What: Meeting of the Insurance & Surety Committee for the Florida Bar's RPPTL Section

When: Monday, September 16, 2013, starting at noon.

Presentation Topic: *Pozzi* and *JSUB* in the wake *Auchter* and progeny – so, in Florida, what constitutes "property damage" under a post-1986 CGL policy with PCOH coverage issued to a general contractor?

Speaker: Patrick J. Poff is a Florida Board Certified Construction Lawyer at the Tampa offices of Trenam Kemker, *et al.*, P.A., who practices complex commercial litigation with an emphasis on construction claims, construction defects, product defects, lien and bond claims and insurance coverage matters. Patrick is AV-Rated "Preeminent" by Martindale Hubbell and is an active member of the American Bar Association's Forum on the Construction Industry, where he serves as Chairman of the Forum's Division on Insurance, Surety & Liens a/k/a "Division 7."

Summary: The Eleventh Circuit in ***Amerisure Mutual Insurance Co. v. Auchter Company***, 673 F.3d 1294 (11th Cir.(Fla), Mar 15, 2012) had for review an insurance coverage dispute involving roofing construction defects. The question before the court was whether a subcontractor's defective installation of roofing materials and the consequent post-completion damages thereto constituted "property damage" under a post-1986 standard form commercial general liability policy with products-completed operations hazard coverage (PCOH). The facts and questions of law at issue in *Auchter* were closely analogous to the construction defects and damages at issue in the well-known Florida Supreme Court decision *Auto-Owners Insurance Company v. Pozzi Window Company,* 984 So.2d 1241 (Fla. 2008). At first blush, one might have reasonably concluded that these similarities would result in a finding of property damage in *Auchter* and, by extension, coverage. Despite the similarities, however, disagreement arose in *Auchter* among the judges as to whether the post-completion damage to the contractor's roofing materials caused by the subcontractor's defective installation thereof constituted "property damage" under the standard form CGL policy with PCOH coverage. The majority opinion concluded that there was no "property damage" within the meaning of the policy and denied coverage. The dissenting opinion, however, provided a detailed analysis of the *Pozzi* decision and why its application to the post-completion damages in *Auchter* constituted "property damage" warranting a finding in favor of coverage. In light of *Auchter*, the question as to what constitutes "property damage" under a post-1986 CGL policy with PCOH coverage, which had seemingly been answered in *Pozzi* and *United States Fire Insurance Co. v. J.S.U.B., Inc.* (979 So.2d 871 (Fla. 2007), may not be as clear as first imagined. Did the majority in *Auchter* properly apply the reasoning set forth in *Pozzi?* Did the majority in *Auchter* really disagree with the reasoning and/or outcome in *Pozzi?* Are the cases, in fact, materially distinguishable? Is there now a split between the Florida courts and the federal courts in the 11th Circuit on this issue? The presentation will review the issues involved in these decisions and their progeny in an attempt to answer more clearly the question: in Florida, what constitutes "property damage" under a post-1986 CGL policy with PCOH coverage issued to a general contractor? This hand-out is intended as a non-exhaustive quick reference guide to the case law and progeny underlying the issues to be discussed during the presentation.

Introduction:

> "***What constitutes property damage and an occurrence in the realm of construction defect claims against an insured general contractor for the acts and/or omissions of its subcontractors are perhaps the most litigated insurance issues over the last several years.***" *Hathaway Dev. Co. v. American Empire Surplus Liner Ins. Co.*, 686 S.E.2d 855 (C.A. Ga. 1st Div. 2009).

Key post-1986 standard form CGL Policy with PCOH Provisions for Discussion:

Standard CGL policy provides coverage for the "'sums that the insured becomes legally obligated to pay as damages' caused by an 'occurrence' within the 'coverage territory' during the policy period."[1]

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"'Property damage' includes '[p]hysical injury to tangible property, including all resulting loss of use of that property.'"[2]

~ ~ ~ ~

"'[O]ccurrence' is 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'"[3]

~ ~ ~ ~

"'[P]roducts-completed operations hazard' coverage . . . [i]ncludes all . . . "property damage" occurring away from premises you own or rent and arising out of 'your product' or 'your work' except: . . . . (2) Work that has not yet been completed or abandoned."[4]

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"The coverage provisions are limited by numerous exclusions . . . that exclude coverage for damage to the insured's property and work" including:

> "j. 'Property damage' to:
> . . . .
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises

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[1] Auto-Owners Insurance Company v. Pozzi Window Company, 984 So.2d 1241, 1244-1246 (Fla. 2008).
[2] *Id.*
[3] *Id.*
[4] *Id.*

out of those operations; or
(6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.

. . . .

Paragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard'.

. . . .

l. 'Property damage' to 'your work' arising out of it or any part of it and including in the 'products-completed operations hazard'.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor."[5]

~ ~ ~ ~

"'Your work' means:

a. Work or operations performed by you or on your behalf; and
b. Materials, parts or equipment furnished in connection with such work or operations.

'Your work' includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work'; and
b. The providing of or failure to provide warnings or instructions.'"[6]

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Principal Cases and Progeny for Discussion or Reference:

I. ***United States Fire Insurance Co. v. J.S.U.B., Inc.***, 979 So.2d 871 (Fla.2007)

a. **Holding:** The Supreme Court held that: (1) subcontractors' defective soil preparation, which general contractor did not intend or expect, was an occurrence under post–1986 CGL policy; (2) structural damage to completed homes caused by subcontractor's defective work was property damage under the CGL policy; and (3) CGL policy with Products Completed Operations Hazard provided coverage by operation of the subcontractor exception to the "Your Work" exclusion.

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[5] *Id.*
[6] *Id.*

b. ***Positive Cases:***

Examined in:

-Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So.2d 1241, 1243+, 33 Fla. L. Weekly S392, S392+ (Fla. Jun 12, 2008) (NO. SC06-779)

-Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294, 1298+, 23 Fla. L. Weekly Fed. C 827, 827+ (11th Cir.(Fla.) Mar 15, 2012) (NO. 10-10960)

-Amerisure Mut. Ins. Co. v. Auchter Co., 2010 WL 457386, *2+ (M.D.Fla. Feb 04, 2010) (NO. 3:08-CV-645-J-32HTS)

-St. Paul Fire and Marine Ins. Co. v. Sea Quest Intern., Inc., 676 F.Supp.2d 1306, 1312+ (M.D.Fla. Dec 17, 2009) (NO. 805-CV-962-T-TBM) HN: 1,10,22 (So.2d)

-Homes By Deramo, Inc. v. Mid-Continent Cas. Co., 661 F.Supp.2d 1281, 1284+ (M.D.Fla. Sep 14, 2009) (NO. 808-CV-2528-T-33MAP)

-Woodcraft Mfg., Inc. v. Charter Oak Fire Ins. Co., 2009 WL 1329138, *4+ (N.D.Fla. May 12, 2009) (NO. 3:08CV455/MCR/EMT)

Discussed in:

-Palm Beach Grading, Inc. v. Nautilus Ins. Co., 434 Fed.Appx. 829, 830+ (11th Cir.(Fla.) Jul 14, 2011) (Table, text in WESTLAW, NO. 10-12821) (Table, text in WESTLAW)

-Certain Underwriters at Lloyds v. NOA Marine, Inc., 2012 WL 1623527, *13+ (M.D.Fla. May 09, 2012) (NO. 8:11-CV-63-T-17TGW)

-Arnett v. Mid-Continent Cas. Co., 2010 WL 2821981, *4+ (M.D.Fla. Jul 16, 2010) (NO. 8:08-CV-2373-T-27EAJ)

-Rolyn Companies, Inc. v. R & J Sales of Texas, Inc., 671 F.Supp.2d 1314, 1323+ (S.D.Fla. Nov 16, 2009) (NO. 08-61618-CIV)

-Liberty Mut. Fire Ins. Co. v. Mark Yacht Club on Brickell Bay, Inc., 2009 WL 2633064, *4+ (S.D.Fla. Aug 25, 2009) (NO. 09-20022-CIV)

-Amerisure Mut. Ins. Co. v. American Cutting & Drilling Co., Inc., 2009 WL 700246, *4+ (S.D.Fla. Mar 17, 2009) (NO. 08-60967-CIV)

-Schmidt v. Continental Cas. Co., 2007 WL 4557238, *2+ (M.D.Fla. Dec 21, 2007) (NO. 207CV-383-FTM-34DNF)

-Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Florida, Inc., 2011 WL 2313206, *4+ (S.D.Tex. Jun 09, 2011) (NO. 4:09-CV-02872)

-Capstone Bldg. Corp. v. American Motorists Ins. Co., 67 A.3d 961, 974+, 308 Conn. 760, 773+ (Conn. Jun 11, 2013) (NO. 18886)

-Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co., --- S.E.2d ----+, 2013 WL 3481555, *5+, 13 FCDR 2184, 2184+ (Ga. Jul 12, 2013) (NO. S13Q0462)

-Architex Ass'n, Inc. v. Scottsdale Ins. Co., 27 So.3d 1148, 1155+ (Miss. Feb 11, 2010) (NO. 2008-CA-01353-SCT)

-K & L Homes, Inc. v. American Family Mut. Ins. Co., 829 N.W.2d 724, 729+, 2013 ND 57, 57+ (N.D. Apr 05, 2013) (NO. 20120060)

c. ***Negative Cases:***
Distinguished by:
-Scottsdale Ins. Co. v. Mt. Hawley Ins. Co., 2011 WL 9169946, *7+ (S.D.Tex. Jun 15, 2011) (NO. CIV.A. M-10-58)

-Assurance Co. of America v. Lucas Waterproofing Company, Inc., 581 F.Supp.2d 1201, 1209+ (S.D.Fla. May 01, 2008) (NO. 07-14084-CIV

Declined to follow by:
-Group Builders, Inc. v. Admiral Ins. Co., 231 P.3d 67, 73, 123 Hawai'i 142, 148 (Hawai'i App. May 19, 2010) (NO. 29402) HN: 10,18 (So.2d)

-Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parkshore Development Corp., 2009 WL 1737032, *3 (D.N.J. Jun 17, 2009) (NO. CIV. 07-1331 RBK/JS)

-General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co., 205 P.3d 529, 535+ (Colo.App. Feb 19, 2009) (NO. 07CA2291, 07CA2292)

-Westfield Ins. Co. v. Sheehan Const. Co., Inc., 580 F.Supp.2d 701, 711+ (S.D.Ind. Aug 29, 2008) (NO. 1:05-CV-0617-RLY-TAB)

-Lyerla v. AMCO Ins. Co., 536 F.3d 684, 689+ (7th Cir.(Ill.) Aug 04, 2008) (NO. 07-3104)

II. ***Auto-Owners Insurance Company v. Pozzi Window Company,*** 984 So.2d 1241 (Fla. 2008)

a. **Holding**: On rehearing, the Florida Supreme Court held that: post–1986 (CGL) policy with Products Completed Operations Hazard coverage (1) provided coverage for cost to repair or replace the windows if subcontractor's defective installation damaged the windows, but (2) the policy did not provide coverage if the windows were defective before installation.

b. ***Positive Cases:***

Examined in:
-Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294, 1300+, 23 Fla. L. Weekly Fed. C 827, 827+ (11th Cir.(Fla.) Mar 15, 2012) (NO. 10-10960)

-St. Paul Fire and Marine Ins. Co. v. Sea Quest Intern., Inc., 676 F.Supp.2d 1306, 1310+ (M.D.Fla. Dec 17, 2009) (NO. 805-CV-962-T-TBM)

Cited in:
-Trinidad v. Florida Peninsula Ins. Co., --- So.3d ----, 2013 WL 3333823, *3, 38 Fla. L. Weekly S507, S507 (Fla. Jul 03, 2013) (NO. SC11-1643)

-Penzer v. Transportation Ins. Co., 29 So.3d 1000, 1005, 35 Fla. L. Weekly S73, S73 (Fla. Jan 28, 2010) (NO. SC08-2068)

-Palm Beach Grading, Inc. v. Nautilus Ins. Co., 434 Fed.Appx. 829, 830+ (11th Cir.(Fla.) Jul 14, 2011) (Table, text in WESTLAW, NO. 10-12821) (Table, text in WESTLAW)

-Certain Underwriters at Lloyds v. NOA Marine, Inc., 2013 WL 1736790, *7+ (M.D.Fla. Apr 22, 2013) (NO. 8:11-CV-63-T-TGW)

-National Trust Ins. Co. v. Graham Bros. Const. Co., Inc., 916 F.Supp.2d 1244, 1254 (M.D.Fla. Jan 04, 2013) (NO. 8:11-CV-1437-T-33MAP)

-Federated Nat. Ins. Co. v. Maryland Cas. Co., 2012 WL 5955008, *2 (M.D.Fla. Nov 28, 2012) (NO. 8:12-CV-1286-T-30EAJ)

-Great American Fidelity Ins. Co. v. JWR Const. Services, Inc., 882 F.Supp.2d 1340, 1355 (S.D.Fla. Apr 09, 2012) (NO. 10-61423-CIV)

-Mid-Continent Cas. Co. v. Siena Home Corp., 2011 WL 2784200, *4+ (M.D.Fla. Jul 08, 2011) (NO. 5:08-CV-385-OC-10GJK)

-Arnett v. Mid-Continent Cas. Co., 2010 WL 2821981, *4 (M.D.Fla. Jul 16, 2010) (NO. 8:08-CV-2373-T-27EAJ) HN: 3,4 (So.2d)

-Mid-Continent Cas. Co. v. Clean Seas Co., Inc., 2009 WL 812072, *4 (M.D.Fla. Mar 27, 2009) (NO. 3:06-CV-518-J-32MCR)

-Big-D Const. Corp. v. Take it for Granite Too, 917 F.Supp.2d 1096, 1107 (D.Nev. Jan 22, 2013) (NO. 2:11-CV-00621-PMP)

-Taylor Morrison Services, Inc. v. HDI-Gerling America Ins. Co., --- S.E.2d ----, 2013 WL 3481555, *7, 13 FCDR 2184, 2184 (Ga. Jul 12, 2013) (NO. S13Q0462)

c. ***Negative Cases:***
Distinguished by
-Homes By Deramo, Inc. v. Mid-Continent Cas. Co., 661 F.Supp.2d 1281 (M.D.Fla. Sep 14, 2009) (NO. 808-CV-2528-T-33MAP)

-Amerisure Mut. Ins. Co. v. Auchter Co., 2010 WL 457386 (M.D.Fla. Feb 04, 2010) (NO. 3:08-CV-645-J-32HTS)
-Fireman's Fund Ins. Co. v. Sneed's Shipbuilding, Inc., 803 F.Supp.2d 530 (E.D.La. Mar 22, 2011) (NO. CIV.A. 08-4882)

d. ***Mentioned In:***
-Geico Gen. Ins. Co. v. Virtual Imaging Services, Inc., --- So.3d ----, 2013 WL 3332385, *3, Med & Med GD (CCH) P 304,525, 304525 (Fla. Jul 03, 2013) (NO. SC12-905)

-Keck v. Eminisor, 104 So.3d 359, 363, 37 Fla. L. Weekly S697, S697 (Fla. Nov 15, 2012) (NO. SC10-2306)

-Certain Underwriters at Lloyds v. NOA Marine, Inc., 2012 WL 1623527, *15 (M.D.Fla. May 09, 2012) (NO. 8:11-CV-63-T-17TGW) HN: 3,4,6 (So.2d)

-Amerisure Mut. Ins. Co. v. Summit Contractors, Inc., 2012 WL 716884, *11 (M.D.Fla. Feb 29, 2012) (NO. 8:11-CV-77-T-17TGW)

III. ***Amerisure Mutual Insurance Co. v. Auchter Company,*** 673 F.3d 1294, 23 Fla. L. Weekly Fed. C 827 (11th Cir.(Fla), Mar 15, 2012).

a. **Holding:** The Court held that owner's claim against general contractor for project's defective roof was not a claim for "property damage" within the plain wording of post–1986 (CGL) policy with Products Completed Operations Hazard coverage issued to general contractor.

b. ***Positive Cases:***
-Caloosa Property Owners Ass'n, Inc. v. Capitol Specialty Ins. Corp., --- Fed.Appx. ----, 2013 WL 3185275, *1 (11th Cir.(Fla.) Jun 24, 2013) (NO. 12-15790)

-Zodiac Group, Inc. v. Axis Surplus Ins. Co., 2012 WL 6214564, *4 (S.D.Fla. Dec 13, 2012) (NO. 12-80299-CIV)

c. ***Mentioned In:***
-Federated Nat. Ins. Co. v. Maryland Cas. Co., 2012 WL 5955008, *2 (M.D.Fla. Nov 28, 2012) (NO. 8:12-CV-1286-T-30EAJ)

d. ***Secondary Resources:***

-Couch on Insurance s 129:6, "Property damage" (2012)

-Couch on Insurance s 129:23, Completed operations-Generally (2012)

-Construction Litigation Reporter 11, Under Florida Law, Owner's Claim that Subcontractor's Faulty Installation of Tile Roof Required Replacement of the Entire Roof Does Not Allege "Property Damage" Under Contractor's CGL Policy (2012)

-33 Construction Litigation Reporter 11, Under Florida Law, Owner's Claim that Subcontractor's Faulty Installation of Tile Roof Required Replacement of the Entire Roof Does Not Allege "Property Damage" Under Contractor's CGL Policy (2012)

-NO. 6 Insurance Litigation Reporter 163, Under Florida Law, Owner's Claim that Subcontractor's Faulty Installation of Tile Roof Required Replacement of Entire Roof Does not allege "Property Damage" under Contractor's CGL Policy Florida Precedents Analyzed A (2012)

-NO. 14 Insurance Litigation Reporter 464, General Contractor's Faulty Workmanship May Constitute an Occurrence, Regardless of Whether there is Damage to "other Property" Fraud Claim Inconsistent with Accident Requirement Taylor Morrison Services, Inc. v. HDI-GER (2013)

-Bruner and O'Connor on Construction Law s 11:82.50, Focus on "what" property was damaged rather than "whether" property was damaged-Conflating insuring grant and policy exclusions (2013)

-Bruner and O'Connor on Construction Law s 11:83, Does it matter what property is damaged for the insuring clause? (2013)

-Bruner and O'Connor on Construction Law s 11:87, Repair of defective work as "property damage" (2013)

-Bruner and O'Connor on Construction Law s 11:103, Completed operations work exclusion-Generally (2013)

-Bruner and O'Connor on Construction Law s 11:105, Subcontractor exception to completed operations work exclusion (2013)

-37 Construction Contracts Law Report 123, Subcontractor's Faulty Workmanship Could Constitute Occurrence Under Contractor's CGL Policy (2013)

-Insurance Coverage of Construction Disputes s 6:27, "Property damage"- "Physical injury" qualification - The incorporation or presence of something unwanted as a "physical injury" (2013)

-Insurance Coverage of Construction Disputes s 6:34, "Property damage"- Business Risk Doctrine and "property damage" to insured's work or product versus other property (2013)

-Construction Insurance, A Guide for Attorneys and Other Professionals, Stephen D. Palley, Timothy E. Delahunt, John S. Sandberg, and Patrick J. Weilinski, Editors, ABA Publishing, American Bar Association Forum on the Construction Industry (2011).

