

Perrin Conferences National Construction Defect Conference



Indemnity Panel



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Indemnification and the Interplay with Additional Insured Status

Panel Introductions

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Disclaimer

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Overview of Discussion



Common Law Indemnity

Contractual Indemnity

Additional Insured

Builders Risk Across Policies

Other Avenues of Recovery

Distinguishing Indemnity



Breach of Contract
vs.
Indemnity

First Party Claims
vs.
Third Party Claims

Contribution

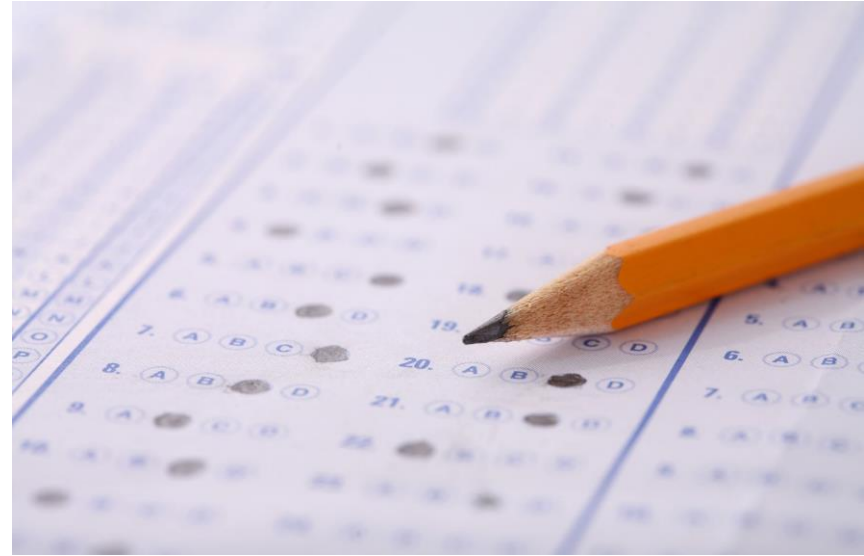
Subrogation

Common Law Indemnity



- Equitable remedy based on a “special relationship” of vicarious, constructive, derivative, or technical liability.
- Usually sought where there is no contract or contractual indemnity provision between parties.
- Generally no duty to defend
- American Rule - Attorneys’ fees not recoverable under common law indemnity

Common Law Indemnity Test



- 1) Party seeking indemnity (indemnatee) must be without fault, and its liability must be solely vicarious for the wrongdoing of another
- 2) Party against who indemnity is sought, that is the indemnitor, must be at fault

Contractual Indemnity

**Contract Interpretation –
Follows plain language**



Contractual Indemnity (Cont'd)

Fla. Stat. 725.06

<u>Title XLI</u> STATUTE OF FRAUDS, FRAUDULENT TRANSFERS, AND GENERAL ASSIGNMENTS 725.06 Construction contracts; limitation on indemnification.—	<u>Chapter 725</u> UNENFORCEABLE CONTRACTS
--	--

Tenn. Stat. 62-6-123 (Broad)

62-6-123. Indemnify or hold harmless agreement invalid.

A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees or indemnitee, is against public policy and is void and unenforceable.

Additional Insured



Afforded Coverage by language of Contract

Ongoing Operations v. Completed Operations Coverage

Builders Risk Insurance, OCIP, WRAP

Duty to Defend



Operative document

**“Suit” Pre-Suit Notice – Construction Defect
Complaint/Demand in Arbitration**

Triggered = “potential for coverage”

Majority = when damage occurred

Minority = when defective work was performed

Duty to Defend Entire Suit

366 So.3d 1154
District Court of Appeal of Florida, Second District.

ECKERD YOUTH ALTERNATIVES,
INC., d/b/a Eckerd Kids, Appellant,
v.
The DEVEREUX FOUNDATION, INC., Appellee.

