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TAB 1

832 F.3d 1318
United States Court of Appeals, Eleventh Circuit.

ALTMAN CONTRACTORS, INC., a Florida corporation, Plaintiff-Appellant,
v.
CRUM & FORSTER SPECIALTY INSURANCE COMPANY, an Arizona company, Defendant-Appellee.

No. 15-12816
|
August 2, 2016

Synopsis

Background: Insured general contractor brought breach action against commercial general liability (CGL) insurer for breach of contract and declaratory judgment that insurer owed duty to defend and indemnify it as part of presuit process to resolve claim for construction defects, and that insurer breached the liability insurance policy by refusing to initially defend insured. The United States District Court for the Southern District of Florida, D.C. Docket No. 9:13-cv-80831-KAM, Kenneth A. Marra, J., 124 F.Supp.3d 1272, entered summary judgment in favor of insurer. Insured appealed.

[Holding:] The Court of Appeals, Jordan, Circuit Judge held that certification was appropriate on question of first impression as to whether notice and repair process for resolving construction disputes was a "suit" within meaning of CGL policies.

Question certified.

West Headnotes (9)

[1] **Federal Courts**
Summary judgment

Court of Appeals reviews district court's grant or denial of motion for summary judgment de novo and applies the same legal standards that governed the district court. Fed. R. Civ. P. 56(a).

3 Cases that cite this headnote

[2] **Federal Courts**
Statutes, regulations, and ordinances, questions concerning in general
Federal Courts
Contracts

Contract interpretation and statutory construction present questions of law subject to plenary review.

1 Cases that cite this headnote

[3] **Insurance**
Construction as a whole

Under Florida law, courts look at an insurance policy as a whole and give every provision its full meaning and operative effect.

3 Cases that cite this headnote

[4] **Insurance**
Plain, ordinary or popular sense of language

Florida courts start with the plain language of the insurance policy, as bargained for by the parties.

2 Cases that cite this headnote

[5] **Insurance**
Understanding of Ordinary or Average Persons
Insurance
Plain, ordinary or popular sense of language

Under Florida law, insurance policy terms are

given their plain and ordinary meaning and read in light of the skill and experience of ordinary people.

4 Cases that cite this headnote

[6] **Insurance**
Construction or enforcement as written

Under Florida law, if the relevant insurance policy language is unambiguous, it governs.

1 Cases that cite this headnote

[7] **Insurance**
Exclusions, exceptions or limitations
Insurance
Coverage--in General

Under Florida law, if the relevant insurance policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is considered ambiguous and should be interpreted liberally in favor of the insured and strictly against the drafter of the policy.

2 Cases that cite this headnote

[8] **Insurance**
Claim, suit, or demand for damages

Prior Florida statute which stated that providing to liability insurer a copy of notice to resolve construction dispute was not a claim for insurance purposes did not prohibit treatment of the notice as a claim for insurance purposes; rather, policy language determined whether contractor's commercial general liability (CGL) policy insurer owed duty to defend contractor in statutorily prescribed notice and repair process. Fla. Stat. Ann. § 558.004(13) (2012).

1 Cases that cite this headnote

[9] **Federal Courts**
Particular questions

Certification to Florida Supreme Court was appropriate on question of first impression as to whether notice and repair process for resolving construction disputes between property owners and contractors was a "suit" within the meaning of commercial general liability (CGL) policies requiring insurer to defend insured against "suit" seeking damages; decision had policy implications for construction and insurance industries. Fla. Stat. Ann. § 558.001.

3 Cases that cite this headnote

Attorneys and Law Firms

***1319** Adam P. Handfinger, Joshua Ari Levy, Meredith N. Reynolds, Peckar & Abramson, PC, Miami, FL, Eric Neuman, Murdoch, Weires & Neuman, PLLC, Boca Raton, FL, for Plaintiff-Appellant.

Holly S. Harvey, Clyde & Co US LLP, Ariadna Hernandez, Jackson Lewis, PC, Miami, FL, Kimberly A. Ashby, Akerman, LLP, Orlando, FL, for Defendant-Appellee.

Christine A. Gudaitis, Ashley Hacker, Ver Ploeg & Lumpkin, PA, Miami, FL, Mark Andrew Boyle, Sr., Alexander Brockmeyer, Molly Ann Chafe Brockmeyer, Boyle & Leonard, PA, Fort Myers, FL, for Construction Association of South Florida, Leading Builders of America, and South Florida Associated General Contractors, Amici Curiae.

Steven Michael Klepper, Kramon & Graham PA, Baltimore, MD, William Gray Dunlap, Jr., W. Gray Dunlap, Jr., PA, St. Petersburg, FL, for American Insurance Association, and The Florida Insurance Council, Amici Curiae.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:13-cv-80831-KAM

Before JORDAN and FAY, Circuit Judges, and FRIEDMAN,* District Judge.

Opinion

JORDAN, Circuit Judge:

In 2003, the Florida Legislature enacted Chapter 558 of the Florida Statutes, establishing a notice and repair process to resolve construction disputes between ***1320** property owners and contractors, subcontractors, suppliers, or design professionals. The Florida Legislature said it passed Chapter 558 because it was "beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners." Fla. Stat. § 558.001.

In this appeal, we must decide whether Chapter 558's statutorily prescribed notice and repair process constitutes a "suit" under a commercial general liability (CGL) insurance policy, so as to trigger the insurer's duty to defend. Remarkably, in the 13 years since the enactment of Chapter 558 no Florida court (or federal court sitting in diversity) has addressed this important issue in a reported decision.

After reviewing the briefs submitted by the parties and *amici curiae*, and with the benefit of oral argument, we believe that we would greatly benefit from the guidance of the Florida Supreme Court on the meaning of the policy language at issue here and its relationship to Chapter 558. As a result, we certify a dispositive question of law to the Florida Supreme Court.

I

Generally, pursuant to Chapter 558's notice and repair process, a property owner (the claimant) must serve a written notice of a claim on the contractor, subcontractor, supplier, or design professional (for ease of reference, the contractor), describing the nature of the alleged construction defect. *See* Fla. Stat. § 558.004(1). Chapter 558 prescribes time periods for the contractor to inspect the defect or engage in destructive testing to determine the nature and cause of the defect; to serve a copy of the notice of claim on any additional parties the contractor believes may be responsible for the defect; and to serve a written response that offers to remedy the defect at no cost to the claimant, offers to compromise and settle the claim, or disputes the claim. *See* §§ 558.004(2)–(5).

Chapter 558 provides that, upon request, the claimant and the contractor shall exchange various materials pertaining to the alleged construction defect, including design plans, specifications, photographs and video, expert reports, and maintenance records. *See* § 558.004(15). The parties have 30 days to provide the requested materials, and "[i]n the event of subsequent litigation, any party who failed to provide the requested materials shall be subject to such sanctions as the court may impose for a discovery violation." *Id.*

If the contractor disputes the claim and will neither remedy the defect nor compromise and settle the claim, or if the contractor fails to respond to the notice within the prescribed time period, the claimant may proceed with a civil action or arbitration proceeding against the contractor. *See* §§ 558.004(6), 558.002. The claimant may proceed to trial only as to alleged construction defects noticed in accordance with Chapter 558. *See* § 558.004(11).

II

The appellant, Altman Contractors, Inc., served as the general contractor for the construction of a high-rise residential condominium in Broward County, Florida. ACI purchased seven, consecutive, one-year CGL insurance policies from the appellee, Crum & Forster Specialty Insurance Company. Those policies were in effect from February 1, 2005, through February 1, 2012, and are the same in all relevant respects.

The CGL policies state:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty ***1321** to defend the insured against any "*suit*" seeking those damages. However, we will have no duty to defend the insured

> against any "*suit*" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

D.E. 36-1 at 9 (emphasis added).[1]

And the policies define the term "suit" as follows:

> "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
>
> a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
>
> b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

Id. at 23.

In April of 2012, the condominium served ACI with a notice of claim pursuant to Chapter 558, alleging the existence of various construction defects and deficiencies that resulted in property damage. The condominium served several supplemental notices of claims later in 2012 and in 2013. We refer to these claims as the "Chapter 558 notices."

In January of 2013, ACI sent a demand letter to C&F notifying the insurer of the Chapter 558 notices and demanding that C&F defend and indemnify ACI. C&F denied that it had a duty to defend ACI because the matter was "not in suit." On August 5, 2013, C&F advised ACI that it maintained its position that the matter did not meet the policies' definition of "suit," but that it was nonetheless exercising its discretion to participate in ACI's response to the Chapter 558 notices and, in doing so, had hired counsel for ACI. C&F did not consult with ACI concerning its choice of counsel. Nor did C&F reimburse ACI for the attorney's fees and costs it had incurred prior to C&F's retention of counsel. On August 21, 2013, ACI filed this lawsuit against C&F.

In Count I, ACI sought a declaration that C&F owed it a duty to indemnify and a duty to defend and to cover the claims asserted against ACI by the condominium in the Chapter 558 notices. In Count II, ACI asserted a breach of contract claim based on C&F's initial refusal to defend ACI in the Chapter 558 process.

The parties filed competing motions for summary judgment. As on appeal, the determinative issue was whether the Chapter 558 process constitutes a "suit" under the CGL policies' language. The district court, applying Florida law, found the policies' language unambiguous and determined the Chapter 558 process was not a "suit." This appeal by ACI followed.

III

[1]We review a district court's grant or denial of a motion for summary judgment *de novo*, and apply the same legal standards that governed the district court. *See Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1293 (11th Cir. 2013). Summary judgment is properly granted when the movant shows there is no genuine issue as to any material fact and the ***1322** movant is entitled to judgment as a matter of law. *See id.* at 1293–94; FED. R. CIV. P. 56(a).

[2]Contract interpretation and statutory construction present questions of law subject to plenary review. *See Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015). Federal jurisdiction in this case is based on diversity, and the parties agree that Florida law controls. *See State Farm Fire and Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004); *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160, 1163 (Fla. 2006).

[3] [4] [5] [6] [7]Under Florida law, we look at an insurance policy "as a whole and give every provision its full meaning and operative effect." *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1186 (11th Cir. 2002). "Florida courts start with 'the plain language of the policy, as bargained for by the parties.' " *Steinberg*, 393 F.3d at 1230 (quoting *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000)). "Policy terms are given their plain and ordinary meaning and read in light of the skill and experience of ordinary people." *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1306 (11th Cir. 2008). If the relevant policy language is unambiguous, it governs. *See Steinberg*, 393 F.3d at 1230. If, however, the relevant policy language is susceptible to more than one reasonable interpretation—one providing coverage and the other limiting coverage—the insurance policy is

considered ambiguous and should be interpreted liberally in favor of the insured and strictly against the drafter of the policy. *See Anderson*, 756 So.2d at 34.

A

[8]On appeal, C&F revives an argument it unsuccessfully raised before the district court—that § 558.004(13) forecloses imposing a mandatory defense obligation on insurers. Prior to the 2015 amendments, this subsection stated:

> This section does not relieve the person who is served a notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. *However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes*. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.

§ 558.004(13) (2012) (emphasis added). C&F, analogizing to Hawaii's notice and repair statute, relies on the italicized language to argue that "the legislature clearly prohibited treating a [Chapter] 558 notice as a 'claim for insurance purposes,' thus making it impossible for a [Chapter] 558 notice to create a duty to defend against a [Chapter] 558 notice." Br. for Appellee at 20. *See also* D.E. 37 at 12.

The district court rejected C&F's attempt to compare § 558.004(13) to Hawaii's notice and repair statute. Hawaii's statute provides:

> A claimant, no later than ninety days before filing an action against a contractor, shall serve the contractor with a written notice of claim. The notice of claim shall describe the claim in detail and include the results of any testing done. *The notice of claim shall not constitute a claim under any applicable insurance policy and shall not give rise to a duty of any insurer to provide a defense under any applicable insurance policy unless and until the process set forth in section 672E-5 is completed*. Nothing in this chapter shall in any way ***1323** interfere with or alter the rights and obligations of the parties under any liability policy."

Haw. Rev. Stat § 672 E-3(a) (emphasis added).

The district court noted that, unlike the Hawaii statute, "the Florida statute does not say that the notice is not a claim. It says that the **provision** of the notice is not a claim. Nor does the Florida statute contain the specific language addressing the insurer's duty to defend contained in the Hawaii statute." D.E. 66 at 7. The district court concluded that the language of § 558.004(13) simply clarifies that nothing in the statute was intended to supplant the notice requirements under any applicable insurance policy. *See id.*

The district court believed its reading of the statutory provision was consistent with the (at the time, proposed) 2015 amendment, which added clarifying language to § 558.004(13). After the amendment, § 558.004(13) reads (emphasis ours): "However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes *unless the terms of the policy specify otherwise*." According to the district court, the 2015 amendment clarified the intent of the Florida Legislature that Chapter 558 was to have no impact on the obligations of the insured to provide to the insurer whatever notice was required by the underlying insurance policy.

Although the nature of the Chapter 558 process is undoubtedly relevant in this appeal, the critical question before us—whether Chapter 558's notice and repair process constitutes a "suit" under the CGL policies—is,

first and foremost, a question about what the language in the policies means. We agree with the district court that there is no statutory bar to defense and coverage of Chapter 558 proceedings, and therefore focus on the language in the insurance policies. That language ultimately determines whether C&F has a duty to defend.

B

ACI contends that the Chapter 558 process meets the CGL policies' definition of "suit" because it is a "civil proceeding." As ACI puts it, the Chapter 558 process is "undisputedly civil in nature." Br. for Appellant at 22. Furthermore, ACI argues, because the Chapter 558 process is a condition precedent to bringing a lawsuit and impacts any subsequent lawsuit, it is also a "proceeding," a term defined in legal dictionaries as "[a]n act or step that is part of a larger action" and "the steps taken or measures adopted in the prosecution or defense of an action," *id.* (quoting Black's Law Dictionary 1324 (9th ed. 2009)), or as "a particular step or series of steps in the enforcement, adjudication, or administration of rights, remedies, laws, or regulations," *id.* at 26 (quoting Merriam-Webster's Dictionary of Law 387 (1996)). ACI argues that these two dictionary definitions are persuasive because the Florida Supreme Court relied on them in *Raymond James Financial Services, Inc. v. Phillips*, 126 So.3d 186, 191 (Fla. 2013), when it interpreted the word "proceeding" in a statute of limitations statute and concluded that "[w]hereas civil actions may be limited to court cases, a proceeding is clearly broader in scope."[2]

Alternatively, ACI argues that, even if the Chapter 558 process is not a "civil proceeding," it nonetheless constitutes an "alternative dispute resolution proceeding," ***1324** and is therefore still a "suit" under the CGL policies. *See* Br. for Appellant at 49. In support of this argument, ACI notes that the Florida Legislature described the Chapter 558 process as an "alternative method to resolve construction disputes," and an "alternative dispute resolution mechanism." *Id.* at 50 (quoting § 558.001). Under this theory, ACI maintains, there is a question of fact as to whether or not C&F consented to ACI's participation in the Chapter 558 process.

For its part, C&F argues that the definition of "suit" in its policies requires a proceeding that determines the insured's legal liability to pay damages. The Chapter 558 process, it says, "provides no mechanism to seek, and no adjudicatory procedure for, a determination of the insured's legal obligation to pay damages[.]" Br. for Appellee at 9. "Such a proceeding can only occur *after* the [Chapter] 558 notice and opportunity to repair process ends." *Id.* Therefore, C&F argues, it has no duty to defend ACI during the Chapter 558 process.

In addition, C&F contends that ACI's reliance on *Raymond James* is misplaced. In that case, C&F says, the Florida Supreme Court relied on a definition of "proceeding" in Black's Law Dictionary different than the one ACI proposes should be used. According to that definition, "proceeding" is "[a]ny procedural means for seeking redress from a tribunal or agency." *Raymond James*, 126 So.3d at 190 (quoting Black's Law Dictionary 34 (9th ed. 2009)). Because a "tribunal" is " '[a] court or other adjudicatory body,' " *id.* at 191 (quoting Black's Law Dictionary 1646 (9th ed. 2009)), and an arbitrator fell under the definition of an adjudicator, the Florida Supreme Court held that "proceeding," as used in the statute, is "a broad term and includes arbitration." *Id.*

C&F has one more argument. Even assuming that the Chapter 558 process constitutes an "alternative dispute resolution proceeding in which such damages are claimed"—something C&F does not concede—C&F disputes the contention that ACI submitted to the Chapter 558 process with its consent.

C

The district court ruled in favor of C&F, concluding that the Chapter 558 process did not constitute a "suit" and that, as a result, C&F had no obligation to defend or indemnify ACI under the CGL policies. The district court relied on the definition of "civil proceeding" from the 10th edition of Black's Law Dictionary—"[a] judicial hearing, session, or lawsuit in which the purpose is to decide or delineate private rights and remedies, as in a dispute between litigants in a matter relating to torts, contracts, property, or family law." D.E. 66 at 11 (quoting Black's Law Dictionary 300 (10th ed. 2014)). It explained that "[n]othing about the Chapter 558 process satisfies this definition." *Id.*

The district court also examined the definition of "proceeding" in the eighth and ninth editions of Black's Law Dictionary, but disagreed with ACI that these definitions supported its position: "Far from an act or step that is part of a larger action, Chapter 558 is intended to

avoid the commencement of an action." *Id.* at 13. In the view of the district court, "the thrust of the definitions in Black's [Law Dictionary is] that for something to be a 'civil proceeding', there must be some sort of forum and some sort of decision maker involved." *Id.* The district court found this conclusion to be consistent with the Florida Supreme Court's analysis in *Raymond James*.

Based on this definition, the district court determined that the Chapter 558 notice and repair process was aptly described by the Florida Legislature in § 558.001 as a "mechanism" and not a ***1325** "proceeding." This mechanism was meant to guide parties to enter into discussions about a possible resolution with one another, but it did not constitute a " 'proceeding' of any kind," *id.* at 15—including an alternative dispute resolution proceeding—because it did not provide for the parties to appear before anyone to assist with the process, or result in a decision or delineation of private rights and remedies. Consequently, the district court held that the Chapter 558 process, which the condominium triggered with its notices to ACI, was not a "suit" under the CGL policies.

IV

[9]The district court concluded that the terms "suit," and more particularly, "civil proceeding," were not ambiguous, but we are not as sure. The policies define "suit," in part, as a "civil proceeding." They do not contain a corresponding definition for the term "civil proceeding," but do provide that "suit" includes an "arbitration proceeding" or "[a]ny other alternative dispute resolution proceeding" "in which such damages are claimed" and to which ACI submits with C&F's consent. D.E. 36-1 at 23.

Although "the lack of a definition in a policy does not necessarily render [a] term ambiguous and in need of interpretation by the courts," we have "held that differing interpretations of the same provision is evidence of ambiguity[.]" *Hegel*, 778 F.3d at 1220 (internal quotation marks and citations omitted). Here, there are reasonable arguments presented by both sides as to whether the Chapter 558 process constitutes a "suit" or "civil proceeding" within the meaning of the CGL policies issued by C&F. The Florida Supreme Court has provided some guidance regarding the meaning of "proceeding" in *Raymond James*. That case, however, involved the interpretation of a statute and not the interpretation of an insurance policy, which "must be read in light of the skill and experience of ordinary people, and be given their everyday meaning as understood by the man on the street." *Ergas v. Universal Prop. and Cas. Ins. Co.*, 114 So.3d 286, 288 (Fla. 4th DCA 2013) (internal quotation marks and citation omitted).

As the parties and district court noted, there are several decisions from courts outside of Florida that address an insurer's duty to defend an insured pursuant to certain CGL policies during a statutory notice and repair process. *See Clarendon Am. Ins. Co. v. StarNet Ins. Co.*, 186 Cal.App.4th 1397, 113 Cal.Rptr.3d 585, 592, 593 (2010) (holding that the "Calderon Process" in California was a "civil proceeding" within the meaning of a CGL policy because it "is more than a prelitigation alternative dispute resolution requirement," as "[i]t is part and parcel of construction or design defect litigation" and "cannot be divorced from a subsequent complaint"), *review granted*, 117 Cal.Rptr.3d 613, 242 P.3d 67 (Cal. 2010), *review dismissed*, 121 Cal.Rptr.3d 879, 248 P.3d 191 (Cal. 2011); *Melssen v. Auto–Owners Ins. Co.*, 285 P.3d 328, 334–35 (Colo. App. 2012) (holding that the Colorado Defect Action Reform Act process constituted an alternative dispute resolution proceeding, and thus was a "suit" within the definition of a CGL policy); *Cincinnati Ins. Co. v. AMSCO Windows*, 593 Fed.Appx. 802, 809 (10th Cir. 2014) (holding that Nevada's "Chapter 40" prelitigation process was not a "civil proceeding" within the meaning of a CGL policy because "while Chapter 40 purports to mandate participation by contractors, subcontractors, and suppliers, noncompliance does not result in any adverse judgment or obligation but rather imposes limited consequences in subsequent litigation"). Although these cases involve similar policy language, each of these decisions pertains to a unique state notice and repair statute ***1326** that is different from Florida's Chapter 558.

"On many occasions this court has resolved difficult or uncertain questions of state law without recourse to certification." *Escareno v. Noltina Crucible and Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998). But here we are confronted with a question intersecting state insurance law and a state statute for which there is no guidance from the Florida courts. And, as we explain, the outcome of this case may have significant practical and policy implications for Florida.

ACI argues that, without the benefit of insurance carriers' participation and defense during the Chapter 558 process, many in the construction industry will decline to meaningfully participate in the process and may even invite litigation to obtain the carriers' contribution, thus undermining the Florida Legislature's intent. *See* Br. for

Appellant at 55. This view is shared by its *amici curiae*, the Construction Association of South Florida, the South Florida Associated General Contractors, and the Leading Builders of America. They argue that if the term "suit," as used in C&F's CGL policies, does not include the process set forth in Chapter 558, then policyholders "will contest or not respond to [Chapter] 558 notices so that the claimant files a lawsuit—triggering the duty to defend." Amended Br. of Construction Ass'n of South Florida *et al*. at 10–11.

C&F, on the other hand, maintains that imposing a duty on insurers to defend during the Chapter 558 process will fuel an insurance crisis in the state by dramatically increasing the cost of insurance to those in the construction trade and limiting its availability. *See* Br. for Appellee at 26–27. The American Insurance Association and the Florida Insurance Council, in their *amici curiae* brief in support of C&F, argue that it is not necessarily in an insured's interest for a Chapter 558 notice to trigger a defense obligation. They say that if the insurer must appoint counsel to represent the insured at the Chapter 558 stage, the claimant's likely response will also be to retain a lawyer, and then "[o]nce the claimant retains counsel, its legal fees ... make it harder for the claimant to be made whole and, therefore, for the case to settle," thereby also frustrating the Florida Legislature's intent. Br. of American Ins. Ass'n *et al*. at 18.

Given these possible policy implications with respect to this question of first impression, we think certification to the Florida Supreme Court is appropriate.

V

We respectfully certify the following question of law to the Florida Supreme Court:

> Is the notice and repair process set forth in Chapter 558 of the Florida Statutes a "suit" within the meaning of the CGL policies issued by C&F to ACI?

Our phrasing of this question is not intended to restrict, in any way, the Florida Supreme Court's consideration or resolution of the issue. To assist the Florida Supreme Court in considering this certified question, the record in this case, copies of the parties' briefs, and copies of the briefs of the *amici curiae* shall accompany this certification.

QUESTION CERTIFIED.

All Citations

832 F.3d 1318, 26 Fla. L. Weekly Fed. C 588

Footnotes

* The Honorable Paul L. Friedman, United States District Judge for the District of Columbia, sitting by designation.

1 According to the American Insurance Association and the Florida Insurance Council, appearing as *amici curiae*, this policy language comes from standard commercial general liability forms drafted by the Insurance Services Office, an industry organization that promulgates standard insurance policies that are used by insurers throughout the country. *See* Br. of American Ins. Ass'n *et al*. at 2.

2 Neither the eighth edition of Black's Law Dictionary, published in 2004, nor the ninth edition of Black's Law Dictionary, published in 2009, contains a definition of "civil proceeding."

TAB 2

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.

Synopsis

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 (6)

[1] **Federal Courts**
Proceedings following certification

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.

Cases that cite this headnote

[2] **Appeal and Error**
Insurers and insurance

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.

2 Cases that cite this headnote

[3] **Insurance**
Property damage

Damage to windows from subcontractor's defective 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.

33 Cases that cite this headnote

[4] **Insurance**
Property damage

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.

36 Cases that cite this headnote

[5] **Insurance**
Accident, occurrence or event

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.

1 Cases that cite this headnote

[6] **Insurance**
Property damage

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.

28 Cases that cite this headnote

Attorneys and Law Firms

***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.

Opinion

***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."[1] 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").

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.[2] Pozzi also contended that the negligently installed windows leaked,

> 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. [3]

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.)[4]

The parties filed cross-motions for summary judgment.[5] 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.

[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.[6] 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.

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 windows 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.*

All Citations

984 So.2d 1241, 33 Fla. L. Weekly S392

Footnotes

1 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.

2 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."

3 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.

4 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.

5 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 windows.

6 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).

