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COURT OF APPEALS
STATE OF NEW YORK

THE BURLINGTON INSURANCE COMPANY,

Appellant,

-against-

No. 57

NYC TRANSIT AUTHORITY,

Respondent.

Westchester County Courthouse
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York
April 26, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar to be heard is appeal number 57, The
3 Burlington Insurance Company v. NYC Transit Authority.

4 Counsel.

5 MR. D'AMBROSIO: Good morning, Your Honor.

6 CHIEF JUDGE DIFIORE: Good morning.

7 MR. D'AMBROSIO: Joseph D'Ambrosio, Ford Marrin,
8 on behalf of the appellant, The Burlington Insurance
9 Company. Your Honor, the legal - - -

10 CHIEF JUDGE DIFIORE: Mr. D'Ambrosio, may I
11 interrupt you for a second? Would you like rebuttal time,
12 sir?

13 MR. D'AMBROSIO: May I have two minutes, Your
14 Honor?

15 CHIEF JUDGE DIFIORE: Yes. Of course.

16 MR. D'AMBROSIO: Thank you. Although the legal
17 question in this case involves contract interpretation, the
18 practical question is whether there is any limit - - - of
19 traditional insured covered in the state. The result of
20 the holding below by the Appellate Division is that in a
21 situation where the subcontractor had zero fault - - -

22 JUDGE RIVERA: Well, as I understand your
23 position, counsel, it's - - - it's that the additional
24 insureds, if they're solely negligent - - -

25 MR. D'AMBROSIO: That's correct, Your Honor.

1 JUDGE RIVERA: - - - that they then have no
2 coverage. Is there the use of that term anywhere in the
3 endorsement or anywhere in the policy about the negligence
4 of the additional insured?

5 MR. D'AMBROSIO: The - - - I don't think it has
6 to do with the negligence of the additional insured, Your
7 Honor. It has to do with the lack of negligence of any
8 kind on the part of the named insured, the subcontractor.

9 JUDGE RIVERA: Is there any reference to the
10 negligence of the named insured anywhere in the language?

11 MR. D'AMBROSIO: The language refers to proximate
12 cause. The langu - - -

13 JUDGE RIVERA: Well, does it says proximate
14 cause?

15 MR. D'AMBROSIO: Well, when they're trying to
16 define the term proximate cause, they don't use the word
17 proximate in the definition, but they use the same
18 terminology that is used in the pattern jury instructions
19 for defining proximate cause, the same in whole or in part
20 acts or remissions language. And I would submit, Your
21 Honor, that both - - -

22 JUDGE FAHEY: Well, isn't - - - isn't the
23 language that we're talking about here is the policy
24 language that says who is an insured, right?

25 MR. D'AMBROSIO: Yes, Your Honor.

1 JUDGE FAHEY: That - - - that's the language that
2 we're talking about. I think that's what Judge Rivera is
3 referring to. And that says "caused in whole or part by
4 your acts or omission." You would have us read that as
5 saying caused in whole part by your negligent acts - - - or
6 omission. Is that correct? Is that the reading you're
7 asking us to put in there?

8 MR. D'AMBROSIO: Yes, Your Honor.

9 JUDGE FAHEY: So - - - so the rule that basically
10 you're - - - you're seeking from this court is that we can
11 imply that term in this contract?

12 MR. D'AMBROSIO: That's absolutely right, Your
13 Honor.

14 JUDGE FAHEY: Now, of course, the - - - I worked
15 for Kemper. I was house counsel to Kemper for about eight
16 hours, and they were quite strict about applying that. The
17 words in the contract meant the words in the contract. And
18 - - - and, of course, it's an adhesion contract so it has
19 to be read against the carrier, but even leaving that
20 aside, it - - - it's a really - - - it seems a stretch in
21 terms of the basic rules of insurance contract
22 interpretation. I understand the policy reason. It's a
23 fair - - - I think it's a good point, but I'm having a hard
24 time with the basic rules of contract interpretation
25 supporting your position.

1 MR. D'AMBROSIO: Your Honor, I think what - - -
 2 what supports our interpretation, Your Honor, is that you
 3 have to give effect to all of the words in the endorsement.
 4 And as set forth in our papers, I submit that when you have
 5 language - - - triggering language "caused by," it can only
 6 be two - - - one of two things. It can but for cause,
 7 cause in fact, or it can be proximate cause, legal cause.