No. 2D21-1050
I
April 26, 2023

Synopsis

Background: Minor siblings in state foster care brought action against indemnitee, to which state had delegated responsibility to provide for welfare of some children in state foster care system, indemnitor that subcontracted with indemnitee, and indemnitor's employees, alleging that siblings were negligently reunited with abusive biological father and suffered injuries as result. Indemnitee filed cross-claim against indemnitor alleging breach of contract, seeking contractual indemnity, and asserting right to common-law indemnity. Following indemnitee's and indemnitor's independent settlements with siblings, the Circuit Court, 13th Judicial Circuit, Hillsborough County, [Caroline Tesche Arkin, J.](#), awarded final summary judgment to indemnitor on cross-claim and denied indemnitee's motion for summary judgment on cross-claim. Indemnitee appealed.

The District Court of Appeal, [Northcutt, J.](#), held that indemnitee sufficiently invoked indemnitor's duty to defend.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

*1155 Appeal from the Circuit Court for Hillsborough County; [Caroline Tesche Arkin, Judge.](#)

Attorneys and Law Firms

[Philip E. Glatzer](#) of Marlow Adler Abrams Newman & Lewis, Coral Gables, for Appellant.

[Mark D. Tinker](#) of Cole, Scott & Kissane, P.A., Tampa, for Appellee.

Opinion

[NORTH CUTT](#), Judge.

The circuit court awarded a final summary judgment to The Devereux Foundation, Inc., on cross-claims filed against it by Eckerd Youth Alternatives, Inc. We reverse and remand for further proceedings.

Prior to the litigation below, the Florida Department of Children and Families delegated to Eckerd the responsibility to provide for the welfare of some children in the State's foster care system. Eckerd, in turn, contracted with Devereux to provide these services. Eckerd's subcontract with Devereux contained an indemnification provision that required Devereux to defend and indemnify Eckerd as follows:

20. Indemnification:

To the extent permitted by Florida Law, the Provider [Devereux] shall indemnify, save, defend, and hold Eckerd and the Department harmless from any and all claims, demands, actions, causes of action of whatever nature or character, arising out of or by reason of the execution of this agreement or performance *1156 of the services provided herein. It is understood and agreed that [Devereux] is not required to indemnify Eckerd or Department for claims, demands, actions, or causes of action arising solely out of Eckerd's or the Department's negligence.

In 2016, two siblings who were in foster care made claims against Eckerd, alleging that they had been negligently reunited with their abusive biological father and that they suffered injuries as a result. Ultimately, the siblings sued Eckerd, Devereux, and some Devereux employees for their involvement.

When it first learned of the siblings' claims, Eckerd promptly sent a letter to tender its defense to Devereux, but it was unsatisfied with the response:

- August 5, 2016: Upon receiving the notice of claim from one of the siblings and before the siblings filed suit, counsel for Eckerd wrote to Devereux, quoted the indemnification and defense provision of the contract agreement, and said "we hereby tender the above-styled and described claim to The Devereux Foundation, Inc. and its carrier." The letter also demanded that Devereux indemnify Eckerd.

Eckerd Youth Alternatives, Inc. v. Devereau Foundation, Inc., 366 So. 3d 1154 (Fla. 2d DCA 2023)



Case Analysis: Indemnitor responsible for defense of entire suit, following Florida's AI defense cases.

Attorney's Fees for Defense of Third-Party Claims

Contract Indemnification

Defense fees as damages vs policy limits

Additional Insured

Defense fees under policy provisions outside of policy limits

Attorney's Fees for Prosecution of Indemnity/AI

Contract Indemnification

General Rule: No

Exception: Separate attorneys fees
provision in contract


Additional Insured

Dictated by Policy or Statute

Multiple Carriers -> Each carrier has
personal duty to defend (100%
liable for defense fees and costs)

Travelers Property Casualty Company of America v. Amerisure Insurance Company, 161 F.Supp.3d 1133 (N.D. Fla. 2015)

Case Analysis - Insurer liable for not only defense fees of the main claims, but also in pursuing the third-party claims

 KeyCite Yellow Flag - Negative Treatment
Distinguished by *Scottsdale Insurance Company v. Granada Insurance Company*, S.D.Fla., February 5, 2019

161 F.Supp.3d 1133
United States District Court, N.D. Florida,
Panama City Division.

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, Plaintiff,
v.
AMERISURE INSURANCE
COMPANY et al., Defendants.

