2020 WL 584535 (C.A.11) (Appellate Brief)
United States Court of Appeals, Eleventh Circuit.

THE PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, Plaintiff-Appellee,
v.
HUB CITY ENTERPRISES, INC. and Wall Street Enterprises of Orlando, Inc., Defendants-Appellants,
and
Robert Hunt, Defendant.

No. 19-14193.
February 4, 2020.

Appeal from the United States District Court for
the Middle District of Florida, No. 6:18-cv-01608,
Honorable Carlos E. Mendoza, Judge Presiding

Brief of Appellee, the Princeton Excess and Surplus Lines Insurance Company

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Oral Argument Requested

***C-1 Certificate of Interested Persons and Corporate Disclosure Statement**

The undersigned counsel of record certify that the following persons and entities, as described in Eleventh Circuit Rule 26.1-2(a) and not included or incorrectly listed in Appellants' Certificate of Interested Persons and Corporate Disclosure Statement in their opening brief (filed December 16, 2019), have an interest in the outcome of this case:

• Kelly, Honorable Gregory J.--United States District Court Magistrate Judge;

• Mendoza, Honorable Carlos E.--United States District Court Judge;

• Munich Re America Corporation--direct parent company of The Princeton Excess and Surplus Lines Insurance Company;

• Munich Reinsurance Company (FRA: MUV2)--direct parent company of Munich Re America Corporation; and

• Pearson Doyle Mohre & Pastis, L.L.P.--counsel for plaintiff/appellee, The Princeton Excess and Surplus Lines Insurance Company.

***i Statement Regarding Oral Argument**

Appellee respectfully requests that this Court grant oral argument, which will be of material assistance to this Court in deciding issues of substantive Florida law surrounding a liability insurer's duty to defend.

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*1 Statement of Facts

The Parties

Hub City Enterprises, Inc. and Wall Street Enterprises of Orlando, Inc. (collectively, "the insureds") own and operate a complex of bars, restaurants and nightclubs in downtown Orlando, Florida. (D.E. #30-1 at 2 of 10) The Princeton Excess and Surplus Lines Insurance Company ("PESLIC") is their liability insurer. (D.E. #1-2 at 2 of 86)

The PESLIC Policy

PESLIC issued a commercial general liability policy to the insureds, effective December 16, 2016 to December 16, 2017, with limits of $1,000,000 per occurrence and $2,000,000 general aggregate. (D.E. #1-2 at 2, 39 of 86) The policy benefits extend to ownership, maintenance or use of eight premises: seven bars and one office. (D.E. #1-2 at 15, 39 of 86)

The policy imposes a duty to pay those sums that the insureds become legally obligated to pay as damages because of "bodily injury," and imposes a duty to defend any "suit" seeking such damages. (D.E. #1-2 at 41 of 86) The policy expressly disavows a duty to defend any "suit" that is not seeking covered damages: "[W]e will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' ... to which this insurance does not apply." (D.E. #1-2 at 41 of 86)

***2 The "Amusement Devices" Exclusion**

By endorsement, the policy contains an "Amusement Devices" exclusion. (D.E. #1-2 at 19 of 86) The exclusion bars coverage for any loss allegedly arising out of the use of an "amusement device." (D.E. #1-2 at 19 of 86) That term is defined non-exhaustively to include, among other things, "[a]ny device that requires the user to strike, punch, or kick" it:

This insurance does not apply to any loss, claim, "suit" or any obligation of any "insured" to indemnify, defend or contribute jointly or severally with another because of "bodily injury", "property damage", "personal and advertising injury" or "injury", actually or allegedly arising directly or indirectly based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to the ownership maintenance, operation, sponsorship, instruction, supervision, set-up or take-down or other use of an "amusement device".

* * * *

For the purpose of this insurance, "amusement device" shall include, but not be limited to:

1. Any mechanical or non-mechanical ride;

2. Any device that requires the user to strike, punch, or kick;

3. Rock climbing walls, Velcro walls and similar scaling devices;

4. "Moon Bounces", "Moon Walks", "Space Walks", and similar inflatable games and devices;

***3** 5. Laser tag, bungee jumping, Sumo wrestling, human spheres, slides, water slides and similar games and devices;

6. Gymnastic equipment;

7. Mechanical bull, horse, surfboard, skateboard and similar devices;

8. Dunking booth or tank; and

9. Trampoline.

* * * *

(D.E. #1-2 at 19 of 86)

The Policy Drafting Generally Omits A Serial Comma

The drafting of the policy as a whole reflects a stylistic choice generally to omit a serial comma--a comma after the penultimate item in a list of three or more items, before "and" or "or." (D.E. #1-2) The entire policy omits a serial comma approximately 87% of the time, whereas it includes a serial comma approximately 13% of the time. (D.E. #1-2)

The "Amusement Devices" exclusion, for example, omits a serial comma eight out of ten times:

• "loss, claim, "suit" or any obligation";

• "indemnify, defend or contribute jointly or severally with another";

• " 'bodily injury', 'property damage', 'personal and advertising injury' or 'injury';

***4** • "based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to";

• "ownership maintenance, operation, sponsorship, instruction, supervision, set-up or take-down or other use";

• "Rock climbing walls, Velcro walls and similar scaling devices";

• "Laser tag, bungee jumping, Sumo wrestling, human spheres, slides, water slides and similar games and devices"; and

• "Mechanical bull, horse, surfboard, skateboard and similar devices."

(D.E. #1-2 at 19 of 86) The "Amusement Devices" exclusion includes a serial comma two out of ten times:

• "strike, punch, or kick"; and

• " 'Moon Bounces', 'Moon Walks', 'Space Walks', and similar inflatable games and devices."

