IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. SC05-1295

UNITED STATES FIRE INSURANCE COMPANY,

Petitioner,

vs.

FIRST HOME BUILDERS OF FLORIDA,

Respondent.

BRIEF OF AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS, IN SUPPORT OF RESPONDENT

On Discretionary Review from the District Court of Appeal, Second District

L.T. No. 2D03-134

August 5, 2006

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

OTHER

IDENTITY OF AMICUS CURIAE

The Academy of Florida Trial Lawyers ("the Academy") is a voluntary statewide association of more than 4,000 trial lawyers concentrating on litigation in all areas of the law. Members of the Academy are pledged to foster the preservation of the American legal system, the protection of individual rights and liberties, the evolution of the common law and the right of access to courts. The Academy has been involved as amicus curiae in hundreds of cases in this Court and other Florida District Courts. The Academy believes this case involves an issue that is significant to the vast number of contractors in the State of Florida who purchased and were issued Commercial General Liability insurance policies, requiring its participation on their behalf.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to ignore well-established rules of insurance policy construction and the plain language of the policy, in favor of nonexistent public policy considerations. Faulty workmanship is an "occurrence" under the 1986 Commercial General Liability ("CGL") policy, subject to the policy's exclusions. The 1986 CGL policy excludes damage to a contractor's work, but expressly excepts from that exclusion property damage caused by a subcontractor's work. The shifting of risk for damage caused by a subcontractor's faulty workmanship was intentionally incorporated within the 1986 CGL policy, and Petitioner cannot

now escape the effect of the language that it drafted in the policy for which it collected premiums.

ARGUMENT

I. THE 1986 CGL POLICY FORM PROVIDES COVERAGE FOR A SUBCONTRACTOR'S FAULTY WORKMANSHIP

Magicians employ "slight of hand" to distract the viewer, focusing the audience's attention on one hand while they manipulate objects with the other. In the same manner, Petitioner and its supporting Amici seek to distract this Court from the plain language of the 1986 CGL policy by focusing on nonexistent public policy considerations and citations to inapplicable legal doctrines. Stated simply, a plain reading of the 1986 CGL policy form shows that it provides coverage to a general contractor for property damage caused by a subcontractor's faulty workmanship.[1]

A. PRINCIPLES OF FLORIDA LAW REGARDING THE CONSTRUCTION OF INSURANCE CONTRACTS

It has long been a tenet of Florida insurance law that an insurer, as the writer of an insurance policy, is bound by the language of the policy, which is to be

[1] The Academy agrees with Respondent that certain issues relating to breach of contract and economic losses (and the public policy against insuring same) were not raised below and cannot be considered by this Court. *See* Respondent's Brief at 6. Accordingly, the Academy will only address those arguments to the extent that they may be incidental to other issues that were properly raised.

construed liberally in favor of the insured and strictly against the insurer. *Berkshire Life Ins. Co. v. Adelberg*, 698 So.2d 828, 830 (Fla. 1997). The policy should be read as a whole, giving every provision its full meaning and operative effect. *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000). Policy language is to be given its plain and ordinary meaning as understood by the "average man." *Adelberg*, 698 So.2d at 830; *see also Pennsylvania Life Ins. Co. v. Aron*, 739 So.2d 1171, 1173 (Fla. 3rd DCA 1999), *rev. denied*, 753 So.2d 563 (Fla. 2000) (applying "man-on-the-street" understanding of policy term).

Coverage provisions should be liberally construed, with ambiguities resolved in favor of the insured:

> Where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. … In addition, "when an insurer fails to define a term in a policy, … the insurer cannot take the position that there should be a narrow, restrictive interpretation of the coverage provided."

State Farm Fire and Cas. Co. v. CTC Dev. Corp., 720 So.2d 1072, 1076 (Fla. 1998) (citations omitted) (holding builder's intentional construction of house in violation of setback requirement, followed by failure to obtain variance permitting such construction was covered "occurrence" under 1986 CGL policy).

Within that framework, we turn to an analysis of the 1986 CGL policy language.