CASE NO. 5:14cv10-RH/CJK

1
Signed 09/30/2015

Synopsis

Background: General contractor's insurer brought action against subcontractor's insurer to recover attorney fees and costs incurred in defending contractor in underlying action, including fees and costs incurred in pursuing third-party claims against subcontractor. Parties filed cross-motions for summary judgment.

Holdings: The District Court, Robert L. Hinkle, J., held that:

[1] contractor was additional insured under subcontractor's commercial general liability policy, and

[2] subcontractor's insurer had duty to defend contractor in owner's action alleging damage purportedly caused by defective stucco work by subcontractor.

Motions granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (4)

[1] **Insurance**  Scope of coverage

Insurance  Defense costs

Under Florida law, general contractor was additional insured under subcontractor's

commercial general liability policy, and thus subcontractor's insurer was liable to contractor's insurer for attorney fees and costs incurred in defending contractor in underlying action, including fees and costs incurred in pursuing third-party claims against subcontractor, where policy made contractor additional insured if subcontract required subcontractor to obtain coverage for it, subcontract included such provision, and claims in underlying lawsuit against contractor were kind of claims contemplated by policy's your-work or completed-operations coverage.

2 Cases that cite this headnote
[More cases on this issue](#)

[2] **Insurance**  Several Grounds or Causes of Action

Under Florida law, liability insurer's duty to defend extends to entire lawsuit if any claim in lawsuit may come within policy's coverage.

1 Case that cites this headnote

[3] **Insurance**  Continuous acts and injuries; trigger

Under Florida law, insurer had duty under commercial general liability policy to defend general contractor in owner's action alleging damage purportedly caused by defective stucco work, even though damage was not discovered until several years after policy period ended, where policy's coverage extended to any "occurrence" within policy period, and damage may have occurred during policy period, either after completion of work or while work was ongoing.

3 Cases that cite this headnote
[More cases on this issue](#)

[4] **Insurance**  Right to control defense
Insurance  Effect of Breach

Under Florida law, when insurer breaches its duty to defend, insured is justified in assuming defense of action and is released from contractual obligation to leave case's management to insurer.

Indemnification for Negligence of Promisee v. Promisor

100% Promisor liability
Promisor and Promisee liability
100% Promisee



Excess & Primary Insurance

Multiple Occurrences

- 1) Cause Test
- 2) Liability Triggering Test

Urban Oaks Builders LLC v. Gemini Insurance Company, 2021 WL 7209213 (S.D.Tex. December 14, 2021)

2021 WL 7209213
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

URBAN OAKS BUILDERS LLC, et al., Plaintiffs,
v.
GEMINI INSURANCE COMPANY, et al., Defendants.

Civil Action No. 4:19-cv-4211
|
Signed 12/14/2021

Attorneys and Law Firms

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Alexander Brockmeyer, Mark Andrew Boyle, Molly Chafe Brockmeyer, Boyle, Leonard & Anderson, P.A., Fort Myers, FL, for Plaintiffs 1662 Multifamily LLC, Hines Interests Limited Partnership, Hines 1662 Multifamily LLC, Hines Investment Management Holdings Limited Partnership, HIMH GP LLC, Hines Real Estate Holdings Limited Partnership, JCH Investments, Inc.

Jason Lee Boland, Julie Goodrich Harrison, Norton Rose Fulbright US LLP, Houston, TX, Joel McNabney, Pro Hac Vice, Michele A. Vargas, Sina Bahadoran, Clyde & Co. US LLP, Miami, FL, for Defendant Gemini Insurance Company.

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Joshua Walton Wolfshohl, Porter Hedges LLP, Houston, TX, for Defendants Cottingham Road TIC, LLC, Durban Road TIC, LLC.

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Da Pau Enterprises, Inc., Pro Se.

Florida Construction Services, Inc., Longwood, FL, Pro Se.

Structural Contractors South, Inc., Longwood, FL, Pro Se.