(D.E. #1-2 at 19 of 86)

The policy exclusions immediately preceding and following the "Amusement Devices" exclusion--the "Punitive or Exemplary Damages," "Assault and Battery," "Athletic or Sports Participants" and "Stunt Activity" exclusions-- entirely omit a serial comma:

• "punitive damages, exemplary damages or the multiplied portion of any award";

***5** • " 'bodily injury', 'property damage' or 'personal and advertising injury' ";

• " 'employees', contractors, vendors or agents";

• “assault, battery, fight, altercation or similar incident or act of violence”;

• “you, your ‘employee’, your customers, patrons, guests or any other person or cause whatsoever”;

• “supervision, hiring, employment, training or monitoring”;

• “loss, claim, ‘suit’, ‘bodily injury’, ‘property damage’, ‘personal and advertising injury’ or ‘injury’ ”;

• “based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to”;

• “activity, feat, performance or trick”; and

• “strength, skill, expertise, equipment, device or daring.”

(D.E. #1-2 at 16-18, 20-21 of 86)

Likewise, the policy's “Bodily Injury ... Liability” insuring agreement and prefatory statement entirely omit a serial comma:

• “rights, duties and what is and is not covered”;

• “ ‘we’, ‘us' and ‘our’ ”;

• “continuation, change or resumption”; and

• “care, loss of services or death.”

***6** (D.E. #1-2 at 41 of 86)

The Accident: A Festivalgoer Is Injured When He Strikes An Enormous Novelty Beach Ball Being Tossed About The Crowd

The insureds own and operate Wall Street Plaza, a complex of bars, restaurants and night clubs located within one city block of each other in downtown Orlando, Florida. (D.E. #30-1 at 2 of 10) In the summer of 2017, during the PESLIC policy period, the insureds promoted and hosted an annual event known as “Rum Fest,” an outdoor street festival that took place in and around Wall Street Plaza. (D.E. #1-1 at 3 of 6; D.E. #1-2 at 2 of 86; D.E. #30-1 at 3 of 10)

As the owners and operators of Rum Fest, the insureds supplied the crowd with or allowed the crowd to use an extra-large inflatable beach ball (even larger than the type often seen at sporting events and musical concerts). (D.E. #1-1 at 3 of 6) The crowd was tossing around the extra-large inflatable beach ball when it approached attendee Robert Hunt. (D.E. #1-1 at 3 of 6) When Hunt reached up to bat away the extra-large inflatable beach ball, he sustained ligament and tendon injuries. (D.E. #1-1 at 3 of 6)

The following photographs depict the actual extra-large inflatable beach ball that was in use at Rum Fest the day that Hunt was injured, showing the crowd striking and punching it:

2613

***7** (D.E. #19 at 7-8 of 10)

***8 The Underlying Action: The Accident Occurred When The Extra-Large Inflatable Beach Ball Was Being "Knocked" And "Pushed" About The Crowd**

Hunt filed a negligence action, currently pending, against the insureds in Florida state court. (D.E. #1-1; D.E. #30-1 at 3 of 10) Hunt alleged that the insureds supplied or allowed the extra-large inflatable beach ball "to be thrown into the crowd for people to push it around in the air." (D.E. #1-1 at 3 of 6) Hunt further alleged that attendees, including himself, used the extra-large inflatable beach ball in this manner:

People in the crowd knocked the extra large beach ball in the air toward [Hunt] who used his outstretched arms and hands to push the extra large beach ball away from him to prevent it from hitting him in the head.

[Hunt's] shoulder and elbow could not withstand the pressure of the heavy, extra large, beach ball and he suffered severe ligament and tendon injuries when he pushed it away to avoid being stuck in the face.

(D.E. #1-1 at 3 of 6) Hunt did not allege that the insureds supplied the extra-large inflatable beach ball as a decoration or thematic prop, or that Hunt or anyone else was using the extra-large inflatable beach ball in this manner at the time of the accident. (D.E. #1-1)

The Present Coverage Action

Nearly eight weeks after the underlying complaint was filed, the insureds' broker tendered it to PESLIC. (D.E. #19 at 2, 4 of 10) Through ***9** its third-party claims administrator, PESLIC agreed to defend the insureds subject to a reservation of rights to deny coverage. (D.E. #19 at 4 of 10)

While PESLIC was defending the insureds, it simultaneously filed the present coverage action to obtain a judicial declaration of its rights and obligations under the policy. (D.E. #1; D.E. #19) Although PESLIC's original complaint asserted a claim seeking recoupment of defense costs, in the event it prevailed in obtaining a judicial declaration that it owed no duty to defend, PESLIC's operative first amended complaint abandoned that claim. (D.E. #1 at 9 of 10; D.E. #19 at 8-9 of 10)

The Insureds Seek To Create A Duty To Defend Through Self-Authored Extrinsic Evidence

Both sides filed dispositive motions. (D.E. #27; D.E. #30) PESLIC moved for judgment on the pleadings, arguing that the underlying complaint's allegations alone established that the "Amusement Devices" exclusion barred coverage. (D.E. #27) The insureds cross-moved for summary judgment. (D.E. #30) In support, the insureds submitted self-authored extrinsic evidence that was created long after they tendered the underlying action to PESLIC: (1) the affidavit of the Events and Marketing Director for Wall Street Plaza, an employee of Hub City Enterprises, Inc.; ***10** and (2) Hub City Enterprises, Inc.'s answers to interrogatories in the underlying action. (D.E. #30-1; D.E. #30-3)

The insureds contended that this extrinsic evidence gave rise to a duty to defend. (D.E. #30 at 4 of 26) According to the extrinsic evidence, at the start of the Rum Fest event, the extra-large inflatable beach ball was placed in a nearby fountain to serve as a decoration or thematic prop. (D.E. #30-1 at 4-5 of 10; D.E. #30-3 at 3-4 of 8) Sometime later, an attendee removed the extra-large inflatable beach ball from the fountain and tossed it into the crowd. (D.E. #30-1 at 4 of 10; D.E. #30-3 at 3-4 of 8) The

extrinsic evidence does not speak to how the extra-large inflatable beach ball was being used at the time of Hunt's accident. (D.E. #30-1; D.E. #30-3)

