IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2320

INTERVEST CONSTRUCTION OF JAX, INC., a Florida corporation, and ICI HOMES, INC., a Florida corporation,

Appellants,

vs.

GENERAL FIDELITY INSURANCE COMPANY, a foreign corporation,

Appellee.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No.: 10-12613-GG

APPELLANT'S INITIAL BRIEF

W. BRAXTON GILLAM, IV
Florida Bar No. 122076
ROBERT M. DEES
Florida Bar No. 714399
MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.
14 East Bay Street
Jacksonville, Florida 32202
Tel: (904) 357-3660
Fax: (904) 357-3661

Counsel for Appellants

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STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

This is a breach of contract claim by the insureds, Intervest Construction of Jax, Inc., and ICI Homes, Inc., (collectively, "ICI"), against their insurer, General Fidelity Insurance Company, based upon a commercial general liability insurance policy General Fidelity issued to ICI (the "Policy"). The dispute arose out of a personal injury lawsuit filed against ICI by an injured homeowner. The Policy contains a $1 million self-insured retention ("SIR"). The issue in the case is whether the Policy prevents ICI from using funds it received as indemnification from a third-party to satisfy the SIR.

B. Statement of the Facts

In 2000, ICI contracted with Custom Cutting, Inc., for Custom Cutting to provide trim work, including installation of attic stairs, in a home that ICI was building. (Doc. 11, ¶3) The contract between ICI and Custom Cutting contained an indemnification clause requiring Custom Cutting to indemnify ICI for any damages resulting from Custom Cutting's negligence. (Doc. 11, Ex. 2)

In April 2007, the owner of the home was Katherine Ferrin. (Doc. 11, ¶2) Ms. Ferrin was seriously injured when the attic stairs Custom Cutting had installed fell from the ceiling while she was using them. (*Id.*) Ms. Ferrin filed suit against ICI for her injuries. (*Id.*) Ms. Ferrin did not make any claim against Custom

Cutting. (Doc. 11, Ex. 1) ICI demanded indemnification from Custom Cutting based on the indemnification clause in the contract between ICI and Custom Cutting. (Doc. 11, ¶9) ICI also became aware that Custom Cutting had a commercial general liability insurance policy issued by North Pointe Insurance Company ("North Pointe"), with limits of $1,000,000. (*Id.*, ¶13) ICI was not an insured or additional insured in the North Pointe policy.

In July of 2009, ICI, Custom Cutting, North Pointe, General Fidelity, and Ms. Ferrin participated in a mediation. (*Id.*, ¶11) At the mediation, the parties agreed that ICI and General Fidelity would pay Ms. Ferrin $1,600,000 to settle Ms. Ferrin's claim. (*Id.*, ¶12) Also at the mediation, North Pointe agreed to pay $1,000,000 to settle ICI's indemnification claim against Custom Cutting (the "Custom Cutting Payment"). (*Id*., ¶13) Custom Cutting's policy with North Pointe was in effect at the time of the accident in April 2007, however, Custom Cutting was providing no work for ICI in April of 2007. (*Id*., ¶5, Ex. 4, 8th "Whereas" paragraph)

North Pointe issued a check in the amount of $1,000,000 payable to the trust account of ICI's counsel, Milam Howard Nicandri Dees & Gillam, P.A. ("Milam Howard"). (Doc. 11, Ex. 4) General Fidelity had refused to settle unless Milam Howard agreed to hold the $1,000,000 in escrow and subject to General Fidelity's claim. (*Id.*) ICI objected to that procedure but agreed under protest so the Ferrin

case could be settled. (*Id.*) ICI and General Fidelity agreed that each would fund an additional $300,000 to make up the $1,600,000 settlement while reserving all rights and claims against one another regarding the Custom Cutting Payment. (*Id.*) In the reservation of rights, ICI and General Fidelity dispute the characterization of the Custom Cutting Payment and to whom it should have been made. (*Id.*, ¶14)

ICI provided Milam Howard with an additional $300,000. Pursuant to ICI's instructions, and the agreement reached at mediation, Milam Howard delivered a trust account check in the amount of $1,300,000.00 to Ferrin's counsel on August 11, 2009. General Fidelity paid the remaining $300,000. (*Id.*)

