IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

JOHNSON-GRAHAM-MALONE, INC.,
a Florida corporation,

Plaintiff,

CASE NO.: 16-2009-CA-005750-XXXX-MA
Division: CV-F

v.

AMERISURE INSURANCE COMPANY, a Michigan
Insurance company,

Defendant.
_____/

DEFENDANT AMERISURE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

The Defendant, AMERISURE INSURANCE COMPANY (herein "Amerisure"), by and through undersigned counsel, and pursuant to Florida Rule of Civil Procedure 1.510, hereby moves this Honorable Court for the entry of an order granting summary judgment in its favor for the reasons set forth herein.

I. INTRODUCTION

Johnson-Graham-Malone, Inc. (herein "Johnson") seeks a declaration that it is entitled to coverage under certain Commercial General Liability insurance policies (herein "CGL policies") issued by Amerisure Insurance Company (herein "Amerisure"), in connection with an underlying lawsuit styled *Property Reserve, Inc. v. Johnson-Graham-Malone, Inc., et al.*, Case No.: 16-2007-CA-003589-XXXX-MA (herein "*PRI* Action" or "underlying lawsuit"). In the operative Second Amended Complaint (herein "Complaint"), the underlying plaintiff, Property Reserve, Inc. (herein "PRI"), has alleged that construction defects present at a residential

apartment complex, The 54 Magnolia Apartments (herein "54 Magnolia"), were "'latent' in nature, . . . [and] *did not begin to be discovered until approximately October 2005, when they began to manifest themselves outwardly.*" (emphasis added) [See Joint Compendium of Documents, Exhibit I]. The CGL coverage provided by Amerisure, however, expired on January 1, 2005, and thus, this alleged loss falls outside the ambit of Amerisure's coverage.

Florida law, whose application is undisputed, instructs that when determining the timing of a loss in a continuing injury context, the date the damage manifests itself or is initially discovered governs for purposes of identifying which CGL policy must respond. Indeed, this "manifestation" theory places the "occurrence", under a CGL policy, at that point in time when "property damage" first manifests itself or is discovered for purposes of determining which CGL policy is "triggered." *See Essex Builders Group Inc. v. Amerisure Ins. Co.*, 485 F.Supp.2d 1302, 1311 (M.D. Fla. 2006); *Travelers Insurance Company v. C.J. Gayfer's and Company*, 366 So.2d 1199, 1202 (Fla. 1st DCA 1979). Here, it is undisputed that the CGL policies expired on January 1, 2005 – ten (10) months before the alleged defects at 54 Magnolia first outwardly manifested themselves. The CGL policies, therefore, are clearly not "triggered" for purposes of PRI's alleged loss, and this purely legal issue is ripe for adjudication in Amerisure's favor.

The parties have met and conferred regarding: the remaining legal issue to be resolved in this proceeding; the most expeditious and appropriate way to resolve this legal dispute; and in an effort to create a joint record for purposes of deciding the cross-motions for summary judgment. Both parties agree that a disposition of the "trigger" issue is a legal predicate finding that will resolve the actual controversy between the parties and will likely prove case-dispositive.

II. UNDISPUTED FACTS

A. The Underlying Lawsuit

On or about April 26, 2007, PRI filed the initial complaint of the underlying lawsuit. [See Joint Compendium of Documents, Exhibit G]. In its operative Second Amended Complaint, PRI alleges that it "purchased 54 Magnolia [a residential apartment complex located in Duval County, Florida] in approximately February 2000 from the developer, Estates at Deerwood Park, Ltd." [See Joint Compendium of Documents, Exhibit I, ¶ 14]. PRI also alleges that the "construction of 54 Magnolia was characterized by numerous defects which constituted deviations from or violations of the applicable State Building Code . . . ." [See Joint Compendium of Documents, Exhibit I, ¶ 15]. The Complaint further alleges that at the time "PRI purchased 54 Magnolia, the construction defects . . . were not apparent or obvious from observation of the premises, but were hidden from PRI's knowledge and view by finishes, trim carpentry, or other building surfaces. Accordingly, the subject construction defects were 'latent' in nature[,]" and "[d]ue to their latent nature, the construction defects did not begin to be discovered until approximately October 2005, when they began to manifest themselves outwardly." [See Joint Compendium of Documents, Exhibit I, ¶ 16-17]

The underlying lawsuit was globally mediated and settled for $400,000, with the amount to be shared amongst Johnson and four other co-defendants. [See Joint Compendium of Documents, Exhibit J, ¶ 24]. Johnson contributed $50,000 to the settlement. [See Joint Compendium of Documents, Exhibit J, ¶ 24].