The insureds represented the extrinsic evidence as "undisputed." (D.E. #30 at 3 of 26) The record does not reflect that Hunt, after the affidavit was served on him in the coverage action and after discovery was served on him in the underlying action, amended his complaint to allege that the extra-large inflatable beach ball was a decoration or thematic prop. (D.E. #1-1)

The Ruling Below

Applying Florida law, the district court held as a threshold matter that the underlying complaint's allegations control the duty to defend. (D.E. #37 at 3 of 12) The court rejected consideration of extrinsic evidence, ***11** distinguishing exceptional cases following a contrary rule because the insureds' extrinsic evidence was not undisputed and did not place the underlying action outside the scope of coverage. (D.E. #37 at 2-3 of 12)

Comparing the underlying complaint's allegations to the language of the "Amusement Devices" exclusion, the court found no potential for coverage. (D.E. #37 at 10 of 12) The court ruled that the extra-large inflatable beach ball was an "amusement device," reasoning that it was provided for amusement purposes and qualified as a "device that requires the user to strike, punch, or kick" it. (D.E. #37 at 10 of 12)

The court also determined that the "Amusement Devices" exclusion was unambiguous. (D.E. #37 at 9 of 12) The court disagreed with both PESLIC's and the insureds' proffered interpretations, observing that the exclusion "presents a strong argument for use of the serial comma." (D.E. #37 at 8 of 12) Nevertheless, given that omission of a serial comma is "entirely common and accepted in American English," the court found the exclusion sufficiently clear. (D.E. #37 at 8 of 12)

The court concluded that PESLIC owed no duty to defend and, consequently, no duty to indemnify. (D.E. #37 at 10-11 of 12) Accordingly, the court granted PESLIC's motion for judgment on the pleadings, denied ***12** the insureds' cross-motion for summary judgment and entered judgment for PESLIC. (D.E. #37 at 1, 11 of 12; D.E. #38) The insureds, but not Hunt, now appeal. (D.E. #39)

After PESLIC Withdraws From The Defense, The Insureds Opt To Continue Being Represented By PESLIC-Retained Defense Counsel

After PESLIC prevailed below, more than a year after it accepted the insureds' defense, PESLIC withdrew from the defense. (D.E. #38; Insureds' Br. at 13) The docket in the ongoing underlying action does not reflect that new counsel thereafter substituted an appearance for the insureds, leading to the inference that the insureds have opted to continue being represented by PESLIC-retained defense counsel at their own expense. Orange County Clerk, https://myeclerk.myorangeclerk.com/Cases/Search (enter "2018-CA-005683-O" in "Case Number" field) (last visited Feb. 4, 2020).

***13 Summary of the Argument**

At the core of the insureds' appeal lies a plea to effect a sea change in Florida law. The insureds implore this Court to abandon longstanding and binding pronouncements of Florida law concerning the contours of the duty to defend. Instead of looking solely to the underlying complaint's allegations, as the Florida Supreme Court dictates, the insureds propose a novel approach, to wit: the duty to defend arises from extrinsic evidence the insureds engineered for the sole purpose of steering the loss into coverage, even though the claimant does not plead his claim in that manner. There is no reason to believe, however, that the Florida Supreme Court would adopt such a framework or sanction consideration of extrinsic evidence for any reason other than to deny a duty to defend.

Under the facts of this case, the insureds effectively concede Hunt's complaint does not give rise to a duty to defend. The underlying complaint's allegations about Hunt and others' use of the subject extra-large inflatable beach ball, the instrumentality of his injuries, place the claim squarely within the policy's "Amusement Devices" exclusion. That is why the insureds are eager to divert attention to their self-authored extrinsic evidence.

No matter what this Court considers, the end result is the same: there is no possibility of coverage. The extrinsic evidence shows only that the extra- ***14** large inflatable beach ball was being used as a decoration before the accident occurred. But this does not defeat the exclusion. The extrinsic evidence does not speak to how the extra-large inflatable beach ball was being used when Hunt was injured, the relevant time period. And even if the extra-large inflatable beach ball was being used as a decoration at that moment, the fact remains that it was *also* being used as an "amusement device."

Hoping to dodge the exclusion altogether, the insureds raise the specter of ambiguity sufficient to warrant coverage by default. Engaging in semantic acrobatics, the insureds divine ambiguity by way of strained interpretations that violate basic rules of grammar. The district court correctly saw through the insureds' machinations, finding the exclusion clear and unambiguous.

In the end, the insureds' various challenges to the judgment distill to a misguided bid to retailor the policy to their liking. Yielding to their demand would be to topple the parties' negotiated bargain, foisting onto PESLIC liability for a risk that it never contemplated, did not agree to shoulder and for which it was not compensated. Having defended the insureds *gratis* for over a year, PESLIC has already bestowed policy benefits that it neither owed nor sought to recoup. The insureds' effort to claim for themselves even more policy benefits to which they are not entitled cannot stand.

***15 Argument**

I. ***An insurer's duty to defend must be found, if at all, solely within the four corners of the underlying complaint.***

A. Under Florida law, the four corners rule governs.

Binding Florida Supreme Court precedent holds that an insurer's duty to defend is determined solely from the allegations of the underlying complaint against the insured. *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 443 (Fla. 2005); *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 10 (Fla. 2004); *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 535 (Fla. 1977); *accord* *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1323 (11th Cir. 2014) (applying Florida law); *Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co.*, 657 F.3d 1135, 1141 (11th Cir. 2011) (applying Florida law).

The propriety of this so-called "four corners" rule has been recognized even in the context of a policy exclusion. *Travelers Indem. Co. v. Figg Bridge Eng'rs*, 389 F. Supp. 3d 1060, 1070-71 (S.D. Fla. 2019) (applying Florida law), *appeal docketed*, No. 19-12854 (11th Cir. July 24, 2019); *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565, 574 (Fla. 1st DCA 2010); *Keen v. Fla. Sheriffs' Self-Ins. Fund*, 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007); *State Farm Fire & Cas. Co. v. Tippett*, 864 So. 2d 31, 36 (Fla. 4th DCA 2003); *Reliance Ins. Co. v. Royal Motorcar Corp.*, 534 So. 2d 922, 923 (Fla. 4th DCA 1988).

