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CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

J. SMITH LANIER & CO.,

Appellant,

vs.

ACCEPTANCE INDEMNITY
INSURANCE COMPANY,

Appellee.

Case No. A04A2138

On Appeal from the
Superior Court
of Gwinnett County
Civil Action File
No. 02-A-10795-7

BRIEF OF APPELLANT

Respectfully submitted,

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BRIEF OF APPELLANT

COMES NOW, J. Smith Lanier & Co., Appellant in the above-styled civil action, and pursuant to O.C.G.A. § 5-6-34(a) and Appeals Court Rule 27, files this, its Brief of Appellant, showing this Honorable Court as follows:

PART I.

STATEMENT OF FACTS

J. Smith Lanier (Defendant below) is an insurance broker, and Southeastern Forge, Inc. (Plaintiff below, hereinafter "SEF") is its client, a manufacturer of agricultural blades. In 1998, J. Smith Lanier initially prepared and forwarded SEF's insurance application to wholesale broker Leverett Insurance Group (Third Party Defendant below). Pursuant to business custom, Leverett was to complete the loss history on the application. Although evidence shows that, at the time of the application, the omitted claim was

not material to the risk, Acceptance has treated the policy as void and denied coverage for a loss occurring in the policy period. Applicant seeks reversal of the trial court's grant of summary judgment to Acceptance on JSL's Third Party Complaint.

1. 1998 Application for Excess Liability Insurance.

At all times relevant to this action, JSL was the excess coverage Property and Casualty Agent for SEF. JSL initially prepared SEF's applications for excess liability coverage for the 1998/1999 and 1999/2000 policy years. (See Depo. of Culpepper, 06/05/03, R-VIII-120-pp 003694, 003736-38). JSL sent SEF's application for excess liability insurance to Leverett, a wholesale broker and incumbent broker on SEF's primary General Liability coverage, and requested that Leverett provide quotes for coverage. (See Depo. Culpepper, 06/28/01, R-VI-106-pp 002692-93). JSL did not fill in the loss history portion of the application, as pursuant to prior custom and practice, Leverett provided loss history information on applications from JSL. (See Id. and Depo. of J. Leverett, 06/20/01, R-VII-113-pp 003025-26, 003127-29). Leverett attached loss history information to the applications for 1998/1999 and 1999/2000 and marketed the applications to various excess liability carriers. (See Depo. of Leverett, 06/20/01, R-VII-113-pp 002945-47, 003032, 003098). No losses were shown for

1998. (See 1998 Application, R-VI-106-pp 002665-69).

Leverett sent one such excess liability application to Commercial Services and Protection, Inc., (hereinafter CSPI), which acts as a managing underwriter for Acceptance. (See Depo. of Fred Gaunce, 11/06/01, R-V-103-p 002278). CSPI was authorized to bind insurance policies on behalf of Acceptance. Id. at 002279. CSPI received SEF's application from Leverett on October 22, 1998, and calculated coverage and premium prices for SEF. Id. at 002336-66. CSPI confirmed that Acceptance would bind excess coverage for SEF with Acceptance, and issued the policy. (See Id. and Dec. Page, Policy XG 38700172, 1998/1999, R-VI-106-p 002695). This is the policy presently in dispute.

2. The Mississippi Incident.

On August 19, 1998, SEF received notice that, on August 4, 1998, a person was allegedly injured by a defective bush-cutter blade manufactured by SEF. (See Depo. of Culpepper, 06/05/03, R-VIII-120-p 003718). The primary carrier, Colony Insurance, learned of the August 1998 Mississippi Incident within a few weeks of its occurrence. (See Depo. of A. Wright, 04/10/02, R-106-p 002698). It investigated both the liability and damages aspects of the claim. Id. at 002699-002701.

An investigator hired by Colony concluded that the accident

was caused by operator error - the blade broke when the Bush Hog operator failed to raise the mechanism high enough to clear a concrete culvert. Id. at 002702-03. Based on this investigation, Colony did not feel that SEF had much liability exposure. Id. at 002704. It appeared that the accident was caused by error "on the part of the individual operating the machine." Id. at 002705. Although the claim involved death of one person and injuries to others, Colony set its reserve at only \$50,000 on October 2, 1998. Id. Not until March, 1999, did Colony receive new information indicating that there could be problem in the manufacturing process, and increase the reserve. Id. at 002706-09.

