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Supreme Court, Appellate Division, Second Department, New York.

STATE INSURANCE FUND, et al., Respondents,

v.

HERMITAGE INSURANCE COMPANY, Appellant.

Dec. 7, 1998.

School district sued for declaratory judgment that its liability insurer was obligated to defend it in third-party action which was brought by child care service identified as additional insured and named as defendant in underlying personal injury action. The Supreme Court, Westchester County, [Donovan](#), J., found that insurer had duty to defend, and insurer appealed. The Supreme Court, Appellate Division, held that, while clause in insurance policy provided that an otherwise applicable exclusion would not apply if school district's liability arose under "insured contract," lease between school district and child care service did not constitute "insured contract," within meaning of this exception to policy exclusion.

Reversed.

West Headnotes

Insurance  **2350(1)**[217k2350\(1\) Most Cited Cases](#)

Liability insurer was not obligated to defend school district in third-party action which was brought by child care service identified as additional insured and named as defendant in underlying personal injury action; while clause in policy provided that an otherwise applicable exclusion would not apply if school district's liability arose under "insured contract," lease between school district and child care service did not constitute "insured contract," within meaning of this exception to policy exclusion.

****354 Israelson & Gold**, Plainview, N.Y. ([Jeffrey B. Gold](#) of counsel), for appellant.

****355** David C. Wrobel, P.C., New York, N.Y., for respondents.

Before [ROSENBLATT](#), J.P., [RITTER](#), [COPERTINO](#) and [McGINITY](#), JJ.

MEMORANDUM BY THE COURT.

***329** In an action, *inter alia*, for a judgment declaring that the defendant is obligated to defend the plaintiff Castle Union Free School District as a third-party defendant in a personal injury action entitled *Cappello v. St. Christopher's--Jennie Clarkson Child Care Services, Inc.*, pending in the Supreme Court, Westchester County, under Index Number 12070/95, the defendant appeals from an order and judgment (one paper) of the Supreme Court, Westchester County (Donovan, J.), entered October 8, 1997, which, upon granting the plaintiffs leave to reargue an order and judgment (one paper) of the same court, entered April 4, 1997, denying their prior motion for summary judgment on the complaint and granting its cross motion for summary judgment, in effect, granted the plaintiffs' motion and denied the defendant's cross motion, and declared that the defendant is obligated to defend and indemnify the plaintiff School District as a third-party defendant in the underlying personal injury action.

ORDERED that the order and judgment is reversed, with costs, that branch of the plaintiffs' motion which was for reargument is denied, and the order and judgment entered April 4, 1997, is reinstated.

***330** The defendant Hermitage Insurance Company (hereinafter Hermitage) issued an insurance policy to the plaintiff Greenburgh/North Castle Union Free School District (hereinafter the School District) in which the School District was the named insured and St. Christopher's--Jennie Clarkson Child Care Services, Inc. (hereinafter Clarkson) was an additional insured. The policy contained a provision which stated that its exclusions were not applicable if the insured's liability arose under an "insured contract". Despite the School District's assertion to the contrary, the lease between it and Clarkson does not constitute

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an "insured contract". Therefore, Hermitage is not obligated to defend and indemnify the School District in the third-party action brought by Clarkson against the School District in the underlying personal injury action (see, [Continental Cas. Co. v. Rapid-American Corp.](#), 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506).

In light of our holding, Hermitage's remaining contentions need not be addressed.

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- [1998 WL 35162930](#) (Appellate Brief) Reply Brief of Defendant-Appellant (Jun. 9, 1998)
- [1998 WL 35162929](#) (Appellate Brief) Brief for Plaintiffs-Respondents (May 25, 1998)
- [1998 WL 35162928](#) (Appellate Brief) Brief of Defendant-Appellant (Apr. 20, 1998)

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