8 JUDGE FAHEY: Well, that's - - -

9 JUDGE STEIN: Well, let's assume for a moment
 10 that - - - that it is proximate cause, and as lawyers we
 11 tend to equate that to a negligence situation. But to the
 12 average person, to an insured reading that, the plain
 13 common understanding of "caused by," does that necessarily
 14 indicate negligence? Or couldn't it be something - - -
 15 some causal relationship similar or the same as, really,
 16 proximate cause but not require negligence?

17 MR. D'AMBROSIO: Your Honor, in the context of
 18 insurance policy which, you know, provides coverage for
 19 accidents, negligence - - - negligence, I don't - - - I
 20 think the context of it makes it clear that you're - - -
 21 you're talking about proximate cause here and not just but
 22 for cause because this court has said, even when
 23 interpreting much broader language "arising out of," that
 24 it was more than just but for cause. You said there needed
 25 to be a causal nexus between the accident and the risk for

1 which coverage was provided. And we would submit that the
2 test that the Appellate Division came up with res - - -
3 with respect to the narrower "caused by" language, it's
4 resulted in much broader coverage because anything can be a
5 but for cause. It's unlimited. And here - - -

6 JUDGE STEIN: Well, arising out of, I think the
7 focus is not on - - - on the cause but out of the - - - the
8 circumstances, the enterprise in which the parties were
9 involved. Whereas cause certainly suggests that there is
10 some cause and effect, so-to-speak. And regardless of
11 whether you call it but for or proximate cause or what you
12 call it, to me, I think that we - - - you know, we pretty
13 clearly said that those are two different things. But does
14 that necessarily mean that it has to be negligent, that it
15 has to mean negligence?

16 MR. D'AMBROSIO: Well, if it's not - - - if it's
17 not necessarily, Your Honor, then I'd say that the
18 (indiscernible) for proximate cause - - -

19 JUDGE STEIN: Well, we - - - it's - - - for
20 example the situation we have right here.

21 MR. D'AMBROSIO: Yeah.

22 JUDGE STEIN: Okay. So - - - so the excavator
23 hit something. It wasn't their fault. They were doing
24 what they were supposed to do. There wasn't negligence.
25 But certainly, it did cause the explosion to happen. It

1 was one of the causes - - -

2 MR. D'AMBROSIO: It was - - -

3 JUDGE STEIN: - - - that caused it. It was
4 somebody else's negligence that led to that, but it was one
5 of the causes. Isn't - - - that - - - I mean that's what
6 we're - - -

7 MR. D'AMBROSIO: Sure. I think that - - -

8 JUDGE STEIN: - - - that's the situation.

9 MR. D'AMBROSIO: That's - - - I think what you're
10 saying is that but that - - - but for cause, and I think it
11 - - - it was a but for cause. We don't dispute that it was
12 a but for cause, Your Honor.

13 JUDGE STEIN: But that's different from arising
14 out of. It's more narrow. You - - - you're suggesting
15 that it's broader. I'm suggesting that it is more narrow
16 than arising out of which doesn't necessarily require even
17 but for cause.

18 MR. D'AMBROSIO: But the reason I even started
19 with the arising out of comparison, Your Honor, is because
20 in this court's decisions in Worth Construction and Regal
21 Construction, you came up with a test that I submit is more
22 than but for cause. You said there needed to be a causal
23 nexus and under the Worth and Regal holdings, I submit that
24 under the fact of this case, there would not be coverage.
25 Even if we had what everyone considers to be broader

1 arising out of language because there was no negligence.
2 Worth said it's not the subcontractor's fault. There's no
3 causal connection. There is no substantial - - - there's
4 no nexus. And then in Regal, the court said, well, it's
5 not just fault, not just negligence if it's the
6 subcontractor's employee.

7 Well, if this is an accident involving the
8 transit's employee because of a - - - an elevation hazard
9 that - - - in terms of falling off a work platform, then it
10 was triggered by their failure to de-energize the tables,
11 which is their - - - their negligence. So you have what I
12 - - - what I submit is situation that would not even fit
13 under the broader arising out of holdings of this court.
14 And yet, we're dealing with, on its face, narrower
15 language. We could debate about it, but - - -

16 JUDGE GARCIA: Counsel - - -

17 JUDGE RIVERA: What - - - what any meaning do
18 those other words - - - let's get back to the actual words
19 in the policy and the endorsement in whole or in part of
20 the actual word liability. Liability, to me, seems to
21 suggests under the law how you're going to be liable, which
22 requires some negligence. So can you address those
23 phrases?