Miscellaneous Considerations for Discussion – Economic Loss and Consequential Damage:

"Insurers sometimes argue that a loss is purely economic in nature and thus not property damage."[7] Is "property damage," as it has been defined in recent Economic Loss Rule decisions, consistent with the definition emerging from the *Pozzi, JSUB,* and *Auchter?* If not, does it need to be?

I. **Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.**, 110 So. 3d 399, 407 (Fla. 2013).

II. **May 24, 2013 - Order on the Parties' Cross-Motions for Summary Judgment as to Count 1 of Plaintiff's Third Amended Complaint,** Central Park LV Condominium Association, Inc. v. Summit Contractors, Inc., *et al.*, In the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida, Case No. 2010-CA-015748-O.

[7]Construction Insurance, A Guide for Attorneys and Other Professionals, Stephen D. Palley, *et al.*, Editors, ABA Publishing, American Bar Association Forum on the Construction Industry (2011), p. 79.

EXHIBIT 1

984 So.2d 1241, 33 Fla. L. Weekly S392
(Cite as: 984 So.2d 1241)

Supreme Court of Florida.
AUTO–OWNERS INSURANCE COMPANY, Appellant,
v.
POZZI WINDOW COMPANY, et al., Appellees.

No. SC06–779.
June 12, 2008.
Rehearing Denied Aug. 26, 2008.

Background: Window manufacturer, as insured contractor's assignee, sued commercial general liability (CGL) insurer, alleging that insurer breached its contract by denying coverage for costs of repair or replacement of windows which were defectively installed by subcontractor, and that insurer acted in bad faith. The United States District Court for the Southern District of Florida, Theodore Klein, United States Magistrate Judge, granted summary judgment for manufacturer on issue of coverage, and, following jury verdict, entered judgment as a matter of law for insurer on bad faith claim. Insurer appealed as to coverage, and manufacturer cross-appealed judgment on bad faith claim. The United States Court of Appeals for the Eleventh Circuit, 446 F.3d 1178, affirmed in part and certified question of law.

Holdings: On rehearing, the Supreme Court, Pariente, J., held that:
(1) policy provided coverage for cost to repair or replace the windows if subcontractor's defective installation damaged the windows, but
(2) the policy did not provide coverage if the windows were defective before installation.

Certified question answered.

Lewis, C.J., concurred in result only and filed opinion.

West Headnotes

[1] Federal Courts 170B ⚿392

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk388 Federal Decision Prior to State Decision
170Bk392 k. Withholding Decision; Certifying Questions. Most Cited Cases
Supreme Court on federal Court of Appeals' certification of insurance coverage question would decline to address issues that were not the subject of certified question pertaining to insurer's bad faith and liability for punitive damages.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Whether a post–1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provided coverage for the repair or replacement of a subcontractor's defective work was an issue of insurance policy construction, which was a question of law subject to de novo review.

[3] Insurance 217 ⚿2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property Damage. Most Cited Cases
Damage to windows from subcontractor's de-

fective installation was "physical injury to tangible property" and thus "property damage" within the meaning of contractor's commercial general liability (CGL) policy with products-completed operations hazard coverage, if the windows were not defective when purchased, and, thus, coverage would exist for repair or replacement of the windows.

[4] Insurance 217 ⚿2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property Damage. Most Cited Cases

Subcontractor's defective installation of allegedly defective windows would not be "physical injury to tangible property" and thus would not be "property damage" within the meaning of general contractor's commercial general liability (CGL) policy, and, thus, the policy did not cover cost to repair or replace the windows if defective.

[5] Insurance 217 ⚿2275

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2275 k. Accident, Occurrence or Event. Most Cited Cases

Subcontractor's defective installation of windows, which general contractor did not intend or expect, was an "occurrence" under general contractor's commercial general liability (CGL) policy with products-completed operations hazard coverage.

[6] Insurance 217 ⚿2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property Damage. Most Cited Cases

The mere inclusion of a defective component, such as a defective window or the defective installation of a window, is not "property damage" within the meaning of a contractor's commercial general liability (CGL) insurance policy unless that defective component results in physical injury to some other tangible property.

***1242** Denise V. Powers, Coral Gables, FL, for Appellant.

Edmund M. Kneisel and Richard E. Dolder of Kilpatrick Stockton, LLP, Atlanta, GA, for Appellees.

Ronald L. Kammer and Sina Bahadoran of Hinshaw and Culbertson, LLP, Miami, FL, on behalf of Mid-Continent Casualty Company; David K. Miller and Ginger L. Barry of Broad and Cassel, Tallahassee, FL, Keith Hetrick, Florida Home Builders Association, Tallahassee, FL, R. Hugh Lumpkin and Michael F. Huber of Ver Ploeg and Lumpkin, P.A., Miami, FL, on behalf of Florida Home Builders Association, National Association of Home Builders, Arvida/JMB Partners, L.P., Arvida Managers, Inc., Arvida/JMB Management, L.P., and Mercedes Home Corporation; Warren H. Husband of Metz, Husband, and Daughton, P.A., Tallahassee, FL, and Patrick J. Wielinski of Cokinos, Bosien, and Young, P.C., Arlington, TX, on behalf of Associated General Contractors of America, Florida A.G.C. Council, Inc., the Associated General Contractors of Greater Florida, Inc., South Florida Chapter of the Associated General Contractors, Florida East Coast Chapter of the Associated General Contractors of America, Inc., American Subcontractors Association, Inc., and American Subcontractors of Florida, Inc.; and Mark A. Boyle, Sr. of Fink and Boyle, P.A., Fort Myers, FL, on behalf of FHBF Partners, LLP, Aubuchon Homes, Inc., Camden Development, Inc., and Keenan, Hopkins, Schmidt and Stowell Contractors, Inc., As Amici Curiae.

984 So.2d 1241, 33 Fla. L. Weekly S392
(Cite as: 984 So.2d 1241)

***1243** PARIENTE, J.

The United States Court of Appeals for the Eleventh Circuit has certified the following question of Florida law that is determinative of a cause pending in that court and for which there appears to be no controlling precedent:

> DOES A STANDARD FORM [COMMERCIAL] GENERAL LIABILITY POLICY WITH PRODUCT[S] COMPLETED OPERATIONS HAZARD COVERAGE, SUCH AS THE POLICIES DESCRIBED HERE, ISSUED TO A GENERAL CONTRACTOR, COVER THE GENERAL CONTRACTOR'S LIABILITY TO A THIRD PARTY FOR THE COSTS OF REPAIR OR REPLACEMENT OF DEFECTIVE WORK BY ITS SUBCONTRACTOR?

Pozzi Window Co. v. Auto–Owners Ins. Co., 446 F.3d 1178, 1188 (11th Cir.2006). We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const.

When the Eleventh Circuit certified the question, it did not have the benefit of our decision in *United States Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla.2007), in which we held that a subcontractor's defective work can constitute an "occurrence" under a post–1986 standard form commercial general liability policy. In this case, the defective work relates to the repair or replacement of custom windows in a home. However, in its opinion, the Eleventh Circuit used the terms "defective installation" and "defective windows" interchangeably, even though the terms are not interchangeable for purposes of determining whether there is insurance coverage based on our decision in *J.S.U.B.* In fact, as we will explain more fully below, there is a critical distinction for purposes of insurance coverage depending on whether the "defective work" refers only to the defective installation of the custom windows or whether the windows themselves were also defective. Therefore, the answer to the certified question is dependent on this ultimate determination, which we are not in a position to make.

FACTS AND PROCEDURAL HISTORY

Coral Construction of South Florida, Inc., and Coral's president James J. Irby ("Builder") constructed a multimillion dollar house in Coconut Grove, Florida. The house included windows that were individually purchased by Mr. Perez ("Homeowner") from International Windows & Doors, Inc. ("Retailer"), manufactured by Pozzi Window Company ("Pozzi") and installed by a subcontractor, Brian Scott Builders, Inc. ("Subcontractor"). After moving into the house, the owner complained of water leakage around the windows. The Homeowner filed suit against Pozzi, the Retailer, the Builder, and the Subcontractor.

According to the Homeowner's complaint, the Builder urged him to purchase the Pozzi-manufactured windows from the Retailer, which in turn hired the Subcontractor to perform the installation. The Homeowner asserted that the windows were shipped directly to his residence, that he paid the Retailer directly for the windows, and that the windows "were defectively and deficiently designed and manufactured, and were installed improperly into [his] home." Pozzi filed a cross-claim against the Subcontractor alleging that the damages to the home were caused by the defective installation and not a result of any defect in the windows themselves.

Pozzi entered into a settlement with the Homeowner, agreeing to "remedy the defective ***1244** installation of the windows." [FN1] Thereafter, Pozzi also settled with the Builder, and as the Builder's assignee, filed a lawsuit against the Builder's insurer, Auto–Owners Insurance Company ("Auto–Owners").

> FN1. Importantly, the consent judgment never resolved the apparent factual dispute as to what caused the damage to the home in this case. The Homeowner seemed to argue that the windows themselves were defective *and* were also defectively installed. Conversely, Pozzi maintained that the actual windows were not defective, but that

> the faulty installation resulted in damage to both the home and to the windows themselves.

In its complaint, Pozzi alleged that Auto–Owners breached its insurance contract by denying coverage, acted in bad faith, and that Pozzi, as assignee of the Builder, was entitled to fees and costs incurred by the Builder in prosecuting this action. Pozzi claimed that the Homeowner purchased the windows and that the Subcontractor, under the supervision of the Builder, negligently installed the windows.[FN2] Pozzi also contended that the negligently installed windows leaked,

> FN2. Pozzi argued that the Subcontractor "negligently installed the windows in at least the following respects: By ignoring Pozzi's manufacturer's instructions and applicable building codes requiring that the windows be installed plumb, level and square; by undersizing the window openings; by failing to install wooden bucks in framing the windows; and by failing to install shims properly to secure and level the windows."

causing substantial water damage to the surrounding plaster and wood of the walls, floors, and ceiling of the Perez residence, as well as damage to the windows themselves. The damage caused by negligent installation and resulting water intrusion rendered the Pozzi windows unfit for use in the residence, requiring their replacement.

In its answer, Auto–Owners admitted that the Homeowner purchased the windows from the Retailer and that the Subcontractor alone installed the windows; however, Auto–Owners specifically denied Pozzi's allegations as to the defectiveness of the installation and that the installation caused damage to the windows themselves, which required their replacement. Auto–Owners also filed a counterclaim seeking a determination that it had no duty to defend the Builder and that there was no coverage for the claims asserted because defective work performed by the Subcontractor was excluded under the policies.

Pursuant to the policies, Auto–Owners had paid the Homeowner for personal property damage caused by the leaking windows, but refused to provide coverage for the cost of repair or replacement of the windows. The insurance policies that Auto–Owners had issued the Builder were two identical commercial general liability (CGL) policies. The policies provided coverage for the "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' " caused by an "occurrence" within the "coverage territory" during the policy period. As defined in the policies, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "property damage" includes "[p]hysical injury to tangible property, including all resulting loss of use of that property." The policies also contain "products-completed operations hazard" coverage that

> [i]ncludes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> ....
>
> ***1245** (2) Work that has not yet been completed or abandoned. [FN3]

> FN3. Under the policies, the Builder had a per occurrence limit of $1 million, a general aggregate limit of $1 million, and a separate products-completed operations hazard aggregate limit of $1 million for which additional premiums were charged.

The coverage provisions are limited by numerous exclusions. Of particular relevance are those exclusions, with their exceptions, that exclude coverage for damage to the insured's property and work:

j. "Property damage" to:

....

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

....

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

....

l. "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Emphases supplied.) [FN4]

FN4. The policies define "your work" as follows:

"Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

b. The providing of or failure to provide warnings or instructions.

The parties filed cross-motions for summary judgment.[FN5] Auto–Owners argued that the Homeowner originally sued the Builder in the underlying lawsuit for "defective construction and poor workmanship for work done in the installation of the windows." Similarly, in its memorandum in support of its cross-motion for partial summary judgment, Pozzi contended that coverage existed because of the defective installation performed by the Subcontractor, rather than asserting that the windows themselves were damaged or defective.

FN5. In a Statement of Undisputed Material Facts, which was agreed to by the parties after the motions for summary judgment were filed, Pozzi and Auto–Owners agreed that the Homeowner's initial complaint alleged that the Subcontractor negligently installed the windows, which caused damage to the walls, floors, ceiling, and to the windows themselves and that Pozzi promised to remedy the defective installation of the windows in the settlement agreement with the Homeowner. However, the stipulation never addressed whether the windows were defective and only agreed upon the fact that the underlying claim was for defective installation that also damaged the win- dows.

[1] The federal district court granted Pozzi's cross-motion for summary judgment and found that the policies provided coverage for the Subcontractor's defective work. *See Pozzi Window,* 446 F.3d at 1181.[FN6] On appeal, the Eleventh Circuit ***1246** concluded that under this Court's decision in *State Farm Fire & Casualty Co. v. CTC Development Corp.,* 720 So.2d 1072, 1076 (Fla.1998), "[d]efective construction is an 'occurrence' under

Florida law." *Pozzi Window,* 446 F.3d at 1184. However, the Eleventh Circuit recognized that this Court's earlier decision in *LaMarche v. Shelby Mutual Insurance Co.,* 390 So.2d 325 (Fla.1980), used broad language and reasoning that indicated that CGL policies generally do not cover the costs of repair and replacement of defective work. *See Pozzi Window,* 446 F.3d at 1185. The Eleventh Circuit also noted that as a result of the Second District's decision in *J.S.U.B., Inc. v. United States Fire Ins. Co.,* 906 So.2d 303 (Fla. 2d DCA 2005), there was a split in Florida case law on this issue. *See Pozzi Window,* 446 F.3d at 1186. Accordingly, the court certified to this Court the unsettled question of Florida law. *See id.* at 1188.

> FN6. A jury trial before a magistrate judge resulted in a finding of bad faith and a punitive damages award of $500,000 against Auto–Owners. On Auto–Owners' motion for judgment as a matter of law, the magistrate judge concluded that there was insufficient evidence to support the jury's finding of bad faith and award of punitive damages. The Eleventh Circuit affirmed the magistrate's grant of judgment as a matter of law on these issues. *See id.* at 1189. Because these issues are not the subject of the question certified by the Eleventh Circuit, we decline to address them. *See Hawkins v. Ford Motor Co.,* 748 So.2d 993, 997 n. 5 (Fla.1999) (declining to address issues outside the scope of the certified question and already addressed by the Eleventh Circuit).

ANALYSIS

[2] The question certified by the Eleventh Circuit asks whether a post–1986 standard form CGL policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage for the repair or replacement of a subcontractor's defective work. This is an issue of insurance policy construction, which is a question of law subject to de novo review. *See Fayad v. Clarendon Nat'l Ins. Co.,* 899 So.2d 1082, 1085 (Fla.2005). In addressing this issue, we first review our decision in *J.S.U.B.*, which involved policy language that is identical in all material respects to the policies at issue in this case and addressed a question similar to the one posed by the Eleventh Circuit. We then apply our reasoning in *J.S.U.B.* to this case.

The *J.S.U.B.* Decision

In *J.S.U.B.*, after the contractor completed the construction of several homes, damage to the foundations, drywall, and other interior portions of the homes appeared. *See* 979 So.2d at 875. It was undisputed that the damage to the homes was caused by subcontractors' use of poor soil and improper soil compaction and testing. *See id.* The contractor sought coverage under its CGL policies issued by United States Fire Insurance Company. The insurer agreed that the policies provided coverage for damage to the homeowners' personal property, such as the homeowners' wallpaper, but asserted that there was no insurance coverage for the costs of repairing the structural damage to the homes, such as the damage to the foundations and drywall. *See id.* at 876.

The issue presented to this Court was "whether a post–1986 standard form commercial general liability policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work." *Id.* at 877. We addressed this question in two parts. We first determined whether faulty workmanship can constitute an "occurrence." *See id.* at 883. After reviewing our decisions in *LaMarche* and decisions from other jurisdictions, we held that ***1247** "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post–1986 CGL policy." *Id.* at 888. In doing so, we rejected the insurer's assertion that a subcontractor's faulty workmanship can never be an "occurrence," which is defined as "an accident," because faulty

workmanship results in reasonably foreseeable damages and is a breach of contract not covered by general liability policies. We explained that we previously "rejected the use of the concept of 'natural and probable consequences' or 'foreseeability' in insurance contract interpretation in *CTC Development,* " *id.* at 883, and that nothing in the language of the insuring agreement differentiated between tort and contract claims. *See id.* at 884. We also noted that "a construction of the insuring agreement that precludes recovery for damage caused to the completed project by the subcontractor's defective work renders the 'products-completed operations hazard' exception to exclusion (j)(6) and the subcontractor exception to exclusion (*l*) meaningless." *Id.* at 887. Accordingly, we concluded that the subcontractors' defective soil preparation, which was neither intended nor expected by J.S.U.B., was an "occurrence." *Id.* at 888.

We then addressed whether the subcontractors' defective soil preparation caused "property damage" within the meaning of the policy. *See id.* at 888–89. We held that faulty workmanship or defective work that has damaged the completed project has caused "physical injury to tangible property" within the plain meaning of the definition in the policy. *See id.* at 889. In reaching this conclusion, we rejected the insurer's arguments that faulty workmanship that injures only the work product itself does not result in "property damage" and that "there can never be 'property damage' in cases of faulty construction because the defective work rendered the entire project damaged from its inception." *Id.* We also observed that "[i]f there is no damage beyond the faulty workmanship or defective work, then there may be no resulting 'property damage.' " *Id.* Because structural damage to the completed homes was caused by the defective work, we concluded that there was "physical injury to tangible property" and thus the claim against the contractor for the structural damage was a claim for "property damage" within the meaning of the policies. *See id.* at 890.

This Case

The Eleventh Circuit characterizes the "defective work" in this case in two distinct manners. The opinion initially notes that the issue in the case is "whether the Policies cover [the Builder's] liability for the repair or replacement of the defectively installed windows." *Pozzi,* 446 F.3d at 1179. However, the opinion later refers to "the repair or replacement of the defective windows." *Id.* at 1181. In fact, the federal district court also used the terms "defective windows" and "defective installation" interchangeably, noting first that the issue in the case was "whether insurance coverage exists for the repair [of] the defective windows," and later finding that coverage existed because "the defective installation of the windows" was performed by a subcontractor. Accordingly, there appears to be a factual issue as to whether the windows themselves were defective or whether the faulty installation by the Subcontractor caused damage to both the windows and other portions of the completed project. Based on our decision in *J.S.U.B.,* this factual issue is critical.

[3][4] At each stage of the litigation, from the underlying complaint filed by the ***1248** Homeowner through the Eleventh Circuit's decision in this suit between Pozzi and Auto–Owners, there have been conflicting allegations about whether the windows were defective before they were installed. If the windows were purchased by the Homeowner and were not defective before being installed, coverage would exist for the cost of repair or replacement of the windows because there is physical injury to tangible property (the windows) caused by defective installation by a subcontractor. In that instance, damage to the windows caused by the defective installation is the same as damage to other portions of the home caused by the leaking windows. However, a different result would follow if the windows were defective prior to being installed and the damage to the completed project was therefore caused by defective windows rather than faulty installation alone.