It did not appear liability for the Mississippi Incident would reach SEF's excess liability policy. The liability limit on Colony's primary policy was \$1 million, so Acceptance's policy would only be triggered if damages exceeded that amount. CSPI maintains that if a primary carrier sets a low reserve on a loss, then the loss probably would not affect CSPI's underwriting process for an excess liability policy. (See Depo. of Gaunce, R-V-103-pp 002406-07). CSPI generally relies on the accuracy of a low reserve set by the primary carrier. (See Depo. K. Fincher, R-IV-101-pp 001866-67). CSPI would not go out and investigate such a low-reserve incident to make its own determination of fault or

liability. (See Depo. of Gaunce, R-V-103-pp 002406-07). CSPI received notice of the Mississippi claim on January 19, 2000. Id. at 002462-63.

Acceptance's own senior underwriter, Kenneth Smith, confirmed that at the time of the application, knowledge of the August 1998 loss would not have affected underwriting of SEF's excess liability policy. (See Depo. of K. Smith, 07/12/02, R-V-102-pp 002221-22). Mr. Smith directly supervised CSPI in its participation in the Acceptance underwriting program. Id. at 001999-002000. His responsibilities included performing random reviews of CSPI's underwriting process. Id. at 002002. Having obtained a CSPI file, Mr. Smith would look at the application and the information available to CSPI, and evaluate whether policy issued and price charged by CSPI were in compliance with Acceptance underwriting guidelines. Id. at 002002-06. Mr. Smith testified that if he had performed such a random review of the SEF file and considered the application, details of the August 1998 loss as described to Colony, and the \$50,000 reserve, he would not have questioned CSPI's issuance or pricing of the policy. Id. at 002221-22

3. 1999 Renewal of SEF's Excess Liability Insurance.

In October, 1999, SEF applied for a renewal of the Acceptance excess liability policy. JSL forwarded the application to

Leverett, which completed the loss information sections and forwarded the application to CSPI. (See Depo. of Leverett, 06/20/01, R-VI-113-pp 002945-47, R-VII-113-pp 003032, 003098). Kim Fincher of CSPI processed SEF's 1999/2000 renewal application. (See Depo. of Fincher, R-IV-101-pp 001885-92).

Leverett notified CSPI that SEF had a \$120,000 loss in the 1998/1999 policy period. (See Depo. of Fincher, R-IV-101-p 001887). Although the loss did not exist and was mistakenly included by Leverett, CSPI considered the \$120,000 as an amount having been "paid or incurred" on a loss in the 1998/1998 policy period. Id. at 001889. CSPI was also told that Colony had raised its premium - it charged SEF \$7500 for the 1998/1999 policy year, and \$13,500 for 1999/2000. Id. at 001891. *Despite consideration of a \$120,000 loss, and an 80% increase in primary coverage premium, Acceptance did not adjust its premium, but wrote the same coverage amount for the same premium of \$2000.* Id. at 001889-90, and Dec. Page, Policy XG 38700058 1999/2000, at R-VI-106-p 002716.

4. The Texas Incident.

On September 21, 1999, a blade manufactured by SEF flew off of a "bush hog" mower and injured Judd Eddins. (See Eddins Complaint, 03/27/00, at R-VI-106-pp 002718-26). On March 23, 2000, the Texas Plaintiffs made a settlement demand on Acceptance and Colony for

their combined policy limits of \$3 million. (See Corr. Adams to West, 03/23/00, at R-VI-106-pp 002728-31). The demand stated that it would expire on April 8, 2000. Id. It also stated that the Texas Plaintiff would completely indemnify SEF against any future contribution or lien claims. Id. On March 24, 2000, Texas Plaintiffs contacted Colony and Acceptance, reminding them to notify SEF of the fact that the settlement would protect it against any excess judgment in the case. (See Corr. Adams to West, 03/24/00, at R-VI-106-p 002733). Eddins then filed a complaint in Texas regarding this injury, naming SEF as a defendant. (See Complaint, 03/27/00, at R-VI-106-pp 002718-26).

