IN THE SUPREME COURT OF TEXAS

NO. 03-0647

EVANSTON INSURANCE COMPANY,
PETITIONER,

v.

ATOFINA PETROCHEMICALS, INC.,
RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued April 13, 2005

JUSTICE GREEN delivered the opinion of the Court.

In this case we consider the scope of insurance coverage that is provided to a third-party additional insured under an excess insurance policy. Specifically, we are asked to decide whether the additional insured provisions of the policy in question are broad enough to indemnify the third-party's own acts of negligence, and whether the scope of this coverage is limited in any way by the separate indemnity agreement between the third-party and the policy's named insured. We decide the first question by concluding that the policy language excludes coverage for the additional

insured's sole negligence and, for that reason, it is unnecessary to reach the second question. We remand for a determination of the underlying liability issues.

ATOFINA Petrochemicals, Inc.[1] hired Triple S Industrial Corporation as an independent contractor to perform maintenance and construction work at ATOFINA's Port Arthur oil refinery. A Triple S employee was killed at the ATOFINA facility while performing work pursuant to the independent contractor agreement between ATOFINA and Triple S. The employee's relatives sued ATOFINA for wrongful death and received a favorable settlement. ATOFINA seeks indemnification for its share of the settlement from one of Triple S's insurers, Evanston Insurance Company.

I. Background

A. The Relevant Agreements

The contract between ATOFINA and Triple S required Triple S to indemnify ATOFINA against personal injuries and property losses sustained during the performance of the contract, unless those losses were attributable to ATOFINA's concurrent or sole negligence.[2] To that end, Triple S

---

[1] ATOFINA is the successor company to FINA Oil and Chemical Company, which originally executed the independent contractor agreement with Triple S. For purposes of this opinion, we shall refer to FINA and ATOFINA, without distinction, as ATOFINA.

[2] The indemnity provision provided, in relevant part:

> [Triple S] agrees to hold [ATOFINA] . . . harmless from . . . each and every claim . . . arising out of any injury (including death) to persons, including [Triple S's] employees . . . occasioned in any way by . . . the actions or omissions of [Triple S] . . . , except to the extent that any such loss is attributable to the concurrent or sole negligence, misconduct, or strict liability of [ATOFINA].

agreed to carry at least $500,000 in comprehensive general liability ("CGL") insurance for each occurrence of bodily injury or property damage covered by the indemnity provision.

In addition, Triple S was required to maintain at least $500,000 in excess (or "umbrella") insurance. The contract between ATOFINA and Triple S specified that the excess policy was to be a "following form" policy, meaning that the excess policy would insure exactly the same types of liabilities as the CGL policy. Finally, Triple S also agreed to name ATOFINA as an "additional insured" on both the CGL and excess insurance policies.

Triple S purchased $1 million in CGL coverage from Admiral Insurance Company, thus satisfying the primary insurance responsibility under its contract with ATOFINA. The Admiral CGL policy listed ATOFINA as an additional insured but specifically excluded from coverage any liability arising from ATOFINA's sole negligence.[3] As for excess insurance, Triple S purchased a $9 million policy from Evanston, more than satisfying the minimum coverage requirement of $500,000.

The Evanston excess policy contains two relevant definitions of who is an insured under the policy. First, under section III.B.5 of the policy, an insured is

> [a]ny . . . person or organization who is insured under a policy of "underlying insurance." The coverage afforded such insureds under this policy will be no broader than the "underlying insurance" except for this policy's Limit of Insurance.

Second, under section III.B.6 of the policy, an insured may also be

---

[3] Endorsement 20 to the Admiral CGL policy provided as follows:

> WHO IS AN INSURED (Section II) is amended to include as an insured [ATOFINA], but only with respect to liability arising out of [Triple S's] ongoing operations performed for [ATOFINA], but in no event for [ATOFINA's] sole negligence.

> [a] person or organization for whom [Triple S has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by [Triple S] or on [Triple S's] behalf, or facilities owned or used by [Triple S].

ATOFINA qualifies as an insured under both provisions.

B. The Jones Accident and Procedural History

Matthew Todd Jones, a Triple S employee working at the ATOFINA facility pursuant to the contract, drowned after he fell through the corroded roof of a storage tank filled with fuel oil. Jones's relatives sued Triple S and ATOFINA for wrongful death, and ATOFINA initially sought insurance coverage from Admiral (as the primary insurer for the contract between Triple S and ATOFINA).

Admiral quickly tendered its $1 million policy limit to ATOFINA. Hoping to recover any additional costs, ATOFINA also claimed insurance coverage as an "additional insured" under Triple S's umbrella policy with Evanston. Evanston denied the claim, and ATOFINA impled Evanston as a third-party defendant seeking a declaration of coverage. ATOFINA later severed its suit against Evanston from the remainder of the Jones litigation and amended its complaint to assert a breach of contract claim. Both parties moved for partial summary judgment. While the motions were pending, ATOFINA settled the wrongful death litigation for $6.75 million and continued to seek recovery of the remaining $5.75 million from Evanston.