MEMORANDUM AND RECOMMENDATION AND ORDER

Christina A. Bryan, United States Magistrate Judge

*1 Several dispositive and non-dispositive motions are currently pending in this multi-party insurance dispute.¹ This case is currently stayed until the Court rules on the pending motions. ECF 310. In this Memorandum and Recommendation, the Court concludes that Plaintiffs' claims involve multiple occurrences under the Gemini Policy and makes recommendations on other pending motions.

I. Background

The facts set forth in this section are undisputed unless otherwise noted. In July 2014, Urban Oaks Builders, LLC (UOB) contracted with 1662 Multifamily LLC to be the general contractor on the construction of six apartment buildings and a clubhouse in Celebration, Florida. UOB entered into contracts with various subcontractors that in turn were enrolled in a controlled insurance program (CIP) to provide general liability insurance for the project. As a result, the term "insureds" under the CIP policies includes UOB, the project owners/developers, and the subcontractors.

Defendants Gemini Insurance Company, Ironshore Specialty Insurance Company, Navigators Specialty Insurance Company, and Great American Assurance Company issued

MidContinent Cas. Co. v. Basdeo, 742 F. Supp. 2d 1293, 1301 (S.D. Fla. 2010), *aff'd*, 477 F. App'x 702 (11th Cir. 2012)



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Sparta Ins. Co. v. Colareta*, S.D.Fla., January 6, 2014

742 F.Supp.2d 1293
United States District Court, S.D. Florida,
Miami Division.

MID-CONTINENT CASUALTY
COMPANY, a foreign corporation, Plaintiff,
v.
Guitree BASDEO, Southgate Gardens
Condominium Association, Inc., and First
State Development Corporation, Defendants.

Case No. 08-61473-CIV
I
Sept. 27, 2010.

Synopsis

Background: Insurer brought action against insured contractor, additional insured condominium association, and condominium unit owner, seeking declaratory judgment that it had no duty to defend contractor from association's state court negligence action against contractor in which summary judgment was entered, and seeking limits on its liability under the commercial general liability (CGL) policy. Parties cross-moved for summary judgment.

Holdings: The District Court, *Donald L. Graham, J.*, adopted the report and recommendation of *Robin S. Rosenbaum*, United States Magistrate Judge, and held that:

[1] fact that insurer settled with individual condominium unit owner did not waive insurer's right to notice and cooperation as to subsequent claims brought by condominium association and other condominium unit owners;

[2] insurer was not statutorily estopped from invoking coverage defenses as they related to lawsuit by condominium association, but was estopped from invoking defenses with respect to suit by individual owner;

[3] triable issue existed as to whether insurer suffered substantial prejudice as a result of failure by contractor and condominium association to provide the requisite notice of loss;

[4] triable issue existed as to whether contractor completely violated its duty to cooperate with insurer; and

[5] triable issue existed as to whether insured contractor abandoned its work on additional insured condominium association's building.

Plaintiff's motion denied. Defendants' motions granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (59)

[1] **Summary Judgment** ➡ **Form and Requisites**
Unsworn statements should not be considered in determining the propriety of summary judgment. *Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.*

9 Cases that cite this headnote

[2] **Summary Judgment** ➡ **Sham affidavits or evidence**

When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact for summary judgment, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony; as a result, where the offering party fails to set forth a valid explanation for the change, a court may strike the offending portions of the affidavit. *Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.*

3 Cases that cite this headnote

[3] **Summary Judgment** ➡ **Sham affidavits or evidence**

In order to be stricken as a sham, a summary judgment affidavit must be inherently inconsistent; when an affidavit contains a satisfactory explanation of the contradictions between it and the affiant's earlier testimony, or when newly discovered evidence furnishes a

Liberty Mut. Fire Ins. Co. v. Bosa Dev. California II, Inc., No. 17-CV-0666-AJB-BGS, 2020 WL 1864645, at *8 (S.D. Cal. Apr. 13, 2020)



KeyCite Yellow Flag - Negative Treatment

Distinguished by *San Bernardino County v. Insurance Company of Pennsylvania*, C.D.Cal., May 16, 2023

2020 WL 1864645

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

LIBERTY MUTUAL FIRE
INSURANCE COMPANY, Plaintiff,
v.