[5] Similar to the CGL policies at issue in *J.S.U.B.*, the CGL policies issued by Auto–Owners to the Builder in this case provide coverage for an "occurrence" that causes "property damage." Our analysis of the term "occurrence" is controlled by our decision in *J.S.U.B.*, in which we held that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post–1986 CGL policy." 979 So.2d at 888. Auto–Owners does not contend, and there is no indication in the record, that the Builder expected the windows to be defectively installed. Thus, as was the faulty soil preparation in *J.S.U.B.*, the defective installation of the windows in this case, which the Builder did not intend or expect, was an "occurrence" under the terms of the CGL policies. However, as we noted in *J.S.U.B.*, in order to determine whether the policies provide coverage, we must also address whether the "occurrence" caused "property damage" within the meaning of the policies. *See id.* It is the analysis of this issue that is directly affected by the factual issue apparent in the record.

[6] The CGL policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." In *J.S.U.B.*, we explained that other courts have also "recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.' " *Id.* at 889. For example, in *West Orange Lumber Co. v. Indiana Lumbermens Mutual Insurance Co.*, 898 So.2d 1147, 1148 (Fla. 5th DCA 2005), a lumber company sought coverage under a CGL policy when it failed to provide the proper grade of cedar siding. There was no damage to the construction itself. The Fifth District Court of Appeal concluded that there was no allegation of "property damage" when the only damage alleged was the cost of removing and replacing the wrong grade cedar siding that had been installed. *See id.* In essence, the mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property.

Accordingly, if the claim in this case is for the repair or replacement of windows that were defective both prior to installation and as installed, then that is merely a claim to replace a "defective component" in the project. As the Supreme Court of Tennessee recently explained:

> [A] "claim limited to faulty workmanship or materials" is one in which the sole damages are for replacement of a defective***1249** component or correction of faulty installation.
>
> ... [The contractor's] subcontractor allegedly installed the windows defectively. *Without more, this alleged defect is the equivalent of the "mere inclusion of a defective component" such as the installation of a defective tire, and no "property damage" has occurred.*

Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 310 (Tenn.2007) (emphasis supplied). Because the Subcontractor's defective installation of the defective windows is not itself "physical injury to tangible property," there would be no "property damage" under the terms of the CGL policies. Accordingly, there would be no coverage for the costs of repair or replacement of the defective windows.

Conversely, if the claim is for the repair or replacement of windows that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property. In other words, because the windows were purchased separately by the Homeowner, were not themselves defective, and were damaged as a result of the faulty installation, then there is physical injury to tangible property, i.e., windows damaged by defective installation. Indeed, damage to the win-

dows themselves caused by the defective installation is similar to damage to any other personal item of the Homeowner, such as wallpaper or furniture. Thus, coverage would exist for the cost of repair or replacement of the windows because the Subcontractor's defective installation caused property damage.

CONCLUSION

As previously discussed, the record appears to contain a factual issue as to whether the "defective work" in this case is limited to the faulty installation or whether the windows themselves were also defective. Because that factual issue is determinative of the outcome, based upon our recent decision in *J.S.U.B.*, we return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

WELLS, ANSTEAD, QUINCE, and BELL, JJ., concur.
LEWIS, C.J., concurs in result only with an opinion.
CANTERO, J., recused.
LEWIS, C.J., concurring in result only.

I have provided my view on the extent of coverage afforded by post–1986 standard-form commercial general liability policies ("CGL") concerning faulty subcontractor work that damages the completed project in my concurrence in the result only in *United States Fire Insurance Co. v. J.S.U.B. Inc.*, 979 So.2d 871 (Fla.2007). If this case exclusively involves a claim to recover the costs associated with replacing a defectively installed component, which has not caused any damage to the *completed project,* then this case does not involve "property damage" within the meaning of a CGL policy. If the situation is otherwise, I would refer the Eleventh Circuit to our opinion in *J.S.U.B.*

Fla.,2008.
Auto-Owners Ins. Co. v. Pozzi Window Co.
984 So.2d 1241, 33 Fla. L. Weekly S392

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294 Fed.Appx. 588, 2008 WL 4369301 (C.A.11 (Fla.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 294 Fed.Appx. 588, 2008 WL 4369301 (C.A.11 (Fla.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
POZZI WINDOW COMPANY, Plaintiff-Counter-Defendant-Appellee Cross-Appellant,
v.
AUTO-OWNERS INSURANCE, Defendant-Counter-Claimant-Third Party-Plaintiff-Appellant Cross-Appellee,
v.
Coral Construction of South Florida, Inc., James Irby, Third-Party-Defendants.

No. 05-10559.
Sept. 26, 2008.

Background: Manufacturer, as insured contractor's assignee, sued commercial general liability (CGL) insurer, alleging breach of contract for denial of coverage of manufacturer's negligent supervision claim against insured, and for failure to pay insured's costs of defending manufacturer's action, and also alleging bad faith. The United States District Court for the Southern District of Florida, 429 F.Supp.2d 1311, granted summary judgment for manufacturer on issue of coverage, and, following jury verdict, entered judgment as a matter of law for insurer on bad faith claim, and set aside award of punitive damages. Insurer appealed as to coverage, and manufacturer cross-appealed judgment on bad faith claim. The Court of Appeals, 446 F.3d 1178, affirmed in part and certified a question. The Supreme Court of Florida, 984 So.2d 1241, answered the certified question.

Holding: The Court of Appeals held that a claim that insurance coverage would not exist if windows were defective prior to installation was waived.

Affirmed and remanded.

West Headnotes

Federal Courts 170B ⚿614

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk614 k. Nature and Theory of Cause. Most Cited Cases

Claim that insurance coverage would not exist under commercial general liability (CGL) policies if windows were defective prior to installation was waived where the parties had litigated the case as though the only matter at issue was whether coverage would exist if the windows were defectively installed.

***588** Denise V. Powers, Denise V. Powers, P.A., Coral Gables, FL, for Defendant-Counter-Claimant-Third Party-Plaintiff-Appellant Cross-Appellee.

Edmund M. Kneisel, Richard E. Dolder, Kilpatrick Stockton, LLP, Atlanta, GA, for ***589** Plaintiff-Counter-Defendant-Appellee Cross-Appellant.

Appeals from the United States District Court for the Southern District of Florida. D.C. Docket No. 02-23093-CV-TK.

Before TJOFLAT and HULL, Circuit Judges, and RESTANI,[FN*] Judge.

FN* Honorable Jane A. Restani, Chief Judge, United States Court of International

Trade, sitting by designation.

PER CURIAM:

**1 In this insurance dispute, Appellant Auto-Owners Insurance Company ("Auto-Owners") issued two commercial general liability policies (the "Policies") to Coral Construction of South Florida, Inc. ("Coral") and Coral's president, James J. Irby ("Irby"). Appellee Pozzi Window Company ("Pozzi") manufactured the windows in a home that Coral, as a general contractor, constructed. After the homeowner sued Pozzi for water damage due to leakage around the windows, Pozzi cross-claimed against Coral and Irby, asserting that their subcontractor had defectively installed the windows. Coral and Irby settled Pozzi's claims against them, and as part of the settlement, they assigned their rights under the Policies to Pozzi. Auto-Owners and Pozzi dispute whether the Policies cover Coral's and Irby's liability for the repair or replacement of the defectively installed windows.

The district court concluded that the Policies provided coverage and granted partial summary judgment to Pozzi. The case then proceeded to a jury trial before a magistrate judge on Pozzi's claims of bad faith and breach of contract-i.e., breach of the Policies-and the jury found in Pozzi's favor. Auto-Owners appealed.

After review and oral argument, this Court certified the coverage issue to the Florida Supreme Court. *See Pozzi Window Co. v. Auto-Owners Ins.*, 446 F.3d 1178, 1188 (11th Cir.2006) (" *Pozzi I* "). [FN1] The specific question certified to the Florida Supreme Court was:

> DOES A STANDARD FORM COMPREHENSIVE GENERAL LIABILITY POLICY WITH PRODUCT COMPLETED OPERATIONS HAZARD COVERAGE, SUCH AS THE POLICIES DESCRIBED HERE, ISSUED TO A GENERAL CONTRACTOR, COVER THE GENERAL CONTRACTOR'S LIABILITY TO A THIRD PARTY FOR THE COSTS OF REPAIR OR REPLACEMENT OF DEFECTIVE WORK BY ITS SUBCONTRACTOR?
> *Id.*

In answering this certified question, the Florida Supreme Court opined that there "appear[ed] to be a factual issue as to whether the windows themselves were defective or whether the faulty installation by the Subcontractor caused damage to both the windows and other portions of the completed project." *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So.2d 1241, 1247 (Fla.2008). The Florida Supreme Court dubbed this purported factual issue "critical," and thus answered the certified question as follows:

> If the windows were purchased by the Homeowner and were *not* defective before being installed, coverage would exist for the cost of repair or replacement of the windows.... However, a different ***590** result would follow if the windows *were* defective prior to being installed....
>
> *Id.* at 1243, 1248 (emphasis added).

The parties have litigated this case as though the only matter at issue was whether coverage would exist under the Policies if the windows were defectively installed-and *not* whether coverage would exist if the windows were defective prior to installation. As detailed in *Pozzi I*, this litigation commenced when Jorge Perez hired Coral and Irby to construct his house. *Pozzi I*, 446 F.3d at 1180. The house included windows manufactured by Pozzi and installed by Coral's and Irby's subcontractor, Brian Scott Builders, Inc. ("Scott"). *Id.* After Perez moved into the house, he complained of water damage due to leakage around the windows

FN1. In *Pozzi I*, this Court also affirmed the magistrate judge's (1) grant of judgment as a matter of law to Auto-Owners on Pozzi's claim of bad faith, and (2) decision to set aside the jury's grant of punitive damages to Pozzi. *See Pozzi I*, 446 F.3d at 1179. Further background can be found in the prior opinion. *See id.* at 1179-1182.

and filed suit against Pozzi, Coral, and Scott. *Id.*

**2 In Perez's lawsuit, Pozzi cross-claimed against Coral and Irby for negligent supervision of Scott during the window installation.[FN2] *Id.* Coral and Irby filed claims with Auto-Owners for coverage under the Policies for their liability arising from Pozzi's claim that the windows were defectively installed, but Auto-Owners responded that the damages sought by Pozzi were not covered. *Id.* Pozzi ultimately settled its cross-claims against Coral and Irby, and as part of that settlement, Coral and Irby assigned to Pozzi their rights under the Policies, including their claims against Auto-Owners for denying coverage for Pozzi's original cross-claims that alleged defective installation of the windows. *Id.*

> FN2. Pozzi settled Perez's claims and agreed to remedy the problems with the windows. *Pozzi I,* 446 F.3d at 1180.

Pozzi's cross-claims unambiguously asserted that the damages caused to Perez's home were the result of Scott's improper or defective *installation* of the windows. Amended Cross-Claim ¶ 14. More importantly, in Auto-Owners' December 2000 letter denying coverage to Coral and Irby for Pozzi's cross-claims, Auto-Owners advised as follows:

> In accordance with Florida Law, our policy will not extend coverage for the damages consisting of the defective construction performed by you or by your subcontractors. The costs incurred to remedy the *defective installation of windows* are not damages covered under your policy.

Letter from Auto-Owners to Coral (Dec. 27, 2000) (emphasis added). In other words, from the very beginning of this case, Auto-Owners denied coverage for Pozzi's cross-claims based solely on the argument that defective work performed by the subcontractor Scott was not covered under the Policies. Auto-Owners never asserted that Pozzi's claims were not covered due to defects in the windows that existed prior to installation.

Indeed, even on appeal before this Court, the statement of issues in Auto-Owners' brief identified one issue and framed the only issue as whether the Policies covered "damages for repair and replacement *due to defective workmanship* of the general contractor or its subcontract." Appellant's Br. at 1 (emphasis added). It is well-settled that an argument not raised or developed on appeal is waived. *See McFarlin v. Conseco Servs., LLC,* 381 F.3d 1251, 1263 (11th Cir.2004) (collecting cases). Even assuming *arguendo* that Auto-Owners at one time might have raised the argument that the only liability and loss in this case arose from defective manufacture of the windows and that coverage was unavailable under the Policies due to defects in the windows themselves, Auto-Owners did not raise ***591** that issue and thus waived it. The sole issue in this particular case has always been whether, under Florida law, the Policies covered Coral's and Irby's liability for repairing and replacing Scott's defective installation of the windows. *See Pozzi I,* 446 F.3d at 1188. Because the Florida Supreme Court has now answered *that* question in the affirmative, we affirm the breach-of-contract judgment in Pozzi's favor.[FN3] We remand for consideration of whether Pozzi is entitled to attorney's fees, but express no opinion about that issue. [FN4]

> FN3. The Florida Supreme Court's conclusion that there "appear[ed] to be a factual issue as to whether the windows themselves were defective or whether the faulty installation by the Subcontractor caused damage to both the windows and other portions of the completed project" seems to be based primarily on language in our original *Pozzi I* opinion. *See Auto-Owners Ins. Co.,* 984 So.2d at 1247 ("The Eleventh Circuit characterizes the 'defective work' in this case in two distinct manners."). Our opinion in *Pozzi I* contained at least fourteen references to "defective work," but there are two stray references to "defective windows." After reviewing the record again and for the reasons already outlined above,

294 Fed.Appx. 588, 2008 WL 4369301 (C.A.11 (Fla.))
(Not Selected for publication in the Federal Reporter)
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> we conclude there is no factual dispute in this coverage lawsuit, and the only issue on appeal is whether the Policies covered "damages for repair and replacement due to defective workmanship of the general contractor or its subcontractor." Appellant's Br. at 1.
>
> FN4. We note that in 2005, after a joint motion to stay by the parties, the magistrate judge entered an order staying determination of attorney's fees and costs until this appeal was resolved.

****3 AFFIRMED and REMANDED.**

C.A.11 (Fla.),2008.
Pozzi Window Co. v. Auto Owners Ins.
294 Fed.Appx. 588, 2008 WL 4369301 (C.A.11 (Fla.))

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EXHIBIT 2

Westlaw.

673 F.3d 1294, 23 Fla. L. Weekly Fed. C 827
(Cite as: 673 F.3d 1294)

H

United States Court of Appeals,
Eleventh Circuit.
AMERISURE MUTUAL INSURANCE COMPANY, a foreign corporation, Amerisure Insurance Company, a foreign corporation,
Plaintiffs–Appellees,
v.
AUCHTER COMPANY, a Florida corporation, Defendant,
Amelia Island Company, a Florida corporation, Defendant–Appellant.

No. 10–10960.
March 15, 2012.

Background: The United States District Court for the Middle District of Florida, No. 3:08-cv-00645-TJC-TEM, Timothy J. Corrigan, J., granted summary judgment in favor of insurer on its suit seeking declaratory judgment that commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to a general contractor did not provide coverage to contractor for damage to project component caused by subcontractor's defective work.

Holding: The Court of Appeals, Tjoflat, Circuit Judge, held that owner's claim against general contractor for project's defective roof was not a claim for "property damage" within the plain wording of post–1986 (CGL) policy with PCOH coverage issued to general contractor.

Affirmed.

Hill, Circuit Judge, filed opinion concurring dubitante.

Carnes, Circuit Judge, filed opinion dissenting.

West Headnotes

[1] Insurance 217 ⚿2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property damage. Most Cited Cases

Insurance 217 ⚿2296

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2296 k. Products and completed operations hazards. Most Cited Cases

Under Florida law, unless the defective component results in physical injury to some other tangible property, i.e., other than to the component itself, there is no coverage under a post–1986 commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to a general contractor, which provides coverage when a claim is made against the contractor for damage to the part of the completed project performed by a subcontractor; there is no coverage if there is no damage beyond the faulty workmanship, i.e., unless the faulty workmanship has damaged some "otherwise nondefective" component of the project, and if a subcontractor is hired to install a project component and, by virtue of his faulty workmanship, installs a defective component, then the cost to repair and replace the defective component is not "property damage."

[2] Insurance 217 ⚿2277

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2277 k. Property damage. Most Cited Cases

Insurance 217 ⚿2296

217 Insurance
217XVII Coverage—Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2296 k. Products and completed operations hazards. Most Cited Cases

Under Florida law, owner's claim against general contractor for project's defective roof was not a claim for "property damage" within the plain wording of post–1986 commercial general liability (CGL) policy with products-completed operations hazard (PCOH) coverage issued to general contractor; subcontractor's defective installation of roof did not cause "physical injury to tangible property" as required to trigger coverage under the CGL, and therefore contractor's insurer had no duty to indemnify or defend general contractor against owner's execution of the state court judgment enforcing the arbitrator's award against general contractor.

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Mark Andrew Boyle, Sr., Boyle, Gentile, Leonard & Crockett, PA, Fort Myers, FL, for Amici Curiae.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, CARNES and HILL, Circuit Judges.

TJOFLAT, Circuit Judge:

This insurance coverage dispute requires us to determine, under Florida law, what constitutes "property damage" under a post–1986 standard form commercial general liability ("CGL") policy with products-completed operations hazard ("PCOH") coverage. Specifically, we must decide whether such a policy issued to a general contractor provides coverage when a claim is made against the contractor for damage to the part of the completed project performed by a subcontractor, but not to any other project component, caused by a subcontractor's defective work.

The district court, ruling on cross-motions for summary judgment, held that the damage at issue was not covered under the policy, granted the insurer's motion, and entered a declaratory judgment for the insurer.[FN1] The insurer's adversary now appeals. In light of Florida precedent addressing the scope of similar CGL policies, we conclude that the policy provides no coverage in this case. We therefore affirm the district court.[FN2]

FN1. The district court exercised its diversity jurisdiction over the controversy pursuant to 28 U.S.C. § 1332.

FN2. We review the district court's grant of summary judgment *de novo*. *Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1331 (11th Cir.2005). We have jurisdiction over the appeal of the district court's final judgment under 28 U.S.C. § 1291. As all parties have acknowledged, Florida law governs this dispute.

I.

A.

1.

On April 17, 1997, the Amelia Island Company ("Amelia") entered into a contract with the Auchter Company ("Auchter"), a general contractor, for the construction of an inn and conference center (the "Inn") on Amelia's property in Nassau County, Florida.[FN3] Auchter entered into a subcontract agreement with Register Contracting Company ("Register") to install the Inn's roof. Amelia did not require Auchter to obtain a performance bond to

cover Auchter's contractual obligations.

> FN3. Along with the inn and conference center, the $26,572,363.49 standard form construction contract that Amelia and Auchter executed provided for the construction of various additional buildings on Amelia's property. These other buildings are not relevant to this case.

