IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-CT-264

U.S. Automatic Sprinkler Corporation,
Appellant

–v–

Erie Insurance Exchange, et al.,
Appellees

Argued: October 11, 2022 | Decided: March 6, 2023

Interlocutory Appeal from the Marion Superior Court
49D12-1706-CT-24859
The Honorable David J. Dreyer, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 21A-CT-580

Opinion by Chief Justice Rush

Justices Massa, Slaughter, and Molter concur.
Justice Goff concurs in part and dissents in part with separate opinion.

Rush, Chief Justice.

Indiana courts have a long history of safeguarding the freedom to contract. With this freedom, contracting parties have the opportunity to forecast whether and to what extent they can recover loss. But when a non-contracting party suffers a loss, we must look elsewhere, such as statutes or common law, to ascertain whether recovery is available. The central question before us today is whether commercial tenants—one connected by contract and the others not so connected—can recover for their respective property damages.

Here, after a contractor performed work on a sprinkler system, the system malfunctioned and a flood ensued. The company that had the system installed and other commercial tenants in the building sustained property damage. While the contractor and the company were connected by contract, the other commercial tenants did not share any contractual relationship with the company. The company's insurer subsequently sued the contractor for subrogation recovery. And the other commercial tenants sued the contractor to recover their property damages. Seeking summary judgment, the contractor contended that all parties were barred from recovery as a matter of law—but the trial court disagreed.

We hold that the contractor is entitled to summary judgment against the insurer and the other commercial tenants. Under the contract's broad subrogation waiver and agreement to insure, the company waived its insurer's right to recover through subrogation. And under our common law, the absence of contractual privity between the contractor and the other commercial tenants precludes them from recovery because the contractor's allegedly negligent work posed a risk to only property and the commercial tenants suffered only property damage. We therefore reverse and remand for the trial court to enter summary judgment in favor of the contractor.

Facts and Procedural History

The Sycamore Springs Office Complex ("Landlord") leased office space to four commercial tenants: Surgery Center, Dr. Chen, Dr. Pruett, and 3D Exhibits. Surgery Center requested the Landlord's permission to install a

sprinkler system at the office complex. The Landlord agreed but amended Surgery Center's lease agreement by requiring the tenant to be "solely" responsible for maintenance of the system and to maintain "adequate insurance coverage in the event any damage is caused by the failure of said sprinkler system to its leased premises and other leased premises which are situated directly under the sprinkler equipment."

Surgery Center contracted with U.S. Automatic Sprinkler Corporation to both install the sprinkler system and conduct periodic inspections and testing. This contract (the "Inspection Agreement") contained specific terms regarding the scope of Automatic Sprinkler's work and the conditions under which it would be held liable for any damage. The scope of work was limited to "the inspection and testing of the devices and equipment detailed in the Equipment List and accepted in the Scope of Work section." Although that section excluded "[r]epair, replacement, and emergency services," each could be performed "upon request and authorization of [Surgery Center] at [Automatic Sprinkler's] market prices." As to damages, the Inspection Agreement provided, in relevant part, that "[n]o insurer or other third party will have any subrogation rights against" Automatic Sprinkler and that Surgery Center "will be responsible for maintaining all liability and property insurance."

Before conducting scheduled inspections of the system, Automatic Sprinkler generally contacted a Surgery Center employee to set up a date and time. Upon arrival, the employee would give an Automatic Sprinkler employee a key to access the riser room, which stored the system's components. Following the inspection, the Automatic Sprinkler employee would return the key and provide their findings to a Surgery Center employee who would sign off on the findings.

On November 28, 2016, Automatic Sprinkler performed a scheduled inspection and identified no issues. However, on December 12, the Landlord's maintenance employee discovered water leaking from a main drain connected to the sprinkler system. Although the Landlord, by Surgery Center's lease agreement, retained the right to "enter the Premises to make inspections or repairs in or to the Premises . . . at any time in the event of an emergency," the maintenance employee did not perform any

work on the system and, instead, asked Automatic Sprinkler to come take a look at the leak.

An employee from Automatic Sprinkler came to the property and "messed with some valves" connected to the sprinkler system but ultimately observed that the air pressure and water pressure were normal. Neither the maintenance employee nor Automatic Sprinkler received Surgery Center's approval before examining the system that day.