The trial court granted summary judgment in favor of Evanston. The court of appeals reversed, holding that ATOFINA was covered under the Evanston policy. 104 S.W.3d 247, 250-52 (Tex. App.—Beaumont 2003, pet. filed). It then remanded the case for a determination of penalties and attorney's fees. *Id.* at 252. The court of appeals began its analysis by observing that Triple S's

agreement to purchase insurance (and thus name ATOFINA as an "additional insured") was not limited to insuring only the indemnity obligation. *Id.* at 250. If this were the case, the court noted, the insurance requirement would likewise be limited only to the indemnity liability. *Id.*

"But where the additional insured provision stands separately from the indemnity provision, and is essentially a free-standing insurance purchasing requirement, the scope of the insurance requirement is not limited by the indemnity clause." *Id.* As the court noted,

> The contractual requirement that the insurance to be obtained by Triple S *include* insurance coverage for the indemnity obligation does not exclude other excess insurance coverage.

Id. (citations omitted). Thus, the court concluded that the insurance purchasing requirement in the Triple S / ATOFINA contract required Triple S to provide insurance for ATOFINA to the same extent Triple S had insurance coverage. *Id.* The net result of the court's holding is that ATOFINA's coverage under the Evanston policy is essentially the same as if it were the primary insured.

II. Analysis

As Evanston is the defendant here, the salient inquiry is not what the insurance purchasing agreement required Triple S to do for ATOFINA, but rather what coverage the Evanston policy actually provided. More specifically, does the Evanston policy provide coverage for ATOFINA's acts of negligence?

ATOFINA claims coverage for its negligence by virtue of its insured status under section III.B.6 of the Evanston policy which, as we have already noted, provides that an "insured" under the policy includes "[a] person or organization for whom [Triple S has] agreed to provide insurance." It is undisputed that Triple S agreed to provide excess insurance to ATOFINA. Thus, the question

before us is one of scope. In other words, we must determine what, if any, limits exist upon the coverage afforded by the broadly-worded language in section III.B.6.

In the proceedings below, Evanston and the court of appeals focused on one particular source of limitation: the indemnity agreement between Triple S and ATOFINA. Evanston argued that section III.B.6, although appearing broad enough to cover ATOFINA's negligence, was necessarily limited in scope by the indemnity agreement between ATOFINA and Triple S. And as we have seen, the indemnity agreement specifically excluded any acts of ATOFINA's sole negligence. The court of appeals disagreed, holding that the "additional insured" provision was not limited to covering only the liabilities reflected in the indemnity agreement. 104 S.W.3d at 250.

While the indemnity agreement is relevant to determining what the parties *intended* with respect to the scope of the indemnity obligation, an insurance policy secured to insure that obligation stands on its own. To the extent the insurance policy fails to satisfy the indemnity obligation, the obligor (Triple S) remains exposed.

But there is no conflict here between what the indemnity agreement requires and what the insurance policy provides. The Evanston policy provides in section III.B.5 that "[t]he coverage afforded [to ATOFINA] under this policy will be no broader than the 'underlying insurance'." So, looking to the underlying policy to determine the scope of Evanston's coverage, we find that the Admiral CGL policy specifically excludes coverage for ATOFINA's sole negligence. *See supra* note

3. Because the Evanston policy covered only the liabilities reflected in the underlying CGL policy, it cannot be reasonably interpreted to cover ATOFINA's sole negligence.[4]

We recognize that ATOFINA asserts coverage under section III.B.6 of the Evanston policy, which does not limit the coverage afforded to an insured to that provided by an underlying policy. However, we believe that sections III.B.5 and III.B.6 cannot be read in isolation. *See State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995) (noting that "courts must be particularly wary of isolating from its surroundings or considering apart from other provisions a single phrase, sentence, or section of a[n insurance] contract"). By its express language, section III.B.5 applies to the facts of this case. We cannot ignore the limitations in this section simply because section III.B.6 (which contemplates a separate, although equally applicable, set of circumstances) is also implicated.

Having determined that ATOFINA is not covered by the Evanston policy for its own acts of negligence does not, however, end the matter. On the record before us, we are unable to determine as a matter of law whether the Jones accident was the product of ATOFINA's sole negligence. The Jones family originally sued both ATOFINA and Triple S, alleging both parties were negligent. In addition, there were allegations in ATOFINA's pleadings that Jones himself was contributorily negligent. Triple S was eventually non-suited, and the Jones's claim against ATOFINA was settled with no admission of liability by either party. Thus, without a determination of liability, it is

[4] ATOFINA contends Evanston waived any argument regarding the impact of "following form" language in the insurance purchasing agreement by failing to raise this point in its cross-motion for summary judgment. While Evanston did not articulate this argument in precisely the same form as it is enunciated here, we note that Evanston did in fact argue before the trial court that the scope of its policy was bounded by the sole-negligence exclusion contained in the Admiral CGL policy. Furthermore, as the party that prevailed in the trial court, Evanston was not required to raise this issue before the court of appeals, as we do not normally require a party defending a judgment to raise every alternative theory on which the trial court could base its action. *See Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990).

impossible to say whether ATOFINA's responsibility for the accident, if any, excluded it from coverage under the Evanston policy. Since the policy only excludes ATOFINA's sole negligence from coverage, we must remand this case to the trial court for a determination of the respective liabilities of the parties.[5]

III. Conclusion

We reverse the judgment of the court of appeals in favor of ATOFINA and remand the matter to the trial court for proceedings consistent with this opinion.

_____
PAUL W. GREEN
JUSTICE

OPINION DELIVERED: May 5, 2006

[5] Because the coverage issue is potentially dispositive to this case, we do not address the parties' additional issues regarding the applicability of article 21.55 of the Texas Insurance Code and the reasonableness of the settlement between Triple S and the Jones family.