any structural, manufacturing, or design defect. That testing occurred several months later and indicated a defect in the Southeastern Forge blade. As a result of that exam, Colony immediately increased its "reserve" from the nominal, interim

its \$1 million policy limits to the Texas Plaintiffs. (See April 6, 2000 Correspondence from A. Wright to G. Adams, R-II-30-488-491). Southeastern Forge sent parallel settlement demands to both JSL and Acceptance, requesting that they pay the remaining \$2 million; both refused. (See correspondence exhibits to W. Tucker deposition, Southeastern Forge's demand and JSL's refusal, R-VII-115-3397-3408; April 3, 2000 correspondence from W. Tucker to M. Anderson, Acceptance demand, R-II-30-485-487; April 28, 2000 correspondence from L. West to G. Adams, R-II-30-537-540). On July 7, 2000, Acceptance filed a successful<sup>5</sup> Declaratory Action, contending that the 1998–1999 policy was void ab

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figure of \$50,000 to the policy limit of \$1 million. (See Affidavit of Alton Wright, R-VI-30-378-382; Colony Adjuster's Report, R-IX-127-4159, 4146-4147).

<sup>5</sup> JSL inexplicably states that “[t]he evidence shows that JSL procured an insurance policy of the type and amount requested by Plaintiff” when JSL knows that the United States District Court for the Middle District of Georgia has entered judgment declaring that policy void ab initio due to JSL's material omission of the prior near-beheading wrongful death claim. (Compare JSL Brief at 20 with Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga.

initio due to the failure of Southeastern Forge to disclose the August 4, 1998 loss in its October 5, 1998 application for excess liability insurance. (See Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., et al., USDC, Middle District of Georgia, Columbus Division, Civil Action File No. 4:00-CV-103, Acceptance Complaint, ¶¶ 6-7, R-I-14-149-152).<sup>6</sup>

In October 2000, the Eddins again offered to settle all claims against Southeastern Forge, and fully indemnify and protect it from any claims by any other party in exchange for payment of the primary and would-be excess policy limits. (See October 17, 2000 correspondence from G. Adams to L. West, R-II-30-549-551). Southeastern Forge, again, demanded that either JSL or Acceptance pay

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2002); Rule 68 Offer of Judgment, R-II-33-571-574; and Rule 68 Judgment, R-II-33-569-570).

<sup>6</sup> JSL incorrectly states in its brief that Acceptance “has treated the policy as void.” (See JSL Brief at 2). The record clearly reflects that Acceptance, upon learning of the Mississippi Incident – during its investigation of the Texas Incident – promptly reserved its rights and sought a declaration that the subject policy, underwritten without knowledge of the Mississippi claim, was void ab initio.

the \$2 million policy limits demand. (See correspondence from W. Tucker to R. Sumrall, R-VII-115-3411-3419, 3423-3429). Each again refused.<sup>7</sup> (See July 31, 2002 correspondence from R. Sumrall to W. Tucker, JSL refusal, R-VII-115-3430-3431). The Texas lawsuit was settled with the claimant at mediation for a total amount of \$5 million, \$1 million of which was paid by Southeastern Forge's primary layer insurer and the remaining \$4 million by co-defendants East Texas Mill Supply, Inc. ("ETMS"), Southern Marketing Affiliates of Dallas, Inc., and Southern Marketing Affiliates, Inc. (collectively "SMA"). (See Pleadings in

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<sup>7</sup> Regarding the Texas Incident, JSL states that the Texas Plaintiffs notified Acceptance and Colony of their policy limits settlement demand of \$3 million (\$1 million from Colony; \$2 million from Acceptance). (See JSL Brief at 7). JSL fails to inform the Court that Southeastern Forge also notified JSL of the settlement demand. (See W. Tucker Depo. and correspondence exhibits, R-VII-115-3305-3312, 3318-3319, 3394-3431). JSL further fails to inform the Court that Southeastern Forge, now recognizing JSL's error on the application, made parallel demands for protection to both Acceptance and JSL (or its errors and omissions carrier). Id.

Intervention of ETMS and SMA, R-VI-106-2763-97). By final judgment, the Court ordered Southeastern Forge to indemnify ETMS and SMA for their liability to the Texas Plaintiffs in an amount totaling \$4,457,676.68. (See Texas Judgment, R-II-30-552-558).