Less than a week later, water in the sprinkler system froze and ruptured the pipes, causing flooding and property damage to all four tenants—each of whom had procured insurance for their respective properties. Travelers Indemnity Company covered Surgery Center's losses, and Erie Insurance Company covered Dr. Chen's.

Travelers filed a subrogation action against Automatic Sprinkler seeking to recover their losses, contending they were the result of Automatic Sprinkler's allegedly negligent work. Likewise, seeking recovery for their property damages, Dr. Pruett, 3D Exhibits, and Erie on behalf of Dr. Chen (the "Non-Contract Tenants"), sued Automatic Sprinkler. These actions were consolidated.

Automatic Sprinkler sought summary judgment against both Travelers and the Non-Contract Tenants. Against Travelers, Automatic Sprinkler argued the Inspection Agreement's subrogation waiver and agreement to insure precluded the subrogation action. Against the Non-Contract Tenants, Automatic Sprinkler argued it owed no duty to these parties and thus was not liable for their damages. The trial court denied both motions. Automatic Sprinkler moved to certify the orders for interlocutory appeal, which the trial court granted.

After accepting jurisdiction over the interlocutory appeal, the Court of Appeals affirmed in part and reversed in part. *U.S. Auto. Sprinkler Corp. v. Erie Ins. Exch.*, 185 N.E.3d 445, 446–47 (Ind. Ct. App. 2022). The panel affirmed the trial court's denial of Automatic Sprinkler's motion against Travelers, finding that the Inspection Agreement did not apply because the allegedly negligent work fell outside the agreement's scope. *Id.* at 449. And the panel reversed the trial court's denial of Automatic Sprinkler's

motion against the Non-Contract Tenants, reasoning that Automatic Sprinkler did not owe them a duty due to the lack of contractual privity. *Id.* at 450–51.

Automatic Sprinkler and the Non-Contract Tenants separately petitioned for transfer, which we granted, vacating the Court of Appeals' Opinion. Ind. Appellate Rule 58(A).

Standard of Review

We review summary judgment decisions de novo, applying the same standard as the trial court. *See, e.g.*, *Lake Cnty. Bd. of Comm'rs v. State*, 181 N.E.3d 960, 962 (Ind. 2022). To prevail, Automatic Sprinkler—the moving party—must show that the designated evidence reveals no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C).

Here, there is no dispute as to any genuine issue of material fact. Automatic Sprinkler performed work on Surgery Center's sprinkler system on December 12. And though the parties dispute the nature and extent of this work, it is undisputed that the work was completed without Surgery Center's "request and authorization." It is also undisputed that Automatic Sprinkler and the Non-Contract Tenants do not share a contractual relationship, that the alleged negligence did not pose a risk of personal injury, and that the Non-Contract Tenants seek recovery for only property damages and loss of business income.[1]

Accordingly, whether Automatic Sprinkler is entitled to summary judgment turns on two questions of law: (1) whether the Inspection Agreement precludes Travelers from pursuing its subrogation action against Automatic Sprinkler; and (2) whether Automatic Sprinkler owed a

[1] Because the Non-Contract Tenants present no basis for imposing tort liability on Automatic Sprinkler for this particular type of loss, its claim for recovery of these damages is barred. *See, e.g.*, *Indpls.-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 736, 742 (Ind. 2010).

duty to the Non-Contract Tenants, such that they can seek recovery for their property damages.

Discussion and Decision

We first address whether the Inspection Agreement precludes Travelers from pursuing its subrogation action against Automatic Sprinkler. Generally, when an insurer provides coverage for their insured's loss, the insurer may seek recovery against the responsible party through subrogation. *See State Farm Mut. Auto. Ins. v. Cox*, 873 N.E.2d 124, 128 (Ind. Ct. App. 2007). But here, Automatic Sprinkler contends that Surgery Center waived Travelers's subrogation rights under the Inspection Agreement. Travelers, however, contends that the Inspection Agreement does not apply because Surgery Center's damages stem from work completed outside the scope of the agreement.

We agree with Automatic Sprinkler and hold that Travelers is barred from seeking subrogation recovery against Automatic Sprinkler. The Inspection Agreement's unambiguously broad subrogation waiver and agreement to insure evince the parties' intent to shift all risk of loss—irrespective of its source—to insurance.