B. A PLAIN READING OF THE 1986 CGL POLICY SHOWS THAT IT CONTEMPLATES COVERAGE FOR PROPERTY DAMAGE CAUSED BY A SUBCONTRACTOR'S FAULTY WORKMANSHIP

Interpretation of coverage under an insurance policy necessarily begins with a determination of whether the claimed damages fall within the insuring agreement. *International Ins. Co. v. Johns*, 874 F.2d 1447, 1453 (11th Cir. (Fla.) 1989). If a covered loss exists, an analysis follows as to whether the policy's exclusions bar coverage. *Id.* It is axiomatic that exclusions and coverage defenses are only applied to an otherwise covered loss. *See, e.g.*, *Doe v. Allstate Ins. Co.*, 653 So.2d 371, 374 (Fla. 1995). Following the same analytical process, we begin our discussion with the policy's insuring agreements, then turn to an analysis of the policy's exclusions.

1. THE INSURING AGREEMENT INCLUDES "PROPERTY DAMAGE" CAUSED BY AN "OCCURRENCE"

The 1986 CGL policy provides that the insurer will pay all "sums that the insured becomes legally obligated to pay" as damages because of "bodily injury" or "property damage," provided that the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and occurs during the policy period.[2]

[2] There is no dispute that the subject claim occurred within the coverage territory during the policy period.

Property Damage: The 1986 CGL policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property." There is no dispute that the subject claim arose out of physical injury to physically tangible property – the structure of the houses were compromised, as well as resulting damage to the interior finishes and construction materials. *J.S.U.B., Inc. v. United States Fire Ins. Co.*, 906 So.2d 303, 305 (2nd DCA 2005); *see also American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 70 (Wisc. 2004) ("The sinking, buckling, and cracking of the warehouse was plainly 'physical injury to tangible property'").[3]

Occurrence: The 1986 CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy, but the plain meaning is obvious: an event that is unexpected from an insured's perspective. *See CTC Dev. Corp.*, 720 So.2d at 1076 (finding that errors in construction neither expected nor intended by the insured are an occurrence and therefore covered under a general liability policy); *accord Travelers Indem. Co. v. PCR, Inc.*, 889 So.2d 779, 790-91 (Fla. 2004) (holding the term "accident" in insurance contracts

[3] The 1986 CGL policy does not define the term "tangible property." Petitioner therefore cannot rely on a restrictive interpretation of that term (*i.e.*, defining "tangible property" as property other than the insured's work) to defeat coverage. *Anderson*, 756 So.2d at 34.

to include any damages not expected or intended from the insured's subjective point of view) (*citing CTC Dev. Corp.*).

The attempt to distinguish this Court's holding in *CTC Dev. Corp*. only serves to underscore the fatal flaw in Petitioner's argument. This Court found that a contractor's inability to obtain a variance after building a home too close to the setback line was an unexpected result of an intentional act, which qualified as an accident under the 1986 CGL policy. *CTC Dev. Corp.*, 720 So.2d at 1076. Examining the 1986 CGL policy language, this Court concluded that the contractor's faulty workmanship was "property damage" caused by an "occurrence," and therefore fell within the coverage grant. *Id*.

Petitioner reasons that because a third-party (the neighbor) allegedly suffered damage,[4] the contractor's faulty workmanship was an "occurrence" under the policy. There is nothing in the policy language to suggest that an "occurrence" is limited only to circumstances where a third party is injured, as opposed to the party with whom the insured has entered a contract. Clearly, if the home in *CTC Dev. Corp.* had collapsed due to faulty construction and crushed the homeowner's car, shed or pool house, the resulting damage would be an "occurrence" under

[4] Petitioner's interpretation of the facts in *CTC Dev. Corp*. Is, of course, absurd: the homeowner's neighbor sued to have the newly-built home moved away from the property line, but the party suffering damage (*i.e.*, the cost of relocating the home) was to be borne by the homeowner.