On August 29, 2002, after almost two years of litigating the validity of the Acceptance policy, Southeastern Forge offered judgment to Acceptance indicating the policy was void ab initio due to the omission of the prior Mississippi Incident from the application sent to Acceptance. (See R-II-33-571-574).

JSL emphasizes the testimony of Kenneth Smith, an employee of Acceptance, that he would not have questioned Fred Gaunce's<sup>8</sup> pricing of the premium for the Acceptance policy even if JSL had informed him of the Mississippi wrongful death claim. (See JSL Brief at 5). However, Mr. Gaunce actually underwrote the policy and made all premium determinations under this

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<sup>8</sup> Mr. Gaunce was the Senior Underwriter for Commercial Services and Protection, Inc. ("CSPI"), an underwriting agent acting on behalf of Acceptance. Acceptance assigned Mr. Smith to administratively monitor CSPI's underwriting under this program.

program, not Mr. Smith. (See K. Smith July 12, 2002 Depo., R-V-102-2170, 2203-2204). Mr. Smith did not testify that Acceptance would have agreed to insure Southeastern Forge for the original premium. A careful reading of that testimony reveals that Mr. Smith actually testified that if Mr. Gaunce had been made aware of the claim before quoting the premium amount, and Mr. Gaunce had determined to charge the same figure, he would not have countermanded that decision. (See K. Smith July 12, 2002 Depo., R-V-102-2169, 2203-2204). Mr. Gaunce unequivocally testified that had he known of the Mississippi Incident, he would have charged a higher premium for the policy. (See K. Smith July 12, 2002 Depo., R-V-102-2007-2008, 2012-2013; F. Gaunce Dec. 17, 2001 Depo., R-V-104-2449-2452; R-VI-104-2623). In fact, both Messrs. Smith and Gaunce agree that knowledge of the Mississippi Incident would have substantially altered Acceptance's evaluation of the risk it was asked to insure. (See K. Smith July 12, 2002 Depo., R-V-102-2196-2198). Mr. Smith also testified that, had he known of the Mississippi Incident, he might not have even issued the policy at all. (See K. Smith July 12, 2002 Depo., R-V-102-2172).

## **PART TWO**

### **ARGUMENT AND CITATION OF AUTHORITIES**

#### **I. SUMMARY JUDGMENT STANDARD.**

To prevail at summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. Shaffer v. State Farm Mut. Auto. Ins. Co., 246 Ga. App. 244, 540 S.E.2d 227 (2000), citing Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). Southeastern Forge claims injury as a result of JSL's 1) negligence (failure to obtain adequate insurance coverage); 2) breach of contract; and 3) breach of fiduciary duties. (See Complaint, Counts I-III, R-I-3-12-14). Because of the nature of contribution and indemnity claims, JSL's claims against Acceptance must therefore arise from a) at least one of Southeastern Forge's claims against JSL; or b) any claim Southeastern Forge may have against Acceptance. In this matter, however, Southeastern Forge has made, and can make, no further claims against Acceptance. The prior federal action disposed of all claims between Southeastern Forge and Acceptance. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002).

A tortfeasor is generally entitled to assert a claim for contribution or indemnity from a joint tortfeasor. A necessary predicate to recovery, however, is that the parties are jointly liable to the plaintiff for the same damages. An alleged joint tortfeasor who cannot be held liable on the underlying tort claim cannot be held liable for contribution or indemnity. Georgia Ports Auth. v. Andre Rickmers Schiffsbeteiligungsges MBH & Co. KG, 262 Ga. App. 591, 585 S.E.2d 883 (2003), citing O.C.G.A. § 51-12-32 (1987); Southern Ry. Co. v. Brewer, 122 Ga. App. 292, 176 S.E.2d 665 (1970). See also City of Albany v. Pippin, 2004 WL 1757762, \*2-3 (Ga. App. Aug. 6, 2004), quoting Maxwell Bros. of Athens, Inc. v. Deupree Co., 129 Ga. App. 254, 257, 199 S.E.2d 403 (1973) (“contribution among joint tortfeasors must originate in the first instance on the interconnection of acts of negligence on the part of each resulting in damage to the plaintiff.”) (emphasis added).

