award.

Appeal no. 2D11-6432 affirmed in part, reversed in part, and remanded for further proceedings; appeal no. 2D11-6479 affirmed. (CRENSHAW and BLACK, JJ., Concur.)

---

[1]The parties do not dispute the equitable distribution of their personal belongings, autos, or cash accounts.

* * *

Insurance—Automobile liability—Duty to defend—Action by one insurer against another insurer alleging that defendant breached its duty to defend plaintiff's insureds in a personal injury action, and seeking indemnification for attorney's fees and costs expended in defending its insureds—Anti-subrogation rule—Trial court did not err in granting summary judgment in favor of plaintiff insurer on claim that defendant breached its duty to defend plaintiff's insureds in personal injury action against plaintiff's insureds and defendant's insured, who contracted with plaintiff's insureds for provision of trucking services and who, as part of the subcontract, agreed to maintain policy of automobile liability insurance which would be primary and further agreed to defend, indemnify, and hold plaintiff's insureds harmless for claims, damages, and losses arising out of negligent acts or omissions—Anti-subrogation rule did not apply where there was a specific and contractual obligation of indemnification in favor of plaintiff's insureds that shifted exposure from plaintiff, leaving defendant with the primary obligation to defend actions arising out of its insured's negligence

PROGRESSIVE EXPRESS INSURANCE COMPANY, Appellant, v. FLORIDA DEPARTMENT OF FINANCIAL SERVICES, AS RECEIVER FOR AEQUICAP INSURANCE COMPANY, PATCO TRANSPORT, INC. AND TAMPA BAY TRUCKING, INC., Appellees. 4th District. Case No. 4D10-22. February 6, 2013. Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch IV, Judge; L.T. Case No. 08-037120. Counsel: Christopher J. Nicholas and Julius F. Parker III of Butler Pappas Weihmuller Katz Craig LLP, Tallahassee, for appellant. Aaron Behar, Jaclyn Bentley and Jonah D. Kaplan of Aaron Behar, P.A., Coral Springs, for appellees.

(PER CURIAM.) The issue presented is whether the trial court erred in granting summary judgment in favor of appellees on their claim that appellant breached its duty to defend Tampa Bay Trucking, Inc. ("TBT") and Patco Transport, Inc. ("Patco") in an earlier personal injury action, entitling appellees to indemnification for costs expended in defending that action. We find that the trial court correctly determined that appellees were entitled to indemnification for their defense costs, and therefore, we affirm the granting of summary judgment.

Arturo Matos Ortiz entered into a subcontract agreement with TBT for the provision of trucking services to third parties. The agreement required Ortiz to maintain a policy of automobile insurance at Ortiz's expense. Under the agreement, such insurance would be primary, and any applicable insurance carried by TBT would be excess over Ortiz's insurance. The agreement further included an indemnity provision, which provided:

> [Ortiz] shall defend, indemnify and hold harmless [TBT], Owner, Architect, and the consultants, agents, and employees of each of them from and against any and all claims, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from the performance of the work, provided that such claim, damage, loss or expenses is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of [Ortiz], or of anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Appellant issued a policy of insurance to Ortiz, agreeing to insure Ortiz's tractor and a non-owned attached trailer as long as the trailer was attached to the tractor. TBT was an additional insured under the policy.

Aequicap[1] insured Patco and TBT. An endorsement to the Aequicap policy provided that an "insured" under the policy was "[y]ou for any covered 'auto' only when the covered 'auto' is driven by an approved driver described in paragraph 'b' of this section." Paragraph "B" read:

> Any driver authorized as a commercial truck driver while Operating covered "auto" with your knowledge and consent under your operating authority. No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy. Coverage on any such driver newly placed in service will become effective as of the date and time we advise you he/she is acceptable and that they are covered by the policy and not before.

Neither Patco nor TBT submitted Ortiz to Aequicap for pre-approval. Both appellant's policy and Aequicap's policy contained "Other Insurance" clauses.[2]

In 2006, Ortiz was involved in an auto accident with Raymond Heydenburg. After the accident but before suit was filed, appellant informed counsel for Heydenburg that it had identified TBT and Patco as possible omnibus insureds under its policy. Heydenburg rejected appellant's offer to settle for the policy limits in exchange for a release of Ortiz, TBT, and Patco. Aequicap informed its insured, Patco, that Ortiz had not been pre-submitted as a driver and that it was reserving all rights as to whether it was obligated to provide coverage for the accident.

