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

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26 of the Florida Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1 and 28-1(b), the undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. See Fed. R. App.P. 26; 11th Cir.R.26.1-1, 26.1-3, 28-1(b).

1. Catizone, John R. – Attorney for Appellant, Mid-Continent Casualty Company.

2. Carithers, Hugh A. – Plaintiff.

3. Carithers, Katherine S. – Plaintiff.

4. Litchfield, Cavo, LLP – Attorneys for Appellant, Mid-Continent Casualty Company.

5. Mid-Continent Casualty Company – Appellant.

6. Honorable Judge Magnuson – United States District Judge in the district court proceedings.

7. Schottenfeld, Dara L. – Attorney for Appellant, Mid-Continent Casualty Company.

8. Warren, Robert E. – Counsel for Plaintiffs

9. Heekin, Robert – Counsel for Cronk, Duch

10. Cronk, Duch Miller & Associates

11. Cronk, Joseph

STATEMENT REGARDING ORAL ARGUMENT

Carithers do not believe oral argument is necessary or would benefit the Court in deciding the issues on appeal. The substantive issues presented are well known to the Court and have been the subject of appeal in numerous other cases. No new arguments are made in MCC's Brief. The facts established at trial are undisputed and control the outcome of the case. The decision of the court below should be affirmed without oral argument.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellees have no basis to contest the subject matter jurisdiction of this Court. This is a direct appeal of a final judgment entered in the United States District Court for the Middle District of Florida, Jacksonville Division. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. **The district court's ruling on MCC's motion for summary judgment is non-reviewable, was reaffirmed after trial on the merits and was not error as a matter of law.**

II. **The district court did not err as a matter of law in ruling that all claimed damages were for "property damage" as that term is defined in the standard CGL policy and therefore covered by the policy.**

III. **The district court allowed MCC to amend its pleadings to conform to the evidence but otherwise denied the amendment as moot. The district court did not rely on an inapplicable state statute.**

STATEMENT OF THE CASE

This is a direct appeal of a final judgment finding coverage for property damage under a standard commercial general liability (CGL) policy of insurance.

(i) Course of Proceedings and Disposition.

Carithers sued contractor/builder Cronk Duch in state court in Jacksonville, Florida for damages caused by construction defects in certain aspects of Carithers' new home. The defense of Cronk Duch was tendered to Appellant Mid-Continent Casualty Co. (MCC) pursuant to its policies of commercial general liability insurance issued to Cronk Duch. MCC denied a defense to Cronk Duch claiming none of the damages sought by Carithers were covered by any MCC policy.

The litigation in state court resulted in a final judgment in favor of Carithers. The parties entered into a Coblentz Agreement which provided, among other things, that Carithers would receive an Assignment of Cronk Duch's right to proceed against MCC on any of its CGL policies.

Carithers then sued MCC in state court seeking to collect on the state court final judgment. MCC removed the action to the United States District Court for the Middle District of Florida, Jacksonville Division. (Case No.: 3:12-CV-00890-MMH-PDB). In the federal court action, each side moved at various times for summary judgment. On December 6, 2013, Judge Paul A. Magneson granted

Carithers' motion on MCC's duty to defend Cronk Duch in the underlying state court action and denied all other motions. In so doing, Judge Magneson held that "injury-in-fact" was the appropriate trigger in Florida for when damages occur under standard form CGL policy.

The matter proceeded to trial, without a jury, on February 11, 2014. Memorandum and Order was entered on March 11, 2014 (Doc #126) reaffirming the Court's ruling on MCC's duty to defend, and awarding Carithers all the damages awarded in the state court. A Final Judgment was entered on March 31, 2014 (Doc #130). This appeal followed. Carithers presently has pending before the trial court their motion for attorneys' fees and costs pursuant to Florida Statute §627.428 (Doc #133). Ruling on this motion has been deferred pending issuance of the mandate in this appeal (Doc #138).