BOSA DEVELOPMENT CALIFORNIA
II, INC., et al., Defendants.
And Related Consolidated Action

Lead Case No.: 17-cv-0666-AJB-BGS
I
Signed 04/09/2020
I
Filed 04/13/2020

Attorneys and Law Firms

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Michael A. Zarconi, *Robert P. Allenby*, *Shailendra Upendra Kulkarni*, Sullivan Hill Lewin Rez & Engel APLC, San Diego, CA, for Defendant Bosa Development California II, Inc.

Andrew D. Herold, *Andrew Mullen*, *Benjamin J. Haeck*,
David Gregory Hackett, *Drew Peter Rosell*, *Herold and Sager*, Encinitas, CA, for Defendant Insurance Company of the State of Pennsylvania.

Timothy Clarke Earl, *Michael A. Zarconi*, *Robert P. Allenby*,
Sullivan Hill Rez & Engel, APLC, San Diego, CA, for
Defendant Bosa Development California, Inc.

ORDER:

(1) GRANTING LIBERTY MUTUAL
FIRE INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT;

(2) DENYING BOSA DEVELOPMENT
CALIFORNIA II, INC.'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; AND

(3) DENYING LIBERTY MUTUAL FIRE
INSURANCE COMPANY'S MOTION FOR LEAVE
TO FILE A FIRST AMENDED COMPLAINT

Hon. *Anthony J. Battaglia*, United States District Judge

*1 Presently before the Court is: (1) Liberty Mutual Insurance Company's ("Liberty") motion for summary judgment, (Doc. No. 156); (2) Bosa Development California II, Inc.'s ("Bosa") motion for partial summary judgment, (Doc. No. 157); and (3) Liberty's motion for leave to file a First Amended Complaint, (Doc. No. 166). All motions were fully briefed, and the Court held oral argument on December 5, 2019. After the Court heard oral argument, Bosa filed supplemental briefing in support of its motion for partial summary judgment. (Doc. No. 187.) Liberty and the Insurance Company of the State of Pennsylvania ("ICSOP") opposed the supplemental briefing. (Doc. Nos. 188, 191-192.) For the reasons set forth below, the Court **GRANTS** Liberty's motion for summary judgment, **DENIES** Bosa's motion for partial summary judgment, and **DENIES** Liberty's motion for leave to amend.

I. BACKGROUND


This case arises out of several defects found in a condominium construction project. The central issue for determination by the Court is how many "occurrences" arose under an applicable insurance policy, and accordingly, how many "deductibles" the insured, Bosa, is liable for.

Bosa was the developer¹ of the Legend condominium project ("the Legend Project"). (Doc. No. 156-1 at 9.) Before Bosa began construction on the Legend Project, Bosa purchased a "wrap-up"² insurance policy issued by Liberty for all contractors and subcontractors involved in the project ("the Liberty Policy"). (*Id.* at 10.) The excess insurance policy was issued by ICSOP. (Complaint "Compl." ¶ 19.)

A. The Liberty Policy and the ICSOP Policy

The Liberty Policy provides that the amount Liberty will pay for "bodily injury" and "property damage" is limited to \$2,000,000 for each "occurrence," subject to a total

Trammell Crow Residential Co. v. St. Paul Fire & Marine Insurance Co., No. 3:11-CV- 2853-N, 2014 WL 12577393, (N.D. Tex. Jan. 21, 2014)

 KeyCite Yellow Flag - Negative Treatment
Declined to Follow by [Urban Oaks Builders LLC v. Gemini Insurance Company](#), S.D.Tex., December 14, 2021

2014 WL 12577393

Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

TRAMMELL CROW RESIDENTIAL CO., Plaintiff,
v.
ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, et al., Defendants.

Civil Action No. 3:11-CV-2853-N

1
Signed 01/21/2014

Attorneys and Law Firms

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Robert I. Siegel, Christopher Rutledge Teske, Gieger Laborde & Laperouse LLC, New Orleans, LA, Ben T. Zinnecker, Weinstein Tippetts & Little LLP, [Brendan Patrick Doherty](#), Gieger Laborde & Laperouse, [Darin L. Brooks](#), [Donald Parkinson Walker](#), Beirne Maynard & Parsons LLP, [Les D. Pickett](#), Galloway Johnson Tompkins Burr & Smith, Houston, TX, for Defendants.