We next address whether Automatic Sprinkler owed a duty to the Non-Contract Tenants. Resolving this issue turns on our common-law rules for determining when a contractor can be liable for a third party's property damages. When a contractor negligently performed work, but this work was accepted by the owner, the "acceptance rule" traditionally shielded contractors from liability if their work personally harmed a third party. *See, e.g.*, *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457, 457–58 (1896). The Non-Contract Tenants contend that, in *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004), we abandoned the acceptance rule and adopted the "foreseeability doctrine" to assess a contractor's liability when their negligent work endangers either a third party or their property. Automatic Sprinkler disagrees, arguing that this doctrine is limited to third-party allegations of personal injury.

We again agree with Automatic Sprinkler and, in clarifying *Peters*, hold that the foreseeability doctrine does not apply in these circumstances.

Automatic Sprinkler shares no contractual relationship with the Non-Contract Tenants. As such, and because Automatic Sprinkler's allegedly negligent work posed a risk to only property and the Non-Contract Tenants suffered only property damage, the Non-Contract Tenants' negligence claim fails as a matter of law.

I. Automatic Sprinkler is entitled to summary judgment against Travelers.

The viability of Travelers's subrogation action turns on whether, or to what extent, Surgery Center waived its subrogation rights under the Inspection Agreement—a question of contract interpretation. Our goal when interpreting contracts is to determine the parties' intent. *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 752 (Ind. 2018). Here, the unambiguous terms of the Inspection Agreement establish the parties' intent to shift all risk of loss to insurance. And because those terms are not conditioned on loss being caused in any particular way, they apply here. Thus, as a matter of law, Travelers is precluded from pursuing its subrogation action against Automatic Sprinkler.

A. Travelers's subrogation action is barred by the Inspection Agreement's plain and unambiguous terms.

When parties enter into a service contract, the risk of loss is of paramount concern. To contain their risk, parties are generally free to craft contractual provisions that delineate the nature and extent to which certain damages are recoverable. *See, e.g.*, *Gen. Bargain Ctr. v. Am. Alarm Co.*, 430 N.E.2d 407, 410–12 (Ind. Ct. App. 1982); *Chase Manhattan Bank v. Lake Tire Co.*, 496 N.E.2d 129, 133 (Ind. Ct. App. 1986). Two such provisions, both found in the Inspection Agreement, function in this way: an agreement to insure and a waiver of subrogation. To guide our interpretation, we begin by clarifying the general intent that accompanies a contract's inclusion of these provisions.

1. Contracts that include an agreement to insure or a subrogation waiver evince the parties' intent to recover loss through insurance.

Contracting parties can limit the availability of remedies in various ways. For instance, they can include a clause that limits one party's liability to the other only for damages that arise in a specific manner. *E.g.*, *Pinnacle Comput. Servs., Inc. v. Ameritech Publ'g., Inc.*, 642 N.E.2d 1011, 1014 (Ind. Ct. App. 1994); *Anderson v. Four Seasons Equestrian Ctr., Inc.*, 852 N.E.2d 576, 584 (Ind. Ct. App. 2006), *trans. denied*. Parties can also include an indemnification clause under which one party will be liable to the other in the event a third party sustains damages. *E.g.*, *In re Ind. State Fair Litig.*, 49 N.E.3d 545, 548–50 (Ind. 2016). Or, as is relevant here, the parties can include clauses—such as an agreement to insure or a subrogation waiver—that remove themselves from exposure to liability and, instead, shift the risk of loss to insurance. *E.g.*, *Ind. Erectors, Inc. v. Trs. of Ind. Univ.*, 686 N.E.2d 878, 880 (Ind. Ct. App. 1997).

An agreement to insure is intended "to provide both parties with the benefits of insurance regardless of the cause of the loss (excepting wanton and willful acts)." *Id.* Otherwise, "each would provide his or its own insurance protection and there would be no need for the contract to place the duty on one of them." *Morches Lumber, Inc. v. Probst*, 180 Ind. App. 202, 388 N.E.2d 284, 287 (1979). As a result, "where one party agrees to purchase insurance for the benefit of both parties," this party "has no cause of action" against the other regardless of their fault in contributing to or inducing the loss. *Ind. Erectors*, 686 N.E.2d at 880. And the same is true for subrogated insurers, as their rights "can rise no higher than" those of the insured. *LeMaster Steel Erectors, Inc. v. Reliance Ins.*, 546 N.E.2d 313, 317 (Ind. Ct. App. 1989).

