CASE NO. 14-11639

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HUGH A. CARITHERS and KATHERINE S. CARITHERS,

***Plaintiffs/Appellees*,**
v.
MID-CONTINENT CASUALTY COMPANY,

Defendant/Appellant.

Appeal from the United States District Court for the
Middle District of Florida
Hugh A. Carithers and Katherine S. Carithers v.
Mid-Continent Casualty Company
Case No: 3:12-cv-00890-MMH-PDB

REPLY BRIEF OF APPELLANT MID-CONTINENT CASUALTY COMPANY

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I. THE DISTRICT COURT'S DENIAL OF MCC'S MOTION FOR SUMMARY JUDGMENT IS REVIEWABLE FOR LEGAL ERROR.

Carithers argues that the district court's denial of MCC's summary judgment motion on the duty to defend is nonreviewable in light of the facts found at trial. In the alternative, Carithers argues that the underlying allegations created a duty to defend. As established below, both arguments must be rejected.

A. The Denial of MCC's Motion For Summary Judgment On The Duty To Defend Is Reviewable.

Carithers argues that the denial of a motion for summary judgment is not reviewable after facts have been found at trial. Although that might be correct in some cases, i.e., where the facts were relevant to the summary judgment motion, that cannot be the case where, as here, the court's order denying MCC's motion was based on the pleadings rather than the facts. Florida law is clear that the duty to defend is determined solely by the pleadings and the duty to indemnify is determined from the facts found at trial. *Jones v. Florida Ins. Guar. Assoc., Inc.*, 908 So.2d 435 (Fla. 2005); *National Union Fire Ins. Co. v. Lenox Liquors Inc.*, 358 So.2d 533 (Fla. 1977). Carithers' argument that facts found at trial somehow supersede the allegations in determining the duty to defend has no support under Florida law.

Also, Carithers points out that MCC did not take an interlocutory appeal upon the district court's denial on the duty to defend. The argument has no merit, because MCC could not have immediately appealed the district court's denial of its motion on the duty to defend because the court had not yet ruled on the duty to indemnify. Thus, the district court's ruling was not an appealable nonfinal order. *See*, e.g., *National Assur. Underwriters, Inc. v. Kelley*, 702 So. 2d 614, 615 (Fla. 4th DCA 1997); *Nationwide Mutual Ins. Co. v. Harrick*, 763 So. 2d 1133 (Fla. 4th DCA 1999) ("Because this order only determines that the insurer has a duty to defend, and does not determine coverage, this order is not appealable at this time.")

Carithers also argues that an insurer's duty to defend is not confined solely to the pleadings but must also include extrinsic facts that subsequently become known to the insurer. [Answer Brief at 16-17]. The argument fails for several reasons. First, the cases relied on by Carithers are completely distinguishable and are not based in Florida law. *Milliken* was based on Kansas law on the duty to defend, not Florida law. *Milliken v. Fid. & Cas. Co. of New York*, 338 F.2d 35 (10th Cir. 1964). *Fielland* relied on *Milliken*. *C. A. Fielland, Inc. v. Fid. & Cas. Co. of New York*, 297 So. 2d 122 (Fla. 2d DCA1974). *Broward Marine* relied on *Milliken* and *Fielland* (which had relied on *Milliken*). *Broward Marine, Inc. v. Aetna Ins. Co.*, 459 So. 2d 330 (Fla. 4th DCA1984). *Bennett* was based on an amended pleading, not extrinsic facts, and the court merely restated the rule that

the duty to defend is determined from the pleadings. *Bennett v. Fid. & Cas. Co. of N.Y.*, 132 So. 2d 788 (Fla. 4th DCA1961).

In *Hodor,* the appellate court simply affirmed the trial court's ruling that the insurer had a duty to defend from the date the plaintiff moved to amend the pleadings. *St. Paul Fire & Marine Ins. Co. v. Hodor*, 200 So. 2d 205 (Fla. 3d DCA 1967). Thus, *Hodor* did not depend on the insurer's knowledge of "extrinsic facts," it depended on the insurer's knowledge of the motion for leave to amend so as to assert allegations that might bring the matter within the policy's coverage. Second, none of the decisions relied upon by Carithers are from the Supreme Court of Florida, which has stated emphatically that an insurer's duty to defend is based solely on the pleadings. *See, e.g., Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 9-10 (Fla. 2004); *Jones v. Florida Ins. Guar. Assoc., Inc.*, 908 So. 2d 435 (Fla. 2005).

Third, Carithers does not point to any evidence in the record to show that MCC ever became aware of any extrinsic facts that might have placed the claim within potential coverage. Therefore, even if Carithers' proposition could pass legal muster, he has completely failed to point to any knowledge by MCC of extrinsic facts that might possibly have created a duty to defend under any circumstance. Thus, his arguments must be rejected.

