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CASE INFORMATION SHEET

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COUNTY and COURT: Hillsborough - United States District Court,
Middle District of Florida, Tampa Division

NAME OF CASE: [complete style]

Richard S. Gallina and Horne Brothers Construction, Inc. v.
Commerce and Industry Insurance and Commercial Union Insurance
Company

CASE/DOCKET NO.: 8:06-cv-01529-JDW-EAJ **JUDGE:** James Whittemore

PLAINTIFF(S) ATTORNEY(S)/TRIAL COUNSEL: [full names, firm and
city]

Lee Gunn, Esquire and Kelly Gray, Esquire, Gunn Law Group, P.A.,
Tampa.

DEFENDANT(S) ATTORNEY(S)/TRIAL COUNSEL: [full names, firm and city]

Matthew J. Fink, Esquire and Kelly Stoltz, Esquire, Bates & Carey, LLP, Chicago and Joel D. Adler, Esquire, Marlow, Connell, Valerious, Abrams, Adler, Newman & Lewis, Coral Gables, (Counsel for Commerce and Industry Insurance Company).

Richard B. Mangan, Esquire and Bradley S. Bell, Esquire, Rissman, Barrett, Hurt, Donahue & McLain, P.A., Tampa and Michael H. Lax, Esquire, Michael Lax, P.A., Miami (Counsel for Commercial Union).

AGE/SEX/OCCUPATION OF PLAINTIFF or DECEDENT: [at time of accident or occurrence]

Richard Gallina, 23, single, male, construction worker who specialized in erecting steel cellular/communication towers and self supporting towers.

For WRONGFUL DEATH cases, please give age and relationship of survivors:

DATE, TIME and PLACE OF ACCIDENT or OCCURRENCE:

February 17, 2001 in Hernando County.

CAUSE OF INJURY: [factual description including allegations and defenses on liability]

This lawsuit involved a very complex action for Declaratory Judgment for Breach of Contracts and for Common Law Insurer Bad Faith against Defendants, Commerce and Industry Insurance and Commercial Union Insurance Company. The employer entered into a **Coblentz** agreement with the Plaintiff, agreeing to a judgment of \$5 million in compensatory damages and \$2 million in punitive damages.

The underlying action arose when Gallina fell approximately 100 feet when the gin-pole (crane-like equipment) he was using on top of the cellular tower broke. The gin-pole was not being used in a manner compliant with the manufacturer's intent. The state court action was settled with numerous defendants, including Horne Brothers Construction, Gallina's employer and thereafter Plaintiff brought suit against the insurance companies alleging bad faith and breach of contract.

Commerce and Industry represented Horne Brothers Construction in the underlying state court action. Commercial Union denied coverage under its primary policy and under its umbrella policy. The declaratory action and breach of contract action were related to Commercial Union's umbrella policy.

Commerce and Industry argued that it was providing a full defense for the employer/defendant, Horne Brothers Construction, at the time Horne Brothers Construction withdrew Commerce and Industry's defense and entered into the **Coblentz** agreement. Plaintiff argued Commerce was not negotiating or attempting to settle the action in good faith and Plaintiff was entitled to terminate the defense. Commerce argued by terminating the defense and entering into a **Coblentz** agreement, Horne Brothers Construction had breached the terms of the insurance policy.

Commercial Union denied coverage for the Plaintiff's (Gallina) injuries from the inception, and was not involved in the litigation in the state court. However, the denial specifically reserved its right to raise other policy defenses and stated it was not waiving any other defenses. Plaintiffs brought a cause of action against Commercial Union for breach of contract and Declaratory Judgment. A review of the underwriting file in this case showed that Commercial Union had informed Horne Brothers Construction that Commercial Union would not insure for the exposure of cellular tower erection work. The correspondence between Horne Brothers Construction (and its agent) with Commercial Union showed that Horne Brothers Construction agreed it would not conduct any tower erection services. Rather, Horne Brothers Construction stated it would incorporate another entity which would handle all of the tower erection work.

Through discovery and depositions, it was determined that Mr. Gallina, at the time he fell from the cellular tower, was an employee of Horne Brothers Construction, despite the company's representations to Commercial Union that its employees would not conduct this type of work. Upon further investigation, it was determined that the entity created by Horne Brothers Construction's principals which allegedly handled the tower construction was no more than a shell entity that had no employees and conducted no work whatsoever. It was Commercial Union's argument that the shell entity was used only to defraud the insurers and obtain an insurance policy for cellular tower construction.