B. The CGL Policies

Amerisure issued three (3) CGL policies to Johnson, which include: (1) CPP1384487000000, effective 1/1/2002 to 1/1/2003 [See Joint Compendium of Documents, Exhibit A]; (2) CPP1384487010003, effective 1/1/2003 to 1/1/2004 [See Joint Compendium of Documents, Exhibit B] and; (3) GL 2017328000000, effective 1/1/2004 to 1/1/2005.[1] [See Joint Compendium of Documents, Exhibit C]. Certified copies of the CGL policies are contained in the parties' joint record on summary judgment. [See generally Joint Compendium of Documents]. According to the policies, Amerisure "will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies. [Amerisure] will have the right and duty to defend the insured against any 'suit' seeking those damages." [See Joint Compendium of Documents, Exhibits A-C]. The policies then state that the "insurance applies to . . . 'property damage' only if: [t]he . . . 'property damage' is caused by an 'occurrence'" and "occurs during the policy period." [See Joint Compendium of Documents, Exhibits A-C]. An "occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [See Joint Compendium of Documents, Exhibits A-C].

[1] Amerisure Mutual Insurance Company (herein "AMIC") issued primary policy no. GL 2022789000000 to Johnson, effective 1/1/2004 to 1/1/2005. On information and belief, this policy is inapplicable to the present claim. Even if this policy is deemed to apply, for the reasons set forth in this memorandum – namely, the damage in the underlying lawsuit manifested after the policy had lapsed – the present claim does not fall within the policy's coverage period. AMIC also issued three (3) Umbrella Liability policies, which include: (1) CU-1384488, effective 1/1/2002-1/1/2003 [See Joint Compendium of Documents, Exhibit D]; (2) CU-1384488, effective 1/1/2003-1/1/2004 [See Joint Compendium of Documents, Exhibit E]; and (3) CU-1384488, effective 1/1/2004 to 1/1/2005 [See Joint Compendium of Documents, Exhibit F] (collectively "umbrella policies"). Insofar as the umbrella policies were in effect during the identical policy periods and contain the same material terms and conditions, and insofar as the amounts at issue do not reach the umbrella policies' attachment points, the discussion herein focuses on the CGL policies.

Johnson tendered the underlying lawsuit to Amerisure seeking a defense on or about September 8, 2008. On September 10, 2008, Amerisure denied Johnson's claim on the basis that the alleged defects first manifested themselves outside of the Amerisure policy periods, and thus such policies are not triggered in connection with PRI's allegations. At Johnson's behest, Amerisure reconsidered its denial, but, based on the Complaint's plain language and the state of Florida law, remained steadfast in its coverage position.

C. Johnson's Complaint

On or about April 10, 2010, Johnson filed suit against Amerisure, and others, seeking to recover its defense costs incurred in the underlying lawsuit, and its settlement contribution of $50,000. [See Joint Compendium of Documents, Exhibit J]. All defendants, save Amerisure, have been dismissed from this action.

III. ARGUMENT

A. The Summary Judgment Standard

Entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c); *Kitchen v. Ebonite Rec. Ctrs., Inc.*, 856 So. 2d 1083, 1084-85 (Fla. 5th DCA 2003). A party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the non-moving party. *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 170 (Fla. 4th DCA 2002). Here, there are no factual disputes that preclude an entry of summary judgment on the purely legal question of whether Amerisure's

CGL policies, in connection with the underlying lawsuit, have been "triggered." Based on the overwhelming body of Florida jurisprudence to have addressed and decided this issue, they have not.