24 MR. D'AMBROSIO: Yes. Yes, Judge Rivera - - -
25 Rivera. One of the arguments we - - - we made regarding

1 the plain textual analysis of this is that, you know, the
2 First Department read out of the endorsement the in whole
3 or in part language. And why I say that is because only a
4 proximate cause can be a partial one. You can't have a
5 partial but for cause. It just doesn't make sense. You
6 can have infinite numbers of but for causes, but they're
7 either whole or not. They're not partial. So - - -

8 JUDGE GARCIA: Counsel - - -

9 MR. D'AMBROSIO: Yes.

10 JUDGE GARCIA: - - - just - - - just step back in
11 perhaps a very basic question. It's an additional
12 insurance provision, right. Generally, in the industry,
13 what's the purpose of the additional insured provision?

14 MR. D'AMBROSIO: Thank you, Your Honor. The - -
15 - the purpose of the additional insured provision is to
16 provide coverage to upstream parties for accidents that
17 happen that are results of - - - of your negligence or
18 involve your work on the project depending on the precise
19 language. And that here we're dealing with language that
20 was modified - - -

21 JUDGE GARCIA: And - - - and just to stop at that
22 point, though, first before we get to the language. Just
23 stay with the purpose. So it - - - I don't - - - you know,
24 this is a very specialized business, but an upstream, as
25 you call it, party who's looking to become an additional

1 insured, it seems in - - - in some of the cases this is
2 because something may happen to the insured. The insured
3 may have some type of - - - you know, go bankrupt or
4 something other - - - so it gives the additional insured
5 rights against the insurer, to me it seems, for the conduct
6 of the primary insured.

7 MR. D'AMBROSIO: Yes, Your Honor. I mean and it
8 provides for coverage when there are actions on the part of
9 the named insured, the subcontractor, in most cases, that
10 trigger the coverage depending on the precise language
11 that's used. And I just want to point out that, you know,
12 this - - - this endorsement that you're interpreting today
13 is an amendment of earlier language, endorsements from the
14 '90s that was the - - - the arising out of language, the
15 purpose of it was to narrow the scope of coverage. That
16 was even conceded by the Appellate Division.

17 JUDGE FAHEY: Yeah. But see, this is an
18 analytical problem that I'm - - - I'm having with - - -
19 with your argument which is that you're arguing what the
20 purpose of it is. You're arguing what the intent of the
21 drafters is. And I - - - there's a Pennsylvania case that
22 - - - that talks about the use of parole evidence in - - -
23 in analysis of an additional insured endorsement. And in -
24 - - in this context, I think we need to - - - we're really
25 restricted by the language. You're asking us to go to step

1 outside of the construct of the language, and really, our
2 function here is to say does this case turn on the cause by
3 language, not whether it's the same meaning as arising out
4 of or a lesser, smaller meaning. Our - - - our simple
5 question in front of us does this endorsement for acts
6 include just negligent acts or any act. That's what we're
7 stuck with. And anything else is really beyond the scope
8 of our purview here.

9 MR. D'AMBROSIO: Our main argument, Your Honor,
10 is the - - - the plain meaning argument. It's not - - - we
11 provided the - - - the intent as background, but that's not
12 the focus of our argument. Our argument - - -

13 JUDGE RIVERA: So you don't argue it's ambiguous?

14 MR. D'AMBROSIO: No. Absolutely not. We're - -
15 - our argument is that construing this to req - - - to
16 require any non-negligent act or non-negligent omission
17 renders it to be unworkable because - - -

18 JUDGE FAHEY: Well, then why not just put the
19 word negligent before acts?

20 MR. D'AMBROSIO: And that gets back to the - - -
21 the first point I tried to make was that they're trying to
22 - - - the drafters are trying to define the term proximate
23 cause. They did not use the word proximate because just
24 like in the patent jury instructions, you don't - - - you
25 don't use the word you're trying to - - - the concept

1 you're trying to define in the definition of it. It uses
2 the same - - -

3 JUDGE FAHEY: Sure. But - - - but you see the
4 problem. The definition of proximate cause is a
5 substantial factor, but for - - - but for causation would
6 mean any factor, not necessarily a substantial factor. So
7 those differences, that's why I'm wondering if it's - - -
8 if it's necessarily applicable to our strict interpretation
9 of the phrases that are in dispute here.

