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Supreme Court of Florida.
INTERVEST CONSTRUCTION OF JAX, INC., et al., Appellant,
v.
GENERAL FIDELITY INSURANCE COMPANY, Appellee.

No. SC11–2320.
Feb. 6, 2014.

Background: Insured brought action against general liability insurer, alleging breach of contract and seeking declaratory judgment seeking return of money paid above policy's indemnification provision. The United State District Court for the Middle District of Florida granted summary judgment in favor of insurer. Insured appealed. The United States Court of Appeals for the Eleventh Circuit certified questions to state Supreme Court.

Holdings: The Supreme Court, Quince, J., held that:
(1) insured was permitted to apply third-party indemnification payment toward its self-insured retention obligation, and
(2) transfer of rights provision in policy did not abrogate made whole doctrine.

Questions answered.

Canady, J., filed dissenting opinion.

West Headnotes

[1] Insurance 217 2283

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2279 Amounts Payable
217k2283 k. Self-Insured Retentions. Most Cited Cases

Insured was permitted to apply indemnification payments received from third-party toward satisfaction of its $1 million self-insured retention obligation pursuant to general liability policy, where language of the policy stated that the retained limit was required to be paid by the insured, but did not specify where those funds were required to originate, and insured paid for indemnity protection in the purchase price of subcontract that was basis of underlying action and therefore hedged its retained risk, just as it could have paid for a loan or paid a premium on an insurance policy.

[2] Insurance 217 1806

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1806 k. Application of Rules of Contract Construction. Most Cited Cases

The interpretation of insurance contracts is governed by generally accepted rules of construction.

[3] Insurance 217 1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases

Insurance 217 1836

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1836 k. Favoring Coverage or Indemnity; Disfavoring Forfeiture. Most Cited Cases

Ambiguities in insurance contracts are construed against the insurer and in favor of coverage.

[4] Insurance 217 ⚿1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases

Insurance contracts are construed according to their plain meaning.

[5] Insurance 217 ⚿1808

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1808 k. Ambiguity in General. Most Cited Cases

When construing an insurance policy, courts only look to the rules of construction when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction.

[6] Insurance 217 ⚿1807

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1807 k. Function Of, and Limitations On, Courts, in General. Most Cited Cases

Insurance 217 ⚿1812

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1811 Intention
217k1812 k. In General. Most Cited Cases

When construing insurance policies, courts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties.

[7] Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a Whole. Most Cited Cases

In construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.

[8] Insurance 217 ⚿2090

217 Insurance
217XV Coverage—in General
217k2090 k. In General. Most Cited Cases

Insurance 217 ⚿2098

217 Insurance
217XV Coverage—in General
217k2096 Risks Covered and Exclusions
217k2098 k. Exclusions and Limitations in General. Most Cited Cases

Although exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read in pari materia.

[9] Insurance 217 ⚿3514(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement
217k3514 Payment to Insured or Injured Person

217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

Transfer of rights provision in general liability insurance policy, which gave insurer subrogation rights, did not abrogate the "made whole doctrine," and therefore insured had priority to receive any indemnification payment from third-party before insurer, where the transfer of rights provision only allowed insurer to recover payments it had actually made, indemnification payment to insured was not enough to satisfy insured's self-insured retention obligation, such that insurer had yet to provide payment, and provision did not address the priority of reimbursement nor did it expressly abrogate the made whole doctrine.

[10] Subrogation 366 29

366 Subrogation
366k29 k. Mode and Effect of Subrogation in General. Most Cited Cases

Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right.

[11] Subrogation 366 27

366 Subrogation
366k27 k. Agreements for Subrogation. Most Cited Cases

"Conventional subrogation" arises or flows from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor.

[12] Subrogation 366 1

366 Subrogation
366k1 k. Nature and Theory of Right. Most Cited Cases

Subrogation 366 27

366 Subrogation
366k27 k. Agreements for Subrogation. Most Cited Cases

Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract.

[13] Insurance 217 3514(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement
217k3514 Payment to Insured or Injured Person
217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

In the absence of express terms to the contrary, an insured is entitled to be made whole before the insurer may recover any portion of the recovery from a tortfeasor.

[14] Insurance 217 3514(2)

217 Insurance
217XXX Recovery of Payments by Insurer
217k3511 Subrogation Against Third Parties; Right to Proceeds of Action or Settlement
217k3514 Payment to Insured or Injured Person
217k3514(2) k. Adequate Compensation of Insured; "Made Whole" Doctrine. Most Cited Cases

The "made whole doctrine" provides, absent a controlling contractual provision that states otherwise, that the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available.

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Louis Schulman of Dutton Law Group, P.A., Tampa, FL, for Appellee.

QUINCE, J.

***1** This case is before the Court for review of two questions of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that are determinative of a cause pending in that court and for which there appears to be no controlling precedent. We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const. For the reasons that follow, we hold that the insured in this case can use the payments to it from a third party to satisfy the self-insured retention provision.

FACTUAL AND PROCEDURAL HISTORY

This case involves the terms of a general liability insurance contract entered into by General Fidelity Insurance Company (General Fidelity) with Intervest Construction of Jax, Inc., and ICI Homes, Inc. (ICI). The dispute arose out of a personal injury lawsuit filed against ICI by an injured homeowner.

In 2000, ICI contracted with Custom Cutting, Inc. (Custom Cutting) to provide trim work, including installation of attic stairs in a residence that ICI was in the process of building. The contract between Custom Cutting and ICI contained an indemnification provision requiring Custom Cutting to indemnify ICI for any damages resulting from Custom Cutting's negligence. In April 2007, Katherine Ferrin, the owner of a residence constructed by ICI, fell while using the attic stairs installed by Custom Cutting. This fall resulted in serious injuries to Ferrin. Ferrin filed suit against ICI for her injuries; she did not file suit against Custom Cutting. In turn, ICI sought indemnification from Custom Cutting under the terms of the subcontract.

At the time of the accident, Custom Cutting maintained a commercial general liability insurance policy with North Pointe Insurance Company (North Pointe). ICI was not an additional insured under Custom Cutting's policy with North Pointe. ICI held the General Fidelity policy at the time of the accident. Contained in the General Fidelity policy was a Self–Insured Retention endorsement (“SIR”) in the amount of $1 million. The SIR endorsement stated that General Fidelity would provide coverage only after the insured had exhausted the $1 million SIR. The policy also included a transfer of rights clause granting the insurer some subrogation rights, the extent to which the parties dispute.

ICI, Custom Cutting, North Pointe, General Fidelity, and Ferrin participated in a mediation of Ferrin's claim. At the mediation, the parties agreed to a $1.6 million settlement of Ferrin's claim. As part of the settlement, North Pointe agreed to pay ICI $1 million to settle ICI's indemnification claim against Custom Cutting. ICI, in turn, would pay that $1 million to Ferrin. The instant dispute then arose as to whether ICI or General Fidelity was responsible for paying Ferrin the remaining $600,000.

Because of the disagreement between General Fidelity and ICI over coverage, North Pointe paid the $1 million into the trust account of ICI's counsel and each party reserved all rights and claims against the other. Approximately one month later, both ICI and General Fidelity each paid $300,000 to Ferrin, in addition to the $1 million from North Pointe, in order to settle Ferrin's claim for the full $1.6 million. However, the parties reserved the right to bring their claims against each other in order to be reimbursed for their contribution to the settlement.

***2** ICI filed suit in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida for breach of contract and a declaratory judgment seeking return of the $300,000 ICI paid above the $1 million indemnification payment and for attorneys' fees and costs incurred in the Ferrin lawsuit. General Fidelity then removed the case to the United States District Court for the Middle District of Florida based on diversity jurisdiction. General Fidelity filed a counterclaim seeking return of the $300,000 it had paid to Ferrin. The parties filed cross-motions for summary judgment.

In its complaint, ICI alleged that General

Fidelity failed to perform its obligation under the policy by refusing to pay $600,000 of the $1.6 million settlement. ICI maintained that Custom Cutting/North Pointe's contribution of $1 million to settle ICI's indemnification claim, which was then passed on to Ferrin, satisfied the SIR obligation in the policy and General Fidelity was required to pay the remaining $600,000. General Fidelity argued that North Pointe's $1 million payment to settle the indemnity claim did not reduce the SIR because the payment originated from Custom Cutting, not ICI. Thus, General Fidelity maintained that the terms of the policy required ICI to pay the additional $600,000 to settle Ferrin's claim.

The district court denied ICI's motion for summary judgment but granted General Fidelity's motion, holding that ICI could not use the $1 million indemnification payment to satisfy the SIR. The district court cited four California cases addressing similar SIR provisions in insurance policies. Based on the reasoning in those California cases, the district court concluded that the language in the SIR provision at issue in this case is unambiguous because it provides that the "Retained Limit" must be paid by the insured and that the "Retained Limit" will only be reduced by payments made by the insured. Thus the district court found that the indemnity payment that ICI received from Custom Cutting did not exhaust the SIR obligation as required by the language of the policy. Additionally, the district court found that even if ICI had paid the $1 million out of pocket, General Fidelity had paid out the additional $600,000, and ICI was indemnified by Custom Cutting at a later date, ICI would still not have exhausted the SIR as required by the policy because the "transfer of rights" provision in section IV(8) of the policy provides that if the insured has rights to recover all or part of any payment that the insurer has made, those rights are transferred to the insurer. Accordingly, the district court entered judgment in favor of General Fidelity for $300,000.

ICI appealed the district court's ruling to the Eleventh Circuit Court of Appeals. The Eleventh Circuit identified two issues that governed the outcome of the case, but concluded there was no controlling Florida law on either issue. Unlike the district court, the Eleventh Circuit did not find the California cases persuasive in interpreting the General Fidelity policy because the California policies were materially different. Thus, the Eleventh Circuit certified two questions to this Court for resolution:

> ***3** 1. DOES THE GENERAL FIDELITY POLICY ALLOW THE INSURED TO APPLY INDEMNIFICATION PAYMENTS RECEIVED FROM A THIRD–PARTY TOWARDS SATISFACTION OF ITS $1 MILLION SELF–INSURED RETENTION?
>
> 2. ASSUMING THAT FUNDS RECEIVED THROUGH AN INDEMNIFICATION CLAUSE CAN BE USED TO OFFSET THE SELF–INSURED RETENTION, DOES THE TRANSFER OF RIGHTS PROVISION FOUND IN THE GENERAL FIDELITY POLICY GRANT SUPERIOR RIGHTS TO BE MADE WHOLE TO THE INSURED OR TO THE INSURER?

Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co., 662 F.3d 1328, 1332–33 (11th Cir.2011). We address each question in turn below.

ANALYSIS

[1][2][3][4][5][6][7][8] Under Florida law, the interpretation of insurance contracts, such as the commercial general liability policy in this case, is governed by generally accepted rules of construction. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 877 (Fla.2007). "Insurance contracts are construed according to their plain meaning. Ambiguities are construed against the insurer and in favor of coverage." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla.2005). However, courts only look to the rules of construction "when a genuine inconsistency, uncertainty, or ambiguity in meaning

remains after resort to the ordinary rules of construction." *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So.2d 1245, 1248 (Fla.1986)). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id.* (quoting *Pridgen,* 498 So.2d at 1248). Further, "in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *J.S.U.B.,* 979 So.2d at 877 (quoting *Auto–Owners Ins. Co. v. Anderson,* 756 So.2d 29, 34 (Fla.2000)). "Although exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari materia.*" *Id.* (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So.2d 1072, 1074–75 (Fla.1998)).

The text of the SIR endorsement in the instant case provides, in pertinent part:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**
>
> **SELF–INSURED RETENTION Per Occurrence**
>
> **Self–Insured Retention: $1,000,000 Per Occurrence Including Loss Adjustment Expense**
>
> In consideration of the premium charged, it is agreed the insurance afforded by the policy to which this endorsement is attached is subject to the following additional terms, conditions and provisions. In the event of a conflict between any of the terms, conditions or provisions of the policy and this endorsement, this endorsement will control the application of insurance to which the policy applies.
>
> Unless otherwise specified, all terms used in this endorsement have the meaning set forth in the policy.
>
> ***4** 1. The Self–Insured Retention, shown above, applies to each and every "occurrence" or offense made against any insured, to which this insurance applies, irrespective of the number of claims which may be joined in to any one "suit" or claim.
>
> 2. Our total liability will not exceed the Limits of Insurance as specified in the policy Declarations, Coverage Parts or endorsements. The Limits of Insurance will apply only in excess of the Self–Insured Retention, hereinafter referred to as the "Retained Limit."
>
> 3. We have no duty to defend or indemnify unless and until the amount of the "Retained Limit" is exhausted by payment of settlements, judgments, or "Claims Expense" by you.
>
> ....
>
> 5. Should any claim arising under this policy result in a settlement or judgment, including "Claims Expense" incurred by the insured or on the insured's behalf, in excess of the "Retained Limit," we will pay those amounts in excess of the "Retained Limit" to which this insurance applies subject to the Limits of Insurance as specified in the Declarations.
>
> 6. The "Retained Limit" will only be reduced by payments made by the insured.
>
> ....
>
> 11. With respect to any claim payable under this insurance and subject in whole or in part to the "Retained Limit" as provided in this endorsement, we will have the right, but not the obligation to assume the control of said claim and to pay any part of or all of the amount of any such loss including "Claims Expense" within the "Retained Limit" on behalf of and for the account of the insured to affect settlement of said claim. Amounts paid by us

> pursuant to this paragraph will be reimbursed to us by the insured within ten (10) days from the date of our written request to the insured. We will have the right to make partial recoveries from the insured when partial settlements or "Claims Expense" are incurred by us within the "Retained Limit" as provided by this endorsement.
>
> ....
>
> 14. The insolvency, bankruptcy, receivership of the insured, or any refusal by or inability of the insured to satisfy its obligations pursuant to this endorsement will not reduce the "Retained Limit" as set forth in the endorsement, nor will it require us to pay any amounts within the "Retained Limit." The payment of the "Retained limits" by the insured is a condition precedent for our obligation to pay any sums either in defense or indemnity and we shall not pay any such sums until and unless the insured has satisfied its "Retained limits."

The underlined portions of the endorsement were cited by the district court as unambiguously requiring the insured to pay the "Retained Limit" from his or her own funds.

Both parties filed motions for summary judgment on the issue of whether ICI's self-insured retention obligation was exhausted by an indemnification made by one of its subcontractors. The district court denied ICI's motion and granted General Fidelity's motion, entering judgment in its favor for $300,000. *Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, Case No. 3:09–cv–00894–HES–JRK (M.D.Fla. Apr. 22, 2010). The district court recognized that no Florida law addressed this narrow issue and cited three California decisions as persuasive authority. *Id.* at 6. The cited cases included *Vons Cos. v. United States Fire Insurance Co.*, 78 Cal.App.4th 52, 92 Cal.Rptr.2d 597 (2000), *Travelers Indemnity Co. v. Arena Group 2000, L.P.*, 2007 WL 935611 (S.D.Cal. Mar. 8, 2007), and *Forecast Homes, Inc. v. Steadfast Insurance Co.*, 181 Cal.App.4th 1466, 105 Cal.Rptr.3d 200 (2010). The district court briefly summarized the reasoning in the cases and noted that "the instant case does not fall directly in line with any of the policy language discussed" in these cases. *Intervest Constr.*, Case No. 3:09–cv–00894–HES–JRK, slip op. at 8. However, the district court found that the SIR endorsement in the policy repeatedly stated that the retained limit must be paid *by the insured* and that the limit would only be reduced by payments *made by the insured.* The district court found these terms to be unambiguous and required ICI to exhaust the SIR by payment of its own funds, not by application of the indemnification funds. *Id.*

***5** On appeal, the Eleventh Circuit stated that the crux of the dispute between the parties focuses on two provisions of the General Fidelity policy, the SIR endorsement and the transfer of rights clause.[FN1] *Intervest Constr.*, 662 F.3d at 1329. The Eleventh Circuit noted that the particular language at issue in the General Fidelity policy is different from the language in the California cases.[FN2] *Id.* at 1330. The Eleventh Circuit considered these distinctions to be "potentially significant" and found the policies in the California cases to be "materially different for two reasons: (1) the General Fidelity Policy, unlike those policies examined by other courts, does not contain an explicit provision addressing the precise issue in question, and (2) the language of the General Fidelity Policy is arguably less restrictive than the language of the policies at issue in those cases." *Id.* (footnotes omitted). The Eleventh Circuit explained that "[r]equiring that a payment be made from one's 'own account' is not necessarily the same as requiring that the retained limit be *paid* 'by you'." *Id.* In fact, the Eleventh Circuit reasoned that "a strong argument could be made that ICI exhausted its SIR because it *paid* for the protection afforded in the indemnification clause; to wit, ICI *paid* for that indemnity protection in the purchase price of the Custom Cutting subcontract and therefore hedged its retained risk, just as it could have *paid*

for a loan or *paid* a premium on an insurance policy." *Id.* Thus the Eleventh Circuit expressed skepticism of the district court's analysis of this issue of Florida law. *Id.* at 1330–31. The Eleventh Circuit also noted that the policy at issue here "appears on its face to be more permissive" than those in the California cases because it did not contain any other provision requiring payments directly from the insured's own account or expressly prohibiting the use of indemnification payments to satisfy the SIR. *Id.* at 1331.

Although each of the California cases cited by the district court and the Eleventh Circuit addressed the satisfaction of a SIR obligation, none involved the same policy language at issue here. What the cases have in common with each other, and with the resolution of the instant case, is that the policy language controlled—because it either clearly addressed or was ambiguous on the issue of how or by whom the SIR could be paid.

Vons involved an issue similar to the one presented here. A person was injured by a pallet jack being operated by a Vons employee in the common area of a shopping center owned by Vons' landlord, Longs Drug Stores (Longs). *Vons*, 92 Cal.Rptr.2d at 599. The victim sued Vons for his injuries. Vons in turn cross-complained against Longs, alleging that Longs had expressly agreed to indemnify Vons for injuries that occurred in the common area and that Longs was partially to blame for the accident. *Id.* As part of Vons' lease agreement with Longs, Vons was named an additional insured under Longs' comprehensive general liability (**CGL**) insurance policy. The insurance policy contained a SIR endorsement, but it had been exhausted at the time the injured man filed his complaint. Thus the insurance policy provided first dollar coverage for the victim's injuries. *Id.*

***6** Vons was also insured under its own **CGL** policy issued by U.S. Fire. The Vons policy provided $1 million in coverage, but also included a $1 million SIR endorsement. The SIR endorsement in the Vons policy also provided that it was "subject to the limits of liability, exclusions, conditions, and other terms of the policy to which this agreement is attached ..." and that "all other terms and conditions of this Policy remain unchanged." *Id.* Longs' insurer issued a $1 million check to Vons as an additional insured under the Longs policy; Vons contributed $539,905 of its own funds to pay all of the settlement to the injured man. Vons and U.S. Fire disagreed on whether the $1 million SIR in the Vons policy would be deemed exhausted if that sum were paid on behalf of Vons as an additional insured under the Longs policy.

Vons sued U.S. Fire for declaratory relief on the issue. The trial court ruled that U.S. Fire had to reimburse Vons the $539,905 contributed to the settlement. The trial court determined that the Vons policy did not limit the source of the $1 million SIR in any way and did not require Vons to pay the SIR exclusively from its own pocket. *Id.* at 600. U.S. Fire appealed to the California appellate court, which concluded that the "subject to" language in the SIR endorsement made the endorsement subordinate to the other policy terms and conditions, including the "other insurance" provision that made the insurance excess in the event that other insurance was available. *Id.* at 604–05. The court explained that the SIR standing alone would ordinarily make the Vons policy excess, but this provision was expressly made subject to policy terms which also provided that U.S. Fire's coverage was excess if any other valid insurance were available for the same coverage. The appellate court concluded that the most reasonable construction of this provision permitted the payment of the SIR amount through other valid and collectible insurance. *Id.* at 605. At the very least, the court stated, it rendered the SIR ambiguous on this point. *Id.* As the appellate court explained:

> Nowhere does the SIR expressly state that Vons itself, not other insurers, must pay the SIR amount. Because the SIR was subject to the other

insurance provisions, which also made the Vons policy excess if there were another policy covering the accident, Vons as a reasonable insured could read the policy as permitting the use of other insurance proceeds to cover the SIR amount.

Id.