***16** Under the four corners rule, the duty to defend is not determined from the actual facts, the insured's versions of the facts or the insured's liability defenses. *Trailer Bridge*, 657 F.3d at 1141, 1144; *Tippett*, 864 So. 2d at 33; *Amerisure Ins.*

Co. v. Gold Coast Marine Distribs., Inc., 771 So. 2d 579, 580 (Fla. 4th DCA 2000); *Reliance Ins. Co.*, 534 So. 2d at 923. This means that an insurer's duty to defend can extend to false allegations and unsound legal theories. *Jones*, 908 So. 2d at 443; *Tippett*, 864 So. 2d at 33; *see also* *Trailer Bridge*, 657 F.3d at 1142 ("The merits of the underlying suit have no bearing on whether the duty [to defend] is owed.").

Consequently, when extrinsic evidence conflicts with the facts alleged in the underlying complaint, the latter control in determining the insurer's duty to defend. *Stephens*, 749 F.3d at 1323; *Travelers Indem. Co.*, 389 F. Supp. 3d at 1070; *Jones*, 908 So. 2d at 443; *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 814 (Fla. 1st DCA 1985). The same is true even when extrinsic evidence merely supplements or clarifies the facts alleged in the underlying complaint. *Travelers Indem. Co.*, 389 F. Supp. 3d at 1070.

Against this backdrop, the insureds' protestations of innocence and assurances that extrinsic evidence merely provides "additional context" fall flat. (Insureds' Br. at 6-7, 10, 13-14, 17-19, 22, 29, 32-33, 40-43, 53-54) ***17** Florida law has repeatedly rejected an insured's use of extrinsic evidence to contradict or enlarge the underlying complaint's allegations. *See, e.g.*, *Travelers Indem. Co.*, 389 F. Supp. 3d at 1070; *Jones*, 908 So. 2d at 443.

Equally off-base is the insureds' observation that an assertion is not a fact. (Insureds' Br. at 39) That is true, but irrelevant with respect to the duty to defend. As the veracity of the claimant's allegations is *presumed*, an insurer could owe a duty to defend actually false allegations. *Jones*, 908 So. 2d at 443.

The insureds speculate that, if only Hunt had known about their side of the story, he might have pled as much in the underlying complaint. (Insureds' Br. at 36, 39-40, 42) The record is to the contrary. Hunt does, in fact, know about the insureds' side of the story. Hunt was so apprised twice: when the insureds served him with their affidavit in the coverage action; and when the insureds served him with discovery in the underlying action. (D.E. #30-1; D.E. #30-3) But the record does not reflect that Hunt thereafter amended his complaint accordingly.

In any event, the duty to defend does not arise from some hypothetical unpled version of the underlying complaint. *Selective Ins. Co. of S.E. v. Wm. P. White Racing Stables, Inc.*, 718 F. App'x 864, 869 (11th Cir. 2017) (applying Florida law) (holding that the duty to defend does not arise from the ***18** "hypothetical possibility" that the claimant may one day plead a covered claim); *Carolina Aircraft Corp. v. Am. Mut. Liab. Ins. Co.*, 517 F.2d 1076, 1077 (5th Cir. 1975) (applying Florida law) (holding that where the claimant pleads a claim outside the scope of coverage, the duty to defend does not arise from the possibility that the claimant could have pled another type of claim that might have been covered); *Weitz Co., LLC v. Transp. Ins. Co.*, No. 08--23183--CIV, 2009 WL 1636125, at *2 (S.D. Fla. June 11, 2009) (applying Florida law) (holding that a court cannot "read into the facts scenarios beyond what is set forth in the underlying pleading itself").

The insureds counter that the underlying complaint's allegations are not always conclusive regarding the duty to defend. (Insureds' Br. at 37-38) The insureds highlight the situation where, although the underlying complaint does not initially allege a potentially covered claim, it is later actually or effectively amended to add a potentially covered claim. *Broward Marine, Inc. v. Aetna Ins. Co.*, 459 So. 2d 330 (Fla. 4th DCA 1984); *C.A. Fielland, Inc. v. Fid. & Cas. Co. of N.Y.*, 297 So. 2d 122 (Fla. 2d DCA 1974). Upon notification of such a development, an insurer would have a duty to defend going forward. *Reliance Ins.*, 534 So. 2d at 924 (holding that, "[f]rom that time forward," the insurer must pay defense costs); ***19** *Baron Oil*, 470

So. 2d at 814-15 (holding that, upon notification of amendment to add a potentially covered claim, an insurer would only then become obligated to defend).

This line of cases is inapposite. Because Hunt has not amended his complaint to add new claims, the duty to defend could not have arisen at some point after inception of the underlying action. The insureds unwittingly concede the point. The insureds contend that the duty to defend arose on December 21, 2018, when they served Hunt with discovery in the underlying action. (Insureds' Br. at 13, 39) Yet the insureds are not seeking a defense starting December 21, 2018; rather, they are seeking an unqualified defense from the outset of the underlying action. (Insureds' Br. at 55) In other words, as the insureds recognize, the essence of Hunt's claims has remained constant. It follows that the duty to defend never arose. *Reliance Ins.*, 534 So. 2d at 923 (finding no duty to defend a claim that, as pled, never fell within the scope of coverage because it was expressly excluded).

B. The limited exception to the four corners rule, that an insurer may rely on undisputed extrinsic evidence to deny a duty to defend, is inapplicable.

There is a narrow exception to the four corners rule. Where the underlying complaint alleges a potentially covered claim, an insurer may rely on extrinsic evidence to deny a duty to defend based on facts that would not normally be alleged in the underlying complaint. *Composite Structures, Inc.* ***20** *v. Cont'l Ins. Co.*, 560 F. App'x 861, 865 (11th Cir. 2014) (applying Florida law); *Higgins*, 894 So. 2d at 10 n.2.