On April 3, 2000, Acceptance sent SEF a letter regarding Policy XG38700172 and the Eddins loss of September 9, 1999. (See Corr. Anderson to Stout, 04/03/00, at R-VI-106-pp 002735-36). Acceptance acknowledged the Eddins claim, accepted the defense, and advised SEF that damages in the case could exceed its coverage. Id. The letter does not contend that the policy is void. Id.

On April 6, 2000, Colony tendered its \$1 million policy limits to the Texas Plaintiffs. (See Corr. Wright to Adams, 04/06/00, at R-VI-106-pp 002738-40). Colony advised Acceptance of the tender, and implored Acceptance to pay its policy limits to protect SEF from excess liability. (See Corr. Wright to Anderson, 04/06/00, at

R-VI-106-pp 002742-43). Colony advised Acceptance that such excess liability would be its sole responsibility. Id.

On the same day, Texas Plaintiffs' counsel extended the time to respond to the policy limits settlement demand to April 28, 2000. (See Corr. Adams to Choate, 04/06/00, at R-VI-106-pp 002745). Colony advised Acceptance that a verdict in the case could reach \$4 million to \$5 million, exclusive of punitive damages and interest, and strongly advised Acceptance to pay its policy limits before the April 28, 2000 deadline expired. (See Corr. West to Anderson, 04/28/00, at R-VI-106-pp 002747-51). On April 27, SEF attorney Tucker repeated SEF's demand that Acceptance pay its policy limits. (See Corr. Tucker to Anderson, 04/27/00, at R-VI-106-pp 002753-54). The settlement demand expired on April 28, 2000, with Acceptance having refused to contribute. (See Corr. West to Adams, 04/28/00, at R-VI-106-pp 002756-58).

On July 7, 2000, Acceptance filed a federal Declaratory Action in Georgia, contending that Policy XG38700172 for 1998/1999 was void *ab initio* due to omission of the August 4, 1998 loss in the October 5, 1998 application for excess liability insurance. (See Acceptance's Statement of Material Facts, R-II-75-p 000916; Complaint for Declaratory Relief, R-I-14-pp 000150-53). This filing occurred five and one half months after Acceptance received

notice of alleged misrepresentations in the application for the 1998-1999 policy, and was the first time it provided notice that it considered the 1998-1999 policy void due to misrepresentation in the application for insurance. SEF counter-claimed against Acceptance for Bad Faith refusal to settle the Texas lawsuit. (See Amended Answer and Counterclaim of SEF, R-III-96-pp 001217-43). Therein, SEF pled: "This is a classic case of an insurance company's bad faith refusal to settle a claim within policy limits when such a settlement was eminently reasonable and would have avoided catastrophic exposure to the insured." Id. at 001223.

On October 17, 2000, mediation was held in the Texas lawsuit. (See Corr. Adams to West, 10/17/00, at R-VI-106-pp 002760-61). Acceptance did not contribute to the settlement. The remaining Texas defendants, ETMS and SMA, paid a total of \$4 million, and later intervened in the declaratory action. (See Pleadings in Intervention of SMA and ETMS, at R-VI-106-pp 002763-97). A "Final Judgment" in the Texas matter ordered that SEF indemnify SMA and ETMS for liability to the claimant in an amount totaling \$4,457,676.68. (See Texas Judgment, at R-VI-106-pp 002799-002802).

STATEMENT OF PROCEEDINGS

Southeastern Forge, Inc. filed suit against J. Smith Lanier & Co., J. Smith Lanier & Co. of Atlanta, and J. Smith Lanier & Co. of Columbus on October 4, 2002. (R-I-3-pp 000005-000027). Plaintiff's Complaint alleged Negligent Failure to Procure Insurance, Breach of Contract to Procure Insurance, Breach of Fiduciary Duty to Procure Insurance, and Breach of Duty to Settle claims on behalf of Plaintiff/Appellee. Id. As damages, SEF claimed the \$4.4 million Texas Judgment as well additional interest, costs and expenses. Id. Appellant J. Smith Lanier & Co., which Plaintiff misnamed in its Complaint as J. Smith Lanier & Co. of Atlanta, and J. Smith Lanier & Co. of Columbus, filed a timely Answer on November 22, 2002, denying liability. (R-I-10-pp 000041-000054). The three entities named as Defendants merged in 1994 and became the single entity J. Smith Lanier & Co. Id. at 000041.

