

ORIGINAL

**IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA**

FILED IN OFFICE

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CLERK COURT OF APPEALS OF GA

J. SMITH LANIER & CO.,

Appellant (A04A2138)

Appellee (A05A0939),

vs.

ACCEPTANCE INDEMNITY
INSURANCE COMPANY,

Appellee (A04A2138),

vs.

SOUTHEASTERN FORGE, INC.,

Appellant (A05A0939)

Case No. A04A2138

Case No. A05A0939

**MOTION FOR RECONSIDERATION
OF APPELLANT (A04A2138) / APPELLEE (A05A0939)**

Respectfully submitted,

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COMES NOW, J. Smith Lanier & Co., Appellant in Case No. A04A2138 and Appellee in Case No. A05A0939, and pursuant to Rule 37 of the Rules of the Court of Appeals of the State of Georgia, hereby moves this Honorable Court to reconsider its opinion dated March 29, 2005, and respectfully shows this Court that it overlooked material facts in the record and controlling case law. This Court's March 29, 2005 Opinion is attached hereto as Exhibit "1."

PART I.

STATEMENT OF FACTS

In its Opinion, the Court addressed two separate Appeals.

In Case No. A04A2138, J. Smith Lanier & Co. (JSL) appeals the grant of summary judgment to its third party defendant, Acceptance Indemnity Insurance Company. The Court affirmed the grant of summary judgment to Acceptance, holding that liability of JSL and Acceptance were mutually exclusive and that JSL's third party complaint was based on liability of Acceptance to SEF, not liability of Acceptance to JSL. JSL respectfully submits that, by affirming summary judgment, this Court overlooked certain material facts and discounted valid law supporting JSL's position that the Trial Court erred by granting Acceptance's motion. A defendant/third-party plaintiff may show 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 against the defendant/third-party plaintiff.

In Case No. A05A0939, SEF appeals the grant of partial summary judgment to JSL. SEF argues that JSL could be liable for more than the \$2 million policy limits of its insurance policy, despite case law to the contrary. The Court's Opinion affirms grant of summary judgment on SEF's Fiduciary Duty Claim, but reverses summary

judgment on the limitation of damages issues. JSL respectfully submits that, by holding a broker liable for more than policy limits, this Court overlooked relevant material facts and implicitly reversed over a century of controlling authority.

ARGUMENT AND CITATION OF AUTHORITY

CASE NO. A04A2138

I. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER ACCEPTANCE IS A JOINT-TORTFEASOR AND MAY BE LIABLE ON JSL'S THIRD PARTY COMPLAINT.

Official Code of Georgia section 9-11-14 permits a defendant to implead any party which might be responsible for some or all the damages sought by plaintiff. See O.C.G.A. § 9-11-14. That statute provides that "a defendant, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him" 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). Through its claims for contribution and indemnity, a defendant/third-party

plaintiff may show that the third party defendant is liable for some or all of the damages sought by the plaintiff. See O.C.G.A. § 51-12-32.

Acceptance was granted summary judgment on JSL's third party complaint essentially on the grounds that the complaint attempted to supplant one defendant with another. However, as Plaintiff's Complaint is plead, JSL could be entitled to contribution and/or indemnification due to the derivative liability of Acceptance. JSL's third party complaint asserts claims for contribution and indemnification which are preserved by O.C.G.A. § 51-12-32 and authorized to be brought in the present action by O.C.G.A. § 9-11-14.

The trial court erred by failing to consider that a defendant/third-party plaintiff may show 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 against the defendant/third-party 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); State Line Metal, Inc. v. Aluminum Co. of America, 216 Ga. App. 14, 15 (1994); Tenneco Oil Co. v. Templin, 201 Ga. App. 30 (1991). A defendant/third-party plaintiff's right to contribution and

indemnity from the third-party defendant will "continue unabated" regardless of whether plaintiff has already entered a "compromise or settlement" of its direct claim against the third-party defendant. O.C.G.A. § 51-12-32. Accordingly, JSL's third-party claims that Acceptance caused some or all of Plaintiff's damages when it breached duties to Southeastern Forge, "are not extinguished by release, dismissal, or judgment in the underlying litigation." Scott v. Rakestraw, 252 Ga. App. 408, 409 (2001).