The exception applies, however, only when the facts reflected in the extrinsic evidence are undisputed and, had they been pled in the underlying complaint, would have clearly placed the claim outside the scope of coverage. *Stephens*, 749 F.3d at 1323; *Nationwide Mut. Fire Ins. Co. v. Keen*, 658 So. 2d 1101, 1103 (Fla. 4th DCA 1995); *see also* *Travelers Indem. Co.*, 389 F. Supp. 3d at 1070 (holding that extrinsic evidence that neither is uncontroverted nor precludes coverage should not be considered).

The exception to the four corners rule developed from, as this Court observes, "exceptional cases in which courts have crafted an equitable remedy when it is manifestly obvious to all involved that the actual facts placed the claims outside the scope of coverage." *First Specialty Ins. Corp. v. 633 Partners, Ltd.*, 300 F. App'x 777, 786 (11th Cir. 2008) (applying Florida law); *accord* *Composite Structures*, 560 F. App'x at 865 n.2.

The facts of this case do not fit within the limited exception to the four corners rule. This is true for four reasons: (1) unlike the foregoing cases, it is the insureds (not PESLIC) who seek to rely on extrinsic evidence to create (not to negate) a duty to defend; (2) also unlike the foregoing cases, the ***21** insureds' extrinsic evidence is not undisputed; (3) even if the facts reflected in the extrinsic evidence had been pled, they would not place the underlying action within the scope of coverage (explained below in Argument III(B)); and (4) there is no occasion for an equitable remedy.

As to the insureds' representation that their extrinsic evidence is undisputed, sheer repetition does not make it so. (Insureds' Br. at 6, 9, 32-35, 39, 51-54) PESLIC does not take a position--much less one of assent-- concerning the veracity of the extrinsic evidence, which is irrelevant to the existence of a duty to defend. To the extent germane to Hunt's claims, that issue will be resolved in the underlying action.

The insureds assert that the district court found the extrinsic evidence was not undisputed based solely on PESLIC's say-so. (D.E. #37 at 2 of 12; Insureds' Br. at 39) That is false. Read in context, the district court's opinion makes clear that its finding

was premised on Hunt's allegations, not PESLIC's position as to the legal import of those allegations. *Carolina*, 517 F.2d at 1077 (observing that claimants, as "masters of their own pleadings," dictate the nature of their complaints and that the insured's response thereto does not change what claimants must prove to succeed).

***22** To give the impression that PESLIC acceded to the extrinsic evidence's validity, the insureds note that PESLIC-retained defense counsel prepared their discovery responses in the underlying action. (Insureds' Br. at 13-14, 19, 39-40) This fact implies nothing of the sort. It is axiomatic that defense counsel's allegiance is to the insureds. *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 462 (Bankr. M.D. Fla. 2013) ("[I]t is well settled that the insured is the client even where an insurer retains (and pays for) counsel to represent the insured."). Any possible doubt was erased when, after PESLIC withdrew from the defense, the insureds chose to continue being represented by the same defense counsel at their own expense.

Finally, this is not the sort of exceptional case where courts have found the need to craft an equitable remedy. To be sure, there is nothing inequitable about holding the insureds to the terms of an exclusion to which they consented. As a liability insurer, PESLIC does not undertake to safeguard against every peril that might befall an insured in the course of its business venture. *Camelot by the Bay Condo. Owners' Ass'n, Inc. v. Scottsdale Ins. Co.*, 32 Cal. Rptr. 2d 354, 364 (Cal. Ct. App. 1994) ("The insurer does not ... insure the entire range of an insured's well-being, outside the scope of ***23** and unrelated to the insurance policy, with respect to paying third party claims. It is an insurer, not a guardian angel.").

Nor is there any merit to the insureds' objection that, because they paid a premium, a no-coverage ruling is unfair. (Insureds' Br. at 6, 10, 18, 36, 42, 52, 54-55) In exchange for a reduced scope of coverage, the insureds presumably paid a correspondingly reduced premium. Indeed, the insureds received *more*--and PESLIC *less*--than the parties' negotiated bargain contemplated. Considering that PESLIC never owed a duty to defend, and dropped its claim to recoup over a year's worth of defense costs expended before it withdrew from the defense, the insureds enjoyed valuable policy benefits for free. (D.E. #19 at 8-9 of 10) They are entitled to nothing more.

C. This Court is not empowered to upend existing Florida law to hold, in the first instance, that an insured may rely on disputed extrinsic evidence to create a duty to defend.

The insureds suggest that, if an insurer can rely on undisputed extrinsic evidence to *negate* coverage, they should be able to rely on *disputed* extrinsic evidence to *create* coverage. (Insureds' Br. at 32-43) Not so.

Expansion of the limited exception to the four corners rule would be unprecedented under Florida law. Confirming the point, the insureds do not cite a single decision in which a Florida appellate court relied on extrinsic ***24** evidence--disputed or not--to find a duty to defend entirely outside the underlying complaint's allegations.

The only authority the insureds muster is a lone district court case applying Florida law and a Montana Supreme Court case applying Montana law. (Insureds' Br. at 35-38) *Victoria Select Ins. Co. v. Vrchota Corp.*, 805 F. Supp. 2d 1337 (S.D. Fla. 2011) (applying Florida law); *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919 (Mont. 2009). These cases held that a duty to defend arises outside the underlying complaint's allegations when the insurer is notified of extrinsic evidence placing the claim within the scope of coverage. 805 F. Supp. 2d at 1343; 206 P.3d at 928. The insurer must then consider the insured's version of the facts, investigate those facts and base its decision on the "true facts." 805 F. Supp. 2d at 1343.

Neither case supports adoption of that rule here. *Victoria Select* acknowledged that its holding was an unprecedented departure from Florida law: "[N]o Florida state cases directly address this issue ...." *Id*. Instead, *Victoria Select* relied on a decision

interpreting Georgia law. *Colonial Oil Indus., Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 & TO31504671*, 491 S.E.2d 337 (Ga. 1997). And *Revelation Industries*, which did not even purport to apply Florida law, was an articulation of Montana law. 206 P.3d at 928. ***25** Whatever the merits of Georgia and Montana law on this issue, Florida law is to the contrary. *See, e.g.*, *Jones*, 908 So. 2d at 443.

