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 REPLY BRIEF

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REPLY ARGUMENT

I. Reply to General Fidelity's attempt to restate the certified questions

General Fidelity begins its Summary of Argument by asserting that the questions certified by the Eleventh Circuit do not correctly state the issues before this Court. ICI submits that the Eleventh Circuit's certified questions correctly state the issues before this Court, and that General Fidelity's suggested restatement of the second certified question, frankly, makes no sense.

The Eleventh Circuit's certified questions are: (1) whether the policy allows ICI to use the $1,000,000 indemnification payment it received to satisfy the SIR; and (2) if the indemnification funds can be used to satisfy the SIR, whether the transfer of rights clause in the policy grants superior rights to be made whole to ICI or to General Fidelity.

General Fidelity argues that the second certified question should be changed to: "[a]ssuming indemnification payments received from a third party cannot be used to offset the self-insured retention, does the allocation of risk in the General Fidelity policy grant superior rights to indemnification payments to the insured or to the insurer?" (AB, p. 8-9) General Fidelity incorrectly argues that "[i]f indemnification from North Pointe can be used to satisfy payment of the SIR, then the Court of Appeals' second question is moot." (AB, p. 9)

General Fidelity's position is wrong, and just the opposite is true. If the indemnification funds cannot be used to satisfy the SIR, then coverage under the policy would not have been implicated in the first place, and any provisions in the policy regarding priority to indemnification would never come into play. In other words, it is General Fidelity's asserted second certified question that is moot.

The Eleventh Circuit correctly framed the issues. If ICI can use indemnification funds to satisfy the SIR, the question then becomes whether any provision in the policy waives the made whole doctrine, and gives General Fidelity priority over ICI to recoveries from third-parties.

General Fidelity is incorrect in arguing that "[a]llowing indemnity payments to be used to satisfy the SIR would render the separate provision dealing with the rights of the parties to the policy as against third-parties superfluous and meaningless." (AB, p. 9) The policy could have specifically addressed priority to third-party recoveries, but it does not. For example, the policy could have stated that "if the insured has rights to recover indemnification from a third-party, such rights are transferred to General Fidelity and General Fidelity shall have priority over the insured to recover from the third-party." Alternatively, General Fidelity could have given itself priority to indemnification payments by stating in the policy that "this insurance, including the SIR, is excess over any recoveries the insured obtains from third-parties." Absent such a provision, the issues before this

Court are those articulated by the Eleventh Circuit, and this Court should reject General Fidelity's attempt to reframe the issues.

II. The Policy does not say ICI has to pay the SIR with its "own funds"

General Fidelity argues in Section A of its Answer Brief that "the policy requires ICI to pay the SIR with its own funds." (AB, p. 12) General Fidelity uses the term "own funds" throughout the Answer Brief, although "own funds" never appears in the policy. General Fidelity's insertion of "own funds", as if the policy used that term, is probably an effort to make this case sound closer to one of the California cases, *Travelers Indemnity Co. v. Arena Group 2000, LP*, 2007 WL 935611 (S.D. Cal. March 8, 2007). The policy in *Arena Group* stated that the "insured shall pay from its own account all amounts within the retained amount . . . ." *Arena Group*, 2007 WL 935611, *3.

The policy in this case does not say that ICI must pay the SIR from its own account or its own funds. What the policy does say is that the SIR must be paid "by the insured." Since ICI owned the $1,000,000 it recovered from Custom Cuttings, its payment of the $1,000,000 to Ferrin in the underlying action was a payment "by the insured."