SEF's complaint alleges that its broker is liable for negligence and failure to procure insurance, and that SEF suffered damages as a result. JSL's Third-Party Complaint seeks contribution and indemnification from Acceptance. Genuine issues of material fact exist as to that 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) (emphasis added).

Under the facts of this case, it is possible that both SEF's broker and Acceptance could be found liable if the omission is found not to be material to Acceptance's underwriting. A nationally known and respected insurance expert 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; R[A05A0939]-I-26-p. 112). 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 light of these facts, genuine issues of material fact exist as to whether Acceptance is a joint-tortfeasor which may be liable for some or all of the damages alleged in Plaintiff's Complaint. It was therefore error for the trial court to grant summary judgment to Acceptance. JSL respectfully requests that the Court reconsider its Opinion in light of these facts, and reverse the grant of summary judgment to Acceptance.

CASE NO. A05A0939

I. THE COURT'S HOLDING THAT A BROKER FAILING TO PROCURE INSURANCE MAY BE LIABLE FOR LOSSES GREATER THAN THE LIMIT OF THE AGREED POLICY IS CONTRARY TO CONTROLLING AUTHORITY.

This Court reversed the trial court's grant of summary judgment to JSL, holding that a broker may be liable for damages in excess of the policy limits. However, JSL respectfully submits that the Court's Opinion disregards controlling authority which is directly on point. "There is controlling authority for the proposition that where one 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., 22 Ga. 516, 518 (1966). The Court's Opinion is directly contrary to and/or implicitly overrules over a century of relevant Georgia cases.

The Court reasons that the cited authority is not controlling because it says brokers may be liable within the limits of the insurance policy, but is silent as to liability in excess of the policy limits. An analogy may be illustrative on this point:

A mother tells her young child that he may go outside and play within their fenced-in yard. The son promptly runs through the yard, outside the fence and down the street. When he returns, the mother is furious and shouts "I told you to play inside the yard!"

The son responds, "yes, but you didn't tell me I couldn't play *outside* the yard."

Clearly, the mother *did* tell the son he could not play outside the yard. The entire reason the mother told him to play *in* the yard was so he would not go *outside* of the yard. Otherwise, the mother would have said, "go wherever you want" or said nothing at all. The child in this example deliberately disobeyed his mother.

JSL respectfully submits that the example above is analogous to interpretation of the cases relevant to this case. The limit of Southeastern Forge's policy was \$2 million, thus under controlling authority, JSL could not be liable for more than that amount. However, this Court accepted Southeastern Forge's argument that potential liability is not limited by the terms of the policy: "But in none of the cases cited by the trial court, nor in the cases cited by JSL on appeal, was the question resolved whether such broker may be liable for damages in excess of the policy limits." Opinion, page 17-18.

JSL respectfully disagrees, as *each* of the cited cases

expressly hold that such a broker *cannot* be liable for damages in excess of the policy limits. To say that a broker may be liable "to the limit of the agreed policy" is the same as saying that a broker cannot be liable for more than the limits of the agreed policy. The numerous courts previously addressing this exact issue did not say that a broker could be liable for "any resulting loss" without limitation. Rather, they said brokers could be liable only to "the limit of the amount of the agreed policy." To hold otherwise is to render meaningless the plain and consistent language of controlling authority. There is no other possible interpretation of the language that a broker may only be "liable for loss or damage to the limit of the amount of the agreed policy" than that a broker cannot be liable for more than the limits of the policy.

For more than one hundred years, Georgia courts have consistently held that a broker negligently failing to procure insurance "may be liable for loss or damage to the limit of **the amount** of the agreed policy." Home Bldg. & Loan Ass'n v. Hester, 213 Ga. 393, 395 (1957) (emphasis added). Georgia Courts' consistent application of this standard may be traced back through Minter v. Georgia Piggly-Wiggly Co., 185 Ga. 116 (1937), which cites Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599 (1921).