Defendant/Appellant JSL filed its Third Party Complaint against Appellee Acceptance Indemnity Insurance Company (hereinafter "Acceptance" or "Appellee") and Leverett Insurance Group on November 25, 2002. (R-I-11-pp 000055-000121). Appellee filed its answer to the third party complaint January 15, 2003. (R-I-22-pp 000306-000318). On August 25, 2003, Acceptance filed

its Motion for Summary Judgment (R-II-74-pp 000913-000914), Statement of Material Facts, (R-II-75-pp 000915-000918), Theories of Recovery (R-II-76-pp 000919-000920), and Memorandum of Law (R-II-77-pp 000921-001035).

JSL filed its response on October 2, 2003. This included its Response to Acceptance's Statement of Facts and JSL's own Statement of Material Facts and Theories of Recovery (R-III-95-pp 001148-001155), and Brief in Response (R-III-96-pp 001156-001290). Acceptance filed a Reply Brief on November 3, 2003 (R-III-99-pp 001465-001689). JSL filed its Request for Oral Argument and Sur-Response Brief on December 1, 2003. (R-VI-105-pp 002635-002636; R-VI-106-pp 002637-002846). On the day of the hearing, January 6, 2004, Acceptance filed a Supplemental Memorandum of Law. (R-VIII-121-pp 003853-003968). By permission of the Court, JSL then filed a Supplemental Response on January 22, 2004. (R-VIII-125-pp 003977-003984).

In an Order dated February 24, 2004, the Court granted Appellee Acceptance's Motion for Summary Judgment. (R-VIII-134-pp 004236-004237). Appellant JSL filed a timely Certificate of Immediate Review on March 2, 2004. (R-IX-137-pp 004307). JSL's Application for Interlocutory Appeal was filed on March 12, 2004. That application was granted on April 12, 2004. (R-I-2-p 000004).

Appellant filed its Notice of Appeal on April 13, 2004. (R-I-1-p 000001-03).

**METHOD OF PRESERVATION OF
ENUMERATION OF ERROR ON APPEAL**

Appellants' enumeration of error flows from the trial court's order granting the Motion for Summary Judgment of Appellee Acceptance Indemnity Insurance Company. The enumeration of error was properly preserved by submission of evidence at the trial court level and by the filing of a timely notice of appeal.

PART II.

ENUMERATION OF ERROR

- I. Grant of Motion for Summary Judgment was in Error, as Liability of an Insurer and an Insurance Broker are not Mutually Exclusive under Plaintiff SEF's Complaint.
- II. Grant of Motion for Summary Judgment was in Error, as Genuine Issues of Material Fact Exist as to Whether Acceptance is Liable to JSL in Contribution and Indemnity.

STATEMENT OF JURISDICTION

The Court of Appeals of Georgia has jurisdiction over this case on appeal, as this case is not in the category of cases of which the Supreme Court has exclusive jurisdiction under the Constitution of the State of Georgia, Article VI, § 5, ¶ 3 and

Article VI, § 6, ¶ 3. Jurisdiction to hear this appeal is granted to this Court by the Constitution of Georgia, Article VI, § 5, ¶ 3.

PART III.

STANDARD OF REVIEW

In reviewing the grant or denial of summary judgment, an appellate court will apply a de novo standard of review and consider the evidence with all reasonable inferences therefrom in favor of the party opposing summary judgment. Neighborhood Assistance Corp. of America v. Dixon, 265 Ga. App. 255 (2004).

ARGUMENT AND CITATION OF AUTHORITY

The Trial Court erroneously granted Acceptance's Motion for Summary Judgment, as it based its decision on an incorrect statement of law and disregarded substantial genuine issues of material fact. In that Order, the Court held that "[a] jury must determine whether the omission was material in order to make its determination of liability as to each count" against JSL. (R-VIII-134-p 004236). However, JSL is an insurance broker, and "materiality" is not an element of any claim against it.