ORDER

David C. Godbey, United States District Judge

*1 This Order addresses Plaintiff Trammell Crow Residential Company's ("TCRC") motion for partial summary judgment [128] against Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"). Because Texas law follows the "vertical exhaustion" doctrine and because, from the perspective of the insured, there was a single occurrence, the Court grants the motion. ¹

I. FACTUAL BACKGROUND

TCRC is a large real estate firm that operates through a variety of affiliated companies. ² In 1998 and 1999, TCRC

affiliate Southampton Apartments, LLC ("SA") developed a multi-family housing project in South Carolina called "Southampton." Another TCRC affiliate was the general contractor. In August 2000, SA conveyed Southampton to Southampton Properties, LLC.

St. Paul Fire and Marine Insurance Company ("St. Paul") issued a commercial general liability ("CGL") policy to TCRC for February 5, 1999 through February 15, 2000. ³ The St. Paul CGL policy had limits of \$1,000,000 per occurrence and \$2,000,000 aggregate. General Accident Insurance Company of America n/k/a OneBeacon Insurance Company ("OneBeacon") issued a CGL policy to TCRC for February 15, 2000 through February 15, 2001. The OneBeacon CGL policy had the same limits as the St. Paul policy. National Union issued a \$10 million umbrella policy to Trammell Crow Residential, Inc. ⁴ for the period from February 5, 1999 to February 5, 2000, and another \$10 million umbrella policy for the period from February 5, 2000 to February 15, 2001. ⁵ TCRC had other liability insurance before and after the February 5, 1999 to February 15, 2001 period.

In 2009, Southampton residents and the property owners association sued the TCRC affiliate developer and contractor (and other parties) alleging that defective construction caused water intrusion and damage to the premises (the "Southampton Litigation"). The TCRC affiliates eventually settled the Southampton Litigation for \$3.435 million, funded as follows: (1) St. Paul paid \$1 million; (2) OneBeacon paid \$1 million; (3) TCRC paid \$540,000 through another affiliate; (4) National Union paid \$470,000; and (5) other parties paid the remaining \$425,000. TCRC now seeks to recover the \$540,000 it paid in settlement from National Union under one or both of its excess umbrella policies.

*2 The instant motion deals with the question whether the underlying St. Paul and OneBeacon CGL policies are exhausted so that National Union's umbrella policies are in play. This raises two subissues: (1) is TCRC required to exhaust only the St. Paul and OneBeacon policies to get into National Union's umbrellas ("vertical exhaustion"), or is TCRC required also to exhaust the primary policies for other policy years that would potentially have coverage for the Southampton Litigation ("horizontal exhaustion"), and (2) was there a single occurrence or multiple occurrences.

Metropolitan Dade County v Florida Aviation Fueling Company, Inc., 578 So. 2d. 296 (3rd DCA 1991)

578 So.2d 296
District Court of Appeal of Florida,
Third District.

METROPOLITAN DADE COUNTY, Appellant,
v.
FLORIDA AVIATION FUELING
COMPANY, INC., Appellee.

No. 87-2456.

I

March 5, 1991.

I

Rehearing Denied May 1, 1991.

Synopsis

Worker who was injured while using temporary fueling device at county-owned airport sued county and other defendants. County filed third-party indemnity action against injured worker's employer, which leased facility from county. The Circuit Court, Dade County, Michael H. Salmon, J., entered adverse final summary judgment in third-party action, from which county appealed. The District Court of Appeal held that: (1) lessee had duty to defend county against injured worker's claims, even though not all of them were covered by indemnification clause in lease, and (2) to prevail on its indemnification claim, county would have to establish that settlement with injured worker or portion thereof was attributable to covered vicarious liability claim and that portion of settlement attributable to that claim was reasonable as to its amount.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

*297 Kelley Drye & Warren, including Smathers & Thompson, and [Christian D. Keedy](#), Miami, for appellant.

Marlow, Shofi, Connell, Valerius, Abrams, Lowe & Adler and [Joseph H. Lowe](#), Miami, for appellee.