B. Florida's Duty to Defend and Indemnity Doctrines

Florida jurisprudence is clear; the adjudication of an insurer's duty to defend is determined solely from the allegations of the underlying complaint and the subject policy(s). *See Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 10 (Fla. 2004); *see also St. Paul Fire & Marine Ins. Co. v. The Medical Protective Co. of Fort Wayne, Indiana, et al.*, No. 2:04cv0391, 2006 U.S. Dist. LEXIS 89422 at *13-14 (M.D. Fla. Dec. 8, 2006). Where there is no duty to defend, there is no duty to indemnify. *See Lime Tree Village Community Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir. 1993) (duty to defend is broader than the duty to indemnify); *see also Orlando Nightclub Enters. v. James River Ins. Co.*, No. 6:07-cv-1121, 2007 U.S. Dist. LEXIS 88320 at *28-29 (M.D. Fla. Nov. 30, 2007) (citing *Allstate Ins. Co. v. RJT Enters., Inc.*, 692 So. 2d 142, 144 (Fla. 1977) ("Under Florida law, the duty to indemnify is encompassed within the duty to defend. . . . There cannot be a duty to indemnify without a duty to defend."); *see also Fun Spree Vacations, Inc. v. Orion Insurance Company*, 659 So.2d 419, 421 (Fla. 3d DCA 1995). While a situation can arise where an insurer is required to defend an insured and is ultimately absolved of any indemnity obligation, there can be no duty to indemnify when an insurer is determined to have no duty to defend. *See Orlando Nightclub*, 2007 U.S. Dist. LEXIS 88320, at *28-29. An insured may not re-plead, ignore or alter through extraneous material the allegations of the underlying complaint in an attempt to trigger a defense obligation. *See Tropical Park v. United States Fid. & Guar. Co.*, 357 So. 2d 253, 256 (Fla. 3d DCA 1978) ("the

duty of an insurance carrier to defend a claim falling within its insurance contract depends solely on the allegations in the complaint . . . ."); *see also Nat'l Union Fire Ins. Co. v. Lenox Liquors Inc.*, 358 So. 2d 533, 536 (Fla. 1977). As Johnson seeks to trigger Amerisure's defense obligation and concomitantly recover defense costs, the allegations of the Complaint solely determine whether the CGL policies are triggered.

C. Any "Property Damage" Alleged in the Underlying Complaint Manifested Outside of the Amerisure CGL Policy Periods

No material issues of fact exist to preclude summary judgment on the purely legal determination of what "trigger" theory applies, and its effect in light of the Complaint's clear allegations. Here, summary judgment in favor of Amerisure is warranted because the allegations of the Complaint indicate that the alleged defects at 54 Magnolia manifested, and thus occurred, outside of the Amerisure CGL policy periods.

Here, the policies require not only that all "bodily injury" and/or "property damage" be caused by an "occurrence", but that the "'bodily injury' or 'property damage' occur[] during the policy period." [See Joint Compendium of Documents, Exhibits A-C]. In being asked to determine the applicable "trigger" theory in the context of similar, if not identical, policy language, "Florida courts follow the general rule that" in a continuous injury context "the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself." *Essex Builders Group Inc.*, 485 F.Supp.2d at 1310 (quoting *Auto Owners Insurance Company v. Travelers Casualty & Surety Company*, 227 F.Supp.2d 1248, 1266 (M.D. Fla. 2002)); *see also C.J. Gayfer's*, 366 So.2d at 1202 (holding that the time of the "occurrence" is defined at the point "in which the negligence manifests itself in property damage or bodily

injury . . . ."); *see also Arnett v. Mid-Continent Cas. Co.*, No. 8:08-CV-2373, 2010 U.S. Dist. LEXIS 71666 at *19 (M.D. Fla. July 16, 2010) ("Under Florida law, the general rule is that the time of occurrence within the meaning of an 'occurrence' policy is the time at which the injury first manifests itself, that is, the date on which the damage first becomes visible."); *see also American Motorist Insurance Co. v. Southern Security Life Insurance Co.*, 80 F.Supp.2d 1280, 1284 (M.D. Ala. 2000) (applying Florida law) (citing *C.J. Gayfer's* and holding same); *see also Harris Specialty Chems., Inc. v. U.S. Fire Ins. Co.*, No. 3:98-CV-351, 2000 U.S. Dist. LEXIS 22596 at *40-41 (M.D. Fla. July 7, 2000); *see also Mid-Continent Cas. Co. v. Frank Casserino Constr.*, No. 6:09-cv-1065, 2010 U.S. Dist. LEXIS 59636 (M.D. Fla. June 16, 2010); *see also North River Ins. Co. v. Broward County Sheriff's Office*, 428 F. Supp.2d 1284, 1289 (S.D. Fla. 2006); *but see Trizec Properties, Inc. v. Biltmore Constr. Co.*, 767 F.2d 810, 813 (11th Cir. 1985) (while employing an "injury in fact" trigger, the holding has been effectively ignored in favor of the manifestation trigger by all district courts having confronted the trigger issue following *Trizec*). If the damage or injury manifests, *i.e.*, occurs outside of the term of a liability policy, the insurer faces no liability. *See North River Ins. Co.*, 428 F. Supp.2d at 1288-89; *Auto-Owners Ins. Co.*, 277 F.Supp.2d at 1266; *Essex Builders Group, Inc.*, 485 F.Supp.2d at 1302.