Like an agreement to insure, a subrogation waiver signifies the contracting parties' intent to recover damages "through insurance claims, not lawsuits"—but perhaps more explicitly. *Bd. of Comm'rs of Cnty. of Jefferson v. Teton Corp.*, 30 N.E.3d 711, 715 (Ind. 2015); *see also Performance Servs., Inc. v. Hanover Ins.*, 85 N.E.3d 655, 663 (Ind. Ct. App. 2017). Though parties are free to waive their insurer's subrogation rights, these

provisions "cannot be enforced beyond the scope of the specific context in which" they appear. *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654, 665 N.Y.S.2d 47, 687 N.E.2d 1330, 1333 (1997). Nevertheless, parties can specify the conditions under which a subrogation waiver will operate, perhaps by limiting its application to certain damages or by triggering its application based on events giving rise to the damages. *See Teton*, 30 N.E.3d at 717. But absent plain language that expressly conditions the waiver's application, or in cases of gross negligence, this "provision bars recovery." *S.C. Nestel, Inc. v. Future Const., Inc.*, 836 N.E.2d 445, 451 (Ind. Ct. App. 2005).

Overall, when a contract contains an agreement to insure or a waiver of subrogation, the parties demonstrate their intent to avoid liability by allocating it to an insurer. At the same time, parties remain free to specify the scope of these provisions or the conditions under which they operate. In such cases, whether the parties intended to shift their risk of loss for the alleged damages turns on the plain language of the provisions—which, if unambiguous, will be enforced as written. We turn now to the applicability of the two provisions in the Inspection Agreement.

2. The Inspection Agreement's broad, unambiguous agreement to insure and subrogation waiver evince the parties' intent to shift all risk of loss to insurance.

Because the Inspection Agreement contains both an agreement to insure and a waiver of subrogation, the question is not whether Surgery Center agreed to waive its insurer's subrogation rights—it did. Instead, the question is whether these provisions were limited to or conditioned on Surgery Center's damages arising in a particular manner.

To answer this question, we are constrained by the four corners of the Inspection Agreement—we may not add or subtract language. *Sawyer*, 93 N.E.3d at 752–53. And we review the agreement in its entirety, not merely "individual words, phrases, or paragraphs." *Id.* at 756. In so doing, our goal is to harmonize the provisions and avoid placing them in conflict. *Allgood v. Meridian Sec. Inc.*, 836 N.E.2d 243, 247 (Ind. 2005). When there is no ambiguity, we enforce the plain language. *Sawyer*, 93 N.E.3d at 752.

The agreement to insure provides that Surgery Center "will be responsible for maintaining all liability and property insurance." This provision, by its plain language, is not conditioned on Surgery Center's loss arising in any particular way. Further, by agreeing to purchase insurance for Automatic Sprinkler's benefit, Surgery Center effectively agreed to waive Automatic Sprinkler's liability in the event of loss. *See LeMaster*, 546 N.E.2d at 317. And because "the rights of a subrogated insurer can rise no higher than the rights of its insured," the agreement to insure forecloses Travelers from pursuing this subrogation action. *Youell v. Cincinnati Ins.*, 117 N.E.3d 639, 643 (Ind. Ct. App. 2018).

We reach the same conclusion based on the plain, unambiguous language of the subrogation waiver. That clause, which immediately precedes the agreement to insure, states, "No insurer or other third party will have any subrogation rights against [Automatic Sprinkler]." This provision captures the understanding that "no" party—including Surgery Center's insurer, Travelers—would have "any" subrogation rights against Automatic Sprinkler. Travelers, however, insists that this waiver applies only to losses sustained through work completed within the scope of the agreement. But, by its plain language, the subrogation waiver is not conditioned on Surgery Center's loss arising in any particular way. *Cf. Cont'l Ins. v. Faron Engraving Co.*, 577 N.Y.S.2d 835, 179 A.D.2d 360, 360–61 (App. Div. 1992) (finding that the plain language of the waiver established that it applied only to specific property). Instead, given its use of the word "any," the waiver unambiguously forecloses the availability of a subrogation action against Automatic Sprinkler irrespective of the circumstances giving rise to the loss.