The Inn would be constructed with a barrel tile roof. This roof was made from concrete, S-shaped tiles installed in an interlocking fashion and in overlapping rows. The tiles were to be installed by screwing them to the roofing substrate, which provides*1296 the roof's water resistance. Each tile contains two screw holes and the installer must fasten one screw through each hole to prevent pivoting. Moreover, each screw must be fastened at a precise tightness: if the screw is too tight, the tile will crack; too loose and the tile can be unfastened or cracked by the upward force of the wind. The specific requirements of installation were to be according to the Florida Building Code, which dictated, in part, that the roof had to be resistant to 110 m.p.h. winds. Auchter hired Register to install the entire roof—including the roofing substrate system and the roofing tiles—at the Inn.

The contract gave Amelia the option to pay Auchter for some of the building materials used on, but not yet incorporated into, the project. These materials included the concrete roof tiles, which were delivered to and stored at the construction site before Register began installing them. On October 6, 1997, Auchter submitted a payment application to Amelia requesting payment for the Inn's roof tiles stored on site. Amelia paid Auchter for the roof tiles on October 31, 1997, at which point Amelia took ownership of the tiles under the contract.[FN4] During September and October 1997, Register installed the roof's substrate in preparation for installing the roof tiles. Register then began installing the roof tiles in November 1997, completing work on the Inn's roof in January 1998.

> FN4. Amelia disputes a statement in the district court's order that "[t]he contract provided that Auchter would ... store and insure all materials and labor for the completed project." Order at 11, *Amerisure Mut. Ins. Co. v. Auchter Co.*, No. 3:08–cv–645–J–32HTS, 2010 WL 457386 (M.D.Fla. Feb. 4, 2010). This purported discrepancy, however, is immaterial to the present dispute. The undisputed record shows that the tiles at issue in this case were delivered to Amelia's property, were paid for by Amelia, and were then installed by Register.

Beginning in August 2002, the concrete tiles on the Inn's roof began dislodging from the roof. Amelia contacted Auchter to make repairs. On two occasions—August 18, 2002, and April 4, 2003—roofers conducted temporary repairs on the affected areas. During the 2004 hurricane season, however, Hurricanes Frances, Ivan, and Jeanne skirted the Amelia Island area, causing even more tiles to come off the roof. Some of these tiles hit other tiles on the roof, cracking them. Although the exact number of tiles lost during this time is unknown, Amelia's counsel has suggested the number exceeds 25 percent. Amelia then contracted for additional temporary repairs to remedy the tile losses. Between 2002 and 2008, Amelia paid $78,007.56 to various contractors to rectify the roof's failure. In response to these expenses, Amelia contacted Auchter, arguing that Auchter was liable for the repairs. Auchter and Amelia were unable, however, to agree regarding the cause of the roof's failure.

In 2006, pursuant to the arbitration clause in Amelia's contract with Auchter, [FN5] Amelia filed a demand for arbitration. Amelia claimed that Auchter was liable to Amelia for over $2 million in damages for defectively installing the roof. Amelia alleged that Auchter breached its contractual and legal obligations to Amelia to perform its work in a good and workmanlike manner. Although Amelia asserted that *1297 the failed roof was aesthetically

deficient and dangerous to persons and property, Amelia did not allege that falling roof tiles damaged any other property or part of the project. Nor did Amelia allege that the loss of tiles had caused the roof to fail in such a way as to allow the elements to damage other components of the project. Amelia did allege, however, that it would suffer lost profits because the Inn would be unusable during the course of roof repairs.

> FN5. The relevant arbitration clause, General Condition 4.5.1, provides:
>
> > Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof[.]

Amerisure Mutual Insurance Company and Amerisure Insurance Company ("Amerisure") had issued successive CGL and umbrella liability ("UL") policies to Auchter for coverage between May 2002 and January 2006.[FN6] Amerisure defended Auchter in the arbitration proceedings under a reservation of rights. On June 25, 2008, Amerisure filed a declaratory judgment action in the United States District Court for the Middle District of Florida seeking a declaration that Amelia's claim against Auchter was not covered by the insurance policies Amerisure issued to Auchter. Specifically, Amerisure argued that Amelia's claim against Auchter was not for "property damage" as required to trigger coverage under the policies. If the district court granted Amerisure's requested relief, Amerisure would have no duty to indemnify or defend Auchter in its dispute with Amelia.

> FN6. The provisions of these policies relevant to the present dispute are provided in part I.A.2, *infra.*

While the declaratory judgment action was pending, the arbitration between Amelia and Auchter took place. The arbitrator[FN7] conducted a two-day hearing at which counsel for Amelia and Auchter made appearances.[FN8] The arbitrator found Auchter liable to Amelia for $2,167,313.67 in damages for the defective installation of the roof, which constituted a breach of Auchter's contract with Amelia. Specifically, the arbitrator found that

> FN7. The arbitration clause in the construction contract provided for arbitration before a panel of three arbitrators. Amelia and Auchter, however, stipulated that the arbitration would be heard instead by a single arbitrator.
>
> FN8. Amerisure was not a party to the arbitration. Amerisure sent a representative to the arbitration proceedings but the representative did not participate in the arbitration.

> the requirement of compliance with the 110 mile an hour wind velocity was a condition of the contract and that the failure itself combined with other evidence such as missing screws and excessively loose tiles constitute [proof] by a preponderance of [the] evidence that the roof was not installed in accordance with contract requirements.
> Appellees' Br. app. 3, at 4 (citing *Cmty. Television Servs., Inc. v. Dresser Indus., Inc.,* 586 F.2d 637 (8th Cir.1978)).

The amount of damages was supported, in part, by evidence that the entire roof had to be replaced. For one, the roof design did not permit inspection and replacement of defectively installed tiles on an individual basis. Individual replacement was impossible because "in order to determine whether all tiles have been properly nailed or screwed down, it would be required to remove the tiles in the next tier, in essence requiring removal of the entire roof." *Id.* at 5. Moreover, tiles identical to those used on the Inn's roof were unavailable.

Amelia then demanded payment of the award. Auchter, however, made no payment. [FN9] On August 7, 2009, Amelia converted the arbitrator's award to a final judgment against Auchter in state court. This judgment includes the full amount ***1298** awarded by the arbitrator plus interest and fees. Thus, Amelia has a state court judgment in hand that it is prepared to execute, but has not yet executed against any party.

FN9. The record before us indicates that at some point before the arbitration finished, Auchter ceased doing business.

2.

We return briefly to the insurance policies at issue in Amerisure's declaratory judgment action. Amerisure insured Auchter between May 1, 2002, and January 1, 2006, through a series of CGL and UL policies. In all, Amerisure issued three CGL policies and three UL policies with coverage effective during this period. For the present case, however, only two policies are relevant: the CGL and UL policies in effect in August 2002—the approximate time the Inn's roof began to fail.[FN10] Nevertheless, all the CGLs are standard form Insurance Services Office ("ISO") policies.[FN11] The operative policy language is thus identical for each of Amerisure's CGLs issued for coverage between 2002 and 2006.

FN10. Those policies are CGL policy CPP 1156636090002, effective May 1, 2002, to May 1, 2003, and UL policy CUF–1319343, effective May 1, 2002, to May 1, 2003.

FN11. As the Florida Supreme Court has explained, the ISO is "an industry organization that promulgates various standard insurance policies that are utilized by insurers throughout the country, including the standard CGL policy at issue in this case." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 879 n. 6 (Fla.2007) (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772, 113 S.Ct. 2891, 2896, 125 L.Ed.2d 612 (1993)).

The CGL policy provides, in relevant part, "[Amerisure] will pay those sums that the insured becomes legally obligated to pay as damages because of ... 'property damage' to which this insurance applies .... This insurance applies to ... 'property damage' only if ... the 'property damage' is caused by an 'occurrence[.]' " The CGL defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property .... or ... [l]oss of use of tangible property that is not physically injured." An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

After this general grant of coverage, the CGL excludes certain losses:

> j. "Property damage" to:
>
> ....
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> ....
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> ....
>
> *l.* "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged

work or the work out of which the damage arises was performed on your behalf by a subcontractor.

Exclusion (*l*) is known as the "your work" exclusion. *See, e.g., U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So.2d 871, 879 (Fla.2007). The exception to the "your work" exclusion is known as the subcontractor exception. *See id.*

***1299** The Amerisure CGL policy issued to Auchter also included PCOH coverage. PCOH is defined under the policy as follows:

> [PCOH] [i]ncludes all ... "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The UL provides coverage under the following provision: "[Amerisure] will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages which exceed the limit of 'underlying liability insurance' ... because of ... 'property damage' ... caused by an 'occurrence' to which this insurance applies." The CGL is the "underlying liability insurance" for the UL. The UL covers the same "property damage" as the CGL. Coverage under the UL, therefore, depends on the existence of coverage under the CGL. In effect, without "property damage" as covered by the CGL, there is no coverage under the UL.

3.

The insurance coverage discussed in the previous subsection lays the foundation for the arguments in the declaratory judgment action. Amerisure moved for summary judgment, seeking a declaration of no coverage for the arbitrator's award—enforceable through the state court judgment—under Amerisure's policies, on the ground that none of the arbitration damages awarded to Amelia constitute "property damage." Amelia filed a cross-motion for summary judgment seeking a declaration of coverage under Amerisure's policies. [FN12] Although named as a defendant, Auchter, which the record indicates has ceased doing business, hired no counsel and took no part in the suit.

> FN12. Although Amelia filed a Chapter 11 bankruptcy petition while the cross-motions for summary judgment were still pending, Amelia waived the automatic-stay benefits of 11 U.S.C. § 362(a) for purposes of litigating this dispute.

Both Amerisure and Amelia conceded that the crux of the dispute was whether the roof had suffered "property damage." In support of its position, Amerisure argued that Amelia's claim was essentially one to recover the roof it had paid for but not received; any damage was limited to the roof itself. In response, Amelia argued that the plain meaning of "property damage" under the CGL imposes no requirement that "other" property be damaged to trigger coverage. Even if such a requirement existed, Amelia argued, the cracked and lost roofing tiles themselves would constitute damaged property and would be covered because no CGL ex-

clusion applied. Amelia proposed distinguishing between construction defects like the one in this case—where a defective installation caused some physical degradation*1300 of the project component and thus constituted "property damage"—and other breaches of contract that had not physically manifested themselves in a detrimental way. The parties did not dispute that the subcontractor's installation of the roofing tiles was defective or that the defective installation constituted an "occurrence" under the CGL. It was also undisputed that the tiles themselves were nondefective.

On February 4, 2010, the district court entered its order granting Amerisure's motion for summary judgment, ruling that the damage to the roof was not "property damage," and that Amerisure thus had no continuing duty to defend or to indemnify Auchter regarding the arbitrator's award. The district court denied Amelia's motion and directed the clerk of the district court to enter a declaratory judgment for Amerisure, which was entered on February 5, 2010.

B.

Along with its order, the district court issued an opinion evaluating Florida Supreme Court jurisprudence on what qualifies as "property damage" under a CGL. Relying on two cases we discuss at length in part II, *infra,* the district court ruled that, under Florida law, claims solely for the repair and replacement of defective work are not claims for "property damage." A claim for "property damage" requires physical injury to some tangible property other than the contractor's own defective work.

Applying these principles, the district court found that Amelia's claim in the underlying arbitration did not allege property damage. The amounts Amelia sought were solely for the repair and replacement of the entire roof. Amelia never alleged that the defective installation caused damage to any other component of the project but the roof. The district court rejected as irrelevant Amelia's argument that the roofing damage was "property damage" because Amelia owned the tiles at the time of installation. Amelia's claim was not, the court observed, for individual broken tiles, but rather to remedy the failure of the roofing system.

II.

We turn to Florida law to resolve this dispute. *See, e.g., Ernie Haire Ford, Inc. v. Ford Motor Co.,* 260 F.3d 1285, 1290 (11th Cir.2001) ("In rendering a decision based on state substantive law, a federal court must decide the case the way it appears the state's highest court would." (citation and internal quotation marks omitted)). The Florida Supreme Court, in two seminal cases, has opined at length regarding the scope of coverage provided by CGL policies issued to general contractors in construction-defect cases. Both Amerisure and Amelia argue that these two cases— *United States Fire Insurance Co. v. J.S.U.B., Inc.,* 979 So.2d 871 (Fla.2007), and *Auto–Owners Insurance Co. v. Pozzi Window Co.,* **984** So.2d **1241** (Fla.2008) —control the outcome of the present litigation. We agree with Amerisure that *J.S.U.B.* and *Pozzi* establish that a claim like that in the present case is not a claim for "property damage" covered by CGL policies. Because the present case involves no "property damage," we need not examine the scope of the exclusions to Auchter's CGL policies.

A.

In *J.S.U.B.,* a general contractor engaged in home construction purchased a CGL policy with PCOH coverage that was, for our purposes, identical to the policy Amerisure issued to Amelia. 979 So.2d at 875–76. After completion and delivery of the contractor's work—the completed homes—damage to the foundations, drywall, and other parts of the homes appeared.*1301 *Id.* at 875. This damage was undisputedly caused by a subcontractor's improper soil use, compaction, and testing. *Id.* Pursuant to the CGL policy, the insurer paid for damage to the homeowner's personal property that resulted from the subcontractor's faulty work, but denied insurance coverage for the costs of repairing the structural damage to the homes. *Id.* at 876. J.S.U.B., the general contractor, filed a declaratory

action to determine whether the CGL policy covered property damage to the work it contracted to perform caused by the defective work of its subcontractors. *Id.* The circuit court entered judgment in favor of the insurer, but the Second District Court of Appeal reversed. *J.S.U.B., Inc. v. U.S. Fire Ins. Co.*, 906 So.2d 303 (Fla.2d Dist.Ct.App.2005).

1.

The Florida Supreme Court exercised its jurisdiction[FN13] to address "whether a post–1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work." *J.S.U.B.*, 979 So.2d at 874–75. The supreme court ultimately "answer[ed] this question in the affirmative." *Id.* at 875. The *J.S.U.B.* court began its analysis, however, by stating the rules of construction for interpreting insurance contracts, which also guide our analysis today. Under Florida law, insurance contracts are "construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage." *Id.* at 877 (citing *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla.2005)). Further, a court construing an insurance policy should interpret the policy as a whole, "endeavoring to give every provision its full meaning and operative effect." *Id.* (quoting *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla.2000)). Accordingly, the "pertinent provisions" of the insurance contract should be read *in pari materia*. *Id.* (quoting *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1075 (Fla.1998)). Exclusionary clauses, however, "cannot be relied upon to create coverage" through principles of contract interpretation where otherwise there is none. *Id.* (quoting *CTC Dev.*, 720 So.2d at 1074).

> FN13. The Florida Constitution authorizes the supreme court to "review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal ... on the same question of law." Fla. Const. art. V, § 3(b)(3).
>
> The Second District Court of Appeal's decision in *J.S.U.B., Inc. v. United States Fire Ins. Co.*, 906 So.2d 303 (Fla.2d Dist.Ct.App.2005), conflicted directly with the Fourth District Court of Appeal's holding in *Lassiter Construction Co. v. American States Insurance Co.*, 699 So.2d 768 (Fla.4th Dist.Ct.App.1997), which found that a post–1986 CGL policy did not cover damage to the general contractor's work caused by a subcontractor's defective construction.

The supreme court then discussed the origin and evolution of the standard form CGL policy. Significantly, the court addressed the ISO's 1986 addition of exclusion (*l*), the "your work" exclusion, as well as the subcontractor exception to the "your work" exclusion. Explaining these additions to the standard form policy, the court stated:

> [T]he insurance and policyholder communities agreed that the CGL policy should provide coverage for defective construction claims so long as the allegedly defective work had been performed by a subcontractor rather than the policyholder itself. This resulted both because of the demands of the policyholder community (which wanted this sort of ***1302** coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

Id. at 879 (alteration in original) (quoting 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.13[D], at 14–224.8 (3d ed. Supp. 2007)). Further, the court quoted a circular promulgated by the ISO that "confirm[s] that the 1986 revisions to the standard CGL policy ... specifically 'cover[ed] damage caused by faulty workmanship to other

parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.' " *Id.* (quoting Insurance Services Office Circular, Commercial General Liability Program Instructions Pamphlet, No. GL–86–204 (July 15, 1986)).

Because the policy in *J.S.U.B.* was a post–1986 CGL policy, the court had to first determine whether pre–1986 Florida Supreme Court construction-defect jurisprudence was controlling precedent. The leading case in that respect was *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325 (Fla.1980). *LaMarche* was "generally cited to support the proposition that CGL policies do not provide coverage for damage to the contractor's work caused by faulty workmanship." *J.S.U.B.*, 979 So.2d at 880. The *J.S.U.B.* court, however, rejected *LaMarche* as binding precedent because the *LaMarche* court based its holding on pre–1986 exclusionary language. *Id.* at 881 (citing *LaMarche*, 390 So.2d at 326).[FN14] Moreover, *LaMarche* was factually distinguishable from *J.S.U.B.*: " *LaMarche* involved a claim of faulty workmanship by the contractor, rather than a claim of faulty workmanship by the subcontractor." *J.S.U.B.*, 979 So.2d at 882. The Florida Supreme Court thus determined that *LaMarche* did not control on the issue of "whether a subcontractor's faulty workmanship is covered in a post–1986 CGL policy." *Id.* at 883.

> FN14. The relevant pre–1986 exclusionary language was standard language in post–1973 CGL policies. Coverage did not apply
>
> > (a) to liability assumed by the insured under any contract or agreement except as an incidental contract; but this exclusion does not apply to a warrant[y] of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;
> >
> > (n) to property damage to the named insured's products arising out of such products or any part of such products; [or]
> >
> > (*o*) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith[.]
>
> *J.S.U.B.*, 979 So.2d at 880 (quoting *LaMarche*, 390 So.2d at 326) (first and third alterations in original). The *J.S.U.B.* court noted additionally that *LaMarche* adopted the holding of *Weedo v. Stone–E–Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979), which was based on the same policy language as that in *LaMarche*. *J.S.U.B.*, 979 So.2d at 881 (citing *LaMarche*, 390 So.2d at 326–27).

2.

Because *LaMarche* was not dispositive, the Florida Supreme Court had to analyze whether the claim against J.S.U.B. was covered by the CGL. The court began by addressing the "threshold issue" of "whether a subcontractor's defective work can constitute an 'occurrence.' " [FN15] ***1303** *Id.* at 880. Well-settled Florida insurance jurisprudence held that when a CGL policy defines an "occurrence" as an "accident," the policy "provide[s] coverage not only for accidental events, but also injuries or damage neither expected nor intended from the standpoint of the insured." *Id.* at 883 (quoting *CTC Dev.*, 720 So.2d at 1076 (internal quotation marks omitted)). The bulk of the insurer's argument in *J.S.U.B.* was thus that defective workmanship in breach of contract could *never* give rise to covered claims because damage could be expected from the breach. *Id.* at 883–85.

> FN15. We need not belabor this discussion; the parties to this case do not dispute that there was an "occurrence" within the

> coverage period, and instead focus their arguments on the existence of "property damage." We do the same.
>
> > It is worth noting, however, that the Florida Supreme Court declined to "make the definition of 'occurrence' depend[ ] on which property was damaged," *J.S.U.B.*, 979 So.2d at 883, and rejected drawing a distinction between tort and contract claims, where faulty construction causing a tort would constitute an "occurrence," but such construction causing a breach of contract would not, *id.* at 884 ("If [the insurer] intended to preclude coverage based on the cause of action asserted, it was incumbent on [the insurer] to include clear language to accomplish this result." (citation omitted)). In declining to endorse a line of demarcation between tort and contract claims, the court noted that there exists a breach-of-contract endorsement that was not present in the CGL policy at issue in the case. *Id.* at 884.