General Fidelity complains that ICI is mischaracterizing the underlying settlement by stating that the $1,000,000 payment on behalf of Custom Cuttings was made to ICI. (AB, p. 14, 15) ICI agrees that the payment on behalf of Custom

Cuttings was made to both ICI and General Fidelity. ICI only agreed to that because General Fidelity threatened to prevent the underlying settlement if ICI did not agree that the Custom Cuttings payment would be jointly to ICI and General Fidelity. However, the fact that the payment was made jointly does not mean that the funds were owned jointly. In fact, that is one thing both sides should be able to agree on. Either ICI or General Fidelity owned the funds; they did not own them jointly. If this Court agrees that the made whole doctrine applies, then ICI was the sole owner of the $1,000,000, and ICI's payment of the $1,000,000 to the underlying plaintiff was a payment "by the insured" as required by the SIR.

General Fidelity next addresses the California cases referenced in ICI's Initial Brief (AB, p. 16-19). ICI takes issue with General Fidelity's statement that "[t]he exact issue facing the Court in this case has been addressed by several decisions from California, applying the same rules of construction used in Florida." (AB, p. 16) This case does not involve the "exact issue", because the policy language was different in the California cases. As the Eleventh Circuit correctly noted:

> [T]he policies in those cases are 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.
>
> *Intervest Const. of Jax, Inc. v. General Fidelity Ins. Co.*, 662 F.3d at 1330 (footnotes omitted).

General Fidelity concludes Section I of its Brief by arguing that "ICI is trying to avoid the consequences of having chosen a policy with an SIR, and instead is trying to make the coverage provided by General Fidelity primary." (AB, p. 21) First, General Fidelity's policy is primary. It is just subject to the SIR. A primary policy is not excess over an SIR. *State Farm Mutual Auto Ins. Co. v. Universal Atlas Cement Co.*, 406 So.2d 1184, 87 (Fla. 1st DCA 1982)("… the State Farm policy is not excess over U.S. Steel's self-insurance.")

Second, it is General Fidelity that is trying to change the terms of the policy. ICI acknowledges that it purchased a policy with an SIR, and that the policy provides no coverage until the SIR amount is paid by ICI. However, the policy does not prevent ICI from being indemnified for the amount of the SIR, nor does the policy state that General Fidelity's subrogation rights are superior to ICI's rights to indemnification from third-parties. General Fidelity is the one trying to avoid the consequences of having issued a policy that does not give it the rights that it asks this Court to write into the policy.

III. The Policy does not give General Fidelity priority over ICI to recover indemnification from third parties

In Argument Section B of its Answer Brief, General Fidelity argues that the policy gives it priority over ICI to recover indemnity from third parties. (AB, p. 23-33) General Fidelity begins its argument by stating "[i]f ICI could use an indemnity payment to satisfy the SIR, then any rights granted to indemnity payments would be meaningless." (AB, p. 23) The most glaring flaw in General Fidelity's reasoning is that the Transfer of Rights clause on which General Fidelity relies cannot possibly be read to give General Fidelity priority over ICI to the indemnification ICI received from Custom Cutting. The Transfer of Rights clause states as follows:

> 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 correctly stated:

> The language in this provision on its face is clear – the insurer has subrogation rights. Given that both ICI and General Fidelity have some rights, the language is still completely silent as to who has *priority* to recover when the indemnity amount is insufficient to "make whole" both parties.
>
> 662 F.3d 1328, 1331 (11th Cir. 2011).

Since the Transfer of Rights Clause is "completely silent" regarding priority, the clause cannot be read to give priority to General Fidelity over ICI. Since the policy does not say that General Fidelity has priority to recoveries from third-parties, ICI was entitled to be made whole before General Fidelity was entitled to subrogation.