This is perhaps why, in the nine years since *Victoria Select* and the eleven years since *Revelation Industries* were decided, they have never been cited by a Florida state or federal court for the proposition that extrinsic evidence alone creates a duty to defend. In fact, both this Court and another judge of the same court that issued *Victoria Select* have since implicitly rejected its holding by reaffirming that the duty to defend arises solely from the underlying complaint's allegations. *Stephens*, 749 F.3d at 1323; *Trailer Bridge*, 657 F.3d at 1141; *Travelers Indem.*, 389 F. Supp. 3d at 1069-70.

And with good reason: *Victoria Select* and *Revelation Industries* clash with basic tenets of insurance law. If a duty to defend could arise from extrinsic evidence alone, the underlying complaint would become a meaningless touchstone. Not only that, the limited exception for consideration of extrinsic evidence would swallow the four corners rule. The result would be a collapse of the distinction between the duty to defend, which turns on alleged facts, and the duty to indemnify, which turns on true facts. *Mt. Hawley Ins. Co. v. Tactic Sec. Enf't, Inc.*, No. 6:16--cv--1425, 2017 WL 8316925, at *7 (M.D. Fla. Sept. 28, 2017) (applying Florida law) (holding that reading ***26** the exception so broadly as to allow consideration of extrinsic evidence any time unpled facts are invoked "would swallow the general rule entirely" and "conflate the analysis of the duty to defend with the duty to indemnify").

Moreover, the insureds' proposed upheaval of Florida law is irreconcilable with the purpose of the duty to defend. The duty to defend is grounded in causes of action and damages for which the claimant seeks to hold the insured liable. Absent amendment, the claimant can prove no set of facts outside the underlying complaint's ambit. While evidence may develop that supports new causes of action or elements of damages, that is inconsequential when the claimant does not seek to hold the insured liable for such new causes of action or elements of damages. Otherwise, an insured could collect policy benefits relative to a liability it does not face.

Despite no indication that the Florida Supreme Court would do away with the four corners rule, the insureds criticize the district court for its fidelity to existing Florida law and demand reversal on that basis. This is an invitation to err, as it contravenes the *Erie* doctrine:

> The duty of federal courts deciding common law cases under diversity would seem to be, if changes in state law are to be made, to leave it to the state courts (or, of course, legislature), to make them. To take the lead would be contrary to the teaching of *Erie Railroad Co. v. Tompkins* ... and indeed would be an outrageous ***27** imposition on the right of the people of Florida to make their own laws and interpret or enforce them through institutions of their own creation.

Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986) (Nichols, J., concurring) (applying Florida law); *see also Buell v. Direct Gen. Ins. Agency, Inc.*, 488 F. Supp. 2d 1215, 1216 (M.D. Fla. 2007) (applying Florida law) (holding that a federal court must apply state law as it currently exists).

In short, *Victoria Select* and *Revelation Industries* are outliers that have never represented Florida law. This Court should continue to reject them. *Selective Ins.*, 718 F. App'x at 866 (holding that this Court is bound by Florida appellate court decisions, as well as its own decisions applying Florida law).

II. *Looking solely to the underlying complaint's allegations, the "Amusement Devices" exclusion bars coverage.*

A. The extra-large inflatable beach ball is a device that necessarily requires a user to strike, punch or kick it--and Hunt and others did, in fact, use it in this manner.

For the "Amusement Devices" exclusion to apply, the extra-large inflatable beach ball that is the subject of the underlying action must qualify as an "amusement device." The exclusion defines the term non-exhaustively to include "[a]ny device that requires the user to strike, punch, or kick" it. (D.E. #1-2 at 19 of 86)

***28** As the photographs of record depict, the extra-large inflatable beach ball is a novelty designed for fun and entertainment. (D.E. #19 at 7-8 of 10) Given its comically enormous size, the sole means of interaction with the extra-large inflatable beach ball is to strike or punch it. Because the goal is to keep the extra-large inflatable beach ball aloft, as commonly seen at sporting events and musical concerts, crowd members strike and punch the extra-large inflatable beach ball as it passes overhead.

That is exactly how the Rum Fest crowd, including Hunt, interacted with the extra-large inflatable beach ball. The underlying complaint alleged that the extra-large inflatable beach ball was "thrown" into the crowd at an outdoor street festival and that attendees "knocked" and "push[ed] it around in the air." (D.E. #1-1 at 3 of 6) The underlying complaint also alleged that Hunt "used his outstretched arms and hands to push" the extra-large inflatable beach ball away from him. (D.E. #1-1 at 3 of 6)

The allegations that attendees, including Hunt, "threw," "knocked" and "pushed" the extra-large inflatable beach ball are synonymous with "strike" and "punch" within the meaning of the "Amusement Devices" exclusion. The common thread running throughout these verbs is forcible contact, as underscored by the fact that the definition of "knock" includes "strike" and ***29** the definition of "punch" includes "push." *Compare* Definition of *Throw*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/throw (last visited Feb. 4, 2020) ("to propel through the air by a forward motion of the hand and arm"), Definition of *Knock*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/knock (last visited Feb. 4, 2020) ("to strike something with a sharp blow"), *and* Definition of *Push*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/push (last visited Feb. 4, 2020) ("to press against with force in order to drive or impel"), *with* Definition of *Strike*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/strike (last visited Feb. 4, 2020) ("to drive or remove by or as if by a blow"), *and* Definition of *Punch*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/punch (last visited Feb. 4, 2020) ("to strike with a forward thrust especially of the fist" or "to drive or push forcibly by or as if by a punch"). These ordinary and commonly understood definitions demonstrate that the extra-large inflatable beach ball is a "device that requires the user to strike, punch, or kick" it.