Indeed, the shell entity purchased the insurance policy through Commerce and Industry, the insurance company that represented Horne Brothers Construction at the state court level. Commercial Union argued it did not owe any coverage to Horne Brothers Construction, and Commercial Union's umbrella policy did not cover the Commerce and Industry policy purchase through the shell company. The shell entity was not listed as an additional insured on the Commercial Union umbrella policy, and the Commerce and Industry policy was not listed on the declarations schedule of the umbrella policy as underlying insurance.

The U.S. District Court for the Middle District of Florida granted the Defendants' respective Motions for Summary Judgment. The Middle District ruled in favor of Commercial Union finding that Horne Construction's representation to its insurer concerning the scope of its business activities was critical. Specifically, Horne Construction was asked in writing regarding the scope of its business activities. The federal court found where misrepresentations are made in the form of written answers to written questions, the misrepresentations are deemed to be material. The material misrepresentations regarding the scope of work to be performed immediately prior to the renewal of the umbrella policy for Horne Construction constituted a material misrepresentation.

The Middle District federal district also granted summary judgment in favor of Commerce & Industry based on its analysis that an excess judgment is an element of a bad faith claim, except under a few well-defined exceptions. None of those exceptions were present in this case. The federal court found Commerce was providing a full defense, with no reservation of rights when the insured rejected Commerce's defense of the claim. Absent an excess judgment subjecting the insured to personal liability, Plaintiff had no claim against Commerce & Industry.

Plaintiff has petitioned the Middle District to reconsider its ruling.

NATURE OF INJURY: [please be specific concerning injuries, treatment, and medical testimony]

Mr. Gallina sustained a two level cervical fracture, multiple broken ribs, two collapsed lungs, a ruptured spleen, two crushed thoracic vertebrae, a displaced fracture of his pelvic, fractured teeth and evolving degenerative diseases of his musculoskeletal system.

PLAINTIFF'S EXPERT WITNESSES: [include full name, degree, specialty and city]

Justin C. Johnson, Esq., J.D., claims involving significant damages and settlements, St. Petersburg, FL;

Peter H. Knowe, B.S., AIC, CLLA, CPCU, insurance evaluation and policy interpretation, Hoover, AL;

Steven S. Oscher, CPA, accounting, analysis, auditing and financial evaluations, Fayetteville, NC.

DEFENDANT'S EXPERT WITNESSES: [include full name, degree, specialty and city]

Thomas Scott, Esq., LL.M., Judicial Process, J.D., claims involving significant damages and settlements, Miami, FL (expert on behalf of Commerce & Industry).

Mark Rosen, AAI, CPCU, specialized in insurance coverage issues, Tallahassee, FL (expert on behalf of Commercial Union.

CHECK APPROPRIATE SPACE: X Summary Judgment

DATE OF SUMMARY JUDGMENT OR VERDICT:

October 1, 2008

VERDICT/SETTLEMENT AMOUNT: NA

COMPARATIVE NEGLIGENCE: NA

JUDGMENT:

A Judgment was entered on October 1, 2008 in favor of Defendants. Plaintiff has pending motions for reconsideration.

DATE OF JUDGMENT:

October 1, 2008

DEFENDANT'S OFFER:

Commercial Union -- \$1,500,000
Commerce and Industry -- Unknown

PLAINTIFF'S DEMAND:

\$5 million

ATTORNEY'S COMMENTS:

This was a very interesting case from a policy interpretation aspect. Commercial Union denied coverage initially without knowledge of the misrepresentation, but specifically reserved its right to raise other bases for denial by stating it was not waiving any other defenses. It was not until the agent for the employer and the principal of the employer were deposed that the depths of the misrepresentation were uncovered. The insurer even performed audits of the employer/insured, but the owner/insured represented that the tower erection workers were excluded and insured under a separate policy.

The separate policy was a workers' compensation policy with Commerce and Industry. However, unbeknownst to any of the insurers, the separate entity never had a single employee, never performed any business, yet still paid premiums for the employer's tower erection employees for several years. The names of the two entities were so similar that Commerce & Industry did not realize that its insured (the shell entity) was not even a named party in the litigation.

Submitted By: Bradley S. Bell Date: 3/10/09

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