Before [BARKDULL](#), HUBBART and [COPE](#), JJ.

Opinion

PER CURIAM.

Metropolitan Dade County appeals an adverse final summary judgment in its third party action against Florida Aviation Fueling Company, Inc. (FAFCO) for indemnity. We reverse.

Dade County owns an aircraft refueling facility adjacent to Miami International Airport. It leased the fueling facility to FAFCO, which assumed responsibility for all operations, maintenance and repair. The lease between the county and FAFCO contained an indemnity provision which states:

The Lessee shall indemnify and save the County harmless from any and all claims, liability, losses and causes of actions which may arise out of the operation of Lessee's business under this Lease Agreement. The Lessee shall pay all claims and losses of any nature whatsoever in connection therewith, and shall defend all suits in the name of the County when applicable, and shall pay all costs and judgments which may issue thereon.

In 1983 FAFCO discovered a leak in the underground pipes at the fuel facility. A temporary fueling system was devised using an above-ground flexible rubber hose for transferring fuel from storage tanks into the aircraft fuel trucks. During the use of the temporary assembly, FAFCO employee James Myles was thrown from the top of a fuel truck and was rendered quadriplegic.

Myles brought suit against a number of defendants, including Dade County. He alleged that the temporary fueling device was improperly designed and dangerous for the pumping of fuel at high pressure. The plaintiff alleged in substance that the device did not comply with applicable standards and was inherently unstable. The plaintiff alleged that the system lacked an appropriate "dead man" control for emergency shutdown, and that previous accidents with the temporary system had made all of these matters obvious.

Metropolitan Dade County v CBM Industries of Minnesota, Inc.; 776 So. 2d 937 (3rd DCA 2001)

776 So.2d 937

District Court of Appeal of Florida,
Third District.

METROPOLITAN DADE COUNTY, a political
subdivision of the State of Florida, Appellant,
v.

CBM INDUSTRIES OF
MINNESOTA, INC., etc., Appellee.

No. 3D99-1954.

|
Sept. 20, 2000.
|

Rehearing Denied Feb. 21, 2001.

Synopsis

Airline employee brought slip and fall claim against county and airport's janitorial cleaning service, and county sought indemnity from cleaning service. After cleaning service settled employee's suit on behalf of county and itself, the county filed cross-claim for indemnity of attorney fees against cleaning service. The Circuit Court, Dade County, [Gisela Cardonne, J.](#), granted summary judgment to cleaning service. County appealed. The District Court of Appeal, [Levy, J.](#), held that claim against county was a vicarious liability claim and thus cleaning service had a contractual duty to defend and indemnify county.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

*937 Merritt, & Sikes and [William C. Merritt](#), Miami; Hicks & Anderson and [Martin E. Leach](#), Miami, for appellant.

Walton Lantaff Schroeder & Carson and [John P. Joy](#) and [Kenneth L. Valentini](#), Miami, for appellee.

Before [COPE](#), [LEVY](#), and [GERSTEN](#), JJ.

Opinion

[LEVY](#), Judge.

Metropolitan Dade County ("the County") appeals from the denial of its Motion for Summary Judgment and the entry

of Final Summary Judgment in favor of CBM Industries of Minnesota, Inc. ("CBM"), contending that an indemnity provision in the Management Agreement ("agreement") between the parties requires CBM to indemnify the County for attorney fees expended in defending a slip and fall claim. We agree with the County and reverse, concluding that the underlying Complaint raises alternative claims against the County sounding in negligence and vicarious liability for negligence stemming from CBM's negligent maintenance of the premises.

