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IN THE COURT OF APPEALS  
FOR THE STATE OF GEORGIA

CLERK COURT OF APPEALS OF GA.

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.

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REPLY BRIEF OF APPELLANT

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Respectfully submitted,

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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 Reply Brief of Appellant, showing this Honorable Court as follows:

ARGUMENT AND CITATION OF AUTHORITY

I. THE CLAIMS AND ISSUES RAISED IN JSL'S THIRD PARTY COMPLAINT  
ARE NOT PRECLUDED BY THE FEDERAL ACTION.

In its Brief of Appellee, Acceptance contends that the claims and issues presented in JSL's Third Party Complaint are precluded by the Order and consent judgment entered in the prior federal declaratory action. Acceptance contends the federal court decided and adjudged that: the application for the 1998 excess liability policy omitted material information (Brief of Appellee at 18,

note); the policy was void ab initio (Id. at 3, 9, 24 note 12, 27); Acceptance did not waive its right of rescission (Id. at 28); and JSL lacks standing (Id. at 21, 21 note, 22). However, a simple reading of the opinion reveals that none of these issues were actually decided by the federal court. Moreover, Appellee ignores a point made repeatedly in the Order: "Since JSL is no longer a party, it will not be bound by this judgment, nor will the judgment have any res judicata or collateral estoppel effect on JSL and its ability to litigate in the future issues relating to the subject matter of this litigation." (See Acceptance v. SEF, 209 F.R.D. 697, 699 (M.D. Ga. 2002), R-III-96-p 001286). A review of the relevant facts is in order.

On July 7, 2000, Acceptance filed a Declaratory Action in the Middle District of 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. (R-II-75-p 000916; R-I-14-pp 000150-53). SEF was named as defendant and counter-claimed against Acceptance for Bad Faith refusal to settle the Texas lawsuit. (R-III-96-pp 001217-43). JSL moved to intervene based on its interest as SEF's broker, allegedly responsible for obtaining the insurance policy in question, and was granted intervention as of right. (R-III-99-pp 001481). Along

with SEF, JSL sought a declaration that the subject policy was valid and binding. Id.

After two years of litigation, Acceptance then settled with SEF in exchange for a consent judgment stating that the policy was void. Through a Loan Receipt agreement, Acceptance "loaned" SEF \$2.15 million to pay the judgments against it, yet SEF is in no way obligated to repay the money. (See Loan Receipt, R-VII-116-pp 003604-06). As consideration, SEF offered consent judgment to Acceptance pursuant to Fed. Rule Civ. P. 68. (See Rule 68 Offer of Judgment, R-II-33-pp 000571-74). SEF also authorized Acceptance to proceed under SEF's name and prosecute any colorable claims against third parties - namely, JSL. (See Subordination Agreement, R-VII-116-pp 003607-11).

As Acceptance intended to pursue a claim in SEF's name against JSL and because the policy was actually valid and binding, JSL opposed entry of the Rule 68 consent judgment. (See JSL's Objection, R-III-99-p 001481). The Court found that "in order for a 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." (See Acceptance v. SEF, 209 F.R.D. 697, 700 (M.D.

Ga. 2002), R-III-96-p 001286). Accordingly, the Court reviewed its decision permitting JSL to intervene. Id.

At that time, JSL's primary interest in the action arose from the "possibility" that SEF might later bring an action based on failure to procure insurance. Id. at 700. The Court found that "possibility" did not satisfy the test for intervention as of right and then dismissed JSL as a party so the consent judgment might be entered and the case terminated. Id. at 700-701. However, the Court emphasized: "This dismissal is conditioned upon the Court's express finding that the judgment to be entered on the Rule 68 offer in this case is not binding upon JSL and shall have not res judicata or collateral estoppel effect on JSL." (R-III-96-p 001295). With JSL dismissed from the case, the Court then directed the clerk to enter the Rule 68 consent judgment. (R-III-96-p 001295). The instant action was then filed by SEF, now represented by Acceptance's counsel.

Acceptance contends that JSL's claims for contribution and indemnity fail as they were either directly or implicitly adjudicated in the prior litigation. This argument fails for three reasons. First, the federal Order expressly precludes Acceptance's arguments, preserving JSL's claims and all "issues related to the subject matter." Second, no issues of law or fact related to

liability of the parties were actually determined through adjudication in the prior action. SEF and Acceptance simply agreed not to litigate the issues. Third, regardless of adjudication in the prior action, the right to seek contribution in a subsequent action continues and necessarily includes the right to litigate the negligence of the joint tortfeasor.