Heydenburg and his spouse then filed suit against Ortiz, TBT, and Patco, alleging that, while in the course and scope of his relationship with TBT and Patco, Ortiz negligently caused injuries to Heydenburg while operating his tractor and an attached trailer owned by TBT. In January 2007, counsel for TBT and Patco, hired by Aequicap, wrote to appellant for the purpose of obtaining a conflict of interest waiver. The attorney requested that appellant provide separate counsel for Ortiz, based on his "understanding that [TBT] is an additional insured under the policy issued by Progressive to Arturo Ortiz and that they intend to maintain a demand for defense and indemnity under that policy." Appellant first provided a defense to TBT and Patco in November 2007.

The Heydenburg litigation was settled in 2009. Before a settlement was reached, appellees filed suit against appellant, asserting a right to indemnification for attorney's fees and costs incurred in the defense of TBT and Patco from January through November 2007.

Both parties moved for summary judgment. In granting appellees' motion for summary judgment, the trial court found that appellant should have provided a defense to TBT and Patco before November 1, 2007, and that appellant was required to indemnify appellees for attorney's fees and costs incurred in their defense up to that time.

On appeal, appellant argues that it was entitled to judgment as a matter of law on appellees' indemnification claim under the rule disallowing reimbursement for defense costs between insurers of a mutual insured (the "anti-subrogation rule"). Because we find that this case is controlled by the indemnification agreement between the insured parties, we disagree with appellant's argument and affirm.

In Florida, as a general matter, "[t]he duty of each insurer to defend its insured is personal and cannot inure to the benefit of another

insurer," and for this reason, "[c]ontribution is not allowed between insurers for expenses incurred in defense of a mutual insured." *Argonaut Ins. Co. v. Md. Cas. Co.*, 372 So. 2d 960, 963 (Fla. 3d DCA 1979); *see also Cont. Cas. Co. v. United Pac. Ins. Co.*, 637 So. 2d 270, 272 (Fla. 5th DCA 1994) ("[T]raditional principles of subrogation will not support a reimbursement of defense costs in favor of someone who has the independent contractual duty to pay all such expenses.").

However, "[i]ndemnity has been defined as a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other." *Stuart v. Hertz Corp.*, 351 So. 2d 703, 705 (Fla. 1977). In the present context, we are persuaded by the case of *Continental Casualty Co. v. City of South Daytona*, 807 So. 2d 91 (Fla. 5th DCA 2002), which illustrates the effect that an indemnification agreement between insured parties has on the anti-subrogation rule. In *Continental*, a little league contracted to use the city's facilities and agreed to indemnify the city from any and all claims, and to secure an insurance policy naming the city as a co-insured. After a coach was injured and sued both insured parties, the city's insurance carrier was left defending the claim. The city's insurance carrier sought reimbursement of its defense costs from the little league's insurance carrier, which were awarded by the trial court.

The Fifth District rejected the little league's insurance carrier's reliance on *Argonaut* and its progeny, reasoning:

> *Argonaut*, which was followed in *Continental* [*v. United Pacific Insurance Co.*], held that an insurer is not entitled to recover from another insurer the costs of defending a mutual insured. These two cases, however, are inapplicable because they addressed the issue of equitable subrogation among insurers where there was no contract of indemnification between the insured parties. In the instant case, there is a specific and contractual obligation of indemnification in favor of the City that was provided by the Little League, who in turn was required to and did insure that obligation by securing the Continental policy.
>
> We agree with the City that the agreement with the Little League shifted exposure from the City's own liability carrier to the Little League's liability carrier, and that the primary obligation to defend the City for an action arising out of the Little League's use of the City's facilities was with Continental. Continental's failure to defend entitles the City, as the indemnitee or the additional insured, to a recovery of reasonable attorney's fees incurred in the defense of the claim.

Id. at 92-93.

Similarly, in the present case, "there is a specific and contractual obligation of indemnification" in favor of TBT that was provided by Ortiz. The subcontract agreement "shifted exposure" from Aequicap to appellant, leaving appellant with the primary obligation to defend TBT and Patco[3] for an action arising out of Ortiz's negligence. Appellant's failure to defend TBT and Patco from January through November of 2007 accordingly entitled appellees to a recovery of reasonable attorney's fees and costs incurred in defending the Heydenburg claim during that period.