(ii) Statement of Facts

The home which is the subject matter of this action was built between April 2004 and June 2005 (Doc. #126). From March 9, 2005 to March 9, 2006, Cronk Duch had a policy of commercial general liability insurance with MCC (policy no. GL-000594283). In the time between June 2005 and March of 2006, damages started to occur at the home. (Tr.1 pp. 36 to 44) Cracks appeared in the tile patio, electrical appliances stopped working and exterior bricks began to fade. Carithers was uncertain as to the cause of the problems. (Tr.1 p.46)

In 2010, Carithers first noticed water stains on the ceiling of the garage. A general contractor (Brian Wingate) was consulted and it was determined all the damages were due to defective construction by various subcontractors working for Cronk Duch. (Tr. 1 pp.38 to 48)

At trial all the witnesses testified, and the court thereafter found, that all the damages "began to occur almost immediately after the home's construction in 2005." (Doc #126) There was no evidence to the contrary or to suggest the damages occurred any other time. Accordingly, it is an unrebutted fact that all the damages awarded in state court fell within the policy period of MCC's first of four policies issued to Cronk Duch (policy no. GL-000594283). This policy contained the subcontractor's exception to the "your work" exclusion under the CGL policy. The amount awarded in the state court final judgment represented the cost of repair of property damage covered by MCC's CGL policy with Cronk Duch.

Appellees further adopt all the other facts found by the trial court.

(iii) Standard of Review

The findings of fact set forth in the trial court's Memorandum and Order (Doc #126) are reviewed under the clearly erroneous standard. The legal conclusions drawn from those facts may be reviewed de novo. Kona Tech Corp. v. Southern Pac Transport Co., 225 F 3d 595, 601 (5th Cir. 2000).

The trial court's declining to allow MCC to rely on a coverage exclusion asserted for the first time after the close of the evidence is reviewed for abuse of discretion. Borden, Inc. v. Florida East Coast Ry Co., 772 F.2d 750, 758 (11th Cir. 1985).

The trial court's order granting Carithers' motion for partial summary judgment and denying MCC's motion for summary judgment in December 2013 is not reviewable.

SUMMARY OF ARGUMENT

Following a trial on the merits, the district court found as unrebutted, unequivocal and "not disputed" fact that the damages sued for in this action occurred in 2005/2006. Based on these facts the trial court found MCC's Commercial General Liability policy in effect from March 9, 2005 to March 9, 2006 was applicable to Carithers' claim. It does not, therefore, matter to the disposition of this case whether the "injury-in-fact" or manifestation trigger applies.

The construction work on Carithers' home was performed by subcontractors. Policy GL 00594283 contained the subcontractor exception to the "your work" exclusion set forth in the policy. Accordingly, property damage to the residence due to the negligent work of a subcontractor is covered.

It was not until 2010 that Carithers understood all the home's problems were due to construction defects. Accordingly, the allegations contained in paragraph 10 of the underlying state court complaint do not plead the case out of coverage (especially when read in context with other allegations thereof) and MCC owed Cronk Duch the duty to defend. MCC breached this duty.

The state court and the court below found all the damages awarded in state court were for repair of the "property damage" caused by the faulty workmanship of subcontractors.

The trial court's denial on MCC's summary judgment is not reviewable. None of the other issues raised on appeal justify reversal of the trial court's decision.

ARGUMENT

I. THE DISTRICT COURT'S RULING ON MCC'S MOTION FOR SUMMARY JUDGMENT IS NON-REVIEWABLE, WAS REAFFIRMED AFTER TRIAL ON THE MERITS AND WAS NOT ERROR AS A MATTER OF LAW.

By Order dated December 6, 2013 (Doc. #97) the trial court granted Carithers' motion for partial summary judgment (Doc. #70) and denied MCC's motion (Doc. #69) on the duty to defend.[1] MCC now seeks a reconsideration of that Order. To support its position on appeal, MCC seeks to return the case to its status as of December 6, 2013 and have this Court decide the legal issues raised therein on the same legal arguments and alleged undisputed facts it argued then. MCC ignores the fact that the matter has now been tried with a determination made that all the damages complained of in fact occurred in 2005. Accordingly, the alleged undisputed facts relied on by MCC for summary judgment are not the same now as they were then.

In Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 781-82 (11th Cir. 1991) this Court held that once a matter has been tried on the merits a prior denial of a motion for summary judgment will not be reviewed on appeal. See, also, Lind v. United Parcel Service, 254 F.3d 1281 (11th Cir. 2001). Even if the prior ruling were to be considered, the court should review the motion based on the facts

[1] MCC did not seek interlocutory appeal.

established by the trial and not on the evidence available at the time the motion was made. Univ. of Fla. v. KPB, Inc., 89 F.3d 773 (11th Cir. 1996) and Stuckey v. N. Propane Gas Co., 874 F.2d 1563 (11th Cir. 1989). MCC has offered no basis for deviating from the rule that the trial court's ruling is not reviewable.

