[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12988

D.C. Docket No. 4:16-cv-10044-JEM

MAXUM INDEMNITY COMPANY,
a foreign corporation,

Plaintiff - Appellee,

versus

JAMES MASSARO,
MARIA DEL CARMEN SOLIS,
Personal Representative of the Estate of Pedro Jose Sanchez,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(June 19, 2020)

Before ROSENBAUM, JILL PRYOR and BRANCH, Circuit Judges.

PER CURIAM:

Pedro Jose Sanchez died after sustaining injuries while working for his employer, 3rd Generation Plumbing. The personal representative of Sanchez's estate sued James Massaro, 3rd Generation's president, secretary, and sole director, in state court for wrongful death. Maxum Indemnity Company, 3rd Generation's insurance company, then filed this federal declaratory judgment action seeking a determination whether, under the terms of 3rd Generation's commercial general liability policy, Maxum owed a duty to defend or indemnify Massaro in the wrongful death action. At the summary judgment stage, the district court determined that Maxum owed no duty to defend or indemnify Massaro.

On appeal, Maxum argues that it owed no duty to defend Massaro because the policy's employer's liability and workers' compensation exclusions barred coverage. Looking to the allegations in the wrongful death complaint, we disagree. The complaint did not establish that the estate's claims fell within either policy exclusion; therefore, Maxum had a duty to defend Massaro under the policy. We reverse the district court's judgment on the duty to defend. In addition, we vacate the district court's judgment that Maxum had no duty to indemnify Massaro under the policy—which was based on the court's conclusion that there was no duty to defend—and remand for the district court to look anew at the duty to indemnify.

I. FACTUAL BACKGROUND

Sanchez worked for 3rd Generation, a plumbing contractor. While at work, Sanchez was injured when performing mechanical work on a tractor. He died from these injuries. Sanchez's estate received workers' compensation benefits.

A. Sanchez's Estate Sued Massaro for Wrongful Death.

Sanchez's widow, Maria Del Carmen Solis, filed on behalf of the estate a lawsuit in Florida state court alleging a claim for wrongful death against Massaro.[1] In the operative complaint in that action, the estate alleged that Sanchez was injured while working as "an employee of 3rd Generation acting within the course and scope of his employment." Doc. 66-2 at ¶ 7.[2]

The complaint acknowledged that under Florida's Workers' Compensation Law, Massaro, as 3rd Generation's president, secretary, and sole director, was generally immune from liability. *See* Fla. Stat. § 440.11(1)(b). The estate alleged that Massaro enjoyed no immunity from the wrongful death claim, however, because Florida law carved out an exception to the general rule: an officer or director may be liable for injury to an employee when (1) "in the course and scope of his . . . duties," he "acts in a managerial or policymaking capacity and the

[1] The estate originally named both Massaro and 3rd Generation as defendants in the wrongful death action but later amended its complaint and did not include its claim against the company.

[2] Citations in the form "Doc. #" refer to entries on the district court's docket.

conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties" and (2) his conduct constitutes a "violation of a law, whether or not a violation was charged," for which the maximum penalty exceeds 60 days' imprisonment. *Id.*

The estate alleged that the exception applied, first because Sanchez's death was the result of conduct that Massaro, an officer and director of 3rd Generation, undertook in a managerial capacity, including providing inadequate supervision over the company's operations, altering machinery to bypass safety features, failing to perform adequate safety inspections of equipment, and offering inadequate training. Second, Massaro's conduct constituted a violation of law punishable by more than 60 days' imprisonment under the Occupational Safety and Health Act ("OSHA"). The estate relied on the following OSHA provision:

> Any *employer* who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or *by imprisonment for not more than six months*, or by both . . . .

29 U.S.C. § 666(e) (emphasis added).[3] Although § 666(e) punished only employers, the estate alleged that Massaro's actions, given his "role as President,

[3] The substantive regulation the estate alleged that Massaro violated was an OSHA regulation that required an employer "to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up[,] or

Secretary[,] and Sole Director of 3rd Generation, a closely held corporation, [were] so pervasive and total that he would be considered an employer" for OSHA purposes. Doc. 66-2 at ¶ 15.