10 MR. D'AMBROSIO: And the phrase, I think, Your -
11 - - the phrase, Your Honor, that I focused on is in Hollner
12 Park because again I don't think there can be partial, you
13 know, non-proximate causes, not - - - but for causes.
14 There can't - - - there can be infinite numbers of but for
15 causes but there can't be partial ones. They're - - - you
16 know, there's a number of different but for causes that
17 give rise to an accident or an event, but they're not
18 partial but for causes. That language is quite exclusively
19 single proximate cause and so the absence of the word
20 negligent to modify acts or omission would - - - you know,
21 it's just - - - it's not necessary. It's - - -

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. D'AMBROSIO: Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Counsel. Counsel, could
25 the endorsement have been more clearly written?

1 MR. STRUGATZ: May it please the court - - -

2 CHIEF JUDGE DIFIORE: Yes.

3 MR. STRUGATZ: Yes, Your Honor. I'm Charles
4 Strugatz on behalf of the respondents. Yes. It certainly
5 could have. It could have used the word as in - - - it
6 could have used the phrase that was used in Crespo,
7 "liability for the named insured's negligence." It could
8 have used the word cause by reason of the negligence - - -
9 of - - - only for the negligence. In fact, there are
10 several cases that we brief where we pointed out where the
11 court - - - where the language specifically excluded
12 additional insured endorsement coverage for an additional
13 insured that was solely negligent. They could have put
14 that language in. They didn't. They didn't put in the
15 words negligence. They didn't put in the words proximate
16 cause. And - - -

17 JUDGE RIVERA: Counsel - - -

18 MR. STRUGATZ: And if - - -

19 JUDGE RIVERA: Counsel. Counsel, no, no. Let me
20 interrupt you.

21 MR. STRUGATZ: I'm sorry.

22 JUDGE RIVERA: Counsel, am I correct that in the
23 requirements to the agreement with the transit authority,
24 the transit authority required that the insured get
25 insurance for additional insureds using the ISO form or its

1 equivalent?

2 MR. STRUGATZ: That is correct.

3 JUDGE RIVERA: That's correct. Okay. So that
4 form and - - - and the group that's creating it - - -
5 created it, the ISO, isn't it obvious that it's intended
6 only to cover proximate cause?

7 MR. STRUGATZ: I wouldn't think so, Your Honor,
8 because - - -

9 JUDGE RIVERA: Well, you guys chose that form as
10 your example, and that's what's intended by the form. How
11 could it not be that you knew that?

12 MR. STRUGATZ: Well, Your Honor, certainly - - -

13 JUDGE RIVERA: Why would you chose a form with
14 language that's intended to mean proximate cause?

15 MR. STRUGATZ: We - - - the additional insured,
16 both the city and the TA, did not have that understanding
17 that - - - that it carried forth a requirement of proximate
18 cause. The - - - there's no substantial factor language.
19 Counsel suggested that - - -

20 JUDGE RIVERA: Why would you chose a form, then,
21 that is clearly intended to - - - to have that outcome?

22 MR. STRUGATZ: I don't think it does have that
23 outcome, Your Honor, because in - - - for example, in
24 arising under, it's liability arising under. That doesn't
25 suggest - - -

1 JUDGE RIVERA: Well, you all entered - - - you
2 all requested this - - - and correct me if I'm wrong, you
3 all requested this form be used and entered or - - - or
4 accepted the contract with this particular insurance before
5 the First Department had issued these cases, equating,
6 arising under, with - - -

7 MR. STRUGATZ: That is correct. But - - -

8 JUDGE RIVERA: Right?

9 MR. STRUGATZ: We - - - we were under the
10 apprehension, the understanding, that this language would
11 require a showing of any type of causation.