General Fidelity spends the next three pages (AB, p. 24-26) discussing *Bordeaux, Inc. v. American States Ins. Co.*, 186 P.3d 1188 (Wash. Ct. App. 2008). General Fidelity attempts to distinguish *Bordeaux* by misstating the holding of the case. General Fidelity's statement that *Bordeaux* "addresses a fundamentally different issue" from this case is simply false. (AB, p. 24) The primary issue in *Bordeaux* was whether Bordeaux was "entitled to the proceeds of the third-party settlements to fully reimburse them for the SIR funds they had paid for defense and settlement costs before any of the proceeds were paid to their insurers." 186 P.3d at 1190. The insurers argued that the made whole doctrine did not apply because the SIR was the equivalent of a primary level of coverage, and the insurer's coverage was excess. In addition, the Transfer of Rights clause in *Bordeaux* was verbatim the Transfer of Rights clause in this case. Since *Bordeaux* involved identical facts and an identical Transfer of Rights clause, General Fidelity's argument that "[n]othing in that case [Bordeaux] dealt with an indemnity payment, or any type of payment from a third-party otherwise addressed in the policy" is

disingenuous at best.

From pages 27 to 30 of its Answer Brief, General Fidelity makes meaningless distinctions between this case and other Florida cases discussing the made whole doctrine. ICI readily admits that none of the Florida cases discussing the made whole doctrine are exactly on point (as *Bordeaux* is), but that is not the point. General Fidelity cannot deny that the made whole doctrine is part of Florida law. Under the made whole doctrine, ICI has the right to be made whole before General Fidelity is entitled to enforce its subrogation rights. Nothing in the policy says otherwise.

Having spent the previous ten pages in its Answer Brief trying to convince this Court that the Transfer of Rights clause gives General Fidelity priority to indemnity from third-parties, General Fidelity admits at page 33 that the Transfer of Rights clause "does not in and of itself establish any priority of recovery…." After admitting that the Transfer of Rights clause does not give it priority over ICI, General Fidelity concludes that "[t]he very silence of the 'Transfer of Rights' provision indicates that the right to indemnity is based upon the allocation of rights under the Policy." (AB, p. 33) ICI submits that "the very silence" of the policy regarding priority to indemnity payments means the made whole doctrine applies. Since neither the Transfer of Rights clause nor the SIR address priority to indemnification payments from third-parties, General Fidelity is left arguing that

the made whole doctrine does not apply to policies with SIRs. As set forth more fully below, there is no legal support for General Fidelity's argument.

IV. The reimbursement clause in the Policy does not apply

General Fidelity argues in Section C of its Answer Brief that the policy requires ICI to "reimburse" General Fidelity to the extent that ICI receives indemnification from a third-party. General Fidelity boldly states that "[t]he policy specifically grants General Fidelity this right, and this right has been recognized under similar facts in a number of prior cases." (AB, p. 34) Contrary to General Fidelity's assertion, the policy does not address whether or not ICI can be indemnified for the SIR, and the cases General Fidelity cites have no relevance to this case.

In the next paragraph, General Fidelity makes the baseless argument that where "the Insured has contracted to retain the initial risk, **it only makes sense** that if it achieves any recovery from a third party, that payment becomes the property of General Fidelity to the extent of any payment in excess of the SIR." (emphasis added). First, there was no payment in excess of the SIR in this case. Second, from ICI's standpoint, "it only makes sense" that ICI should be entitled to recover the indemnification it bargained for from Custom Cutting since the policy does not say ICI cannot do so.

More importantly, however, the gist of General Fidelity's argument is that, where a policy is subject to a SIR, the insurer always has priority to indemnification payments from third parties. In other words, General Fidelity is arguing that the made whole doctrine does not apply to insurance policies with SIRs. No case in the country has ever held that, nor has any case even discussed that as a viable issue. Every case involving SIRs and indemnification payments has been resolved based on the specific wording of the policy at issue.

General Fidelity bases its claim to reimbursement on paragraph 11 of the SIR. (AB, p. 34-5) General Fidelity cites a partial quote of paragraph 11, out of context, and argues that the paragraph says something that it clearly does not say. Due to General Fidelity's mischaracterization of paragraph 11, ICI will restate the paragraph in full here:

> 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.

Paragraph 11 simply states that General Fidelity can take over defense and settlement of a case within the SIR and it can recover from ICI amounts incurred in doing so. The paragraph has nothing to do with indemnification from third parties as argued by General Fidelity.