In the wrongful death action, the estate further alleged that Massaro's conduct as a director and officer of 3rd Generation, including the failure to follow appropriate safety procedures, caused Sanchez's death. The estate thus sought to hold Massaro liable for damages arising out of Sanchez's wrongful death.

B. Massaro Sought Coverage for the Estate's Claim Under 3rd Generation's Insurance Policy.

After the estate filed the wrongful death action, Massaro sought coverage under 3rd Generation's commercial general liability insurance policy. Under the policy Maxum agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." Doc. 66-3 at 17. The policy covered damages because of a "bodily injury"[4] only if the injury was caused by an "occurrence," which the policy defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 30.

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release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative." 29 C.F.R. § 1910.147(c)(1).

[4] There is no dispute here that Sanchez suffered a bodily injury as that term is defined in the policy.

The policy listed exclusions that limited the scope of coverage. Two of these exclusions—the employer's liability exclusion and the workers' compensation exclusion—are relevant for our purposes. The employer's liability exclusion stated:

> This insurance does not apply to: . . .
>
> "Bodily injury" to . . . [a]n "employee" of the insured arising out of and in the course of:
>
> a. Employment by the insured; or
>
> b. Performing duties related to the conduct of the insured's business . . . .

Id. at 18.

The workers' compensation exclusion stated:

> This insurance does not apply to: . . .
>
> Any obligation of the insured under a workers' compensation, disability benefits[,] or unemployment compensation law or any similar law.

Id.

The policy spelled out duties of both Maxum and the insured. Maxum was required to "defend the insured against any 'suit' seeking" damages for "'bodily injury' . . . to which this insurance applies." *Id.* at 17. The insured was required to "[c]ooperate with [Maxum] in the investigation or settlement of the claim or defense against the 'suit.'" *Id.* at 27. The policy prohibited the insured, except at

his own cost, from "voluntarily mak[ing] a payment, assum[ing] any obligation, or incur[ring] any expense . . . without [Maxum's] consent." *Id.*

The policy addressed who qualified as an "insured." The entity listed on the policy's declarations page, 3rd Generation, was identified as a named insured. In addition, 3rd Generation's "executive officers and directors" qualified as insureds under the policy "but only with respect to their duties as [the company's] officers or directors." *Id.* at 25 (internal quotation marks omitted). The policy also included a "Separation Of Insureds" provision stating that "this insurance applies . . .[a]s if each Named Insured were the only Named Insured." *Id.* at 28.

Maxum agreed to defend Massaro in the wrongful death action. But it provided the defense "under a complete reservation of rights, including the right to seek reimbursement for attorney's fees and costs" incurred in defending Massaro. Doc. 66 at ¶ 25. Massaro accepted the defense.

C. Maxum Filed This Declaratory Judgment Action.

While providing Massaro a defense in the wrongful death action, Maxum filed this declaratory judgment action naming Massaro, the estate, and 3rd Generation as defendants. Maxum claimed that the policy's employer's liability and workers' compensation exclusions barred coverage.

For approximately a year, both the wrongful death case and this declaratory judgment action proceeded. Shortly before the summary judgment deadline in this

action, Massaro and the estate scheduled a mediation session without including Maxum. When Maxum learned about the planned mediation, it warned Massaro that settling the wrongful death action without its consent would constitute a breach of the policy precluding its liability for the settlement. Massaro nonetheless proceeded with the mediation and reached a settlement with the estate in which he agreed to a consent judgment settling the wrongful death action for $3.75 million. As a part of the settlement, Massaro assigned all his rights under the policy to the estate in exchange for the estate's agreement not to execute the judgment against him.

Maxum then sought to amend its complaint in this action to add new allegations about the settlement. It sought a declaration that it was not liable for the settlement payment because Massaro had breached the policy's cooperation and voluntary payment clauses. Maxum also sought a declaration that the settlement was a product of bad faith and collusion. In response, Massaro and the estate conceded that Maxum should be permitted to amend its complaint. They nonetheless argued that Maxum was liable for the settlement payment because it had placed its own interests above Massaro's interests. The district court permitted Maxum to amend its complaint but directed that the court would wait to resolve any issues related to the settlement until after it ruled on the pending summary judgment motions.