The facts found by the trial judge derived from the direct testimony of Carithers' witnesses admitted at trial without objection. These facts were found to be unrebutted, unequivocal or undisputed. MCC has not challenged those facts as erroneous. On appeal, MCC does not suggest any basis for this court ignoring those facts. (Doc #126, pp. 2, 4 and 6)

In its summary judgment motion, MCC contended that allegations within the four corners of Carithers' state court complaint were unambiguous and established without the slightest uncertainty that none of the MCC policies issued to its insured provided coverage for any of the losses sustained. Specifically, MCC pointed to an allegation that the construction defects in Carithers' home were latent and could not have been discovered until 2010. Because MCC's last policy with Cronk Duch expired October 9, 2008, MCC argued none of the damages claimed occurred within an MCC policy period and, therefore, it had no duty to defend.

In considering the competing motions, the trial court stated the key issue for determination was which trigger applied in Florida for when damages "occur" under the standard CGL policy. (Doc. #97, p.3) The trial court, relying on Axis

Surplus Ins. Co. v. Contravest Constr. Co., 2012 WL 2048303 (M.D. Fla.), held the "injury-in-fact" trigger applied. The trial court observed that while the date of discovery of defects may be relevant to the statute of limitations, it is not relevant to whether damages "occur" during a policy period. The trial court then pointed out that neither the underlying state court complaint nor the state court final judgment established when the damages in this case occurred. Accordingly, a trial was necessary. (Doc #97 pp. 4, 5, & 6)

If this court agrees that "injury-in-fact" is the proper trigger, this issue on appeal is easily resolved. MCC tacitly admits the underlying state court complaint does not address when the damages in fact occurred by constantly interchanging the word "damage" for "defect." Accordingly, when judged in light of the injury-in-fact trigger, salient facts bearing on coverage were not known and MCC's motion was due to be denied.

On appeal, MCC argues against injury-in-fact and seeks a ruling from this Court that "manifestation" is the proper trigger. For two reasons this case is not appropriate for that determination.

First, even though MCC had not renewed its motion at trial, the trial court revisited its summary judgment ruling on the merits and reaffirmed its prior decision. Accordingly, the ruling on MCC's motion for summary judgment is moot. MCC has not appealed the portion of the district court's final judgment that

revisits the duty to defend and offers no legal argument why the summary judgment order is not superseded by the subsequent rulings; or how a court can enter an order on summary judgment based on alleged undisputed facts it knows are not only disputed but unequivocally wrong.

Secondly, the undisputed and unrebutted evidence at trial was that all the damages awarded in the state court final judgment occurred in 2005. (Doc #126 p.2) As to the patio tile, the electric appliances and the exterior brick, there was direct testimony of physical observation admitted at trial without objection. (Carithers Tr. 1 pp. 27-68 and Wingate Tr. 1 pp. 71-104) As to the balcony and garage, there was the unchallenged testimony from a professional engineer that, had a prudent engineering investigation of the garage been conducted in 2005, wood rot would have been manifest. (Newkirk Tr. 1 pp. 106-119) As previously stated, MCC does not challenge these facts.

Instead, MCC argues in favor of the manifestation trigger in either of two forms. First, it espouses a manifestation trigger where "manifest" is synonymous with "discovery." That is, damages "occur" when they are discovered. Clearly, "occur" and "manifest" are not synonymous. MCC has not cited the court to any case in Florida or elsewhere where latent damages are deemed to have occurred when they are discovered. The Middle District of Florida cases relied upon by MCC, Mid-Continent Cas. Co. v. Frank Cassarino Constr. Co., 721 F. Supp. 2d

1209 (M.D. Fla.2010); United Nat'l Ins. Co. v. Best Truss Co., 2010 WL 5014012 (S.D. Fla.) and Mid-Continent Cas. Co. v. Siena Home Corp., 2011WL 2784200 (M.D. Fla.), hold just the opposite.

The second form of the manifestation trigger espoused by MCC is articulated by Judge Hodges in Siena Home as:

> Manifestation exists whenever the property damage would have been visible 'upon a prudent engineering investigation…' even if removal of building components would be necessary to gain access to the damaged areas.

Siena at 2784203.

The undisputed testimony of Brett Newkirk, Carithers' expert and a professional engineer, was that had he performed an investigation of Carithers' garage using "a borer scope which is what we typically use" (Tr.1 p.117 lines 1-7), he would have found the onset of decay within six months of the balcony having been completed (i.e., in 2005). MCC presented no testimony on the subject.