***30** The insureds reply that the "amusement device" definition does not specifically state "beach ball." (Insureds' Br. 16 n.7) The assertion elevates form over substance. The exclusion defines "amusement device" non-exhaustively: "shall include, but not be limited to ...." (D.E. #1-2 at 19 of 86) This means that an extra-large inflatable beach ball could qualify as an "amusement device," despite not being identified by name. *See, e.g.*, *Travelers Indem. Co.*, 389 F. Supp. 3d at 1072-73, 1076-77 (holding that a professional services exclusion applied, even though the service at issue was not among the non-exhaustive list of activities that constituted professional services). The insureds succeed merely in proving that their reading of the exclusion cannot be squared with the policy's plain language.

B. Hunt's injuries arose from use of the extra-large inflatable beach ball.

Another requirement for the "Amusement Devices" exclusion to apply is that Hunt's injuries must have "aris[en] out of" use of the extra-large inflatable beach ball. (D.E. #1-2 at 19 of 86) The phrase "arising out of" is broad and unambiguous, even in the context of a policy exclusion. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 539 (Fla. 2005). It means "originating from," "having its origin in," "growing out of," "flowing from," "incident to" or "having a connection with," describing a causal ***31** nexus more than mere coincidence and less than "because of" or proximate cause. *Id.* at 539-40; *accord* *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 293 (Fla. 2007). The "arising out of" standard is, as this Court puts it, "not difficult to meet." *Zucker for BankUnited Fin. Corp. v. U.S. Specialty Ins. Co.*, 856 F.3d 1343, 1350 (11th Cir. 2017) (applying Florida law).

That low standard is easily met here. The underlying complaint alleged that Hunt was injured as a result of pushing the extra-large inflatable beach ball away from him: "[Hunt's] shoulder and elbow could not withstand the pressure of the heavy, extra large, beach ball and he suffered severe ligament and tendon injuries when he pushed it away to avoid being stuck in the face." (D.E. #1-1 at 3 of 6) This allegation alone establishes that Hunt's injuries arose from use of the extra-large inflatable beach ball.

Notably, the insureds do not disagree. Rather, they maintain that the underlying complaint could be read to assert liability theories independent of the extra-large inflatable beach ball--for example, negligent crowd control. (Insureds' Br. at 29-31) That is not a fair inference from Hunt's allegations. Hunt's negligence theories are tied exclusively to the insureds' acts and omissions relative to the extra-large inflatable beach ball. (D.E. #1- ***32** 1 at 4-6 of 6) To urge otherwise is to "ask[] this Court to infer too much." *Trailer Bridge*, 657 F.3d at 1144.

The insureds fall back on the general proposition that the duty to defend is broad. (Insureds' Br. at 35-36, 38, 42) The duty to defend is broad, but it is not boundless. It cannot be stretched to encompass factual allegations and legal theories that Hunt himself does not assert.

C. The "Amusement Devices" exclusion is unambiguous.

The insureds insist that the "Amusement Devices" exclusion is "ambiguous" and "confusing," in that it arguably applies only to contribution and indemnity actions. (Insureds' Br. at 7, 17, 19-21, 43-51) The insureds read the phrase "to indemnify, defend or contribute jointly or severally with another" as modifying every item in the preceding list: "loss, claim, 'suit' or any obligation." (D.E. #1-2 at 19 of 86) The insureds' interpretation makes no sense, as it violates the last antecedent rule.

The last antecedent rule holds that a qualifying phrase modifies only the last item in a series when the qualifying phrase is not preceded by a comma, whereas a qualifying phrase modifies all items in a series when the qualifying phrase is preceded by a comma. *State ex. rel. Owens v. Pearson*, 156 So. 2d 4, 6 (Fla. 1963); ***33** *Mendelsohn v. State Dep't of Health*, 68 So. 3d 965, 967-68 (Fla. 1st DCA 2011); *Jacques v. Dep't of Bus. & Prof. Reg., Div. of Pari-Mutuel Wagering*, 15 So. 3d 793, 796 (Fla. 1st DCA 2009).

Here, the "Amusement Devices" exclusion omits a comma between the qualifying phrase "to indemnify, defend or contribute jointly or severally with another" and the preceding list of items: "loss, claim, 'suit' or any obligation." (D.E. #1-2 at 19 of 86) In accordance with the last antecedent rule, "to indemnify, defend or contribute jointly or severally with another" modifies only the last listed item. To reach this conclusion, one need not be, as the insureds declare, a "Philadelphia lawyer." [1] (Insureds' Br.

at 22, 50) One need merely be versed in fundamental rules of grammar. *Med. Transp. Mgmt. Corp. v. Comm'r of I.R.S.*, 506 F.3d 1364, 1369 (11th Cir. 2007) (rejecting an interpretation that "strains ordinary rules of grammar").

In hopes of creating some semblance of ambiguity where there is none, the insureds latch onto the district court's statement that the exclusion "presents a strong argument for use of the serial comma." (D.E. #37 at 8 of ***34** 12; Insureds' Br. at 45-48) But the district court ultimately found the provision sufficiently clear to be unambiguous. (D.E. #37 at 9 of 12)

That aside, the absence of a serial comma does not create ambiguity. Grammarians are divided over usage of this particular punctuation mark. *Heaslip v. Freeman*, 511 N.W.2d 21, 23 (Minn. Ct. App. 1994) (noting that *The Chicago Manual of Style* (13th ed. 1982) and *The New York Times Manual of Style and Usage* (Lewis Jordan ed. 1976) have differing opinions on the topic). Serial comma usage is a purely discretionary, stylistic choice. *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971) ("discretionary"); *Jones v. Coffee Cty. Sheriff's Dep't*, 695 F. App'x 530, 531 (11th Cir. 2017) ("optional"); *Brookdale Pontiac-GMC v. Federated Ins.*, 630 N.W.2d 5, 9 (Minn. Ct. App. 2001) ("more a stylistic preference than an absolute rule"). For this reason, courts attach no significance to omission of a serial comma. *Bass*, 404 U.S. at 340 n.6 ("When grammarians are divided, and surely where they are cheerfully tolerant, we will not attach significance to an omitted comma.").