D. The District Court Granted Summary Judgment to Maxum, Concluding that Maxum Owed No Duty to Defend or Indemnify Massaro.

In its summary judgment motion, Maxum argued that the policy's employer's liability and workers' compensation exclusions barred coverage. Looking to the allegations in the complaint in the wrongful death action, the district court concluded that the policy's workers' compensation exclusion barred coverage, so Maxum owed no duty to defend and thus no duty to indemnify Massaro. The court granted summary judgment to Maxum. Massaro and the estate appealed.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of summary judgment and its interpretation of the insurance contract. *EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am.*, 845 F.3d 1099, 1105 (11th Cir. 2017).

III. LEGAL ANALYSIS

An insurance policy typically requires an insurer both to indemnify an insured against any damages award based on a claim covered by the policy and to defend the insured in any action against it to recover these damages. *See EmbroidMe.com*, 845 F.3d at 1107. Under Florida law,[5] it is well-settled that "an

[5] The parties agree that Florida law governs our interpretation of the insurance policy in this diversity action.

insurer's duty to defend an insured is separate and distinct from the question whether it has a duty to indemnify the latter against the imposition of damages." *Id.* An insurer's duty to defend "is determined solely by the allegations in the complaint" in the underlying action. *Farrer v. U.S. Fid. & Guar. Co.*, 809 So. 2d 85, 88 (Fla. Dist. Ct. App. 2002). In contrast, an insurer's duty to indemnify is determined by looking to the facts adduced at trial or during discovery in the underlying action. *Id.*

In deciding whether an insurer owes a duty to defend, a court looks to whether the underlying complaint on "its face alleges a state of facts that fails to bring the case within the coverage of the policy." *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. Dist. Ct. App. 1999) (internal quotation marks omitted). Likewise, an insurer owes no duty to defend when the underlying "complaint alleges facts that clearly bring the entire cause of action within a policy exclusion." *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810, 815 (Fla. Dist. Ct. App. 1985). Because the analysis of whether an insurer owes a duty to defend turns upon the allegations in the underlying complaint, an insurer may have a duty to defend even when the complaint's allegations turn out to be "factually incorrect," "meritless," or resting on an "unsound" legal theory. *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 443 (Fla. 2005); *State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 996 (Fla.

Dist. Ct. App. 2001). "Any doubts regarding the duty to defend must be resolved in favor of the insured." *Jones*, 908 So. 2d at 443.

When interpreting an insurance contract under Florida law, we construe the terms of the contract according to their "plain meaning, with any ambiguities construed against the insurer and in favor of coverage." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). We view the "policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Id.* (internal quotation marks omitted); *see Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003) (stating that courts should "avoid simply concentrating on certain limited provisions to the exclusion of the totality of others"). "In general, exclusionary clauses are strictly construed in a manner that affords the insured the broadest possible coverage." *Indian Harbor Ins. Co. v. Williams*, 998 So. 2d 677, 678 (Fla. Dist. Ct. App. 2009).

Maxum argues that it owed no duty to defend Massaro in the wrongful death action because the employer's liability and workers' compensation exclusions barred coverage. Because the pleadings in the wrongful death action do not show that either exclusion applied, we conclude that Maxum owed a duty to defend.

A. The Allegations in the Wrongful Death Complaint Did Not Clearly Bring the Estate's Claim Within the Employer's Liability Exclusion.

We begin by considering whether the employer's liability exclusion barred coverage. The exclusion stated:

> This insurance does not apply to: . . .
>
> "Bodily injury" to . . . [a]n "employee" of the insured arising out of and in the course of:
>
> (a) Employment by the insured; or
>
> (b) Performing duties related to the conduct of the insured's business . . . .

Doc. 66-3 at 18.