Based on the undisputed facts then, it does not matter to the disposition of this case whether the injury-in-fact or manifestation trigger, applies. Either way the damages complained of herein occurred in 2005, when MCC's first policy was in effect.

The above notwithstanding, Carithers asserts injury-in-fact is the proper trigger. To support this position, Carithers relies first and foremost on the well

reasoned and detailed analysis by Judge Antoon in Axis Surplus Ins. Co. v. Contravest Constr. Co., 921 F.Supp. 2d 1338 (M.D. Fla. 2012).

It is not an observation original to counsel that volumes have been written by lawyers and judges attempting to explain what is supposed to be the plain meaning of a single word in an insurance policy. "Occur," the word at bar, is simple. Its use in a CGL policy seems to be an effort to describe the definitive alteration of an object that demarks the time when aobject which is not damaged changes to an object that is. When damage from latent defects is involved, this would seem to be a question of "evidence" unique to each case. Any evidence that tends to prove or disprove that transition date should be relevant to the determination. The injury-in-fact trigger allows for a broader range of admissible evidence and a greater scope of coverage. It is consistent with Florida law that complaints and policies be interpreted to give the broadest coverage. In any case, as the above referenced case law shows, the evolution of the definition of "manifestation" seems to be merging with injury-in-fact trigger.

Even with discovery as the trigger, MCC does not prevail. MCC argues its duty to defend must be judged within the confines of the four corners of Carithers underlying state court complaint. The court may not consider evidence outside the confines of the complaint to find the duty to defend. MCC apparently considers the state court final judgment and all the evidence admitted at trial to be extrinsic

to the state court complaint. MCC misreads both the state court complaint and the law.

The language MCC relies on is paragraph 10 of the third amended state court complaint. That paragraph reads:

> All of the foregoing defects were latent and were discovered by the Carithers in 2010. They could not have been discovered by reasonable inspection in a prior year. (Doc. 69-1)

This language clearly addresses discovery of construction defects. It does not address the discovery of damages caused by construction defects. The Carithers' residence was completed in 2005. The defects existed from that time forward but were latent and not known to Carithers. The testimony at trial that the damages occurred in 2005 but were not known to have been caused by construction defects until 2010 was, therefore, not inconsistent with or extrinsic to the allegation of the underlying state court complaint. (Tr.1 p.51 line 6 to p.54 line 4) Here, the state court complaint alleges:

After delivery of the residence, it was discovered there was structural damage to the residence as a result of contractors' or subcontractors' defective work. The structural damage included, but is not limited to:

(a) water damage and wood rot on a balcony and adjacent structural framing caused by the balcony being defectively constructed;

(b) paint-like coating defectively mixed and applied to external brick such that the brick suffered damage;

(c) underlying surface defectively prepared so that tile became cracked and unattached in numerous locations and underlying surfaces became washed out and damaged;

(d) electrical circuits were negligently installed, resulting in electrical current anomalies which destroyed appliances and systems within the residence.

These allegations more than marginally implied that the construction defects began in 2005. (Doc #69-1)

Moreover, MCC had a duty to defend if the underlying state court complaint could be "at least marginally and by reasonable implication" construed to invoke coverage. See,e.g., MacLeod v. School Board of Seminole County, 457 So.2d 511 (Fla. 5th DCA 1984); Klassen Brothers, Inc. v. Harbor Insurance, 410 So.2d 611, 613 (Fla. 4th DCA 1982). All doubts as to whether there exists a duty to defend must be resolved in favor of the insured. Grissom v. Commercial Union Insur. Co., 610 So.2d 1299, 1307 (Fla. 1st DCA 1993).

Even if an initial pleading did not invoke coverage, if facts that invoke coverage subsequently become known, the insurer must pick up or provide a defense. Broward Marine Ins. v. Aetna Ins., 459 So.2d 330 (Fla. 4th D.C.A. 1984);

St. Paul Fire & Marine v. Hodor, 200 So.2d. 205 (Fla. 3d D.C.A. 1967); C.A. Fielland, Inc. v. Fidelity & Casualty Co., 297 So.2d 122 (Fla. 2d D.C.A. 1979); Milliken v. Fidelity & Casualty Co., 338 F.2d 35 (10th Cir. 1964); and Bennett v. Fidelity & Casualty Co., 132 So.2d. 788 (Fla. 1st D.C.A. 1961).