The Trial Court further held that JSL's Third Party Complaint failed, as liability of JSL and Acceptance is mutually exclusive.

It stated, "[i]f the jury finds the omission was not material," then "Plaintiff cannot recover against Defendant JSL," and "there is no derivative liability to pass on." Id. But "[i]f the jury finds the omission was material, Defendant JSL bears the loss," and "there could be no claim or recovery" against Acceptance." Id. The Trial Court's conclusion is not supported by the law or the evidence. Under the claims and allegations pled in Plaintiff's Complaint, both JSL and Acceptance could be found liable, whether omission of information from the application is found to be material or not. This leaves genuine issues of material fact as to whether Acceptance may be liable to JSL in contribution and/or indemnification.

Official Code of Georgia section 9-11-14 permits a defendant to implead any party which might be responsible for "all or part" of the damages sought by plaintiff. See O.C.G.A. § 9-11-14. The purpose of the statute is "to avoid multiplicity of actions, to save time and cost of reduplication of evidence and to assure consistent results from similar evidence and common issues." Insurance Co. of North America v. Atlanta Supply Co., 121 Ga. App. 1 (1970). The third party defendant need not have breached any duties to the third party plaintiff. Rather, it may be shown that the third party defendant, through its own acts, omissions, and

breaches of duties to the original plaintiff, caused the damages sought by the plaintiff. See O.C.G.A. § 51-12-32; Marchman & Sons, Inc. v. Nelson, 251 Ga. 475, 477 (1983); Scott v. Rakestraw, 252 Ga. App. 408, 409 (2001).

The evidence may show that the third party defendant is liable for the full amount of plaintiff's damages. The statute expressly permits impleader where the third party defendant may be liable for "all" of the plaintiff's claim against the defendant. See O.C.G.A. § 9-11-14. In the present case, the Trial Court's holding regarding mutual exclusivity of liability would render that statutory language meaningless. However, "it cannot be presumed that the legislature intended that any part of a statute would be without meaning and mere surplusage." Transportation Ins. Co. v. El Chico Restaurants, 271 Ga. 774, 776 (524 S.E.2d 486) (1999). Thus, JSL's third party complaint would stand even if Acceptance was found liable for all damages sought by Plaintiff.

In Georgia law, "contribution" refers to apportioning damages between joint tortfeasors by requiring each to pay his proportionate share, while "indemnity" implies a shifting of the entire loss from the party who paid the judgment to the tortfeasor who should in fairness bear it. See Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F. Supp.2d 1342 (S.D. Ga. 2000).

"Indemnification contemplates imputed liability arising from the torts of another. A person who is compelled to pay damages because of liability imputed to him as the result of a tort committed by another may maintain an action for indemnity against the person whose wrong has thus been imputed to him." Crawford v. Johnson, 227 Ga. App. 548, 549 (1997).

As expressed in Appellee's Third Party Complaint, the damages claimed by Southeastern Forge are "naturally, legally, and proximately flowing" from the wrongful acts of Acceptance. To the extent that JSL is found liable, 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. While JSL denies any liability to SEF, it must argue the possibility of such liability in support of a third party complaint. 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 (1979).

A. The Trial Court Erred in Holding that Liability of JSL and Acceptance is Mutually Exclusive Due to Materiality, as Materiality is Not an Element or Predicate to Liability of JSL.

The Trial Court held that "[a] jury must determine whether the omission was material in order to make its determination of liability as to each count" against JSL. (R-VIII-134-p 004236). However, "materiality" is not an element of any claim against JSL. As pled in its Complaint, Plaintiff could succeed on its claims against JSL without presenting any evidence regarding materiality. Rather, materiality is one measure of whether Appellee properly rescinded its insurance policy with Plaintiff. It was error for the Trial Court to supplant the standard of liability for a broker with the standard for liability of an insurance carrier.