We must read this provision in light of the policy's separation of insureds provision. *See U.S. Fire Ins. Co.*, 979 So. 2d at 877 (explaining that courts must examine an insurance contract as a whole). The separation of insureds provision created a "separate insurable interest" for each person listed as an insured under the policy. *Premier Ins. Co. v. Adams*, 632 So. 2d 1054, 1057 (Fla. Dist. Ct. App. 1994). To give effect to a separation of insureds provision, we substitute the name of the person seeking coverage for the term "insured" in the exclusion provision. *See Shelby Mut. Ins. Co. v. Schuitema*, 183 So. 2d 571, 574 (Fla. Dist. Ct. App. 1966). Under a separation of insureds provision, there may be coverage for one insured even if an exclusion would bar coverage for a claim against another insured. *See Taylor v. Admiral Ins. Co.*, 187 So. 3d 258, 262 (Fla. Dist. Ct. App. 2016) (holding that although policy's employer's liability exclusion barred coverage of individual's tort claim against her employer, the exclusion did not bar

coverage of her tort claims against additional insureds because the policy included a separation of insureds provision).

Applying the substitution approach, we read the employer's liability exclusion as follows:

> This insurance does not apply to: . . .
>
> "Bodily Injury" to . . . [a]n "employee" of [Massaro] arising out of and in the course of:
>
> (a) Employment by [Massaro]; or
>
> (b) Performing duties related to the conduct of [Massaro's] business . . . .

Doc. 66-3 at 18. Given this policy language, the question of whether the exclusion barred coverage turns on whether the underlying complaint alleged that Sanchez was Massaro's employee or 3rd Generation's employee. In the wrongful death complaint, the estate alleged that Sanchez was injured while working as an employee of 3rd Generation, not Massaro. *See* Doc. 66-2 at ¶ 7 ("At all times material hereto, the Decedent Sanchez was an employee of 3rd Generation acting within the course and scope of his employment . . . ."). The estate also alleged that Massaro's wrongful conduct occurred while he was acting as an officer or director of 3rd Generation, not as Sanchez's direct employer. *See id.* at ¶ 8 ("At all times material hereto, the Defendant Massaro, was . . . the President, Secretary[,] and sole Director of 3rd Generation, acting with the course and scope of his

employment . . . ."). Because the complaint alleged that Sanchez was working for 3rd Generation, not Massaro, when he was injured, we cannot say that the complaint alleged facts that clearly bring the claim within the employer's liability exclusion, which applied only if Massaro employed Sanchez.

Maxum reads the wrongful death complaint differently, arguing that Massaro was sued in a different capacity, as Sanchez's actual employer. In making this argument, Maxum focuses on the estate's allegation that Massaro's "role as President, Secretary[,] and Sole Director of 3rd Generation . . . was so pervasive and total that he would be considered an employer" for purposes of OSHA. *Id.* at ¶ 15. We are unpersuaded. Viewed in context, the estate was not alleging that Sanchez actually worked for Massaro; rather, it was alleging that Sanchez worked for 3rd Generation but that Massaro's control of 3rd Generation was so pervasive that he and the company could be considered one and the same, at least for the purposes of liability under OSHA.[6] Given this context and mindful of the fact that we must resolve any doubt regarding the existence of a duty to defend in favor of

[6] At least one circuit has accepted that an officer or director of a corporation may be treated as an employer for OSHA purposes. *See, e.g.*, *United States v. Doig*, 950 F.2d 411, 414 (7th Cir. 1991) ("A corporate officer or director acting as a corporation's agent could be sanctioned under § 666(e) as a principal, because, arguably an officer or director would be an employer. Of course, the corporation would also be responsible for its officer's actions."). But another circuit has questioned this approach, suggesting that liability is limited to a person's actual employer, because the statutory language in § 666(e) refers only to the "employer," not its "agents." *United States v. Shear*, 962 F.2d 488, 492 & n.4 (5th Cir. 1992). We need not decide whether Massaro actually could be held liable under § 666(e) to resolve this appeal and take no position on this issue.

the insured, we read the wrongful death complaint as alleging that Sanchez worked for 3rd Generation.[7]

Maxum argues that the complaint in the wrongful death action must have alleged that Massaro was Sanchez's employer because the estate "actually had to allege that Massaro was Sanchez's employer" to avoid having the wrongful death claim dismissed based on workers' compensation immunity. Appellee's Br. at 14. This argument assumes that, in deciding whether there was a duty to defend, a court should read into the underlying complaint the allegations necessary to state a claim for relief and survive a motion to dismiss based on an affirmative defense. But Florida courts have recognized that an insurer may have a duty to defend against a complaint that rests on a legally "unsound" theory, meaning a court deciding whether there is a duty to defend need not rewrite the underlying state court complaint to make sure that it rests on solid legal grounds. *See Higgins*, 788 So. 2d at 996. Given that a duty to defend can exist even when the underlying complaint rests on an unsound legal theory, we reject Maxum's argument that we must read into the underlying complaint an allegation that Sanchez worked for

[7] Maxum also argues that principles of judicial estoppel dictate that we must treat Massaro as the employer. But this argument rests on the flawed premise that the estate's complaint alleged that Massaro, not 3rd Generation, employed Sanchez.