The cases General Fidelity cites in support of its reimbursement argument are *Perreira v. Rediger*, 169 N.J. 399, 778 A.2d 429 (2001), and *Royal Indemnity Co. v. Wyckoff Heights Hosp.*, 953 F.Supp. 460 (E.D. NY 1996). In *Perreira*, the issue was whether New Jersey's collateral source statute allowed a health insurer to recoup payments made to an insured who has recovered a judgment against a tortfeasor. *Perreira* did not involve an SIR, and has no relevance to the issues in this case.

In *Wyckoff*, the insured had a policy with a $1 million SIR. As part of a settlement of a claim, the insured paid $750,000 for an annuity that would make payments totaling $1 million to the Plaintiff over 12 years. The insurer paid an additional $750,000 to settle the claim, while reserving its right to seek reimbursement of the additional $250,000 from the insured. The issue in the case was whether the $750,000 present-dollar cost of the annuity or the $1,000,000 total payout over time counted toward the SIR. The court correctly held that the present-dollar cost of the annuity was the proper measure. That issue has nothing to do with this case.

General Fidelity states at page 36 of its Answer Brief that "ICI undertook the risk of paying its liability up to $1,000,000 when it decided on a policy with an SIR." That is true, as far as it goes. However, ICI mitigated its risk by requiring an indemnification agreement from Custom Cuttings. Nothing in the policy prevents such indemnification, and nothing in the policy gives General Fidelity superior rights to the recovery from Custom Cutting.

General Fidelity further argues that, while ICI had a right of indemnity against Custom Cuttings, "the right to pursue that claim was assigned by General Fidelity under the policy." (AB, p. 36) The *Bordeaux* court rejected that same argument based on an identical subrogation clause. *Bordeaux* stated that "[n]othing in the American Safety contracts gives it the right to subrogation for sums that it did not pay, such as the SIRs." 186 P.3d at 1192. Contrary to General Fidelity's argument, ICI did not transfer to General Fidelity ICI's rights to indemnification for liability for the amount of the SIR.

Finally, General Fidelity argues that its coverage is excess and the SIR is in effect primary coverage. (AB, p. 36) As the *Bordeaux* court correctly noted in rejecting that argument, this Court has specifically held that self-insurance is not the same as primary insurance. 186 P.3d 1192, *citing Young v. Progressive SE. Ins. Co.*, 753 So. 2d 80, 85-86 (Fla. 2000). *See also, Hillsborough Co. Hosp. & Welfare Bd. v. Taylor*, 546 So. 2d 1055 (Fla. 1989) (self-insurance is not the same

as insurance, because insurance involves distribution of risk); *Gov't. Employees Ins. Co. v. Wilder*, 546 So. 2d 12 (Fla. 3d DCA 1989) (self-insurance is not treated as a primary level of coverage); and *Lipof v. Fla. Pwr. & Light Co.*, 558 So. 2d 1067 (Fla. 4th DCA 1990) (an individual self-insurer is not an "insurer" under the Florida Insurance Code, and self-insurance is not considered a "policy" of insurance).

V. The ice cream analogy

General Fidelity concludes its Answer Brief with an analogy about a father buying his son an ice cream cone. Since General Fidelity attempts to restate the certified questions, ICI would restate General Fidelity's analogy.

A father is at a baseball game with his son. The son wants an ice cream cone, which costs $1.50. The father tells the son that the son has to pay the first dollar, and the father will pay the additional $0.50. The son sees a friend of his who owes him a dollar and goes and gets the dollar from him. He then asks his father for the $0.50. If the father refuses to give his son the $0.50, would he not be breaching the agreement he reached with his son?

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,

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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 *22nd* day of February, 2012.

s/ Robert M. Dees
Attorney

CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

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

s/ Robert M. Dees
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