The Trial Court properly found that it is factually and legally impossible for JSL and Acceptance to be jointly liable to Southeastern Forge for the same damages. If JSL’s omission was material, then JSL breached its duties to Southeastern Forge and it is liable for the resulting damage. Necessarily, then, the Acceptance policy is void ab initio. Since the policy is void from inception,

Acceptance cannot also be liable for those same damages. If, however, the omission was not material, then JSL obtained the insurance it was obligated to obtain, fulfilled each of its duties to Southeastern Forge, and will not be found liable. Without liability to Southeastern Forge, no third-party cause of action – in contribution or indemnity – arises against Acceptance or any other party. Since Acceptance cannot be held liable to Southeastern Forge on the “underlying tort claim,” due to both the nature of the claims alleged against JSL and the prior judgment, JSL’s Third-Party Complaint fails as a matter of law.

## **II. SIMPLE LOGIC SUPPORTS THE TRIAL COURT’S DECISION.**

The Trial Court applied simple logic to the straightforward facts here and granted summary judgment. (See Feb. 24, 2004 Order, R-IX-134-4236-4237). The liability of JSL and Acceptance is mutually exclusive. O.C.G.A. § 33-4-6(a) (2001) sets forth the manner in which an insurer can be liable for an insured’s damages and attorney’s fees, and specifically precludes that possibility in this case:

In the event of a loss which is covered by a policy of insurance and the refusal of an insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has

been made that such refusal was in bad faith, the insurer shall be liable to pay such holder . . . [].

If the omission on the application was material to Acceptance's underwriting, then the policy is void ab initio,<sup>9</sup> and the policy would not "cover"

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<sup>9</sup> A material misrepresentation or omission in an application voids an insurance policy from its inception, or ab initio.

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent recovery under the policy ... unless: (1) Fraudulent; (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or (3) The insurer in good faith would ... not have issued the policy ... if the true facts had been known to the insurer as required either by the application for the policy ... or otherwise.

O.C.G.A. § 33-24-7 (1982). JSL cites to this very statute in its brief. (See JSL Brief at 23-24). A misrepresentation or omission is material if it would influence a prudent insurer in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance. Thompson v.

the loss; Acceptance could not be liable under the contract or under O.C.G.A. § 33-4-6 (2001) to either Southeastern Forge or to JSL in contribution or indemnity. That finding would, however, lead to the conclusion that JSL is liable to Southeastern Forge for its negligence, breach of fiduciary duties, or breach of contract with Southeastern Forge for failing to submit an accurate application for insurance. Conversely, if it is established that the omission on the application was not material to Acceptance's underwriting, then JSL obtained a valid policy of insurance for Southeastern Forge and would have no liability to pass on via a third-party complaint. With no finding of liability against it, JSL has no claim for contribution or indemnity from anyone, much less Acceptance.

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Permanent Gen. Assurance Corp., 238 Ga. App. 450, 451, 519 S.E.2d 249, 250 (1999), citing Georgia Int'l Life Ins. Co. v. Bear's Den, 162 Ga. App. 833, 838, 292 S.E.2d 502, 507 (1982).

The omission in this case was already found to be material in the prior federal action. (See Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga. 2002); Rule 68 Judgment, R-II-33-569-570).

The Trial Court properly found that the simple, straightforward question in this case is whether JSL's omission of the Mississippi Incident was material to Acceptance's underwriting. Regardless of the answer to that question, the liability of JSL and Acceptance is mutually exclusive. (See Feb. 24, 2004 Order, R-IX-134-4236-4237).

The undisputed record clearly supports that conclusion. Fred Gaunce, the actual underwriter of this policy, testified that had he known of the Mississippi claim, he would have charged a higher premium and evaluated the risk differently. (See F. Gaunce Dec. 17, 2001 Depo., R-V-104-2449-2452; R-VI-104-2623). JSL's citations to Ken Smith's and Kim Fincher's testimony are a red herring, in that neither Mr. Smith nor Ms. Fincher underwrote the 1998/1999 policy. (See K. Smith July 12, 2002 Depo., R-V-102-2170, 2203-2204; K. Fincher Dec. 18, 2001 Depo., R-IV-101-1841). In fact, each testified that Mr. Gaunce actually underwrote this policy and each deferred to his greater experience in setting the premium and assessing the risk. (See K. Smith July 17, 2002 Depo., R-V-102-2007-2008, 2012-2013, 2196-2198; K. Fincher Dec. 18, 2001 Depo., R-IV-101-1841, 1914-1915, 1918-1921). Mr. Smith actually testified that, had he personally underwritten the policy and been informed of the Mississippi claim, he might not

have even issued the policy at all. (See K. Smith July 12, 2002 Depo., R-V-102-2172).