Another case which involved the question of whether a policy required the SIR to be paid from the insured's own account is *Arena Group*. The underlying action involved personal injuries sustained when a two-ton marquee sign at the San Diego Sports Arena fell on two individuals. *Arena Group*, 2007 WL 935611, at *1. The Arena Group was an additional insured under a policy that included a SIR of $500,000. The court noted that "a policy may prohibit the use of other insurance to satisfy a retention by including a policy provision requiring the insured to personally pay the retained amount." *Id.* at *5. The court focused on the language of the policy, which stated, "Insured shall pay from its own account all amounts within the Retained Amount" and "The Retained Amount is the responsibility of the Insured and is to be paid from the Insured's own account." *Id.* Thus, the court concluded, the policy "unambiguously requires the Insured to pay the Retained Amount from its 'own account' " and payments made by Arena Group's other insurers to the injured parties did not satisfy the SIR. *Id.*

***7** The language of the insurance policy in *Forecast Homes* was even more explicit, expressly limiting who could satisfy the SIR. The SIR endorsement required that the named insured "make actual payment" of the SIR amount and provided that "[p]ayments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention." *Forecast Homes*, 105 Cal.Rptr.3d at 208. The court found that "[t]his section of the policy regarding *who* can make the payment to satisfy the SIR is clear and unambiguous." *Id.*

Acceptance Insurance involved a number of underlying actions for construction defects and property damage in homes based on work performed by a developer of residential real estate and the developer's subcontractors. 2002 WL 32515066, at *1. The developer had a number of insurance contracts, including two with Insurance Company of the State of Pennsylvania (ISOP) and a comprehensive general liability policy with North American Capacity Insurance Company (NACIC). *Id.* Pursuant to its contracts, ISOP expended substantial funds in defending the underlying actions and making settlement payments. ISOP sought indemnification from NACIC for a portion of the expenditures. *Id.* The NACIC policy included a $250,000 per occurrence SIR endorsement. NACIC argued that the SIR had not been satisfied because the developer did not pay any portion of its defense or settlement costs. *Id.* at *2. Those costs were paid by ISOP and other insurance companies not parties to the action between ISOP and NACIC. Thus, the issue to be resolved was whether the NACIC insurance contract required the developer to fund the SIR itself.

The court determined that the SIR provision "clearly and unambiguously" required the developer to be responsible for satisfying the SIR with its own funds, regardless of any insurance coverage applicable to the underlying actions. *Id.* at *7. The SIR contained a provision stating that regardless of other insurance, the insured would continue to be responsible for the full SIR before the limits of insurance under the NACIC policy would apply. *Id.* The court noted that this provision in the SIR endorsement would be meaningless if not interpreted as requiring the insured to satisfy the SIR with its own funds. *Id.* Otherwise, the provision "would be reduced to simply reiterating the more general terms" of the policy. *Id.* Additionally, the endorsement expressly stated that it changed the policy and that it controlled in the event of a conflict with other policy provisions. *Id.* at *6. The court explained that the SIR endorsement in the NACIC policy "clearly place[d] the insured

on notice that the additional provisions of the Endorsement change[d] the general policy terms and conditions and [were] separate requirements." *Id.*

We agree with the Eleventh Circuit that the policies at issue in the California cases are materially different from the instant policy. *See Intervest Constr.*, 662 F.3d at 1330. While the SIR endorsement in the instant case contains the same notice of change to the policy that the SIR endorsement in *Acceptance Insurance* contained, it does not contain a provision addressing other insurance within the context of the SIR. The policy in *Acceptance Insurance* contained a provision expressly stating that regardless of other insurance the insured would continue to be responsible for the full SIR before the limits of the policy applied. *Acceptance Ins.*, 2002 WL 32515066, at *7. The SIR endorsement in the *Forecast Homes* policy required the named insured to "make actual payment" of the SIR amount and expressly provided that "[p]ayments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention." *Forecast Homes*, 105 Cal.Rptr.3d at 208. There is no similar language or provision in the instant case.

***8** The Eleventh Circuit also noted that the language of the instant policy "is arguably less restrictive than the language of the policies at issue in [the California] cases." *Intervest Constr.*, 662 F.3d at 1330. For example, in *Arena Group*, the "other insurance" provision required the insured to pay all amounts within the retained amount "from its own account" and was also stated prominently on the first page of the policy—"The Retained Amount is the responsibility of the Insured and is to be paid from the Insured's own account." *Arena Group*, 2007 WL 935611, at *5. The *Arena Group* policy clearly and unambiguously informed the insured that the retained amount had to be paid from its own funds. The language of the instant policy states that the retained limit must be paid by the insured, but does not specify where those funds must originate. Requiring payment to be made from the insured's "own account" is not necessarily the same as requiring that it be paid "by you."

Moreover, as the Eleventh Circuit noted in its opinion, "a strong argument could be made that ICI exhausted its SIR because it *paid* for the protection afforded in the indemnification clause." *Intervest Constr.*, 662 F.3d at 1330. The contract between Custom Cutting and ICI, which included the right to indemnification, was entered into six years before the General Fidelity policy was purchased by ICI. ICI paid for the indemnity protection in the purchase price of the Custom Cutting subcontract and therefore hedged its retained risk in this manner. ICI bargained for and paid for this right to indemnification and, without an express policy provision to the contrary, should be able to use it to satisfy the SIR. The instant case is more akin to the policy in *Vons*, in which the SIR did not "expressly state that Vons itself, not other insurers, must pay the SIR amount." *Vons*, 92 Cal.Rptr.2d at 605.

In light of the language of the policy and the right to indemnification for which ICI paid, we answer the first certified question in the affirmative and find that the General Fidelity policy allows the insured to apply indemnification payments received from a third party toward satisfaction of its $1 million self-insured retention.

[9] The second certified question asks whether the common law rule of the "made whole doctrine" applies here or whether the transfer of rights clause in the policy abrogated the doctrine. The district court did not address this issue. However, the Eleventh Circuit considered the effect of the transfer of rights clause if ICI was permitted to use the Custom Cutting indemnification to satisfy the SIR obligation. *See Intervest Constr.*, 662 F.3d at 1331. As the Eleventh Circuit explained, that right alone "would be of little value if the General Fidelity Policy gave General Fidelity the priority to be made whole before ICI could use any of the indemnity payment towards the SIR." *Id.* at 1331 n. 6.

***9** The text of the transfer of rights provision is found in SECTION IV—COMMERCIAL GENERAL LIABILITY LIMITS, and provides in full:

> 8. Transfer Of Rights Of Recovery Against Others To Us
>
> If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring 'suit' or transfer those rights to us and help us enforce them.

As the Eleventh Circuit stated, the language of this provision is clear—it gives the insurer General Fidelity subrogation rights. However, the provision gives no guidance as to the priority to recover when the indemnity amount is insufficient to "make whole" both parties. *See Intervest Constr.*, 662 F.3d at 1331. In its appeal to the Eleventh Circuit, ICI made two arguments regarding why the transfer of rights provision did not affect its priority to the indemnification funds. First, the plain language of the provision allows General Fidelity to recover only for payments "we have made," and, at the time ICI received the indemnification payment from Custom Cutting, General Fidelity had not yet made any payment. Second, even if the court disregards the tense of the language, the General Fidelity policy did not abrogate the "made whole doctrine" and thus ICI has priority to receive any indemnification before General Fidelity. *Id.* In turn, General Fidelity argued that the court cannot place excessive emphasis on the tense of the language, and further that the transfer of rights provision in the policy abrogated the common law rule of the "made whole doctrine" by writing into the policy priority rights for General Fidelity. *Id.*

[10][11][12][13] "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *W. Am. Ins. Co. v. Yellow Cab Co. of Orlando, Inc.*, 495 So.2d 204, 206 (Fla. 5th DCA 1986) (quoting *Boley v. Daniel*, 72 Fla. 121, 72 So. 644, 645 (1916)). Florida recognizes two types of subrogation: conventional subrogation and equitable or legal subrogation. Conventional subrogation arises or flows from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 646 (Fla.1999). Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from a tortfeasor. *See Fla. Farm Bureau Ins. Co. v. Martin*, 377 So.2d 827, 830 (Fla. 1st DCA 1979).

[14] The "made whole doctrine" provides, absent a controlling contractual provision that states otherwise, that the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available. *See Schonau v. GEICO Gen. Ins. Co.*, 903 So.2d 285, 287 (Fla. 4th DCA 2005) ("Decisions applying the 'made whole' doctrine essentially hold that where both the insurer and the insured simultaneously attempt to recover all of their damages from a tortfeasor who cannot (because of insolvency, limited insurance coverage, or other reasons) pay the full value of damages, the insured has priority of recovery over the insurer."). *Martin* and the subsequent cases involving the "made whole doctrine" all deal with the insured's primary right to recover before the insurance carrier. *See, e.g.*, *Monte de Oca v. State Farm Fire & Cas. Co.*, 897 So.2d 471 (Fla. 3d DCA 2004); *Centex–Rodgers Constr. Co. v. Herrera*, 761 So.2d 1215 (Fla. 4th DCA 2000); *Humana Health Plans v. Lawton*, 675 So.2d 1382 (Fla. 5th DCA 1996). We have acknowledged the application of the made whole doctrine in Florida. *See Ins. Co. of N. Am. v. Lexow*, 602 So.2d 528, 529–30 (Fla.1992) ("Using the

common law subrogation principle, endorsed by Florida courts, the district court reasoned that the insured was entitled to be made whole before the subrogated insurer could participate in the recovery from a tortfeasor.").

***10** ICI cites a Washington case for the proposition that the specific language of the transfer of rights provision found in the General Fidelity policy does not write out the "made whole doctrine," thereby preserving ICI's right of priority. *See Bordeaux, Inc. v. Am. Safety Ins. Co.,* 145 Wash.App. 687, 186 P.3d 1188, 1192–93 (2008) (holding that "[t]he trial court properly ruled that [the insureds] were entitled to be made whole before any third-party recovery funds are paid to the insurers"). General Fidelity argues that *Bordeaux* is not on point.

Bordeaux addressed the nature of SIR provisions in commercial general liability policies that American Safety Insurance Company (American Safety) issued to the condominium developer, Bordeaux, Inc. When the condominium association filed a lawsuit against Bordeaux alleging extensive construction defects and property damage relating to the condominiums, Bordeaux tendered its defense to its two insurers, American Safety and Steadfast Insurance. *Id.* at 1189. The American Safety policy contained a SIR provision that obligated Bordeaux to pay $100,000 before American Safety had an obligation to provide indemnity, coverage, or defense under the policy. *Id.* The policy also contained a subrogation provision which stated that "[i]f the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us." The policy defined the word "we" as "American Safety." *Id.* at 1190. The Washington court determined that "the subrogation provision clearly only allows American Safety to recover payments it *actually made.*" *Id.* at 1192 (emphasis added). Additionally, despite the subrogation provision in the policy, the court concluded that the "made whole doctrine" [FN3] applied in the case and affirmed the trial court's ruling that the insureds "were entitled to be made whole before any third-party recovery funds are paid to the insurers." *Id.* at 1192–93.