12 JUDGE RIVERA: So why the language "in whole or
13 in part"? What - - - what does that serve?

14 MR. STRUGATZ: Well, two responses. First, Your
15 Honor, without it, if it's just caused by act or omission
16 arising in the course of the work, then an argument could
17 be made that there's only additional insured coverage if
18 the named insured was solely negligent, solely at fault
19 under all theories of liability. This avoids that - - -
20 that confusion and - - - and creates a circumstance where
21 even if the named insured was at fault or not at fault but
22 there was any type of factual nexus between its act or
23 omission or the occurrence - - -

24 JUDGE RIVERA: I'm sorry. I'm not - - - perhaps
25 I'm just not understanding your argument. You mean if - -

1 - without that language, "caused by" means negligence?

2 MR. STRUGATZ: No. No.

3 JUDGE RIVERA: Okay.

4 MR. STRUGATZ: I'm saying if it was just caused -

5 - -

6 JUDGE RIVERA: Yes. Caused by.

7 MR. STRUGATZ: - - - that - - - caused by in the
8 - - - in the course of the performance of the work, then if
9 - - - without the in whole or in part, it would only cover
10 sole cause, solely caused by the named insured, and that is
11 not the intention. The intention was to cover any type of
12 - - - of causation that has a factual nexus connecting it
13 to the ultimate law.

14 JUDGE STEIN: Could you explain your position on
15 the difference between - - - if any, between the "arising
16 out of" language and the "caused by" language?

17 MR. STRUGATZ: I think that it - - - the First
18 Department held that the functional equivalent - - -

19 JUDGE STEIN: Well, but haven't - - - haven't we
20 held that it's broader?

21 MR. STRUGATZ: Well, it's broader. But again,
22 not requiring a showing of negligence, not requiring a
23 showing of fault, not requiring a showing of proximate
24 causation.

25 JUDGE STEIN: Well, which one is that? You mean

1 both of them?

2 MR. STRUGATZ: All - - - all of them. In other
3 words, the - - - I'm sorry. The - - - the arising out of
4 and the caused in whole or in part, both - - - both of them
5 are functional equivalents to the extent that it is no - -
6 - no requirement that there be a showing of negligence or
7 fault against any - - -

8 JUDGE STEIN: So then why the change in language
9 if they're - - - if they're the same?

10 MR. STRUGATZ: You know, Your Honor, I - - - I
11 could change - - - I'm not trying to be flippant. I could
12 change a sentence from either A - - - either A or B has
13 characteristic X to either - - - and - - - I'm sorry,
14 either A and/or B has characteristic - - -

15 JUDGE STEIN: Well, you have to look at the - - -

16 MR. STRUGATZ: It doesn't change it in logic or
17 is - - -

18 JUDGE STEIN: But you have to look at the context
19 - - -

20 MR. STRUGATZ: Or is one - - -

21 JUDGE STEIN: Excuse me, counselor.

22 MR. STRUGATZ: I'm sorry.

23 JUDGE STEIN: You have to look at the context.

24 Here there were insurance policies that all contained the
25 same language for a long period of time, and then all of a

1 sudden, they were all changed to say something else. Some
2 - - - there had to be some reason to change it.

3 MR. STRUGATZ: Well - - -

4 JUDGE STEIN: Didn't - - - I mean - - -

5 JUDGE FAHEY: Well, the - - - to follow up, isn't
6 it - - - isn't it the Maroney case that - - - that we're
7 specifically referring to here? It's a Court of Appeals
8 case. Are you familiar - - - are you familiar with it?

9 MR. STRUGATZ: The - - - I believe so, Your
10 Honor.

11 JUDGE FAHEY: Okay. Don't worry. Don't worry.
12 It - - - I always hated it when somebody tried to test me
13 like that and it - - - I think in that case, if you - - -
14 if you look at that case and - - - and I think that it may
15 represent a conflict with the Glass case - - - and the W.W.
16 Glass case from the First Department. And the Maroney
17 case, I thought, addressed the question specifically of
18 whether or not a policy coverage requires "a negligent act
19 or acts." And - - -

20 MR. STRUGATZ: Well, that was an arising out of.

21 JUDGE FAHEY: Right.

22 MR. STRUGATZ: And - - - and there, if I
23 remember, the - - - the coverage for the - - - for the barn
24 did not include commercial purposes, and this was, in
25 effect, being used as a - - -

1 JUDGE FAHEY: I think you're - - -

2 MR. STRUGATZ: - - - if I recall, a stable.

3 JUDGE FAHEY: I think you're right. I think
4 you're right, counselor. What I'm wondering is is does the
5 language - - - does the language in that case mean that we
6 have to view arising out of and caused by as differently?

