IN THE SUPREME COURT OF FLORIDA
Case No. SC19-791

PUCCINI, LLC d/b/a 5 NAPKIN BURGER,

Petitioner/Appellee,

v.

ZURICH AMERICAN INSURANCE COMPANY a/s/o LINCOLN-DREXEL WASERSTEIN, LTD. and LINCOLN DREXEL, LTD.,

Respondent/Appellant.
_____/

L.T. Case No.: 3D17-0690
4th Cir. 132016CA0064142000001

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

STATEMENT OF THE CASE AND OF THE FACTS

This is a subrogation action. ZURICH seeks to recover indemnity payments it paid to its insured, the "Landlord", arising from damages caused by a fire due to the fault of the "Tenant," the Petitioner herein. (App. 1). Pursuant to the Tenant's motion, the Trial Court entered a Final Order dismissing ZURICH's claims against the Tenant with prejudice. The Trial Court agreed with Tenant's argument that the Tenant was an implied co-insured under ZURICH's policy of insurance, insuring the Landlord, and therefore, ZURICH was precluded from suing Tenant in subrogation.

On appeal, the Third District Court of Appeal applied the case-by-case approach, conducted an extensive examination of the parties' written Lease as a whole and *reversed,* concluding that the parties did not intend to shift the risk of loss for fire damages caused by the Tenant to ZURICH. (App. 1-2). Pursuant to the terms of the subject Lease, it is clear that the Landlord would not exculpate the Petitioner Tenant for damages it negligently caused, that Landlord had no obligation to procure fire insurance, that Landlord had no obligation to repair damages caused by the negligence of Petitioner Tenant, and that these obligations to procure fire insurance and to repair damages caused by Petitioner Tenant were to be the sole responsibility of Petitioner Tenant. Tenant "is not an implied co-insured under ZURICH's policy and therefore, ZURICH may proceed with its subrogation action against Tenant." (App. 14).

In regard to the "Third District Decision", Tenant now seeks to invoke the Court's discretionary jurisdiction, citing conflict with the Decisions in *Continental Ins. Co. v. Kennerson*, 661 So. 2d 325 (Fla. 1st DCA 1995) and *Underwriters of Lloyds of London v. Cape Publications, Inc.*, 63 So. 3d 892 (Fla. 5th DCA 2011).

SUMMARY OF ARGUMENT

The Third District Decision is not in conflict with the Decisions in *Kennerson* and in *Cape.* All three Courts properly applied the case-by-case approach in accordance with *State Farm Fla. Ins. Co. v. Loo*, 27 So. 3d 747, 748 (Fla. 3d DCA 2010). This approach is not premised upon any presumption, for or against subrogation. It is not controlled by any one term, such as a tenant sharing in the cost of the insurance premiums. Instead, it is based upon an examination of the lease (*as a whole*) in order to ascertain the intent of the parties as to who should bear the risk of loss for damages caused by a negligent tenant. *Sub judice*, provision after provision of the Lease agreement between Landlord and Petitioner Tenant established the parties' intent to clearly shift the risk of loss to the Tenant for damages caused by the Petitioner Tenant. Accordingly, the Petitioner Tenant is *not* an implied co-insured of ZURICH. ZURICH may maintain its subrogation action against the Petitioner Tenant. The holding in *Kennerson* and *Cape* are based upon the same analysis but simply involved different lease terms than those *sub judice.* Unlike the leases in *Kennerson* and *Cape*, Petitioner Tenant, under the subject Lease,

was expressly liable for damages caused by its negligence *and* was specifically required to procure fire insurance. The Landlord, ZURICH's insured, was *not* required to procure fire insurance and was *not* responsible for damages caused by Tenant under the subject Lease.

LEGAL ARGUMENT

I. THE THIRD DISTRICT DECISION DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT IN REGARD TO "WHETHER A TENANT WHO PAID THE INSURER'S PREMIUMS CAN BE SUED IN SUBROGATION BY THE INSURER" [AS FRAMED BY PETITIONER]

The Court does not have discretionary jurisdiction to review the Decision in *Zurich American Insurance Company v. Puccini, LLC*, 44 FLW D383; 2019 WL 454222 (Fla. 3d DCA 2019) (App. 1). The Third District Decision does not conflict with the Decisions in *Continental Ins. Co. v. Kennerson*, 661 So. 2d 325 (Fla. 1st DCA 1995) and *Underwriters of Lloyds of London v. Cape Publications, Inc.*, 63 So. 3d 892 (2011). Petitioner Tenant argues that these cases hold "that a landlord's insurer *cannot* bring a subrogation action against a tenant whose alleged negligence caused a fire damage to the rented building when, under the lease, the tenant paid the majority of the landlord's insurance premiums." (Petitioner's Brief, p. 3).