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TAB 3

782 F.3d 1240
United States Court of Appeals,
Eleventh Circuit.

Hugh A. CARITHERS, Individual, Katherine S. Carithers, Individual, Plaintiffs–Appellees,
v.
MID–CONTINENT CASUALTY COMPANY, a corporation, Defendant–Appellant.

No. 14–11639.
|
April 7, 2015.

Synopsis

Background: Homeowners, as assignees of insured general contractor, brought action against commercial general liability (CGL) insurer, seeking to recover $90,000 consent judgment in favor of homeowners, which was reached in homeowners' underlying suit against insured for construction defects and resulting property damage. The United States District Court for the Middle District of Florida, No. 3:12–CV–00890–MMH–PDB, granted summary judgment in favor of homeowners in part, denied insurer's motion for leave to amend its answer, and ultimately entered judgment, following bench trial, in favor of homeowners. Insurer appealed.

Holdings: The Court of Appeals, Cox, Circuit Judge, held that:

[1] insurer had duty to defend insured in underlying action;

[2] proper trigger for determining when property damage to home "occurred" was date of actual damage, for purpose of degerming if damage was covered within CGL policy period;

[3] District Court did not abuse its discretion in denying insurer's motion for leave to amend its answer;

[4] homeowners had burden to prove that brick installation and application of brick coating were performed by two different subcontractors, in order to prove that damage to brick was "property damage" under CGL policy;

[5] damage to the tile caused by inadequate mud base was not covered "property damage" under CGL policy; and

[6] CGL policy provided coverage for repairing defective balcony, which allowed water to seep into ceilings and walls of garage resulting in wood rot.

Affirmed in part, reversed in part, and remanded.

West Headnotes (14)

[1] **Federal Courts**
Summary judgment

The court of appeals reviews de novo the grant of summary judgment and the denial of summary judgment.

Cases that cite this headnote

[2] **Federal Courts**
Pleading

The court of appeals reviews a district court's denial of a motion for leave to amend the pleadings at trial for abuse of discretion.

Cases that cite this headnote

[3] **Federal Courts**
Questions of Law in General
Federal Courts
"Clearly erroneous" standard of review in general

Following a bench trial, the court of appeals reviews the district court's legal conclusions de novo and findings of fact for clear error.

1 Cases that cite this headnote

[4] **Insurance**
Pleadings

Under Florida law, a court determines whether a liability insurer had a duty to defend its insured in the underlying action using only the allegations in the complaint in the underlying action.

4 Cases that cite this headnote

[5] **Insurance**
Continuous acts and injuries; trigger

Under Florida law, commercial general liability (CGL) insurer had duty to defend insured general contractor on home construction project, in homeowners' action against insured for property damage to home in connection with alleged construction defects; insurer and insured disputed whether property damage to the home occurred during the policy period, and law was uncertain as to whether proper trigger for determining if property damage occurred during policy period was date of actual damage, as asserted by insured, or date when damage was discovered or could have been discovered with reasonable inspection, as asserted by insurer.

6 Cases that cite this headnote

[6] **Insurance**
In general; standard

Under Florida law, a liability insurer's duty to defend is broader than its duty to indemnify.

2 Cases that cite this headnote

[7] **Insurance**
In general; standard

Under Florida law, all doubts as to whether a duty to defend exists in a particular case must be resolved against the liability insurer and in favor of the insured.

1 Cases that cite this headnote

[8] **Insurance**
Pleadings

Under Florida law, a liability insurer must defend an action where the facts alleged against the insured would give rise to coverage, even if those facts are not ultimately proven at trial.

1 Cases that cite this headnote

[9] **Insurance**
Continuous acts and injuries; trigger

Under Florida law, as predicted by the Court of Appeals, the proper trigger for determining when property damage to home arising from latent construction defects, which included damage to electrical appliances, brick exterior, tile, and garage, "occurred" was the date of the actual damage, rather than on later date when the property damage was discovered or could have been discovered with reasonable inspection, for purpose of determining whether damage was covered within period of home builder's commercial general liability (CGL) policy with products-completed operations coverage; policy defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

4 Cases that cite this headnote

[10] **Federal Civil Procedure**
Time for amendment

District Court did not abuse its discretion in denying home builder's commercial general liability (CGL) insurer's motion for leave to amend its answer at trial to assert a coverage defense based on fungus and mold exclusion in the policy, in homeowners' action to recover for property damage, including wood rot allegedly caused by fungus; although insurer was aware of expert's opinion that the wood rot was caused by fungus more than a year before trial, it did not file motion to amend until the close of the homeowners' case.

Cases that cite this headnote

[11] **Insurance**
Burden of proof

The general rule under Florida law is that once the insured establishes a loss apparently within the terms of the insurance policy, the burden is upon the insurer to prove that the loss arose from a cause which is excepted.

Cases that cite this headnote

[12] **Insurance**
Property damage
Insurance
Burden of proof

Under Florida law, homeowners had burden to prove that brick installation on home and the application of exterior brick coating were performed by two different subcontractors, in order to prove that damage to the brick caused by defective application of the brick coating qualified as "property damage" within meaning of commercial general liability (CGL) policy with products-completed operations coverage issued to general contractor; policy's coverage for property damage did not include defective work of subcontractor, but did include damage to other property caused by defective work of subcontractor.

1 Cases that cite this headnote

[13] **Insurance**
Property damage

Under Florida law, the installation of tile in home and the installation of the mud base for the tile were not performed by two different subcontractors, as required to show that damage to the tile caused by inadequate mud base was covered "property damage" within meaning of commercial general liability (CGL) policy with products-completed operations coverage issued to general contractor; policy's coverage for property damage did not include defective work of subcontractor, but did include damage to other property caused by defective work of subcontractor.

2 Cases that cite this headnote

[14] **Insurance**
Products and completed operations hazards

Under Florida law, commercial general liability (CGL) policy with products-completed operations coverage issued to general contractor provided coverage for repairing defective balcony, which allowed water to seep into ceilings and walls of garage resulting in wood rot; although the defective balcony was not covered "property damage" under policy because it was the defective work of a subcontractor, the policy covered costs of repairing damage to garage caused by defective work.

3 Cases that cite this headnote

Attorneys and Law Firms

***1242** Robert Edward Warren, I, Law Offices of Robert E. Warren P.A., Ponte Verda Beach, FL, for

Plaintiffs–Appellees.

John R. Catizone, Morris D. Pataky, Dara Lynn Schottenfeld, Litchfield Cavo, LLP, Fort Lauderdale, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 3:12–cv–00890–MMH–PDB.

Before ED CARNES, Chief Judge, COX, Circuit Judge, and ROYAL,* District Judge.

Opinion

COX, Circuit Judge:

This is an insurance dispute, in a diversity case, arising out of defects in the construction of a house for the Plaintiffs, Hugh and Katherine Carithers ("the Carithers"). Florida law applies. The policy at issue is a post–1986 commercial general liability policy with products-completed operations coverage issued to general contractor Cronk Duch Miller & Associates, Inc. ("Cronk Duch"). Cronk Duch assigned the rights under the policy to the Carithers. We address a number of coverage issues related to damage to a completed project caused by the defective work of sub-contractors. We affirm in part and reverse in part.

1243 I. *Facts and Procedural History

After discovering a number of defects in their home, the Carithers filed suit against their homebuilder, Cronk Duch, in state court ("the underlying action"). Cronk Duch's insurance company, Mid–Continent Casualty Company ("Mid–Continent"), refused to defend the action on behalf of Cronk Duch. The Carithers and Cronk Duch then entered into a consent judgment in the underlying action for approximately $90,000, in favor of the Carithers. The consent judgment also assigned to the Carithers Cronk Duch's right to collect the judgment amount from Mid–Continent. The Carithers then filed this action against Mid–Continent in state court to collect from Mid–Continent on the settlement. Mid–Continent removed the case to the Middle District of Florida. The Carithers are the Plaintiffs in this action due to Cronk Duch's assignment of its rights to them.

Mid–Continent issued four insurance policies to Cronk Duch. The first policy provided coverage from March 9, 2005, to March 9, 2006, the second from March 9, 2006, to March 9, 2007, the third from March 9, 2007, to March 9, 2008, and the fourth from March 9, 2008 to October 6, 2008. The policies read, in relevant part,[1]

SECTION 1—COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages....

b. This insurance applies to "bodily injury" and "property damage" only if....

(2) The "bodily injury" or "property damage" occurs during the policy period....

2. Exclusions

This insurance does not apply to....

j. Damage To Property

"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 these 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. Damage To Your Work

"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 sub-contractor....
>
> SECTION V—DEFINITIONS....
>
> ***1244** 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions....
>
> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it....
>
> This insurance does not apply to:
>
> 1. "Bodily injury", "property damage", "personal or advertising injury" or "medical payments" arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus, mildew, mold or resulting allergens....

(Insurance Policy # 1, DE 69–4 at 16–29, 42).

The parties filed cross-motions for summary judgment on the issue of Mid–Continent's duty to defend Cronk Duch in the underlying action. The complaint in the underlying action alleged that the defects could not have been discovered until 2010. Since Mid–Continent had only agreed to insure Cronk Duch until 2008, Mid–Continent argued, it was not liable for damages that could not have been discovered by reasonable inspection before 2010. On the duty to defend issue, the district court granted summary judgment for the Carithers and denied summary judgment for Mid–Continent. In reaching this conclusion, the district court held that the proper "trigger" for determining if property damage "occurred" during the policy period is the date of the actual damage. The district court rejected Mid–Continent's argument that property damage occurs when it is discovered, or, alternatively, when it could be discovered by reasonable inspection.

The coverage issue was decided following a bench trial. During the trial, the Carithers's expert testified that the damage to the Carithers's garage was the product of wood rot. This expert also testified that wood rot is usually caused by fungus. After this, Mid–Continent asked for leave to amend its answer to assert a defense based on an exclusion in the policy for damage caused by fungus and mold. The district judge denied the motion, holding that Mid–Continent had impermissibly delayed in raising this issue and that an amendment was not permissible under Fla. Stat. § 627.426(2)(a), which, according to the district court, requires thirty days written notice if an insurer is going to deny coverage based on a coverage defense.

Following trial, the court found that the damage occurred in 2005, and, therefore, that the 2005–2006 policy applied. Next, applying the 2005–2006 policy, the court concluded that the policy's coverage for "property damage" does not include the defective work of a sub-contractor, but does include damage to other property caused by the defective work of a sub-contractor. Based on this conclusion, the court determined: (1) that a faulty electrical system caused property damage to the electrical appliances; (2) that the incorrect application of exterior brick coating caused property damage to the brick; (3) that the use of inadequate adhesive and an inadequate base in the installation of tile caused property damage to the tile; and (4) that the incorrect construction of a balcony, which allowed water to seep into the ceilings and walls of the garage leading to wood rot, caused property damage to the garage.

The court concluded that Mid–Continent was liable for all of the damages awarded in the state court judgment. This included the cost of repairing the balcony itself, which, the district judge determined, had to be replaced in order to repair the property ***1245** damage to the garage. In other words, though the balcony was not property damage (because it was the defective work of a sub-contractor), the balcony was part of the cost of repairing the garage, which was property damage. Similarly, the damage award included the cost of replacing the defective mud base, apparently because it needed to be replaced in order to replace the tiles, though the district court made no such finding.[2]

II. *Contentions on Appeal*

Mid–Continent presents three contentions on this appeal. First, Mid–Continent contends that it was entitled to summary judgment on the issue of the duty to defend Cronk Duch in the underlying action. And, Mid–Continent contends, if there was no duty to defend, there is no duty to indemnify Cronk Duch for the damages awarded in the underlying action. Second, Mid–Continent contends that the court erred by refusing to grant it leave to amend its answer to include a coverage defense based on the fungus and mold exclusion in the policy. Third, Mid–Continent contends that the court improperly awarded damages for the brick, the tiles, the mud base,

and the balcony.[3]

III. *Standard of Review*

[1] [2] [3] We review de novo the grant of summary judgment and the denial of summary judgment.[4] *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir.1997). We review a district court's denial of a motion for leave to amend the pleadings at trial for abuse of discretion. *Borden, Inc. v. Florida E. Coast Ry. Co.*, 772 F.2d 750, 758 (11th Cir.1985). Following a bench trial, we review legal conclusions de novo and findings of fact for clear error. *Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276, 1282 (11th Cir.2006).

IV. *Discussion*

a. Summary Judgment on the Duty to Defend

[4] We determine whether Mid–Continent had a duty to defend Cronk Duch in the underlying action using only the allegations in the Carithers's complaint in the underlying action. *Jones v. Florida Ins. Guar. Ass'n, Inc.*, 908 So.2d 435, 442–43 (Fla.2005).

[5] Mid–Continent contends that this issue turns on what the proper trigger is for determining whether property damage "occurs" during the policy period. Mid–Continent contends that property damage occurs when it manifests itself. The parties call this the "manifestation" trigger. Mid–Continent presents two versions of the manifestation trigger: (1) that damage occurs when it is discoverable by reasonable inspection; or (2) that damage occurs when it is actually discovered. The Carithers contend that property damage occurs when the property is damaged. The ***1246** parties call this the "injury-in-fact" trigger.

The complaint in the underlying action alleged that the damages could not have been discovered by reasonable inspection until 2010. There was no policy in effect, however, after 2008. Thus, Mid–Continent contends, if we apply the manifestation trigger, there was no duty to defend Cronk Duch in the underlying action because the property damage that gave rise to the underlying action did not occur during any of the four policy periods. Mid–Continent does not assert any other basis for refusing to defend Cronk Duch in the underlying action. The Carithers respond in two ways. First, as discussed above, they argue that the manifestation trigger is not the proper trigger. Second, they argue that, even if the manifestation trigger applies, there was a duty to defend in the underlying action.

[6] [7] We hold that there was a duty to defend in the underlying action. An insurance company's duty to defend is broader than its duty to indemnify. *See MacLeod v. School Bd. of Seminole Cnty.*, 457 So.2d 511, 511 (Fla. 5th DCA 1984). And, "[a]ll doubts as to whether a duty to defend exists in a particular case must be resolved against the insurer and in favor of the insured." *Grissom v. Commercial Union Ins. Co.*, 610 So.2d 1299, 1307 (Fla. 1st DCA 1992). In short, Mid–Continent was required to offer a defense in the underlying action unless it was certain that there was no coverage for the damages sought by the Carithers in the action.

Mid–Continent admits that "no Florida state court appellate decision" has decided which trigger applies to determining when property damage occurs in these circumstances. (Br. for Appellant at 15). And, Mid–Continent admits that the issue has split federal district courts in Florida. (*Id.*). Basically, Mid–Continent is asking this court to make new law deciding which trigger applies, and, thereby, retroactively justify its refusal to offer a defense to Cronk Duch.

[8] Even if we were to agree with Mid–Continent as to what the appropriate trigger is for determining when property damage occurs, it would not follow that it was entitled to refuse to offer Cronk Duch a defense. An insurance company must defend an action where the facts alleged against the insured would give rise to coverage, even if those facts are not ultimately proven at trial. We consider this situation analogous. Given the uncertainty in the law at the time, Mid–Continent did not know whether there would be coverage for the damages sought in the underlying action because Florida courts had not decided which trigger applies. Mid–Continent was required to resolve this uncertainty in favor of the insured and offer a defense to Cronk Duch. *See Mid–Continent Cas. Co. v. Am. Pride Bldg. Co.*, 601 F.3d 1143, 1149 (11th Cir.2010) (" 'Thus, an insurer is obligated to defend a claim even if it is uncertain whether coverage exists under the policy.' ") (quoting *First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co.*, 695 So.2d 475, 476 (Fla. 3d DCA 1997)).

For this reason, we hold that the district court did not err in finding that Mid–Continent had a duty to defend Cronk Duch in the underlying action.

when an "occurrence" results in "property damage." There is no requirement that the damages "manifest" themselves during the policy period. Rather, it is the damage itself which must occur during the policy period for coverage to be effective.

Id. at 813.

We agree with the analysis in *Trizec*. The plain language of the policy does not support Mid–Continent's reading. Property damage occurs when the damage happens, not when the damage is discovered or discoverable.

We note the difficulty that may arise, in cases such as this one, where the property damage is latent, and is discovered much later. We also note that the district court found as a fact in this case that the property was damaged in 2005. For this reason, we limit our holding to the facts of this case, and express no opinion on what the trigger should be where it is difficult (or impossible) to determine when the property was damaged. We only hold that the district court did not err in applying the injury-in-fact trigger in this case.

b. The Appropriate Trigger for Determining Coverage

[9] Although we need not decide which trigger applies for purposes of determining whether there was a duty to defend, this issue is material to whether there is coverage for the damages awarded.

As discussed above, the parties disagree about what it means for property damage to occur during the policy period, and thus trigger coverage. The district court held, and the Carithers contend, that the proper ***1247** trigger is the injury-in-fact trigger. Applying this trigger, the only inquiry is when the property was damaged. If the date of actual damage was during the policy period, then that policy applies. Mid–Continent contends that we should apply the manifestation trigger, which (depending on which version of the test you apply) asks (1) when the damage was reasonably discoverable, or (2) when the damage was actually discovered.

The policy at issue applies to property damage that "occurs during the policy period." The policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Though cited by neither party, this court considered a similar policy, under Florida law, in *Trizec Properties, Inc. v. Biltmore Construction Co., Inc.*, 767 F.2d 810 (11th Cir.1985).[5] In *Trizec*, the policy defined an "occurrence," in relevant part, as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage...." *Id.* at 812. The policy language is almost identical in this case. The *Trizec* court considered the same issue:

> [The insurance company] contends that since the complaint alleges that the damage did not "manifest" itself until 1979, and because its coverage ceased on January 1, 1976, it has no duty to defend [the] lawsuit. It asserts that the occurrence of the damage can only trigger coverage where it is discovered or has "manifested" itself.
>
> We believe that [the insurance company] owes [the insured] a duty to defend [the] lawsuit. The language of the policy itself belies [the insurance company's] assertions. The potential for coverage is triggered

c. Denial of Motion to Amend the Pleadings

[10] The district court denied Mid–Continent's motion for leave to amend its pleadings at trial to assert a coverage defense based on the fungus and mold exclusion in the policy. Mid–Continent contends that the district court erred in relying on Fla. Stat. § 627.426(2)(a) as the basis for denying the motion. According to Mid–Continent, this statute does not apply to denials of coverage ***1248** based on express policy exclusions, such as the fungus and mold exclusion at issue here. The Carithers do not appear to dispute that Fla. Stat. § 627.426(2)(a) was not a proper basis for denying the motion. They contend, instead, that disallowing this last minute amendment was not an abuse of discretion under the circumstances.

The district court's entire discussion of this issue is found in a footnote in its Memorandum and Order:

> One of Plaintiffs' witnesses, Brett Douglas [Newkirk], testified that the wood rot in Plaintiffs' garage developed because the water incursion allowed microscopic "critters" such as fungi to grow in the wood. (Tr. at 113.) Mid–Continent then argued that the Policy would exclude coverage for damage to the garage because the Policy contains a "Fungus, Mildew and Mold Exclusion." (Policy at ML 12 17 (04 01).)

> But Mid–Continent has been aware since the inception of this matter that the damage to the garage was caused by wood rot, which is by definition "decomposition from the action of bacteria or fungi." Definition of verb "rot," www.merriam-webster.com/dictionary/rot (last visited March 3, 2014). 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).

(Mem. and Order, DE 126 at 6–7 n. 2). We read the district court's opinion as denying the motion to amend for two reasons. First, the court discussed what can be characterized as unreasonable delay. The court stated that Mid–Continent had been aware of wood rot "*since the inception* of this matter" and that "Mid–Continent cannot now rely on an exclusion that it has *never* before mentioned in this litigation. (*Id.*) (emphasis added). Second, the district court determined that the amendment was precluded by Fla. Stat. § 627.426(2)(a).

We hold that the court did not abuse its discretion in denying the amendment based on Mid–Continent's unreasonable delay. We need not decide whether the court's reliance on Fla. Stat. § 627.426(2)(a) was error. Mid–Continent raised this issue for the first time at the close of the Carithers's case, after the Carithers had finished presenting evidence. (Trial Tr. 1, DE 124 at 141). Long before he testified at trial, the Carithers's expert had attested in an affidavit that "[d]ecay of wood components is the result of *decay-fungi* which consume the wood and are sustained by repeated wettings." (Aff. of Brett Newkirk, DE 21–2 at ¶ 9) (emphasis added). The Carithers filed the expert's affidavit containing that statement more than a year before the trial as a document in support of their motion for summary judgment. We agree with the district court that Mid–Continent was on notice of this issue since the inception of the case, and find no abuse of discretion in the district court's denial of the motion to amend its pleadings based on Mid–Continent's unreasonable delay.

d. Property Damage Determinations

The district court awarded damages for damages to the brick, the tiles, the mud base, and the balcony. Mid–Continent contends that the brick, the tile, the mud base, and the balcony were not properly considered property damage under the policy. For this reason, Mid–Continent contends that the district court erred in awarding damages for these items. The Carithers contend that the brick was properly considered property damage. The Carithers also contend that the tile was ***1249** properly considered property damage. As for the balcony, they contend that, though not property damage itself, the replacement of the balcony was necessary to effect repairs to the garage. Similarly, they contend that the replacement of the mud base was necessary to effect repairs to the tile.

The parties agree that the Supreme Court of Florida's two decisions, *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), govern this case. Neither party contends that the insurance policies in these two cases contain materially different policy language.

According to these cases, "faulty 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." *J.S.U.B.*, 979 So.2d at 889. However, "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.* (citations omitted). And, these cases only apply this rule to the work of sub-contractors. *See, e.g., id.* at 890 ("Even if a 'moral hazard' argument could be made regarding the contractor's own work, the argument is not applicable for the subcontractors' work."). Finally, where a homeowner purchases tangible property—such as a window—which is defectively installed by a sub-contractor, the damage to that tangible property caused by the defective installation constitutes property damage. *Pozzi Window*, 984 So.2d at 1249 ("[B]ecause 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....").

This court interpreted these cases in *Amerisure Mutual Insurance Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir.2012), which is binding precedent in this court. *See United States v. Chubbuck*, 252 F.3d 1300, 1305 n. 7 (11th Cir.2001) (the prior precedent rule applies to interpretations of state law). In *Auchter*, a sub-contractor negligently installed tiles on a roof and the result of this negligent installation was that the entire roof needed to be replaced. 673 F.3d at 1307. The plaintiff argued that the defective installation of tiles caused property damage to

the roof. *Id.* The court rejected this argument, holding that the defective work in this case was the entire roof, not just the tiles. *Id.* at 1308. In other words, because a single sub-contractor built the roof, the roof was the relevant component for distinguishing between defective work and damage caused by defective work. *Id.* And, since the sub-contractor's defective work (the roof) did not cause damage to any other property, there was no property damage.

The *Auchter* court interpreted *Pozzi Window* narrowly. It distinguished between a window, which is composed of many components, and roofing tiles, which are merely one component that goes into creating a roof. *Id.* at 1308 n. 20. Thus, unlike in *Pozzi Window,* it was irrelevant whether the plaintiff had separately purchased the roofing tiles. *Id.* It only mattered that the sub-contractor's negligent work on the roof did not damage any property other than the roof. *Id.*

We apply this framework to the property damage awards challenged by Mid–Continent.

i. *The Brick*

The district court determined that the negligent application of exterior brick coating ***1250** caused property damage to the brick itself. This issue turns on whether the brick installation and the application of the brick coating were done by a single sub-contractor. If it was done by a single sub-contractor, then the damage to the bricks was part of the sub-contractor's work, and this defective work caused no damage apart from the defective work itself. However, if the bricks were installed by one sub-contractor, and a different sub-contractor applied the brick coating, then the damage to the bricks caused by the negligent application of the brick coating was not part of the sub-contractor's defective work, and constituted property damage.

At oral argument, Carithers's counsel conceded that there was no evidence presented on whether the brick coating was applied by the sub-contractor who installed the bricks, or a different sub-contractor. Thus, we must decide who had the burden of proof on this issue.

[11] [12] The general rule under Florida law is that "once the insured establishes a loss apparently within the terms of the policy, the burden is upon the insurer to prove that the loss arose from a cause which is excepted." *Phoenix Ins. Co. v. Branch,* 234 So.2d 396, 398 (Fla. 4th DCA 1970). We conclude that proof that the damaged property was the work of a separate sub-contractor is part of the insured's initial burden of bringing the loss within the terms of the policy. As the Supreme Court of Florida has noted, "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'...." *J.S.U.B.,* 979 So.2d at 889 (citations omitted). We hold that distinguishing defective work from the damage caused by defective work is necessary to establish "a loss apparently within the terms of the policy."