Plaintiff's Complaint pleads no fewer than six bases of liability of JSL: Negligent failure to list the Mississippi claim on the 1998 application; Negligent failure to notify the intermediate broker of that claim; Breach of Contract to procure insurance; Breach of Fiduciary Duty to procure insurance; Breach of Fiduciary duty to assist SEF in settling the Texas claim; and Breach of Fiduciary duty to indemnify SEF for the judgments against it. See Plaintiff's Complaint, R-I-3-pp 000005-27). If a single

one of these claims could survive without a finding on materiality, then the Trial Court's ruling was erroneous.

The essential allegations of the failure to procure claims are that JSL negligently omitted the August 1998 Mississippi claim from SEF's 1998 application for excess liability insurance, and that omission caused Acceptance to deny coverage for the September 1999 Mississippi claim. Id. Plaintiff alleges that JSL "failed to act with ordinary care, skill and diligence" when it left the loss history portion of the 1998 application blank and "neglected" to inform the intermediate broker of the August 1998 claim. Id. at ¶¶ 45, 46. As a result, SEF alleges that it incurred personal liability for the September 1999 loss, totaling to "an amount no less than \$4.75 million plus interests and costs." Id. Plaintiff SEF now seeks that amount, including its lost coverage, excess judgments, and expenses, from JSL. Id.

If an independent insurance agent or broker "undertakes to procure insurance for another and is guilty of fraud or negligence in his undertaking, he is liable for loss or damage to the limit of the agreed policy." Beiter v. Decatur Federal Savings & Loan Assn., 222 Ga. 516, 518 (1966). Accord Clark, Davis & Easley Ins. Agency, Inc. v. Tile Technology, Inc., 217 Ga. App. 809, 810 (1995). This claim against a broker for failure to procure

insurance is the same whether it is phrased as one for negligence or breach of contract. See Minter v. Georgia Piggly-Wiggly Co., 185 Ga. 116 (1937), citing Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599 (1921). There is no claim for breach of fiduciary duty to procure insurance. When a broker has been retained to procure a particular type and amount of insurance and negligently fails to do so, it is a breach of "a contractual relationship rather than the negligent performance of a fiduciary duty." McCulloughs Service Station, Inc., v. Wilkes, 183 Ga. App. 687, 690 (1987).

"Materiality" is not an element of any claim against JSL. As Southeastern Forge pled in its Reply in Support of Plaintiff's Second Motion to Compel: *"The question of whether the policy of insurance issued by Acceptance Indemnity Insurance Company to Southeastern Forge was void ab initio does not form the substance of Plaintiff's claim here."* (R-II-69-p 000876). Rather, the word references the legal authority of an insurance carrier to rescind a policy it has issued to its insured. An insurer may prevent recovery under a policy if the insured omitted information from its application which would have been "material either to the acceptance of the risk or to the hazard assumed by the insurer." O.C.G.A. § 33-24-7.

It is not necessary that a jury determine whether the omission was material in order to make its determination of liability against JSL. As pled in its Complaint, Plaintiff could succeed on its claims against JSL without presenting any evidence regarding materiality. Further, JSL could succeed in defense of Plaintiff's Complaint without presenting any evidence as to materiality. The evidence shows that JSL procured an insurance policy of the type and amount requested by Plaintiff. (See Depo. of Gaunce, 11/06/01, R-V-103-pp 002366 and Dec. Page, Policy XG 38700172, 1998/1999, R-VI-106-p 002695).

In Count Two of its Complaint, Plaintiff claims that JSL breached fiduciary duties to SEF. (See Complaint, R-I-3-p 000005, ¶¶ 51-64). Plaintiff contends this fiduciary duty required JSL "to consider and protect Southeastern Forge's interests more than its own," "to assist Southeastern Forge in settling the Texas incident," and "to indemnify Southeastern Forge for the adverse verdict against" it. Id. at ¶¶ 60-62. There is no evidence or allegation that those fiduciary duties were contingent or triggered upon omission of material information from SEF's application. Rather, Plaintiff pleads that JSL always "owes fiduciary duties to its customers." Id. at ¶ 53. As a result of a breach of that

duty, Plaintiff pleads that JSL is liable for all resulting damages. Id.