**A. The federal Order Expressly Precludes Appellee's Arguments Regarding Res Judicata and Collateral Estoppel.**

For its argument that res judicata and collateral estoppel preclude JSL's Third Party Complaint, Acceptance relies on an Order which expressly states that it has *no preclusive effect on JSL's claims*. (See Acceptance v. SEF, 209 F.R.D. 697 (M.D. Ga. 2002), R-III-96-p 001286). In that Order, the Court could not have been more clear in its intent to foreclose the very arguments Acceptance now makes. The Order states *four times* that, as JSL was not a party, the consent judgment could have no preclusive effect on JSL's right to later litigate related claims and issues. Id. at 699 - 701. It is ironic that Acceptance's argument is actually what is precluded by the federal Order.

Acceptance argues that JSL has no right to litigate and prove the direct liability of Acceptance to SEF. It states: "JSL is

collaterally estopped from relitigating the question of its legal right to enforce the policy of insurance between Southeastern Forge and Acceptance." (See Brief of Appellee at 21). Aside from the Order's express prohibition of collateral estoppel, Appellee's argument lacks merit. The federal Order applied the Rule 24(a) standard for intervention as of right. (See Order, 209 F.R.D at 700). At the time, JSL's interest was the "possibility" that SEF would file a claim against it for failure to procure insurance. Id. That "possibility" has become a reality, along with JSL's interest in litigating the validity of the insurance policy. Further, the previous ruling on intervention could not preclude JSL's right to litigate its claims for contribution and indemnification, as the previous determination was not on "same or similar issues." See Cincinnati Ins. Co. v. MacLeod, 259 Ga. App. 761, 765 (2003).

**B. No Issues of Fact or Law Related to the Third Party Complaint were Adjudicated in the Prior Federal Action.**

Appellee argues that the judgment in the prior federal action acts as res judicata and precludes JSL from litigating whether: the information omitted from the 1998 insurance application was material (See Brief of Appellee at 18); whether the policy was then

The federal judgment does not preclude litigation of whether there was a material omission from the application, whether the policy was void *ab initio*, and whether Acceptance waived any right of rescission, as the merits of the federal case were not adjudicated. See O.C.G.A. § 9-12-42. The federal action was terminated through the settlement and entry of consent judgment pursuant to Fed. Rule Civ. P. 68. Federal Rule 68 authorizes "a party defending against a claim" to "serve upon the adverse party an offer to allow judgment" to be taken against it. Fed. Rule Civ. P. 68. A "Rule 68 judgment results from a binding contract" and not from any actual litigation of the issues. Mallory v. Eyrich, 922 F.2d 1273 (6<sup>th</sup> Cir. 1991). Such a consent judgment "is not the result of a judicial determination after the annealment of the adversary process and a judge's reflection about the ultimate merits of the conflicting claims. It does not determine right or wrong in the initial dispute. Forged by the parties as a compromise between their views, it embodies primarily the results of negotiation rather than adjudication." United States v. Miami, 664 F.2d 435, 440 (5<sup>th</sup> Cir. 1981). See also Raylite Electric Corp. v. Noma Electric Corp, 170 F.2d 914, 915 (2<sup>nd</sup> Cir. 1948) *rev'd on other grounds* ("It seems obvious that the plaintiff's case as against [an

alleged tortfeasor] cannot be aided by the consent judgment obtained against the original defendant." ).

For the judgment in the federal to bar JSL's third party complaint, "the merits of the case must have been adjudicated" in the prior action. See O.C.G.A. § 9-12-42. Entry of a consent judgment does not constitute adjudication on the merits. See Blakely v. Couch, 129 Ga. App. 625, 628 (1973). Where judgment is rendered in conjunction with an agreement to settle, "there has not been an adjudication on the merits, despite the working of the judgment." Id.

Acceptance argues that JSL's contribution claim fails because "a court has already held that Acceptance is not liable to Southeastern Forge." (See Brief of Appellee at 26). However, "the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom." O.C.G.A. § 51-12-32. It is well settled that "contribution claims are separate and distinct from the claims asserted in the underlying litigation, and that they are not extinguished by release, dismissal, or judgment in the underlying litigation." Scott v. Rakestraw, 252 Ga. App. 408, 409 (2001).

II. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO  
JSL'S THIRD PARTY COMPLAINT.