7 MR. STRUGATZ: I don't believe so, but even if
8 you did, I don't believe that the - - - the interpretation
9 of caused in whole or in part by the act or omission of the
10 named insured arising out of the work requires any of the
11 things that they're claiming. What they're claiming, in
12 effect, is that any time a named insured is insulated from
13 liability by the exclusivity remedy provision of the
14 workers' compensation where the injured party was their
15 employee or statute of limitations or discharge in
16 bankruptcy, the additional insured is left there without
17 coverage. And - - -

18 JUDGE FAHEY: And of course, the additional
19 insured is a negotiated part of the contract that was paid
20 for specifically to be covered, right?

21 MR. STRUGATZ: You know, and - - - and I think
22 the ramifications - - -

23 JUDGE RIVERA: Well, I thought their argument was
24 when - - - when the insured is in no way negligent, has no
25 fault, is not to blame, but the additional insured is to be

1 blame - - -

2 MR. STRUGATZ: Well - - -

3 JUDGE RIVERA: - - - that then the additional - -
4 - additional insured shouldn't get the benefit of their own
5 negligence.

6 MR. STRUGATZ: Well, they were free to put in
7 language to that effect. They - - -

8 JUDGE GARCIA: But, counsel, to follow - - -

9 MR. STRUGATZ: - - - such language was included -
10 - -

11 JUDGE GARCIA: Counsel, counsel. You're running
12 out of time, and I just want to ask this.

13 MR. STRUGATZ: Certainly.

14 JUDGE GARCIA: To follow up on Judge Rivera's
15 question, doesn't this interpretation - - - and it's not
16 going outside the contract, it's just fundamental insurance
17 of approach to me. Doesn't this lead to somewhat absurd
18 results? Because, really, what you're asking for is not an
19 additional insured. You're asking to be an insured for
20 your own negligence. So fortuitously in this case, that
21 party hit the wire that was left exposed. It could have
22 been a completely different party that hit that wire in
23 which case you would not recover under this. And the - - -
24 it's almost like the person walking down the street slips
25 on the ice, they're a cause. But really, collecting from

1 their insurance company as an additional insured seems
2 somewhat counterintuitive from an insurance perspective to
3 me.

4 MR. STRUGATZ: Well, I - - - I would submit that
5 this carrier picked language that comprehends their
6 obligation to provide additional insured coverage under the
7 facts of this case. If they chose to do it differently,
8 they could do so.

9 JUDGE RIVERA: Yeah. But they pick language
10 based on what you required is the form or its equivalent
11 and that - - - that again, the drafters of that form and
12 that language intended it to be proximate cause.

13 MR. STRUGATZ: Well, that - - -

14 JUDGE RIVERA: It must mean something that you
15 wanted to use that form and that language.

16 MR. STRUGATZ: Because our understanding of that
17 form and that language is not consistent with their
18 contention of what the draftsmen intended. Their - - -

19 JUDGE RIVERA: Is your position - - - I'm sorry.
20 Just to - - - because your time did run out. Is your
21 position that the language is ambiguous or unambiguous?

22 MR. STRUGATZ: It's unambiguous, and if any
23 ambiguity exists, it should be construed against the
24 draftsmen.

25 JUDGE RIVERA: Got it.

1 MR. STRUGATZ: And - - - and that ultimately, the
2 - - - the fact that - - - and there are cases that
3 establish limits for the additional insured where the
4 occurrence did not arrive out of the work of. That would
5 take care of Your Honor - - -

6 JUDGE RIVERA: If - - - if it's unambiguous - - -
7 I'm sorry. If it ambiguous following that rule that you
8 just advocated for, it should be interpreted against the
9 drafter. I get that. Should - - - should that hold when
10 you said this is the form I want used or its equivalent,
11 this is the language I want used it? Should it - - -
12 should it - - -

13 MR. STRUGATZ: I - - -

14 JUDGE RIVERA: Should it apply in that kind of a
15 case?

16 MR. STRUGATZ: I do, Your Honor, because there's
17 - - - there's no showing that any of the additional
18 insured, whether it be the city or - - - the city expected
19 to be insured. They weren't at fault. They expected
20 coverage. They got it. Without - - - and if you can
21 indulge me for one - - - just one moment, if, should the
22 court conclude that we're wrong on this, in effect,
23 threshold issue that has been the subject of - - - of the
24 discussion by this court this - - - this afternoon, I would
25 submit that the fact that Burlington chose to withd - - -

1 to discontinue their reservation of rights against one
2 additional insured and not against another was improper and
3 that that in and of itself gives rise to a voluntary
4 payment which they have no standing to be bringing this
5 time. But that's only in the event that I should not
6 prevail in the first issue.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. STRUGATZ: Thank you.