Bordeaux cited two Florida cases in support of its conclusion that the SIR did not operate as primary insurance, thereby making American Safety's policy provide excess insurance. This conclusion was significant because had the self-insurance provisions constituted insurance and American Safety's policy been deemed "excess" insurance, then American Safety's rights to subrogation would have been superior to Bordeaux's, and American Safety would have been entitled to recover third-party settlement funds before its insured.[FN4] The *Bordeaux* court cited the Fourth District Court of Appeal's decision in *Zinke–Smith, Inc. v. Florida Insurance Guaranty Ass'n,* 304 So.2d 507, 509 (Fla. 4th DCA 1974), and this Court's decision in *Young v. Progressive Southeastern Insurance Co.,* 753 So.2d 80, 85–86 (Fla.2000), for the proposition that self-insurance does not constitute insurance. Both parties make much of the fact that Florida cases were cited in *Bordeaux.* ICI cites this as evidence that Washington law is similar to Florida's. However, General Fidelity correctly notes that the Florida cases cited turned on a different point of law. *Zinke–Smith* is based on statutory construction, not on interpretation of policy language. The Fourth District held that an employer who secures worker's compensation as a self-insurer does not become an insurer under the insurance code. In *Young,* this Court dealt with the meaning of "insurance" in the Uninsured Motorists Statute, holding that a self-insured party is not insured. *Young* did not involve interpretation of policy terms at all, only statutory interpretation.

***11** However, the language of the transfer of rights clause in the instant case is *exactly* the same as that in *Bordeaux.* While *Bordeaux* is not controlling precedent in this case, it is persuasive authority that the "made whole doctrine" is still

applicable despite the insurance subrogation provision. As Florida law explains, because subrogation is an offspring of equity, equitable principles (such as the "made whole doctrine") apply even when the subrogation is based on contract, *unless* the contract contains express terms to the contrary. *See Fla. Farm Bureau*, 377 So.2d at 830. Here, the transfer of rights clause does not address the priority of reimbursement nor does the clause provide that it abrogates the "made whole doctrine." In the absence of such express language, equitable principles prevail. Thus, we answer the second certified question by stating that the transfer of rights provision in the policy does not abrogate the made whole doctrine, thereby preserving ICI's right of priority.

CONCLUSION

Accordingly, we answer the Eleventh Circuit's first certified question in the affirmative and the second certified question by concluding that the transfer of rights provision in the policy does not abrogate the made whole doctrine. Having answered the certified questions, we return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

PARIENTE, LEWIS, LABARGA, and PERRY, JJ., concur.
CANADY, J., dissents with an opinion in which POLSTON, C.J., concurs.

CANADY, J., dissenting.

Based on the unambiguous allocation of risk under the provisions of the policy, I would conclude that indemnification payments received from a third party may not be applied to satisfy the self-insured retention. I thus would answer the first certified question in the negative. That negative answer to the first question renders the second certified question moot.

Paragraph 3 of the self-insured retention endorsement plainly states that the insurer has "no duty to defend or indemnify unless and until the amount of the 'Retained Limit' is exhausted by payment of settlements, judgments, or 'Claims Expense' *by you* "—that is, by the insured. Paragraph 6 of the endorsement plainly states that "the 'Retained Limit' will *only* be reduced by payments made *by the insured.* " No other provisions of the policy render these provisions ambiguous.

A payment made by a third party pursuant to an indemnification agreement is not a payment "made by the insured." The insurance policy should not be rewritten to allow satisfaction of the self-insured retention limit in a manner other than the manner specifically provided for in the policy. I thus would reject the legal fiction adopted by the majority that a payment made by a third party pursuant to a contractual indemnity provision is a payment "made by the insured." Imposing that legal fiction effectively reads the phrase "by you" out of paragraph 3. And it reads the entirety of paragraph 6 out of the endorsement. The majority's unjustified interpretation of the endorsement gives the endorsement a meaning that is no different than if those provisions were absent from the policy.

***12** I dissent.

POLSTON, C.J., concurs.

FN1. The transfer of rights clause is set forth and addressed in the analysis of the second certified question below.

FN2. The Eleventh Circuit also cited a fourth California case as being materially different from the instant case. The Eleventh Circuit noted in a footnote that the SIR endorsement at issue in *Insurance Co. of the State of Pennsylvania v. Acceptance Insurance Co.*, 2002 WL 32515066 (C.D.Cal. Apr. 29, 2002), contained a provision expressly addressing the possibility that the insured had other insurance covering the same claims.

FN3. The court did not use the term "made whole doctrine," instead referring to the "long-standing rule ... favoring full compensation of insureds over subrogation rights of insurers." *Bordeaux,* 186 P.3d at 1192. This clearly is the same as the "made whole doctrine" under Florida law.

FN4. General Fidelity did not make that argument in this case.

Fla.,2014.
Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co.
--- So.3d ----, 2014 WL 463309 (Fla.), 39 Fla. L. Weekly S75

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126 So.3d 385, 38 Fla. L. Weekly D2256
(Cite as: 126 So.3d 385)

H

District Court of Appeal of Florida,
Fourth District.
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, Appellant,
v.
ADVANCED COOLING AND HEATING, INC., Appellee.

No. 4D12–257.
Oct. 30, 2013.
Rehearing Denied Dec. 5, 2013.

Background: Insurer brought declaratory-judgment action against insured, asserting that it had no duty to defend insured under commercial general liability (**CGL**) insurance policy regarding customer's action, which arose from insured's repair work on air conditioning system. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Janis Brustares Keyser, J., granted insured's motion for summary judgment. Insurer appealed.

Holdings: The District Court of Appeal, Singhal, Raag, Associate Judge, held that:
(1) breach-of-contract claim did not involve property damage, and thus policy provided no coverage, and
(2) policy did not provide coverage regarding faulty-workmanship claim.

Reversed and remanded.

West Headnotes

[1] Insurance 217 2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property damage. Most Cited Cases

Breach-of-contract claim that insured's customer brought against insured regarding repair of air conditioning system did not involve property damage, and thus commercial general liability (**CGL**) insurance policy provided no coverage regarding claim; newly installed compressor, which allegedly was defective or unnecessary component, did not result in physical injury to some other tangible property.

[2] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Trial court's order granting summary judgment as to the duty to defend under an insurance policy is reviewed de novo.

[3] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Question of a liability insurer's duty to defend is answered based upon a review of the underlying pleadings filed against the insured as well as the insurance policy itself.

[4] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

In cases where pleadings in an action against an insured are amended such that they supersede earlier filings, the amended allegations control the issue of a liability insurer's duty to defend.

[5] Insurance 217 2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

Liability insurer's duty to defend arises when a pleading alleges facts which fairly and potentially raise a claim against its insured within policy coverage.

[6] Insurance 217 1713

217 Insurance
217XIII Contracts and Policies
217XIII(A) In General
217k1711 Nature of Contracts or Policies
217k1713 k. Policies considered as contracts. Most Cited Cases

Insurance 217 1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, ordinary or popular sense of language. Most Cited Cases

Insurance 217 2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In general; standard. Most Cited Cases

While any doubt as to whether an insurer has a duty to defend must be resolved in favor of the insured, insurance policies are contracts construed according to their plain meaning.

[7] Insurance 217 2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property damage. Most Cited Cases

For purposes of liability insurance policies providing coverage for property damage claims, a complaint seeking recovery for costs of repair and removal of defective work does not involve a "property damage claim."

[8] Insurance 217 2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property damage. Most Cited Cases

Commercial general liability (**CGL**) insurance policy did not provide coverage regarding faulty-workmanship claim that customer asserted against insured regarding installation of compressor while repairing air conditioning unit, where customer did not allege property damage to some tangible property other than unit itself.

***386** Diane H. Tutt and Hinda Klein of Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow, & Schefer, P.A., Hollywood, for appellant.

Gerald R. Pumphrey of Gerald R. Pumphrey, PA, Jupiter and John P. Wiederhold of Wiederhold, Moses, Kummerlen & Waroncki, PA, West Palm Beach, for appellee.

***387** SINGHAL, RAAG, Associate Judge.

Nationwide Mutual Fire Insurance Company (Nationwide) appeals from a final summary judgment and award of attorney's fees entered in favor of Advanced Cooling and Heating, Inc. (Advanced). The trial court found that Nationwide had a duty to defend Advanced in an action brought by one of Advanced's customers. Because the allegations in the customer's pleadings did not set forth claims within policy coverage, we find Nationwide had no duty to defend and that the trial court erred in granting Advanced's motion for summary judgment and in denying Nationwide's

motion for summary judgment. We reverse and remand for the entry of summary judgment in favor of Nationwide.

Factual Background

In 2009, the customer hired Advanced because of a problem with a home air conditioning unit. They agreed orally to the installation of a compressor under warranty for $438. Upon completion of the work, the customer paid the agreed-upon amount, but by the next day the customer realized the air conditioning problem had not been cured. The customer stopped payment on the check to Advanced, causing Advanced to sue the customer in small claims court. The customer filed a counterclaim and an amended counterclaim alleging breach of contract for failure to properly inspect the air conditioning system which resulted in an unnecessary repair, and failure to complete the repair in a workmanlike manner. At the time of the repair, Advanced was insured by Nationwide under a post–1986 standard form commercial general liability insurance policy.

Upon receipt of the amended counterclaim, Advanced placed Nationwide on notice that Nationwide had a duty to defend Advanced against the claim by the customer. Nationwide denied Advanced a defense after reviewing the customer's pleadings, contending there was no coverage under the policy and that several policy exclusions precluding coverage applied. Advanced retained counsel, defended the counterclaim against the customer and prevailed. Separately, Advanced sought a declaratory judgment as to whether Nationwide had a duty to defend Advanced in its litigation against the customer. The trial court first denied Nationwide's motion for summary judgment, thereby determining that Nationwide owed Advanced a duty to defend. The trial court then granted Advanced's motion for summary judgment and eventually awarded attorney's fees and costs in the amount of $114,268.01 pursuant to section 627.428, Florida Statutes.[FN1] This appeal followed.