The supreme court, however, rejected the insurer's argument. The court specifically repudiated the proposition that a breach of contract could never give rise to a covered "occurrence" within the meaning of the CGL's coverage-granting provision. *Id.* at 885 (citing *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 307 (Tenn.2007); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65, 76 (2004)). Such a definition of "occurrence" would, in large part, render the "your work" exclusion meaningless, for "if the insuring provisions do not confer an initial grant of coverage for faulty workmanship, there would be no reason for [the insurer] to exclude damage to 'your work.' " *Id.* at 886. Nor would there be a need for the subcontractor exception to the "your work" exclusion. *Id.* at 887. Extending *CTC Development,* the court held instead that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post–1986 CGL policy." *Id.* at 888. Because J.S.U.B. did not expect or intend its subcontractor's faulty work, the defective soil preparation was an "occurrence." *Id.*

The supreme court also explained that allowing claims arising from faulty workmanship would not convert CGLs to performance bonds. *Id.* at 887–88. Performance bonds, explained the court, protect a project's owner—not its contractor—by guaranteeing the project's completion after the contractor defaults. *Id.* at 887 (citing *Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So.2d 195, 198 (Fla.1992); *Sch. Bd. of Palm Beach Cnty. v. Vincent J. Fasano, Inc.*, 417 So.2d 1063, 1065 (Fla. 4th Dist.Ct.App.1982)). A performance bond does not protect the contractor or his subcontractor from liability. *Id.* at 888 (citing *Fid. & Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212, 1218 (D.Kan.2002)). The CGL insurer, by contrast, "indemnifies the insured," and does so "only for resulting 'property damage' arising after the project is completed." *Id.* (quoting *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 674 (Tex.App.2006)) (internal quotation marks omitted). Because of this distinction, "a variety of deficiencies that do not constitute 'property damage' may be covered by a performance bond, and not all deficiencies cause additional property damage." *Id.* (quoting *Lennar Corp.*, 200 S.W.3d at 674) (internal quotation marks omitted). The supreme court was thus satisfied that CGLs would not become performance bonds by recognizing that construction defects could give rise to covered claims. *Id.*

3.

Having determined that a subcontractor's faulty workmanship could give rise to an occurrence, the supreme court turned ***1304** to whether the subcontractor's faulty soil work had caused "property damage" within the meaning of the CGL. As an initial matter, the court summarized,

> [The insurer] and the amici that argue in favor of

> its position assert that faulty workmanship that injures only the work product itself does not result in "property damage." However, just like the definition of the term "occurrence," the definition of "property damage" in the CGL policies does not differentiate between damage to the contractor's work and damage to other property.
>
> *Id.* at 889.

The court rejected the insurer's contention that a subcontractor's defective work "rendered the entire project damaged from its inception." *Id.* Instead, the court drew the following distinction:

> [F]aulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused "physical injury to tangible property" within the plain meaning of the definition in the policy. If there is no damage beyond the faulty workmanship or defective work, then there may be no resulting "property damage."
>
> *Id.*

In so holding, the supreme court cited a long list of cases from Florida and other jurisdictions recognizing this distinction. Claims solely for "the costs of repairing and replacing the actual defects in ... construction" are not covered under CGL policies. *Id.* at 889–90 (citing *Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.*, 198 F.Supp.2d 1074, 1079 n. 1 (E.D.Mo.2001); *W. Orange Lumber Co. v. Ind. Lumbermens Mut. Ins. Co.*, 898 So.2d 1147, 1148 (Fla.5th Dist.Ct.App.2005); *Auto Owners Ins. Co. v. Tripp Constr., Inc.*, 737 So.2d 600, 601 (Fla.3d Dist.Ct.App.1999); *Moore & Assocs.*, 216 S.W.3d at 310; *Lennar Corp.*, 200 S.W.3d at 679–80). In *West Orange Lumber*, for example, the cost of removing and replacing cedar siding of the wrong grade, installed in breach of contract, was not "property damage." 898 So.2d at 1148; *see also Lennar Corp.*, 200 S.W.3d at 679–80 (holding that the cost of removing and replacing defective synthetic stucco to preempt water damage to buildings was not "property damage"). In *Moore & Associates*, on the other hand, a subcontractor's defective window installation caused "property damage" because the defective installation allowed water penetration that damaged the windows' surroundings. 216 S.W.3d at 310.

The supreme court reasoned that the claim in *J.S.U.B.* was more like that in *Moore & Associates* than those in *West Orange Lumber* and *Lennar*. "[*J.S.U.B.*] does not involve a claim for the cost of repairing the subcontractor's defective work"—the soil preparation itself—"but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work." *J.S.U.B.*, 979 So.2d at 890.

> Accordingly, we hold that a post–1986 standard form commercial general liability policy with products completed-operations hazard coverage, issued to a general contractor, provides coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage.

Id. at 891. Finding no CGL exclusion applicable, the court held that the structural damage to the homes J.S.U.B. built was covered by its insurance policies. *Id.*

B.

Another case from the Florida Supreme Court, *Auto–Owners Insurance Co. v. Pozzi Window Co.*, **984** So.2d **1241** (Fla.2008), sheds light upon the scope of "property damage" within the meaning of CGL policies***1305** with PCOH coverage. In *Pozzi*, a subcontractor defectively installed custom windows into a multimillion-dollar home. *Id.* at 1243. After completion of the home, the owner complained of water leakage around the windows, which had caused damage to the areas of the home surrounding the windows, as well as to the windows themselves. *Id.* at 1244. The homeowner filed suit against the builder and the subcontractor, along with the manufacturer and retailer of the windows.

Id. at 1243.

The manufacturer of the windows, the Pozzi Window Company, settled with the homeowner and agreed to remedy the defective installation of the windows. *Id.* at 1243–44. The manufacturer also settled with the builder, and, as the assignee of the builder, filed suit against the builder's insurer seeking coverage for the repair and replacement of the windows.[FN16] The builder's insurance policy was, for our purposes, identical to the policy held by Amelia in the present litigation—i.e., a CGL policy with PCOH coverage.

> FN16. The only issue in the suit between the manufacturer and insurer was whether the insurer was obligated to pay for the repair and replacement of the damaged windows; the insurer had already paid "for personal property damage caused by the leaking windows, but refused to provide coverage for the cost of repair or replacement of the windows." *Auto–Owners Ins. Co. v. Pozzi Window Co.,* **984** So.2d **1241**, 1244 (Fla.2008).

The case reached this court, which certified the following question to the Florida Supreme Court:

> DOES A STANDARD FORM [COMMERCIAL] GENERAL LIABILITY POLICY WITH PRODUCT[S] COMPLETED OPERATIONS HAZARD COVERAGE, SUCH AS THE POLICIES DESCRIBED HERE, ISSUED TO A GENERAL CONTRACTOR, COVER THE GENERAL CONTRACTOR'S LIABILITY TO A THIRD PARTY FOR THE COSTS OF REPAIR OR REPLACEMENT OF DEFECTIVE WORK BY ITS SUBCONTRACTOR?

Id. at 1243 (quoting *Pozzi Window Co. v. Auto–Owners Ins.,* 446 F.3d 1178, 1188 (11th Cir.2006)) (alteration in original).[FN17]

> FN17. As the Florida Supreme Court noted,
>
> > [w]hen the Eleventh Circuit certified the question, it did not have the benefit of our decision in *United States Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So.2d 871 (Fla.2007), in which we held that a subcontractor's defective work can constitute an "occurrence" under a post–1986 standard form general commercial liability policy.
>
> *Pozzi,* 984 So.2d at 1243.

In answering this question, the Florida Supreme Court first reiterated *J.S.U.B.*'s pronouncement on property damage. Namely, "there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.' " *Id.* at 1248 (quoting *J.S.U.B.,* 979 So.2d at 889) (internal quotation marks omitted). In so explaining, the court cited *West Orange Lumber,* the cedar-siding case discussed *supra,* for the proposition that there is no property damage "when the only damage alleged was the cost of removing and replacing the wrong grade cedar siding that had been installed" because "[t]here was no damage to the construction itself." *Id.* (citing *W. Orange Lumber,* 898 So.2d at 1148). "[T]he mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property." *Id.* Thus, the supreme court determined that the answer to the certified question was dependent on a critical factual determination: "whether the windows themselves were defective or whether the faulty installation*1306 by the Subcontractor caused damage to both the windows and other portions of the completed project." *Id.* at 1247.

If the windows contracted for were defective prior to installation, then the damage to the windows would not be covered. *Id.* at 1248. In that case, the claim would be "merely a claim to replace

a 'defective component' in the project" and could not, in and of itself, constitute property damage. *Id.* Moreover,

> the mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property.

Id.; *see also id.* at 1249 ("Without more, this alleged defect[ive] [installation] is the equivalent of the 'mere inclusion of a defective component' such as the installation of a defective tire [on a car], and no 'property damage' has occurred." (quoting *Moore & Assocs.*, 216 S.W.3d at 310) (emphasis omitted)).

On the other hand,

> [i]f the windows were purchased by the Homeowner and were not defective before being installed, coverage would exist for the cost of repair or replacement of the windows because there is physical injury to tangible property (the windows) caused by defective installation by a subcontractor.

Id. at 1248. The damage to the windows themselves would be "property damage" in this situation "because the windows were purchased separately by the Homeowner, were not themselves defective, and were damaged as a result of the faulty installation." *Id.* at 1249. The damage to the windows themselves would thus be "similar to damage to any other personal item of the Homeowner, such as wallpaper or furniture." *Id.*[FN18]

> FN18. With the certified question answered, we held that the damage to the windows was covered because Pozzi never argued that the windows themselves were defective. *Pozzi Window Co. v. Auto–Owners Ins.*, 294 Fed.Appx. 588, 591 (11th Cir.2008).

C.

[1] Ultimately, we hold that the Florida Supreme Court has drawn a distinction between "a claim for the cost of repairing the subcontractor's defective work," which *is not* covered under a CGL policy, and "a claim for repairing the structural damage to the completed [project] caused by the subcontractor's defective work," which *is* covered. *J.S.U.B.*, 979 So.2d at 890. "A claim limited to faulty workmanship or materials," as the *J.S.U.B.* court illustrated, "is one in which the sole damages are for replacement of a defective component or correction of faulty installation." *Id.* at 889–90 (quoting *Moore & Assocs.*, 216 S.W.3d at 310 (internal quotation marks omitted) (alteration omitted)). Because of this principle, there is no coverage "[i]f there is no damage beyond the faulty workmanship," i.e., unless the faulty workmanship has damaged some "otherwise nondefective" component of the project. *Id.* at 889. Moreover, if a subcontractor is hired to install a project component and, by virtue of his faulty workmanship, installs a defective component, then the cost to repair and replace the defective component is not "property damage." *Pozzi Window,* 984 So.2d at 1248. Similarly, nondefective and properly installed raw materials can constitute a defective project component when the contract specifications call for the use of different materials, yet the cost to reinstall the correct materials is not "property damage"—even though the remedy for such a nonconformity is to remove and replace that component of the project. *Id.* (citing *W. Orange Lumber,* 898 So.2d at 1148). In other ***1307** words, "unless th[e] defective component results in physical injury to some *other* tangible property," i.e., other than to the component itself, there is no coverage. *Id.* (emphasis added).

III.

[2] We now apply the CGL language and the Florida law distilled above to the present dispute. Amelia's claim against Auchter for the Inn's defective roof is not a claim for "property damage" within the plain wording of the CGL policy issued to Auchter by Amerisure. Register's defective installa-

tion of the Inn's roof did not cause "physical injury to tangible property" as required to trigger coverage under the CGL. Because there is no coverage, Amerisure has no duty to indemnify or defend Auchter against Amelia's execution of the state court judgment enforcing the arbitrator's award.

In its arbitration pleadings, Amelia alleged that "the concrete tile roof system for the Inn and Conference Center began to fail, resulting in large, concrete tiles falling from the top of the Inn and Conference Center, with resulting aesthetic deficiencies and danger to persons and property." Record, vol. 4, no. 43–5, at 4. Amelia claimed that Auchter's roof was in breach of the construction contract. Regarding damages, Amelia contended that "Auchter, through its subcontractor, installed roofs in a defective manner resulting in damage to the Inn roof and the need to replace the entire roof system at the Inn and Conference Center." *Id.* vol. 2, no. 34, app. B, at 3. The arbitration award reflects that full replacement was necessary because repairing the roof piecemeal was impossible. Appellees' Br. app. 3, at 5. Amelia has never alleged that any part of the Inn other than the roof was damaged by the defective roof.

The only damages Amelia alleges are those to correct the faulty roof supplied by Auchter's subcontractor. In so claiming, Amelia is effectively seeking to secure the roof that Auchter should have installed in the first instance: one that conformed with the contract specifications. Amelia's claim is thus simply a "claim for the cost of repairing the subcontractor's defective work." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 890 (Fla.2007). As such, Amelia's claim alleges no "property damage." *See id.* Although the loss of roof tiles may be said to have "damaged" the structural integrity of the roof, thereby rendering it defective, "there is no damage beyond the faulty workmanship" because the defective roof has not damaged some "otherwise nondefective" component of the project. *See id.* at 889. This case is like *West Orange Lumber Co. v. Indiana Lumbermens Mutual Insurance Co.*, 898 So.2d 1147, 1148 (Fla.5th Dist.Ct.App.2005), cited with approval in *J.S.U.B.*, 979 So.2d at 889, and in *Auto–Owners Insurance Co. v. Pozzi Window Co.*, **984** So.2d **1241**, 1248 (Fla.2008), where the cost of removing and replacing siding shingles—which were tiled in an overlapping, interlocking manner—was not property damage even though the defect necessitated a total replacement. *See W. Orange Lumber*, 898 So.2d at 1148. The outcome is no different where, as here, the tiles are installed atop a building rather than on its faces. Amerisure's CGL policy thus does not cover Amelia's claim.[FN19]

> FN19. The CGL contains language that, taken in isolation, superficially suggests coverage for the roof in this case. The policy provides coverage for "tangible property" that "suffers physical injury," unless a policy exclusion applies. The roof here is "tangible," perhaps as opposed to intangible. And the roof is "property": Amelia owned it, the tiles from which it is made, the building upon which it rests, and the land upon which that building sits. Also, through the subcontractor's faulty installation, the roof's integrity and performance were injured, if at all, physically. There is simply no other way—emotionally or spiritually, for example—to injure a roof. The crux of Amelia's contention, then, is that a roof whose tiles have blown away is a roof lacking structural integrity, and that a roof without integrity is an injured roof. As Amelia would have it, the subcontractor whose defective installation enabled those tiles to blow away thus caused "physical" "injury" to "tangible" "property."
>
> Combining these four words, however, does not yield coverage. Amelia's claim, in effect, reduces to the following: Amelia paid Auchter to construct a building with a roof; due to Auchter's

> subcontractor's faulty workmanship in installing the roof's tiles, Amelia did not receive the roof for which it paid. Based on this premise, as Amerisure argued at the summary judgment hearing, "The reason [Auchter] had to replace [the roof] is because [Amelia] didn't get what [it] paid for." Record, vol. 6, no. 66, at 14. This is not a claim for "property damage." *See J.S.U.B.*, 979 So.2d at 889.

***1308** Moreover, Amelia's claim all along has been solely to remedy the installation of a defective component, which in this case is the roof *as a whole*. Because the Inn's roof was an amalgamation of scores of interlocking roofing tiles and other roofing materials, the roofing tiles themselves are not the relevant components in this case. They are simply some of the raw materials from which this particular roof was made. Rather, the relevant component in this case is the Inn's entire roof itself. Amelia hired Auchter to provide an Inn with a roof; Auchter hired Register to construct that roof—not simply to install tiles. The entire roof's faulty construction rendered the roof defective—a defect that, as the parties acknowledge, can be remedied only through total reconstruction. As *Pozzi Window* instructs, however, this defect alone cannot constitute property damage. *See* 984 So.2d at 1248. If the defective roof had "result[ed] in physical injury to some other tangible property," *id.*, there would have been property damage, but because Amelia seeks only to remedy the defect—in effect, to obtain the nondefective roof that should have been built in the first place—there is none, *see id.*

Amelia's argument that the tiles damaged by the faulty installation constitute property damage is unpersuasive. Although the tiles themselves were nondefective, they were simply the materials used to construct the defective component and are thus irrelevant to the "property damage" determination. *See id.* Even if the broken tiles constituted "property damage," as the district court explained, "Amelia's recovery would be limited to the damages to the individual tiles that are broken." Order at 12, *Amerisure Mut. Ins. Co. v. Auchter Co.*, No. 3:08–cv–645–J–32HTS, 2010 WL 457386 (M.D.Fla. Feb. 4, 2010). Of course, Amelia's claim is not for damage to individual tiles, but rather to receive the roof for which it paid. Although the arbitrator determined that replacing the roof was the only way to remedy the degradation caused by the tiles' defective installation, that determination does not transform Amelia's claim into one for "property damage."[FN20]

> FN20. To be clear, *Pozzi Window* does not compel a finding of coverage in this case on the ground that the owner-purchased roofing tiles in this case are analogous to the owner-purchased, custom-built windows in *Pozzi Window*. The components involved in these two cases are not analogous. A window may be a component of a building, but each window is itself composed of various elements: glazing, jambs, sills, sashes, etc. To say that nondefective but improperly installed sashes within the finished window damaged the window is not to say that the sashes caused "property damage" to the window, but rather that the window is itself defective. *Pozzi Window* instructs that there would be no coverage for the installation of such a defective window. *See* 984 So.2d at 1248. The properly analogous description of the construction of Amelia's building is thus that nondefective but improperly installed roofing tiles within the finished roof rendered the roof defective. Just as we cannot say that the defective sashes caused "property damage" to the windows, we cannot say the tiles caused "property damage" to the roof.
>
> So, too, is it irrelevant that Amelia purchased the roofing tiles Register used to construct the Inn's roof. This is because the installation of a defective component—here, the roof—does not give rise

> to a claim for "property damage" absent damage to some property other than the component itself. *See id.* Again, the proper analog to *Pozzi Window* would be, for instance, a case in which Amelia purchased a modular prefabricated roof, which, though nondefective, was installed defectively by a subcontractor, thereby damaging the roof itself. *Pozzi Window* suggests that, in such a case, there would be coverage. *See id.* at 1249. Such facts, however, are not the facts of this case. Auchter hired Register to construct the roof component of the Inn, of Amelia's tiles, which Register did defectively and in breach of contract. This is thus a defective-component-replacement case, for which there can be no coverage under *Pozzi Window* and *J.S.U.B.*

***1309** Similarly, Amelia's proposed distinction between defective workmanship alone (uncovered) and defective workmanship that ultimately damages the functional integrity of the workman's product (covered) is a distinction without a difference.[FN21] If the alleged defect were, for example, that Register installed the wrong grade of tiles in breach of contract, Amelia's claimed "damage" would be the same: because of the way a roof is constructed, a new roof would have to be installed to correct such a defect. Essentially the same claim was held not to be property damage in *West Orange Lumber,* 898 So.2d at 1148. The particular manifestation of the breaching defective workmanship would therefore be irrelevant, so long as it does not damage some other nondefective project component. Amelia's claim thus reduces to one where the only alleged damage is the defect itself. This damage alone is not "property damage" under the language of the CGL or Florida law. *See Pozzi Window,* 984 So.2d at 1248; *J.S.U.B.,* 979 So.2d at 889.[FN22]

> FN21. Amici provide further illustration in their brief:
>
> > Examples of 'faulty workmanship' which do not involve 'property damage [ ]' include, but are not limited to, use of incorrect or insufficient materials, wrong color or type of paint, failure to complete job-related tasks, and improper installation of doors that open in the wrong direction.
>
> Brief of Amicus Curiae Nat'l Ass'n of Home Builders, Fla. Home Builders Ass'n & United Policyholders 10.