As discussed, Carithers's counsel admitted that the Carithers had presented no evidence establishing that the brick installation and the application of the brick coating were performed by different sub-contractors. The Carithers failed to meet their burden of proof on this issue. As noted previously, if it was done by a single sub-contractor, then the damage to the bricks was part of the sub-contractor's work, and this defective work caused no damage apart from the defective work itself. For this reason, we reverse the district court's award of damages for property damage to the bricks.

ii. *The Tile and the Mud Base*

The district court determined that the use of inadequate adhesive and an inadequate base in the installation of tile caused property damage to the tile. The damage award included the cost of replacing both the tile and the mud base itself. The district court found as a fact that this tile was purchased by the Carithers. (Mem. and Order, DE 126 at 7). Mid–Continent does not contend that this factual finding was clearly erroneous. Instead, Mid–Continent contends that the tile itself was part of the defective work of the sub-contractor. The Carithers respond that, since they separately purchased the tile, the Supreme Court of Florida's decision in *Pozzi Window* justifies the award.

[13] While a broad reading of *Pozzi Window* may support this award, such a reading is foreclosed by our decision in *Auchter.* As discussed above, the court in *Auchter* held that there is no coverage for a defective installation where there is no damage beyond the defective work of a single sub-contractor. *Auchter,* 673 F.3d at 1308. And, unlike the windows in *Pozzi Window,* it is immaterial whether

the ***1251** homeowner separately purchased the tile. *Id.* at 1308 n. 20. Thus, as with the brick, this issue turns on whether the installation of the mud base and the installation of the tile were performed by the same sub-contractor.

We have reviewed the evidence cited by the parties and find that there is no evidence from which a reasonable fact-finder could conclude that the tile and the mud base were installed by different sub-contractors. As with the brick, we conclude that the Carithers failed to meet their burden of proof on this issue. As noted previously, if the mud base and the tile were done by a single sub-contractor, then the damage to the tile was part of the sub-contractor's work, and this defective work caused no damage apart from the defective work itself. For this reason, we reverse the district court's award of damages for the tile and the mud base.

iii. *The Balcony*

[14] The district court found that the balcony was defectively constructed, which caused damage to the garage. The district court also recognized that, under Florida law, the defectively constructed balcony was not covered by the policy. However, the district court found as a fact that, in order to repair the garage (which the parties agree constituted property damage), the balcony had to be rebuilt. Mid–Continent does not contend that this factual finding was clearly erroneous. Rather, Mid–Continent contends that the Carithers cannot recover for any defective work, even where repairing that work is a necessary cost of repairing work for which there is coverage.

We hold that the district court did not err in awarding damages for the cost of repairing the balcony. Under Florida law, the Carithers had a right to "the costs of repairing damage caused by the defective work...." *J.S.U.B.*, 979 So.2d at 889. Since the district court determined that repairing the balcony was part of the cost of repairing the garage, which was defective work, the Carithers were entitled to these damages.

V. *Conclusion*

For the foregoing reasons, we reverse the district court's award of damages for the brick, the tiles, and the mud base, affirm the judgment of the district court in all other respects, and remand for a new determination of damages to be awarded.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

All Citations

782 F.3d 1240, 25 Fla. L. Weekly Fed. C 1068

Footnotes

* Honorable C. Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

1 Mid–Continent contends that the relevant provisions are the same in each policy. Because the district court determined that the March 9, 2005, to March 9, 2006, policy applies, and we agree with this determination, we quote only this policy.

2 The district court did not expressly award damages for the mud base. But the parties agree, based on the amount of damages, that the district court awarded these damages.

3 Mid–Continent does not challenge the part of the district court's damages calculation that was based on damage to the Carithers's electrical appliances caused by the defectively installed electrical system. For that reason, we will not address those particular damages in this opinion beyond noting that the district court's judgment on that point stands.

4 The parties dispute whether we should review the duty to defend issue as determined at the summary judgment stage, or whether we should review the duty to defend issue based on the facts established at trial. But, as discussed below, whether there was a duty to defend in this case is determined based on the allegations in the complaint in the underlying action.

5 While the issues raised in *Trizec* related to the insurance company's duty to defend, rather than its duty to indemnify, the

question presented both in *Trizec* and in this case is the meaning of the word "occurrence." While we "express[ed] no opinion" in *Trizec* whether the insurance company was "liable under the policy," this was due to the existence of factual disputes. 767 F.2d at 813.

End of Document

TAB 4

KeyCite Yellow Flag - Negative Treatment
Distinguished by Mid-Continent Casualty Company v. Adams Homes of Northwest Florida Inc., 11th Cir.(Fla.), February 13, 2018

161 F.Supp.3d 1227
United States District Court, S.D. Florida.

PAVARINI CONSTRUCTION CO. (SE) INC., a Delaware Corporation, individually, and for the use and benefit of Steadfast Insurance Company, a Delaware Corporation, Plaintiff,
v.
ACE AMERICAN INSURANCE COMPANY, a Pennsylvania Corporation, Defendant.

CASE NO. 14–CV–20524–KING
|
Signed October 29, 2015
|
Entered October 30, 2015

Synopsis

Background: Insured, a general contractor for condominium construction project, brought action against commercial general liability (CGL) insurer, asserting breach of contract claim based on insurer's failure to indemnify insured for all costs to repair property damage caused by subcontractors' defective work. Both parties moved for summary judgment.

Holdings: The District Court, James Lawrence King, J., held that:

[1] insured had standing to bring breach of contract lawsuit;

[2] damage caused by subcontractors' defective work was "property damage" within meaning of CGL policy;

[3] coverage would not be prorated between CGL insurer and insurer of policy that insured against subcontractor default;

[4] affidavit by subcontractor default insurer's representative would be stricken as it provided analysis within purview of the district court;

[5] insured was entitled to $23,116,798.44 in damages;

[6] purely economic consequential damages were not covered by CGL policy; and

[7] insured was entitled to award of attorney fees.

Insured's motion granted in part and denied in part; insurer's motion denied.

West Headnotes (10)

[1] **Insurance**
Parties

Insured demonstrated invasion of its legally protected interest in subcontractor default insurance policy and therefore had standing to bring breach of contract action against commercial general liability (CGL) insurer, to whom subcontractor default insurer subrogated its rights, based on CGL insurer's denial of coverage for costs incurred to repair subcontractor's deficient installation of steel on condominium construction project; insured's concrete and particularized harm in exhaustion of subcontractor default policy, was likely to be redressed by favorable decision since it was contractually required to pursue recovery and repay subcontractor default insurer with any funds recovered from CGL insurer as condition to receiving any further payments from subcontractor default insurer.

Cases that cite this headnote

[2] **Insurance**
Property damage

Structural damage to condominium building caused by subcontractors' defective work in installing reinforcing steel within concrete columns, beams, and walls, was, under Florida law, "property damage" within meaning of commercial general liability (CGL) policy with products-completed operations coverage issued to general contractor; even if predominant objective of repair effort was to fix instability

caused by defective subcontractor work, which was removed from coverage under "your work" exclusion, the same effort was required to put an end to ongoing damage to otherwise non-defective property.

2 Cases that cite this headnote

[3] **Insurance**
Primary and excess insurance
Insurance
Proration and Allocation

"Other insurance" provisions, stating that coverage would be excess over other collectible insurance, contained in commercial general liability (CGL) policy and policy that insured against default by subcontractors would not apply to prorate coverage, under Florida law, for cost to repair property damage to condominium project caused by subcontractors' defective work in installing steel in support columns, beams, and walls, since the two policies insured against different risks, and therefore CGL insurer could not shift the loss to subcontractor default insurer; CGL policy insured the project owner, general contractor, and most subcontractors against risk of claims of property damage and bodily injury, while subcontractor default policy insured general contractor for its vicarious liability for negligent subcontracting work.

3 Cases that cite this headnote

[4] **Federal Civil Procedure**
Sufficiency of showing

Insured's proffered summary judgment affidavit from representative of subcontractor default insurer only offered a legal representation of plain language of underlying insurance contract, which was an analysis within exclusive purview of the district court in insured's breach of contract action against commercial general liability (CGL) insurer alleging that it had duty to provide indemnification for loss incurred as result of having to repair subcontractor's defective work in installing steel in support columns, beams and walls in condominium building, and therefore such affidavit was due to be stricken.

Cases that cite this headnote

[5] **Insurance**
Amounts Payable

Insured, on its own behalf and on behalf of subcontractor default insurer, was entitled to $23,116,798.44, exclusive of interest and litigation expenses, in damages from commercial general liability (CGL) insurer as coverage for loss incurred as result of having to repair subcontractor's defective work in installing steel in support columns, beams and walls on condominium construction project, where amount of loss was properly accounted for in spreadsheet and submissions that reflected all of the costs and included both invoices and proof of payment.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Matters considered

Ruling on damages at summary judgment is to be made on the record parties have actually presented, not on one potentially possible.

Cases that cite this headnote

[7] **Federal Civil Procedure**
Weight and sufficiency

Disposition of issues of damage at summary judgment may be made on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the

moving party.

Cases that cite this headnote

[8] **Insurance**
Insured's liability for damages
Insurance
Property damage

Commercial general liability (CGL) policy issued to general contractor in connection with condominium construction project did not cover damages that were purely economic in nature, pursuant to Florida law, and therefore general contractor was not entitled to damages arising from or attributable to property damage caused by subcontractor's defective installation of steel in support columns, beams, and walls, including delay costs, overhead expenses, lost profits, diminution in value, and any other economic losses that flowed from injury to property.

2 Cases that cite this headnote

[9] **Insurance**
Costs and Attorney Fees

The insured, a general contractor on condominium construction project, was entitled to award of attorney fees under Florida law, where insured prevailed in its breach of contract action against commercial general liability (CGL) insurer based on insurer's refusal to reimburse insured for costs to repair property damage caused by subcontractor's defective work in installing steel in support columns, beams, and walls. Fla. Stat. Ann. § 627.428(1).

4 Cases that cite this headnote

[10] **Federal Courts**
Costs and attorney fees

In a diversity case, awards of attorney fees are governed by applicable state law.

1 Cases that cite this headnote

Attorneys and Law Firms

***1229** David T. Dekker, Laura A. Freid-Studlo, Melissa C. Lesmes, Stephen Scott Asay, Pillsbury Withrop Shaw Pittman LLP, Washington, DC, Russell Marc Landy, Peter Francis Valori, Damian & Valori LLP, Miami, FL, for Plaintiff.

Joel D. Adler, Marlow Adler Abrams Newman & Lewis, Maritza Pena, Marlow Connell Abrams Adler Newman & Lewis, Coral Gables, FL, for Defendant.

AMENDED ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

JAMES LAWRENCE KING, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF FLORIDA

THIS MATTER comes before the Court upon cross-motions for summary Judgment (DE 128), filed July 13, 2015. The motions are fully briefed.

I. INTRODUCTION

Plaintiff Pavarini Construction Co. was the general contractor for construction of 900 Biscayne Bay Condominium, a 63–floor, 516–unit condominium ("the Project"). *See* DE 131 at ¶¶ 1–2. The project was insured by three relevant insurance policies: (1) the commercial general liability ("CGL") policy issued by American Home Assurance Company ("American Home"); (2) the CGL policy issued by Defendant ACE American Insurance Company ("ACE"); and (3) the Subguard policy issued by Steadfast Insurance Company

("Steadfast"). *See id.* at ¶¶ 20–24.

The American Home and ACE CGL policies are part of an Owner Controlled Insurance Program ("OCIP") made up of a set of CGL policies designed to provide insurance coverage for the project owner, Terra–Adi International Bayshore, LLC, ("Project Owner"), Plaintiff Pavarini and certain of Plaintiff's subcontractors with uniform insurance coverage for claims of property damage and bodily injury. *See id.* at ¶¶ 17–22. Separately, the Subguard policy with Steadfast ("Steadfast policy") provides coverage to Plaintiff Pavarini Construction Co. as general contractor for risk of subcontractor contractual default. *See id.* at ¶¶ 24, 26.

The American Home policy contains a $2 million per occurrence limit and a $4 million aggregate limit. *See id.* at ¶ 20. ACE's policy has a $25 million per occurrence limit and $25 million aggregate limit. *See id.* at ¶ 22. The ACE CGL policy is excess over the American Home CGL policy. *See id.* The Steadfast policy contains a $25 million aggregate limit. *See id.* at ¶ 79. The Steadfast policy's $25 million aggregate limit applies not just to the 900 Biscayne Bay Condominium but to all covered projects. *See* DE 131 at ¶ 5; DE 131–2 at 105, 110–11, 115. The American Home policy, ACE policy, and Steadfast policy contain "Other Insurance" provisions ***1230** providing that the insurance is excess over any other insurance available. *See* DE 123 at 23, 102.

Plaintiff Pavarini hired subcontractor Alan W. Smith, Inc. ("AWS") for the installation of concrete masonry unit ("CMU") walls and certain reinforcing steel. *See* DE 131 at ¶ 12. Plaintiff hired subcontractor TCOE Corporation ("TCOE") for the supply and installation of reinforcing steel within the cast-in-place concrete columns, beams, and shear walls. *See id.* at ¶ 13. AWS and TCOE were covered by the American Home and ACE policies. *See* DE 110 at 6; DE 128 at 7. The work performed by both subcontractors was so seriously deficient. A significant amount of reinforcing steel was either omitted entirely or improperly installed throughout the building, including placement within its critical concrete structural elements, causing destabilization. *See* DE 110 at 2; DE 131 at ¶ 48.

The building's compromised structural support system resulted in excessive movement of building components. *See* DE 131 at ¶¶ 50–51. This, in turn, caused stucco debonding and cracking on the walls of the building, worsening cracking of cast-in-place concrete elements (columns, beams, and shear walls), and cracking in the mechanical penthouse enclosure on the roof, which led to water intrusion. *See id.*

In December of 2010, upon becoming aware of the deficiency, the Project Owner served Plaintiff with a formal demand to repair all damage. *See id.* at ¶ 46. Both AWS and Plaintiff sought indemnification through the American Home and ACE policies. *See id.* at ¶¶ 64–69. American Home and ACE initially refused coverage.[1] *See id.* at ¶ 69. AWS was contractually obligated to indemnify Plaintiff for the cost of repairing damage caused by its defective work. *See id.* at ¶ 68. In order to meet its indemnification obligation, AWS looked to the American Home and ACE policies for funding. *See id.* Refusal of coverage by American Home and ACE contributed to the contractual default of AWS, which then allowed Plaintiff to receive coverage through the Steadfast policy. *See id.* at ¶¶ 69–70.

On October 5, 2011, Plaintiff and Steadfast entered into a Payment Agreement, whereby Steadfast agreed to advance funds to Plaintiff for approved costs on an ongoing basis. *See id.* at ¶ 75. In return, Plaintiff promised to continue to pursue claims against American Home and ACE and to repay Steadfast with any recovery. *See id.* Through repayment, Plaintiff reduces the amount for which Steadfast can seek recovery. *See id.* at ¶ 95.

Costs incurred by Plaintiff as part of its remediation efforts include amounts paid to: consultants to investigate the damage and design a plan of remediation, install hurricane netting to prevent bodily injury and additional property damage, install a structural steel exoskeleton and a metal panel façade (the "Panel System") to provide the required structural support in the absence of functional steel beams, and repair the mechanical penthouse enclosure on the roof. *See id.* at ¶¶ 57, 91. The parties do not dispute that Plaintiff incurred $25,121,474.84 in costs relating to the remediation effort. *See* DE 135 at 1–3. After accounting for $2 million recovered from the American Home policy and related salvage efforts, Plaintiff seeks a total of $23,116,798.44 in damages. *See* DE 131 at ¶ 100.

***1231** While the amount is undisputed, the parties dispute the nature and character of the loss. *See* DE 135 at 1–3. Plaintiff claims that none of the costs include the repair of defective work itself; rather all repairs were of damage to otherwise non-defective building components. *See* DE 136 at 14–15. Defendant counters that much of the repair effort amounted to a *de facto* repair of the defectively installed steel. *See* DE 128 at 3; DE 135 at 2

Plaintiff brought this action against Defendant ACE for declaratory judgment seeking an adjudication of the rights, duties, and obligations under the ACE policy and for breach of contract seeking monetary damages. The

cross-motions for summary judgment address three main issues: (1) whether Plaintiff has standing to bring its claims; (2) whether the damage caused by the defective work of Plaintiff's subcontractors is covered by the ACE CGL policy; and (3) whether the American Home and ACE CGL policies should prorate with the Steadfast policy based on the other insurance provisions. Additionally, there is a collateral dispute as to the admissibility of certain affidavits sworn to after the close of discovery.

II. LEGAL STANDARD ON MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate where the pleadings and supporting materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is "material" if it may determine the outcome under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must show specific facts to support that there is a genuine dispute. *Id.* at 256, 106 S.Ct. 2505. On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the nonmoving party. *Id.* at 255, 106 S.Ct. 2505. In reviewing the record evidence, the Court may not undertake the jury's function of weighing the evidence or undertaking credibility determinations. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir.2010).

III. STANDING

[1]Defendant Ace American argues that Plaintiff lacks standing because the Steadfast policy provided coverage and made Plaintiff whole. *See* DE 128 at 17. In addition, Defendant claims that Steadfast expressly waived its contractual and equitable subrogation rights and therefore those rights could not have been assigned. *See id.* at 14–17. Plaintiff disagrees that Steadfast waived its subrogation rights. *See* DE 136 at 4. In addition, Plaintiff contends that it has suffered direct pecuniary damages for which it has yet to be made whole. *See id.* Specifically, Plaintiff maintains that the Steadfast policy required it to pay the first $950,000 in damages, that it has not yet been reimbursed by Steadfast for $1,721,500.79 in damages, that the unnecessary exhaustion of the Steadfast policy has harmed its risk management portfolio,[2] and that it is contractually obligated to pursue recovery as a condition to receiving further payments from ***1232** Steadfast. *See id.* at 12–13. In sum, Plaintiff contends that it has standing to bring these claims because of ongoing harm to independent, legally protected interests.

The Court finds that Plaintiff has standing to bring these claims. Plaintiff has demonstrated invasion of its legally protected interest in the Steadfast policy. *See Mt. Hawley Ins. Co. v. Sandy Lake Properties, Inc.*, 425 F.3d 1308, 1311 (11th Cir.2005). It is undisputed that, pursuant to the terms of the Steadfast policy, Plaintiff has the contractual right to receive coverage. Plaintiff's right to receive coverage is now nearly exhausted, Plaintiff has suffered a concrete and particularized harm. Furthermore, Plaintiff has shown a causal connection between Defendant's refusal to provide coverage and the depletion of the Steadfast policy. Finally, it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision because Plaintiff is contractually required to pursue recovery and repay Steadfast with any funds that it recovers, reducing the amount for which Steadfast can seek recovery. *See* DE 131 at ¶ 75. Because the above analysis is ruling on the standing issue, it eliminates the need to address the continued legitimacy of subrogation rights.

Nonetheless, the Court notes that the language of the endorsement modifying the subrogation clause does not appear to amount to an express waiver of subrogation rights. To the contrary, the endorsement requires Plaintiff to "assist [Steadfast], upon reasonable request, in the enforcement of any right against any person or organization which may be liable to [Plaintiff] because of Loss to which this insurance applies, including but not limited to filing any claims and enforcing any liens or security interest against a Subcontractor or its property." DE 131–2 at 107. The endorsement goes on to detail the process by which recovered funds are to be distributed back to Steadfast. *See id.* at 108. In short, the plain language of the endorsement entitles Steadfast to the recovery of funds owed by responsible third parties to its insured in order to offset its payments thereto—the exact circumstance that subrogation contemplates. The only noteworthy distinction is that the contractual duty to pursue recovery falls upon the insured.

IV. COVERAGE

[2]Defendant argues that the repairs to the building are not

covered by the ACE policy because the repairs only remedied the subcontractors' defective work, not "property damage" as defined in the ACE policy. This Court ruled on a strikingly similar argument in its February 25, 2015 Order Denying Defendant's Motion for Summary Judgment. DE 104 at 5. However, at the May 28, 2015 Calendar Call this Court permitted the parties to "raise any issue ... as if it were renewed—as if it were a motion for summary judgment." DE 132 at 38. Therefore, the Court considers the arguments *de novo*.

In order to understand the scope of coverage under the ACE policy, it must be read together with the American Home policy, which the ACE policy incorporates by reference. *See* DE 131–2 at 71. The American Home policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies." DE 131–2 at 13. The American Home policy ***1233** defines "property damage" as "all physical injury to tangible property, including all resulting loss of use of that property" and includes "[l]oss of use of tangible property that is not physically injured." *Id.* at 27. The American Home policy excludes from coverage[3] " '[p]roperty damage to 'your work' arising out of it or any part of it and included in the products-completed operations hazard." *Id.* at 17. This exclusion is known as the "your work" exclusion. However, the "your work" 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." *Id.* Thus, the ACE Policy provides coverage for damage to the completed project caused by a subcontractor's negligent work, but does not provide coverage for the repair of the defective subcontractor work itself. There is no dispute that the subcontractors' defective work was an "occurrence" under the Policy; the question is whether it caused covered "property damage."

The Florida Supreme Court's holding in *U.S. Fire Insurance Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla.2007) is controlling because it discusses a substantively identical insurance policy. The issue in *J.S.U.B.* was whether a standard form CGL policy with products completed operations hazard coverage issued to a general contractor provided coverage for claims against the contractor for damage to the completed project caused by a subcontractor's defective work. *See id.* at 874–75. It was held that defective work performed by a subcontractor that caused damage to the completed project and was neither expected nor intended from the standpoint of the contractor could constitute "property damage" caused by an "occurrence." *See id.* at 875.

Defendant attempts to transform the language of *J.S.U.B.* to support the argument that the repairs here were mostly of defective work, i.e. *de facto* repairs of the improperly installed steel foundation. DE 128 at 18, 22. It is true that if there is no damage beyond faulty workmanship or defective work, there is no resulting "property damage." *See Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294, 1306 (11th Cir.2012). However, if the defective work causes damage to otherwise non-defective completed product, i.e. if the inadequate subcontractor work caused cracking in the stucco, collapse of the penthouse enclosure, and cracking in the critical concrete structural elements, Defendant is entitled to coverage for the repair of that non-defective work.[4] *See id.* Thus, the subsequent question is what constituted the repair of non-defective work as opposed to the repair of defective work.

In interpreting a substantively identical insurance policy, the United States Court of Appeals for the Eleventh Circuit held that the complete replacement of defective ***1234** subcontractor work may be covered when necessary to effectively repair ongoing damage to otherwise non-defective work. *See Carithers v. Mid–Continent Casualty Company*, 782 F.3d 1240 (11th Cir.2015). There, a balcony that had been defectively installed by a subcontractor was causing runoff and resulting water damage to an adjacent garage. *See id.* at 3244, 1251. Although the balcony itself did not constitute independent "property damage" under the terms of the policy, its replacement was necessary in order to effectively repair the garage.[5] *See id* at 1251. "In other words, to repair the garage, it was necessary to completely replace the defectively constructed balcony." Memorandum and Order, *Carithers v. Mid–Continent Casualty Company*, No. 12–00890, 2014 WL 11332308 (M.D.Fla. Mar. 11, 2014), DE 126 at 8. Similarly here, in order to adequately repair the non-defective project components, the building had to be stabilized. Even if the predominant objective of the repair effort was to fix the instability caused by the defective subcontractor work, it is undisputed that the same effort was required to put an end to ongoing damage to otherwise non-defective property, e.g. damage to stucco, penthouse enclosure, and critical concrete structural elements. *See* DE 128 at 2–3; DE 131 at ¶¶ 52–63. Thus, the ACE policy provides for complete indemnification.[6]

V. PRORATION

[3]The Steadfast policy and the American Home and ACE policies contain "Other Insurance" provisions providing

that the insurance is excess over any other insurance available. *See* DE 123 at 23, 102. "Other Insurance" provisions such as these apply when two or more insurance policies are on the same subject matter, risk, and interest. *See Citizens Prop. Ins. Corp. v. Ashe*, 50 So.3d 645, 650 (Fla. 1st DCA.2010). In this case, it is undisputed that the American Home and ACE policies insured the Project Owner, Plaintiff, and most subcontractors against the risk of claims of property damage and bodily injury. *See* DE 131 at 18. In contrast, the Steadfast policy insured Plaintiff against the risk of subcontractor contractual default. *See id.* at 24–26. The policies thus insure against different risks.[7] *See e.g. Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294, 1303 (11th Cir.2012).

In addition, Courts disregard "Other Insurance" provisions where, as here, there is a contractual right of indemnification ***1235** between the parties insured by the relevant policies. *St. Paul Fire & Marine Ins. Co. v. Lexington Ins. Co.*, No. 05–80230–CIV, 2006 WL 1295408, at *4 (S.D.Fla. Apr. 4, 2006). Here, AWS contracted to indemnify Plaintiff for damages resulting from its work and Defendant insured AWS for claims of property damage. DE 131–1 at 90. Therefore, Defendant cannot utilize the "Other Insurance" provision to shift the loss.

Finally, Defendant insured AWS, the actively negligent subcontractor, whereas Steadfast insured Plaintiff, the vicariously liable general contractor. Provided that ACE has a duty to offer coverage, Steadfast's policy should not have been reached first. *See Allstate Ins. Co. v. Executive Car & Truck Leasing, Inc.*, 494 So.2d 487, 488–89 (Fla.1986); *Allstate Ins. Co. v. Fowler*, 480 So.2d 1287, 1290 (Fla.1985).