Certainly, "at some point, remoteness from the subject matter of the contract will prevent even an extremely broad subrogation waiver from operating." *Amer. Home Ins. v. Monsanto Enviro-Chem Sys., Inc.*, 16 Fed. Appx. 172, 176 (4th Cir. 2001). But remoteness is not a problem here. Indeed, the Inspection Agreement contemplated a potential emergency, stipulating that "[s]hould an emergency arise, [Automatic Sprinkler] personnel will assess the situation and advise [Surgery Center] on a course of action and repair." Thus, the agreement not only authorized periodic testing and inspection but also repairs and emergency services

upon Surgery Center's approval. Further, it was Automatic Sprinkler, not another company, that was contracted to service, test, and inspect the sprinkler system. And while Automatic Sprinkler's allegedly negligent work was not explicitly authorized, it was performed in response to the discovery of a leak. *Cf. S.C. Nestel, Inc.*, 836 N.E.2d at 451 (explaining that a subrogation waiver will apply whether the "theory of recovery is negligence or breach of contract"). Simply put, this work was not so removed from the subject matter of the agreement such that the broad subrogation waiver cannot apply.

In fact, considering the Inspection Agreement as a whole, it is clear Surgery Center was aware of potential loss but nonetheless agreed to shift all risk of such loss—irrespective of how it was sustained—to insurance. For instance, in agreeing to waive "any" right to subrogation, Surgery Center was fully aware that its risk of loss extended to damages caused by "water, water leakage, [or] freezing pipes." Despite this risk, Surgery Center agreed to indemnify and hold Automatic Sprinkler harmless "against any and all claims and costs of whatever nature, including but not limited to . . . property damage . . . that in any way results from or arises under such materials, situations or conditions." And even if "special, incidental, indirect, speculative, remote, or consequential damages" arose from Automatic Sprinkler's "services, equipment, [or] materials," Surgery Center agreed that Automatic Sprinkler would not be liable for such damages. Further, though Surgery Center "chose the scope of services being provided by [Automatic Sprinkler] from a variety of service options," Surgery Center ultimately and unambiguously agreed that Automatic Sprinkler "is not an insurer" and, as such, would "not be held liable for any loss, in tort or otherwise, which may arise from the failure of the system(s) and/or service(s)."

Only under "extraordinary circumstances" may we decline "to enforce a contract's plain and ordinary language," such as when enforcement "would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument." *Hartman v. BigInch Fabricators & Constr. Holding Co.*, 161 N.E.3d 1218, 1224 (Ind. 2021) (cleaned up). But here, there is nothing absurd or repugnant about honoring the parties' decision to shift all risk of loss to insurance—a permissible exercise of business foresight.

And so, based on the plain language of the Inspection Agreement, we hold that Travelers is precluded from pursuing its subrogation action against Automatic Sprinkler. We next consider whether the Non-Contract Tenants are precluded from pursuing their negligence claim.

II. Automatic Sprinkler is entitled to summary judgment against the Non-Contract Tenants.

As a result of Automatic Sprinkler's allegedly negligent work, the Non-Contract Tenants suffered property damages. In reviewing their negligence claim, we address a threshold issue: whether Automatic Sprinkler owed a duty to the Non-Contract Tenants. *See Yost v. Wabash College*, 3 N.E.3d 509, 515 (Ind. 2014). Here, neither statute nor contract supply a basis for imposing a duty on Automatic Sprinkler, so we turn to our common law. *Cf. In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270 (Ind. Ct. App. 2003).

Under our common law, the availability of recovery in a negligence claim varies depending on the damages sustained and whether the parties share a contractual relationship. *See, e.g.*, *Indpls.-Marion Cnty. Pub. Libr.*, 929 N.E.2d at 734–36. In the context of contractor liability, we traditionally followed the "acceptance rule" to assess whether a contractor could be liable to a third party. *See, e.g.*, *Daugherty*, 44 N.E. at 457. Under this rule, which has various exceptions, contractors are generally shielded from third-party liability once the work is completed and then accepted by the owner. *Id.*

But in *Peters v. Forster*, we adopted the "foreseeability doctrine" for determining the scope of contractor liability to third parties. 804 N.E.2d at 742. Under our doctrine,

> [A] builder or contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and acceptance by the owner, where it was reasonably foreseeable that a third party would be injured by such work due to the contractor's negligence.