The insuring agreement in the CGL policy addresses when damages occur: not when the defects which caused the damage occur. The pleading relied on by MCC provides no excuse for MCC to deny a defense to Cronk Duch. The decision of the district judge should be affirmed.

II. THE DISTRICT COURT DID NOT ERR IN RULING THAT ALL THE DAMAGES AWARDED IN STATE COURT WERE PROPERTY DAMAGE AS THAT TERM IS DEFINED IN THE STANDARD CGL POLICY AND THEREFORE COVERED BY THE POLICY

The trial court clearly understood the law applicable to what is and is not "property damage" under the standard CGL policy. The cases and policy provisions cited by MCC in its brief are the same cases and policy provisions briefed and argued by each party below. They were correctly applied to the evidence at trial by the trial judge in his Memorandum and Order. What MCC actually complains about on appeal is (1) the trial court's finding of fact that the four items damaged are separate and distinct from the defective workmanship that caused the damage; and (2) the trial court's finding of fact that the cost of repair of the property damage in each instance necessarily included repair or replacement of the defective workmanship rendered useless in the process of repair. On appeal, MCC is, in essence, trying to argue findings of fact as if they were questions of law. To do so it misstates the evidence presented at trial and attempts to argue facts otherwise missing from the trial record.

The state court final judgment sued upon allocated Carithers' damages into nine categories. (Doc. #69-3) Since MCC wrongfully failed to provide a defense to Cronk Duch in state court, it could not subsequently challenge the facts that supported the items awarded. Coblentz v. American Surety Co. of N.Y., 416 F.2d 1059 (5th Cir. 1969); Jones v. Fla. Ins. Guar. Ass'n., 908 So.2d 485 (Fla. 2005).

Nor did MCC present any evidence at trial to contradict the state court final judgment.

The findings of fact set forth in the trial court's Memorandum and Order were unrebutted. There are no disputed issues of facts in the record. Comments or characterizations made by counsel in closing arguments do not constitute evidence in the case if there is nothing in the record to support them.

The cases in Florida that define "property damage" under the standard CGL policy include United States Fire Insurance 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). Three points are established in those cases that are controlling in this one:

(1) Defective work performed by a subcontractor that causes damage to the contractor's completed project...constitutes "property damage" caused by an occurrence.

(2) [F]aulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused "physical injury to tangible property" within the policy definition; and

(3) Where non-defective property purchased separately by the homeowner is damaged as a result of faulty installation, there is physical damage to property.

MCC relies on two other premises set forth in J.S.U.B. and Pozzi Window:

(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.

The damages awarded by the state court and found by the court below to be covered by the first CGL policy are burned out electric appliances; broken patio tiles; damaged exterior brick and wood rot in the garage's walls, ceiling and floors. Each was found to have been non defective itself, part of the completed project and damaged by other defective workmanship performed by a subcontractor. The amount awarded was the total cost of repair. Carithers addresses each item as follows:

Electrical Appliances: MCC admits that the burned out or broken electrical appliances constitute "property damage" under the standard CGL policy. It concedes Carithers are entitled to recover for these items

Patio Tiles: This issue is controlled by Pozzi Window. The damage to the patio tiles is exactly the type of damage found in Pozzi Window to be "property damage" under the identical CGL policy. It was an accepted fact in Pozzi that the house in question "included windows that were individually purchased by [the Homeowner] from [the Retailer]...and installed by a subcontractor." Pozzi Window, supra at 1243). After an analysis of the law and applicable policy provisions, the Florida Supreme Court held

> 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.

Pozzi, supra, at 1248.

The undisputed facts of this case are that the Carithers individually shopped for, selected, purchased and arranged delivery of the marble tiles that formed the patio. The tiles were the Carithers separate property damaged by faulty workmanship. There is no evidence to the contrary.

Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294 (11th Cir. 2012) does not dictate a different result. First, the tiles that made up the roof in Amerisure were not Amelia's separate and distinct property in any way similar to the windows in Pozzi Window or the marble tiles in this case. The tiles in Amerisure were generic roof tiles purchased and furnished by Auchter, the contractor. The fact that the roof tiles may have been paid for by the owner by the time they were installed does not take this case out of Pozzi. Secondly, as is pointed out by the trial judge, the loose tiles from the roof in Amerisure had not damaged other non damaged components of the project. There was, therefore, no claim for damage beyond the roof itself and the damages sought were solely for replacement of the roof. The court in Amerisure did not address what the result might be if other property had been damaged.