Petitioner's reasoning. *See French v. Assurance Co. of Am.*, 448 F.3d 693, 705 (4th Cir. 2006) (noting the inconsistency of the same argument Petitioner makes herein, finding faulty workmanship by a subcontractor which damages other structural elements an "occurrence"). The identity of the injured party is not contemplated in the 1986 CGL policy. Absent citation to restrictive language supporting Petitioner's reading of the policy – which is noticeable by its absence – the effort to distinguish *CTC Dev. Corp*. only highlights the reasons why faulty workmanship is an "occurrence" under the 1986 CGL policy.

Petitioner's arguments to the contrary notwithstanding, the analysis in *CTC Dev. Corp.* and *J.S.U.B*. is consistent with the manner in which Florida courts analyze the term "occurrence" under the 1986 CGL form. *See, .e.g., Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248 (M.D. Fla. 2002) (finding defective construction to be an occurrence under a CGL policy) (*citing CTC Dev. Corp*.); *Pinkerton & Law, Inc. v. Royal Ins. Co.*, 227 F.Supp.2d 1348 (N.D. Ga. 2002) (same) (applying Florida law).

Reading the policy as a whole, as we are required to do, *Anderson*, 756 So.2d at 34, the Second District's reading of "occurrence" finds further support in the language of the policy's exclusions and definitions. For example, the Products – Completed Operations Hazard ("PCOH") provision specifically addresses coverage for a contractor's work after it has been completed:

> "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" … Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

If, as Petitioner insists, defective construction is not an "occurrence," it would make no sense for the policy to have an express exclusion for a contractor's work. Nor would it be logical to specifically include the insured's "work" in the PCOH, or – most importantly in this case – to have an exception to the "Your Work" exclusion that relieves a general contractor of liability for the faulty workmanship of a subcontractor. Similarly, if an insured's faulty workmanship was not within the insuring agreement, there would be no need to include within the definition of "Your Work" "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your work.'" Viewed as a whole, the plain language of the 1986 CGL policy clearly runs counter to Petitioner's proffered interpretation.

Nor does Petitioner's reliance on *LaMarche v. Shelby Mut. Ins. Co.*, 390 So.2d 325 (Fla. 1980) aid its argument. Not only did the *LaMarche* Court address an older CGL policy form, the Court's ultimate conclusion was that the defective construction at issue was excluded from coverage that otherwise existed. *LaMarche*, 390 So.2d at 326 ("the language of the policy clearly excludes this type of coverage") (addressing the applicability of the business risk exclusions in the

1973 CGL policy to a claim of defective workmanship). Despite Petitioner's efforts to distill a convenient blurb from *LaMarche*, the inescapable fact is that the holding (and the cases on which it relies) found no coverage for a contractor's faulty workmanship due to a policy exclusion, not a failure to qualify as an occurrence.

Florida law does not permit consideration of extraneous interpretive materials if, as here, the policy language is clear.[5] Petitioner nonetheless furthers its effort to deflect this Court's consideration of the policy language by referring to treatises and out-of-state decisions allegedly supportive of its position. Noticeable by their absence from Petitioner's Brief are the portions of those treatises that undermine Petitioner's proposed policy interpretation. *See, .e.g.*, 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §129:4 (3d ed. 2004) ("what does constitute an occurrence is an accident caused by or resulting from faulty workmanship, including damage to any property other than the work product and damage to the work product other than the defective workmanship"). The interpretation in *Couch* is consistent with Respondent's reading of the 1986 CGL

[5] To the extent this Court finds the interplay between policy provisions creates an ambiguity, Florida law favors resolution of the ambiguity in favor of coverage. *CTC Dev. Corp.*, 720 So.2d at 1076.

policy, in that both acknowledge that the cost of repairing the defective work itself may be subject to a policy exclusion (or, if it is performed by a subcontractor, excepted from the "Your Work" exclusion), but it is nonetheless an occurrence under the 1986 CGL policy.[6]

2. NO EXCLUSIONS BAR COVERAGE FOR THE CLAIM

Having established that the Claim includes "property damage" caused by an "occurrence" within the coverage territory and policy period, we turn to an analysis of the policy's exclusions. *International Ins. Co. v. Johns*, 874 F.2d at 1453. As set forth below, no exclusions exist to bar coverage.