JSL denies all liability to Plaintiff and has moved for summary judgment on the Fiduciary Duty claim, but to date, the Trial Court has not ruled on the issue. The viability of Plaintiff's breach of fiduciary duty claim against JSL was not before the Trial Court upon consideration of Acceptance's Motion for Summary Judgment. Thus, for purposes of the third party complaint against Appellee, we must assume that JSL may be liable on the breach of fiduciary duty claim as pled. Plaintiff's Complaint does not hinge this liability on whether material information was omitted from the complaint. Rather, it contends the duties exist as part of the relationship between JSL and all its customers. Accordingly, the Trial Court erred in holding that "a jury must determine whether the omission was material in order to make its determination of liability as to each count" against JSL.

B. The Trial Court Erred in Holding that Liability of JSL and Acceptance is Mutually Exclusive Due to Materiality, as a Finding of Materiality is not Conclusive as to Liability of JSL and Acceptance.

Standing alone, a finding of "materiality" is not conclusive as to the liability of either JSL or Acceptance. At this point in the proceedings, it is erroneous to state as a matter of law that JSL cannot be liable if the omission was not material and Acceptance cannot be liable if the omission was material. Rather, genuine issues of material fact exist as to the Third Party Claims against Acceptance. JSL denies all liability to Plaintiff, but for purposes of supporting its Third Party Complaint, must argue the possibility of incurring liability. These issues, and the potential liability of JSL, exist whether the omitted information was material or not. 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 (1979). As this possibility of recovery presents a valid third party claim, it was error for the Trial Court to grant Acceptance's Motion for Summary Judgment.

If the omitted information was material, JSL and Acceptance could both be found liable. Plaintiff SEF contracted broker JSL to procure a policy of excess liability insurance. SEF alleges that JSL breached that contract by failing to list the Mississippi claim on SEF's 1998 application and by failing to notify Leverett, the intermediate broker, of that claim. Appellee Acceptance later

refused to provide coverage under the contract and sought to have the 1998/1999 policy declared void. (See Acceptance's Statement of Material Facts, R-II-75-p 000916; Complaint for Declaratory Relief, R-I-14-pp 000150-53). As a result, Plaintiff incurred personal liability for subsequent judgments and now seeks to hold JSL liable for all damages. Id. at p 000014. Taking SEF's claim as pled, a jury could find that JSL was negligent in omitting information which was material to the acceptance of the risk by Appellee and thus is liable on Plaintiff's Complaint.

The jury would then go on to consider Appellant's Third Party Complaint against Acceptance. It could find that, while the omitted information might have been material to acceptance of the risk, Appellee waived its right to rescind the policy by failing to promptly notify SEF of its intent to do so. Having waived that defense, Acceptance owed coverage to Plaintiff and would be liable to JSL in contribution and/or indemnification.

At the very least, genuine issues of material fact exist as to whether Acceptance waived its ability to rescind the policy. Georgia statute provides that "misrepresentations, omissions, concealment of facts, and incorrect statements," in insurance applications "shall not prevent a recovery under the policy" unless the omission is "material either to the acceptance of the risk or

to the hazard assumed by the insurer." O.C.G.A. § 33-24-7. However, notice to the insured of an "intent to rescind the contract must be made in a timely fashion, as soon as the facts supporting the claim for rescission are discovered." Holloman v. D.R. Horton, Inc., 241 Ga. App. 141, 146 (1999).

In Florida International Indemnity Co. v. Osgood, this Court held that an insurer waived that defense when it failed to promptly rescind the contract upon discovering misrepresentation in the application. Florida International Indemnity Co. v. Osgood, 233 Ga. App. 111, 115 (1998). The Court emphasized that a party seeking to avoid a contract on the ground of fraud or mistake "must, upon discovery of the facts, at once announce his purpose and adhere to it. Otherwise, he cannot avoid or rescind such contract." Id. at 113. To the Court, the "key" issue was "the time of [the insurer's] learning of the fraud." Id. at 115, n14.