VI. AFFIDAVITS

[4]The Court has discretion to strike affidavits entered at summary judgment if they provide information that would otherwise be inadmissible at trial due to Rule 37(c)(1) sanctions. *See* Fed.R.Civ.P. 37(c)(1); *Burden v. City of Opa Locka*, No. 11–22018–CIV, 2012 WL 4764592, at *7 (S.D.Fla. Oct. 7, 2012) (citing *Cooper v. Southern Co.*, 390 F.3d 695, 728 (11th Cir.2004)). Defendant argues that certain affidavits sworn to after the close of discovery should be stricken as untimely.[8] DE 135 at 3 n.3. However, Defendant fails to specifically identify any witness or information improperly disclosed pursuant to Rule 26.[9] *See* Fed.R.Civ.P. 26; *Burden*, 2012 WL 4764592, at *7; *Rollins v. Alabama Cmty. Coll.*, No. 2:09–636–CIV, 2011 WL 1897415, at *3 (M.D.Ala. May 18, 2011). In addition, Defendant indicates only four affidavits to strike—the affidavits of Plaintiff's expert, Alexandre Hockman, P.E., Plaintiff's President, Gary Glenwenckel, StructureTone's John Marsicano, as well as Steadfast Insurance Company's Andrew Thompson. The first three affiants were listed in Plaintiff's Trial Witness List as witnesses whom Plaintiff expects to present at trial. *See* DE 110–3 at 1–2. The fourth affiant, Andrew Thompson, was listed as a witness whom Plaintiff may call if need arises. *See id.* Plaintiff has not shown that these affidavits provide information that would otherwise be inadmissible at trial. That said, Defendant accurately characterizes Mr. Thompson's affidavit as only offering a legal interpretation of the plain language of the underlying insurance contract, an analysis that remains within the exclusive purview of this court. Accordingly, Mr. Thompson's affidavit (DE 131–8) is due to be stricken.

VII. DAMAGES

[5]It is undisputed that, in total, Plaintiff incurred direct losses of $25,121,474.84 in connection with the remediation effort. *See* DE 131 at 100. After taking into account compensation from the American Home policy and related ***1236** salvage efforts, there remains an undisputed direct loss of $23,116,798.44. *See id.* Defendant admits that the design and installation of the Panel System cost over $23 million and characterizes the report of its own expert, Jacob Zona, as confirming that the Panel System corrected the defective work of AWS and TCOE, including the missing or improperly installed anchors and rebar in the concrete masonry units CMUs and missing or improperly installed steel in the columns and beams, which Mr. Zona also admits was the primary cause of the vast majority of damage. DE 135 at 2; DE 135–1 at 3–5, 38–44.[10] In its pleadings, Defendant refers to the Panel System on several occasions as "the $25 million curtain wall repair," tacitly admitting that the roughly $23 million in damages requested by Plaintiff approximates the actual loss. DE 135 at 7, 14. In addition, Defendant's expert Jonathan Held estimated costs as follows:

> 1. The cost to remove and replace stucco at certain locations at the project is $1,671,157.50.
>
> 2. The cost to install netting, structural steel framing and metal panels (i.e. the curtainwall designed by KCE Engineers) is $11,039,647.00.
>
> 3. The cost to repair defective masonry is

$2,616,680.00.

4. The cost to repair defective concrete is $14,721,161.00.

DE 128–12 at 1–2. Thus, Defendant's own expert estimated direct losses of $30,048,645.50, a figure well in excess of the requested relief of $23,116,798.44, the accuracy of which Plaintiff does not contest. DE 131 at ¶ 94; DE 140 at 7–8.

Plaintiff has attached a spreadsheet to account for all its costs. DE 131–3 at 104–149. Plaintiff has also attached an affidavit of John Marsicano, Director of Shared Financial Services for Structure Tone, Inc. ("Structure Tone"), an affiliate of Plaintiff. DE 131–9 at 2. In his affidavit, Mr. Marsicano attests to his responsibility for the submission of Subcontractor Default Insurance ("SDI") claims to Steadfast and for the oversight of the submission of Plaintiff's SDI claims related to damage caused by missing and improperly installed reinforcing steel at the Project, including the remediation work related to that damage. Mr. Marsicano states that Plaintiff has made 33 submissions to Steadfast, which reflect all of its costs and include both invoices and proof of payment. Mr. Marsicano alleges that total costs in connection with the remediation have amounted to $25,121,474.84 with $23,116,798.44 in covered damages remaining. *Id.* at 2, 4–6.

[6] [7]The ruling on damages is to be made on the record the parties have actually presented, not on one potentially possible. *Madeirense do Brasil S/A v. Stulman–Emrick Lumber Co.*, 147 F.2d 399, 405 (2d Cir.1945). Disposition of issues of damage at summary judgment may be made on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 623–24, 64 S.Ct. 724, 88 L.Ed. 967 (1944). Accordingly, for the reasons set forth above, Plaintiff, for itself and on behalf of Steadfast, is entitled to recover and Defendant is liable for $23,116,798.44 in damages, exclusive of interest and litigation expenses.

*1237 VIII. CONSEQUENTIAL DAMAGES

[8]Plaintiff argues that the terms of the American Home and ACE Policies provide coverage for all damages arising from or attributable to the property damage—including consequential damages such as delay costs, overhead expenses, lost profits, diminution in value, and any other "economic" losses that flow from injury to property. DE 130 at 21 (citing *Am. Home Assurance Co. v. Libbey–Owens–Ford Co.*, 786 F.2d 22, 26–27 (1st Cir.1986)). However, under Florida law, general liability policies such as the ACE policy do not cover damages that are purely economic in nature. *Key Custom Homes, Inc. v. Mid–Continent Cas. Co.*, 450 F.Supp.2d 1311, 1317–18 (M.D.Fla.2006); *Harris Specialty Chemicals, Inc. v. U.S. Fire Ins. Co.*, No. 3:98–CV–351–J–20B, 2000 WL 34533982, at *6 (M.D.Fla. July 7, 2000); *Old Republic Ins. Co. v. W. Flagler Associates, Ltd.*, 419 So.2d 1174, 1177 (Fla. 3d DCA 1982). The argument that consequential damages are covered if they arise from or are "because of" property damage caused by defective work is made without binding legal support.

IX. ATTORNEY'S FEES

[9] [10]In a diversity case, awards of attorney's fees are governed by applicable state law. *See Perkins State Bank v. Connolly*, 632 F.2d 1306 (5th Cir.1980); *see also Blasser Brothers, Inc. v. Northern Pan–American Line*, 628 F.2d 376 (5th Cir.1980). Because this is a diversity case arising under Florida law, Florida law determines whether attorney's fees should be awarded here. Fla.Stat.Ann. § 627.428(1), authorizes the award of attorney's fees in this insurance case. This section provides that a court shall award a reasonable sum to compensate the insured's attorney for prosecuting the suit when a judgment is entered against the insurer in favor of the insured. *Id.* Plaintiff prevailed in this action against its insurer. Therefore, Plaintiff is entitled to recover attorneys' fees and costs incurred in prosecuting its claims, with the amount to be determined at a later date.

X. CONCLUSION

The evidence establishes that Defendant owed a duty to indemnify Plaintiff for all costs to resolve the claim against Plaintiff for repair of property damage to the Project resulting from the defective work of its subcontractors. Accordingly, after a careful review of the record and the Court otherwise being advised in the premises, it is **ORDERED, ADJUDGED and DECREED** as follows:

1. Plaintiffs Motion for Summary Judgment **(DE 128)** be, and the same is, hereby **GRANTED IN PART and DENIED IN PART.** Specifically,

insofar as the motion seeks summary judgment in Plaintiff's favor on Count I for Declaratory Judgment and Counts II and III for Breach of Contract the motion is **GRANTED;** insofar as the motion seeks attorney's fees and costs pursuant to Fla.Stat.Ann. § 627.428 the motion is **GRANTED;** but insofar as the motion seeks consequential damages the motion is **DENIED.**

2. Plaintiff **SHALL** file a Motion for Pre–Judgment Interest, addressing the amount of interest to which Plaintiff is entitled within **twenty (20) days** of this Order.

***1238** 3. Defendant's Motion for Summary Judgment and Incorporated Memorandum of law **(DE 130)** be, and the same is, hereby **DENIED.**

4. The affidavit of Andrew Thompson **(DE 131–8)** is **STRICKEN with prejudice.**

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 29th day of October, 2015.

All Citations

161 F.Supp.3d 1227, 25 Fla. L. Weekly Fed. D 279

Footnotes

1 In December 2012, American Home acknowledged coverage.

2 The Steadfast policy's $25 million limit applies not just to the 900 Biscayne Bay Condominium but in the aggregate to all covered projects. *See* DE 131 at 5; DE 131–2 at 105, 110–11, 115.

3 Exclusion j(6) and k, cited by way of cursory reference by Defendant, are inapplicable. All of the damages occurred within the "products-completed operations hazard" so exclusion j(6) does not bar coverage. *See US. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 887 (Fla.2007). Exclusion k does not bar coverage because all of the damages occurred to real property in the form of the Project. Moreover, Defendant fails to meet its burden of proving exclusion from coverage because the reference to Exclusion j(6) and k is without accompanying legal argument. See *Mich. Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 925 (11th Cir.1998).

4 Defendant concedes that the cracked stucco and emergency netting constituted covered damage to other property. *See* DE 128 at 27, 30.

5 ACE misrepresents the facts of *Carithers* when it asserts that the defective work was removed simply to access covered property damage. *See* DE 140 at 11–12. To the contrary, the District Court held that faulty workmanship that causes damage to non-defective property and that must be repaired in order to repair the damage being caused can constitute covered property damage under the policy. *See* Memorandum and Order, *Carithers v. Mid–Continent Casualty Company,* No. 12–00890, 2014 WL 11332308 (M.D.Fla. Mar. 11, 2014), DE 126 at 8.

6 Citing *J.S.U.B.,* Defendant argues somewhat incidentally that mitigation of damages is not covered Nowhere in *J.S.U.B.* is mitigation of damages mentioned. On the contrary, *J.S.U.B.* stands for the proposition that claims for repairing structural damage caused by the defective work of subcontractors may be covered. As a natural corollary, coverage may exist for costs to repair defective work in order to prevent further structural damage and covered loss. *See, e.g., Carithers v. Mid–Continent Cas. Co.,* 782 F.3d 1240, 1251 (11th Cir.2015).

7 Plaintiff's claim is that the two policies were triggered by separate occurrences—the ACE policy triggered by a claim of property damage; the Steadfast policy triggered by subsequent subcontractor default.

8 At the May 28, 2015 Calendar Call, the Court explained that "all the discovery is done ... pleading practice is cut off, discovery's cut off, and we now are at a pleading stage...." DE 132 at 38.

9 In a separate pleading, (DE 140), Defendant complains generally about the affidavits of Gary Glenwenckel, Thomas Miller and David DeSoto, mentioning that the latter two were not disclosed during discovery and that the first offered a purely legal interpretation. Defendant does not ask the Court to strike these affidavits and the Court declines to do so *sua sponte*.

10 Mr. Zona concluded that "[r]epairing the [existing] damage does not correct the underlying defects" and that "[d]effective concrete and masonry construction is left in place, and the new structural steel and cladding elements functionally replace the defective concrete and masonry elements." DE 135–1 at 41–42.

TAB 5

KeyCite Yellow Flag - Negative Treatment
Distinguished by Jimenez v. Government Employees Ins. Co., M.D.Fla., November 7, 2014

446 F.3d 1178
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.
|
April 19, 2006.

Synopsis
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, No. 02-23093-CV-TK, 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, and set aside award of punitive damages. Insurer appealed as to coverage, and manufacturer cross-appealed judgment on bad faith claim.

[Holding:] The Court of Appeals held that insurer could not be liable for bad faith, given serious debate about applicability of CGL policies to facts of case and other factors.

Affirmed in part; question certified.

West Headnotes (4)

[1] **Insurance**
Insurer's settlement duties in general

Under Florida law, commercial general liability (CGL) insurer could not be liable for bad faith in its denial of coverage as to negligent supervision claim against insured contractor; coverage issue, i.e. whether CGL policy provided coverage for replacement-cost liability to third party arising out of subcontractor's defective work, was subject to serious debate, insurer had made well-reasoned denial of coverage, there was no evidence of misrepresentation, and insurer did not subject insured to damages beyond denial of coverage.

13 Cases that cite this headnote

[2] **Insurance**
Insurer's settlement duties in general
Insurance
Duty to settle within or pay policy limits
Insurance
Investigations and inspections

Under Florida insurance law, factors in bad faith determination in liability insurance context include: (1) efforts or measures taken by insurer to resolve coverage dispute promptly or in such a way as to limit any potential prejudice to insured; (2) substance of coverage dispute or weight of legal authority on coverage issue; (3) insurer's diligence and thoroughness in investigating facts specifically pertinent to coverage; and (4) efforts made by insurer to settle liability claim in face of coverage dispute.

4 Cases that cite this headnote

[3] **Federal Courts**
Taking case or question from jury; judgment as a matter of law

Court of Appeals reviews de novo district court's grant of motion for judgment as a matter of law, applying same standards as district court.

1 Cases that cite this headnote

[4] **Insurance**
Punitive or multiple damages
Insurance
Bad faith in general

Under Florida law, in order for punitive damages to be awarded against insurer in third party's bad faith action, insurer's conduct against insured's interests must be so egregious as to constitute independent tort.

3 Cases that cite this headnote

Attorneys and Law Firms

***1179** Denise V. Powers, Denise V. Powers, P.A., Miami, FL, for Auto–Owners Ins.

Edmund M. Kneisel, Richard E. Dolder, Kilpatrick Stockton, L.L.P., Atlanta, GA, for Pozzi Window Co.

Nancy Wood Gregoire, Bunnell, Woulfe, Kirschbaum, Keller, McIntyre & Gregoire, P.A., Ft. Lauderdale, FL, David K. Miller, Ginger Lynne Barry, Broad & Cassel, Tallahassee, FL, Mark A. Boyle, Sr., Fink & Boyke, P.A., Fort Myers, FL, for Amici Curiae.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and HULL, Circuit Judges, and RESTANI*, Judge.

Opinion

PER CURIAM:

This appeal involves an insurance coverage dispute. Appellant Auto–Owners Insurance Company ("Auto–Owners") issued to contractor Coral Construction of South Florida, Inc. ("Coral") and Coral's president, James J. Irby, two commercial general liability policies (the "Policies"). The insured Coral assigned its rights under the Policies to Pozzi Window Company ("Pozzi"), which manufactured the windows in a home that Coral constructed. The parties dispute whether the Policies cover Coral and Irby's liability for the repair or replacement of the defectively installed windows. The district court concluded that coverage existed and granted partial summary judgment in favor of Coral and Irby's assignee Pozzi and against Auto–Owners.

The case then proceeded to a jury trial before a magistrate judge on Pozzi's claims of bad faith and breach of contract against Auto–Owners. The jury found in Pozzi's favor and awarded Pozzi $500,000 in punitive damages on the bad faith claim. Thereafter, the magistrate judge granted Auto–Owners' motion for judgment as a matter of law as to the bad-faith verdict and set aside the jury's punitive-damages award.

Auto–Owners appeals the judgment in favor of Pozzi as to the coverage issues and argues that its Policies do not cover the costs of repair or replacement of defective work. After review and oral argument, we certify the coverage issue to the Florida Supreme Court. In Pozzi's cross-appeal, we affirm the magistrate judge's grant of judgment as a matter of law in favor of Auto–Owners on the bad faith and punitive damages issues.

I. BACKGROUND

Auto–Owners issued to Coral and its president, Irby, two identical commercial general liability policies. The Policies provided a general aggregate limit of liability coverage (other than "Products–Completed Operations") of $1 million as well as a separate aggregate limit of liability coverage for "Products–Completed Operations" of $1 million.

***1180** *A. Underlying Litigation*

During the coverage period, Coral and Irby constructed a multi-million-dollar house for Jorge Perez in Coconut Grove, Florida. The house included windows

manufactured by Pozzi and installed by Coral's subcontractor, Brian Scott Builders, Inc. ("Scott"). The windows apparently were defectively installed by Scott. After moving into the house in 1997, Perez complained of water damage to his home as a result of leakage around the windows.

Perez filed suit in state court against Pozzi, Coral, and Scott. Pozzi entered into a settlement with Perez, under which Pozzi agreed to remedy the defective installation of the windows. In the same lawsuit, Pozzi filed cross-claims against Coral for negligent supervision of Scott. Pozzi later added Irby as a defendant on its cross-claims. Coral and Irby made a claim under the Policies, and Auto–Owners asserted that the damages Pozzi was seeking were not covered.

Auto–Owners provided a defense for Coral under a reservation of rights. Auto–Owners paid Perez for his claims for personal property damage caused by leakage from the windows, and Perez released Coral and Irby from any liability. However, Auto–Owners continued to maintain that there was no coverage for the costs of repair or replacement of the windows.

Irby retained Stanley Klett as his attorney in the litigation with Pozzi. According to Irby, Auto–Owners initially refused to pay for Irby's defense. Klett scheduled a mediation for April 2002.[1] At the mediation, Auto–Owners took the position that there was no coverage. As a result, Pozzi's lawyers told Auto–Owners to "go home," and Pozzi, Coral, and Irby continued settlement talks without Auto–Owners.

At the mediation, the parties reached an agreement in principle to settle all claims among them. Under the proposed settlement, Pozzi would recover from Coral and Irby and release its claims against them, and Coral and Irby would assign to Pozzi their insurance claims against Auto–Owners.

Just after the mediation, having been informed of the separate settlement discussions among Pozzi, Coral, and Irby, Auto–Owners had Thomas Berger, the defense lawyer it had retained for Coral, file a notice of appearance on behalf of Irby. Auto–Owners agreed to defend Irby under the same reservation of rights issued to Coral. Auto–Owners, however, continued to refuse to reimburse Klett and/or Irby for the fees Klett had incurred in representing Irby in the previous seven months. According to Irby and Klett, although Berger and Klett had communicated about the case, Irby and Klett were not informed prior to the filing of the notice of appearance that Berger would be taking over Irby's representation.

Shortly thereafter, Coral and Irby entered into a settlement with Pozzi. As part of the settlement, Pozzi, Irby, and Coral signed onto a Consent Judgment, which was entered by the state court. Under the Consent Judgment, Pozzi was entitled to recover from Coral and Irby $646,726 in principal, $163,298 in prejudgment interest, and post-judgment interest at the statutory rate. Also under the settlement, Coral and Irby assigned to Pozzi ***1181** their claims against Auto–Owners and their rights under the Policies.

B. This Litigation

Pozzi then filed this lawsuit in the district court alleging that Auto–Owners breached its insurance contract by denying coverage to Coral and Irby for Pozzi's claims in the underlying litigation, refusing to defend Irby or reimburse his defense costs, and refusing to participate in the settlement (Count One). Pozzi also asserted that Auto–Owners' conduct was in bad faith (Count Two). Pozzi further asserted that, as assignee of Coral's and Irby's rights under the Policies, it was entitled to fees and costs incurred by Coral and Irby in prosecuting this action (Count Three). Auto–Owners filed a counterclaim for declaratory relief, seeking a determination that it had no duty to defend Coral and Irby and that there was no coverage under the Policies for the claims asserted in the underlying litigation.

The parties filed cross-motions for summary judgment. The district court concluded the Policies provided coverage for the repair or replacement of the defective windows and that Auto–Owners had breached its duty to defend Irby. The district court thus granted partial summary judgment in favor of Pozzi.

Pozzi and Auto–Owners then consented to the magistrate judge conducting the jury trial on the issues of damages under the Policies, bad faith, and punitive damages. Before the case was submitted for the jury's consideration, Auto–Owners moved for a directed verdict concluding that there was no bad faith and that punitive damages were inappropriate. The magistrate judge reserved ruling on Auto–Owners' motion and submitted the case to the jury. The jury returned a verdict for Pozzi, found bad faith, and awarded $500,000 in punitive damages against Auto–Owners.

The jury also made the following findings in special interrogatories: (1) the settlement between Coral or Irby and Pozzi was not the product of collusion or fraud; (2)

Pozzi and Coral and Irby acted reasonably and in good faith in settling the underlying lawsuit, but the settlement in the amount of $646,726, as specified in the Consent Judgment in the underlying litigation, was not reasonable and in good faith, and $300,000 was a reasonable settlement amount; (3) Auto–Owners acted in bad faith in denying coverage for the cross-claims asserted by Pozzi against Coral and Irby in the underlying litigation and in breaching its duty to defend Irby; and (4) an award of $500,000 in punitive damages was warranted.

The magistrate judge entered final judgment in favor of Pozzi and awarded compensatory and punitive damages in the amounts specified by the jury. Auto–Owners then moved for judgment as a matter of law on three issues, arguing (1) that the evidence was insufficient to support an award of punitive damages, (2) that the evidence was insufficient to support the finding of bad faith, and (3) that, based on the evidence at trial, the Policies did not provide coverage, and the district court had erred in awarding partial summary judgment in favor of Pozzi on the coverage issue. In the alternative, Auto–Owners sought a new trial on all issues.

The magistrate judge granted in part Auto–Owners' motion for judgment as a matter of law. Specifically, the magistrate judge concluded that the evidence was insufficient to support the jury's finding of bad faith or its award of punitive damages and set aside the jury's punitive-damages award. The magistrate judge also conditionally granted the motion for new trial on these issues, specifying that a new trial ***1182** on bad faith and punitive damages should proceed in the event that its decision is reversed or vacated on appeal. The magistrate judge concluded that he was without authority to modify the district court's earlier grant of partial summary judgment as to coverage.

II. DISCUSSION

A. Auto–Owners' Coverage Appeal

On appeal, Auto–Owners argues that its Policies do not provide products-completed operations hazard ("PCOH") coverage for repair or replacement of defective work. Auto–Owners argues that under Florida law, comprehensive general liability ("CGL") policies, such as the Policies[2] here, cover bodily injury and property damage resulting from defective work, but not the repair or replacement of the work itself.

The district court rejected this argument, concluding that the Policies unambiguously provided PCOH coverage for repair or replacement of defective work by a subcontractor. We first describe the relevant policy language and then outline the Florida law.

1. The Policies

The Policies provide coverage for sums that the insured Coral is legally obligated to pay as damages because of "bodily injury" and "property damage" caused by an "occurrence" that takes place in the "coverage territory" and during the policy period. Specifically, the Policies state as follows:

> 1. Insuring Agreement.
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result ....
>
> ...
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.

The Policies also specifically provide for PCOH coverage limited to $1 million. The Policies define "Products-completed operations hazard" as including all property damage "arising out of 'your product' or 'your work,' " as follows:

> 11. a. "Products-completed operations hazard" includes all "bodily injury" and "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.

b. "Your work" will be deemed completed at the earliest of the following times:

(1) When all of the work called for in your contract has been completed.

***1183** (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.

(3) 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.

c. This hazard does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the "loading or unloading" of it;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials;

(3) Products or operations for which the classification in this Coverage Part or in our manual of rules includes products or completed operations.

Pozzi claims that the defective windows here were completed work—in Perez's home, in which he resided—and that the damages arose out of that work and thus would fall within the PCOH coverage definition.

The Policies further define "your work" to mean "[w]ork or operations performed by you *or on your behalf,*" (emphasis added) as follows:

15. "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.

(Emphasis added.) Pozzi thus claims that the work performed by Coral's subcontractor Scott is also covered under the Policies.

The Policies also define "property damage" to mean:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Thus, the main question is whether the PCOH coverage provided to Coral and Irby includes Coral and Irby's liability for the repair or replacement of defective work performed by Coral's subcontractor.

2. Exclusions

The Policies also contain two relevant exclusions, as follows:

2. Exclusions

This insurance does not apply to:

...

j. "Property damage" to:

...

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

...

***1184** 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.

First, exclusion (j)(6) provides that the insurance does not apply to property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." However, the Policies further provide that this exclusion "does not apply to 'property damage' included in the 'products-completed operations hazard.' " Thus, if the costs of repair or replacement are covered under the PCOH coverage, this exclusion does not affect coverage.

Second, exclusion (*l*) excludes " '[p]roperty damage' to 'your work' arising out of any part of it and including in the 'products-completed operations hazard.' " However, the Policies further provide that 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." Here, the damaged or defective work was performed on the insured Coral's behalf by the subcontractor Scott. Thus, this exclusion also is inapplicable.

Because none of the exclusions applies, the main question in this appeal remains, as stated earlier, whether the Policies' PCOH coverage includes Coral and Irby's liability for the cost of the repair or replacement of defective work performed by Coral's subcontractor.

3. LaMarche v. Shelby Mutual Insurance Co.

Viewing the language of the Policies in isolation, the district court's conclusion that coverage exists arguably would seem to be proper. The Policies clearly cover PCOH property damage caused by occurrences in the coverage territory during the coverage period. Defective construction is an "occurrence" under Florida law, *see State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla.1998), and it is undisputed that the defective work here occurred in the coverage territory and during the coverage period. Thus, according to Pozzi, the costs of repair or replacement are covered under the PCOH provision because it is a sum the insureds Coral and Irby were legally obligated to pay as damages because of property damage (damaged, incorrectly installed windows) arising out of the subcontractor Scott's work.