The Elam case involves a breach of contract claim by an insured against its insurance broker for failure to obtain adequate insurance coverage. Id at 604. Therein, it is stated that it "is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he as assumed, and *within the amount of the proposed policy* he may be held liable for the loss properly attributable to his negligent default." Id. at 602 (emphasis added), citing Thomas v. Funkhouser, 91 Ga. 478 (1893) (agent breached duty to procure fire insurance; house a total loss at \$1,800; claim against broker for \$1,000, which was the limit of the amount of the agreed policy). The potential liability of an insurance broker for failure to secure adequate insurance coverage, in either tort or breach of contract, is limited to the amount of the policy.

SEF argued below that "All the decisions JSL cites in support address the failure of an agent to procure first party insurance or claims within the limits of the would-be coverage. . ." See SEF's Response to JSL's MSJ, p. 11. SEF has never shown support for that statement. Such a conclusion certainly cannot be drawn from the cases themselves. See Hester, 213 Ga. 393 (1957) (not specified);

Robinson 220 Ga. App. 737 (1996) (not specified); Tile Technology, 217 Ga. App. 809 (1995) (not specified); Mosely, 199 Ga. App. 99 (1991) (type of loss covered, amount of claim not specified); Arnold, 175 Ga. App. 850 (1985) (not specified); Roland, 135 Ga. App. 263 (1975) (not specified).

In at least one Georgia Supreme Court case, the court does specify the amount of the loss and the limits of the policy. In that case, the uninsured loss was nearly twice the policy limits, but the claim against the broker was for policy limits. See Thomas v. Funkhouser, 91 Ga. 478 (1893). Although many cases hold that a broker can only be liable up to the policy limits, not a single case (until the present opinion) holds that a broker may be liable for more than the policy limits.

Contrary to SEF's assertion, each of the cited cases do say that a broker's liability cannot exceed the policy limits. SEF, and now the Court's opinion, rely on unsupported assumptions about these cases to overrule their express language. SEF has never cited a single case holding that a broker may be liable for more than the policy limits. JSL has cited many cases holding that a broker cannot be liable for more than the policy limits.

The application of the doctrine of *stare decisis* is essential to the performance of a well-ordered system of jurisprudence; in

most instances, it is of more practical utility to have the law settled and to let it remain so, than to open it up to new constructions, as the personnel of the court may change. See Etkind v. Suarez, 271 Ga. 352 (1999). As the clear and controlling authority on this issue limits liability of brokers to the amount of the policy, JSL respectfully requests that the Court reconsider its Opinion and affirm the Order of the trial court.

II. THE COURT'S OPINION MISCONSTRUES LIABILITY OF INSURERS AND IMPROPERLY APPLIES THAT STANDARD TO BROKERS.

The Court's Opinion reasons that an insurer may be liable for judgments exceeding policy limits, so a broker should as well. However, an insurer is not liable for judgments exceeding policy limits except in narrow instances created by law, and applying only to insurers. By holding that JSL may be liable for excess judgments against SEF, the Court does not simply place JSL into the shoes of SEF's insurer. Rather, the Court places JSL into the shoes of a carrier *who has tortiously breached its duty to settle claims*.

There is no question in this case that the Mississippi claim was a loss covered by the terms of Acceptance's policy. Assume for

the sake of argument that the plaintiff in the Mississippi action made a demand within policy limits, but in bad faith, Acceptance refused to tender the policy limits. Further assume the case was later settled for about \$5 million and the settling defendants obtained a judgment for indemnification against SEF. SEF would have a claim against Acceptance for the \$2 million in coverage plus the excess judgment.

Acceptance's liability for that excess judgment would be based on its bad faith refusal to pay the claim within 60 days of a demand. See O.C.G.A. § 33-4-6. "Bad faith" is shown by evidence that, under the terms of the policy upon which the demand is made and under the facts surrounding the response to that demand, the insurer had no "good cause" for resisting and delaying payment. See Georgia Int'l Life Ins. Co. v. Harden, 158 Ga. App. 450 (1981).

"Bad faith" is the "frivolous and unfounded refusal to pay a claim." Dixie Constr. Prods. Inc. v. WMH, Inc., 179 Ga. App. 658 (1986). If the insurer has tortiously refused to pay the claim and then a judgment exceeding the policy limits is entered against the insured, the insurer is liable for the full amount of the judgments. See Shaw v. Caldwell, 229 Ga. 87 (1972).