Here, the Complaint alleges that the "construction defects did not begin to be discovered until approximately October 2005, when they *began to manifest themselves outwardly*." (emphasis added). [See Joint Compendium of Documents, Exhibit I, ¶ 17]. The Amerisure policies under which Johnson now seeks coverage expired on January 1, 2005 – ten (10) months prior to the manifestation of the alleged defects at 54 Magnolia. *Id.* Following Florida's strict adage of deciding an insurer's duty to defend exclusively on the complaint, the

allegations of the Complaint here warrant summary judgment in favor of Amerisure insofar as any alleged "property damage" first manifested outside of the Amerisure policy periods. Thus, the CGL policies are not "triggered" in connection with this alleged loss.[2]

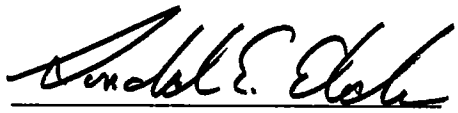
Factually akin and supporting this conclusion is the district court's decision in *Essex Builders Group, Inc.*, 485 F.Supp.2d 1302, where, as here, water damage was discovered after a liability insurer's policy had expired. Although there was evidence in *Essex* that the damage was actually occurring during the policy period, the court found that the "injury-in-fact" trigger theory did not apply, and decided that under the applicable Florida trigger – the manifestation theory – "there was no occurrence within the policy period" because the damage was not visible until after the policy had expired. *Id.* at 1310. Similarly, *C.J. Gayfer's*, 366 So. 2d at 1202, held that damage discovered after a liability policy had expired did not constitute an "occurrence" that led to "property damage" because an "'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage . . . ." *Id.* For these reasons, summary judgment is properly awarded in favor of Amerisure.

WHEREFORE, Defendant, AMERISURE INSURANCE COMPANY, respectfully requests that this Honorable Court enter an order in its favor and against JOHNSON-GRAHAM-MALONE, INC.: granting Amerisure's motion for summary judgment; awarding costs to Amerisure associated with bringing this motion; and for such other relief as this Court deems just and proper.

[2] On information and belief, Johnson procured CGL coverage through Mid-Continent Casualty Company, which was in effect during the time of the manifestation of the alleged damage in October 2005. Johnson has elected to settle with Mid-Continent, and has dismissed Mid-Continent from this lawsuit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail to: Robert Buesing, Trenam Kemker, 101 E. Kennedy Boulevard, Suite 2700, Tampa, FL 33602 on this 18th day of November, 2010.



Donald E. Elder (admitted *pro hac vice*)
Email: delder@tresslerllp.com
Illinois State Bar No.: 6255889
Abraham Sandoval (admitted *pro hac vice*)
Email: asandoval@tresslerllp.com
Illinois State Bar No.: 6296504
Tressler LLP
233 S. Wacker Drive, 22nd Floor
Chicago, IL 60606
(312) 627-4000
Attorneys for Defendant, Amerisure Insurance Company

Co-Counsel:
Andrew F. Russo, Esq.
FBN 508594
Rywant, Alvarez, Jones, Russo & Guyton, P.A.
Suite 500, Perry Paint & Glass Building
109 Brush Street
Tampa, Florida 33602
(813) 229-7007 – Telephone
(813) 223-6544 – Facsimile
Email:arusso@rywantalvarez.com