However, the Florida Supreme Court in *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325, 326 (Fla.1980), concluded that CGL policies do not cover the costs of repair and replacement of defective work, but only cover any damage or injury resulting from the defective work. In *LaMarche*, the LaMarches entered into a building contract for the construction of their home. The general contractor's work proved to be deficient, and the LaMarches sought payment from the contractor's CGL insurance company for the replacement and repair of the defective work. The Florida Supreme Court concluded that the policy covered personal injury or property damage as a result of faulty work, but that no coverage existed for the replacement and repair costs:

> ***1185** To interpret the policy as providing coverage for construction deficiencies, as asserted by the petitioners and a minority of states, would enable a contractor to receive initial payment for the work from the homeowner, then receive subsequent payment from his insurance company to repair and correct deficiencies in his own work. We find this interpretation was not the intent of the contractor and the insurance company when they entered into the subject contract of insurance, and the language of the policy clearly excludes this type of coverage. Rather than coverage and payment for building flaws or deficiencies, the policy instead covers damage caused by those flaws.

LaMarche, 390 So.2d at 326. The Florida Supreme Court then adopted the following reasoning of the Supreme Court of New Jersey in *Weedo v. Stone–E–Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979):

> An illustration of this fundamental point may serve to mark the boundaries between "business risks" and occurrences giving rise

> to insurable liability. When a craftsman applies stucco to an exterior wall of a home in a faulty manner and discoloration, peeling and chipping result, the poorly-performed work will perforce have to be replaced or repaired by the tradesman or by a surety. On the other hand, should the stucco peel and fall from the wall, and thereby cause injury to the homeowner or his neighbor standing below or to a passing automobile, an occurrence of harm arises which is the proper subject of risk-sharing as provided by the type of policy before us in this case.

LaMarche, 390 So.2d at 326–27 (quoting *Weedo*, 405 A.2d at 791–92) (quotation marks omitted).

The particular policy language and exclusions at issue in *LaMarche* were different from those at issue here. However, the broad language and reasoning of *LaMarche* does not seem to be dependent on the precise terms of the policy. Rather, *LaMarche* indicates that CGL policies (as opposed to warranty policies, for instance) generally do not cover the costs of repair or replacement of defective work.

While the Florida Supreme Court has not reviewed the policy language here, the majority of Florida intermediate appellate courts have applied *LaMarche* broadly and concluded that CGL policies do not cover repair or replacement costs. *See, e.g.*, *Auto–Owners Ins. Co. v. Marvin Dev. Corp.*, 805 So.2d 888, 892–93 (Fla.Dist.Ct.App.2001) ("We also note that the Auto–Owners' insurance policies were not warranty policies providing coverage for construction deficiencies or defective workmanship. Comprehensive liability policies generally do not provide coverage to a contractor for deficiencies in its own work."); *Auto Owners Ins. Co. v. Tripp Constr., Inc.*, 737 So.2d 600, 601 (Fla.Dist.Ct.App.1999) (CGL policies protect against only personal injury or property damage resulting from defective work, not for the repair of the work itself); *Aetna Cas. & Sur. Co. of Am. v. Deluxe Sys., Inc., of Fla.*, 711 So.2d 1293, 1296 (Fla.Dist.Ct.App.1998) (quoting *LaMarche*, 390 So.2d at 326, for the proposition that the " 'purpose of ... comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product' "); *Lassiter Constr. Co. v. Am. States Ins. Co.*, 699 So.2d 768, 769 n. 1 (Fla.Dist.Ct.App.1997) (same); *Home Owners Warranty Corp. v. Hanover Ins. Co.*, 683 So.2d 527, 529 (Fla.Dist.Ct.App.1996) (concluding, based on *LaMarche*, that the CGL policy, which was similar to the Policies here, did not provide coverage ***1186** for repair or replacement of defective work, and rejecting argument that exclusion identical to exclusion (*l*) created such coverage); *Tucker Constr. Co. v. Michigan Mut. Ins. Co.*, 423 So.2d 525, 528 (Fla.Dist.Ct.App.1982) (same); *see also Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248, 1262 (M.D.Fla.2002) (applying Florida law to similar policy and concluding that, while the policy language was different from those in *LaMarche*, "Florida courts examining the same CGL policies ... in this case continue to hold that CGL policies do not cover the costs to repair and/or replace defective construction" performed by subcontractors).

Most of the post-*LaMarche* cases are distinguishable in that the courts rested their decisions, at least in part, on specific policy language or factual circumstances that do not exist here. *See Marvin Dev. Co.*, 805 So.2d at 891–92 (policy excluded PCOH coverage); *Deluxe Sys.*, 711 So.2d at 1296–97 (claims fell within two different exclusions); *Lassiter*, 699 So.2d at 770 (no coverage for repair or replacement of subcontractor's faulty work because claim fell within exclusion for work on real property by the insured "or any other contractors or subcontractors working directly or indirectly on [the insured's] behalf"); *Tucker*, 423 So.2d at 528–29 (claims fell within exclusion for property damage to work performed by the named insured). However, in each case cited above, the courts nevertheless went beyond the language of the particular policies in issue and reaffirmed the *LaMarche* holding that repair or replacement costs for defective work are not the type of costs covered by CGL policies generally. Further, at least one of those cases, the district court's decision in *Travelers*, 227 F.Supp.2d at 1263, involves policy language identical to the Policies here and similar factual circumstances.

4. Recent Split in Florida Courts

Although the majority of Florida interim appellate courts have concluded CGL policies do not cover repair or replacement of the defective construction itself, in *J.S.U.B., Inc. v. United States Fire Insurance Co.*, 906 So.2d 303 (Fla.Dist.Ct.App.2005), the Florida Court of Appeal, Second District, came to the opposite conclusion. In *J.S.U.B.*, the claims at issue related to damage resulting from the subcontractor's faulty work in constructing

houses, and the insurer argued that the damages were outside the scope of the CGL policies. The court acknowledged *LaMarche* and its progeny, but concluded that both the standard CGL provisions and the controlling law had changed since *LaMarche.*[3]

The Florida court first noted that the policies contained broad insuring language covering property damage caused by an "occurrence," defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *J.S.U.B.,* 906 So.2d at 308. "Accident" was undefined in the policies. *Id.* At the time *LaMarche* was decided, Florida law defined "accident," for insurance coverage purposes, to exclude "the natural and probable consequences of the insured's deliberate actions." *Id.* (citing *Hardware Mut. Cas. Co. v. Gerrits,* 65 So.2d 69 (Fla.1953)). But in *State Farm Fire & Casualty Co. v. CTC Development Corp.,* 720 So.2d 1072, 1076 (Fla.1998), the Florida Supreme Court broadened the scope of insurance coverage, concluding that "an occurrence included not only an accidental event but also 'the unexpected injury or damage resulting from the insured's ***1187** intentional acts. Thus, if the resulting damages are unintended, the resulting damage is accidental even though the original acts were intentional.' " *J.S.U.B.,* 906 So.2d at 308 (quoting *CTC,* 720 So.2d at 1075) (other quotation marks and citation omitted). In *CTC,* the Florida Supreme Court concluded that a contractor's construction of a home in violation of setback requirements, where the contractor was under the mistaken belief that it had obtained a variance, was an "occurrence" under the policy. *CTC,* 720 So.2d at 1076. Based on this expanded definition of coverage events, the *J.S.U.B.* court concluded that *LaMarche* and its progeny no longer compelled the conclusion that CGL policies do not provide coverage for claims for repair or replacement of the subcontractor's faulty work. *J.S.U.B.,* 906 So.2d at 309.

The Florida court in *J.S.U.B.* also looked to the policies' exclusions to determine that coverage existed. The court acknowledged that, under Florida law, an exclusion cannot "create" coverage. However, the Florida court also recognized that " '[r]eading the coverage provision of the policy together with the exclusionary clause could support a conclusion that coverage is provided in the ... policy for occurrences where the insured did not intend or expect to cause harm to the third party.' " *Id.* at 310 (quoting *CTC,* 720 So.2d at 1075).

In *J.S.U.B.,* the Florida court also addressed the same exclusions relevant here and found that they supported coverage of claims for repair or replacement of a subcontractor's faulty work. Specifically, the Florida court reasoned as follows:

> ... Subparagraph 6 excludes coverage for restoration, repair, or replacement that is required because of work that was incorrectly performed. However, an exception to the exclusion is for "property damage" included in the "products-completed operations hazard." If we were to read the policies as suggested by the Insurer, without considering the import of the exclusions, it is arguable that this exclusion and exception to the exclusion would have no meaning or effect in this policy ....
>
> Similarly, the "Damage To Your Work" exclusion contains an exception for work performed by a subcontractor on the Builder's behalf. The Insurer does not contend that the exclusion applies: instead, it simply reiterates its view that the policy simply provides no coverage for the Builder's claims. If the policies provide coverage, the exception to this exclusion would apply because the damage that occurred was the result of the subcontractors' use of poor soil and improper soil compaction and testing. Accordingly, based on our conclusion that the policies provide coverage, this exclusion does not apply because the exception to the exclusion applies.

Id. Thus, the Florida court concluded that *LaMarche* was inapplicable, that the policies provided coverage, and that none of the exclusions applied. *Id.* at 310–11. However, the Florida Supreme Court on April 5, 2006, accepted jurisdiction of the *J.S.U.B.* case and ordered briefing.

5. Unsettled Question of Florida Law

The facts relevant to this appeal are basically undisputed and the parties agree that Florida law controls. Thus, the appeal turns on the purely legal question of the interpretation of the standard terms in CGL policies, such as the Policies in issue.

"Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law." *Tobin* ***1188** *v. Michigan Mut. Ins. Co.,* 398 F.3d 1267, 1274 (11th Cir.2005). As discussed above, there is dissension among Florida intermediate appellate courts, as well as federal district courts, about the continued vitality of *LaMarche* and its applicability to standard CGL policies such as the Policies. Accordingly, because this appeal depends on resolution of a question of

Florida law that will affect many other cases, we certify the issue to the Florida Supreme Court.

6. Certification to the Florida Supreme Court

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO ARTICLE V, SECTION 3(B)(6) OF THE FLORIDA CONSTITUTION.

TO THE SUPREME COURT OF FLORIDA AND ITS HONORABLE JUSTICES:

We certify the following question to the Supreme Court of Florida for determination under Florida law:

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?

The phrasing used in this certified question should not restrict the Supreme Court's consideration of the problem posed by this case. "This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers is given." *Tobin*, 398 F.3d at 1275 (quotation marks and citations omitted). To assist the Supreme Court's consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida.

B. Pozzi's Cross-appeal

[1] We now turn to Pozzi's claim on cross-appeal that the magistrate judge erred in granting judgment as a matter of law in favor of Auto–Owners as to the issues of bad faith and punitive damages.

[2] The Florida Supreme Court has identified the following factors as relevant to a bad-faith determination: (1) "efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds"; (2) "the substance of the coverage dispute or the weight of legal authority on the coverage issue"; (3) "the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage"; and (4) "efforts made by the insurer to settle the liability claim in the face of the coverage dispute." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 63 (Fla.1995). The parties agree that these are the relevant factors.

In granting judgment as a matter of law in favor of Auto–Owners, the magistrate judge concluded that the evidence showed Auto–Owners' conduct was appropriate for an insurer that believed reasonably and in good faith that the claims were not covered:

> ... The evidence shows that Auto–Owners denied coverage, defended the case under a reservation of rights, challenged coverage through the appropriate legal mechanism, and eventually was found to be wrong on the issue of coverage. Despite Pozzi's characterization of the evidence, ***1189** it is clear that Auto–Owners did what insurance companies properly do when they have a serious doubt as to coverage: it defended under a reservation of rights, and sought declaratory relief on the question of coverage. There was no evidence of unreasonable conduct, no evidence of any independent tort, and no evidence that it exposed its insureds to excess judgments by its conduct. It did not mislead its insureds, and did not cause them any damages other than the amount of coverage provided by the policy.

The magistrate judge then concluded that each of the *Laforet* factors weighed in favor of Auto–Owners.

[3] On appeal, Pozzi challenges the magistrate judge's application of the *Laforet* factors. After careful review of the record, we conclude that the magistrate judge did not err in applying the *Laforet* factors.[4] For example, as the magistrate judge's order explained, the coverage issue was and is subject to serious debate; the evidence showed that Auto–Owners' denial of coverage was well-reasoned; there was no evidence that Auto–Owners misrepresented

the terms of its Policies; Auto–Owners did not subject its insured to any damages beyond the denial of coverage; and the evidence was insufficient to support the jury's bad faith verdict. We conclude that Auto–Owners was entitled to judgment as a matter of law on the bad faith issue.[5]

[4] Pozzi also argues that the same factors establishing bad faith warrant a punitive-damages award.[6] For the reasons set forth above and in the magistrate judge's order, we reject this argument and conclude that the magistrate judge properly granted Auto–Owners judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons, the magistrate judge's grant of judgment as a matter of law in favor of Auto–Owners as to the issues of bad faith and punitive damages is affirmed. As to the coverage issue, we certify the above question to the Florida Supreme Court.

AFFIRMED in part and QUESTION CERTIFIED.

All Citations

446 F.3d 1178, 19 Fla. L. Weekly Fed. C 471

Footnotes

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

1 Shortly after the mediation was scheduled, Auto–Owners also brought a separate declaratory judgment action in state court seeking a determination that the Policies did not cover the repair or replacement costs. In this case, the district court denied Auto–Owners' motion to dismiss in light of that action, and Auto–Owners has not challenged that ruling in this appeal.

2 The Policies are form policies promulgated by the Insurance Services Offices ("ISO") and include standard language used in commercial general liability policies.

3 The Policies here, and the policies in *J.S.U.B.,* are standardized ISO policies that are identical in all material respects.

4 We review de novo a district court's grant of a motion for judgment as a matter of law, applying the same standards as the district court. *Transamerica Leasing, Inc. v. Institute of London Underwriters,* 430 F.3d 1326, 1331 (11th Cir.2005). "A district court may not grant a motion for a judgment as a matter of law unless 'the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached.' " *Olmsted v. Taco Bell Corp.,* 141 F.3d 1457, 1460 (11th Cir.1998) (quotation marks and citations omitted).

5 We recognize that Pozzi emphasizes the June 10, 2002, letter that Auto–Owners' coverage counsel sent to Klett regarding Irby's defense and argues that this letter illustrates Auto–Owners' bad faith. However, we conclude that the letter does not create an issue of material fact as to bad faith and punitive damages.

6 Under Florida law, "the plaintiff must establish at trial, by *clear and convincing evidence,* its entitlement to an award of punitive damages." Fla. Stat. § 768.725 (emphasis added). Florida courts have clarified that for punitive damages to be awarded, "the conduct of the insurer against the interests of the insured must be so egregious as to constitute an independent tort." *Dunn v. Nat'l Sec. Fire & Cas. Co.,* 631 So.2d 1103, 1108 (Fla.Dist.Ct.App.1993). Generally, dishonesty, misrepresentations, or fraudulent conduct must be alleged and proven. *Id.*

End of Document

TAB 6

294 Fed.Appx. 588
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.

Synopsis
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 (1)

[1] **Federal Courts**
Matters of Substance

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.

3 Cases that cite this headnote

Attorneys and Law Firms

***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,* Judge.

Opinion

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* ").[1] 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 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.[2] *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.*

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.[3] We remand for consideration of whether Pozzi is entitled to attorney's fees, but express no opinion about that issue.[4]

****3 AFFIRMED and REMANDED.**

All Citations

294 Fed.Appx. 588, 2008 WL 4369301

Footnotes

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

1 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.

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

3 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, 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.

4 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.

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.

Synopsis

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 (6)

[1] **Federal Courts**
Proceedings following certification

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.

Cases that cite this headnote

[2] **Appeal and Error**
Insurers and insurance

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.

2 Cases that cite this headnote

[3] **Insurance**
Property damage

Damage to windows from subcontractor's defective 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.

33 Cases that cite this headnote

[4] **Insurance**
Property damage

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.

36 Cases that cite this headnote

[5] **Insurance**
Accident, occurrence or event

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.

1 Cases that cite this headnote

[6] **Insurance**
Property damage

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.

28 Cases that cite this headnote

Attorneys and Law Firms

***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.

Opinion

***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."[1] 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").

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.[2] Pozzi also contended that the negligently installed windows leaked,

> 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. [3]

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.)[4]

The parties filed cross-motions for summary judgment.[5] 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.

[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.[6] 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.

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 windows 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.*

All Citations

984 So.2d 1241, 33 Fla. L. Weekly S392

Footnotes

1 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.

2 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."

3 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.

4 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.

5 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 windows.

6 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).

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TAB 7

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Cohen v. Pacific Specialty Insurance Company, Cal.App. 2 Dist., November 14, 2017

208 So.3d 694
Supreme Court of Florida.

John Robert SEBO, etc., Petitioner,
v.
AMERICAN HOME ASSURANCE COMPANY, INC., Respondent.

No. SC14–897.
|
Dec. 1, 2016.

Synopsis
Background: Insured brought declaratory-judgment action against property insurer, asserting that policy provided coverage regarding damage that was sustained by insured's home. Following a jury trial, the Circuit Court, Collier County, Cynthia Pivacek, J., entered judgment in favor of insured. Insurer appealed. The District Court of Appeal, 141 So.3d 195, reversed. Insured appealed.

[Holding:] The Supreme Court, Perry, J., held that concurrent-causation doctrine, not efficient-proximate-cause theory, applied when determining causation of insured's loss, and thus loss would be covered under policy.

Quashed and remanded.

Canady, J., concurred in result.

Polston, J., dissented and filed opinion.

West Headnotes (6)

[1] **Appeal and Error**
Insurers and insurance
Insurance
Questions of law or fact

Whether coverage existed under homeowner's all-risk policy when multiple perils combined to create a loss and at least one of the perils was excluded by terms of the policy, which answer would be determined by proper theory of recovery to apply, was a pure question of law, subject to de novo review.

4 Cases that cite this headnote

[2] **Insurance**
Plain, ordinary or popular sense of language
Insurance
Ambiguity, Uncertainty or Conflict

Insurance contracts are construed in accordance with the plain language of the policy; however, if the language is susceptible to more than one reasonable interpretation and is therefore ambiguous, the policy will be strictly construed against the insurer and in favor of the insured.

1 Cases that cite this headnote

[3] **Insurance**
Exclusions, exceptions or limitations
Insurance
Risks or Losses Covered and Exclusions

Ambiguous exclusionary clauses are construed even more strictly against the insurer than coverage clauses; in all-risk insurance policies, construction is governed by the language of the exclusionary provisions.

1 Cases that cite this headnote

[4] **Insurance**
Combined or concurrent causes

For purposes of determining appropriate theory of recovery to apply when two or more perils

converge to cause a loss and at least one of the perils is excluded from an insurance policy, when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine, rather than the efficient proximate cause doctrine.

8 Cases that cite this headnote

[5] **Insurance**
Combined or concurrent causes

Concurrent-causation doctrine (CCD), not efficient-proximate-cause theory (EPC), applied when determining causation of insured's loss regarding home, which sustained damage allegedly due to wind, rain, and defective construction, and thus loss would be covered under all-risk homeowners insurance policy, even though policy contained defective-work exclusion, where there was no reasonable way to distinguish proximate cause of insured's property loss and insurer did not explicitly avoid applying the CCD in language of the policy.

6 Cases that cite this headnote

[6] **Appeal and Error**
Damages or other relief

Trial court's failure to consider amount of settlements homeowner had received, in connection with his lawsuit against insurer, sellers of property, architect, and construction company for water damages home had sustained, as a post-judgment offset against insurer, warranted remand for further proceedings.

Cases that cite this headnote

Attorneys and Law Firms

***695** Edward K. Cheffy, David Allan Zulian, and Debbie Sines Crockett of Cheffy Passidomo, P.A., Naples, FL; and Mark Andrew Boyle, Geoffrey Henry Gentile, Michael Wade Leonard, Amanda Kaye Anderson, Molly Ann Chafe Brockmeyer, Justin Michael Thomas, and Thomas Patrick Rechtin of Boyle, Gentile & Leonard, P.A., Fort Myers, FL, for Petitioner.

Anthony J. Russo, Scott J. Frank, Christopher M. Ramey, and Ezequiel Lugo of Butler Weihmuller Katz Craig LLP, Tampa, FL; Janet L. Brown and Susan B. Harwood of Boehm, Brown, Harwood, P.A., Maitland, FL; and Raoul G. Cantero, III, David P. Draigh, and Ryan Andrew Ulloa of White & Case LLP, Miami, FL, for Respondent.

Richard Hugh Lumpkin and Benjamin C. Hassebrock of Ver Ploeg & Lumpkin, P.A., Miami, FL; and George Alexander Vaka and Nancy Ann Lauten of Vaka Law Group, P.L., Tampa, FL, for Amicus Curiae United Policyholders.

Michael Jerome Higer and Colleen Alexis Maranges of Higer Lichter & Givner, LLP, Aventura, FL, for Amicus Curiae The Florida Association of Public Insurance Adjusters.

James Andrew McKee, Thomas Joseph Maida, and Benjamin James Grossman of Foley & Lardner LLP, Tallahassee, FL, for Amici Curiae Florida Insurance Council, Property Casualty Insurance Association of America, National Association of Mutual Insurance Companies, and American Insurance Association.

Opinion

PERRY, J.

John Sebo seeks review of the decision of the Second District Court of Appeal in *American Home Assurance Co. v. Sebo*, 141 So.3d 195 (Fla. 2d DCA 2013), on the ground that it expressly and directly conflicts with a decision of the Third District Court of Appeal in *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. 3d DCA 1988), on a question of law. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. For the following reasons, we quash the decision in *Sebo*, and approve the rationale of the Third District in *Wallach.*

FACTS

The facts of this case are taken from the Second District Court of Appeal's opinion:

> [John] Sebo purchased [a Naples, Florida] home in April 2005, when it was four years old. [American Home Assurance Company (AHAC)] provided homeowners insurance as of the date of the purchase. The policy, which insured against "all risks," was issued through a private client group and was referred to as a manuscript policy. It was not a standard form but instead was created specifically for the Sebo residence. The house and other permanent structures were insured for over $8,000,000. The ***696** policy also provided additional coverage for loss of use of the home.
>
> Shortly after Sebo bought the residence, water began to intrude during rainstorms. Major water leaks were reported to Sebo's property manager as early as May 31, 2005. She prepared a list of problems: leaks in the main house at the foyer, the living room, dining room, piano room, exercise room, master bathroom, and upstairs bathroom. By June 22, 2005, the property manager advised Sebo of these leaks in writing. It became clear that the house suffered from major design and construction defects. After an August rain, paint along the windows just fell off the wall. In October 2005, Hurricane Wilma struck Naples and further damaged the Sebo residence.
>
> Sebo did not report the water intrusion and other damages to AHAC until December 30, 2005. AHAC investigated the claim, and in April 2006 it denied coverage for most of the claimed losses. The policy provided $50,000 in coverage for mold, and AHAC tendered that amount to Sebo but stated that "the balance of the damages to the house, including any window, door, and other repairs, is not covered." In May 2008, Sebo renewed his claim and sent more information about the damages to AHAC, but AHAC again denied the claim except for the $50,000 in mold damages.
>
> The residence could not be repaired and was eventually demolished. In January 2007, Sebo filed suit against a number of defendants, including the sellers of the property, the architect who designed the residence, and the construction company that built it. He alleged that the home had been negligently designed and constructed and that the sellers had fraudulently failed to disclose the defects in the property. Sebo eventually amended his complaint in November 2009, adding AHAC as a defendant and seeking a declaration that the policy provided coverage for his damages. After Sebo settled his claims against a majority of all other defendants, the trial proceeded only on his declaratory action against AHAC. The jurors found in favor of Sebo, and the court eventually entered judgment against AHAC.

Sebo, 141 So.3d at 196–97.

On appeal, the Second District found that "[t]here is no dispute in this case that there was more than one cause of the loss, including defective construction, rain, and wind." *Id.* at 197. However, the court disagreed with the trial court's application of *Wallach*, 527 So.2d 1386, and, in fact, disagreed with the Third District's "determination that the concurrent causation doctrine should be applied in a case involving multiple perils and a first-party insurance policy." *Sebo*, 141 So.3d at 198. The court reversed and remanded for a new trial, "in which the causation of Sebo's loss is examined under the efficient proximate cause theory." *Id.* at 201.

Standard of Review

[1] The issue presented is whether coverage exists under Sebo's all-risk policy when multiple perils combined to create a loss and at least one of the perils is excluded by the terms of the policy. To answer this question, this Court must determine the proper theory of recovery to apply, which is a pure question of law. Therefore, the review is de novo. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1085 (Fla.2005).