An insurer's duty to settle in good faith is created by statute and applies only to insurers. See O.C.G.A. § 33-4-6. SEF

has never cited any case or authority holding that a broker, or any other accused tortfeasor, has a similar duty to settle. The Court's Opinion in this case does not cite any case or other authority holding that a broker or any other accused tortfeasor, has a similar duty to settle.

The Court's Opinion does not hold that JSL may be "liable for loss or damage to the limit of the agreed policy." See Beiter v. Decatur Federal Savings & Loan Assn., 222 Ga. 516, 518 (1966). Rather, it presumes either (1) that all accused tortfeasors have a duty to settle and do not have the right to litigate their liability, or (2) that Acceptance would have, in bad faith, breached its statutory duty to settle within 60 days of a demand, and JSL should "step into the shoes" of an insurer who has been adjudged liable for bad faith refusal to settle. Accordingly, JSL respectfully requests that the Court reconsider its Opinion and affirm the Order of the trial court.

**III. UNDER CONTROLLING AUTHORITY, THE INSURED'S LEGAL REMEDY
SQUARELY MEETS THE HARM.**

Under existing law, the insured's legal remedy squarely meets the harm. The injury suffered by the client "is uninsured loss." Robinson, 220 Ga. App. at 738. To the extent the loss exceeds the

agreed-upon insurance, such damages could not have been proximately caused by the broker's failure to procure the policy. The client's remedy is for the broker to provide recompense for the uninsured loss, and thereby become "liable for loss or damage to the limit of the agreed policy." Id.

A plaintiff is only entitled to recover up to the value of the policy from the broker, as that is the only damage proximately caused by the broker's failure to procure the policy. It is axiomatic that the harm caused by an agent's failure to procure insurance is lack of coverage. Thus, the injury suffered by the client "is uninsured loss." Robinson, 220 Ga. App. at 738. Recovery on a theory of negligence is only authorized where evidence establishes that the defendant's negligence proximately caused the loss for which recovery is sought. See Church's Fried Chicken v. Lewis, 150 Ga. App. 154, 157 (1979). A "plaintiff must show he sustained injury or damage as a result of the negligent act or omission to act in some duty owed to him." Whitehead v. Cuffie, 185 Ga. App. 351, 353 (1987), citing O.C.G.A. § 51-1-8. Damages exceeding the terms of the policy could not have been proximately caused by the broker's failure to procure the policy.

A client's remedy is for the broker to provide "coverage" for the uninsured loss, and thereby become "liable for loss or damage

to the limit of the agreed policy." Georgia Farm Bureau Mut. Ins. Co. v. Arnold, 175 Ga. App. 850, 852 (1985). The broker cannot be liable for any loss or expense for which the intended carrier would not have been liable. Where "there has been no showing that recovery against the insurance carrier would have been possible, the alleged negligence of the insurance agent in failing to procure . . . coverage has not been shown to have caused the loss." Peagler & Manley Ins. Agency v. Studebaker, 156 Ga. App. 786 (1980). A broker cannot be held to liability greater than the intended insurance carrier under the agreed-upon policy. Accordingly, JSL respectfully requests that the Court reconsider its Opinion and affirm the Order of the trial court.

CONCLUSION

For the above and foregoing reasons, JSL respectfully requests that the Court reconsider its Opinion. JSL requests that the Court reverse the trial court's Order granting summary judgment to Acceptance. JSL requests that the Court affirm the trial court's order granting summary judgment to JSL.

This 8th day of April, 2005.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

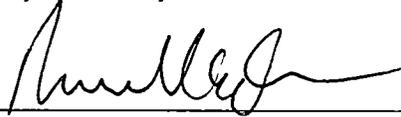
I HEREBY CERTIFY that I have this day served a copy of the within and foregoing MOTION FOR RECONSIDERATION OF APPELLANT (A04A2138) / APPELLEE (A05A0939) upon all parties in this matter by depositing a true and correct copy of same in the United States Mail, in a properly addressed envelope with adequate postage thereon to all counsel of record as follows:

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This 8th day of April, 2005.

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