FN1. Nationwide does not challenge the amount of the award.

Analysis

[1][2][3][4] A trial court's order granting summary judgment as to the duty to defend under an insurance policy is reviewed de novo. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 877 (Fla.2007). The question of duty to defend is answered based upon a review of the underlying pleadings filed against the insured as well as the insurance policy itself. *Keen v. Fla. Sheriffs' Self–Ins. Fund*, 962 So.2d 1021, 1024 (Fla. 4th DCA 2007). In cases where pleadings are amended such that they supersede earlier filings, the amended allegations control the duty to defend issue. *State Farm Fire & Cas. Co. v. Higgins*, 788 So.2d 992, 995 (Fla. 4th DCA 2001). Based upon the allegations contained in the customer's amended counterclaim, Nationwide owed Advanced no duty to defend. Both the customer's breach of contract claim and the faulty workmanship claim fell outside policy coverage.

***388** [5][6] An insurer's duty to defend arises when a pleading alleges facts which fairly and potentially raise a claim against its insured within policy coverage. *Id.* While any doubt as to whether an insurer has a duty to defend must be resolved in favor of the insured, it is well-settled that insurance policies are contracts construed according to their plain meaning. *J.S.U.B.*, 979 So.2d at 877. The insurance policy issued to Advanced covers “bodily injury” or “property damage” resulting from an “occurrence” pursuant to policy definitions. The breach of contract claim alleges only that an improper or unneeded repair resulted in an unnecessary $438 expense to the customer. There are no allegations of bodily injury or property damage at all. In fact, the wherefore clause of the customer's amended counterclaim seeks only “damages and the return of check number 1533 in the amount of $438.00, together with costs of suit, interest and for such further relief as this Honorable Court deems proper.”

[7] Property damage as contemplated by the plain meaning of the insurance policy refers to damage to property other than the property being repaired. A complaint seeking recovery for costs of repair and removal of defective work does not involve a property damage claim. *See J.S.U.B.*, 979 So.2d at 889. In *Auto–Owners Insurance Co. v. Pozzi Window Co.*, 984 So.2d 1241 (Fla.2008), the Florida Supreme Court provides an example analogous to the facts of this case and states:

> [I]n *West Orange Lumber Co. v. Indiana Lumbermens Mutual Insurance Co.*, 898 So.2d 1147, 1148 (Fla. 5th DCA 2005) a lumber company sought coverage under a [commercial general liability] policy when it failed to provide the proper grade of cedar siding. There was no damage to the construction itself. The Fifth District Court of Appeal concluded that there was no allegation of "property damage" when the only damage alleged was the cost of removing and replacing the wrong grade cedar siding that had been installed. *See id.* In essence, the mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property.
>
> *Auto–Owners Ins. Co.*, 984 So.2d at 1248.

Similarly, the newly installed compressor in this case, essentially a defective or unnecessary component, did not result in physical injury to some other tangible property. The injury is purely economic, which does not constitute property damage under a commercial general liability insurance policy. *J.S.U.B.*, 979 So.2d at 892 (Lewis, C.J., concurring). The customer's amended counterclaim contains no allegation that Advanced caused property damage to any of the customer's other tangible property. Thus, Nationwide had no duty to defend in this case.

[8] The customer's alternative faulty workmanship claim also did not fall within the coverage parameters of the policy. The customer's faulty workmanship claim alleged that Advanced installed the compressor in an unworkmanlike manner, resulting in a leak in the air conditioning system causing a physical injury to tangible property—the compressor. This claim also did not allege property damage to some tangible property other than the air conditioning unit itself. Because we find that Nationwide owed Advanced no duty to defend, we need not address the applicable policy exclusions.

Conclusion

The allegations in the pleadings below did not set forth claims within policy coverage***389** as they did not allege property damage. Accordingly, we find Nationwide had no duty to defend and the trial court erred in granting Advanced's motion for summary judgment and in denying Nationwide's motion for summary judgment. We therefore reverse and remand for entry of summary judgment in favor of Nationwide.

Reversed and Remanded.

DAMOORGIAN, C.J., and STEVENSON, J., concur.

Fla.App. 4 Dist.,2013.
Nationwide Mut. Fire Ins. Co. v. Advanced Cooling and Heating, Inc.
126 So.3d 385, 38 Fla. L. Weekly D2256

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--- So.3d ----, 2013 WL 4734045 (Fla.App. 2 Dist.), 38 Fla. L. Weekly D1890
(Cite as: 2013 WL 4734045 (Fla.App. 2 Dist.))

C

District Court of Appeal of Florida,
Second District.
LIBERTY MUTUAL FIRE INSURANCE COMPANY, Appellant,
v.
MI WINDOWS & DOORS, INC., f/k/a MI Home Products, Inc., Appellee.

Nos. 2D12–2793, 2D12–2800.
Sept. 4, 2013.

Background: Insured brought action against insurer, which issued commercial general liability (**CGL**) policy, to recover consequential damages and cost of repairing and replacing insured's defective doors or windows. The Circuit Court, Pinellas County, Bruce Boyer, J., granted insured's motion for summary judgment. Insurer appealed.

Holding: The District Court of Appeal, LaRose, J., held that under "your product" exclusion, sliding glass doors remained insured's "product" after buyer of doors installed transoms running atop door.

Affirmed in part and reversed in part.

West Headnotes

Insurance 217 2278(21)

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(20) Products and Completed Operations Hazards
217k2278(21) k. In General. Most Cited Cases

Under "your product" exclusion in commercial general liability (**CGL**) insurance policy, sliding glass doors remained insured's "product" after buyer of doors installed transoms running atop doors; addition of transoms did not fundamentally change nature and function of doors, and doors retained their identity after being hung on transoms.

Anthony J. Russo, R. Steven Rawls, and Rebecca C. Appelbaum of Butler Pappas Weihmuller Katz Craig LLP, Tampa; and Nina S. Whiston of Akerman Senterfitt, Miami, for Appellant.

R. Hugh Lumpkin, Meghan C. Moore, W. Allen Bonner, and Dale S. Dobuler of Ver Ploeg & Lumpkin, P.A., Miami, for Appellee.

LaROSE, Judge.

***1** Liberty Mutual Fire Insurance Company appeals a final summary judgment ruling that Liberty had to pay its insured, MI Windows & Doors, Inc., for the $3.4 million MI paid to settle several defective-product lawsuits. We conclude that the trial court erred in ruling that the "your product" exclusion in the policy was inapplicable to the cost of replacing MI's defective doors. Accordingly, we reverse, in part, and affirm, in part.

MI manufactures windows and doors. In the late 1990s and early 2000s, MI sold windows and doors to All Seasons, which agreed to install these products in five condominium projects under construction along the Alabama coast. All Seasons subcontracted the installation work to third parties. In two of the condominiums, the doors were installed with no change. In the other three, All Seasons manufactured and installed transoms running atop sliding-glass doors. Apparently, this change weakened the structural integrity of the doors.

MI was a named insured under a Liberty commercial general liability (**CGL**) policy. During the policy period, tropical storms Hanna and Isidore slammed the Alabama coast, damaging each condominium. Five condominium associations sued MI and All Seasons. While these suits were

pending, Hurricane Ivan ravaged the Alabama coast in September 2004. Without question, Ivan was a potent storm and caused extensively more damage than the tropical storms. MI settled the lawsuits. Invoking the protections of the **CGL** policy, MI then sued Liberty to recover the consequential damages and the cost of repairing and replacing the defective doors or windows at each condominium.

The **CGL** policy provides coverage on an occurrence basis. An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The policy provides a $500,000 deductible for every "occurrence." This deductible can be satisfied with losses paid. The policy also features a "your product" exclusion which bars coverage for damage to any of MI's "products."

The trial court granted summary judgment to MI. The trial court found two "occurrences." The first was "the distribution of a series of allegedly defective windows and doors"; the second was "the unanticipated alteration of sliding glass doors [with transoms] in three of the five condominiums." The trial court also concluded that the "your product" exclusion did not apply to the doors with transoms, because the doors were "significantly changed by others after the sale[,] contributing to the consequential damage suffered." The court found that there was $3,484,600 worth of damages covered by the policy, $1,925,700 of which was for replacement of the transom doors. Because the policy had a $1,000,000 per-occurrence limit, the court awarded MI $2,000,000 in damages.

Dissatisfied with the result, Liberty appealed.

Standard of Review

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000). We review the final summary judgment de novo. *Id.*

"Your Product" Exclusion

***2** Liberty challenges the trial court's ruling that the "your product" exclusion did not limit its liability. We must agree with Liberty. The exclusion's language is unambiguous:

> 2. Exclusions This insurance does not apply to:
>
> ....
>
> k. Damage to Your Product
>
> "Property damage" to "your product" arising out of it or any part of it.

Few Florida cases address the issue of coverage for altered products.[FN1] Although the trial court wrote that "Florida courts have adopted a similar understanding," it cited only one Florida case, *Broward Marine, Inc. v. Aetna Insurance Co.*, 459 So.2d 330, 331 (Fla. 4th DCA 1984). In *Broward*, the insured manufactured a boat that subsequently burned to the waterline. *Id.* at 331–32. The insurer claimed that a "your product" exclusion barred coverage because corrective work was done before the boat burned. *Id.* The court held that a question of fact remained as to whether the boat was repaired to correct a defect. *Id.* at 332. This case, along with other Florida cases, gives no conclusive answer to the issue before us.

Despite the dearth of applicable case law, the trial court held the "your product" exclusion inapplicable because the doors were so materially changed by the addition of the transoms that they were no longer MI's "product." The trial court relied on *Imperial Casualty & Indemnity Co. v. High Concrete Structures, Inc.*, 858 F.2d 128 (3d Cir.1988), where the Third Circuit held that when the insured's steel sheets were stamped into washers by the purchaser, they became "a new product." *Id.* at 134. The trial court also cited *Pittsburgh Plate Glass Co. v. Fidelity & Casualty Company of New York*, 281 F.2d 538 (3d Cir.1960). In *Pittsburgh*, the court held that paint that had been baked into jalousies was "no longer identifiable as a separate

entity" and was covered by the liability insurance policy. *Id.* at 541; *see also Aetna Cas. & Sur. Co. v. M & S Indus., Inc.*, 64 Wash.App. 916, 827 P.2d 321 (1992) (holding that plywood used to construct concrete form boxes was "altered").