Id. By its plain terms, neither the absence of privity nor the acceptance of work insulates a contractor from liability when a third party sustains personal injury as a result of the contractor's allegedly negligent work. *Id.* Instead, the dispositive consideration is whether the third party's injury was "reasonably foreseeable." *Id.*

But the doctrine also purports to apply when there is "damage to a third person." *Id.* For the Non-Contract Tenants, this phrase means that a contractor may also be liable when its allegedly negligent work presents a risk of harm **only** to a third party's property. Though our use of the word "damage" is instructive, it ultimately does not lead to the Non-Contract Tenants' interpretation of the doctrine's scope.

When discerning the scope of a common law rule, such as the foreseeability doctrine, our interpretive endeavor demands a cautious inquiry. Indeed, the meaning of our common law is inextricably linked to the precedential context from which it emerged—the common law is designed to adapt to conditions that necessitate change. *See, e.g.*, *Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992). And these conditions constrain our review, unless new conditions have emerged that necessitate modification. In conducting that review, we must remain mindful of what the Court says—but just as importantly, what it does not say. *Cf. City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017).

When we adopted the foreseeability doctrine in *Peters*, the privity requirement functioned differently depending on the condition of the completed work, the event that caused the third party's damages, and the nature of those damages. For example, the absence of privity no longer shielded manufacturers from liability when their defective product personally injured a third party. *See J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519, 522–23 (1964). But the absence of privity continued to insulate contractors and builders from third-party liability **unless** the work was so "dangerously defective, inherently dangerous, or imminently dangerous" such that it produced a "risk of imminent personal injury." *Blake v. Calumet Constr. Corp.*, 674 N.E.2d 167, 172–73 (Ind. 1996).

Additionally, while the privity requirement was subject to exceptions when third-party personal injury was within the realm of risk, the same

was not true when a contractor's negligent work produced "an imminent danger of property damage **only**." *Citizens Gas & Coke Util. v. Amer. Econ. Ins.*, 486 N.E.2d 998, 1000 (Ind. 1985) (emphasis added). Indeed, when a contractor's work posed an imminent risk of personal injury, "humanitarian principles" justified an exception to the privity requirement. *Id.* at 1000–01. Under this exception, if a contractor's work produced an imminent risk of personal injury but resulted in only property damage, the third party could still recover property damages. *See*, *e.g.*, *Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 14 N.E.2d 339, 342, 345 (1938) (en banc); *Hiatt v. Brown*, 422 N.E.2d 736, 740 (Ind. Ct. App. 1981). However, when the work endangered only property, no "humanitarian principles" justified exposing contractors to liability for a third party's property damages. *See Citizens Gas*, 486 N.E.2d at 1000; *see generally Blake*, 674 N.E.2d at 172–73; *U-Haul Int'l, Inc. v. Mike Madrid Co.*, 734 N.E.2d 1048, 1052–56 (Ind. Ct. App. 2000); *N. Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, 250 N.E.2d 378, 410–11 (1969).

With the necessary context in hand, we now return to *Peters*. There, a homeowner hired a contractor to transport and install a ramp at their home. 804 N.E.2d at 737. The contractor installed the ramp by attaching it "to the front of the house with 'a couple of screws.'" *Id.* After the work was finished and accepted by the owner, a third party slipped on the ramp, fell, and sustained personal injuries. *Id.* at 738. Seeking damages for those injuries, the third party sued the contractor who in turn argued that the acceptance rule shielded him from liability. *Id.*

Due to the rule's withered roots in cases involving personal injury to third parties, we abandoned it and adopted the foreseeability doctrine for assessing contractor liability when a third party sustains "injury or damage" due to a contractor's negligent work. *Id.* at 742. In considering this holding within its proper, precedential context, we clarify the foreseeability doctrine's scope in two ways.

First, the foreseeability doctrine applies when a third party seeks recovery for personal injury that was a foreseeable consequence of a contractor's allegedly negligent work. This clarification is in harmony with *Peters* in which we sought to equalize the liability field in the context

of negligence claims resulting in injuries to third parties. Indeed, we found "insufficient grounds to differentiate between liability of a manufacturer of goods and that of a building contractor" when the result—personal injury—was the same. *Id.* We also observed that, in modern practice, owners relinquish some of their control by hiring contractors specifically to rely upon their skill, expertise, and knowledge. *Id.* at 741. And we further recognized that an "increasing number of jurisdictions" had similarly equalized the liability field in this way. *Id.* at 741–42.