The state court final judgment here provided that the mud base for the patio was both inadequate and improper. The deficiencies in the mud base were

expanded upon by testimony at trial. (Wingate Tr.1, p.81, lines 21 to p.86, line 4) It is not an accurate representation of the evidence for MCC to present in its brief ...."there was nothing wrong with the mud base itself." It was both defective and improperly installed.

MCC argues the repair and replacement of the mud base should not be covered. The definition of "property damage" in the policy reads:

> 17. "Property damage" means:
>
> > a. Physical injury to tangible property including all resulting loss of use of that property....;
> >
> > b. loss of use of tangible property that is not physically injured....

The state court found replacement of the mud base necessary to repair the tiles. To repair the damaged tile, it was necessary to take them up and clean or replace them. This rendered the existing mud base useless. There was accordingly loss of use of that property. Thus, repair and replacement of both the tiles and the mud base were "property damage." MCC could not and did not present any evidence to the contrary.

Boral Coating: There is no basis for MCC to claim a single masonry subcontractor installed the brick and the Boral coating. The logical conclusion from the trial evidence was they were done at separate times and not by the same subcontractor. The brick was laid long before the coating was applied since one

had to be done early in construction and the other later on. (Tr.1 at p. 65 line 19 to p. 66 line 9) MCC cannot supply missing evidence by simply stating incorrect and unsupported facts on appeal.

Carithers' witnesses gave a full explanation of how the brick was selected and how it was supposed to work. (Wingate Tr.1 p.87 to 89; Carithers Tr.1 p.33 to 34) The state court found the brick was damaged by the Boral coating and that the installation of another coating was necessary to affect repair to the damaged brick. (Doc #69-3) The trial judge below also concluded the brick was damaged by faulty workmanship. (Doc #126 p.7) MCC neither challenges this conclusion as erroneous nor points to any evidence in the record to the contrary.

Garage: The trial court gave special consideration to this issue. There is no question the defectively constructed balcony caused damage to the ceiling, walls and floor of the non-defective garage. MCC concedes this point. (Tr.2, p.40) The trial court found as an undisputed fact that the damage to the garage could not be repaired without removing the useless balcony. (Doc #126, p.8) The state court final judgment also found the balcony needed to be removed to effect repairs. The cost of repair or replacement of items rendered useless by repair of property damage is part of the property damage.

MCC's reliance on Assurance Co. of America v. Lucas Waterproofing, 581 F.Supp.2d 1201 (S.D. Fla.2008) is misplaced. Lucas Waterproofing was generally

a denial of opposing motions for summary judgment. The facts of the case had not been established. It is not authority for the proposition the cost of repairing the defective work must be segregated from the costs of repairing the covered property damage under the facts of this case.

III. THE DISTRICT COURT ALLOWED MCC TO AMEND ITS PLEADINGS TO CONFORM TO THE EVIDENCE BUT OTHERWISE DENIED THE AMENDMENT AS MOOT. THE DISTRICT COURT DID NOT RELY ON AN INAPPLICABLE STATE STATUTE

The district court did not deny MCC's motion for leave to amend its answer to conform to the evidence. It granted the motion. At the time the motion was made, the trial judge stated, "...pleadings, in my view, are always amended to conform to the evidence presented. And that's true in this case." ((Tr. 1 p. 143). In his closing argument on February 12, 2014, counsel for MCC acknowledged, "We asked you to amend the pleadings to conform to the evidence and you granted that motion." (Tr. 2 p. 38 lines 14-15). Accordingly, Rule 15(b) was not disregarded.

It is more correct to say the trial court denied the motion as moot (Doc #118). MCC does not address this ruling in its brief. MCC's ore tenus motion to amend its answer to include a fungus exclusion was made at the close of Carithers' case. (Tr.1 p.141) Strictly speaking, however, it was made at the close of all the evidence. MCC's only witness, Nora Webb, had been taken out of turn and had concluded her testimony on an unrelated subject. Counsel for MCC then announced to the trial court MCC had no further witnesses or evidence to present. (Tr.1 p.134) As no further evidence was presented, there was no occasion for

rebuttal. MCC's motion should, therefore, be viewed as having been made post trial.

The reason given for MCC's belated motion was that it had not previously been put on notice by Carithers, and MCC did not otherwise know, that a claim for wood rot might involve fungus. This is simply not true. MCC's conduct was intentional and consistent with the manner in which it had conducted itself throughout this case.