ICI thereafter filed this action for breach of contract and declaratory judgment seeking return of the $300,000 ICI paid above the $1 million indemnification payment, as well as attorneys' fees incurred in the *Ferrin* lawsuit. (Doc. 2) ICI filed suit in the Circuit Court of Duval County, and General Fidelity removed the case to Federal court based on diversity jurisdiction. General Fidelity filed a counterclaim seeking return of the $300,000 General Fidelity had paid. (Doc. 5) The parties filed cross-motions for summary judgment. (Doc. 12, 16) The district court denied ICI's motion for summary judgment, and granted General Fidelity's motion for summary judgment, holding that ICI could not use the $1 million indemnification payment to satisfy the SIR. (Doc. 25) ICI appealed the district court's ruling to the Eleventh Circuit. Since there are no Florida cases on

point, the Eleventh Circuit certified two questions to this Court.

C. Questions Certified

The Eleventh Circuit certified the following questions to this Court for resolution:

> 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?

D. Standard of Review

This Court's review of a certified question regarding the interpretation of an insurance policy is *de novo*. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1226-27 (Fla. 2004); *Coleman v. Fla. Ins. Guaranty Ass'n., Inc.*, 517 So. 2d 686, 690 (Fla. 1988).

SUMMARY OF ARGUMENT

ICI received the $1 million in indemnification based on its contract with Custom Cutting. General Fidelity was not a party to or beneficiary of the contract containing the indemnity clause. The only requirement in the Policy to reduce the SIR is that payment must be made "by the insured." Since ICI owned the

indemnification funds, ICI's payment of the funds to Ms. Ferrin satisfied the Policy's requirement that the amount of the SIR be paid "by the insured." The Policy says nothing about, and therefore does not prevent, ICI from receiving indemnity for the amount of the SIR under the facts of this case.

Under the "made whole doctrine", ICI was entitled to be made whole by being indemnified for the amount of the SIR prior to General Fidelity being entitled to subrogation. The Policy does not address which party has priority to recover when an indemnity payment is insufficient to fully compensate both the insured and the insurer. Since the Policy does not waive the "made whole doctrine", ICI is entitled to be made whole from the indemnification payment before General Fidelity is entitled to enforce its subrogation rights. Accordingly, the trial court should have ruled that ICI's payment of the $1 million indemnification funds to Ferrin satisfied the SIR, and that General Fidelity must reimburse ICI for the additional $300,000 ICI paid as well as defense costs incurred in the *Ferrin* action.

ARGUMENT

I. Nothing in the Policy Prevents ICI from Being Indemnified for the Amount of the SIR

The first certified question is whether, under the Policy language, ICI can use the $1,000,000 it received from Custom Cutting to satisfy the SIR. The SIR endorsement states that the SIR will only be reduced by payments "by you", or "by the insured." Since ICI owned the funds received as indemnification from Custom Cutting, ICI could use the funds to satisfy the SIR.

A. The Policy provisions

Nothing in the Policy precludes ICI from being indemnified for the amount of the SIR.

The SIR

The SIR provides in relevant part:

> 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.
>
> . . .
>
> 14. . . . 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".

ICI satisfied Paragraphs 3, 6, and 14, by agreeing to pay the Custom Cutting Payment to Ferrin as part of the settlement of her claim. The Custom Cutting Payment belonged to ICI until it was paid to the underlying Plaintiff. ICI's counsel delivered a check in the amount of $1,300,000 to Ferrin's counsel. This payment constituted payment of a settlement by ICI and was a "payment made by the insured" pursuant to the terms of the SIR.

Under Paragraph 5, General Fidelity agreed that if a settlement of a claim exceeded the Retained Limit, General Fidelity would pay the amount in excess of the Retained Limit. The underlying settlement was for the amount of $1,600,000. Under the provisions of Paragraph 5, General Fidelity is required to pay the $600,000 excess over the $1,000,000 Retained Limit.[1]

[1] At the time of settlement with Ferrin, ICI had already paid over $60,000 in defense costs that reduced the retained limit. As such, not only did ICI not owe the additional $300,000 it was forced to advance to ensure settlement of Ferrin's claim, but it did not owe the full $1 million of the Custom Cutting Payment in order to meet its obligations under the SIR endorsement.

No provision in the Policy prevents or even addresses whether ICI can make arrangements with third-parties to be indemnified for the amount of its SIR. Accordingly, General Fidelity had no legal claim to the $1,000,000 indemnification payment. General Fidelity's ability to demand that ICI's counsel hold the $1,000,000 in escrow arose solely out of its practical ability to prevent settlement of the underlying claim unless its demand was met.