Massaro, as opposed to 3rd Generation.[8] Because the allegations in the wrongful death action did not clearly bring the estate's wrongful death claim within the employer's liability exclusion, we cannot say that this exclusion bars coverage.

B. The Allegations in the Wrongful Death Complaint Did Not Clearly Bring the Estate's Claim Within the Workers' Compensation Exclusion.

We now turn to whether the allegations in the underlying complaint clearly brought the estate's wrongful death claim within the policy's workers' compensation exclusion. Applying the policy's separation of insureds provision, we read the exclusion as stating:

> This insurance does not apply to: . . .
>
> Any obligation of [Massaro] under a workers' compensation, disability benefits[,] or unemployment compensation law or any similar law.

Doc. 66-3 at 18. Applying the policy language and looking to the allegations in the wrongful death complaint, we conclude that any "obligation" Massaro owed to the estate from the lawsuit would not arise under workers' compensation law.[9]

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[8] Maxum raises an alternative argument that if Massaro was sued as an employee of 3rd Generation, there is no coverage under the policy because the policy treats an employee, who is not an executive officer, as an additional insured under the policy except for claims of bodily injury brought by a co-employee. But Maxum devoted only two sentences of a footnote in its appellate brief to this argument. Because Maxum made only passing references to this argument, we deem it abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

[9] Maxum urges us to ignore the separation of insureds provision and read the workers' compensation exclusion as barring coverage if the obligation of any insured—whether Massaro

Because this exclusion barred coverage for any obligation Massaro would owe under a workers' compensation system, we briefly review how Florida's workers' compensation scheme functions. Florida's Workers' Compensation Law, Fla. Stat. §§ 440.01-440.60, lays out a comprehensive scheme intended "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." Fla. Stat. § 440.015. For those employees who fall within the statute's purview, "workers' compensation is the exclusive remedy for accidental injury or death arising out of work performed in the course and the

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or 3rd Generation—arose under a workers' compensation scheme. In making this argument, Maxum urges us to rewrite the policy to state that the exclusion applies if any obligation of *any* insured arose under a workers' compensation scheme, contrary to the policy's separation of insureds provision. To support this argument, Maxum relies on a decision from a district court in our circuit, which we summarily affirmed in an unpublished decision. *See Oppenheim v. Reliance Ins. Co.*, 804 F. Supp. 305, 308 (M.D. Fla. 1991), *aff'd*, 968 F.2d 23 (11th Cir. 1992) (unpublished). In *Oppenheim*, after an employee of a roofing company was injured at work, he sued his supervisor, who was also the company's sole officer, director, president, and shareholder. *Id.* at 306. The supervisor stipulated to a judgment in favor of the injured employee. *Id.* Although the supervisor qualified as an insured under the roofing company's insurance policy, the insurer denied coverage. *See id.* When the employee later sued the insurer for improper denial of insurance coverage, the district court concluded that there was no coverage because the roofing company's policy contained a workers' compensation exclusion. *Id.* at 308. Because the exclusion barred coverage for any potential claim that the injured employee had against the roofing the company, the court explained, there was no coverage for any claim that the employee brought against any other insured under the policy. *Id.* The district court reached this conclusion even though the policy included a separation of insureds provision. *See id.*

We are not persuaded by the district court's reasoning in *Oppenheim*. The court's reasoning is inconsistent with later decisions from Florida courts recognizing that when a policy contains a separation of insureds provision, the fact that an exclusion would bar coverage for one named insured does not mean that the exclusion also bars coverage for other insureds. *See Taylor*, 187 So. 3d at 262; *Adams*, 632 So. 2d at 1057.

scope of employment." *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000) (internal quotation marks omitted). Under the workers' compensation system, employers and insurance carriers "assume responsibility for limited amounts of medical and wage loss benefits resulting from workplace injuries without regard to fault in exchange for limitations on their liability." *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 90 (Fla. 2005); *see* Fla. Stat. §§ 440.10(1)(a), 440.11(1).