The County owns the Miami International Airport and contracted with CBM for janitorial and cleaning maintenance services at the airport. An airline employee slipped and fell at the airport and filed suit against the County for her injuries. *938 The plaintiff later amended her Complaint to include CBM as a co-defendant. The County sought to invoke an indemnity provision contained in the agreement which provides:

[CBM] shall *indemnify* and save the County harmless from any and all claims, liability, losses and causes of actions which may arise out of the willful, negligent, or unlawful acts or omissions of [CBM] in its operations under this Agreement and shall pay all claims and losses of any nature whatsoever in connection therewith, *shall defend all suits, in the name of the County, when applicable, including appellate proceedings, and shall pay all costs, judgments, and attorneys fees, which may issue thereon;* provided, however, that nothing herein shall be construed to require [CBM] to *indemnify* the County against liability resulting from the willful, negligent, or unlawful acts of omissions of the County, nor to be liable for loss or damage incurred or occasioned by [CBM] in the performance of operations under this Agreement. This provision shall survive the termination of this Agreement. (emphasis supplied)

2023 WL 6388974

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

SOUTH CAPITOL BRIDGEBUILDERS
("SCB"), a joint venture composed
of ARCHER WESTERN
CONSTRUCTION, LLC and GRANITE
CONSTRUCTION COMPANY, Plaintiff,

v.

LEXINGTON INSURANCE
COMPANY, Defendant.

Case No. 21-cv-1436 (RCL)
I
Filed 09/29/2023

MEMORANDUM OPINION

Royce C. Lamberth United States District Judge

*1 This diversity case is before the Court on cross-motions for summary judgment and concerns the interpretation of an insurance policy issued by defendant Lexington Insurance Company ("Lexington") to plaintiff South Capitol Bridgebuilders ("SCB"). SCB was hired to build the Frederick Douglas Memorial Bridge and obtained a "builder's risk policy" and endorsements thereto from Lexington. In building and integrating the supportive structures of the bridge, SCB's poor vibration of concrete resulted in construction malformations known as "honeycombing" and "voiding," which harmed the structural integrity of the bridge. As a result, SCB had to replace sizable portions of the bridge's supportive structures. Believing that the insurance agreement provided coverage for those expenses, SCB sought reimbursement. However, Lexington, relying on its interpretation of the insurance policy, refused to pay. SCB then brought this suit seeking damages for breach of contract and bad faith.

Before the Court are SCB's Motion for Partial Summary Judgment on the breach of contract claim, ECF No. 66, and Lexington's Cross-Motion for Summary Judgment on the breach of contract claim and on SCB's bad faith claim, ECF No. 68. SCB has not filed for summary

judgment on the bad faith claim. Neither party disputes that concrete repair expenses were necessitated by deficiencies in SCB's workmanship. They simply disagree over whether the insurance policy provides coverage—a question of law. Because the material facts are not in dispute, Lexington's liability under the policy is an appropriate question for summary judgment.

Upon consideration of the parties' briefing, the record, and the applicable law, the Court will **GRANT** SCB's motion and **DENY** Lexington's motion.

I. BACKGROUND

A. The Insurance Policy and The Extension

SCB began building the Frederick Douglass Memorial Bridge in Washington, D.C. in the summer of 2017. Compl. ¶ 22, ECF No. 1.¹ SCB obtained a "completed value builder's risk" insurance policy from Lexington to cover the period from July 13, 2017 to January 1, 2022. *Id.* ¶¶ 2, 13. The Policy agreement insured against "all risks of direct physical loss of or damage to insured property." Exhibit 1, ECF No. 1-1, at 9. The Policy defined "Property Insured" to include "Permanent Works" and "Temporary Works." PSMF ¶ 13. "Permanent Works" included "[a]ll materials, supplies, equipment, machinery, and other property of a similar nature ... when used or to be used in or incidental to the demolition of existing structures, site preparation, fabrication or assembly, installation or erection or the construction of or alteration, renovation, rehabilitation of the Insured Project." *Id.* ¶ 14. The Policy defined "Temporary [W]orks" as "[a]ll scaffolding, form work, fences, shoring, hoarding, falsework, and temporary buildings all incidental to the project." *Id.* ¶ 5.

*2 Part B(1) of The Policy, entitled "Perils Excluded," explicitly excluded certain items from coverage under the Policy. Part B(1) states in pertinent part:

This policy shall not pay for loss, damage or expense caused directly or indirectly by any of the following.

[...]

(B) Faulty or defective workmanship or materials, unless direct physical loss or damage by an insured peril ensues and then this policy will cover for such ensuing loss or damage only;

South Capital Bridgebuilders v Lexington Ins. Co.; 2023 WL 6388974 (D.D.C 2023)



QUESTIONS