The Transfer of Rights Clause

Similarly, the subrogation clause in the policy does not apply. The subrogation clause states that:

> 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.
>
> (Doc. 2, p. 32 of 81)

This clause does not apply because, at the time General Fidelity made its $300,000 payment, Custom Cutting had been released by ICI, with General Fidelity's approval. In addition, the subrogation clause does not say that General Fidelity's subrogation rights are superior to those of ICI. Under Florida law, the opposite is true, and General Fidelity's subrogation rights are inferior to ICI's subrogation rights. As more fully set forth in Section II of this brief, *infra*, the "made whole

doctrine" applies where an insurer and its insured both have subrogation rights but the potential recovery exceeds the available funds. In such circumstance the insurer is not entitled to subrogation until the insured has been made whole.

The Subcontractor Requirements Endorsement

Similarly, and contrary to General Fidelity's argument in the trial court, the Subcontractor Requirements Endorsement does not apply to this case.[2] (Doc. 11, Ex. 3) The Subcontractor Endorsement specifically applies only to "services performed or completed during the policy period." The Subcontractor Requirements Endorsement states that:

> 1. You are required to procure and maintain a written agreement with each of your Service Providers **for services performed or completed during the policy period** that includes the following material provisions to the maximum extent allowable by state laws: (emphasis supplied)
>
> (Doc. 2, p. 61 of 81)

The indemnity agreement between ICI and Custom Cutting was executed in 2000, six years before the effective date of General Fidelity's policy. The Policy does not require the insured to obtain an indemnity agreement where the services were not performed or completed during the policy period. Here, Custom

[2] General Fidelity admitted in its Answer Brief in the Eleventh Circuit that the Subcontractor Requirements Endorsement does "not directly apply to the facts in this case. . . ." (AB, p. 33)

Cutting's work was completed six years before the policy was issued. General Fidelity had nothing to do with requiring or obtaining the indemnity agreement between ICI and Custom Cutting, and is not entitled to receive the benefit of this agreement.

No clause in the policy addresses the circumstances of this case, where ICI received contractual indemnification from a subcontractor for work performed or completed prior to issuance of the policy. General Fidelity was a stranger to the indemnification agreement between ICI and Custom Cutting, and ICI was entitled to use those funds, which belonged to ICI, to satisfy the SIR.

If Custom Cutting's work had been performed during the policy period, and the Subcontractor Requirements Endorsement was therefore applicable, General Fidelity would have a stronger argument that its policy would be excess over a payment made by a subcontractor's insurance policy as indemnification to ICI. The Subcontractor Requirements Endorsement states that:

> This insurance shall be excess over any other insurance available to you **as an additional insured** under a policy of insurance issued to a Service Provider or subcontractor.
>
> (Doc. 11, Ex. 3) (emphasis supplied)

Those are indisputably not the facts of this case. In addition to Custom Cutting's work not being performed during the policy period, ICI was not an additional

insured under the North Pointe policy. As such, the Subcontractor Endorsement does not apply and General Fidelity cannot now rewrite the policy to address circumstances not addressed in the policy.

If the underlying case had not settled and the underlying Plaintiff had obtained a judgment against ICI for $1,600,000, ICI would have been responsible for paying the first $1,000,000 and General Fidelity would have been responsible for paying $600,000 plus defense costs. ICI would have had five years thereafter to bring a claim against Custom Cutting for contractual indemnification. Nothing in the Policy prevents ICI from being indemnified and nothing entitles General Fidelity to take credit for indemnification ICI receives, at the very least not until ICI has been made whole.

B. California case law

There are no Florida cases on point regarding satisfaction of an SIR. There are some California cases discussing satisfaction of an SIR, but none of the California cases have the same policy language as in this case. As the Eleventh Circuit correctly noted in its decision, the California cases which held that payments from other parties did not satisfy an SIR involved insurance policies that specifically addressed the factual circumstances that occurred. Where the policies did not specifically prohibit use of funds from other parties to satisfy SIRs, the California cases allowed money received from third parties to satisfy an SIR.