These cases are distinguishable from the one before us. No alchemy confronts us. The addition of transoms to the sliding glass doors did not fundamentally change the nature and function of those doors. This is far different from stamping steel into a washer or baking paint onto a jalousie. Common sense dictates that the doors were not "made into something else." *See Imperial*, 858 F.2d at 135. The doors retained their identity after being hung on transoms. They continued to operate as sliding glass doors. Thus, the doors remained MI's product, and the "your product" exclusion precludes any damages awarded to replace them.

We reverse the damages awarded in relation to the "your product" exclusion. In all other aspects, we affirm.

Affirmed in part; reversed in part.

KELLY and SLEET, JJ., Concur.

FN1. *Auto–Owners Insurance Co. v. American Building Materials, Inc.*, 820 F.Supp.2d 1265, 1272 (M.D.Fla.2011), dealt with a "your product" exclusion. The policy defined "your product" as "[a]ny goods or products, *other than real property* ... sold ... by ... you." The insurer argued that the "your product" exclusion precluded coverage for drywall that had been installed in a house. The court held that, as incorporated in the building, the drywall is "real property," thus rendering the "your product" inapplicable. Neither party framed their issues on appeal to address this situation.

Fla.App. 2 Dist.,2013.
Liberty Mut. Fire Ins. Co. v. MI Windows & Doors, Inc.
--- So.3d ----, 2013 WL 4734045 (Fla.App. 2 Dist.), 38 Fla. L. Weekly D1890

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C

District Court of Appeal of Florida,
Second District.
Terry TSAFATINOS, individually; and Sigma TAF Management, Inc., Appellants,
v.
FAMILY DOLLAR STORES OF FLORIDA, INC.; David C. Sugas; and Barbara D. Sugas, Appellees.

No. 2D12–3621.
June 21, 2013.

Background: Employee of tenant brought action against tenant's landlord and landlord's property manager for negligent failure to maintain property through failure to repair a floor, which was allegedly uneven. Landlord brought third-party complaint against tenant for indemnification and breach of contract. The Circuit Court, Pinellas County, Pamela A.M. Campbell, J., dismissed third-party complaint. Landlord appealed.

Holdings: The District Court of Appeal, Black, J., held that:
(1) third-party complaint was not barred by workers' compensation immunity, and
(2) landlord did not properly plead a claim for common law indemnity.

Affirmed in part and reversed in part.

West Headnotes

[1] Appeal and Error 30 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

The standard for reviewing a trial court's order granting a motion to dismiss with prejudice is de novo.

[2] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases

When reviewing the trial court's decision granting motion to dismiss with prejudice, District Court of Appeal is limited to the four corners of the complaint.

[3] Workers' Compensation 413 2084

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A) Between Employer and Employee
413XX(A)1 Exclusiveness of Remedies Afforded by Acts
413k2084 k. In general. Most Cited Cases

Workers' Compensation 413 2142

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(B) Action by Third Person Against Employer
413XX(B)1 In General
413k2142 k. In general. Most Cited Cases

Landlord's third-party complaint against tenant, whose employee made workers' compensation claim and brought action against landlord for failure to maintain property through failure to repair a floor, which was allegedly uneven, was not barred by workers' compensation immunity;

exclusive remedy provision of Workers' Compensation Law was unconstitutional as applied to bar action against allegedly negligent employer that paid its injured employee workers' compensation benefits and to the extent that it immunized tenant from liability to a third party. West's F.S.A. § 440.11(1).

[4] Parties 287 55

287 Parties
287IV New Parties and Change of Parties
287k49 Bringing in New Parties
287k55 k. Rights and liabilities of parties brought in. Most Cited Cases

Defendant, third-party plaintiff, charged with active negligence in the original complaint, is allowed to place his own characterization upon the events and maintain a third-party claim alleging active negligence on the part of the third-party defendant and only passive negligence, if any, on his own part; the purpose of the rule is to settle the controversy in a single action, and it would be unfair to the defendant-third party plaintiff to confine it to the version of facts asserted by the plaintiff in the first instance. West's F.S.A. RCP Rule 1.180.

[5] Workers' Compensation 413 2142

413 Workers' Compensation
413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(B) Action by Third Person Against Employer
413XX(B)1 In General
413k2142 k. In general. Most Cited Cases

Though a third party has a right to sue a workers' compensation claimant's employer, the claim must be viable in the first place.

[6] Indemnity 208 53

208 Indemnity
208III Indemnification by Operation of Law
208k53 k. Common law indemnification. Most Cited Cases

Common law indemnity arises out of obligations imposed through special relationships.

[7] Indemnity 208 59

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k59 k. Relative culpability. Most Cited Cases

Indemnity 208 61

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k61 k. Secondary liability. Most Cited Cases

Indemnity 208 97

208 Indemnity
208V Actions
208k97 k. Pleading. Most Cited Cases

To state a claim for common law indemnity, a party must allege that he is without fault, that another party is at fault, and that a special relationship between the two parties makes the party seeking indemnification vicariously, constructively, derivatively, or technically liable for the acts or omissions of the other party.

[8] Indemnity 208 68

208 Indemnity
208III Indemnification by Operation of Law
208k63 Particular Cases and Issues
208k68 k. Land, premises, highways, or streets. Most Cited Cases

Indemnity 208 97

208 Indemnity

208V Actions
208k97 k. Pleading. Most Cited Cases

Landlord did not properly plead a claim for common law indemnity in action by tenant's employee for negligence, where he failed to show the existence of any special relationship between himself and tenant that would make landlord vicariously, constructively, derivatively, or technically liable to the tenant's employee because of tenant's negligence or fault.

[9] Landlord and Tenant 233 162

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k162 k. Nature and extent of landlord's duty. Most Cited Cases

Landlord's liability for negligence is not predicated on the ownership of the property, but on the failure of the possessor of the property to use due care.

[10] Landlord and Tenant 233 167(1)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(E) Injuries from Dangerous or Defective Condition
233k167 Injuries to Third Persons and Their Property
233k167(1) k. In general. Most Cited Cases

The duty to protect others from injury resulting from a dangerous condition on the premises rests on the right to control access to the property, which is usually in the hands of the tenant, who is in possession and control; thus, if landlord completely surrenders possession and control of a premises to tenant, the landlord will not be liable for injuries to third persons that occur on the property.

[11] Pretrial Procedure 307A 695

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak695 k. Amendment or pleading over. Most Cited Cases

When a complaint appears to be capable of being amended to properly state a cause of action, it should not be dismissed with prejudice without affording the third-party plaintiff the chance to amend.

[12] Contribution 96 7

96 Contribution
96k7 k. Measure of contribution. Most Cited Cases

Indemnity 208 59

208 Indemnity
208III Indemnification by Operation of Law
208k56 Right of One Compelled to Pay Against Person Primarily Liable
208k59 k. Relative culpability. Most Cited Cases

Indemnity 208 74

208 Indemnity
208III Indemnification by Operation of Law
208k73 Scope and Extent of Liability
208k74 k. In general. Most Cited Cases

In an action for indemnification, the defendant is liable for the entire amount, while in an action for contribution, the defendant is only liable for his pro rata share; thus, unlike in a case involving contribution, the concept of weighing of the relative fault of tortfeasors is simply inapplicable in an indemnity action as the party seeking indemnity must be without fault.

[13] Parties 287 51(3)

287 Parties
287IV New Parties and Change of Parties
287k49 Bringing in New Parties

287k51 Necessity and Grounds
287k51(3) k. Actions in which new parties may be brought in. Most Cited Cases

Landlord's claim against tenant for breach of contract on the basis of failure to name landlord as an additional insured on its commercial general liability (**CGL**) policy or its self-insurance policy could not be maintained as a third-party claim, where related claim for common law indemnification failed to state a cause of action. West's F.S.A. RCP Rule 1.180(a).

West Codenotes
Recognized as UnconstitutionalWest's F.S.A. § 440.11(1) ***578** Thomas Valdez and Jeanette Bellon of Quintairos, Prieto, Wood & Boyer, P.A., Tampa, for Appellants.

Jonathan E. Lewerenz and David R. Bolen of Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, Tampa, for Appellee Family Dollar Stores of Florida, Inc.

No appearance for remaining Appellees.

BLACK, Judge.

Terry Tsafatinos and Sigma TAF Management, Inc., appeal the trial court's order dismissing Mr. Tsafatinos' third-party claims for common law indemnity and for breach of contract against Family Dollar Stores of Florida, Inc. We affirm in part and reverse in part.

I. Background

Family Dollar Stores of Florida, Inc. (Family Dollar), leased its business premises from Terry Tsafatinos, individually. On December 26, 2008, David Sugas, an employee of Family Dollar, allegedly stepped on an uneven concrete floor in the backroom of the Family Dollar store, fell, and injured his knee. As a result, Family Dollar has been providing workers' compensation benefits to Mr. Sugas.

Mr. Sugas and his wife filed a three-count amended complaint against Mr. Tsafatinos and Sigma TAF Management, Inc. (Sigma), alleging the incident occurred during the course and scope of Mr. Sugas' employment, Mr. Tsafatinos owned the property, and both Mr. Tsafatinos and Sigma negligently maintained the property by failing to adequately repair the floor in the backroom. It was further alleged that Mr. Sugas was injured and suffered damages as a result of the fall at the negligently ***579** maintained premises.[FN1]

FN1. In count three of the amended complaint, Mrs. Sugas alleged loss of consortium.

Mr. Tsafatinos was granted leave to file a third-party complaint against Family Dollar for common law indemnification and for breach of contract. Regarding the indemnity claim, Mr. Tsafatinos alleged that there was a special relationship between the parties by virtue of the lease agreement. It was further alleged that although Mr. Tsafatinos was the property owner, Family Dollar leased and maintained possession of the property, making Mr. Tsafatinos' liability, if any, solely vicarious, constructive, derivative, or technical in nature. Mr. Tsafatinos alleged that as such, Family Dollar was wholly at fault and liable to the Sugases for any and all injuries suffered as a result of the fall.

Mr. Tsafatinos based his breach of contract claim on the pertinent insurance provision of the lease agreement, paragraph 11(b):

> Tenant shall maintain a commercial general liability policy with a minimum single limit of $1,000,000 for bodily injury, death and property damage insuring Tenant with respect to occurrences on the demised premises. Landlord shall be named as an additional insured under the policy but only for claims arising out of the acts or omissions of Tenant or arising out of the manner of Tenant's use of the demised premises.

He alleged that Family Dollar breached the lease agreement by failing to name him as an

additional insured on its commercial general liability policy or on its "self-insurance policy," which Mr. Tsafatinos alleged Family Dollar maintained in lieu of a commercial general liability policy.