B. The Underlying Allegations Pleaded The Matter Out Of Coverage.

As stated in MCC's Initial Brief, the appropriate trigger of coverage in Florida is manifestation, whether one considers damage to be manifest when it is discovered or when it is discoverable. Because Carithers alleged in the underlying complaint that the construction defects "were not discovered until 2010 and could not have been discovered by a reasonable inspection in a prior year," the allegations eliminated the potentiality of coverage, and therefore they eliminated a duty to defend.

Carithers makes two arguments in response to MCC's position. First, Carithers asks this Court to consider trial testimony, not even from the underlying action but from the subsequent coverage action, to determine that an engineer would have discovered the defects earlier if he had inspected the property. There are two problems with Carithers' argument. First, as stated above, a court must determine the duty to defend solely from the pleadings, not testimony in a declaratory judgment action. Second, the underlying allegation was unqualified in stating that the defects could not have been discovered by a reasonable inspection, i.e., the allegation was not qualified or limited to an inspection by Carithers.

Carithers also contends that the underlying allegation only stated that the "defects" could not have been discovered earlier, as opposed to the "damages caused by construction defects." The argument is nonsensical. If Carithers was

conceding in that underlying allegation that the actual property damage could have been discovered earlier than 2010, Carithers would have faced a dismissal based on the statute of limitations and would never have obtained a judgment. Carithers' arguments must be rejected.

II. NOT ALL DAMAGES AWARDED CONSTITUTE "PROPERTY DAMAGE" UNDER THE CGL POLICY.

Carithers argues that MCC is improperly characterizing its argument that not all damages constituted "property damage" under the policy as a question of law when, at least according to Carithers, this involved findings of fact. Simply stated, Carithers is wrong. The construction of the policy, including what constitutes "property damage" under Florida law, is clearly a question of law. *See Barnier v. Rainey*, 890 So. 2d 357, 359 (Fla. 1st DCA 2004); *American Equity Ins. Co. v. Van Ginhoven*, 788 So. 2d 388, 390 (Fla. 5th DCA 2001) (citing *Coleman v. Florida Ins, Guar. Ass'n, Inc.*, 517 So. 2d 686, 690 (Fla. 1988)); *Technical Coating Applicators, Inc. v. U.S. Fidelity and Guar. Co.*, 157 F.3d 843 (11th Cir. 1998); *DEC Electric, Inc. v. Raphael Construction Corp.*, 558 So.2d 427 (Fla. 1990); *Jones v. Utica Mutual Ins. Co.*, 463 So.2d 1153 (Fla. 1985).

Carithers points out that MCC relies on two legal propositions from two seminal cases, *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007) and *Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008): (1) If there is no damage beyond the faulty workmanship or defective work then there is

no property damage; and (2) Although the cost of repairing other components damaged by the defective work is property damage, the cost of repairing the defective work is not. [Answer Brief at 19]. Significantly, Carithers does not dispute the correctness of MCC's legal propositions. Instead, Carithers argues that each element of property damage to one subcontractor's work was caused by the defective workmanship of a different subcontractor. [*Id.* at 20]. Carithers' argument ignores the testimony of his own expert.

With respect to the outdoor tiles and their mud base, there was nothing wrong with the mud base itself; it was allegedly just the wrong mud base for that specific function, which caused some tiles to crack. [Tr. at pg. 84, lines 10-14]. Also, the undisputed testimony was that the installation of the mud base and the tiles was performed by a single subcontractor, thus they constituted a single component of the work. [Tr. at pg 66, lines 20-25]. It was also undisputed that the mud base and tiles did not cause any physical damage to any other component of the work.

Carithers contends in the alternative that because the tiles were purchased by Carithers, property damage caused by defective installation constitutes "property damage" under *Pozzi Windows* and therefore there is coverage. The argument fails for two reasons. First, as set forth in MCC's Initial Brief, even assuming *arguendo* "property damage," both the tiles and the mud base constitute "your work."

Therefore, coverage would be excluded under the "damage to your work" exclusion because the defective work did not damage the work of any other subcontractor. Second, unlike *Pozzi Windows,* in this case both the tiles and the mud base were installed at the same time by a single contractor, thus it is defective workmanship that did not damage a different component of the work, and therefore, it is not "property damage." Further, even assuming solely for the sake of argument that property damage to the tiles did constitute "property damage," the cost of the mud base removal and replacement absolutely did not constitute "property damage" under *Lucas Waterproofing* and the other cases discussed in MCC's Initial Brief.

With respect to the brick and its Boral coating, Carithers contends that "there is no basis for MCC to claim a single masonry subcontractor installed the brick and the Boral coating." [Answer Brief at 22]. Carithers contends that MCC is supplying "missing evidence." [*Id.* at 3]. To the contrary, MCC is relying on the undisputed trial testimony of one of Carithers' own experts that a single masonry subcontractor installed the brick and the Boral coating, and that the masonry subcontractor's work did not damage any other component of the work, only his own work. [Tr. at pg. 97, lines 3-9]. Therefore, because the undisputed actual facts as testified to at trial are that the brick and Boral coating were done by the same subcontractor and that the work did not damage the work of a different

subcontractor, the cost of repair cannot constitute "property damage" under the policy.