While the Trial Court has not yet determined whether the prior federal court judgment collaterally estops JSL from arguing the materiality of its omission,<sup>10</sup> there is no disputed issue of material fact that alters the Trial Court's conclusion on this motion. JSL and Acceptance cannot be joint tortfeasors. A finding by the jury that JSL's admitted omission on Southeastern Forge's application was material will necessarily lead to the conclusion that the Acceptance policy is void ab initio. Acceptance has no obligations and cannot be liable, to either Southeastern Forge or JSL, on a non-existent policy. The Trial Court properly found that JSL cannot avoid this simple logic.

### **III. ACCEPTANCE CANNOT BE LIABLE TO JSL IN INDEMNITY.**

The right to indemnification arises either from a contract between the parties or by operation of law. Fidelity & Deposit Co. of Md. v. Williams, 699 F. Supp. 897, 899 (N.D. Ga. 1988). Neither basis for indemnification exists here. First, it is

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<sup>10</sup> As outlined in greater detail in Acceptance's original Motion for Summary Judgment. (See R-II-74-77-913-1035).

undisputed that JSL and Acceptance had no contractual relationship. Indeed, JSL is a third-party stranger to the insurance contract between Acceptance and Southeastern Forge. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697, 700 (M.D. Ga. 2002) (coverage action in which court dismissed JSL from case because JSL lacked an interest in the subject matter of the litigation:

The Court finds that JSL has never had an interest in the subject matter of this [declaratory judgment] litigation that would have been impaired or impeded by the disposition of this action. JSL's only interest in this litigation arises from the possibility that Southeastern [Forge] may seek indemnification from JSL in a later suit based upon JSL's alleged failure to secure the insurance coverage in question).

One court has already prohibited JSL from seeking enforcement of the insurance contract between Acceptance and Southeastern Forge because JSL did not have a legal interest in the contract. Right or wrong, JSL did not appeal that decision.<sup>11</sup>

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<sup>11</sup> JSL is collaterally estopped from relitigating the question of its legal right to enforce the policy of insurance between Southeastern Forge and Acceptance. Acceptance Indem. Ins. Co. v. Southeastern Forge, Inc., 209 F.R.D. 697 (M.D. Ga.

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2002). “[T]he doctrine of collateral estoppel precludes relitigation of an issue when there is: 1) an identity of parties; 2) a previous determination of same or similar issues in a previous court with competent jurisdiction; and 3) precludes only those issues actually litigated or by necessity had to be decided for the judgment to be rendered.” Cincinnati Ins. Co. v. MacLeod, 259 Ga. App. 761, 765, 577 S.E.2d 799, 803 (2003) (insurer estopped from retrying the amount of damages from the default judgment because it had already defended the insured and obtained a verdict that the insured was not negligent; therefore, all of the damages were attributable to the insurer’s failure to defend timely); Copelan v. Copelan, 261 Ga. App. 726, 728, 583 S.E.2d 562, 564 (2003).

Here, all three elements of collateral estoppel are present. First, both JSL and Acceptance were parties to the Middle District action. Second, the Middle District Court decided the question of whether JSL had an independent right to seek an interpretation of the Acceptance insurance policy in the negative. Southeastern Forge, 209 F.R.D. at 700. Third, it was necessary to the action that the court decide the issue of whether JSL had an independent right to seek an interpretation of the policy:

JSL nonetheless urges this Court to grant it a “second bite” and allow what the federal court in the coverage action refused it. The federal court found that JSL did not have a sufficient legal interest to seek an interpretation of or to enforce the contract between Acceptance and Southeastern Forge. Id. Here, JSL urges the Court to go beyond that and allow it to actually enforce that same contract by requiring Acceptance to indemnify JSL. Such a result is unsupported by the contract itself and the law.

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[T]he Court finds that in order for final judgment to be entered in this case pursuant to the offer of judgment, all of the parties must agree to it or any objecting party must be dismissed from the case prior to the entry of the final judgment.... The Court further finds that allowing JSL to remain as a permissive intervenor will unduly delay and prejudice the adjudication of the rights of the original parties, and therefore, the Court finds that JSL should now be dismissed as a party to this lawsuit without prejudice.... The Court finds that JSL has never had an interest in the subject matter of this litigation....