The Sugases objected to the filing of the third-party complaint, arguing that the workers' compensation benefits paid by Family Dollar to Mr. Sugas acted as the exclusive remedy against Family Dollar, including any liability of Family Dollar to third parties. The Sugases further argued that their claims did not fall under Family Dollar's insurance policy but rather under Florida's Workers' Compensation Law,[FN2] the exclusive remedy against, and likewise the exclusive liability of, Family Dollar.

FN2. *See* § 440.11(1), Fla. Stat. (2008).

In its motion to dismiss the third-party complaint, Family Dollar argued that the indemnity count was improperly pleaded. Family Dollar also asserted that because the right of contribution has effectively become obsolete due to the abolition of joint and several liability, it necessarily follows that third-party claims for common law indemnity are no longer available in negligence cases. Further, Family Dollar argued that since the Sugases alleged no negligence against Family Dollar, Mr. Tsafatinos may not do so in the third-party complaint. Pursuant to the pertinent language of the insurance provision of the lease agreement, Family Dollar argued that the breach of contract count was legally impermissible because the amended complaint contained no allegation of negligence against Family Dollar, and thus Mr. Tsafatinos would not be an additional insured under the policy Family Dollar was required to maintain.

After a hearing, the trial court granted the motion to dismiss with prejudice. This appeal followed.

II. Discussion

[1][2] The standard for reviewing a trial court's order granting a motion to dismiss with prejudice is de novo. ***580***Value Rent–A–Car, Inc. v. Grace*, 794 So.2d 619, 620 (Fla. 2d DCA 2001). When reviewing the trial court's decision, this court is limited to the four corners of the complaint. *Id.*

A. Workers' Compensation Immunity

[3] Mr. Tsafatinos' third-party complaint was not barred by workers' compensation immunity. *Sunspan Engineering & Construction Co. v. Spring–Lock Scaffolding Co.*, 310 So.2d 4 (Fla.1975), is controlling. In *Sunspan*, the Florida Supreme Court held that section 440.11(1), Florida Statutes, the exclusive remedy provision of the Workers' Compensation Law, was unconstitutional as applied to bar a third-party plaintiff's common law action for indemnification against a negligent employer who paid its injured employee workers' compensation benefits. *Id.* at 7–8. Thus, a third party's claim for common law indemnification against a negligent employer is not barred by section 440.11(1). *Id.; see also L.M. Duncan & Sons, Inc. v. City of Clearwater*, 478 So.2d 816, 818 (Fla.1985); *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 721 So.2d 1254, 1256 (Fla. 5th DCA 1998). Further, section 440.11(1) is also unconstitutional to the extent that it functions to immunize an employer from liability to a third party where the employer contracted to indemnify the third party for losses resulting from its negligence. *City of Clearwater v. L.M. Duncan & Sons, Inc.*, 466 So.2d 1116, 1118 (Fla. 2d DCA), *aff'd*, 478 So.2d 816 (Fla.1985).

The Sugases cited *Zeiger Crane Rentals, Inc. v. Double A Industries, Inc.*, 16 So.3d 907 (Fla. 4th DCA 2009), in support of their objection to Mr. Tsafatinos' motion for leave to file a third-party complaint, contending that workers' compensation benefits are the exclusive remedy against Family Dollar. *Zeiger*, which involved same-project contractors, is distinguishable because it stands for the proposition that a subcontractor is not liable to the employees of another contractor; rather, the subcontractor is protected by the exclusive liability

provisions of section 440.11. *Zeiger,* 16 So.3d at 913; *see also* § 440.10(1)(e).

B. Allegations in Underlying Action Not Determinative

[4] Despite Family Dollar's contentions, Mr. Tsafatinos is not restricted by the allegations in the Sugases' amended complaint, namely, that Mr. Tsafatinos was actively negligent, or by the fact that the Sugases did not allege negligence on the part of Family Dollar.

> "Rule 1.180, RCP, allows the defendant, third-party plaintiff, charged with active negligence in the original complaint to place his own characterization upon the events and maintain a third party claim alleging active negligence on the part of the third party defendant and only passive negligence, if any, on his own part. The purpose of the rule is to settle the controversy in a single action, and it would be unfair to the defendant-third party plaintiff to confine it to the version of facts asserted by the plaintiff in the first instance."

Broward Marine, Inc. v. New England Corp. of Del., 386 So.2d 70, 73 (Fla. 2d DCA 1980) (quoting *Cent. Truck Lines, Inc. v. White Motor Corp.,* 316 So.2d 579, 580 (1975) (internal quotation marks omitted)); *see also Welch v. Complete Care Corp.,* 818 So.2d 645, 651 (Fla. 2d DCA 2002) ("A party seeking indemnity is not locked in by the injured person's allegations against it in the underlying lawsuit.").

C. Common Law Indemnity Claim

[5][6][7] Though a third party has a right to sue an employer, the claim must be viable in the first place. ***581***Houdaille Indus., Inc. v. Edwards,* 374 So.2d 490, 494 n. 4 (Fla.1979). Common law indemnity "arises out of obligations imposed through special relationships." *Rosenberg v. Cape Coral Plumbing, Inc.,* 920 So.2d 61, 65 (Fla. 2d DCA 2005). To state a claim for common law indemnity, a party must allege that he is without fault, that another party is at fault, and that a special relationship between the two parties makes the party seeking indemnification vicariously, constructively, derivatively, or technically liable for the acts or omissions of the other party. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA,* 731 So.2d 638, 642 (Fla.1999); *Houdaille,* 374 So.2d at 493.

[8][9][10] Mr. Tsafatinos did not properly plead a claim for common law indemnity because he failed to show the existence of any special relationship between himself and Family Dollar that would make Mr. Tsafatinos vicariously, constructively, derivatively, or technically liable to the Sugases because of Family Dollar's negligence or fault. *See Welch,* 818 So.2d at 649; *Marino v. Weiner,* 415 So.2d 149, 150–51 (Fla. 4th DCA 1982). Mr. Tsafatinos, as landlord and property owner, is not liable for injuries that result from dangerous conditions on the property because

> liability is not predicated on the ownership of the property, but on the failure of the possessor of the property to use due care. The duty to protect others from injury resulting from a dangerous condition on the premises rests on the right to control access to the property. This right is usually in the hands of the tenant, who is in possession and control. Thus, if a lessor completely surrenders possession and control of a premises to a lessee, the lessor will not be liable for injuries to third persons that occur on the property.

Welch, 818 So.2d at 649 (citations omitted); *see also Bovis v. 7–Eleven, Inc.,* 505 So.2d 661, 662–64 (Fla. 5th DCA 1987) (noting same). As Mr. Tsafatinos alleged in his complaint, Family Dollar was in possession of the property, and thus Mr. Tsafatinos could not be vicariously, constructively, derivatively, or technically liable for the Sugases' injuries. Without vicarious liability, Mr. Tsafatinos' claim for common law indemnity against Family Dollar is not viable in the first place.

[11] It is true, as Mr. Tsafatinos contends, that when a complaint appears to be capable of being

amended to properly state a cause of action it should not be dismissed with prejudice, as it was here, without affording the third-party plaintiff the chance to amend. *See Kapley v. Borchers,* 714 So.2d 1217, 1218 (Fla. 2d DCA 1998). However, Mr. Tsafatinos' claim for common law indemnity is not capable of amendment to state a cause of action as Mr. Tsafatinos previously asserted in his pleadings that he was not in possession or control of the property and thus he cannot be vicariously liable for the Sugases' injuries. Therefore, the trial court correctly dismissed this count of Mr. Tsafatinos' complaint. *See Welch,* 818 So.2d at 649.

[12] Family Dollar's reliance on *T & S Enterprises Handicap Accessibility, Inc. v. Wink Industrial Maintenance & Repair, Inc.,* 11 So.3d 411 (Fla. 2d DCA 2009), holding that the abolition of joint and several liability acts to defeat all third-party causes of action for contribution, is misplaced. The court in *Wink* reasoned that because judgment is now entered purely on a pro rata finding of fault, there is no longer a need to seek recovery from a non-party joint tortfeasor. *Id.* at 411. Mr. Tsafatinos filed a third-party complaint for common law indemnification, not contribution, and common law indemnification is a legal remedy wholly apart from contribution. *See* ***582***Stuart v. Hertz Corp.,* 351 So.2d 703, 706 (Fla.1977). In an action for indemnification, the defendant is liable for the entire amount, while in an action for contribution, the defendant is only liable for his pro rata share. *Id.* Thus, unlike in a case involving contribution, the concept of "weighing of the relative fault of tortfeasors" is simply inapplicable in an indemnity action as the party seeking indemnity must be without fault. *Houdaille,* 374 So.2d at 493.

D. Breach of Contract Claim

[13] Mr. Tsafatinos alleged that Family Dollar breached its lease by failing to name him as an additional insured on its commercial general liability policy or its "self-insurance policy," pursuant to the lease agreement. We agree that the plain language of the lease required Family Dollar to name Mr. Tsafatinos as an additional insured on the policy. However, since we find that Mr. Tsafatinos' claim for common law indemnification failed to state a cause of action, the related claim for breach of contract may not be maintained as a third-party claim. *See* Fla. R. Civ. P. 1.180(a); *Dacryn Corp. v. Peacock,* 630 So.2d 1169, 1170 (Fla. 2d DCA 1993); *see also Leggiere v. Merrill Lynch Realty/Fla., Inc.,* 544 So.2d 240, 241–42 (Fla. 2d DCA 1989) (holding that the 1984 amendment to rule 1.180(a) was meant to permit a claim "in *addition to* but not in the *absence of* a claim for indemnification, subrogation or contribution").

Though this claim may not be maintained as a third-party action, since the plain language of the lease does not unambiguously establish that Family Dollar did not breach its duty, the court erred in dismissing the third-party claim for breach of contract with prejudice. *See Consuegra v. Lloyd's Underwriters at London,* 801 So.2d 111, 112 (Fla. 2d DCA 2001). This claim may be asserted by Mr. Tsafatinos in a separate action against Family Dollar.[FN3] The dismissal with prejudice would bar such an action.

> FN3. The lease agreement may lend itself to a third-party claim for contractual indemnification. However, we express no opinion as to the viability of such claim.

For the reasons stated herein, we affirm the dismissal with prejudice of the claim for common law indemnification and we affirm the dismissal of the claim for breach of contract. We reverse the dismissal of the breach of contract claim to the extent that such dismissal is with prejudice.