Florida's Workers' Compensation Law creates immunity from suit not only for an employer but also for its officers, directors, and managers. *See* Fla. Stat. § 440.11(1)(b) ("The same immunity provisions enjoyed by an employer shall also apply to any . . . corporate officer or director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity . . . ."). But this immunity is not absolute. An officer, director, or manager is entitled to immunity only if the conduct that caused the alleged injury "arose within the course and scope of said managerial or policymaking duties and was not a violation of law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in s. 775.082." *Id.* As a Florida appellate court explained, under the "criminal acts" exception, "a managerial or policymaking employee loses immunity for conduct which causes injury to an employee *and* violates a law that

has a maximum penalty exceeding 60 days imprisonment." *Byers v. Ritz*, 890 So. 2d 343, 347 (Fla. Dist. Ct. App. 2004) (en banc).

In this appeal, Maxum argued that it owed no duty to defend because the workers' compensation exclusion barred coverage. The question of whether the exclusion barred coverage here turns upon whether tort liability of an individual who is not entitled to workers' compensation immunity under the criminal acts exception qualifies as an "obligation . . . under a workers' compensation" law. Doc. 66-3 at 18.

An "'obligation' is that which one is legally bound to do." *Fulghum v. State*, 109 So. 644, 646 (Fla. 1926). The affirmative statutory duty that Florida imposes upon an employer to maintain workers' compensation insurance is undoubtedly an "obligation." *See* Fla. Stat. § 440.10(1)(a) ("Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees . . . of the compensation payable under ss. 440.13 [medical services and supplies], 440.15 [compensation for disability], and 440.16 [compensation for death]."). Because nothing in Florida's Workers' Compensation Law required Massaro, who, as explained above, was not alleged to have employed Sanchez, to

maintain workers' compensation insurance, we cannot say that the Florida's Workers' Compensation Law imposed any obligation on him.[10]

This is not to say that Massaro owed no obligation to the estate. In the underlying action, the estate alleged that Massaro was liable for causing Sanchez's wrongful death, and we accept that any liability imposed against Massaro in connection with the lawsuit would qualify as an "obligation." But we cannot say that any obligation Massaro owed the estate would arise under Florida Workers' Compensation Law. The estate's complaint alleged that Massaro was liable "under the Florida Wrongful Death Act," not Florida's Workers' Compensation Law. *See* Doc. 66-2 at 6. True, Florida's Workers' Compensation Law was relevant to determining whether Massaro was entitled to immunity from the estate's claim

[10] Maxum also appears to argue that Massaro was required to secure workers' compensation insurance because he qualified as Sanchez's "statutory employer." Under Florida law, a general contractor must maintain workers' compensation insurance for any employees of its subcontractors and is therefore referred to as a "statutory employer." The relevant statute states:

> In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.

Fla. Stat.§ 440.10(1)(b); *see also Miami Herald Publ'g v. Hatch*, 617 So. 2d 380, 383 (Fla. Dist. Ct. App. 1993) ("[T]o be regarded as a 'contractor' under the statutory employer provisions of section 440.10(1), the company's primary obligation in performing a job or providing a service must arise out of a contract." (internal quotation marks omitted)). Because there is no allegation in this case that Massaro was a general contractor, with 3rd Generation working as its subcontractor, Massaro was not Sanchez's statutory employer under Florida law.

because the statute provided that a company's officer or director, such as Massaro, generally enjoyed immunity from suit for actions that he took in a managerial or policymaking role unless the criminal acts exception applied. *See* Fla. Stat. § 440.11(1)(b). But because the statute established that Massaro was not entitled to immunity from the estate's claim, we cannot say the obligation Massaro owed the estate arose under Florida's Workers' Compensation Law. Because the policy limited the scope of the workers' compensation exclusion to "[a]ny obligation . . . under a workers' compensation" law, we conclude that the exclusion did not bar coverage here. *See Swire Pac. Holdings*, 845 So. 2d at 165 ("[T]he guiding principle that this Court has consistently applied [is] that insurance contracts must be construed in accordance with the plain language of the policy.").