In the present case, Acceptance's agent, CSPI, received notice of the Mississippi claim on January 19, 2000. (See Depo. of Gaunce, R-V-103-pp 002462-63). Not until July 7, 2000, did Acceptance file its federal Declaratory Action, contending that Policy XG38700172 for 1998/1999 was void *ab initio* due to omission of the August 4, 1998 from the 1998 application. (See Acceptance's Statement of Material Facts, R-II-75-p 000916; Complaint for

Declaratory Relief, R-I-14-pp 000150-53). This filing, nearly five and one half months after Acceptance received notice of omission from the application, was the first time it provided notice that it considered the 1998-1999 policy as void due to alleged misrepresentation in the application. Whether Acceptance waived its defense by failing to promptly rescind the policy is a question for the jury.

It was error for the Trial Court to grant Appellee's dispositive motion on the grounds that "if the jury finds the omission to be material, . . . there could be no claim or recovery sustained against Acceptance whatsoever." (Order, R-IX-134-p 004237). As shown above, a jury could find that the omission was material, but Acceptance waived its policy defense, and is liable for contribution and/or indemnification.

Similarly, both JSL and Acceptance could be found liable if the omission is found not to be material to Acceptance's underwriting. An insurance expert recently testified in this case that, even if no material information was omitted from the application and Acceptance wrongfully rescinded the policy, a broker breached the duty of care by failing to include a valuation date and applicant's signature on the application. (Depo. of Dr. Joseph Launie, 03/22/04, p. 44, 49 [record to be supplemented]).

The valuation date for loss information on an application notifies the carrier of a gap in information, and if a carrier wants loss information for the period between the valuation date and the application date, it may request it. Id. at 66. The absence of that valuation date has "affected the entire sequence of events" in this case, leading Acceptance to assert its purported coverage defense and subsequent judgments against Southeastern Forge. Id. at 44, 49. A jury could find that, although the omitted information was not material to Acceptance's underwriting, the omission did open the door to the defense and lead to litigation over the matter.

In the alternative, JSL could be entitled to indemnification from Acceptance. "A person who is compelled to pay damages because of liability imputed to him as the result of a tort committed by another may maintain an action for indemnity against the person whose wrong has thus been imputed to him." Crawford v. Johnson, 227 Ga. App. 548, 549 (1997). As expressed in Appellee's Third Party Complaint, the damages claimed by Southeastern Forge are "naturally, legally, and proximately flowing" from the wrongful acts of Acceptance. To 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.

Acceptance would only be authorized to rescind its insurance policy with SEF if the omission was found to be material. See O.C.G.A. § 33-24-7. Acceptance's own Senior Underwriter Kenneth Smith, who had direct supervision over general agent CSPI, testified that if he had performed such a random review of the SEF file, considering the application, knowledge of the August 1998 loss as it was described to Colony, and the \$50,000 reserve, he would not have questioned CSPI's issuance or pricing of the policy.

(See Depo. of K. Smith, 07/12/02, R-V-102-pp 002221-22). During underwriting of the same policy the following year, CSPI considered a \$120,000 loss and an 80% increase in the premium for the primary coverage, but still did not change the premium or coverage for the policy. (See Depo. of Fincher, R-IV-101-pp 001889-90, and Dec. Page, Policy XG 38700058 1999/2000, at R-VI-106-p 002716).

Based on this evidence, the jury could find that the omission was not material, and hold Acceptance liable for wrongfully declaring the policy void and for bad faith failure to settle the Texas claim within policy limits. JSL would then be entitled to indemnification from Acceptance for its liability to

Plaintiff. As none of Plaintiff's claims against JSL hinged on materiality, it could be held liable under any of the six or more bases of liability alleged by Plaintiff. Contrary to the Trial Court's holding, derivative liability would pass on to Appellee.

CONCLUSION

The Trial Court erred in granting Appellee's Motion for Summary Judgment. As "materiality" is not an element of any claim against JSL, the potential liability of JSL and Acceptance are not mutually exclusive. Further, material issues of genuine fact exist as to JSL's Third Party Complaint.

This 26th day of July, 2004.

Respectfully Submitted,

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FOR THE STATE OF GEORGIA

J. SMITH LANIER & CO.,

Appellant,

vs.

ACCEPTANCE INDEMNITY
INSURANCE COMPANY,

Appellee.

Case No. A04A2138

CERTIFICATE OF SERVICE

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

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