A. Genuine Issues of Material Fact Exist as to  
JSL's claims for contribution and indemnity.

Acceptance argues that JSL's claims for contribution and indemnity should fail as potential liability is mutually exclusive and one but not both could be tortfeasors. Acceptance incorrectly narrows the allegations of Plaintiff's Complaint and the facts of the case. Nonetheless, Acceptance *admits that "genuine issues of material fact"* exist as to the various ways a jury might interpret the facts and find that JSL and Acceptance are joint tortfeasors. (See Brief of Appellee at 27).

A defendant to an action may file a third party complaint against another who "may be liable to him for all or part of the plaintiff's claim against him." O.C.G.A. § 9-11-14. In proving its claims for contribution and indemnification, 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).

In its Complaint, Plaintiff asserts a number of claims and categories of damages against a sole defendant, JSL. (See Plaintiff's Complaint, R-I-3-pp 00005-27). Plaintiff claims it was injured through breach of duties to procure insurance and breach of duties to settle the claim against SEF. Id. Plaintiff alleges it incurred an uninsured loss, an excess judgment, and various other costs and expenses. Id. Given the extensive evidence in this case, there is no way to predict which, if any, parties a jury might find liable. These are genuine issues of material fact which make erroneous the grant of summary judgment on JSL's third party complaint.

Plaintiff's claim for breach of fiduciary duties is particularly problematic. Plaintiff claims that JSL had fiduciary duties to SEF which required JSL to "consider and protect Southeastern Forge's interests more than its own," to assist in settling the Texas claim against SEF, and to "indemnify SEF for the adverse verdict against Southeastern Forge." (See Plaintiff's Complaint, R-I-3-pp 00005-27). It appears that whether an insurance broker has a fiduciary duty to protect and indemnify its

clients is a novel issue before Georgia Courts. (See JSL's Motion for Partial Summary Judgment, R-VII-116-p 003432). As of yet, there has been no ruling as to the existence or scope of such a duty. Does this fiduciary duty between agent and principal exist regardless of whether an agent omits material information from an application? Did JSL and Acceptance share the same duty to protect Southeastern Forge? Did either or both JSL and Acceptance breach this duty by refusing to settle the Texas claim? Did either or both JSL and Acceptance breach this duty by refusing to indemnify SEF for the excess judgment against it? These are genuine issue of material fact as to JSL's claims for contribution and indemnity from Acceptance. Accordingly, grant of summary judgment on JSL's Third Party Complaint was in error.

**B. "Materiality" Is Not an Element  
of Any Claim Against JSL.**

Acceptance argues that the "Trial Court properly found that materiality is the central element of any of Southeastern Forge's claims against JSL." (Brief of Appellee at 4). 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). Plaintiff

Coming short of even arguing that no genuine issue of material fact exists, Acceptance contends that evidence supports a finding that the information omitted from SEF's application was material to Acceptance's underwriting. (See Brief of Appellee, 12, 13, 19, 20). Acceptance argues that the testimony of Senior Claims Underwriter Ken Smith should be discounted, but the testimony of agent Fred Gaunce should be emphasized. Id. These questions of weight of testimony are within the strict purview of the jury. The conflicting evidence and testimony present genuine issues of material fact as to whether the omitted information was material.

**D. Genuine Issues of Material Fact Exists as to  
Whether Acceptance Waived any Right of Rescission.**

Even if material information was omitted from the 1998 application, Acceptance could still be liable for bad faith failure to settle if it waived its right of rescission. See Holloman v. D.R. Horton, Inc., 241 Ga. App. 141 (1999). Acceptance argues in response that the "record clearly reflects that Acceptance, upon learning of the Mississippi Incident . . . promptly reserved its rights and sought a declaration that the subject policy . . . was void." (Brief of Appellee at 10 note 6). It argues "the record clearly and indisputably reflects" that Acceptance did not waive any right of rescission." Id. at 28. Acceptance does not,

however, cite anywhere in the record to support that claim. Upon consideration of Acceptance's Motion for Summary Judgment, "all reasonable inferences must be construed in favor of the non-movant." AFLAC, Inc v. Chubb & Sons, Inc, 260 Ga. App. 306, 306 (2003). Plaintiff contends JSL should be liable for all consequential damages from its omission of information from the application. Genuine issues of material fact exist as to whether some or all of Plaintiff's damages were proximately caused by Acceptance.

**CONCLUSION**

JSL respectfully requests that the Trial Court's order granting Appellee's Motion for Summary Judgment be reversed.

This 15<sup>th</sup> day of September, 2004.

Respectfully Submitted,

**HALL, BOOTH, SMITH & SLOVER, P.C.**



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing **REPLY 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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This 15<sup>th</sup> day of September, 2004.



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