[2] [3] Additionally, the policy at issue in this case is an all-risk policy. We have stated that "[a]lthough the term 'all-risk' is afforded a broad, comprehensive meaning, an 'all-risk' policy is not an 'all loss' policy, and this does not extend coverage for every ***697** conceivable loss." *Id.* at 1086 (citation omitted). Insurance contracts are construed in accordance with the plain language of the policy. *Id.* (citing *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 33 (Fla.2000)). However, if the language is susceptible to more than one reasonable interpretation and is therefore ambiguous, the policy will be strictly construed against the insurer and in favor of the insured. *Id.* "[A]mbiguous 'exclusionary clauses are construed even more strictly against the insurer than coverage clauses.' " *Id.* (quoting *Anderson*, 756 So.2d at 34). In short, in all-risk policies such as the one held by Sebo, construction is governed by the language of the exclusionary provisions.

DISCUSSION

[4] We are confronted with determining the appropriate theory of recovery to apply when two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy. When addressing this question, courts have developed competing theories on how to determine coverage: the efficient proximate cause and concurring cause doctrines. To begin our analysis, we first explain these doctrines. Then we discuss the Second District's decision below. We conclude that when independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine. Accordingly, we quash the decision below.

Efficient Proximate Cause (EPC)

The EPC provides that where there is a concurrence of different perils, the efficient cause—the one that set the other in motion—is the cause to which the loss is attributable. *Sabella v. Nat'l Union Fire Ins. Co.,* 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889, 892 (1963); *Fire Ass'n of Phila. v. Evansville Brewing Ass'n,* 73 Fla. 904, 75 So. 196 (1917).

We applied the EPC in *Evansville Brewing,* where the coverage at issue provided under an all-loss fire policy excluded loss caused by an explosion. We explained, "[w]hile the insurer is not liable for a loss caused by an explosion which was not produced by a preceding fire, yet if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable." *Evansville Brewing,* 75 So. at 198. In *Evansville Brewing,* we contemplated a chain of events where one peril directly led to a subsequent peril. In finding that coverage existed under the policy, we drew the distinction between a covered peril setting into motion an uncovered peril and an uncovered peril setting into motion a covered peril. Coverage exists for the former but not the latter.

The EPC was explained by the California Supreme Court[1] in *Sabella,* where it reasoned, " 'in determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster.' " *Sabella,* 27 Cal.Rptr. 689, 377 P.2d at 895 (quoting 6 George J. Couch, *Cyclopedia of Insurance Law* § 1466, at 5303–04 (1930)). The California Supreme Court thus reasoned that a covered peril that convenes with an uncovered peril may still provide for coverage under a policy when the covered ***698** peril triggered the events that eventually led to the loss.

Concurrent Cause Doctrine (CCD)

The CCD provides that coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause. *See Wallach,* 527 So.2d 1386; *State Farm Mut. Auto. Ins. Co. v. Partridge,* 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123, 133 (1973).

The CCD originated with the California Supreme Court's decision in *Partridge,* where the court was presented with "a somewhat novel question of insurance coverage: when two negligent acts of an insured—one auto—related and the other non-auto-related—constitute concurrent causes of an accident, is the insured covered under both his homeowner's policy and his automobile liability policy, or is coverage limited to the automobile policy?" *Id.* 109 Cal.Rptr. 811, 514 P.2d at 124–25. The insured, Wayne Partridge, owned a .357 Magnum pistol and had filed the trigger mechanism to create "hair trigger action." *Id.* 109 Cal.Rptr. 811, 514 P.2d at 125. Partridge was driving two friends, Vanida Neilson and Ray Albertson, in his insured Ford Bronco when he spotted a jack rabbit. In pursuit of the rabbit, he drove the Bronco off the road and hit a bump, causing the pistol to discharge. A bullet entered Neilson's arm, penetrated her spinal cord, and left her paralyzed. *Id.* Neilson filed an action against Partridge and entered into settlement discussions with State Farm. This dispute arose because the parties did not agree whether recovery was available from both the homeowner's and automobile policies. The homeowner's policy contained an exclusion for bodily injury arising out of the use of any motor vehicle. *Id.* 109 Cal.Rptr. 811, 514 P.2d at 126. State Farm relied on this exclusionary language to argue that only the automobile policy provided coverage for the injuries. Specifically, State Farm argued that the language of the policies was intended to be mutually exclusive and not provide for

overlapping coverage. *Id.* 109 Cal.Rptr. 811, 514 P.2d at 128.

The California Supreme Court disagreed. First, the court noted that exclusionary clauses are more strictly construed than coverage clauses. Next, the court reasoned that an insured risk combined with an excluded risk to produce the ultimate injury and determined "that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply *a* concurrent proximate cause of the injuries." *Id.* 109 Cal.Rptr. 811, 514 P.2d at 130 (applying the rationale of *Brooks v. Metro. Life Ins. Co.*, 27 Cal.2d 305, 163 P.2d 689 (1945)). Thus, because neither peril could have created the loss alone but instead combined to create the loss, the California Supreme Court could not identify the prime, moving, or efficient cause in order to determine coverage, and pronounced a new doctrine.

The CCD was first applied in Florida in *Wallach*, where the Third District considered the coverage available to the Rosenbergs after Wallach's sea wall collapsed and led to a portion of the Rosenbergs' sea wall crumbling. 527 So.2d 1386. The Rosenbergs filed suit against Wallach, claiming that he had breached his duty to maintain his premises. They also filed a claim under their all-risk homeowner's policy, which was denied because the policy contained an exclusion for loss resulting from earth movement or water damage. *Id.* at 1387. On appeal, the insurance company argued "that where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy, then no coverage is available to the insured." *Id.* The Third District rejected that theory and adopted "what we think is ***699** a better view—that the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not ... the prime or efficient cause of the accident.' " *Id.* at 1387 (quoting 11 Ronald A. Anderson, *Couch on Insurance 2d* § 44:268, at 417 (rev. ed.1982)). Further, the Third District noted that the California Supreme Court found the efficient cause language of *Sabella* "to be of little assistance in cases where both causes of the harm are independent of each other." *Id.* at 1388 ("We agree with the California court that the efficient cause language set forth in *Sabella* and cited by *[Phelps]* offers little analytical support where it can be said that but for the joinder of two independent causes the loss would not have occurred." (citing *Partridge*, 109 Cal.Rptr. 811, 514 P.2d at 130 n. 10)). Accordingly, the Third District held that "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Id.* (citing *Safeco Ins. Co. v. Guyton*, 692 F.2d 551 (9th Cir.1982)). *Wallach* has continued to be applied in Florida courts until the Second District's decision in *Sebo.* We accepted jurisdiction based on the conflict between *Wallach* and *Sebo.*

This Case

After determining that there was "no dispute in this case that there was more than one cause of the loss, including defective construction, rain, and wind," the Second District noted below that the parties had filed cross-motions for summary judgment, in which Sebo had asserted that AHAC was required to cover all losses under the concurrent cause doctrine. *Sebo*, 141 So.3d at 197. Then, the court expressed its disagreement with *Wallach*'s application to cases involving multiple perils and a first-party insurance policy.[2] *Id.* at 198. Relying on the California Supreme Court's clarification in *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 257 Cal.Rptr. 292, 770 P.2d 704 (1989), the Second District reasoned that "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy." *Sebo*, 141 So.3d at 201 (citing *Garvey*, 257 Cal.Rptr. 292, 770 P.2d at 705). Accordingly, the Second District reversed and remanded the case for a new trial. *Id.*

[5] To determine whether coverage exists under Sebo's policy, we begin with the language of the policy. It is undisputed that Sebo's all-risk policy included the following exclusion:

> The following exclusions apply to the Part II–PROPERTY section of your policy
>
> ....
>
> 8. Faulty, Inadequate or Defective Planning
>
> ***700** We do not cover any loss caused by faulty, inadequate or defective:
>
> a. Planning, zoning, development, surveying, siting;
>
> b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> c. Materials used in repair, construction, renovation or remodeling; or

d. Maintenance;

of part or all of any property whether on or off the residence.

Policy, Part II—Property, D. Exclusions, 8, Page 8.

Also not in dispute is that the rainwater and hurricane winds combined with the defective construction to cause the damage to Sebo's property. As in *Partridge*, there is no reasonable way to distinguish the proximate cause of Sebo's property loss—the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the EPC doctrine because no efficient cause can be determined. As stated in *Wallach*, "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Wallach*, 527 So.2d at 1388. Furthermore, we disagree with the Second District's statement that the CCD nullifies all exclusionary language and note that AHAC explicitly wrote other sections of Sebo's policy to avoid applying the CCD. Because AHAC did not explicitly avoid applying the CCD, we find that the plain language of the policy does not preclude recovery in this case.

[6] Last, AHAC argues that the trial court erred by prohibiting the introduction of the amount of the settlements Sebo received in connection with this case. The trial court excluded evidence of the settlements based on this Court's decision in *Saleeby v. Rocky Elson Construction, Inc.*, 3 So.3d 1078 (Fla.2009). The Second District did not rule on this issue because "it is not completely clear whether this is a valued policy law case." *Sebo*, 141 So.3d at 203. The court therefore left this question to be resolved at retrial, noting that the 2005 version of the statute applied. *Id.* We disagree with the trial court's determination that *Saleeby* precluded AHAC from presenting the settlement amounts to offset the judgment.

Saleeby held that section 768.041, Florida Statutes, which bars disclosure to the jury of settlement or dismissal of a joint tortfeasor, and section 90.408, which bars the disclosure of evidence of an offer to compromise to prove liability, are clear and unambiguous. We held that "[n]o evidence of settlement is admissible at trial on the issue of liability." *Saleeby*, 3 So.3d at 1083. Nothing in our decision affects the ability of a trial court to consider the amount of settlements as a post-judgment offset. We remand for reconsideration of this issue.

For the foregoing reasons, we quash the Second District's opinion below and remand for further proceedings consistent with this opinion.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY, J., concurs in result.

POLSTON, J., dissents with an opinion.

POLSTON, J., dissenting.

As the majority explains in footnote 2, the issue decided by the Second District and then by this Court, whether to apply the efficient proximate cause doctrine instead of the concurring cause doctrine, was not raised by the parties before the trial ***701** court or the Second District. Accordingly, the Second District should not have decided this issue. *See Pagan v. State*, 29 So.3d 938, 957 (Fla.2009) (stating that the "purpose of an appellate brief is to present arguments in support of the points on appeal" and failing to do so will mean that such claims are "deemed to have been waived" (quoting *Duest v. Dugger*, 555 So.2d 849, 852 (Fla.1990))); *City of Miami v. Steckloff*, 111 So.2d 446, 447 (Fla.1959) ("An assigned error will be deemed to have been abandoned when it is completely omitted from the [appellate] briefs."); *see also Robertson v. State*, 829 So.2d 901, 906 (Fla.2002) ("[G]enerally, if a claim is not raised in the trial court, it will not be considered on appeal." (quoting *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla.1999))). Therefore, I would quash and remand for the Second District to consider the issue raised by the parties, and I would not reach the merits of the issue decided by this Court.

I respectfully dissent.

All Citations

208 So.3d 694, 41 Fla. L. Weekly S582

Footnotes

1 We mention California caselaw because Florida courts have looked to California decisions on insurance matters involving the EPC.

2 We note that the abrogation of the CCD was not properly before the Second District to consider. AHAC never specifically argued that the CCD should be abrogated and replaced with the EPC in Florida trial or in its brief on appeal to the Second District. In its order granting partial summary judgment for Sebo, the trial court found that "Florida recognizes the Doctrine of Concurrent Causation" and that the doctrine "applies to all-risk policies." The trial court further found that the causes of loss "are not 'dependent' as that term is understood under" the doctrine. After this adverse ruling, it does not appear that AHAC raised the issue again. Likewise, the focus of AHAC's argument on appeal to the Second District was the improper application of the CCD based on the dependent nature of the perils. Accordingly, the argument was not preserved, and the Second District improperly decided an issue that was not raised.

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TAB 8

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Columbia Insurance Group, Inc. v. Cenark Project Management Services, Inc., Ark., April 28, 2016

979 So.2d 871
Supreme Court of Florida.

UNITED STATES FIRE INSURANCE COMPANY, etc., Petitioner,
v.
J.S.U.B., INC., etc., et al., Respondents.

No. SC05–1295.
|
Dec. 20, 2007.

Synopsis
Background: Insured general contractor brought declaratory judgment action against insurer, asserting that commercial general liability (CGL) policy provided coverage for damage to homes constructed by general contractor which was caused by subcontractors' use of poor soil and improper soil compaction and testing. Following a bench trial, the Circuit Court, Lee County, William C. McIver, J., entered judgment in favor of insurer. General contractor appealed. The District Court of Appeal, Silberman, J., 906 So.2d 303,reversed and remanded. Insurer petitioned for review.

Holdings: The Supreme Court, Pariente, J., held that:

[1] subcontractors' defective soil preparation, which general contractor did not intend or expect, was an occurrence under CGL policy;

[2] structural damage to completed homes caused by subcontractor's defective work was property damage under CGL policy; and

[3] CGL policy provided coverage, disapproving *Lassiter Construction Co. v. American States Insurance Co.*, 699 So.2d 768.

Decision of District Court of Appeal approved.

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

Wells, J., concurred in result only.

West Headnotes (26)

[1] **Appeal and Error**
Insurers and insurance

Whether a post–1986 standard form commercial general liability (CGL) policy with products-completed operations hazard coverage, issued to a general contractor, provided coverage when a claim was made against the contractor for damage to the completed project caused by a subcontractor's defective work, was an issue of insurance policy construction, which was a question of law subject to de novo review.

15 Cases that cite this headnote

[2] **Insurance**
Plain, ordinary or popular sense of language
Insurance
Ambiguity, Uncertainty or Conflict
Insurance
Favoring coverage or indemnity; disfavoring forfeiture

Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage.

47 Cases that cite this headnote

[3] **Insurance**
Construction as a whole

In construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.

38 Cases that cite this headnote

[4] **Insurance**
Construction as a whole
Insurance
Exclusions and limitations in general

Although exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read in pari materia.

38 Cases that cite this headnote

[5] **Insurance**
Risks and Losses

Commercial general liability (CGL) policies are designed to protect an insured against certain losses arising out of business operations.

5 Cases that cite this headnote

[6] **Courts**
Previous Decisions as Controlling or as Precedents

Whether a decision in an insurance policy interpretation case is binding on another is dependent upon there being similar facts and legal issues.

3 Cases that cite this headnote

[7] **Courts**
Previous Decisions as Controlling or as Precedents

Doctrine of precedent ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular judge.

Cases that cite this headnote

[8] **Courts**
Previous Decisions as Controlling or as Precedents

Doctrine of precedent requires that, when the facts are the same, the law should be applied the same.

Cases that cite this headnote

[9] **Courts**
Previous Decisions as Controlling or as Precedents

Where the policies and underlying facts are different, a decision in an insurance policy interpretation case should not be binding in a subsequent case.

3 Cases that cite this headnote

[10] **Insurance**
Accident, occurrence or event

In determining whether a subcontractor's faulty workmanship that resulted in damage to general contractor's work was covered in a post-1986 standard form commercial general liability (CGL) policy, issued to general contractor, it was necessary to first analyze the specific insuring provisions of the policy to determine whether subcontractor's faulty workmanship could constitute an "occurrence."

15 Cases that cite this headnote

[11] **Insurance**
Accident, occurrence or event

Subcontractors' defective soil preparation, which general contractor did not intend or expect, was an "occurrence" under post–1986 commercial general liability (CGL) policy with products-completed hazard coverage issued to general contractor.

2 Cases that cite this headnote

[12] **Insurance**
Accident, occurrence or event

Commercial general liability (CGL) policy that defined an "occurrence" as an "accident," but left "accident" undefined, provided coverage not only for accidental events, but also injuries or damage neither expected nor intended from the standpoint of the insured.

8 Cases that cite this headnote

[13] **Insurance**
Accident, occurrence or event

Construing the term "occurrence" in post-1986 commercial general liability (CGL) policies issued to a general contractor, to include a subcontractor's defective work, would not convert the policies into performance bonds.

3 Cases that cite this headnote

[14] **Principal and Surety**
Building Contracts

The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor.

1 Cases that cite this headnote

[15] **Principal and Surety**
Subject-matter in general

A performance bond benefits the owner of a project rather than the contractor.

Cases that cite this headnote

[16] **Principal and Surety**
Indemnity or reimbursement

A surety is entitled to indemnification from the contractor.

2 Cases that cite this headnote

[17] **Insurance**
Property damage

The fact that damages may result from an "occurrence" under a commercial general liability (CGL) policy is only the first step in determining whether the damages are covered; the occurrence may not have caused "property damage" or coverage provided by the insuring agreement may be precluded by an exclusion.

4 Cases that cite this headnote

[18] **Insurance**
Accident, occurrence or event

A subcontractor's 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 commercial general liability (CGL)

policy.

10 Cases that cite this headnote

[19] **Insurance**
Property damage

Structural damage to completed homes caused by subcontractor's defective work in preparing the soil was "property damage" within meaning of post-1986 commercial general liability (CGL) policy with products completed-operations hazard coverage, issued to general contractor, where policy defined property damage as physical injury to tangible property, and did not differentiate between damage to contractor's work and damage to other property.

63 Cases that cite this headnote

[20] **Torts**
Economic loss doctrine

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.

Cases that cite this headnote

[21] **Torts**
Economic loss doctrine

The economic loss doctrine determines what cause of action is available to recover economic losses: tort or contract.

Cases that cite this headnote

[22] **Insurance**
Property damage

Physical injury to a completed project that occurs as a result of a subcontractor's defective work can constitute "property damage" as defined in a post-1986 commercial general liability (CGL) policy.

25 Cases that cite this headnote

[23] **Insurance**
Property damage

There is a difference between a claim for the costs of repairing or removing a subcontractor's defective work, which is not a claim for "property damage," under a post-1986 commercial general liability (CGL) policy, issued to a general contractor, and a claim for the costs of repairing damage caused by the defective work, which is a claim for "property damage."

39 Cases that cite this headnote

[24] **Insurance**
Public policy limitations in general

There was no public policy reason for precluding coverage under post-1986 commercial general liability (CGL) policy issued to general contractor for subcontractor's defective work that was neither intended nor expected from the standpoint of the general contractor.

3 Cases that cite this headnote

[25] **Insurance**
Products and completed operations hazards
Insurance
Scope of coverage

A post–1986 standard form commercial general

liability (CGL) 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.

20 Cases that cite this headnote

[26] **Insurance**
Products and completed operations hazards
Insurance
Scope of coverage

Post-1986 commercial general liability (CGL) policies with products completed-operations hazard coverage, issued to general contractor that constructed home, provided coverage for damage to the completed project caused by subcontractor's improper soil preparation, including the costs to replace the homeowner's personal property, such as wallpaper, as well as the costs to repair the structural damage to the home, such as the walls, where no exclusions barred coverage; disapproving *Lassiter Construction Co. v. American States Insurance Co.*, 699 So.2d 768.

5 Cases that cite this headnote

Attorneys and Law Firms

***873** Ronald L. Kammer and Sina Bahadoran of Hinshaw and Culbertson, LLP, Miami, ***874** Florida; June Galkoski Hoffman of Fowler, White, and Burnett, P.A., Miami, FL; Joseph R. Miele, Jr. of Marshall, Dennehey, Warner, Coleman, and Goggin, Fort Lauderdale, FL; and Donna M. Greenspan of Edwards, Angell, Palmer and Dodge, LLP, West Palm Beach, FL, for Petitioners.

Mark A. Boyle, Sr., Michael G. Fink and Geoffrey H. Gentile, Sr. of Fink and Boyle, P.A., Fort Myers, FL, for Respondents.

Denise V. Powers, Coral Gables, FL, on behalf of National Association of Mutual Insurance Companies; William D. Horgan of Fuller, Johnson, and Farrell, P.A., Tallahassee, FL, on behalf of Complex Insurance Claims Litigation Association; Pamela A. Chamberlin of Mitrani, Rynor, and Adamsky, P.A., Miami, FL, on behalf of Mid–Continent Casualty Company; John Bond Atkinson, Rebecca A. Brownell, and Ellie A. Levy of Atkinson and Brownell, P.A., Miami, FL, and Shaun McParland Baldwin and Donald E. Elder of Tressler, Soderstrom, Maloney and Priess, Chicago, IL, on behalf of Amerisure Mutual Insurance Company; Perry N. Bass, Houston, TX, and Christopher W. Martin and Levon G. Hovnatanian of Martin, Disiere, Jefferson and Wisdom, LLP, Houston, TX, on behalf of Hartford Fire Insurance Company; and David K. Miller and Ginger L. Barry of Broad and Cassel, Tallahassee, FL, and Keith Hetrick, Florida Home Builders Association, Tallahassee, FL, and 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 Associate General Contractors 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.; Stephen A. Marino, Jr. of Ver Ploeg and Lumpkin, P.A., Miami, FL, on behalf of the Academy of Florida Trial Lawyers; Duane A. Daiker and Steven G. Schember of Shumaker, Loop, and Kendrick, LLP, Tampa, FL, on behalf of Amwest Surety Insurance Company; Daniel J. Santaniello and Paul Stephen Jones of Luks, Santaniello, Perez, Petrillo, and Gold, Orlando, FL, James P. Waczewski of Luks, Santaniello, Perez, Petrillo and Gold, Tallahassee, FL, and Joseph L. Oliva of Oliva and Associates, ALC, San Diego, CA, on behalf of Poole and Kent Company, for Amici Curiae.

Opinion

PARIENTE, J.

J.S.U.B., Inc. seeks review of the decision of the Second District Court of Appeal in *J.S.U.B., Inc. v. United States Fire Insurance Co.*, 906 So.2d 303 (Fla. 2d DCA 2005), which is in express and direct conflict with the decision of

the Fourth District Court of Appeal in *Lassiter Construction Co. v. American States Insurance Co.*, 699 So.2d 768 (Fla. 4th DCA 1997).[1] The conflict issue is 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 ***875** damage to the completed project caused by a subcontractor's defective work.

We answer this question in the affirmative. We conclude that defective work performed by a subcontractor that causes damage to the contractor's completed project and is neither expected nor intended from the standpoint of the contractor can constitute "property damage" caused by an "occurrence" as those terms are defined in a standard form commercial general liability policy. Accordingly, a claim made against the contractor for damage to the completed project caused by a subcontractor's defective work is covered under a post–1986 CGL policy unless a specific exclusion applies to bar coverage. In this case, the terms of the policy included an exception to the "Your Work" exclusion for faulty workmanship by a subcontractor and did not include a breach of contract exclusion. We therefore approve the Second District's decision in *J.S.U.B.* and disapprove the Fourth District's decision in *Lassiter*.

FACTS AND PROCEDURAL HISTORY

J.S.U.B., Inc., and Logue Enterprises, Inc., as partners of First Home Builders of Florida ("J.S.U.B."), contracted to build several homes in the Lehigh Acres area of Lee County, Florida. After completion and delivery of the homes to the homeowners, damage to the foundations, drywall, and other interior portions of the homes appeared. It is undisputed that the damage to the homes was caused by subcontractors' use of poor soil and improper soil compaction and testing. The homeowners demanded that J.S.U.B. repair or remedy the damages, asserting breach of contract, breach of warranty, negligence, strict liability, and violation of the Florida Building Code.

During the period in which the homes were built, J.S.U.B. was insured under a commercial general liability policy and renewal policy issued by United States Fire Insurance Company ("U.S. Fire"). The policies provide 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:
>
> ....
>
> (2) Work that has not yet been completed or abandoned. [2]

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. Damage To Property**
>
> "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 ***876** 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. Damage To Your Work**
>
> "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.

(Emphases supplied.)[3]

J.S.U.B. sought coverage under the policies for the structural damage to the homes and the damage to the homeowners' personal property. U.S. Fire agreed that the policies provided coverage for damage to the homeowners' personal property, such as the homeowners' wallpaper. However, U.S. Fire 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.

J.S.U.B. made the necessary repairs to the homes and filed a declaratory judgment action to determine whether coverage existed for the cost of repairing the structural damage. The circuit court entered judgment in favor of U.S. Fire. Citing to *LaMarche v. Shelby Mutual Insurance Co.*, 390 So.2d 325 (Fla.1980), the circuit court found that the CGL policies did not provide

> coverage for faulty workmanship and that the damages alleged by [J.S.U.B.] and caused by [J.S.U.B.'s] subcontractors' use of poor soil, improper soil compaction and testing are the faulty workmanship for which no coverage exists under the subject policies.

J.S.U.B. appealed and the Second District Court of Appeal reversed. The Second District held that *LaMarche* did not control. The Second District further concluded that the policies contained "broad policy language" that provided coverage to J.S.U.B. in light of this Court's subsequent decision in *State Farm Fire & Casualty Co. v. CTC Development Corp.*, 720 So.2d 1072 (Fla.1998), and that none of the exclusions in the policies applied. *See J.S.U.B.*, 906 So.2d at 309, 311.

Construing a CGL policy similar to those at issue in this case, the Fourth District Court of Appeal came to a contrary conclusion in *Lassiter*. In that case, the contractor argued that because exclusions (j)(6) and (*l*) "do not exclude work performed by subcontractors, there is coverage for the defective work performed by subcontractors." *Lassiter*, 699 So.2d at 770. The Fourth District disagreed, summarily concluding that "[t]he insured has failed to demonstrate that there are any ***877** provisions in the coverage section of the policy which would provide coverage for this defective work." *Id.* We accepted jurisdiction to resolve the conflict between *J.S.U.B.* and *Lassiter*.