Appellant argues that, despite the indemnification agreement, appellees' claim for indemnification must fail because Ortiz was an insured under the Aequicap policy. *See Allstate Ins. Co. v. Fowler*, 480 So. 2d 1287, 1290 (Fla. 1985) (holding, in part, that for a court to disregard an "other insurance" clause pursuant to a right of indemnity, "the insurance policy issued to the vicariously liable party must not cover the active tortfeasor as an additional insured"). We agree with appellees that Ortiz was not insured under the Aequicap policy. Here, Ortiz was never submitted to Aequicap for pre-approval as a driver, as required by the endorsement to Aequicap's policy. Appellant argues that Aequicap was not entitled to maintain that Ortiz was not insured while maintaining that TBT and Patco were insured, because Aequicap's policy provided that TBT and Patco would be insured "for any covered 'auto' only when the covered 'auto' is driven by an approved driver." We disagree that this provision required Aequicap to categorically deny coverage for all of Heydenburg's injuries. Paragraph "B" of the endorsement specifically provided, "No coverage will apply to any driver newly placed in service after the policy begins until you report that driver to us and we advise you in writing that he/she is acceptable to us and that he/she is covered under the policy." Therefore, we find that Aequicap was entitled to deny coverage for Ortiz, while maintaining that coverage existed for its named insureds, TBT and Patco.

We have examined the other arguments raised by appellant, and find no error.

Affirmed. (TAYLOR, CIKLIN and LEVINE, JJ., concur.)

---

[1]The Florida Department of Financial Services was appointed as receiver for Aequicap during the pendency of this appeal.

[2]With respect to Ortiz's tractor, the parties agree that appellant's policy provided primary coverage. However, the parties dispute which policy provided primary coverage to the trailer under the "Other Insurance" clauses.

[3]Appellant argues that the lack of an indemnification agreement between Ortiz and Patco is dispositive of Patco's right to recover its defense costs from appellant. However, "[i]n order to be preserved for appellate review, the specific argument made on appeal must have been raised when the party objected in the trial court." *Eagleman v. Korzeniowski*, 924 So. 2d 855, 860 (Fla. 4th DCA 2006). In the trial court, appellant did not make this argument as a basis to be relieved of having to pay Patco's defense costs.

* * *

Criminal law—Organized scheme to defraud—Conviction of sheriff's deputy who manipulated Sheriff's overtime assignment computer system to secure more overtime assignments than allowable by policy is overturned because defendant's actions did not constitute a criminal violation—While defendant may have deprived the state of opportunities for other deputies to work for overtime pay, these lost opportunities do not constitute "property" obtained by defendant within the meaning of the statute

KATHY DENT, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 4D10-1560. February 6, 2013. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow Brown, Judge; L.T. Case No. 2008CF007611CXX. Counsel: Michael Maher, West Palm Beach, for appellant. Pamela Jo Bondi, Attorney General, Tallahassee, and Mark J. Hamel, Assistant Attorney General, West Palm Beach, for appellee.

(WARNER, J.) Appellant, Kathy Dent, appeals her conviction for engaging in an organized scheme to defraud, in violation of section 817.034(4), Florida Statutes. The state charged and proved that Dent and others manipulated the Sheriff's overtime assignment computer system to secure more hospital guard overtime assignments than the Sheriff's policy would allow. As a result, Dent worked those assignments, earning overtime pay, which shut out other Sheriff's deputies from the opportunity to earn overtime pay. We conclude that although what Dent did may have been contrary to Sheriff's policies and procedures, it is not a criminal violation. We thus reverse.

The Palm Beach County Sheriff's Office provides deputies for hospital duty to guard an inmate or arrested person who is admitted to a hospital. Initially, a deputy on the current shift is assigned to the hospital when the prisoner is admitted, and that deputy serves until the end of his or her shift, at which time it becomes an overtime assignment. To fill these assignments, the Sheriff's department utilizes a computer program which allows deputies to sign up to work overtime shifts. The lieutenant on the shift when the prisoner is admitted to the hospital creates a computer record of the prisoner's admittance. It generates a weekly list of overtime shifts for the week for that prisoner, although if the prisoner is released from the hospital those overtime shifts would not be used. The positions for new overtime shifts become available for signup at midnight on Sunday night for the