FN22. Put another way, the claim in this case would be the same if, as Amelia tries to distinguish, the tiles had been installed defectively but the defect had been discovered before tiles began blowing away. Defective installation, as the arbitrator found, meant that the tiles were prone to rotation and breakage. Because there was no way to determine which individual tiles had been improperly installed, the only way to remedy the defective installation was to remove and replace all the tiles—in effect, to install a new roof that complied with the contract specifications. Not only did each tile have to be attached to the roofing system in a precise manner, but each tile in a roof relies on its neighboring tiles to function as a cohesive system. Because of the tiles' interconnectivity, installations thereof that were in breach of contract and that would require replacing the roof would include installations that—as here—made the tiles more prone to flying off the roof. But such breaching installations would also include the installation of tiles which were of the wrong grade. In the latter case, were Amelia to insist on tiles of the grade specified in the contract, the roofing subcontractor would have to remove the nonconforming tiles and reinstall the roof with the conforming tiles. If Amelia's policy interpretation were accep-

> ted, therefore, many breaching installations of the tiles would thus "damage" the roof by requiring reinstallation. Reinstalling roof tiles may be, as here, a very expensive proposition. A very expensive claim for repair and replacement of defective workmanship alone is not, however, a claim for property damage covered by a CGL policy.

Because we determine that Amelia's claim involves no "property damage," we need not determine whether any policy exclusions or exceptions apply. *Cf.* ****1310** J.S.U.B.*, 979 So.2d at 891 ("[A] post–1986 standard form [CGL] policy with [PCOH] coverage ... provides coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work provided that there is no specific exclusion that otherwise excludes coverage."). The application of the "your work" exclusion and its subcontractor exception thus has no impact on the outcome of this case. We note, however, that these provisions can be read *in pari materia* with the "property damage" requirement and still be given full effect. *See id.* at 877. As the district court explained,

> [F]aulty workmanship to one part of a project (the roof, for example) can lead to damage to another part of the project (such as stucco walls which may leak from faulty roof construction). In such an example, under Auchter's CGL policies, the damage to the stucco walls would be "property damage" within the meaning of the policy, but would ordinarily be excluded under the "your work" exclusion, unless the stucco walls had been constructed by a subcontractor, in which case the damage could be covered by the subcontractor exception to the "your work" exclusion.

Order at 14 n. 9. Amelia, on the other hand, has never claimed such damage to any component of the Inn other than the roof itself and thus has not claimed "property damage."

Accordingly, the district court's Order granting Amerisure's motion for summary judgment and denying Amelia's motion for summary judgment is hereby

AFFIRMED.

HILL, concurring dubitante:

I believe that the significant disagreement between Judges Tjoflat and Carnes regarding which case— *West Orange Lumber Co.* or *Pozzi Window Co.* —more accurately predicts what the Florida Supreme Court would hold on the facts of the instant case militates in favor of the certification of this case to that court. Unable to persuade my brothers as to this prudent court of action, I concur dubitante in the opinion of Judge Tjoflat.

CARNES, Circuit Judge, dissenting:

My colleague, Judge Hill, concurs "dubitante" in the decision of this Court affirming the judgment of the district court. By contrast, my dissent is free of dubitante-ness. I am not dubitante in the least that the Florida Supreme Court's decision in *Auto–Owners Insurance Co. v. Pozzi Window Co.*, **984** So.2d **1241** (Fla.2008), dictates a decision in this case different from the one the majority reaches.

In the *Pozzi Window* case, the Florida Supreme Court held that coverage for the cost of repair or replacement of damaged windows depended on whether the windows were defective to begin with or were damaged because of improper installation. *See id.* at 1249. The court held that if the windows were not defective before being installed, the damage done to them was "property damage" for purposes of a commercial general liability insurance policy. *See id.* In our case, the Amelia Island Company's roof tiles were not defective to begin with but were damaged when improperly installed. Under the *Pozzi Window* decision, that is "property damage" covered by the Amelia Island Company's commercial general liability policy.

The windows involved in the *Pozzi Window*

case were custom-made ones that a property owner bought directly from a retailer and had delivered to his property on which a house was being constructed for him. *Id.* at 1243. After a subcontractor installed the windows, water leaked in around them. *See id.* An insurance coverage dispute arose about the scope of ***1311** "property damage," which is the same term at issue in the present case. *See id.* at 1244–45. The insurer refused to pay for the cost of repairing or replacing the damaged windows. *Id.* at 1244.

In response to a certified question from this Court, the Florida Supreme Court held that whether the cost of repairing or replacing the windows was "property damage" under the policy hinged on a crucial factual issue. *See id.* at 1247. That factual issue was "whether the windows themselves were defective or whether the faulty installation by the Subcontractor caused damage to both the windows and other portions of the completed project." *Id.* The "both ... and" construction in that sentence might be read to imply that damage to the windows alone would not be enough to constitute property damage. But that is not an accurate reading because the "damage to ... other portions of the completed project," *id.*, was not at issue in *Pozzi Window;* it was not at issue because the insurer had already paid for the "personal property damage caused by the leaking windows." *Id.* at 1244. In response to our inquiry, the Florida Supreme Court addressed the question of whether the cost of repairing or replacing the damaged windows themselves was covered. *See id.* at 1243–44. The answer it gave was that it depended on whether the windows were defective or damaged before being installed. If they were, there was no policy coverage; however, if they were not defective or damaged before the installation began, the policy covered the cost of repairing or replacing the windows. *Id.* at 1243–44.

No one has suggested that the roof tiles involved in this case were defective or damaged before the installation began. Instead, everyone agrees that the damage to the tiles occurred because the subcontractor improperly installed them. As the majority opinion explains, defective installation caused the tiles to fall off of the roof, and some of the tiles that fell hit other tiles and cracked them. Maj. Op. at 1296–97. None of the damaged tiles could be used or re-used, so all of those tiles were effectively destroyed. Destroyed roof tiles meet the commercial general liability policy's definition of "property damage" as "[p]hysical injury to tangible property." Doc. 36–2 at § V, ¶ 17a.

The destruction of those individual tiles was not the full extent of the property damage caused by the defective installation. Because some of the tiles were destroyed, all of the tiles on the roof had to be replaced. As the majority opinion explains, "the roof design did not permit inspection and replacement of defectively installed tiles on an individual basis," and "tiles identical to those used on the Inn's roof were unavailable." Maj. Op. at 1297. For those reasons, under the terms of the general commercial liability insurance policy, the "property damage" that occurred as a result of the defective installation of the tiles was both the "[p]hysical injury to tangible property" (the destroyed tiles) and the "[l]oss of use of tangible property that is not physically injured" (the other tiles on the roof). Doc. 36–2 at § V, ¶¶ 17a, 17b.

Substituting roof "tiles" for "windows" in the key parts of the Florida Supreme Court's *Pozzi Window* opinion shows that there is coverage in this case: "If the [tiles] were purchased by the [Amelia Island Company] and were not defective before being installed, coverage would exist for the cost of repair or replacement of the [tiles] because there is physical injury to tangible property (the [tiles]) caused by defective installation by a subcontractor." *Pozzi Window,* 984 So.2d at 1248.

Again, substituting "tiles" for "windows" in the *Pozzi Window* opinion shows how we should decide this case:

> ***1312** [I]f the claim is for the repair or replacement of [tiles] that were not initially defective but

were damaged by the defective installation, then there is physical injury to tangible property. In other words, because the [tiles] were purchased separately by [the Amelia Island Company], were not themselves defective, and were damaged as a result of the faulty installation, then there is physical injury to tangible property, i.e., [tiles] damaged by defective installation. Indeed, damage to the [tiles] themselves caused by the defective installation is similar to damage to any other personal item of the [property owner], such as wallpaper or furniture. Thus, coverage would exist for the cost of repair or replacement of the [tiles] because the Subcontractor's defective installation caused property damage.

Id. at 1249.

The majority opinion misinterprets the following sentence from the *Pozzi Window* opinion: "[T]he mere inclusion of a defective component, such as a defective window or the defective installation of a window, does not constitute property damage unless that defective component results in physical injury to some other tangible property." *Id.* at 1248; *see* Maj. Op. at 1305. But the sentence that immediately follows that one in the *Pozzi Window* opinion shows how inapplicable the statement in that quoted sentence is to the present case: " *Accordingly,* if the claim in this case is for the repair or replacement of windows that were *defective both prior to installation and as installed,* then that is merely a claim to replace a 'defective component' in the project." 984 So.2d at 1248 (emphasis added). In this case, the roof tiles were not a defective component—they were not "defective both prior to installation and as installed," *id.;* the insured is not seeking to replace an initially defective component in the roofing project. Instead, under *Pozzi Window*, because the claim in this case is for the repair or replacement of tiles "that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property." *Id.* at 1249. The *Pozzi Window* formula is: non-defective components damaged by defective installation equals physical injury to tangible property, which is property damage. Fed into that formula, the facts of this case add up to "property damage" and coverage.

The majority opinion attempts to frame the roof as a whole as the "defective component" in this case. *See* Maj. Op. at 1308, 1308–09 n. 20. But no part of the roof was ever defective except for the tiles that were damaged or destroyed because they were improperly installed. The facts of this case simply do not fit in the defective component scenario described in *Pozzi Window. See* 984 So.2d at 1248. Instead, these facts fit into the non-defective component/defective installation scenario. *See id.* at 1249. For that reason, I would hold that the *Pozzi Window* decision resolves the dispute in favor of insurance coverage.

The majority opinion, however, asserts that "[t]his case is like *West Orange Lumber Co.* ... where the cost of removing and replacing siding shingles—which were tiled in an overlapping, interlocking manner—was not property damage even though the defect necessitated a total replacement." Maj. Op. at 1307. The majority's *West Orange Lumber* analogy, like any defective component, won't work. The installation of the siding shingles in that case did not damage them; the shingles were already "defective" before they were installed because they did not conform to the contract specifications. *See W. Orange Lumber Co. v. Ind. Lumbermens Mut. Ins. Co.,* 898 So.2d 1147, 1148 (Fla. 5th DCA 2005). The subcontractor who had installed those defective shingles sued the supplier of them, and the court held that ***1313** the insurance company had no duty to defend or indemnify the shingle supplier. *Id.* at 1147–48. The court noted: "[T]he allegations in the complaint show the owner or general contractor's property suffered no damage from the failure to supply the correct quality of [shingles]. The only damage alleged was the cost or expense to the vendor to remove the defective product and supply an acceptable substitute." *Id.* at 1148. The court also noted that the insurance

policies in that case contained "exclusions which clearly exempt from coverage damages incurred by a vendor who *supplies defective products* and is required to remove and replace them with the specified products." *Id.* at 1149 (emphasis added).

One more time. In this case tiles, which were the correct product and were not defective, were sold to the Amelia Island Company, and then they were damaged by defective installation, and as a result of that damage all of the tiles had to be replaced. The *West Orange Lumber* case is different because in it the shingles were the wrong product and for that reason were defective, requiring that all the shingles be replaced even though they were installed correctly. The Florida Supreme Court's *Pozzi Window* decision is open and shut on the issue in this case, and the majority's attempt to hammer the facts of this case into the *West Orange Lumber* decision is itself an instance of defective installation. And there is no reason to be dubitante about that.

C.A.11 (Fla.),2012.
Amerisure Mut. Ins. Co. v. Auchter Co.
673 F.3d 1294, 23 Fla. L. Weekly Fed. C 827

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EXHIBIT 3

Westlaw.

110 So.3d 399, 38 Fla. L. Weekly S151
(Cite as: 110 So.3d 399)

H

Supreme Court of Florida.
TIARA CONDOMINIUM ASSOCIATION, INC., etc., Appellant,
v.
MARSH & MCLENNAN COMPANIES, INC., etc., et al., Appellees.

No. SC10–1022.
March 7, 2013.

Background: Condominium association brought action against insurance broker, alleging breach of contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, negligence, and breach of fiduciary duty. The United States District Court for the Southern District of Florida, No. 08-80254-CV-DTKH,Daniel T.K. Hurley, J., granted summary judgment in favor of broker on all claims. Association appealed, and the Court of Appeals, 607 F.3d 742,Dubina, Chief Judge, affirmed in part and certified a question to the Florida Supreme Court.

Holding: The Supreme Court, Labarga, J., held that the economic loss rule applies only in the products liability context, receding from *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180; *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244; *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628; *Moransais v. Heathman*, 744 So.2d 973; *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219; *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532.

Certified question answered.

Pariente, J., filed concurring opinion in which Lewis and Labarga, JJ., concurred.

Polston, C.J., filed dissenting opinion in which Canady, J., concurred.

Canady, J., filed dissenting opinion in which Polston, C.J., concurred.

West Headnotes

[1] Torts 379 ⚿118

379 Torts
379I In General
379k116 Injury or Damage from Act
379k118 k. Economic loss doctrine. Most Cited Cases

The "economic loss rule" is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.

[2] Products Liability 313A ⚿156

313A Products Liability
313AII Elements and Concepts
313Ak154 Nature of Injury or Damage
313Ak156 k. Economic losses; damage to product itself. Most Cited Cases

Torts 379 ⚿118

379 Torts
379I In General
379k116 Injury or Damage from Act
379k118 k. Economic loss doctrine. Most Cited Cases

The economic loss rule applies only in the products liability context; receding from *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180; *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244; *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628; *Moransais v. Heathman*, 744 So.2d 973; *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219; *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532.

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(Cite as: 110 So.3d 399)

[3] Courts 106 ⚿90(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(1) k. In general. Most Cited Cases

Courts 106 ⚿90(6)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(6) k. Erroneous or injudicious decisions. Most Cited Cases
The Supreme Court will depart from precedent when such departure is necessary to vindicate other principles of law or to remedy continued injustice; stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice.

***399** Mark L. McAlpine of McAlpine & Associates, P.C., Auburn Hills, MI, for Appellant.

Mitchell J. Auslander and Christopher J. St. Jeanos of Willkie, Farr & Gallagher, LLP, New York, NY, for Appellees.

***400** LABARGA, J.

This case is before the Court for review of a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that is determinative of a cause pending in that court and for which there appears to be no controlling precedent. We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const. In *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., Inc.*, 607 F.3d 742, 749 (11th Cir.2010), the Eleventh Circuit certified the following question to this Court:

> DOES AN INSURANCE BROKER PROVIDE A "PROFESSIONAL SERVICE" SUCH THAT THE INSURANCE BROKER IS UNABLE TO SUCCESSFULLY ASSERT THE ECONOMIC LOSS RULE AS A BAR TO TORT CLAIMS SEEKING ECONOMIC DAMAGES THAT ARISE FROM THE CONTRACTUAL RELATIONSHIP BETWEEN THE INSURANCE BROKER AND THE INSURED?

Because the question as certified by the Eleventh Circuit is premised on the continued applicability of the economic loss rule in cases involving contractual privity, we restate the certified question as follows:

> DOES THE ECONOMIC LOSS RULE BAR AN INSURED'S SUIT AGAINST AN INSURANCE BROKER WHERE THE PARTIES ARE IN CONTRACTUAL PRIVITY WITH ONE ANOTHER AND THE DAMAGES SOUGHT ARE SOLELY FOR ECONOMIC LOSSES?

We answer this question in the negative and hold that the application of the economic loss rule is limited to products liability cases. Therefore, we recede from prior case law to the extent that it is inconsistent with this holding. We begin by discussing the facts and procedural background of this case. We then turn to our analysis.

FACTS AND PROCEDURAL BACKGROUND

The facts of this case are set forth in the Eleventh Circuit Court of Appeals' opinion in *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., Inc.*, 607 F.3d 742 (11th Cir.2010). We summarize the facts here. Tiara Condominium Association (Tiara) retained Marsh & McLennan (Marsh) as its insurance broker. One of Marsh's responsibilities was to secure condominium insurance coverage. Marsh secured windstorm coverage through Citizens Property Insurance Corporation (Citizens),

which issued a policy that contained a loss limit in an amount close to $50 million. In September 2004, Tiara's condominium sustained significant damage caused by hurricanes Frances and Jeanne. Tiara began the process of loss remediation. After being assured by Marsh that the loss limits coverage was per occurrence (meaning that Tiara would be entitled to almost $100 million rather than coverage in the aggregate, which would be half of that amount), Tiara proceeded with more expensive remediation efforts. However, when Tiara sought payment from Citizens, Citizens claimed that the loss limit was $50 million in the aggregate, not per occurrence. Eventually, Tiara and Citizens settled for approximately $89 million, but that amount was less than the more than $100 million spent by Tiara.

In October 2007, Tiara filed suit against Marsh, alleging (1) breach of contract, (2) negligent misrepresentation, (3) breach of the implied covenant of good faith and fair dealing, (4) negligence, and (5) breach of fiduciary duty. The trial court granted summary judgment in favor of Marsh on all claims and Tiara appealed to the Eleventh Circuit. The appeals court concluded that summary judgment was proper as to ***401** the breach of contract, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing claims.[FN1] However, the appeals court did not affirm the summary judgment granted by the trial court on the negligence and breach of fiduciary duty claims, which were based on Tiara's allegations that Marsh was either negligent or breached its fiduciary duty by failing to advise Tiara of its complete insurance needs and by failing to advise Tiara of its belief that Tiara was underinsured. As to these two claims, the appeals court certified a question to this Court to determine whether the economic loss rule prohibits recovery, or whether an insurance broker falls within the professional services exception that would allow Tiara to proceed with the claims. We turn now to a discussion of the economic loss rule.

FN1. The Eleventh Circuit concluded that Marsh correctly interpreted the policy as containing a per-occurrence limit of liability. *See Tiara,* 607 F.3d at 747.