The underlying state court complaint stated a claim for "water damage and wood rot on a balcony and adjacent structural framing." As pointed out by the trial judge in his Memorandum and Order (Doc #126 fn. p. 6), the dictionary definition of wood rot is "decomposition from the action of bacteria or fungi." Accordingly, the court concluded MCC was charged with knowing from the inception of this case what the general public is charged with knowing. That is, wood rot may involve fungus. MCC has been involved in dozens of water damage cases in Florida and knows very well what wood rot is. Moreover, had MCC defended Cronk Duch in the state court as it should have, it could have learned all it wanted to know about the nature of the wood rot in this case. Since it did not, it should not now complain about what it did not learn.

On January 8, 2013, Carithers filed their motion for partial summary judgment on the duty to defend. (Doc. #21). The motion was supported by an

affidavit of Carithers' expert, Brett Newkirk. (Doc #21 Ex.B) In paragraph 9 of his affidavit, Newkirk stated "decay of wood components is the result of decay fungus which consumes wood and is sustained by repeated wettings." To whatever extent MCC needed specific notice, this provided the same.

Newkirk's affidavit also served as Carithers' Rule 26 expert witness disclosure. MCC was aware of Newkirk's opinions because it challenged the sufficiency of the disclosure in a motion to strike. (Doc #38) After a hearing, the Magistrate Judge found the affidavit gave MCC adequate notice of Mr. Newkirk's opinion and the motion to strike was denied. (Doc #52) Thereafter, MCC did not depose Newkirk to learn more about his opinion.

Later in the case, MCC sought to limit Newkirk's testimony in a motion in limine. (Doc #83) The motion sought to limit Newkirk's testimony to the balcony and garage. It is difficult to believe MCC filed these motions without ever informing itself of the specifics of Newkirk's opinions.

Newkirk's trial testimony was consistent with his affidavit. MCC did not object to the testimony as outside the scope of the Rule 26 disclosure. Accordingly, MCC's representations that "there was nothing in [Newkirk's] expert testimony about mold or fungus"; (Tr.1 p.141 lines 9-10), and "the first time anybody in this case has asserted that wood rot was caused by fungus" was Mr.

Newkirk's trial testimony (Tr. p. 141 lines 17-19), are simply false representations to this Court. MCC offered no other excuse for its belated motion.

In Florida, the defense that a specific loss is not covered because of an exclusion in an insurance policy is an affirmative defense which must be timely pled and proven at trial. See, e.g., Peninsula Life v. Hanratty, 281 So.2d 609 (Fla. 3d D.C.A. 1973). Once an insured establishes coverage under a policy, the burden of proof shifts to the insurer to prove an exclusion applies. See, e.g., LaFarge v. Travelers Indem. Co., 118 F.3d 1511, 1516 (11th Cir. 1997).

The trial court here held the CGL policy in this case covered the property damage to the garage caused by the defective balcony. MCC conceded this point in its closing argument. Counsel stated, "(b)ut there is coverage for the repair of the wall and ceiling water damage caused by the defective balcony work." (Tr. 2 p. 40 lines 8-10). Accordingly, the burden of proof was on MCC to prove mold exclusion applied.

While coverage provisions in a policy are construed broadly, exclusionary provisions are construed narrowly. See, e.g., Demshar v. AAACon Auto Transport, Inc., 337 So.2d 963, 964 (Fla. 1976); Indian Harbor Ins. Co. v. Williams, 998 So.2d 677,678 (Fla. 4th DCA 2009).

The sum total of MCC's evidence that the exclusion applied was the use of the word fungus by Mr. Newkirk in his testimony and the presence of the word

fungus in the exclusion. Beyond that, whether the exclusion applied to the facts of this case was not developed. MCC presented no evidence that it did other than the argument of counsel and did not request the case be reopened to allow for additional evidence. Carithers obviously had no opportunity to develop their position or rebut anything MCC might argue. The trial court declined to find the exclusion applicable. As stated by the trial judge, "The concern is that there was wood rot (to the garage)....because of defective construction (of the balcony) and that's what's the issue facing this court." (Tr.1 p.143 lines 23-25). Further, ...how wood rot comes into play is not frankly a concern of this case." (Tr.1 p.143 lines 22-23). Accordingly, the trial court found even with the pleadings amended to conform to the evidence, the exclusion did not apply and MCC did not give it any reason to find otherwise. See, Quesada v. Director, FEMA ,753 F.2d 1011 (11th Cir. 1985); Del Monte Fresh Produce v. Ace Insur., 2002 WL 34702174 (S.D. Fla. 2002).