For example, in *Vons Cos., Inc. v. United States Fire Ins. Co.*, 78 Cal. App. 4th 52 (2000), the insured settled an underlying tort lawsuit. The insured had a liability policy with a $1,000,000 SIR. The insured was also named as an additional insured under its landlord's policy, which did not contain an SIR. The landlord's insurer paid $1,000,000 to Vons, and Vons paid the $1,000,000 and an additional $539,905 to settle the underlying case. Vons' insurer took the position that Vons had not satisfied the $1,000,000 SIR because the $1,000,000 had come from the landlord's insurer. The court held that

> [I]f the policy terms either permitted the use of other insurance to cover the SIR amount, or were at least ambiguous on that point, then the insured could exhaust the SIR in that manner. An examination of the Vons policy leads us to conclude that Vons too could exhaust its SIR through other insurance.
>
> 78 Cal. App. 4th 52, 62.

The California cases that have determined SIRs were not satisfied involve substantially different terms than are in the General Fidelity policy. For example, in *Travelers Indemnity Co. v. Arena Group 2000, LP*, 2007 WL 935611 (S.D. Cal. March 8, 2007), the issues were: (1) whether Arena Group, as an additional insured, was subject to an SIR in a policy issued to the named insured; and (2) whether a policy can require that the SIR be paid from the insured's account. The court held that the SIR did apply to any insured, whether it was the named insured

or an additional insured. The court also held 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." *Arena Group,* 2007 WL 935611, *5, *citing Vons.* The policy in *Arena Group* stated that the "Insured shall pay from its own account all amounts within the Retained Amount…." *Id.*, *3. The policy also stated that the "Retained Amount is the responsibility of the Insured and is to be paid from the Insured's own account." *Id.* The court concluded that:

> Because the Policy unambiguously requires the Insured to pay the Retained Amount from its "own account," the Court concludes that payments made by Arena Group's other insurers to Doll and Snow do not satisfy the retention.
>
> 2007 WL 935611 at *5

General Fidelity's Policy in this case does not have the language the *Arena Group* court relied on in determining that the insured's Retained Limit had to be paid out of the insured's own account. General Fidelity may not add such terms to the Policy after a loss has occurred.

Similarly, the policy terms and facts were different in *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 2010 WL 95091 (Cal. App. 4 Dist. 2010). Forecast Homes was a developer and had been named as an additional insured under its subcontractors' insurance policies. Those insurance policies contained SIR

provisions which required that the named insured pay the retained limit. The policies specifically prohibited the retained limited from being paid by an additional insured. Since the Policy said that the SIR had to be paid by the named insured, and not an additional insured, the court held that payments by Forecast (an additional insured) did not satisfy the SIR. The court also "question[ed] why Forecast apparently never asked the subcontractors to activate their policies by funding the SIR." 181 Cal. App. 4th at 1483.

Unlike the policy in *Forecast Homes*, the General Fidelity Policy does not specifically address the circumstances that occurred. Nothing in the Policy prohibits ICI from being indemnified from a third-party and using the funds received from the third-party to satisfy the SIR.

Since the Eleventh Circuit certified this matter to the Court, the federal district court in the Middle District of California in *National Fire Ins. Co. of Hartford v. Federal Ins. Co.*, 2012 WL 13669 (N.D. Cal., Jan. 4, 2012) distinguished *Forecast Homes* for this same reason. National Fire paid $1 million to settle a wrongful death claim against its insureds, a restaurant and hotel. Federal insured the hotel with a policy containing a $250,000 SIR. The SIR stated that it would only be reduced by "payments you make."

The court rejected Federal's argument that *Forecast Homes* should control since "the policy does not clearly require the hotel to satisfy the SIR out of its own pocket." 2012 WL 13669, at *6. The court held "that the hotel can be deemed to have satisfied the SIR through the payments made by National on its behalf." *Id.*

This case is even stronger than *National Fire* with respect to satisfaction of the SIR, because ICI used money payable to it pursuant to a contract of indemnification to satisfy the SIR amount. It was only General Fidelity's effort to change the facts, by insisting that the $1 million be held jointly for ICI and General Fidelity, that prevented ICI from receiving the $1 million directly and paying it to Ferrin (rather than such sums being paid from its 'attorneys' trust account).