ANALYSIS

[1] The issue we decide is 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.[4] 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 resolving this issue, we first set forth the standards for construing insurance contracts and outline the origin and evolution of CGL policies, highlighting the changes that have been made to the relevant language of the insuring provisions and exclusions over the years. We then review our decision in *LaMarche*, which has been relied on by courts to deny coverage for damage to a completed project caused by a subcontractor's defective work. We then analyze whether under CGL policies issued after 1986, a subcontractor's faulty workmanship can constitute an "occurrence" as that term is defined in the policy and as interpreted in *CTC Development*. Finally, we analyze the definition of "property damage" to determine whether the damage to the completed homes comes within the policy definition.

A. Standards for Construing Insurance Contracts

[2] [3] [4] Our interpretation of insurance contracts, such as the CGL policies in this case, is governed by generally accepted rules of construction. Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage. *See Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 532 (Fla.2005). Further, "in construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect." *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla.2000). Accordingly,

"[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari materia*." *CTC Development*, 720 So.2d at 1074–75 (citations, alteration, and internal quotation marks omitted).

B. The Origin and Evolution of CGL Policies

[5] Commercial General Liability policies are designed to protect an insured against certain losses arising out of business operations. *See Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 305 (Tenn.2007). The first standard form comprehensive general liability insurance policy was drafted by the insurance industry in 1940. *See* 21 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d,* § 129.1, at 7 (2002).[5] The standard policy was the result of a voluntary ***878** effort in the insurance industry to address the misunderstanding, coverage disputes, and litigation that resulted from the unique language used by each liability insurer. *See id.; see also Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So.2d 700, 702 (Fla.1993) (explaining that CGL policies "are standard insurance policies developed by insurance industry trade associations, and these policies are the primary form of commercial insurance coverage obtained by businesses throughout the country").

Since 1940, the standard policy has been revised several times. *See* 21 Holmes, *supra*, § 129.1, at 7–8. We review these changes because the insuring agreement has been expanded over the years and the exclusions narrowed. With regard to the insuring agreement, the language was expanded from providing coverage only for damages "caused by an accident" to include coverage for damages caused by an "occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Compare* 16 *id.* § 117.1, at 215, *with* 20 *id.* § 129.2, at 104. In *CTC Development*, we explained that an "occurrence," which is defined as an "accident," encompasses damage that is "neither expected nor intended from the standpoint of the insured." 720 So.2d at 1076.

Like the insuring language, the exclusions in standard CGL policies have been modified over the years. *See generally* 21 Holmes, *supra*, § 132.1–132.9, at 5–158. The exclusions that are of significance to our analysis in this case are the "business risk" exclusions, including the "your work" and "your product" exclusions. The 1973 standard CGL policy interpreted in *LaMarche* contained broad exclusions for damage to "your work" and "your product" stating that the insurance did not apply

> (n) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (*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.

390 So.2d at 326, 21 Holmes, *supra*, § 132.1, at 11 (emphasis supplied).

Beginning in 1976, the insured could purchase a Broad Form Property Endorsement. *See Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65, 83 (2004). This endorsement replaced exclusion (*o*), set forth above, and exclusion (k), which excluded damage to property owned by or within the control of the insured. As to exclusion (*o*), the endorsement replaced it with more specific exclusions and also differentiated between property damage that occurred before and after operations were completed. The endorsement provided that the insurance did not apply:

> (d) to that particular part of any property ...
>
> (i) upon which operations are being performed by or on behalf of the insured at the time of the property damage arising out of such operations, or
>
> (ii) out of which any property damage arises, or
>
> (iii) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured;
> ...
>
> (3) *with respect to the completed operations hazard* and with respect to any classification stated in the policy or the company's manual as "including completed operations," to property damage to work *performed by the* ***879** *named insured* arising out of such work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith.

21 Holmes, *supra*, § 132.9, at 149 (emphasis supplied). Thus, with regard to completed operations, the endorsement eliminated the exclusion for "work performed on behalf of the named insured."

When the CGL policy was revised again in 1986, it contained new provisions that incorporated and clarified the Broad Form Property Endorsement. *See id.* at 149, 153. New exclusion (j)(6) and the exception to this exclusion clearly stated that the exclusion for faulty workmanship did not apply to work within the products-completed operation hazard:

This insurance does not apply to:

j. Damage to Property

"Property damage" to:

....

(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."

Id. at 145, 153 (emphasis supplied). The 1986 policy also added new exclusion (*l*), the "your work exclusion," with an express exception for subcontractor work as follows:

This insurance does not apply to:

....

l. Damage To Your Work

"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.

Id. at 145, 152 (emphasis supplied). The reason for this 1986 revision that added the subcontractor exception has been explained as follows:

> [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 coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage.

See 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.13[D] at 14–224.8 (3d ed. Supp.2007). Moreover, the Insurance Services Office promulgated a circular on July 15, 1986, confirming that the 1986 revisions to the standard CGL policy not only incorporated the "Broad Form" property endorsement but also 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." Insurance Services Office Circular, Commercial General Liability Program Instructions Pamphlet, No. GL–86–204 (July 15, 1986).[6] Of ***880** course, the subcontractor's exception to the general exclusion for a contractor's defective work becomes important only if there is coverage under the initial insuring provision.

C. *LaMarche*

The threshold issue in this case, whether a subcontractor's defective work can constitute an "occurrence," requires us to examine our decision in *LaMarche* because it is the Florida case that is generally cited to support the proposition that CGL policies do not provide coverage for damage to the contractor's work caused by faulty workmanship. The issue in *LaMarche* involved a claim for a contractor's faulty workmanship, which the homeowners argued caused structural defects and consequent secondary damage. *See Shelby Mut. Ins. Co. v. LaMarche*, 371 So.2d 198, 200 (Fla. 2d DCA 1979). The contractor entered into an agreement for the construction of a home, under which all workmanship with regard to the structure was guaranteed for five years from the date of delivery. *See LaMarche*, 390 So.2d at 326. The CGL policy issued to the contractor provided that the insurer "would pay for bodily injury or property damage for which the contractor became liable." *Id.* However, the policy also included the following relevant exclusionary provisions, which were standard in 1973 CGL policies:

> (a) to liability assumed by the insured under any contract or agreement except 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;
>
> (*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[.]

Id.

The work performed by the contractor was defective, and the homeowners, as beneficiaries under the insurance contract, sought coverage for replacing the defective materials and workmanship. The homeowners argued that

> the average person would interpret subparagraph (a) as granting coverage for damages arising from a breach of warranty of fitness or a failure to perform work in a workmanlike manner. Petitioners further argue that the homeowner, as beneficiary of the insured, should be granted coverage because the policy is ambiguous.

Id. The Court rejected both contentions, ruling that "[t]he district court was correct in concluding that an exclusion does not provide coverage but limits coverage." *Id.*

The Court noted that the district court's decision was consistent with the majority of other jurisdictions, which had concluded that "the purpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product." *Id.* The Court reasoned that this interpretation was consistent with the intent of the parties as ***881** evidenced by the language of the exclusions:

> We find this interpretation was not the intent of the contractor and the insurance company when they entered into the subject contract of insurance, and the language of the policy clearly excludes this type of coverage.

Id.

Thus, although *LaMarche* used broad language regarding the purpose of CGL policies, *LaMarche's* ultimate determination that there was no coverage for repair and replacement of the contractor's own defective work was based on the policy exclusions, not the insuring provisions. This is evident for several reasons.

First, the issue before the district court in *LaMarche* was whether the "three exclusions [at issue in the CGL policy] are clear and unambiguous" and the court's decision, which this Court fully approved, stated:

> In resolving the issue raised on appeal we make no decision as to whether the policy expressly provides coverage for the damage which resulted to appellees' residence. That question is not before us. We hold only that the exclusions at issue here do not create an ambiguity.

371 So.2d at 200–01. Accordingly, the issue on appeal to this Court was whether the district court correctly concluded that the exclusions were clear and unambiguous, which is apparent by this Court solely discussing the issue of coverage in terms of the exclusions. Indeed, the Court found that "the language of the policy clearly excludes this type of coverage," which is further evidence that the Court's decision was based on the exclusions. *LaMarche*, 390 So.2d at 326. We agree with the Second District in *J.S.U.B.*, which recognized this distinction:

> Our decision [in *LaMarche*] specified that we were not deciding whether the CGL policy expressly provided coverage for the damage that had been incurred, but rather, we determined that the policy exclusions that were at issue did not create an ambiguity. *Id.* at 201. In its review of our decision, the supreme court also

> focused on the exclusionary language and concluded that the policy excluded coverage for building flaws or deficiencies and "instead covers damage caused by these flaws." *LaMarche,* 390 So.2d at 326.

906 So.2d at 307–08.

Second, the Court in *LaMarche* adopted in full the reasoning and analysis of the New Jersey Supreme Court's decision in *Weedo v. Stone–E–Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 792 (1979), which was based on the same exclusions at issue in *LaMarche;* specifically, the "insured products" (exclusion "(n)") and "work performed" (exclusion "(*o*)") exclusions. The *Weedo* court explained that the insuring provisions "set forth, in fundamental terms, the general outlines of coverage," while "[t]he limitations on coverage are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded." *Id.* at 790. The court then noted that the insurer conceded that

> but for the exclusions in the policy, coverage would obtain. Hence we need not address the validity of one of the carrier's initially-offered grounds of non-coverage, namely, that the policy did not extend coverage for the claims made even absent the exclusions.

Id. at 790 n. 2.

The New Jersey Supreme Court concluded that coverage was lacking, not due to the insuring provisions, but because faulty workmanship by a contractor was specifically excluded based on the clear and unambiguous "business risk" exclusionary ***882** clauses. *Id.* at 792–95 (concluding that the language of these "business risk" exclusions was clear and rejecting the argument that these exclusions were rendered ambiguous when read in conjunction with exclusion (a)). Additionally, the Court reinforced that it was looking to the exclusions to determine if coverage existed by stating the principle that "[t]he limitations on coverage are set forth in the exclusion clauses of the policy, whose function it is to restrict and shape the coverage otherwise afforded." *Id.* at 790. Thus, it is clear that *LaMarche* relied on the exclusions to determine that no coverage existed in that case.

U.S. Fire and the amici curiae that support its position argue that *LaMarche* and the district court decisions that reiterate *LaMarche's* broad language regarding the purpose of CGL policies stand for the proposition that faulty workmanship that damages the contractor's own work can never constitute a covered "occurrence." *See, e.g., Sekura v. Granada Ins. Co.*, 896 So.2d 861, 862 (Fla. 3d DCA 2005); *Lassiter*, 699 So.2d at 769; *Home Owners Warranty Corp. v. Hanover Ins. Co.*, 683 So.2d 527, 529 (Fla. 3d DCA 1996); *Tucker Constr. Co. v. Michigan Mut. Ins. Co.*, 423 So.2d 525, 527–28 (Fla. 5th DCA 1982). We disagree. Although some of these district court decisions may have reached the correct result under their particular facts, none of them expressly considered whether it is appropriate to apply *LaMarche's* rationale to cases involving different policy provisions.[7]

We conclude that the holding in *LaMarche,* which relied on *Weedo* and involved the issue of whether there was coverage for the contractor's own defective work, was dependent on the policy language of pre–1986 CGL policies, including the relevant insuring provisions and applicable exclusions. The Minnesota Supreme Court, the Tennessee Supreme Court, and the Wisconsin Supreme Court reached the same conclusion regarding prior state court decisions that relied on *Weedo* and interpreted pre–1986 CGL policies. *See Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 327 (Minn.2004); *Moore & Assocs., Inc.*, 216 S.W.3d at 307; *Am. Girl*, 673 N.W.2d at 77.

[6] [7] [8] [9] Because *LaMarche* involved a claim of faulty workmanship by the contractor, rather than a claim of faulty workmanship by the subcontractor, and because the policy being interpreted involved distinct exclusions and exceptions, we do not regard *LaMarche* as binding precedent in this case. The role of precedent in insurance policy interpretation cases depends largely on whether the underlying facts and the policies at issue in the two decisions are similar. Indeed, precedent has been defined as "A decided case that furnishes a basis for determining later cases involving *similar facts or issues.*" *Black's Law Dictionary* 1214 (8th ed.2004) (emphasis supplied). Thus, whether a decision is binding on another is dependent upon there being similar facts and legal issues. As Justice Overton observed in his concurrence in *Perez v. State*, 620 So.2d 1256, 1259 (Fla.1993),

> [t]he doctrine of precedent is basic to our system of justice. In simple terms, ***883** it ensures that similarly situated individuals are treated alike rather than in accordance with the personal view of any particular

> judge. In other words, precedent requires that, when the facts are the same, the law should be applied the same.

However, where the policies and underlying facts are different, then a previous decision should not be binding. We recognized this principle in *Travelers Indemnity Co. v. PCR, Inc.*, 889 So.2d 779, 791 n. 13 (Fla.2004) (questioning the applicability of a previous decision's definition of a policy term in a subsequent case where the exclusionary clauses were materially different).

[10] Accordingly, our decision in *LaMarche* does not control the resolution of the issue in this case, namely, whether a subcontractor's faulty workmanship is covered in a post–1986 CGL policy. Instead, we first analyze the specific insuring provisions of the current policy to determine whether a subcontractor's faulty workmanship that results in damage to the contractor's work can constitute an "occurrence" as that term has been defined under Florida case law. In doing so, we apply well-established principles of insurance contract interpretation, reading the policy both in accord with its plain language, construing any ambiguities in favor of the insured, *see Taurus Holdings*, 913 So.2d at 532, and "as a whole, endeavoring to give every provision its full meaning and operative effect." *Anderson*, 756 So.2d at 34.

D. Whether Faulty Workmanship Can Constitute an "Occurrence"

[11] [12] The question of whether faulty workmanship can constitute an "occurrence" is a matter governed by the actual terms of the policy and Florida law interpreting insurance contracts. The policy and renewal policy in this case define an "occurrence" as an "accident" but leave "accident" undefined. Thus, under our decision in *CTC Development*, these policies provide coverage not only for " 'accidental events,' but also injuries or damage neither expected nor intended from the standpoint of the insured." 720 So.2d at 1076.

U.S. Fire nevertheless argues that a subcontractor's faulty workmanship that damages the contractor's own work can never be an "accident" because it results in reasonably foreseeable damages. We expressly rejected the use of the concept of "natural and probable consequences" or "foreseeability" in insurance contract interpretation in *CTC Development* when we receded from prior case law. *See id.* at 1074–77.

Further, we fail to see how defective work that results in a claim against the contractor because of injury to a third party or damage to a third party's property is "unforeseeable," while the same defective work that results in a claim against the contractor because of damage to the completed project is "foreseeable." This distinction would make the definition of "occurrence" dependent on which property was damaged. For example, applying U.S. Fire's interpretation in this case would make the subcontractor's improper soil compaction and testing an "occurrence" when it damages the homeowners' personal property, such as the wallpaper, but not an "occurrence" when it damages the homeowners' foundations and drywall. As the Tennessee Supreme Court explained, in rejecting this distinction:

> A shingle falling and injuring a person is a natural consequence of an improperly installed shingle just as water damage is a natural consequence of an improperly installed window. If we assume that either the shingle or the window installation will be completed negligently, it is foreseeable that damages will result. If, however, we assume that the installation ***884** of both the shingle and the window will be completed properly, then neither the falling shingle nor the water penetration is foreseeable and both events are "accidents." Assuming that the windows would be installed properly, Moore could not have foreseen the water penetration. Because we conclude the water penetration was an event that was unforeseeable to Moore, the alleged water penetration is both an "accident" and an "occurrence" for which there is coverage under the "insuring agreement."

Moore & Assocs., 216 S.W.3d at 309.

We also conclude that U.S. Fire's argument that a breach of contract can never result in an "accident" is not

supported by the plain language of the policies. The Wisconsin Supreme Court came to the same conclusion in *American Girl:*

> [T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. "Occurrence" is not defined by reference to the legal category of the claim. The term "tort" does not appear in the CGL policy.

673 N.W.2d at 77. The Kansas Supreme Court followed *American Girl's* reasoning in holding that a subcontractor's defective work can constitute an "occurrence" under Kansas law. *See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486, 491 (2006).[8]

If U.S. Fire intended to preclude coverage based on the cause of action asserted, it was incumbent on U.S. Fire to include clear language to accomplish this result. *See Container Corp. of Am. v. Maryland Cas. Co.*, 707 So.2d 733, 736 (Fla.1998) ("Had Maryland wished to limit Container's coverage to vicarious liability, it could have done so by clear policy language."). In fact, there is a breach of contract endorsement exclusion, not present in the CGL policies at issue in this case, that excludes coverage for breach of contract claims. *See B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F.Supp.2d 634, 639 (N.D.Tex.2006). The endorsement provides:

> This insurance does not apply to claims for breach of contract, whether express or oral, nor claims for breach of an implied in law or implied in fact contract, whether "bodily injury," "property damage," "advertising injury," "personal injury" or an "occurrence" or damages of any type is alleged; this exclusion also applies to any additional insureds under this policy.

Id.

Furthermore, ISO has begun to issue an endorsement that may be included in a CGL policy, which entirely eliminates the subcontractor exception to the "your work" exclusion. *See* ISO Properties, Inc., Endorsement CG 22 94 10 01, http:// www.lexis.com; *see also Lamar Homes, Inc. v. Mid–Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex.2007) ("More recently, the Insurance Services Office has issued an endorsement that may be included in the CGL to eliminate the subcontractor exception to the 'your work' exclusion."). The fact that these additional endorsements may be included in CGL policies highlights that the ultimate analysis is governed by the actual ***885** language contained in the applicable insurance contract.

U.S. Fire's assertion that damage resulting from a breach of contract must be presumed to be expected is also unpersuasive. As with U.S. Fire's foreseeability argument, this position makes the definition of "occurrence" dependent on whether the property damaged is part of the construction contract or the homeowner's separate property. Under *CTC Development*, the appropriate consideration is whether the damage was expected or intended from the standpoint of the insured, not whose property was damaged. 720 So.2d at 1076; *see also Lamar Homes*, 242 S.W.3d at 9 ("The CGL policy, however, does not define an 'occurrence' in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident."). As the amici Florida Home Builders Association and National Association of Home Builders assert in arguing that CGL policies issued to their members do not distinguish between the property damaged for purposes of defining "occurrence":

> If a defective masonry wall falls outward and damages a parked car, no one disputes the "occurrence" of "property damage," but if it falls inward and damages the floor, the insurers label that a non-occurrence or not property damage. Likewise, if the wall falls the day before the home buyer resells to a new owner, they contend it is not covered as a contract claim, but if it falls the day after resale, it is covered as a tort claim.

(Citation omitted.)

In sum, we reject a definition of "occurrence" that renders damage to the insured's own work as a result of a subcontractor's faulty workmanship expected, but renders damage to property of a third party caused by the same faulty workmanship unexpected. There is simply nothing in the definition of the term "occurrence" that limits coverage in the manner advanced by U.S. Fire, and we decline to read the broad "business risk" exclusions at issue in *LaMarche* into the definition of "occurrence" used in the coverage provisions of the post–1986 standard CGL policies at issue in this case. We agree with the Wisconsin Supreme Court's observation that

> CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law.

Am. Girl, 673 N.W.2d at 76; *accord Moore & Assocs.,* 216 S.W.3d at 307 (agreeing with *American Girl* that "[r]eliance upon a CGL's 'exclusions' to determine the meaning of 'occurrence' has resulted in 'regrettably overbroad generalizations' concerning CGLs").

Although the Supreme Courts of Kansas, Minnesota, Tennessee, Texas and Wisconsin have adopted a similar interpretation of the term "occurrence" as we do in this case, we recognize that there is an opposing view that defective construction that damages the work product itself can never constitute an accident. *See, e.g., Auto–Owners Ins. Co. v. Home Pride Cos.,* 268 Neb. 528, 684 N.W.2d 571, 577 (2004); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.,* 329 Or. 620, 998 P.2d 1254, 1257 (2000); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 589 Pa. 317, 908 A.2d 888, 899 (2006); *L–J,* ***886** *Inc. v. Bituminous Fire & Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33, 35–36 (2005).[9] However, contrary to our interpretation of the term "accident" in *CTC Development,* these courts construe "accident" narrowly. *See Home Pride Cos.,* 684 N.W.2d at 577 (concluding that faulty workmanship is not an "accident" because it is not a fortuitous event); *Kvaerner Metals,* 908 A.2d at 899 (same); *Oak Crest,* 998 P.2d at 1257 (concluding that faulty workmanship is not an "occurrence" because it is a failure to perform under the contract, which cannot be characterized as unexpected); *L–J, Inc.,* 621 S.E.2d at 35 (same). Moreover, a number of these courts support their decisions by reciting broad principles that categorically dismiss claims for damages caused by defective work as being outside the scope of CGL policies. *See, e.g., Oak Crest,* 998 P.2d at 1257 n. 7; *Kvaerner Metals,* 908 A.2d at 899 n. 10; *L–J, Inc.,* 621 S.E.2d at 35. Because these courts allow recovery when the faulty workmanship injures a third party or results in damage to property other than the work product itself, the implication from these cases is that damage to the insured's own work from failure to perform a construction contract is presumed to be expected while damage to the person or property of a third party is presumed to be unexpected. As explained above, we find this reasoning unconvincing and contrary to policy language defining "occurrence."

Even if there was any ambiguity in the policies as to whether a subcontractor's faulty workmanship can constitute an "occurrence," we would interpret the ambiguity against the insurer and in favor of coverage. *See Taurus Holdings,* 913 So.2d at 532. In addition, our interpretation of the term "occurrence" is guided by a view of the policy as a whole. *See Anderson,* 756 So.2d at 34. As we explained in *CTC Development,* "[a]lthough exclusionary clauses cannot be relied upon to create coverage, principles governing the construction of insurance contracts dictate that when construing an insurance policy to determine coverage the pertinent provisions should be read *in pari materia.*" 720 So.2d at 1074–75 (citations, alteration, and internal quotation marks omitted).

In this case, if the insuring provisions do not confer an initial grant of coverage for faulty workmanship, there would be no reason for U.S. Fire to exclude damage to "your work":

> If ... losses actionable in contract are never CGL "occurrences" for purposes of the initial coverage grant, then the business risk exclusions are entirely unnecessary. The business risk exclusions eliminate coverage for liability for property damage to the insured's

> own work ***887** or product-liability that is typically actionable between the parties pursuant to the terms of their contract, not in tort. If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it. Why would the insurance industry exclude damage to the insured's own work or product if the damage could never be considered to have arisen from a covered "occurrence" in the first place?

Am. Girl, 673 N.W.2d at 78; *accord Lamar Homes, Inc.*, 242 S.W.3d at 12 ("By incorporating the subcontractor exception into the 'your-work' exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance.")

In addition, 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. *See Lee Builders*, 137 P.3d at 494 (stating that "the 'Damage to Your Work' business risk exclusion in the CGL policy in the instant case supports the determination of an occurrence" because "[i]f there can be no occurrence, the exclusion—and its exception—appear to be superfluous"); *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 673 (Tex.App.2006) ("[F]inding no occurrence for defective construction resulting in damage to the insured's work would render the subcontractor exception superfluous and meaningless."), *petition for review filed*, No. 06–287 (Tex. May 11, 2006).[10] Paragraph (j)(6) specifically excludes from coverage that "particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." However, the policy goes on to provide an exception by stating that "[p]aragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard.' " Exclusion (*l*) excludes damage to " 'your work' arising out of it or any part of it and included in the 'products-completed operations-hazard' " but then provides an exception that states that 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." (Emphasis supplied.) We simply cannot ignore the exception that has now been incorporated into exclusion (*l*), an exception that clearly applies to damages to the insured's own work arising out of the work of a subcontractor. Reading these provisions *in pari materia* with the insuring agreement supports the conclusion that a subcontractor's defective work that results in damage to the completed project can constitute an "occurrence."

[13] [14] [15] [16] Finally, we reject U.S. Fire's contention that construing the term "occurrence" to include a subcontractor's defective work converts the policies into performance bonds. "The purpose of a performance bond is to guarantee the completion of the contract upon default by the contractor." *Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd.*, 593 So.2d 195, 198 (Fla.1992). Thus, unlike an insurance policy, a performance bond benefits the owner of a project rather than the contractor. *Cf.* ***888** *School Bd. of Palm Beach County v. Vincent J. Fasano, Inc.*, 417 So.2d 1063, 1065 n. 3 (Fla. 4th DCA 1982) ("On private construction projects performance bonds are usually secured for the benefit of the owner...."). Further, a surety, unlike a liability insurer, is entitled to indemnification from the contractor. *See Western World Ins. Co. v. Travelers Indem. Co.*, 358 So.2d 602, 604 (Fla. 1st DCA 1978); *see also Fidelity & Deposit Co. of Md. v. Hartford Cas. Ins. Co.*, 189 F.Supp.2d 1212, 1218 (D.Kan.2002) (rejecting the argument that "if the structural damage caused by faulty workmanship constitutes an 'occurrence,' then the CGL and umbrella policies will be transformed into a performance bond" because the bond "in no way" protected the contractor or subcontractor from liability).