Second, the doctrine applies when a third party seeks recovery for property damage if personal injury—though not sustained—is a foreseeable consequence of a contractor's allegedly negligent work. This clarification is in harmony with *Citizens Gas*, which *Peters* did not undermine, let alone overrule. Instead, to recover for "damage" under the foreseeability doctrine, it must be "reasonably foreseeable that a third party would be **injured** by such work." *Peters*, 804 N.E.2d at 742 (emphasis added). This plain language simply integrated into the foreseeability doctrine an already-existing exception to the privity requirement for third-party property loss. *See Citizens Gas*, 486 N.E.2d at 1000; *Holland Furnace*, 14 N.E.2d at 342, 345; *Hiatt*, 422 N.E.2d at 740. Thus, when a contractor's allegedly negligent work poses a risk to **only** property—not persons—the privity requirement remains operative and precludes recovery for property damages in a negligence action.

In applying these principles here, it is undisputed that Automatic Sprinkler's alleged negligence did not pose a risk of personal injury to the Non-Contract Tenants, but only endangered their property. As such, *Citizens Gas* controls, and the lack of privity bars the Non-Contract Tenants from recovering their property damages from Automatic Sprinkler. Yet, the Non-Contract Tenants contend that there is no meaningful distinction between personal injury and property damage, and thus, they assert the privity requirement should not bar recovery under these circumstances. We disagree.

It's true that disruptions and devastations often arise when a party suffers property loss through no fault of its own. But, unlike in matters of personal injury, commercial tenants can—and routinely do—exercise

control over their risk of loss by procuring insurance. *See Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 557 N.Y.S. 2d 286, 556 N.E.2d 1093, 1096 (1990). Commercial tenants are also in a superior position to assess the value of their properties and possessions and, as such, "negotiate the cost of the[ir] lease and limitations on liability accordingly." *Id.* Here, the Non-Contract Tenants availed themselves of these opportunities. They were connected by a network of contracts with Surgery Center and the Landlord, controlled their risk of loss by procuring insurance for their respective properties and possessions, and received coverage for their damages as a result.

Under these circumstances, imposing third-party liability on companies—like Automatic Sprinkler—would force them to "insure against a risk the amount of which they may not know and cannot control." *Id.* We find no reason to reallocate this risk and abandon the privity requirement when, as here, the allegedly negligent work created a risk to only property and the third parties suffered only property damage.[2] We therefore hold that Automatic Sprinkler, as a matter of law, owed no duty to the Non-Contract Tenants.

Conclusion

We reverse the trial court's denial of Automatic Sprinkler's motions for summary judgment against both Travelers and the Non-Contract Tenants. And we remand for the trial court to enter summary judgment in favor of Automatic Sprinkler.

Massa, Slaughter, and Molter, JJ., concur.
Goff, J., concurs in part and dissents in part with separate opinion.

[2] The separate opinion cites "fairness" in arguing that we should eliminate the privity requirement and adopt the foreseeability doctrine for purposes of determining whether the Non-Contract Tenants' property damages are recoverable. *Post*, at 2. But, as we explain in Section II, we do not change our common law to conform with individual notions of fairness. And the separate opinion cites no societal conditions that have emerged warranting such a change here. Based on the facts of this case, we simply find no basis to eliminate the privity requirement—whose application to these circumstances was merely clarified, not created.

ATTORNEYS FOR APPELLANT U.S. AUTOMATIC SPRINKLER CORPORATION

Crystal G. Rowe
Katherine E. Tapp
Kightlinger & Gray LLP
New Albany, Indiana

Thomas J. Jarzyniecki, Jr.
Kightlinger & Gray LLP
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT A/S/O SYCAMORE SPRINGS SURGICAL CENTER

James M. Weck
Clausen Miller P.C.
Michigan City, Indiana

Joseph J. Ferrini
Clausen Miller P.C.
Chicago, Illinois

ATTORNEYS FOR APPELLEE ERIE INSURANCE EXCHANGE

James M. Weck
Clausen Miller P.C.
Michigan City, Indiana

Kevin L. Moyer
Moyer Law Firm, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES 3D EXHIBITS, INC. & DR. NANCY PRUETT, DDS

Nelson A. Nettles
J. Kirk Leblanc
Leblanc Nettles Law, LLC
Brownsburg, Indiana

Matt R. Leffler
Evans & Dixon
St. Louis, Missouri

Goff, J., concurring in part and dissenting in part.