C. ICI Satisfied the SIR

The Custom Cutting Payment should have been made directly to ICI only, pursuant the Contract between ICI and Custom Cutting. As such, the $1,000,000 belonged to ICI and ICI was entitled to use these funds to satisfy its SIR obligation. From the time ICI's counsel received the $1,000,000 until the time ICI's counsel delivered the $1,300,000 check to Ms. Ferrin's attorney, ICI owned the $1,000,000, subject only to General Fidelity's incorrect claim that it has a legal interest in the $1,000,000.

Ms. Ferrin brought suit only against ICI and never sued Custom Cutting, North Pointe, or General Fidelity. (Doc 11, ¶ 2) Custom Cutting had no

relationship with Ms. Ferrin, and Ms. Ferrin made no claim against Custom Cutting. As a subcontractor to ICI, Custom Cutting had a contractual relationship with ICI, as evidenced by the Contract, which was executed in 2000. *Id.*, ¶ 4. The Contract required Custom Cutting to "defend, indemnify, and hold harmless [ICI] from… loss, liability, expense, property damage or personal injury on account of any claim against [ICI] caused by the act or omission of [Custom Cutting], [Custom Cutting's] employees or agents in performance of this purchase order". *See id.*, Exhibit 2, ¶ 16. Further, the Contract required Custom Cutting to carry insurance but did not require Custom Cutting to name ICI as an additional insured. *See id.*, ¶ 15.

After being sued by Ms. Ferrin, ICI demanded indemnification from Custom Cutting under the Contract. (Doc. 11, Ex. 3, 6th "Whereas" paragraph) Based on this demand, Custom Cutting and North Pointe agreed to participate in the mediation of the Ferrin suit and ultimately settled ICI's claim for indemnification. *Id.*, Exhibit 4, ¶ 2. General Fidelity and Custom Cutting had no contractual relationship with each other; General Fidelity's only relationship with Ms. Ferrin or Custom Cutting was as the insurer of ICI.

The timing of the payments further illustrates ICI's ownership of the Custom Cutting Payment. ICI had over a month to pay Ms. Ferrin under the Settlement Agreement. (Doc. 11, Ex. 4, ¶ 1) However, Custom Cutting's indemnification obligation had already arisen under the Contract, and ICI and Custom Cutting had agreed to settle that indemnification claim between ICI and Custom Cutting for $1,000,000. *See BP Products v. America, Inc. v. Giant Oil, Inc.*, 545 F.Supp.2d 1257, 1260 (M.D. Fla. 2008) (a contractual indemnity claim is ripe prior to judgment being entered or payment being made). Thus, absent General Fidelity's invalid claim to the funds, ICI should have had a month to use the Custom Cutting Payment for its own purposes, prior to meeting its SIR obligation and making payment of its portion of the settlement with Ferrin.

II. Under the "Made Whole Doctrine", ICI's Rights to the indemnification payment from Custom Cutting are Superior to General Fidelity's Subrogation Rights

The second certified question is whether the transfer of rights provision in the Policy waives the "made whole doctrine" under Florida law. Nothing in the Policy says that General Fidelity's subrogation rights are superior to ICI's rights against third parties. As the Eleventh Circuit correctly noted, the transfer of rights clause is "completely silent as to who has *priority* to recover when the indemnity amount is insufficient to 'make whole' both parties." 662 F. 3d at 1331. Since the transfer of rights clause does not address priority of recovery in a limited fund recovery situation, it does not waive the "made whole doctrine."

The "made whole doctrine" provides that the insured has priority over the insurer to recover its damages when there is a limited amount of indemnification available, unless the insurance policy states otherwise. *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." (citing *Fla. Farm Bureau Ins. Co. v. Martin*, 377 So. 2d 827, 828-30 (Fla. 1st DCA 1979))).

On facts identical to this case, the court in *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wash. App. 687, 186 P.3d 1188 (2008), applied the made whole doctrine and held that the insured's rights were superior to the insurers' with respect to recoveries the insured obtained from subcontractors.

The plaintiffs in *Bordeaux* were real estate developers who had been sued for construction defects due to the negligence of their subcontractors. Bordeaux had commercial general liability policies issued by American Safety Insurance Company and Steadfast Insurance Company (hereinafter, collectively "American Safety") which included SIRs in the amount of $100,000. The underlying construction defect case settled at mediation for $630,000. Subsequently, Bordeaux obtained settlements from several of the third-party subcontractors. Those funds "were held pending a judicial determination of whether American Security was entitled to recover from those funds before Bordeaux was made whole." 186 P.3d at 1190.