[17] The Texas Court of Appeals explained the salient differences between a liability policy and a performance bond:

> [A]lthough defective construction may constitute an "occurrence," the insurer indemnifies the insured only for resulting "property damage" arising after the project is completed. In contrast, a performance bond is broader than a CGL policy in that it guarantees "the completion of a construction contract upon the default of the general contractor." Therefore, 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." Consequently, allowing coverage for some "property damage" resulting from defective construction does not transform a CGL policy into a performance bond and require a CGL carrier to pay anytime an insured fails to complete, or otherwise comply with, its contract.

Lennar Corp., 200 S.W.3d at 673–74 (footnote and

citations omitted) (quoting *Black's Law Dictionary* 1158 (7th ed.1999) and *O'Shaughnessy v. Smuckler Corp.,* 543 N.W.2d 99, 105 (Minn.Ct.App.1996)); *accord Lamar Homes, Inc.,* 242 S.W.3d at 10 & n. 7 ("[T]he protection afforded by a performance bond is, in fact, different from that provided by [a] CGL insurance policy.... [A]n insurance policy spreads the contractor's risk while a bond guarantees its performance. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums; that is, losses are expected. In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. Unlike insurance, the performance bond offers no indemnity for the contractor; it protects only the owner."). The Supreme Court of Tennessee also rejected this argument, recognizing that the fact that damages may result from an "occurrence" under a CGL policy is only the first step in determining whether the damages are covered. *Moore & Assocs.,* 216 S.W.3d at 309. The "occurrence" may not have caused "property damage" or coverage provided by the insuring agreement may be precluded by an exclusion.

[18] We hold 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. In this case, we conclude that the subcontractors' defective soil preparation, which J.S.U.B. did not intend or expect, was an "occurrence." However, in order to determine whether the policies provide coverage for J.S.U.B.'s losses, we must next address whether the "occurrence" caused "property damage" within the meaning of the policies.

E. Whether the Subcontractors' Improper Soil Preparation Caused "Property Damage"

[19] [20] [21] The CGL policies define "property damage" as "[p]hysical injury to ***889** tangible property, including all resulting loss of use of that property." U.S. Fire 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.[11]

[22] We further reject U.S. Fire's contention that there can never be "property damage" in cases of faulty construction because the defective work rendered the entire project damaged from its inception. To the contrary, faulty 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."

Both the Third and Fifth District Courts of Appeal have recognized this distinction. *See West Orange Lumber Co. v. Indiana Lumbermens Mut. Ins. Co.,* 898 So.2d 1147, 1148 (Fla. 5th DCA 2005); *Auto Owners Ins. Co. v. Tripp Constr., Inc.,* 737 So.2d 600, 601 (Fla. 3d DCA 1999). In *Tripp,* although the Third District cited *LaMarche,* the court differentiated between a claim for the costs of repairing and replacing the actual defects in the construction, which it held was not covered, and a claim for the costs of repairing the damage caused by construction defects "to other elements of the subject homes," which it held was covered. 737 So.2d at 601–02. In *West Orange,* the Fifth District held 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. 898 So.2d at 1148.

[23] 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." *See, e.g., Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.,* 198 F.Supp.2d 1074, 1079 n. 1 (E.D.Mo.2001) (concluding that costs of repair and replacement of an improperly installed floor was not covered "property damage"); *Lennar Corp.,* 200 S.W.3d at 679–80 (distinguishing between costs to remove and replace defective stucco as a preventative measure, which were not "damages because of ... property damage," and the costs to repair water damage that resulted from the application of the defective stucco, which were "damages because of ... property damage"). As the Supreme Court of Tennessee explained:

> [A] "claim limited to faulty workmanship or materials" is one in which the sole damages are for replacement of a defective component or correction of faulty installation.
>
> ***890** We conclude that Hilcom's claim is not limited to faulty workmanship and does in fact allege "property damage." Moore'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. The alleged water penetration is analogous to the automobile accident that is caused by the faulty tire. Because the alleged defective installation resulted in water penetration causing further damage, Hilcom has alleged "property damage." Therefore, we conclude that Hilcom has alleged damages that constitute "property damage" for purposes of the CGL.

Moore & Assocs., 216 S.W.3d at 310; *see also Am. Girl*, 673 N.W.2d at 74–75 ("The sinking, buckling, and cracking of the [warehouse] as a result of soil settlement qualifies as 'physical injury to tangible property.' ").

Like the Tennessee case, *Moore & Assocs.*, and the Wisconsin case, *American Girl*, this case does not involve a claim for the cost of repairing the subcontractor's defective work, but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor's defective work. Specifically, it was the subsequent soil settlement due to the subcontractor's faulty workmanship that caused the structural damage to the homes. Because there was "physical injury to tangible property," we conclude that the structural damage to the homes is "property damage" within the meaning of the policies.

[24] In reaching this conclusion, we discern no public policy reason for precluding coverage. A subcontractor's defective work that is neither intended nor expected from the standpoint of the insured is not the type of intentional wrongful act that we have held was uninsurable as a matter of public policy. *See Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1009 (Fla.1989) (holding that public policy prohibits the insured from being indemnified for a loss resulting from intentional employment discrimination). Even if a "moral hazard" argument could be made regarding the contractor's own work, the argument is not applicable for the subcontractors' work:

> Providing coverage for claims arising out of the subcontractor work also made sense in terms of meeting the moral hazard and adverse selection problems associated with faulty workmanship claims. Although it may be unwise to provide liability coverage for a builder directing its own crews, who may be tempted to cut corners if insured, the same rationale did not as readily apply to modern construction that depends heavily on subcontractors on whom general contractors depend.... Particularly if the subcontractor does soil, concrete, or framing work, it is as a practical matter very difficult for the general contractor to control the quality of the subcontractor work. Only if the contractor has a supervisor at the elbow of each subcontractor at all times can quality control be relatively assured—but this would be prohibitively expensive. Because the general contractor depends on the subcontractor to a large degree, the general contractor is not tempted by moral hazard to the degree that makes the consequences of faulty subcontractor work more expensive to insure.

Stempel, *supra*, § 14.13[D], at 14–224.8. Further, the argument that indemnity will create a windfall for the contractor is speculative. As the amici point out, the contractor gains nothing if insurance reimburses the costs of repairing the damage ***891** caused by the defective work. Moreover, if the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage, as can be done simply by either eliminating the subcontractor exception or adding a breach of contract exclusion.

CONCLUSION

[25] We conclude 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 standard form CGL policy. We further conclude that physical injury to the completed project that occurs as a result of the defective work can constitute "property damage" as defined in a CGL policy. 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. In so holding, we distinguish but do not recede from *LaMarche* because that case concluded, based on the policy exclusions, that there was no coverage under a pre–1986 CGL policy for the repair and replacement of the contractor's own defective work.

[26] In this case, because there are no exclusions that bar coverage, we agree with the Second District's conclusion that the CGL policies issued by U.S. Fire to J.S.U.B. provide coverage for the costs to replace the homeowner's personal property, such as their wallpaper, as well as the costs to repair the structural damage to the homes, such as the walls, both of which were caused by the subcontractors' improper soil preparation. Accordingly, we approve the Second District's decision in *J.S.U.B.* and disapprove the Fourth District's decision in *Lassiter* to the extent that it held that CGL policies can never provide coverage for a claim made against the contractor for damage to the completed project caused by a subcontractor's faulty workmanship.

It is so ordered.

ANSTEAD, QUINCE, and BELL, JJ., concur.

LEWIS, C.J., concurs in result only with an opinion.

WELLS, J., concurs in result only.

CANTERO, J., recused.

LEWIS, C.J., concurring in result only.

While I agree with the result reached by the majority, I cannot fully subscribe to the reasoning. Sufficient ambiguity exists in these post–1986 commercial general liability ("CGL") policies to afford coverage for insured contractors whose work is damaged by subcontractor negligence. *See, e.g., State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So.2d 1072, 1076 (Fla.1998) ("[W]here policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer."). However, we must not overlook three major areas of concern with regard to emerging CGL jurisprudence. First, when one is attempting to determine and define the coverage afforded by any given insurance policy, the type of policy at issue must remain a central and critical concern. Second, courts, commentators, and parties to insurance contracts must remain wary of basing coverage determinations primarily upon the exclusions and exceptions within a contract, rather than upon the initial grant of coverage. Third and finally, the original function and scope of CGL policies ***892** has been significantly altered, not by courts, commentators, or insureds, *but by the insurance industry itself* through drafting and marketing practices.

THE TYPE OF POLICY AT ISSUE.

It remains true that when an insurer fails to define a term in a policy, the insurer simply cannot validly assert that there should be a narrow and restrictive interpretation of the coverage provided under the contract. *See, e.g., State Comprehensive Health Ass'n v. Carmichael,* 706 So.2d 319, 320 (Fla. 4th DCA 1997). The coverage provided, however, must be gleaned in part from reference to the type of policy involved. Here, it should be remembered that "a commercial general liability insurance policy is *generally* designed to provide coverage for *tort liability for physical damages to others and not for contractual liability of the insured for economic loss* because the product or work is not that for which the damaged person bargained." 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 129:1 (3d ed.2005) (emphasis supplied).

I do not suggest that I agree with the decisions from other jurisdictions which hold that the defective work of subcontractors can never result in an "occurrence" under a CGL policy. *See, e.g., Auto–Owners Ins. Co. v. Home Pride Companies, Inc.,* 268 Neb. 528, 684 N.W.2d 571, 575–80 (2004); *L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33, 35–36 (2005). Rather, I caution that CGL coverage claims for those things other than the originally intended tort liability to third parties should be viewed with a cautious and suspect eye. *See, e.g.,* 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts,* § 14.01[B], at 14–17 (3d ed. 2007) ("The CGL, like most insurance policies, has a relatively targeted objective for insuring risks. It is designed to protect commercial operators from litigation and liability arising out of their business operations.... [T]he CGL is not designed to guarantee the quality of *the policyholder's work* or the successful completion of its business activities." (emphasis supplied)). Thus, in the interpretation of insurance policy language, as with the interpretation of any contract, one should remain cognizant of the type of policy or contract at issue and the type of coverage that is generally and naturally associated

with such a policy. However, courts should only use interpretive tools to further the intent of the parties, not to usurp or contradict the language of the policy as written. *See, e.g., Discover Prop. & Cas. Ins. Co. v. Beach Cars of W. Palm, Inc.*, 929 So.2d 729, 732 (Fla. 4th DCA 2006).

COVERAGE DETERMINATIONS SHOULD NOT BE MADE BASED UPON POLICY EXCLUSIONS.

The policy-interpretation linguistic gymnastics that tend to occur in some jurisdictions across the country in CGL cases, which involve the so-called subcontractor exception to the your-work exclusion, walk a very thin line of falling into violations of the rule that "exclusionary clauses cannot be relied upon to create coverage." *See, e.g., CTC*, 720 So.2d at 1074. However, *the insurance industry itself* created the language which has necessitated much of this at times thin and often thought-provoking interpretation by drafting CGL forms in a fashion that has pushed insureds and courts to rely on language in the exclusions to give meaning to all the words in the policy and to decipher the coverage grants. *See, e.g., Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis.2d 16, 673 N.W.2d 65, 73 (2004) (adopting a three-part approach to interpreting a CGL policy: (1) examine the initial coverage grant to determine if "property damage" or "bodily injury" has resulted from an "occurrence"; ***893** (2) if "property damage" or "bodily injury" has occurred, examine the policy exclusions to see if the CGL policy's otherwise broad coverage is thereby narrowed to exclude the claim; and finally (3) determine if any exceptions to applicable exclusions restore otherwise excluded coverage); Elmer W. Sawyer, *Comprehensive Liability Insurance* 11 (1943) ("[I]nstead of insuring against only enumerated hazards, *we now insure against all hazards not excluded.*" (emphasis supplied)). Furthermore, the "Business–Risk Doctrine" or the "Historical Model" concept—the weapons upon which the insurance industry has generally relied to deny claims for faulty subcontractor work—simply do *not* appear anywhere in these post–1986 standard-form CGL policies, as demonstrated by the policy involved in *J.S.U.B. See, e.g.*, ISO Policy Form Number CG 00 01 07 98, http://www.lexis.com; *see also* James Duffy O'Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, Constr. Law., Winter 2001, at 15, 15–16 (explaining that the Business–Risk Doctrine or Historical Model cannot be used to rewrite the actual language of the policy); 4 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 11:28 (2002 & Supp.2007) (substantially similar). These concepts should not be used to preclude coverage that the drafters of the policy intended and that insureds relied upon to justify paying additional premiums. Courts should not use the "concepts" of the Business–Risk Doctrine and Historic Model to simply bar coverage, in lieu of examining the policies *as written. See Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 325–27 (Minn.2004) (avoiding this interpretive problem by modifying Minnesota's view of the Business–Risk Doctrine in light of the changed policy language present in post–1986 standard-form CGL policies).

It has become clear that if the insurance industry seeks to avoid further and expansive interpretations of its CGL policies, it must do a better job of more narrowly describing coverage and defining the type of "property damage," "bodily injury," and "occurrences" that it may intend these types of policies to cover, rather than adopting linguistic forms that tend to force courts to swim against the interpretive current by looking into the policy exclusions for answers to coverage questions to give meaning and life to all words utilized. Thus, while I am hesitant to place as much emphasis on the policies' exclusions and exceptions as does the majority, I certainly recognize that courts should not rely on ephemeral policy justifications when the actual language of the policy at issue and the parties' admitted intent do not include or reflect these justifications.

In these cases, this analysis leads me to the conclusion that we cannot simply rely on the Business–Risk Doctrine or Historical Model to deny the coverage claims of the insureds if neither the coverage grant nor the exclusions explain, reference, or use words to evidence these concepts in a manner that causes them to become controlling. The situation this Court faces, while facially complex, is actually fairly straightforward. The relevant CGL policy anticipates the "occurrence" of inadvertent (i.e., "neither expected nor intended") events, which result in "property damage" or "bodily injury."[12] The policies then fail ***894** to outline the protections allegedly afforded as limited by the Business–Risk Doctrine or Historical Model, and the exclusions are *ambiguous* to the extent that we must find that they certainly *do not exclude coverage* for fortuitous damage that faulty subcontractor work causes to other portions of the completed project. If insurers wish to exclude this type of "occurrence" in this context, the onus is on them—not the courts—to *clearly* express that intent through the CGL policies they issue.

THE INSURANCE INDUSTRY HAS STRAYED FROM THE SCOPE OF COVERAGE ORIGINALLY PROVIDED BY CGL POLICIES.

Prior to the 1970s, there was minimal debate with regard to an expansive scope of coverage provided by CGL policies. Before that time, the wide-ranging consensus was that "[t]he coverage is for *tort liability* for physical damages to others and *not for contractual liability* of the insured for economic loss." Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L.Rev. 415, 441 (1971). As I began my analysis of this case, that guiding principle directed my attention; however, it has become apparent that the insurance industry itself began to undermine that consensus, and maybe intentionally, in 1976 when it introduced the Broad Form Property Damage Endorsement ("BFPDE"), which altered the then-existing "your-work" exclusions. Specifically, the BFPDE extended coverage to general-contractor insureds for property damage caused by the work of their subcontractors, and decisions report that the industry has specifically acknowledged as much in its own publications. *See, e.g., Md. Cas. Co. v. Reeder,* 221 Cal.App.3d 961, 270 Cal.Rptr. 719, 725 (1990) ("[T]he ISO explains the broad form endorsement is intended to 'exclud[e] only damages caused by the named insured *to his own work.* Thus, ... [t]he insured would have coverage for damage to his work arising out of a subcontractor's work [and] [t]he insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.' " (emphasis supplied)); *see also* James T. Hendrick & James P. Wiezel, *The New Commercial General Liability Forms—An Introduction and Critique*, 36 Fed'n Ins. & Corp. Couns. Q. 319, 360 (1986); National Underwriter Co., *Fire, Casualty & Surety Bulletins, Public Liability* Aa 16–17 (1993) ("*FC & S Bulletin* ").

It appears that in 1986, the Insurance Services Office ("ISO") issued the fifth major revision of the standard CGL policy form. 9A Russ & Segalla, *supra* § 129:1. As part of that revision, the ISO lifted the extended coverage provided by the BFPDE and directly incorporated it into ***895** the standard CGL policy in the form of the so-called subcontractor exception to the your-work exclusion. *See* 21 Eric Mills Holmes, *Holmes' Appleman on Insurance* § 132.9, 152–53 (2d ed.2002). As a direct result, the insurance industry continued to expand coverage for unintentional, *contractual* damages caused by subcontractors to the contractor-insured's completed project. *See, e.g., FC & S Bulletin* Aa 16–17 (explaining that the ISO intended this exception to the your-work exclusion to provide coverage for damages caused to the insured-contractor's completed work by the defective work of its subcontractors).[13]

Therefore, the scope of CGL policies has apparently been expanded to the extent that a CGL policy, which includes the subcontractor exception to the your-work exclusion, is in operation actually now the equivalent of a warranty or product coverage that affords protection for the contractors' product and work.[14] *Cf. Stempel, supra* § 14.13[B], at 14–216 ("Performance bonds and CGL policies serve different purposes. The performance bond ensures against claims for *defective workmanship* while the CGL insures for *personal injury claims* based on acts or omissions of the policyholder. Courts are wary of permitting claimants or policyholders to receive CGL policy proceeds *for what functionally are claims of defective construction* ...." (emphasis supplied)). It bears repeating, however, that traditional CGL policies were initially designed and intended to cover only tort liability for injuries sustained by third parties or their property, not contractual liability for products that fail to live up to the buyer's expectations.[15] ***896** Moreover, ostensibly expanding the scope of coverage by altering the exclusions and exceptions present in a CGL policy, instead of amending the coverage grant, is counterintuitive from a policy or contract interpretation standpoint, but again, these changes were the result of the deliberate efforts of the insurance industry.

I find this tortuous, indirect melding of the characteristics of different types of insurance coverages, performance bonds, and warranty-type protection to be somewhat inconsistent and inappropriate. However, if the insurance industry now seeks to place blame or fault for the current conditions, it need only look in the mirror: the industry has been a force in producing this apparent confusion, not the insureds and not the courts. The ISO appears to have begun the clean-up process by providing an endorsement to the standard post–1986 CGL policy, which eliminates the subcontractor exception to the your-work exclusion. *See, e.g., Lamar Homes, Inc. v. Mid–Continent Cas. Co.,* 242 S.W.3d 1, 10–11 (Tex.2007). The true resolution to a continuing saga of litigation "of words," however, is clarity of terms in all aspects of contract and policy preparation. The stacking of endorsements upon endorsements upon endorsements may or may not be the answer. Unfortunately, I suspect the latter.

All Citations

979 So.2d 871, 32 Fla. L. Weekly S811

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

2 Under the policies, J.S.U.B. had a per occurrence limit of $1 million, a general aggregate limit of $2 million, and a separate products-completed operations hazard aggregate limit of $2 million for which additional premiums were charged.

3 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.

4 U.S. Fire does not argue that any of the policy exclusions apply to bar coverage.

5 In 1986, the "Comprehensive General Liability" policy was renamed the "Commercial General Liability" policy. However, the acronym "CGL" is commonly used to refer to both. *See id.*

6 The Insurance Services Office, Inc., also known as 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. *See, e.g., Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 772, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers ..., is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.") (citations omitted).

7 For example, in *Home Owners,* the Third District relied on *LaMarche* and *Weedo* in concluding that a post–1986 CGL policy did not provide coverage for the cost of both repair and maintenance as a result of construction defects. *See* 683 So.2d at 529. However, the court also noted that the complaint did not identify any damages caused by the alleged defects. *See id.* at 528 n. 2. As explained below, it is unlikely that based on these allegations, there was coverage under the policy because there was no allegation that the faulty workmanship caused "property damage."

8 *American Girl* most closely resembles the factual scenario in *J.S.U.B.* and the reasoning of the Second District. The Wisconsin Supreme Court held that damage to a warehouse caused by soil settlement, which was the result of a subcontractor's inadequate site preparation, was an "occurrence" because "[n]either the cause nor the harm was intended, anticipated, or expected." *Am. Girl,* 673 N.W.2d at 76.

9 The Kansas Supreme Court explained that there are two different views reflected in the nationwide case law regarding whether defective construction can constitute an accident:

> [O]ne line of cases has held that faulty or improper construction does not constitute an accident; rather, the damage is the natural and ordinary consequence of the insured's act. The other line of cases has held that improper or faulty construction does constitute an accident as long as the resulting damage is an event that occurs without the insured's expectation or foresight.

Lee Builders, 137 P.3d at 491. These two opposing views of the term "accident" are repeated by U.S. Fire and J.S.U.B. as well as the numerous amicus briefs filed in support of the parties. There are also law review articles that advocate both sides of the issue. *Compare* Clifford J. Shapiro, *Point/Counterpoint: Inadvertent Construction Defects Are an "Occurrence" under CGL Policies,* Construction Law. Spring 2002, at 13, *with* Linda B. Foster, *Point/Counterpoint: No Coverage Under the CGL Policy for Standard Construction Defect Claims,* Construction Law. Spring 2002, at 22.

10 Although the petition for review in *Lennar Corp.* is still pending in the Texas Supreme Court and a final disposition has not been released, the Court's decision in *Lamar Homes, Inc.* appears to resolve the pending issue. However, we note that the Court did not specifically approve of the decision in *Lamar Homes, Inc.*

11 U.S. Fire's reliance on the economic loss doctrine to support its position is unconvincing. "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." *Indemnity Ins. Co. of N.Am. v. Am. Aviation, Inc.,* 891 So.2d 532, 536 (Fla.2004). Thus, the economic loss doctrine determines what cause of action is available to recover economic losses—tort or contract—but not whether an insurance policy covers a claim, which depends on the policy language. As explained above, we find no language in the CGL policies that limits coverage to tort claims.

12 Opinions which assert that these CGL policies' definition of "occurrence" somehow excludes coverage for *fortuitous* damage caused by faulty subcontractor work fail to support that position with reference to the actual language of the policies. *See, e.g., L–J, Inc. v. Bituminous Fire & Marine Ins. Co.,* 366 S.C. 117, 621 S.E.2d 33, 34, 35–36 (2005) (without specifying which portions of a road project were completed by the subcontractors—who "perform[ed] most of the work"—court held that damage to the completed project did "not constitute an occurrence under a CGL policy"). Focusing on the definition of "occurrence" does not explain how that definition excludes coverage *ab initio* for fortuitous damage caused by faulty subcontractor work. Clearly, general contractors *intend* for subcontractors to complete their work, but they *do not generally intend* or anticipate that subcontractors will complete their work in a faulty manner, which later results in damage to the completed project. Moreover, any damage caused by subcontractor work that the insured "intended" or "expected" *is already excluded* under the standard CGL policy, which undermines the position that finding coverage in these types of cases provides general contractors with an incentive to render shoddy construction work. *See, e.g.,* ISO Policy Form Number CG 00 01 07 98, exclusion a. ("This insurance does *not* apply to '[b]odily injury' or 'property damage' *expected or intended* from the standpoint of the insured." (emphasis supplied; internal division omitted)).

13 I represent a prime exponent that CGL policies were *originally* intended solely to cover damages that the insured's operations caused to third parties' persons or property. However, there is substantial evidence, which I and the majority have noted, that the insurance industry itself altered this original intent by extending coverage—albeit in a convoluted fashion—to insureds for fortuitous damage caused to their completed projects by faulty subcontractor work. Opinions that hold otherwise regarding standard-form post–1986 CGL policies do not address the evidence in this and other more recent CGL cases, *which indicates that this extension of coverage, while inartfully executed, is exactly what the parties have accomplished—and intended to accomplish—by altering the your-work exclusions to no longer exclude the type of coverage disputed in these cases.* The law requires that we rely on the plain language of the policy's coverage provision, the *ambiguity of the exclusions,* and the ample evidence of the parties' intent to support the proposition that *the policy does not clearly exclude otherwise-present coverage for fortuitous damage caused by faulty subcontractor work.*

14 With the increasing probability that current construction practices will result in construction projects entirely completed by subcontractors, many distinctions between work and product protection and CGL policies that include the subcontractor exception may have disappeared. The majority is correct that the owner-obligee is the direct beneficiary under a performance-bond type protection, but the same functional situation obtains when a disappointed owner sues a general contractor, who then requests coverage from its CGL insurer; the owner becomes the beneficiary of the CGL policy. This too is counter to CGL policies' original function, which was to provide tort-liability coverage for injuries caused to third parties' persons and property. However, this result appears to have been the intent of the parties due to the words of the contract and other supporting evidence.

15 Insurers attempt to draft coverage language with a degree of precision. Liability insurance is intended to insure the policyholder against the consequences of third-party claims, while other types of insurance have traditionally insured against different types of risks. "To maintain this division of labor or compartmentalization, insurers draft liability policies with an eye toward preventing policyholders from obtaining first-party type protections from their liability insurance or converting their liability insurance into protection from nonfortuitous losses such as claims based on poor business operations." *Stempel, supra* § 14.13, at 14–211.

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