9 CHIEF JUDGE DIFIORE: Mr. D'Ambrosio.

10 MR. D'AMBROSIO: Thank you, Your Honor.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. D'AMBROSIO: Just a quick point on the other
13 issues that counsel is referring to. The only issue before
14 this court is the interpretation of this endorsement under
15 C.P.L.R. 5501(b). The other issues are internally
16 inconsistent with the premise that there is coverage here.
17 It's premised on the fact - - argument that there is no
18 coverage. So I'll leave it at that.

19 I just wanted to make note of Judge Garcia seemed
20 to be dealing with this fortuity issue. And I think the -
21 - - the hypothetical that we submitted on our - - - in our
22 brief about the light switch I think illustrates the
23 irreconcilability of this court's holdings in Worth and
24 Regal with the interpretation of this narrow endorsement.
25 You know, we had the light switch example where a carpentry

1 contractor just happens to show up at work one day and he
2 flips on a light switch. Unbeknownst to him, because of
3 something that the general contractor had done
4 (indiscernible) the wiring day before, it triggers a
5 blackout. And another - - - and a general contractor's
6 worker down the hall is working on a scaffold that doesn't
7 have a guardrail and the lights go out and he trips on a
8 bucket and falls off the scaffolding.

9 Under the First Department's interpretation of
10 this endorsement, I don't think there's any question that
11 there would be coverage under the sub - - - under the
12 carpentry subcontractor's policy. I submit to Your Honors
13 that that is an inequitable result. It conflicts with the
14 plain language of the endorsement. And one final thought -
15 - -

16 JUDGE FAHEY: Yeah. But let me ask this. Let me
17 ask this.

18 MR. D'AMBROSIO: Yes.

19 JUDGE FAHEY: You're on a roll. I hate to
20 interrupt you, but - - - you know, but - - - so maybe the
21 judge will indulge you, you can finish your point. But I
22 just - - - couldn't this have simply been corrected by a
23 minor change in the language of the endorsement?

24 MR. D'AMBROSIO: I don't think there needs to be
25 a correction. Could this - - - would we not be here if

1 that - - - you know, if the word negligent were placed - -
2 -

3 JUDGE FAHEY: But - - - but answer my question.

4 MR. D'AMBROSIO: Yes.

5 JUDGE FAHEY: You think it could have been simply
6 corrected by a minor change in the endorsement, referring
7 to either liability or negligence?

8 MR. D'AMBROSIO: Yeah. I just don't think, Your
9 Honor, that this ever came up.

10 JUDGE FAHEY: But it would clarify it. Wouldn't
11 you agree?

12 MR. D'AMBROSIO: I - - - I think it would make it
13 clearer to - - - to judges and lawyers. But I don't think
14 it would make it clearer to, you know, business people
15 because in this case, Your Honor, I submit to you that the
16 interest of the insurance company and its customers and
17 named insured are aligned. Here, the named insured who has
18 no fault and - - - and it's the general contractor who has
19 all the fault, he doesn't expect - - - and it's not even
20 his worker. He does not expect that it's going to be his
21 policy that pays a million dollars, or for the bigger case,
22 five million or ten million dollars, which is going to
23 increase his premiums. And if it's a big enough case, it
24 could drive him out of business.

25 So I think in this case, the interest of the

1 insurance company and its customer, the two contracting
2 parties are aligned. And we note the intent of the
3 insurance company was clearly to narrow coverage, and in
4 this case, it aligns with the - - - with the objective of
5 the named insured who wants to provide coverage to upstream
6 parties, but only if it's his worker or it's his fault.
7 Not just for some fortuitous incident which leads to a but
8 for causation. And with that, Your Honor, I would submit
9 on our briefs. Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 (Court is adjourned)

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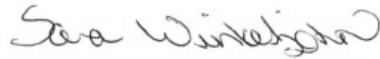
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of The Burlington Insurance Company v. NYC Transit Authority, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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