Carithers was also awarded damages for the replacement of a defective balcony. [D.E. 71-3] The testimony was undisputed that among other things, the defective balcony installation caused damage to itself. [Tr. at pg. 98, lines 18-21]. Thus, the damages awarded in connection with the replacement of the balcony were not because of "property damage" under the policy, even though the cost to remove/repair/replace other subcontractors' work caused by the defective balcony work would constitute "property damage."

III. The District Court's Wholesale Dismissal of the Application of the Fungus, Mildew and Mold Exclusion was Error as a Matter of Law, as was the Court's Reliance on Florida Statute 627.426

It is beyond dispute that Brett Newkirk testified for the first time at trial that the wood rot on the balcony of the Carithers' residence could not have existed but for the presence of both water and fungus. This precise opinion had not been previously disclosed and there is no precedential support for the position that MCC had an affirmative duty to conduct additional inquiry into Mr. Newkirk's expert opinions where those opinions were to be disclosed in their entirety. MCC was entitled to rely on Mr. Newkirk's expert disclosure which did not disclose the entirety of his opinions expressed at trial.

Carithers argues at page 25 of the Answer Brief that the trial court did not deny MCC's Motion to Conform the Pleadings to the Evidence and thus this Court cannot find error in the court's ruling. While the trial court may have stated that the pleadings are always conformed to the evidence presented at trial [Tr. 1 pg. 143], in the very same breath the court also summarily dismissed the application of MCC's Fungus, Mildew and Mold Exclusion to the facts presented at trial, stating, "[H]ow wood rot comes into play is not frankly a concern of this case." [Tr. 1 pg. 143, lines 23-25]. In short, the court's immediate determination that the Exclusion had no application to the case at hand had the precise effect as a denial of MCC's ore tenus Motion to Conform the Pleadings to the Evidence. Thus, the court's outright rejection of the Exclusion's applicability was error as a matter of law.

Carithers argues out of both sides of their proverbial mouths in arguing that MCC should have known about what constituted wood rot because of its experience with water damage cases, while simultaneously arguing that Carithers "obviously had no opportunity to develop their position" where their position would have necessarily been based upon its own expert's opinions. Clearly if MCC should have anticipated that Mr. Newkirk would testify as to previously undisclosed opinions implicating the Exclusion, then Carithers should have anticipated that same Exclusion's possible application.

Carithers also wrongully alleges that the court did not rely on Fla. Stat. 627.426 in its decision to preclude MCC from applying the Exclusion to the facts presented for the first time at trial regarding wood rot requiring the presence of both water and fungus. Carithers is incorrect. The court specifically stated as follows in its Order:

> Mid-Continent cannot now rely on an exclusion that it has never before mentioned in this litigation. See Fla. Stat. § 627.426(2)(a) (prohibiting insurer from denying coverage based on a coverage defense unless insurer gives written notice to insured within 30 days after insurer knew or should have known of the coverage defense).
>
> [D.E. 126 at fn 2]

As detailed in MCC's Initial Brief, the Florida Supreme Court held in *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998 (Fla. 1989) that Florida Statute §627.426 only applies to coverage defenses based on policy "conditions," such as late notice. *Id.* at 1000. MCC was not attempting to rely on any policy "condition" in the present action. Instead, MCC sought to rely on a specific exclusion. Thus, §627.426, relied upon by the trial court, is inapplicable. Accordingly, the trial court erred as a matter of law in its reliance upon the statute.

MCC did not wait to intentionally "spring" this Exclusion on Carithers. To the contrary, it was Carithers' expert, Brett Newkirk that sprang testimony on MCC stating that wood rot cannot occur without the presence of both water and fungus. Carithers claims that MCC "knows very well what wood rot is." Carithers

again misses the point. It is not MCC's responsibility to delve deeper into expert opinion to discover possible hidden meaning in those opinions. The very purpose of an expert disclosure is to prevent the cost and burden of having to depose the expert. An expert report must be complete such that "opposing counsel is not forced to depose an expert in order to avoid ambush at trial; and moreover the report must be sufficiently complete so as to shorten or decrease the need for expert depositions and thus to conserve resources." *Dyett v. N. Broward Hosp.*, 2004 WL 5320630 at * 1 (S.D. Fla. Jan. 1, 2004) (citing *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998)).

Carithers' argument that Mr. Newkirk's testimony was consistent with his affidavit is a red herring; an attempt to throw this Honorable Court off of the trail of truth. The testimony may have been consistent with the affidavit but it improperly added an additional undisclosed layer to Mr. Newkirk's previously disclosed opinions. For these reasons, and the reasons expressed in MCC's Initial Brief, the trial court's decision to summarily dismiss the application of a relevant exclusion where the testimony underlying that exclusion's application was revealed for the first time at trial, was error and this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 32(a)(7)(B). This brief contains 2,659 words.

/s/ John R. Catizone
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Reply Brief of Appellant* was furnished by U.S. Mail on this 27th day of August, 2014, to the following:

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