In Quesada, supra, insureds brought suit for indemnity under a policy of flood insurance issues by the insurer. The insurer denied coverage based upon a policy exclusion from coverage for "earth movement." It developed that all damage to the insured's home had resulted from earth movement and that waters from a nearby flood had not even reached the home. However, it was also clear that the earth movement had been directly caused by the flood, which was an

occurrence covered by the policy. Thereupon this court held that the insureds were entitled to policy indemnification because the earth movement would not have taken place but for the covered occurrence of the flood.

This case is precisely analogous. The wood rot which the insurer wishes to exclude from coverage here was unequivocally caused by an occurrence that is covered by the policy: water intrusion into the frame of the covered structure.

Moreover, the liberal attitude towards amending pleadings is generally based on the view that cases should be decided on their merits, not on the technical status of the pleadings. Factors to be considered in allowing or disallowing an amendment are the timing of the motion, bad faith, repeated failure to cure, dilatory conduct and prejudice to the other parties. Consideration of each of these factors supports the trial court's ruling in this case. Foman v. Davis, 371 U.S. 178 (1962).

Considering the length of the delay, the flimsiness of MCC's excuse and the questionable application of the exclusion, it is not hard to suggest MCC intentionally failed to raise the exclusion until a point when Carithers would have no opportunity to respond to an issue upon which MCC bears the burden of proof. This accusation is supported by a number of prior strategies employed by MCC to finesse the results of this case, rather than have it considered on the merits.

The Case Management Order (Doc #18) provided amendments to the pleading would be filed prior to December 8, 2012. The parties agreed to the simultaneous disclosure of experts. When the time came, Carithers disclosed their experts but MCC did not. It waited until Carithers made their disclosure before it decided on its own. It disclosed its expert (who never testified) one month later. Carithers made other Rule 26 disclosures. MCC made none. MCC responded to Carithers' discovery with little or no information, claiming it could not provide meaningful responses until Carithers made a full disclosure of their evidence. MCC intentionally kept itself uninformed of the facts of this case by not conducting any discovery of its own. This intentional strategy was articulated by counsel as "…., we cannot prepare our rebuttal and the facts in rebuttal until we know what the case – what their case in chief is. (Tr. Doc #54, p.16)." and "…, so to the extent that we will prepare facts in opposition, I can't know that until I know what their complete case in chief is about why there's coverage in the first place….(Doc #54 p.17)" and "So to the extent that we will have facts in opposition, we can't know what those are until we have complete facts in favor of coverage from the plaintiff. (Doc #54 p.17)." It was MCC's intention all along to wait to see Carithers' entire case before disclosing its defenses. It literally did just that. It waited to the close of all the evidence to raise its fungus exclusion. It

would be upsetting to the purpose of the Rules of Civil Procedure and the even handed pursuit of justice to allow this tactic to succeed.

Looking at this issue from Carithers' perspective, it would have been an abuse of discretion to have considered a new defense after the close of all the evidence. MCC intentionally avoided giving Carithers notice of its defenses until it was too late for Carithers to respond. Considering the lateness of the motion, the lack of valid excuse, the bad faith of MCC and the prejudice to Carithers, the trial court was correct in failing to consider the exclusion.

Ultimately, the trial court's ruling on MCC's motion to amend does not affect the outcome of the case. The decision was based on the evidence admitted at trial. Rule 15(b)(2) MCC has not otherwise shown the trial court's decision was error.

It was not necessary for the trial court to rely on F.S. § 627.426(2). To the extent the mold and fungus exclusion may have been applicable to the case, MCC had notice of it since it was specifically mentioned in the denial of coverage letter dated December 22, 2011. (Carithers Trial Ex. 17). MCC's representation to the court it had no such notice misled the trial court on this issue.

CONCLUSION

Carithers' unrebutted proof at trial established the state court final judgment sued upon was a sum Cronk Duch was legally obligated to pay because of property damage caused by an occurrence that took place in a covered territory during a policy period. Accordingly, there is coverage under MCC's policy of commercial general liability insurance GL-000594283.

MCC failed to provide a defense to Cronk Duch in state court. It failed to participate in any meaningful way in the district court. As a result, it has no good faith basis to challenge the district court Final Judgment. This appeal should be dismissed.

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 7,760 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Brief of Appellees* was furnished by U.S. Mail on this 13 day of August, 2014, to the following:

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