The primary issue in the case was whether Bordeaux was "entitled to the proceeds of the third-party settlements to fully reimburse them for the SIR funds they paid for defense and settlement costs before any of the proceeds were paid to their insurers." *Id.* at 1191. American Security argued that the made whole doctrine did not apply because the SIR was the equivalent of a primary level of coverage and American Safety's coverage was excess.

The transfer of rights clause in the American Safety policy was to the transfer of rights clause in this case. The transfer of rights clause states 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." *Id.* at 1190; *see also* Doc. 2, p. 32 of 81. The court ruled in favor of *Bordeaux* and held that:

> Nothing in the American Safety contracts gives it the right to subrogation for sums that it did not pay, such as the SIRs. In fact, the subrogation provision clearly only allows American Safety to recover payments it actually made. We will not give it rights it did not clearly provide for in its policy. The long-standing rule of *Thiringer v. American Motors Ins. Co.* and its progeny favoring full compensation of insureds over subrogation rights of insurers applies here. The trial court properly ruled that Bordeaux and Cameray were entitled to be made whole before any third-party recovery funds are paid to the insurers. *Id*. at 1192-93.

Although *Bordeaux* is a Washington State case, the court's recitation of Washington law shows that it is the same as Florida law both with respect to the construction of insurance policies and the "made whole doctrine." In fact, the court cited to two Florida cases *Young v. Progressive SE. Ins. Co.*, 753 So. 2d 80, 85-86 (Fla. 2000), and *Zinke-Smith, Inc. v. Fla. Ins. Guaranty Ass'n.*, 304 So. 2d 507-09 (Fla. 4th DCA 1974), in its analysis. *Id.* at 1192.

The trial court failed to apply the "made whole doctrine" in accordance with Florida law. The district court's misapplication of Florida law is established by

footnote 4 of district court opinion, where the court stated:

> Even if this court were faced with the situation where Plaintiffs had paid the $1,000,000.00 out-of-pocket, Defendant, pursuant to the Policy, paid out the additional $600,000.00, and then Plaintiffs were indemnified by Custom at a later date, Plaintiffs still would not have exhausted the SIR as required by the Policy. Section IV(8) of the Policy reads, "If the insured has rights to recover all or part of any payment [Defendant] ha[s] made under the coverage part, those rights are transferred to [Defendant]." Doc. 25, p. 8, n. 4.

This is an incorrect statement of Florida law and demonstrates reversible error.

Under the transfer of rights clause, if ICI "has rights to recover all or part of any payment" General Fidelity has "made under this Coverage Part, those rights are transferred to" General Fidelity. Doc. 2, p. 32 of 81. The transfer of rights clause says nothing that could be construed as waiving the "made whole doctrine." The transfer of rights clause simply provides that if ICI has the right to recover payments that General Fidelity has made, then those rights are transferred to General Fidelity. The clause does <u>not</u> state that the rights transferred to General Fidelity are superior to ICI's rights to recover from third parties. Since nothing in the policy states that General Fidelity's subrogation rights are superior to ICI's rights, the "made whole doctrine" must be applied in accordance with Florida law, and ICI was entitled to use the $1,000,000 it recovered on its indemnification claim

against Custom Cutting to satisfy the SIR.

CONCLUSION

Based upon the foregoing, ICI respectfully requests this Court to determine (i) that the Policy does not prevent ICI from obtaining indemnity or using such indemnity funds to satisfy the SIR; and (ii) that the transfer of rights clause does not waive the made whole doctrine, and ICI is entitled to be made whole before General Fidelity is entitled to subrogation.

Respectfully submitted,

MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.

By: *s/ Robert M. Dees*
W. Braxton Gillam, IV
Florida Bar No. 122076
Robert M. Dees
Florida Bar No. 714399
14 East Bay Street
Jacksonville, Florida 32202
Tel: (904) 357-3660
Fax: (904) 357-3661
bgillam@milamhoward.com
rdees@milamhoward.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email and U.S. Mail to Louis Schulman, Esq., Dutton Law Group, P.O. Box 26097, Tampa, FL 33685-0697, on this *13th* day of January, 2012.

s/ Robert M. Dees
Attorney

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

Appellants certify that the text of this Initial Brief complies with the font requirements set forth in Fla. R. App. P. Rule 9.210.

s/ Robert M. Dees
Attorney