Petitioner mis-states the holdings in *Kennerson* and in *Cape*. To be exact, the Court in *Kennerson* stated as follows:

> We conclude that a landlord's insurer cannot exercise any right of subrogation against a merely negligent tenant to recover money paid the landlord under a fire insurance policy, **where the landlord has**

> **agreed to bear the expense of repairing fire damage and has assumed responsibility for procuring fire insurance**, the cost of which the tenant has agreed to bear and has in fact born. [Emphasis added]. *Id.* at 330.

Although the Court in *Kennerson* states it follows the "modern trend," citing the anti-subrogation case of *Sutton v. Jondahl,* 532 P. 2d 478 (Okla. Ct. App. 1975), (in footnote 1), as found by the Court in *Loo*, the Court in *Kennerson* actually applied the case-by-case approach, as did the Court in *Cape* and as did the Court in the Third District Decision. Each Court thereby examined the parties' particular Lease agreement as a whole to determine if the parties intended that the risk of loss for fire damages caused by the tenant's negligence was to be borne by the landlord or the tenant. The polestar guiding the Court in construction of a written contract, such as a lease agreement, is the parties' intent to be garnered from the clear and unambiguous language in the written document. *Bombardier Capital, Inc. v. Progressive Marketing Group, Inc.*, 801 So. 2d 131 (Fla. 4th DCA 2001). Under the case-by-case case approach, the fact that a tenant is obliged to pay a portion of the landlord's insurance premiums, *standing alone,* is not dispositive in determining who bears the risk of loss. The *Kennerson* Court viewed that lease agreement as a whole and found persuasive, the landlord's express contractual obligation to bear the expense of repairing any fire damage caused by its tenant and to procure the fire insurance for the property, the cost of which the tenant was obliged to pay. The

Kennerson lease also had "no provision making [tenant] liable for damages its negligence might cause." *Id.* at 329 (App. 12).

Sub judice, under the Lease agreement, the Petitioner Tenant was *expressly* liable for damages, including by fire, caused by its negligence. (App. 7-8). The Lease agreement also expressly required the Petitioner Tenant to procure and to maintain fire insurance and name the Landlord as an additional insured (App. 10). Under the Lease agreement the Landlord was not required to procure fire insurance. In addition to the foregoing provision requiring Petitioner Tenant to procure fire insurance, the Court, *sub judice*, viewed the parties' Lease agreement as a whole and found persuasive numerous lease provisions, which clearly established the parties' intent that the risk of loss for fire damages caused by Petitioner Tenant's negligence was to be borne by Petitioner as Tenant. Paragraph 41, is specific, stating that in case of fire damage or other casualty caused by Petitioner as Tenant (or its agents) rent would *not* be abated and Petitioner as Tenant would be responsible for the damages and the repair. (App. 7). Paragraph 33 eliminated Landlord's duty to repair structural elements of the building if such repairs were occasioned by the intentional or negligent acts of Petitioner as Tenant (or its agents). Under Paragraph 9, Landlord is *only* liable for loss for Petitioner's (Tenant's) personal property on the Premises if due to Landlord's gross negligence or willful misconduct. (App. 8). Paragraphs 24 and 31 required Petitioner as Tenant to indemnify Landlord and hold it harmless

in regard to costs due to Petitioner's (Tenant's) failure to maintain the Premises. Paragraphs 25 and 26 required Petitioner as Tenant to procure insurance to cover all of its losses, including fire insurance, and name the Landlord as an additional insured. Petitioner as Tenant also expressly waived seeking recovery from Landlord or its insurer for any loss or incident for which Petitioner as Tenant was required to procure insurance. Lastly, although Paragraph 45 required Petitioner as Tenant to pay 70% of Landlord's operating expenses, which included insurance premiums, that provision, standing alone, was not dispositive. *There is no obligation whatsoever for Landlord to procure fire insurance*. (App. 10). Under the case-by-case approach, no one provision is dispositive. See: *Loo,* citing *Tout v. Hartford Acc. & Indem. Co.*, 390 So. 2d 155, Fla. 3d DCA 1980). The Third District applied the case-by-case approach and viewed the subject Lease agreement *as a whole* to determine who the parties intended to bear the risk of loss for fire damages caused by the Tenant. *Sub judice,* when the Lease was viewed as a whole, the Third District properly determined that the parties clearly intended the Tenant to carry that burden. Accordingly, Petitioner as Tenant is not an implied co-insured of ZURICH's. The Third District's analysis of viewing the Lease agreement as a whole is the same analysis conducted by the Court in *Kennerson* and the Court in *Cape Publications* (and in *Loo* and in *Tout).*

Specifically, in *Cape Publications,* the lease expressly required the landlord to purchase a policy of property and casualty insurance, "which undisputedly covered fire damage on the commercial building" in addition to requiring that the tenant's rent includes a pro rata share of the premium. Clearly, the Panel in *Cape Publications,* conducted a case-by-case analysis, considered the lease as a whole and their conclusion did *not* turn solely upon the tenant's payment of its pro rata share of the premium for the landlord's fire insurance for the building. In closing, the Court in *Cape Publications* noted that the same conclusion was reached in *Kennerson wherein the landlord assumed responsibility for procuring fire insurance,* the cost for which the tenant agreed to pay. *Sub judice*, under the subject Lease, ZURICH's insured was not required to procure fire insurance; Petitioner as Tenant was expressly liable under the Lease to procure fire insurance and for all damages, including fire, caused by its negligence (or that of its agents).