I write separately to explain why the acceptance rule should be abrogated in all property damage cases as well as personal injury cases.

Formerly, Indiana followed the general rule that "contractors do not owe a duty of care to third parties after the owner has accepted the work." *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 170 (Ind. 1996). Exceptions existed, however, for "dangerously defective" or "inherently dangerous" work, and for work posing "imminent danger to the health and safety" of members of the public. *Citizens Gas & Coke Utility v. American Economy Ins. Co.*, 486 N.E.2d 998, 1000-01 (Ind. 1985). Another exception was made for work which might become imminently dangerous to life because of a fraudulently concealed defect. *Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 580, 14 N.E.2d 339, 342 (1938).

In *Peters v. Forster*, 804 N.E.2d 736 (Ind. 2004), our predecessors on this Court explained why the acceptance rule was inappropriate, at least in the personal injury context. The rule relied on the idea that one party owed another a duty only if they were in privity of contract with each other. *Id.* at 739 (citing *Daugherty v. Herzog*, 145 Ind. 255, 44 N.E. 457 (1896)). This was inconsistent with the basic principle of tort law that a person is liable when their negligent conduct foreseeably causes injury to another. *Id.* at 742. The rule shifted responsibility from the negligent contractor to innocent property owners on the fictional basis that owners acknowledge and accept defects in contractors' work. *Id.* at 741 (citation omitted). Realistically, most property owners lack the knowledge to evaluate contractors' work. *Id.* (citation omitted). As *Blake* noted, sound policy requires a rule that provides the right incentives: "Contractors presumably will think twice before turning over a dangerous instrumentality if they know they can be called to account for injuries it produces." 674 N.E.2d at 173. These reasons all apply to the risk of third-party property damage just as much as to personal injury. *Jackson v. City of Seattle*, 244 P.3d 425, 431 (Wash. Ct. App. 2010); *Aronsohn v. Mandara*, 484 A.2d 675, 683 (N.J. 1984); *Driscoll v. Columbia Realty-Woodland Park Co.*, 590 P.2d 73, 74 (Colo. App. 1978); *Johnson v. Oman Const. Co., Inc.*, 519 S.W.2d 782, 788 (Tenn. 1975).

The Court today avoids this conclusion on two grounds. First, the Court reasons, "humanitarian principles" do not support exposing contractors to liability for property damage, unlike for personal injury. *Ante*, at 14 (quoting *Citizens Gas*, 486 N.E.2d at 1000). The meaning of this phrase is unclear. If it means that personal injury deserves compensation more than property damage, then I cannot agree. The family whose apartment is wrecked or the small business whose machinery is destroyed by a contractor's negligence deserve to be made whole. Second, the Court reasons that "commercial tenants" are in a better position to assess and insure their property than a contractor, who may not know what property is at risk. *Id.* at 16. Of course, not all third parties in contractor cases will be commercial tenants. Some may be residents who cannot afford insurance. But, in any case, it is unclear why the Court assumes contractors cannot already insure themselves for third-party property damage. Contractors are liable under existing law for property damage when their accepted work poses an imminent danger to public safety. *Id.* at 14, 15; *Holland Furnace*, 105 Ind. App. at 586, 14 N.E.2d at 345 (upholding damages for property destruction where a badly installed furnace was "imminently dangerous" to its users). And the acceptance rule offers contractors no protection before their work is accepted, meaning they may be liable for property damage caused during negligent work. Insurance is presumably available in such situations.

Fundamentally, tort law controls the allocation of losses between those who suffer and those who cause those losses. Reasons of fairness and incentives support the general rule that those who negligently harm the person or property of others should bear the cost. There is no persuasive reason to give contractors special immunity from liability after negligent work has been accepted. This does not mean contractors should face unlimited liability for their errors. There must be unreasonable conduct and proof that the damage was foreseeably caused by the contractor. *Peters*, 804 N.E.2d at 743. And contractors will not be liable for the entire loss unless they were the sole party at fault. *Blake*, 674 N.E.2d at 173. Operating under generally applicable negligence law, contractors could consult their insurers and arrange coverage suitable for their line of business, as they already do today.

For these reasons, I would affirm denial of summary judgment as to the Non-Contract Tenants. Thus, while I concur in Part I, I respectfully dissent from Part II of the opinion of the Court.