This is especially true here, where the policy generally omits a serial comma. The "Amusement Devices" exclusion omits a serial comma 80% of the time. (D.E. #1-2 at 19 of 86) The immediately preceding and following exclusions omit a serial comma 100% of the time, as does the relevant ***35** insuring agreement. (D.E. #1-2 at 16-18, 20-21, 41 of 86) And the policy as a whole omits a serial comma 87% of the time. (D.E. #1-2)

In light of the policy's overall drafting consistency, any one instance of a serial comma's omission is unremarkable. *Brookdale*, 630 N.W.2d at 9 (finding the lack of a serial comma inconsequential where the policy provision at issue, as well as other portions of the policy and a supplemental policy, consistently omitted a serial comma). Tellingly, the insureds suffered no similar confusion in concluding that the underlying action falls within the policy's insuring agreement, which likewise omits a serial comma.

With the law and rules of grammar against them, the insureds scour the Internet in search of support for their efforts to transform a stylistic choice into an ambiguity. The insureds settle on a blogger--one who has never been cited as authoritative by either this Court or a Florida state or federal court. (Insureds' Br. at 48-50) The insureds' reliance on this blogger is self-defeating, given his belief that a serial comma "has nothing to do with what's going on in this provision [the 'Amusement Devices' exclusion]." Kenneth A. Adams, *Some Serious Comma Confusion Out of Florida*, Adams on Contract Drafting (Nov. 5, 2019, updated Jan. 14, 2020), https://www.adamsdrafting.com/some-serious-comma-confusion-out-of-florida/.

***36** In sum, the insureds' interpretation of the "Amusement Devices" exclusion is patently unreasonable. Therefore, the district court correctly determined that there is no ambiguity. *Trailer Bridge*, 657 F.3d at 1145 (holding that a policy should be interpreted in favor of the insured only where there is more than one reasonable interpretation).

III. *Consideration of extrinsic evidence changes nothing: There is still no duty to defend.*

A. The "Amusement Devices" exclusion expressly states that mere allegations are sufficient to bar coverage.

Having plumbed the underlying complaint's allegations and come up short, the insureds seek to manufacture a duty to defend within their self-authored extrinsic evidence. Even if such an endeavor were permissible under Florida law, it would prove fruitless.

The "Amusement Devices" exclusion itself refutes the notion that extrinsic evidence has any bearing on PESLIC's duty to defend. The exclusion bars coverage for "bodily injury" that "actually or *allegedly*" arises from the use of an "amusement device." (D.E. #1-2 at 19 of 86; emphasis supplied) Translation: the exclusion is a self-contained four corners rule, meaning that extrinsic evidence--no matter what it reflects--cannot trump ***37** the underlying complaint. In the face of the exclusion's mandate that allegations alone are sufficient to bar coverage, the insureds remain silent.

B. Extrinsic evidence does not alter the fact that, at the time of the accident, the extra-large inflatable beach ball was being used as an "amusement device."

The insureds maintain that consideration of extrinsic evidence would prove that the underlying action is potentially covered. According to the insureds, the fact that the extra-large inflatable beach ball was being used as a decoration at the outset of the Rum Fest event defeats the "Amusement Devices" exclusion. (Insureds' Br. at 7, 13, 17-19) The insureds' contention rests on the faulty premise that the extra-large inflatable beach ball cannot simultaneously be *both* an "amusement device" *and* a decoration.

The concepts are not mutually exclusive. The insureds' hypothetical illustrates the point. Suppose a customer wrenches from the wall a commemorative mounted golf club, uses it to hit a golf ball and accidentally strikes Hunt in the process. (Insureds' Br. at 41-42) In this situation, the golf club potentially serves dual functions: decoration and amusement.

What matters for purposes of the "Amusement Devices" exclusion, however, is how the device was being used at the time of the accident. This is evident from the exclusion's causal linkage of "bodily injury" and "use of an 'amusement device.' " (D.E. #1-2 at 19 of 86) Assuming the hypothetical ***38** golf club was being used as a decoration when the injury was inflicted, the key inquiry is whether it was also being used as an "amusement device." If so, the fact that the golf club served some additional function is immaterial.

Applying these principles here, the extrinsic evidence demonstrates only that the extra-large inflatable beach ball was being used as a decoration *before* the accident occurred. (D.E. #30-1 at 4-5 of 10; D.E. #30-3 at 3-4 of 8) The extrinsic evidence says nothing about how the extra-large inflatable beach ball was being used *when* the accident occurred. Even if the extrinsic evidence outright stated that the extra-large inflatable beach ball was being used as a decoration at that point in time, it would not rebut the underlying complaint's allegations that the extra-large inflatable beach ball was *also* being used as an "amusement device." Under these circumstances, the district court's consideration of extrinsic evidence would not have altered the outcome: there is still no potential for coverage.

IV. *Absent a duty to defend, there is likewise no duty to indemnify.*

As explained above, the "Amusement Devices" exclusion bars any possibility of coverage in connection with the underlying action. *Tippett*, 864 So. 2d at 35 (holding that an insurer owes no duty to defend where the pleadings show applicability of an exclusion). Absent a duty to defend, as ***39** the insureds admit, PESLIC owes no duty to indemnify. (Insureds' Br. at 52) *Trailer Bridge*, 657 F.3d at 1146. For this reason, the insureds' discussion of the extrinsic evidence on which they might have relied to prove a duty to indemnify--*if* there were a duty to defend and *if* they are eventually held liable to Hunt--is academic. (Insureds' Br. at 51-53) There is but one conclusion: the judgment for PESLIC should be upheld.

***40 Conclusion**

For the reasons stated above and upon the authorities cited, PESLIC respectfully requests that this Court affirm the judgment and grant such further and additional relief as this Court deems just.

Respectfully submitted,

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Footnotes

1 A "Philadelphia lawyer" is "a lawyer knowledgeable in the most minute aspects of the law." Definition of *Philadelphia Lawyer*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/Philadelphia_lawyer (last visited Feb. 4, 2020).

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