ANALYSIS

Origin and Development of the Economic Loss Rule

"The exact origin of the economic loss rule is subject to some debate and its application and parameters are somewhat ill-defined." *Moransais v. Heathman,* 744 So.2d 973, 979 (Fla.1999). In its simplest form, we noted, the rule appeared initially in both state and federal courts in products liability type cases. *Id.* at 979. A historical review of the doctrine reveals that it was introduced to address attempts to apply tort remedies to traditional contract law damages. In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.,* 620 So.2d 1244 (Fla.1993), we recognized the economic loss rule as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Id.* at 1246 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis,* 40 S.C.L.Rev. 891, 894 (1989)). We have defined economic loss as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Casa Clara,* 620 So.2d at 1246 (quoting Note, *Economic Loss in Products Liability Jurisprudence,* 66 Colum. L.Rev. 917, 918 (1966)). We further explained that economic loss

> includes "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages–Tort or Contract?,* 114 U. Pa. L.Rev. 539, 541 (1966). In other words, economic losses are "disappointed economic expectations," which are protected by con-

tract law, rather than tort law. *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55, 58 (1988); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987).

Casa Clara, 620 So.2d at 1246.

[1] Simply put, the economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla.2004). The rule has its roots in the products liability arena, and was primarily intended to limit actions in the products liability context.

***402** Despite its underpinnings in the products liability context, the economic loss rule has also been applied to circumstances when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract.

Contractual Privity Economic Loss Rule

"The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Am. Aviation*, 891 So.2d at 536 (citing *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994) ("Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort."). When the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. *Am. Aviation*, 891 So.2d at 536–37); *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 103 (Fla. 4th DCA 1969) ("[N]o cause of action in tort can arise from a breach of a duty existing by virtue of contract.").

The contractual privity application of the economic loss rule is best exemplified by our decision in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla.1987).[FN2] There, AFM entered into an agreement with Southern Bell that included placing AFM's advertising in the yellow pages. *See id.* at 180. However, Southern Bell listed an incorrect phone number for AFM, causing AFM economic damages. *See id.* In asserting a claim for economic losses, AFM chose to proceed solely on a negligence theory in the trial court below rather than base its theory of recovery on any agreement between the parties. *See id.* at 181. In determining that AFM could not recover economic losses based on a tort theory, this Court noted that AFM's contract with Southern Bell "defined the limitation of liability through bargaining, risk acceptance, and compensation." *Id.* Because AFM had not proved that Southern Bell committed a tort independent of the breach of contract, this Court concluded that AFM had no basis for recovery in negligence. *See id.*

> FN2. We later receded from *AFM* to the extent that it was unnecessarily expansive in its reliance on the economic loss rule as opposed to fundamental contractual principles. *See American Aviation*, 891 So.2d at 542.

Subsequently, in *American Aviation*, we recognized that despite the general prohibition against a recovery in tort for economic damages for parties in privity of contract, we have allowed it in torts committed independently of the contract breach, such as fraud in the inducement. *See* 891 So.2d at 537. For example, in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla.1996), we stated:

> The economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action. Where a contract ex-

ists, a tort action will lie for either intentional or negligent acts considered to be independent from the acts that breached the contract. Fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract.

***403** *Am. Aviation,* 891 So.2d at 537 (quoting *HTP, Ltd.,* 685 So.2d at 1239 (citations omitted)). *See also PK Ventures, Inc. v. Raymond James & Assocs.,* 690 So.2d 1296 (Fla.1997) (economic loss rule did not preclude a cause of action by the buyer of commercial property against the seller's broker for negligent misrepresentation).[FN3]

FN3. In *Moransais,* in describing our refusal to apply our past liberal application of the economic loss rule in *PK Ventures* and *HTP, Ltd.,* we made the following observation: "More recently this Court has recognized the danger in an unprincipled extension of the rule, and we have declined to extend the economic loss rule to actions based on fraudulent inducement and negligent misrepresentation." 744 So.2d at 981.

Another situation in which this Court has determined that public policy dictates that liability not be limited to the terms of the contract involves cases such as those alleging neglect in providing professional services. *See, e.g., Moransais,* 744 So.2d at 983 ("While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice.").

Products Liability Economic Loss Rule

Although the economic loss rule has, over time, been extended to the contractual privity context, the roots of the rule may be found in the products liability context. The products liability economic loss rule developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. *Am. Aviation,* 891 So.2d at 537–38. As the theory of strict liability replaced the theory of implied warranties with regard to actions based on defective products that resulted in personal injury, the issue arose as to whether the courts should permit a cause of action in tort by one who suffered purely economic loss due to a defective product. *Id.* at 539. For those who were in contractual privity, actions based on breach of warranty continued as the viable method if the only damages were economic in nature. *Id.* But for those who were not in contractual privity and who sustained economic losses as a result of defective products, the question became what theory of recovery would be proper. *Id.*

The development of Florida's products liability economic loss rule can be traced to two cases: *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145, 149 (1965), and *East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 871, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). In *Seely,* the California Supreme Court held that the doctrine of strict liability in tort had not supplanted causes of action for breach of express warranty. The court was confronted with a situation in which a plaintiff sought recovery for economic loss resulting from his purchase of a truck that failed to perform according to expectations. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149. The California Supreme Court agreed with the trial court that the defendant could recover the money he paid on the purchase price of the truck and for his lost profits on the basis of breach of express warranty, *see id.,* 45 Cal.Rptr. 17, 403 P.2d at 148, but rejected the argument that warranty law had been superseded by the doctrine of strict liability. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149. The court concluded that the strict liability doctrine was not intended to undermine the warranty provisions of sales or contract law, but was designed to govern the wholly separate and distinct problem of physical injuries caused by defective products. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149–50.

The California Supreme Court recognized that

the rules of warranty continued ***404** to function well in a commercial setting, allowing the manufacturer to determine the quality of the product and the scope of its liability if the product failed to perform. The court reasoned that a manufacturer's liability under that theory would extend to all subsequent purchasers regardless of whether the manufacturer's promise regarding the fitness of the product was ever communicated to those purchasers. If the manufacturer were strictly liable for economic losses resulting from the failure of its product to perform as promised by the warranty, it would be liable not only to the initial purchaser, but to every consumer who subsequently obtained possession of the product. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 150.

In *East River,* the United States Supreme Court adopted the reasoning in *Seely* when it considered the issue of economic loss resulting from defective products in the context of admiralty. According to the Supreme Court, when the damage is to the product itself, "the injury suffered—the failure of the product to function properly— *is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.* " *Id. East River,* 476 U.S. at 868, 106 S.Ct. 2295 (emphasis supplied). The Court stated:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. *The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies.* In exchange, the purchaser pays less for the product.

Id. at 872–73, 106 S.Ct. 2295 (emphasis supplied) (footnote and citation omitted). Recognizing that extending strict products liability to cover economic damage would result in "contract law ... drown[ing] in a sea of tort," *id.* at 866, 106 S.Ct. 2295, the Supreme Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871, 106 S.Ct. 2295. Thus, from the outset, the focus of the economic loss rule was directed to damages resulting from defects in the product itself.

Relying on the reasoning in *Seely* and *East River,* this Court adopted the products liability economic loss rule, precluding recovery of economic damages in tort where there is no property damage or personal injury, in *Florida Power & Light Co. v. Westinghouse Elec. Corp.,* 510 So.2d 899 (Fla.1987), our seminal case on the applicability of the economic loss rule. Florida Power & Light (FPL) entered into contracts with Westinghouse in which Westinghouse agreed to design, manufacture, and furnish two nuclear steam supply systems, including six steam generators. FPL discovered leaks in all six generators. FPL brought suit, alleging that Westinghouse was liable for breach of express warranties in the contracts and for negligence, and sought damages for the cost of repair, revision, and inspection of the steam generators. *Id.* at 900.

In determining whether Florida law permitted FPL to recover the economic losses in tort without a claim for personal injury or separate property damage, this Court considered the policy issues supporting the application of a rule that limits tort recovery for economic losses when a product damages itself. *Id.* Concluding that warranty law was more appropriate than tort law for resolving economic losses in this context, the Court adopted the holding in *East River* that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product***405** from injuring itself." *Florida Power,* 510 So.2d at 901 (quoting *East River,* 476 U.S. at 871, 106 S.Ct. 2295). Thus, as we reaffirmed in *American Aviation:*

> The economic loss rule adopted in *Florida Power* represents this Court's pronouncement that, notwithstanding the theory of strict liability adopted in *West,*[FN4] strict liability has not replaced warranty law as the remedy for frustrated

economic expectations in the sale of goods. In exchange for eliminating the privity requirements of warranty law and *expanding* the tort liability for manufacturers of defective products which cause personal injury, we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself.

> FN4. In *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 92 (Fla.1976), we adopted the theory of strict products liability in Florida.

Am. Aviation, 891 So.2d at 541. We also noted that "the products liability economic loss rule articulated in *Seely* and *East River,* and adopted by this Court in *Florida Power,* applies even in the absence of privity of contract." *Id.* (citing *Airport Rent–A–Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 631 (Fla.1995) (holding cause of action for negligence against manufacturer of defective buses was barred by the economic loss rule notwithstanding absence of privity)); *see also Casa Clara,* 620 So.2d at 1248 (holding cause of action against manufacturer of defective concrete was barred by the economic loss rule notwithstanding absence of privity).

Simply stated, "[t]he essence of the early holdings discussing the rule is to prohibit a party from suing in tort for purely economic losses to a product or object provided to another for consideration, the rationale being that in those cases 'contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.' " *Moransais,* 744 So.2d at 980 (citing *Florida Power,* 510 So.2d at 902). Such was the reasoning in *East River, Seely,* and ultimately, *Florida Power.*

An examination of the application of the economic loss rule in Florida from its inception to our ruling in *Florida Power,* reveals that this Court adhered strictly to the reasoning of *East River* and *Seely.* Subsequent to our ruling in *Florida Power,* however, we issued a number of rulings which, as aptly stated in *Moransais,* "appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent." *Moransais,* 744 So.2d at 980. For example, in *AFM,* as previously discussed, we extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional service context. *See AFM,* 515 So.2d at 181. We also noted in *Moransais,* that "[w]hile we continue to believe the outcome of [*AFM*] is sound, we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles." *Moransais,* 744 So.2d at 981.

In *Casa Clara,* we held that the economic loss rule barred a cause of action in tort for providing defective concrete where there was no personal injury or damage to property other than to the product itself.[FN5] ***406** *Casa Clara,* 620 So.2d at 1248. In *Airport Rent–A–Car,* we followed the reasoning in *Casa Clara* in holding the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses where the only damage alleged was to the buses themselves. *Airport Rent–A–Car,* 660 So.2d at 630–31.

> FN5. Our opinion, however, was not unanimous, especially as to our characterization of "other property." We stated that tort law was designed to protect the interest of society as a whole by imposing a duty of reasonable care to prevent property damage or physical harm to others, whereas contract law operates to protect the economic expectations of the contracting parties when a "product" is the object of the contract. *Casa Clara,* 620 So.2d at 1246.

In *American Aviation,* in recognizing our history of unprincipled extension of the rule, we concluded that the economic loss rule should be expressly limited to the original rationale and intent

of *Seely, East River,* and *Florida Power,* and held that a manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Am. Aviation,* 891 So.2d at 542. "In other words, we reaffirm our recognition of the products liability economic loss rule." *Id.* at 543. Despite this recognition, we expressly noted that the "other property" exception to the products liability economic loss rule remained viable. *Id.* In addition to the "other property" exception, we also reaffirmed that in cases involving either privity of contract or products liability, the other exceptions to the economic loss rule that we have developed, such as for professional malpractice,[FN6] fraudulent inducement,[FN7] and negligent misrepresentation, [FN8] or free-standing statutory causes of action still apply.[FN9] *Am. Aviation,* 891 So.2d at 543. We expressly emphasized, "[t]hese exceptions remain untouched by our ruling today." *See id.*

FN6. *See Moransais,* 744 So.2d at 983.

FN7. *See HTP, Ltd.,* 685 So.2d at 1239.

FN8. *See PK Ventures,* 690 So.2d at 1297.

FN9. *See Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.,* 753 So.2d 1219, 1221 (Fla.1999)

Thus, despite our effort to roll back the economic loss rule to its products liability roots, we left untouched a number of exceptions which continue to extend the application of the rule beyond our original limited intent.

A Legacy of Unprincipled Expansion

For some time, as reflected by the foregoing discussion, this Court has been concerned with what it perceived as an over-expansion of the economic loss rule. We began expressing this concern in *Moransais,* where we noted our refusal to extend its application to actions based on fraudulent inducement and negligent representation cases. *Id.* at 981 (citing *PK Ventures* (negligent misrepresentation); *HTP* (fraudulent inducement)). We observed,

> the [economic loss] rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. We hesitate to speculate further on situations not actually before us. The rule, in any case, should not be invoked to bar well-established causes of actions in tort, such as professional malpractice.

Moransais, 744 So.2d at 983 (footnote omitted). Five years later, in *American Aviation,* we reaffirmed our concern with the over-expansion of the rule and again noted that the economic loss rule should be expressly limited. We emphasized this concern with the following statement:

> Several justices on this Court have supported expressly limiting the economic loss rule to its principled origins. In *Moransais,* Justice Wells stated "directly that it is [his] view that the economic*407 loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product." *Moransais,* 744 So.2d at 984 (Wells, J., concurring). Two justices subsequently joined Justice Wells when he reiterated this position in *Comptech International, Inc. v. Milam Commerce Park, Ltd.,* 753 So.2d 1219 (Fla.1999). *See id.* at 1227 (Wells, J., concurring with an opinion in which Justices Lewis and Pariente joined).

Am. Aviation, 891 So.2d at 542. Thus, in *Moransais, Comptech,* and *American Aviation,* this Court clearly expressed its desire to return the economic loss rule to its intended purpose—to limit actions in the products liability context. In each instance, however, we left intact a number of exceptions that continue the rule's unprincipled expansion. We simply did not go far enough.

[2][3] Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the

rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability. The Court will depart from precedent as it does here "when such departure is 'necessary to vindicate other principles of law or to remedy continued injustice.' " *Allstate Indem. Co. v. Ruiz,* 899 So.2d 1121, 1131 (Fla.2005) (quoting *Haag v. State,* 591 So.2d 614, 618 (Fla.1992)). Stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice. *See Westgate Miami Beach, Ltd. v. Newport Operating Corp.,* 55 So.3d 567, 574 (Fla.2010). Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.

CONCLUSION

Because we now limit the application of the economic loss rule to cases involving products liability, it is not necessary for us to decide whether the economic loss rule exception for professionals applies to insurance brokers. Based on the foregoing, we answer the rephrased certified question in the negative and hold that the application of the economic loss rule is limited to products liability cases. Having answered the rephrased certified question, we return this case to the Eleventh Circuit Court of Appeals.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.
PARIENTE, J., concurs with an opinion, in which LEWIS and LABARGA, JJ., concur.
POLSTON, C.J., dissents with an opinion, in which CANADY, J., concurs.
CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.
PARIENTE, J., concurring.

I concur with the majority's principled conclusion that the economic loss rule is limited to the products liability context. I write to address Justice Canady's assertion in dissent that the Court's decision represents a "dramatic unsettling of Florida law," dissenting op. at 413 (Canady, J.), and to explain that the majority's conclusion is fully consistent with the development of this Court's jurisprudence on the applicability of the economic loss rule in Florida.

***408** The majority's conclusion that the economic loss rule is limited to the products liability context is not a departure from precedent, but instead simply represents the culmination of the Court's measured articulation of the economic loss rule's original intent. This view has been expressed various times, starting in *Moransais v. Heathman,* 744 So.2d 973 (Fla.1999), where Justice Wells stated his belief that "the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product" and that some of the Court's prior decisions had produced "confusion as to the rule's applicability." *Id.* at 984 (Wells, J., concurring). Justice Wells, joined by Justice Lewis and myself, similarly explained in *Comptech International, Inc. v. Milam Commerce Park, Ltd.,* 753 So.2d 1219, 1227 (Fla.1999) (Wells, J., concurring), that "in order to clarify the application of the economic loss rule," the Court should "expressly state that its application is limited to product claims." Today, the Court has done so. This decision provides clear guidance to the lower courts as to the meaning of the economic loss rule in Florida and is both doctrinally principled and consistent with the trajectory of our prior precedent.

Our decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the economic loss rule was always intended to apply only to products liability cases. *See Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.,* 891 So.2d 532, 541 (Fla.2004) ("In

exchange for eliminating the privity requirements of warranty law and *expanding* the tort liability for manufacturers of defective products which cause personal injury [by adopting strict products liability], we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself."). This is because the rule itself acts merely as a specific articulation of the proper approach for those products liability cases in which contract principles, rather than tort principles, are best suited for resolving the claim. *See Fla. Power & Light Co. v. Westinghouse Elec. Corp.,* 510 So.2d 899, 901–02 (Fla.1987) (citing with approval several district courts of appeal cases holding that strict liability applies only where the plaintiff has suffered personal injury or damage to other property and explaining that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage").

The majority's conclusion that the economic loss rule is limited to the products liability context does not undermine Florida's contract law or provide for an expansion in viable tort claims. Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in dissent, our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim. *See Lewis v. Guthartz,* 428 So.2d 222, 224 (Fla.1982) (holding that there must be a tort "distinguishable from or independent of [the] breach of contract" in order for a party to bring a valid claim in tort based on a breach in a contractual relationship); *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.,* 482 So.2d 518, 519 (Fla. 3d DCA 1986) ("[A] breach of contract, alone, cannot constitute a cause of action in tort.... It is only when the breach of contract is attended ***409** by some additional conduct which amounts to an independent tort that such breach can constitute negligence." (citations omitted)).

While the contractual privity form of the economic loss rule has provided a simple way to dismiss tort claims interconnected with breach of contract claims, it is neither a necessary nor a principled mechanism for doing so. Rather, these claims should be considered and dismissed as appropriate based on basic contractual principles—a proposition we reaffirmed in *American Aviation,* where we stated that "when the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss." *Am. Aviation,* 891 So.2d at 542. The majority's decision does not change this statement of law, but merely explains that it is common law principles of contract, rather than the economic loss rule, that produce this result.

The economic loss rule is not a long-standing common law rule that has always existed in our jurisprudence to define the parameters of cognizable contract and tort causes of action, but is instead a doctrine that arose in the torts context to serve a specific purpose—to curb potentially unbounded liability following the adoption of strict products liability. Indeed, we explicitly noted in *American Aviation* that "[t]he economic loss rule adopted in *Florida Power* represents this Court's pronouncement that, notwithstanding the theory of strict liability adopted in *West* [*v. Caterpillar Tractor Co.,* 336 So.2d 80, 92 (Fla.1976)], strict liability has not replaced warranty law as the remedy for frustrated economic expectations in the sale of goods." *Am. Aviation,* 891 So.2d at 541. Accordingly, I believe that limiting the rule to the specific context from which it developed is principled because it prevents unnecessary complexity in the law and restricts the rule's application to its "genuine, but limited, value in our damages law." *Id.* at 542 (quoting *Moransais,* 744 So.2d at 983). In other words, as we first recognized in *Moransais,* "fundamental contractual

principles" already properly delineate the general boundary between contract law and tort law. *Moransais,* 744 So.2d at 981. Application of the economic loss rule to serve this function outside the products liability context simply allows for the possibility of confusion, overuse, and the restriction of well-established common law remedies.