There is no conflict between the Third District Decision and the decisions in *Kennerson* and *Cape Publications.* All were determined by implementing the case-by-case approach. The difference in results is *solely* due to the difference in the express provisions of each respective lease agreement when viewed as a whole.

II. THE THIRD DISTRICT DECISION DOES NOT CREATE CONFUSION AND WILL NOT ADVERSELY IMPACT THOUSANDS OF TENANTS/LESSEES

The Third District Decision does not create confusion but brings clarity in reaffirming the established legal principle that "a limitation of liability for one's negligent acts *cannot be inferred* unless such intention is expressed in unequivocal terms." *Tout v. Hartford Accident & Indemnity Co.*, 390 So. 2d 155 (Fla. 3d DCA 1980); *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444 (Fla. 5th DCA 1982) (any attempt to limit one's liability for his own negligent acts will not be inferred from an agreement unless such intention is expressed in clear and unequivocal terms); *Ivey Plants, Inc. v. F.M.C. Corporation,* 282 So. 2d 205 (Fla. 4th DCA 1973) *Cert. denied,* 289 So. 2d 73 (1974); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Co.*, 374 So. 2d 487 (Fla. 1979). The Third District Decision maintains uniformity and offers even greater certainty in commercial contract law in regard to who carries the risk of loss, the allocation of which begins and ends with ascertaining the intent of parties in negotiating the terms of their contract as expressed by *each* commercial lease when viewed as a whole. That is the economic reality of commercial dealings and that is the responsibility of the sophisticated parties in entering into commercial contracts, including commercial leases, most of which are the product of complex negotiations wherein parties, thereto, are represented by counsel.

Nothing in or about the Third District Decision requires or will require thousands of tenants/lessees to procure overlapping insurance. If a tenant, who is paying much of the insurer's premium, in a multi-unit building, such as the building *sub judice*, is held liable, in subrogation, for a fire or other damage to the building, caused by that tenant's negligence, it is because in negotiating, drafting and entering into its commercial lease, that was the intent of the parties as expressed in their written lease when viewed as a whole. As an example, if such a tenant does not want to bear the risk of loss for damages it causes then, that tenant must not agree to be responsible for damages it causes, must not agree to procure the insurance to cover such damages, naming the Landlord as an additional insured, and must not agree to indemnify the Landlord. *The parties have the freedom to contract. Courts do not rewrite contracts. Hill v. Dearing Bay Marina Assoc., Inc.*, 985 So. 2d 1165 (Fla. 3d DCA 2008); citing *Fernandez v. Homestar at Miller Cove, Inc.;* 935 So. 2d 547, 551 (Fla. 3d DCA 2006) (observing "a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties"), quoting *Emergency Assocs. of Tampa, P.A. v. Sassano,* 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995); *Beach Resort Hotel Corp. v. Wiedler,* 79 So. 2d 659, 663 (Fla. 1955) (holding that,"[i]t is well settled that courts may not rewrite a contract or interfere with the freedom or contract or substitute their judgment for that of the parties

thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.).

CONCLUSION

Accordingly, the Third District Decision is not in conflict with the decisions in *Kennerson* and *Cape*. The Court must therefore, *decline* to exercise discretionary jurisdiction in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on Michael J. Dono, Esq./Jennifer Brooks f.k.a. Miller, Esq., (mdono@hamiltonmillerlaw.com; jmiller@hamiltonmillerlaw.com) Hamilton Miller & Birthisel, LLP, 150 S.E. 2nd Avenue, Suite 1200, Miami, FL 33131 via the Florida Courts Efiling Portal, on this 5th day of June, 2019.

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CERTIFICATE OF COMPLIANCE WITH FLORIDA RULES OF APPELLATE PROCEDURES 9.210(a)(2)

Pursuant to Fla. R. App. P. 9.210(a)(2), Appellant, ZURICH AMERICAN INSURANCE COMPANY a/s/o LINCOLN-DREXEL WASERSTEIN, LTD. and LINCOLN DREXEL, LTD., by and through its undersigned counsel, hereby certifies that the contents of this Respondent's Brief on Jurisdiction are in compliance with the above-referenced Rule with the proviso that Times New Roman 14-point font has been used throughout the Respondent's Brief on Jurisdiction.

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