Our conclusion that a tort judgment against an officer, director, or supervisor who is not entitled to workers' compensation immunity because of a limitation or exception to the immunity is not an "obligation . . . under a workers' compensation" law is consistent with how the Florida Supreme Court has interpreted the workers' compensation exclusion. *See Morales v. Zenith Ins. Co.*, 152 So. 3d 557 (Fla. 2014). In *Morales*, after an employee died of injuries he sustained at work, his estate received workers' compensation benefits and sued the employer for wrongful death. *Id.* at 559-60. In the wrongful death action, the estate obtained a default judgment against the employer. *Id.* at 560. The

employer's insurer refused to pay the tort judgment, claiming that the workers' compensation exclusion barred coverage because the judgment was an "obligation imposed by a workers[']compensation law." *Id.* at 560-61 (alteration adopted).

In later litigation between the estate and the insurer, the Florida Supreme Court determined that the exclusion barred coverage for the estate's claim. *Id.* The court explained that the estate could not maintain a tort action against the employer because the estate's exclusive remedy was under Florida's Workers' Compensation Law. *Id.* at 561-62. Because the employer's liability was set by the workers' compensation scheme, the court concluded that the default judgment against the employer was an obligation under a workers' compensation law. *Id.* at 562-63.

The Florida Supreme Court cautioned that a policy's workers' compensation exclusion would not necessarily bar every claim related to Florida's Workers' Compensation Law. *See id.* at 562. The court discussed that the statute created exceptions to workers' compensation immunity, such as when an employee alleged that he was injured due to a co-employee's grossly negligent acts. *Id.*; *see* Fla. Stat. § 440.11(1)(b) (setting forth exception to workers' compensation immunity when an employee acts "with respect to a fellow employee. . . with gross negligence" and his actions proximately cause a co-employee's injury or death). When an employee is sued relying on the co-employee exception, the court

explained, the allegations in the complaint would remove the employee's claim "from the exclusivity of Florida's Workers' Compensation Law," and any judgment entered in such a suit would not be an "obligation imposed by workers' compensation law." *Morales*, 152 So. 3d at 562.

Morales supports our conclusion that given the allegations in the wrongful death complaint—that Sanchez's death was caused by actions that Massaro took in a managerial or policymaking role and that Massaro's conduct constituted a criminal act punishable by more than 60 days' imprisonment—any judgment in the action against Massaro would not be an obligation imposed under Florida's Workers' Compensation Law. *Morales* discussed a different exception to workers' compensation exclusivity, the exception for a fellow employee's gross negligence, which is not implicated here. But its reasoning applies with equal force to other statutory exceptions to workers' compensation exclusivity, including the criminal acts exception. Given the allegations in the wrongful death action, we cannot say that the workers' compensation exclusion barred coverage.[11]

[11] Maxum also claims that it owed no duty to defend because (1) the allegations in the complaint from the wrongful death action failed to establish that Sanchez's death was an "occurrence," which the policy defines as an "accident," and (2) the policy's expected or intended injury exclusion barred coverage. Because Maxum devotes only a single sentence in a footnote in its appellate brief to each of these arguments, we conclude that it has abandoned them. *See Sapuppo*, 739 F.3d at 681.

IV. CONCLUSION

Because the complaint in the wrongful death action did not allege facts that clearly brought the case within either the employer's liability or workers' compensation exclusion, we conclude that Maxum owed a duty to defend its insured, Massaro. We therefore reverse the district court's judgment that Maxum owed no duty to defend.

The district court also determined that Maxum owed no duty to indemnify Massaro, based on the principle that without a duty to defend, there can be no duty to indemnify. At oral argument, the parties agreed that if we concluded there was no duty to defend, we should vacate the district court's judgment as to the duty to indemnify so that the parties could continue to litigate before the district court issues related to the duty to indemnify. These issues include whether Massaro breached the insurance contract by settling with the estate. Accordingly, we vacate the district court's judgment that Maxum owed no duty to indemnify and remand the case to the district court for further proceedings consistent with this decision.

REVERSED IN PART, VACATED IN PART, AND REMANDED.