Id. (emphasis added). This Court cannot permit JSL to argue this issue once again.

Alternatively, JSL must demonstrate that its right to indemnification arises by operation of law. In that case, JSL must prove that its liability to Southeastern Forge “can be considered as damages naturally, legally and proximately flowing” not from its own wrongful acts, but from the wrongful acts of Acceptance. Southern Nitrogen Co. v. Stevens Shipping Co., 114 Ga. App. 581, 584-85, 151 S.E.2d 916, 920 (1966). As pointed out in detail above, it is factually and legally impossible for a jury to conclude that JSL is liable for any damages arising from the “wrongful acts” of Acceptance. If JSL is found liable, it will be because it failed in its duty to properly complete an insurance application on Southeastern Forge’s behalf, causing the Acceptance policy to be void from its inception.<sup>12</sup> Acceptance will not be the wrongdoer. (Compare Complaint, R-I-3-8-9, 12, with JSL Answer, R-I-10-45-46, 51, ¶¶ 13, 21, 55-56).

#### **IV. ACCEPTANCE CANNOT BE LIABLE TO JSL IN CONTRIBUTION.**

Similarly, contribution is unavailable to JSL because, within the framework of Southeastern Forge’s Complaint, JSL is a single tortfeasor. Contribution is the method by which a recoverable loss is pursued against joint tortfeasors. Defendants are joint tortfeasors when their separate and distinct acts of negligence

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<sup>12</sup> As has already been determined in the prior federal action.

concur to proximately produce an injury. O.C.G.A. § 51-12-32 (1987); City of Albany v. Pippin, 2004 WL 1757762, \*2-3 (Ga. App. Aug. 6, 2004); Travelers Indem. Co. v. Liberty Loan Corp. of Poplar, 140 Ga. App. 458, 461-462, 231 S.E.2d 399, 401-02 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977); Maxwell Bros. of Athens, Inc. v. Deupree Co., 129 Ga. App. 254, 257, 199 S.E.2d 403 (1973); Crockett v. Uniroyal, Inc., 772 F.2d 1524, 1529 (11th Cir. 1985).<sup>13</sup> As correctly noted by the Trial Court, JSL can only cause harm to Southeastern Forge if it alone is negligent, and not in combination with any alleged negligence of Acceptance, and therefore JSL and Acceptance can never be joint tortfeasors.

JSL's contribution claim ignores the principle that a defendant cannot use contribution as a means of establishing a third party's liability in contravention of the rules of law which would prevail if the plaintiff had himself sued that third

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<sup>13</sup> The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

party. Georgia S. & Fla. Ry. Co. v. Odom, 152 Ga. App. 664, 668, 263 S.E.2d 469, 473 (1979). In other words, JSL's contribution claim does not make Acceptance liable to JSL, indirectly or otherwise, because of Acceptance's relationship with Southeastern Forge, particularly where a court has already held that Acceptance is not liable to Southeastern Forge. O.C.G.A. § 51-12-32 (1987); Georgia Ports Auth., 262 Ga. App. at 596, 585 S.E.2d at 888 (an alleged joint tortfeasor who cannot be held liable on the underlying tort claim cannot be held liable for contribution or indemnity).

JSL cites to no authority, in statute or common law, that supports its position that both it and Acceptance can be joint tortfeasors. The cases JSL does cite are inapposite to this issue on appeal. See Scott v. Rakestraw, 252 Ga. App. 408, 411, 556 S.E.2d 492, 494 (2001) (defendant entitled to contribution from a motorist in a passenger's personal injury action even where defendant was previously found liable to motorist; prior court found motorist "also negligent to a certain extent", leaving open the possibility, unlike here, that motorist and defendant could be joint tortfeasors); Tenneco Oil Co. v. Templin, 201 Ga. App. 30, 410 S.E.2d 154 (1991) (whether contribution claim must be brought as a compulsory counterclaim or as a cross-claim); Marchman & Sons, Inc. v. Nelson, 251 Ga. 475, 478, 306 S.E.2d

290, 293 (1983) (dismissal with prejudice of underlying suit does not bar action for contribution by one joint tortfeasor against another joint tortfeasor). While these cases demonstrate that a party can bring a third-party complaint prior to adjudication of the underlying liability, they do not advance JSL's argument that it and Acceptance can be joint tortfeasors in the first instance.