Indeed, this is exactly what has happened since we first adopted the economic loss rule in Florida. Over time, the rule has been inadvertently extended to cover situations outside the context of products liability. *See id.* at 980 ("Unfortunately, however, our subsequent holdings have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent."). Not only has this proved unworkable, as the majority aptly notes, but it is outside the original intent of the rule and, indeed, of our prior decisions. In my view, Justice Canady's assertion in dissent that the majority's conclusion "repudiates our case law," dissenting op. at 411 (Canady, J.), is not borne out by a close examination of the history of our economic loss rule cases.

We have repeatedly explained that the expansion of the economic loss rule beyond products liability to cover situations in which the parties are in privity of contract is best illustrated by *AFM Corp. v. Southern Bell Telephone & Telegraph Co.,* 515 So.2d 180, 181 (Fla.1987), where the Court held that there was "no basis for recovery in negligence" since the plaintiff could not ***410** prove that "a tort independent of the breach [of contract] itself was committed." The Court subsequently indicated, however, that its decision in *AFM* "may have been unnecessarily over-expansive" in its "reliance on the economic loss rule as opposed to fundamental contractual principles." *Moransais,* 744 So.2d at 981. In 2004, we receded from *AFM* "to the extent that it relied on the principles adopted by this Court in *Florida Power.* " *Am. Aviation,* 891 So.2d at 542. Therefore, since we essentially receded in *American Aviation* from this overexpansion of the rule, we need not specifically overrule any case today in order to explicitly clarify that the economic loss rule applies only to products liability cases.

Justice Canady points most recently to *Curd v. Mosaic Fertilizer, LLC,* 39 So.3d 1216 (Fla.2010), and *American Aviation,* as indicating that the contractual privity application of the economic loss rule is settled Florida law. While those two cases did list this application of the rule in reviewing its history, the contractual privity use of the economic loss rule was not at issue in either of those cases. *See Curd,* 39 So.3d at 1223; *Am. Aviation,* 891 So.2d at 541. *Curd* simply restated general language from *American Aviation,* and *American Aviation* used *AFM,* from which it later partially receded, to illustrate how the contractual privity form of the rule has been applied.

In the aftermath of *American Aviation,* which clearly stated an intent to "expressly limit[ ]" the economic loss rule, *American Aviation,* 891 So.2d at 542, it was no longer clear whether our decisions permitted application of the rule to situations involving contractual privity. We now eliminate once and for all any confusion in the application of the economic loss rule remaining since *Moransais* and clearly espouse Justice Wells' view that "the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product." *Moransais,* 744 So.2d at 984 (Wells, J., concurring). Far from upsetting firmly established principles, therefore, our decision resolves any ambiguity remaining from this line of cases and restores the economic loss rule to its principled roots. I concur fully in the majority's well-reasoned decision.

LEWIS and LABARGA, JJ., concur.

POLSTON, C.J., dissenting.

The Eleventh Circuit certified the following question:

> Does an insurance broker provide a "professional service" such that the insurance broker is unable

to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?

No. This Court's controlling precedent clearly answers the certified question in the negative. But without justification, the majority greatly expands the use of tort law at a cost to Florida's contract law. Now, there are tort claims and remedies available to contracting parties in addition to the contractual remedies which, because of the economic loss rule, were previously the only remedies available.[FN10]

FN10. The following examples illustrate the type of cases that are now overruled by the majority's opinion and will make available a wide arsenal of tort claims previously barred by the economic loss rule. *See, e.g., Geico Cas. Co. v. Arce,* 333 Fed.Appx. 396, 398 (11th Cir.2009) (applying Florida law and barring civil conspiracy claim alleging failure to abide by contractual duty to defend); *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.,* 188 Fed.Appx. 966, 969 (11th Cir.2006) (applying Florida law and barring fraudulent misrepresentation claims alleging failure to provide correct information under the terms of a CEO search contract); *Royal Surplus Lines Ins. Co. v. Coachman Indus.,* 184 Fed.Appx. 894, 902 (11th Cir.2006) (applying Florida law and barring insurer's tort actions alleging insured's failure to provide information under the terms of a cooperation clause); *Cessna Aircraft Co. v. Avior Techs., Inc.,* 990 So.2d 532, 538 (Fla. 3d DCA 2008) (barring negligence claim against aircraft repair company for failed contracted-for repairs to aircraft); *Taylor v. Maness,* 941 So.2d 559, 564 (Fla. 3d DCA 2006) (barring cause of action alleging fraudulent failure to perform under the contract and sell real property to plaintiffs); *Straub Capital Corp. v. L. Frank Chopin, P.A.,* 724 So.2d 577, 579 (Fla. 4th DCA 1998) (barring action alleging negligent misrepresentation by a landlord after he failed to timely build and provide space to tenants under the terms of their contract); *Smith v. Bd. of Regents ex rel. Florida A & M Univ.,* 701 So.2d 348, 349 (Fla. 1st DCA 1997) (barring cause of action brought by university professor alleging negligence by the Board of Regents and his bank in potentially breaching their duties under employment and deposit contracts); *Hotels of Key Largo v. RHI Hotels,* 694 So.2d 74, 77 (Fla. 3d DCA 1997) (barring action alleging fraudulent failure to adequately provide increased reservations and hotel management services under the contract).

***411** As noted in *Indemnity Insurance Co. of North America v. American Aviation, Inc.,* 891 So.2d 532, 537 (Fla.2004), tort claims involving professional services are not barred by the economic loss rule. But this Court in *Pierce v. AALL Insurance Inc.,* 531 So.2d 84 (Fla.1988), held that insurance agents are not considered "professional" for purposes of the professional malpractice statute of limitations. *Pierce's* rationale concerning insurance agents applies with equal force to insurance brokers and requires the response to the Eleventh Circuit that insurance brokers do not provide professional services that would bar a defense under the economic loss rule.[FN11] That response is equally dictated by this Court's decision in *Garden v. Frier,* 602 So.2d 1273, 1275 (Fla.1992), when we further reduced the definition of a "professional" under the professional malpractice statute to those "vocation[s] requiring at a minimum a four-year college degree before licensing is possible in Florida." It is undisputed by the parties that a four-year college degree is not necessary to become licensed as an insurance broker.

> FN11. The services of Marsh & McLennan Companies certainly appear professional to me under the rationale given by Justice McDonald in his dissenting opinion in *Pierce:* "If the act is one which involves giving advice, using superior knowledge and training of a technical nature, or imparting instruction and recommendations in the learned arts then the act is one of a professional." 531 So.2d at 88 (McDonald, J., dissenting) (quoting *Pierce,* 513 So.2d at 161). But this definition was expressly rejected by the Court in *Pierce.*

Instead of simply answering the certified question that our cases clearly control, the majority obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available without deference to contract claims. Florida's contract law is seriously undermined by this decision.

Accordingly, I respectfully dissent.

CANADY, J., concurs.
CANADY, J., dissenting.

For many years, this Court has recognized the vital role of the economic loss rule in maintaining the boundary between tort law and contract law. With today's decision, the majority repudiates our case law and sets a new course for the expansion of tort law at the expense of contract law. I agree with Chief Justice Polston's view that "Florida's contract law is seriously undermined by this decision," dissenting op. at 411 (Polston, C.J.), and I accordingly dissent.

***412** Just two years ago, in *Curd v. Mosaic Fertilizer, LLC,* 39 So.3d 1216, 1223 (Fla.2010), the same majority that decides today's case joined in an opinion stating the general principle that "the economic loss rule in Florida is applicable" not only in the products liability context but also "where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract." The majority in *Curd* simply restated Florida law.

In *Indemnity Insurance Co. of North America v. American Aviation, Inc.,* 891 So.2d 532, 536 (Fla.2004), we explained that the general "prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." We recognized the rationale for the economic loss rule:

> Underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.

Id. at 536–37.

The holding in *American Aviation* was based on the negative answer to this Court's rephrased certified question: "Whether the economic loss doctrine bars a negligence action to recover purely economic loss in a case where the defendant is neither a manufacturer nor distributor of a product and there is *no privity of contract.* " *Id.* at 534 (emphasis added). By rephrasing the certified question in this manner, this Court emphasized the significance of the existence of privity of contract in determining whether the economic loss rule should be applied to bar a negligence action. This Court held as follows: "Because the defendant in this case is neither a manufacturer nor distributor of a product, and the parties *are not in privity of contract,* this negligence

action is not barred by the economic loss rule." *Id.* (emphasis added).

Both *Curd* and *American Aviation* merely rearticulated the point we had made earlier in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993), concerning the boundary between tort law and contract law:

> [E]conomic losses are disappointed economic expectations, which are protected by contract law, rather than tort law. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.

(Citations omitted) (internal quotation marks omitted). And *Casa Clara* itself echoed the reasoning of *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla.1987), that "contract principles [are] more appropriate than tort principles for [resolving] economic loss without an accompanying physical injury ***413** or property damage." *Casa Clara,* 620 So.2d at 1247 (quoting *Florida Power,* 510 So.2d at 902).

In *Florida Power,* 510 So.2d at 902, we rejected the invitation—in the products liability context—"to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public." In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180, 180 (Fla.1987), we then applied the reasoning of *Florida Power* to bar a claim for economic losses in tort by a purchaser of services where there was no claim for personal injury or property damage.

Our cases thus have repeatedly recognized the economic loss rule as a rule that prevents contract law from "drown[ing] in a sea of tort." *Casa Clara,* 620 So.2d at 1247 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)).[FN12] The basis for this rationale—which the Court has repeatedly elaborated—is not limited to the products liability context. The application of the economic loss rule in the context of other relationships based on contract is not "unprincipled." Majority op. at 406–07. The goal of preventing contract law from drowning in a sea of tort is as compelling in the broader context of contract-based relationships as it is in the product liability context. The majority articulates no explanation of why the economic loss rule is appropriately applied in the products liability context but is unworkable or unwise in that broader context.

> FN12. The Restatement (Third) of Torts: Liability for Economic Harm (Tentative Draft No. 1) § 3 (April 4, 2012) states the general rule that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." The comments explaining this rule observe that "[i]f two parties have a contract, the argument for limiting tort claims between them is most powerful." *Id.* at cmt. a. The comments explain the rationale for the rule:
>
> > When a dispute arises, the rule protects the bargain the parties have made against disruption by a tort suit. Seen from an earlier point in the life of a transaction, the rule allows parties to make dependable allocations of financial risk without fear that tort law will be used to undo them later. Viewed in the long run, the rule prevents the erosion of contract doctrines by the use of tort law to work around them. The rule also reduces the confusion that can result when a party brings suit on the same facts under contract and tort theories that are largely redundant in practical effect.
>
> *Id.* at cmt. b.

The best the majority offers is some turgid and obscure dicta from *Moransais v. Heathman,* 744 So.2d 973 (Fla.1999), and criticism of the exceptions from the economic loss rule recognized in our case law. The fact that the economic loss rule is subject to certain recognized exceptions—exceptions that are based on specific policy considerations—does not undermine the integrity of the general rule or obliterate the purpose on which it is based. On the contrary, the exceptions are predicated on the validity of the general rule. In short, the majority has failed to justify this dramatic unsettling of Florida law.

The concurring opinion likewise fails to provide any reasoning to support the limitation on the scope of the economic loss rule imposed by today's decision. Totally absent from the concurrence is any discussion of how the rationale we have articulated for the economic loss rule can be reconciled with limiting the operation of the rule to products liability cases. Like the majority opinion, the concurring opinion effectively dismisses the reasoning in this Court's prior decisions as irrelevant.

The concurrence correctly recognizes that a minority of this Court has previously expressed the view concerning the limited scope of the economic loss rule that is ***414** today adopted by the Court. But a minority of the Court does not articulate the law of Florida. Nothing in those prior minority views provides a principled basis for rejecting the general application of the rationale articulated in our prior decisions.

The concurrence also relies on this Court's statements in *American Aviation* concerning our holding in *AFM.* But the concurrence's reliance on *American Aviation* to support departing from our precedent in *AFM* is unwarranted. I readily concede that confusion arose from this Court's declaration that it was receding from *AFM* "to the extent that it relied on the principles adopted" in *Westinghouse Electric. Am. Aviation,* 891 So.2d at 542. This statement is problematic for two salient reasons.

First, and most important, *American Aviation* itself predicated its holding and its formulation of the rephrased certified question on the significance of the existence of privity of contract. At the outset of the opinion, this Court stated: "We conclude that the 'economic loss doctrine' ... bars a negligence action to recover solely economic damages only in circumstances where the parties are either in *contractual privity* or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies." 891 So.2d at 534 (emphasis added). To the extent that the subsequent statement concerning *AFM* is understood to suggest a repudiation of the "contractual privity economic loss rule," 891 So.2d at 537, the majority's opinion in *American Aviation* is self-repudiating and irredeemably incoherent.

Second, as the concurrence correctly observes, the facts in *American Aviation* did not involve a contractual relationship between the parties. Accordingly, *American Aviation* did not present a proper occasion for the Court to repudiate a prior holding, such as *AFM,* that specifically addressed the application of the economic loss rule to facts based on the existence of a contractual relationship. If the statement in *American Aviation* concerning *AFM* is anything, it is dicta.

With today's decision, we face the prospect of every breach of contract claim being accompanied by a tort claim. I strongly dissent from this decision. Based on the precedents explained in Chief Justice Polston's dissent, I would conclude that an insurance broker does not provide a professional service and thus is not precluded from asserting the economic loss rule as a bar to tort claims. I therefore would answer the certified question in the negative.

POLSTON, C.J., concurs.

Fla.,2013.
Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies, Inc.
110 So.3d 399, 38 Fla. L. Weekly S151

110 So.3d 399, 38 Fla. L. Weekly S151
(Cite as: 110 So.3d 399)

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EXHIBIT 4

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2010-CA-015748-O

CENTRAL PARK LV CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Plaintiff,

v.

SUMMIT CONTRACTORS, INC., a Florida profit corporation; ACC-U-RATE SHEETMETAL & STEEL FABRICATORS, INC., a Florida profit corporation; ARCI LITD, a Foreign Limited Partnership; FORM-RITE CONCRETE, INC., a Florida profit corporation; TRI-CITY ELECTRICAL CONTRACTORS, INC., a Florida profit corporation; J.R. HOBBS CO. ATLANTA, LLC, a Foreign Limited Liability Company; NORTH FLORIDA FRAMING, INC., a Florida profit corporation; MARQUEZ CONSTRUCTION, INC., a Florida profit corporation; JAMES W. WALKER d/b/a TAMPA DRYWALL; AMPAM J.A. CROSON COMPANY, a Florida profit corporation; and FUGLEBERG KOCH ARCHITECTS, INC., a Florida profit corporation,

Defendants.
_____/

ORDER ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT AS TO COUNT 1 OF PLAINTIFF'S THIRD AMENDED COMPLAINT

THIS MATTER comes before the Court on the Parties' Cross-Motions for Summary Judgment, heard on April 8, 2013. The Court, having considered the motions, arguments of counsel, record evidence, and case law cited by parties, finds as follows:

The basic facts of this case are not in dispute. Plaintiff, Central Park LV Condominium Association, Inc., represents its members who own the units and common areas of Central Park

LV Condominiums, a condominium complex that was converted from apartment units in 2005. In Count I of its Third Amended Complaint, Plaintiff alleges that Defendant - contractors, who originally built the units as apartments, were negligent in the construction of the units. Because Plaintiff obtained ownership of the units after they were converted into condominiums, Plaintiff is not in privity with the Defendant - contractors.

The Defendant, Summit, as general contractor, and Defendant sub-contractors, Acc-U-Rate, ARCI, Regal Custom Painting, and North Florida Framing filed affirmative defenses stating that the economic loss rule barred Count I – the Plaintiff's negligence count. Plaintiff filed a motion for summary judgment, alleging that the economic loss rule does not bar tort claims where there is no contract (and thus no warranty claims) between the parties. Subsequently, Defendants Summit and ARCI filed cross-motions for summary judgment as to Count I, arguing that the economic loss rule does in fact bar Plaintiff's negligence claim.

Summary judgment is proper where there is no genuine issue of material fact and where the moving party is entitled to a judgment as a matter of law. *Sunshine State Ins. Co. v. Jones,* 77 So. 3d 254 (Fla. 4th DCA 2012).

The economic loss rule precludes negligence claims against the manufacturer of a defective product where the only damages claimed are to the product itself. *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628, 630-631 (Fla. 1995); *see also Indem. Ins. Co. of N. America v. American Aviation,* 891 So. 2d 532, 536 (Fla. 2004) (stating that the rule is a "judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses"). The economic loss rule further applies to the purchase of houses, wherein the home or dwelling is the product. *Casa Clara Condominium Ass'n., Inc. v. Charley Toppino and Sons, Inc.,* 620 So. 2d 1244, 1247-1248 (Fla.

1993) (refusing to hold that "homeowners are not subject to the economic loss rule," and further determining that "[t]he character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant"). The rationale behind the rule is that "contract principles [are] more appropriate than tort principles for recovering economic loss without an accompanying physical injury or property damage." *Id.* at 1248 (quoting *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 902 (Fla. 1987)) (internal quotations omitted). Furthermore, the rule is unconcerned in those cases where the plaintiff has no alternative theory of recovery. *See Airport Rent-A-Car*, 660 So. 2d at 630-631 (determining that the economic loss rule barred the plaintiff's tort claim against a defendant - manufacturer with whom the plaintiff did not have privity of contract because the rule does not recognize an exception for when the plaintiff has no alternative remedy).

Recently, the Florida Supreme Court specifically held that the "application of the economic loss rule is limited to products liability cases" in an effort to recede from "what has been described as the unprincipled extension of the rule." *Tiara Condominium Ass'n., Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 407 (Fla. 2013) (receding from its previous rulings that left intact a number of exceptions that allowed for the rule's "unprincipled expansion," as well as receding from its "prior rulings to the extent that they have applied the economic loss rule to cases other than products liability"). At the hearing that took place on April 8, 2013, Plaintiff urged the Court to find that the holding in *Tiara* means *Casa Clara* and its progeny are overturned, and thus, the cases that *Casa Clara* overturned are now good law. Defendants, however, argued that *Tiara* should be read in conjunction with *Casa Clara*, which they maintain is still good law and bars Plaintiff's claim of negligence. This Court declines to

adopt Plaintiff's interpretation of *Tiara*, and instead finds that *Tiara* should be interpreted only as a limitation on the economic loss rule which does not overrule *Casa Clara*.

Here, the Court finds that the economic loss rule precludes Plaintiff from bringing a tort claim because the only damages it suffered are to the homes, that is, the products themselves. The previously discussed case law makes clear that without an accompanying personal injury or injury to other property, a negligence claim cannot stand. As a result, Defendants are entitled to summary judgment as a matter of law as to Plaintiff's Count I.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendants' Motions for Summary Judgment are **GRANTED** as to Count I, and Plaintiff's Motion for Summary Judgment is **DENIED** as to Count I.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ____ _____ day of _____, 2013.

Original signed by:
A. Thomas Mihok
Circuit Court Judge, this
MAY 24 2013
and conformed copies were
furnished by Judicial Assistant

A. THOMAS MIHOK
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via mail on this _____ day of _____, 2013, to the following:

John Bengier, Esq.
Meier, Bonner, Muszynski,
O'Dell & Harvey, P.A.
260 Wekiva Springs Road, Suite 2000
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