Affirmed in part and reversed in part.

CASANUEVA and SLEET, JJ., Concur.

Fla.App. 2 Dist.,2013.
Tsafatinos v. Family Dollar Stores of Florida, Inc.

116 So.3d 576, 38 Fla. L. Weekly D1383

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116 So.3d 508, 38 Fla. L. Weekly D1185
(Cite as: 116 So.3d 508)

H

District Court of Appeal of Florida,
First District.
DANNY'S BACKHOE SERVICE, LLC, Appellant,
v.
AUTO OWNERS INSURANCE COMPANY and Ring Power Corporation, A Florida corporation, Appellees.

No. 1D12–5142.
May 30, 2013.
Rehearing Denied July 10, 2013.

Background: Liability insurer brought declaratory-judgment action against insured, alleging that insurer was not required to defend or indemnify insured in action arising from damage to leased excavator. The Circuit Court, Leon County, John C. Cooper, J., granted insurer's motion for summary judgment. Insured appealed.

Holdings: The District Court of Appeal, Marstiller, J., held that:
(1) policy's provision stating that damage to property that insured owned or rented was not covered and provision excluding coverage for damage to property that the insured's employees owned, rented, occupied, or used except that exclusion did not apply to insured's liability for damage to such property were independent of each other and were entirely consistent with each other;
(2) excavator was excluded from insurance policy's commercial inland marine (CIM) coverage for equipment; and
(3) insurer's failure to give insured written notice of reservation of rights did not preclude insurer from denying liability coverage.

Affirmed.

West Headnotes

[1] Declaratory Judgment 118A 393

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak393 k. Scope and extent of review in general. Most Cited Cases

District Court of Appeal would review de novo trial court's interpretation of commercial general liability (**CGL**) insurance policy and statute governing claims administration de novo in insurer's declaratory-judgment action regarding coverage. West's F.S.A. § 627.426(2).

[2] Insurance 217 2278(26)

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(25) Property of Insured
217k2278(26) k. In general. Most Cited Cases

Insurance 217 2278(27)

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(25) Property of Insured
217k2278(27) k. Owned property. Most Cited Cases

Provision in commercial general liability (**CGL**) insurance policy stating that damage to property that insured owned or rented was not covered and provision excluding coverage for damage to property that the insured's employees owned, rented, occupied, or used except that exclusion did not apply to insured's liability for damage to such property were independent of each other and were entirely consistent with each other.

[3] Insurance 217 2136(4)

217 Insurance
217XVI Coverage—Property Insurance
217XVI(A) In General
217k2130 Property Covered or Excluded
217k2136 Personal Property
217k2136(4) k. Tools, implements or equipment. Most Cited Cases

Excavator, which insured leased and which was damaged while insured's worker was operating it, was excluded from insurance policy's commercial inland marine (CIM) coverage for equipment; CIM coverage extended only to items listed under "Contractors Equipment," and sole item specified as of date on which excavator was damaged was backhoe.

[4] Insurance 217 3120

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver agreements and reservation of rights. Most Cited Cases

Liability insurer's failure to give insured written notice of reservation of rights did not preclude insurer from denying liability coverage for leased excavator, which was damaged while being operated by insured's worker; insurer did not assert coverage defense but rather claimed complete lack of coverage based on express policy exclusions. West's F.S.A. § 627.426(2)(a).

[5] Insurance 217 3120

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver agreements and reservation of rights. Most Cited Cases

For purposes of statute providing that liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless written notice of reservation of rights is given to insured within 30 days, "coverage defense" means a defense to coverage that otherwise exists. West's F.S.A. § 627.426(2)(a).

[6] Insurance 217 3120

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver agreements and reservation of rights. Most Cited Cases

Liability insurer's failure to comply with requirements of statute providing that written notice of reservation of rights must be given to insured within 30 days in order for insurer to deny coverage based on a particular coverage defense will not bar an insurer from disclaiming liability where the coverage sought is expressly excluded or otherwise unavailable under the policy. West's F.S.A. § 627.426(2)(a).

***509** John S. Kalil of Law Offices of John S. Kalil, P.A., Jacksonville and John E. Spiller of John E. Spiller, P.A., Kissimmee, for Appellant.

Brett B. Little of Carter, Drylie & Little, P.A., Gainesville, for Appellees.

MARSTILLER, J.

Appellant, Danny's Backhoe Service, LLC ("Danny's Backhoe"), appeals a final summary judgment declaring that Appellee, Auto Owners Insurance Company ("Auto Owners"), has no duty to defend Danny's Backhoe in a tort suit brought by Appellee, Ring Power Corporation ("Ring Power"), for damage to its equipment, and that Auto Owners did not waive the right to deny coverage. Finding no error by the trial court in interpreting either the insurance contract or the pertinent statute, we affirm.

The relevant facts are not in dispute. Auto Owners issued Danny's Backhoe an insurance policy providing, *inter alia*, commercial general liability ("**CGL**") coverage and commercial inland marine ("CIM") coverage for equipment. Ring Power is denoted an "additional insured—lessor of

leased equipment" under the **CGL** portion of the policy. The CIM coverage insures equipment "described in the Declarations under Contractors Equipment."

On February 8, 2011, Danny's Backhoe rented a Caterpillar 307C Excavator from Ring Power to remove a customer's in-ground swimming pool. During the removal, the excavator operator, Danny Smith, ruptured a propane gas tank, causing an explosion and fire that damaged the excavator. Ring Power subsequently sued Danny's Backhoe claiming $68,437 in damages caused by Smith's alleged negligence.

Before the accident, the only item listed in the insurance policy under "Contractors Equipment" for CIM coverage was a 2002 John Deere Backhoe. In addition, the policy sets forth the following relevant exclusions from **CGL** coverage:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> ...
>
> **J. Damage To Property**
>
> "Property damage" to:
>
> (1) Property you own, rent, occupy or use, including any cost or expense incurred by you or any other person, ***510** organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
>
> (2) Property that any of your:
>
> (a) "Employees";
>
> (b) "Volunteer workers";
>
> (c) Partners or members (if you are a partnership or joint venture); or
>
> (d) Members (if you are a limited liability company)
>
> own rent, occupy or use. However, this exclusion **J.(2),** shall not apply to your liability for damage to such property.

When Danny's Backhoe filed a claim under the policy for the damaged excavator at issue in the Ring Power's lawsuit, Auto Owners denied coverage and filed a declaratory judgment action alleging the excavator was not covered under the policy, and thus, Auto Owners had no duty to defend Danny's Backhoe. Granting Auto Owners' motion for summary judgment, the trial court found:

> Since the equipment wasn't added to the policy prior to the loss it isn't covered and Auto–Owners has no duty to defend Danny's or pay any damages, attorneys fees or costs on its behalf.... Exclusion 2 J(1) applies in cases where there is "Property damage to: 1) Property you own, rent, occupy or use ... [.]" It is clear from the record Danny's rented the equipment and Danny's is the insured under the policy.... Further, there is no ambiguity between exclusions 2 J(1) and 2 J(2).

In addition, the court concluded Auto Owners had not waived its right to deny coverage, finding that "[a] reservation of rights letter wasn't necessary because this is clearly a 'complete lack of coverage claim.' "

[1] Appealing the summary judgment, Danny's Backhoe argues the trial court incorrectly interpreted the insurance policy to exclude coverage for the leased excavator, and erred in concluding that Auto Owners did not waive the right to claim no coverage.[FN1] We conclude the plain and unambiguous policy language excludes the leased equipment, and that section 627.426(2), Florida Statutes, did not require Auto Owners to provide written notice of reserving its right to assert a coverage defense.

FN1. We review the trial court's

interpretation of the policy and statute *de novo*. *See Chandler v. Geico Indem. Co.*, 78 So.3d 1293, 1296 (Fla.2011) (insurance contract interpretation); *J.M. v. Gargett*, 101 So.3d 352, 356 (Fla.2012) (statutory interpretation).

[2][3] Under the plain language of the policy, CIM coverage extends only to items listed under "Contractors Equipment." The sole item specified as of February 8, 2011, was a John Deere backhoe. Thus, the excavator was excluded from CIM coverage. As to **CGL** coverage, although Ring Power is an additional named insured, paragraph 2 J. (1) under **CGL** coverage exclusions unambiguously states that damage to "property you own [or] rent" is not covered. Thus, whether applied to Danny's Backhoe or to Ring Power as the named insured, the excavator is excluded from **CGL** coverage. Danny's Backhoe argues that paragraphs 2 J. (1) and 2 J. (2) create an ambiguity as to coverage that should operate in its favor. We disagree. Paragraph 2 J. (2) excludes coverage for damage to "Property that any of your (a) 'Employees'; (b) 'Volunteer Workers'; (c) Partners or Members (if you are a partnership or joint venture); or (d) Members (if you are a limited liability company) own, rent, occupy or use. However,***511** this exclusion **J. (2),** shall not apply to your liability for damage to *such property.* " (italics added.) It is clear in that paragraph 2 J. (1) excludes coverage for damage to property leased by the insured, while paragraph 2 J. (2) excludes coverage for damage to property leased by the insured's employees, etc., *unless the insured is liable for damage to that property*. The two provisions are independent of each other, are entirely consistent with each other, and are not ambiguous.

[4][5][6] Turning to whether Auto Owners waived its right to deny coverage, section 627.426, Florida Statutes, provides, in pertinent part:

(2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:

(a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery[.]

§ 627.426(2)(a), Fla. Stat. (2010). As the Florida Supreme Court explained in *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So.2d 998 (Fla.1989), the notice requirement only applies where coverage exists under an insurance policy, but the insurer seeks to assert a coverage defense. "[T]he term 'coverage defense,' as used in section 627.426(2), means a defense to coverage that otherwise exists. We do not construe the term to include a disclaimer of liability based on a complete lack of coverage for the loss sustained." *Id.* at 1000. Thus, "failure to comply with the requirements of the statute will not bar an insurer from disclaiming liability ... where the coverage sought is expressly excluded or otherwise unavailable under the policy [.]" *Id.* Here, Auto Owners claimed a "complete lack of coverage" based on express policy exclusions. Therefore, under *Block Marina*, failure to give Danny's Backhoe written notice of reservation of rights did not preclude Auto Owners from denying coverage for the damaged excavator.

AFFIRMED.

CLARK and SWANSON, JJ., concur.

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