**V. JSL BASES ITS ALTERNATIVE THEORIES OF JOINT LIABILITY BETWEEN ACCEPTANCE AND JSL IN AN ATTEMPT TO RELITIGATE THE VALIDITY OF THE ACCEPTANCE POLICY.**

JSL argues that “[a] third party complaint ‘should be allowed to stand if, under some construction of the facts which might be adduced at trial, recovery would be possible.’” Register v. Stone’s Indep. Oil Distribs., 122 Ga. App. 335, 345, 177 S.E.2d 92, 98-99 (1970), rev’d on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971). JSL then concocts a number of scenarios that bear no relation to the facts or law here. These “alternatives” are the only genuine issues of material fact JSL raises to survive summary judgment.

JSL’s first alternative simply argues Southeastern Forge’s rights under the insurance policy with Acceptance, despite the fact that JSL is a third-party stranger to that policy. JSL contends that Acceptance waived “its right to rescind the policy

by failing to promptly notify Southeastern Forge of its intent to do so.” (See JSL Brief at 23). The record clearly and indisputably reflects, however, that Acceptance both properly reserved its rights and successfully prosecuted a declaratory judgment action to prove no waiver or coverage exists. Further, the prior federal court determined, through final judgment, that no waiver exists and that JSL is collaterally estopped from asserting any legal interest sufficient to argue waiver or enforcement of the policy. (See Section III, supra).

JSL’s second alternative also asserts a contract defense, but with a faulty premise. JSL contends that, even if the jury finds that the omission is not material, the jury could find that Acceptance wrongfully rescinded the policy based on JSL’s failure to include a valuation date and applicant’s signature on the application. (See JSL Brief at 25). First, if the Trial Court determines that the omission was material, then no policy exists for any party to enforce, much less a third-party stranger to the contract. Second, JSL raises a breach that Southeastern Forge has not even alleged: the failure to include a valuation date and signature. JSL cannot be found liable on a claim of negligence that Southeastern Forge has not even raised.

JSL's final alternative rests on a theory of indemnity. JSL claims that Southeastern Forge's damages flow solely from Acceptance's negligence:

[t]o the extent that JSL is found liable for negligence, the negligence of Acceptance in denying coverage based on a non-material omission from the application and its bad faith refusal to settle the claim were active and primary, while any negligence of J. Smith Lanier in omitting a non-material loss from the applications for insurance was passive and secondary.

(See JSL Brief at 26-27). JSL then goes on to say, in the next sentence, that "Acceptance would only be authorized to rescind its insurance policy with Southeastern Forge if the omission was found to be material." *Id.* This is exactly the point. JSL could only be found liable for negligence (or breach of fiduciary duty or breach of contract) if the omission was material. If the omission was material, then Acceptance, as JSL acknowledges, rightly (and successfully) sought to have the policy declared void ab initio.

A simple syllogism dictates the Trial Court's grant of summary judgment to Acceptance. As much as JSL would like to place the blame upon Acceptance, it is

not a question of “active” or “passive” negligence. It is a question of the result of JSL’s negligence: a void, non-existent policy of insurance.

**CONCLUSION**

The damages Southeastern Forge seeks are for its uninsured loss, statutory interest, and costs. If JSL had fulfilled its duties, then Southeastern Forge would be insured, and would have incurred no loss at all. If the policy is void due to JSL’s failure to fulfill its duties, then no recovery can be had against Acceptance, either by JSL or by Southeastern Forge because the policy is non-existent.

Respectfully submitted this 3 day of September, 2004.

  
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Attorneys for Appellee Acceptance  
Indemnity Insurance Company

IN THE COURT OF APPEALS

FOR THE STATE OF GEORGIA

J. SMITH LANIER & CO.,	)	
	)	
Appellant,	)	Case No. A04A2138
	)	
v.	)	On Appeal from the Superior
	)	Court of Gwinnett County
ACCEPTANCE INDEMNITY	)	Civil Action File No.
INSURANCE COMPANY,	)	02-A-10795-7
	)	
Appellee.	)	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **BRIEF OF APPELLEE ACCEPTANCE INDEMNITY INSURANCE COMPANY** upon all parties to this matter by depositing a true copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to the counsel of record as follows:

**Counsel for Appellant J. Smith Lanier & Co.**  
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This 3rd day of September, 2003.



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SUPREME COURT OF GEORGIA

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*John Edison*  
SUPREME COURT OF GEORGIA