Damage to Your Work: The Second District correctly rejected the application of the "Your Work" exclusion to a subcontractor's faulty workmanship. *See J.S.U.B.*, 906 So.2d at 310 (holding "'Damage to Your Work' exclusion contains an exception for work performed by a subcontractor," and therefore did not bar coverage to the general contractor); *accord Pozzi Window Co. v. Auto-Owners, Ins.*, 446 F.3d 1178,1184 (11th Cir. 2006)(same, stating "[h]ere, the damaged or defective work was performed on the insured's … behalf by the subcontractor …. Thus, this exclusion is also inapplicable"). The plain language

[6] Respondent's reading of the policy is also consistent with the historical basis for the 1986 revision to the CGL policy form, discussed in Section II, *infra.*

of the 1986 CGL policy excepts from the exclusion work done by subcontractors.[7]

If the Court is inclined to look beyond the unambiguous policy language, an insurance industry-related commentary[8] provides a clear analysis of the effect the exception to the exclusion has on coverage under similar circumstances:

> An example will help illustrate the application of this exclusion. Assume a general contractor builds a warehouse, subcontracting out 50 percent of the work. One year later the building is destroyed in a fire caused by faulty electrical work. The warehouse owner's fire insurer pays the claim then subrogates against the general contractor to recover the amount paid to the owner. If the electrical work was performed by one of the general contractor's subcontractors, the exclusion will not apply; the general contractor's policy will cover the entire loss (subject, of course, to its limit of liability).

Annotated ISO CGL, Insurance Risk Management Institute, at Section V.D.202 "Damage to Your Work" (32nd Reprint, May 2006). As the illustration shows, the subcontractor exception renders the "Your Work" exclusion inapplicable.

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[7] The exception to the exclusion also bolsters Respondent's argument that the 1986 CGL policy contemplates faulty workmanship as a covered loss – if it were not, there would be no need for an exception to the "York Work" exclusion. Similarly, as the Second District pointed out, if defective workmanship were not included within the 1986 CGL policy's covering agreement, the "Damage to Property" exclusion – in particular subsection 6, which excludes "[t]hat particular part of any real property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" would be superfluous. *J.S.U.B.*, 906 So.2d at 310.

[8] International Risk management Institute, Inc. states, in its company profile, that its purpose is "to provide important risk and insurance information to business, legal, risk management and insurance professionals." *See* www.irmi.com.

No other policy exclusions have been effectively raised on appeal. Likewise, Petitioner has not asserted any policy conditions that would bar coverage. Accordingly, a general contractor's 1986 CGL policy form provides coverage for property damage caused by a subcontractor's faulty workmanship, and the decision below should be affirmed.

II. THERE EXISTS NO "PUBLIC POLICY" AGAINST INSURING A GENERAL CONTRACTOR AGAINST THE RISK OF A SUBCONTRACTOR'S FAULTY WORKMANSHIP

Petitioner dedicates much of its Brief to a series of public policy arguments, warning of the "moral hazard" of insuring against faulty workmanship. Essentially, Petitioner is seeking to distract this Court from the plain language of the policy by painting McCarthyist pictures of contractors across the nation who have fallen into a "culture of interested carelessness." Petitioner's Brief at 47. Petitioner and Respondent cite to numerous cases across the United States addressing this issue, including states where faulty workmanship has been held to be a covered loss under the 1986 CGL policy.[9] Petitioner offers no proof of the formation of a culture of carelessness, however, only soundbites from appellate decisions where the term "public policy" is typically offered without any rationale supporting it.

[9] The division among so many courts on the interpretation of the term "occurrence" in the 1986 CGL policy implies an ambiguity that must be resolved in favor of coverage. *Security Ins. Co. v. Investor Diversified, Ltd.*, 407 So.2d 314,

Petitioner's public policy argument is disingenuous at best. Insurers draft policy language, seek approval for it from a state's insurance department, then market the policy to potential insureds. When coverage is sold, the insurer collects a premium; on the 1986 CGL policy, the premium includes the cost of shifting the risk of a subcontractor's defective workmanship.[10] As several courts and scholars have noted, the reason the 1986 CGL policy was created was that the 1973 policy form excluded coverage for "work performed by or on behalf of the named insured," which meant that no coverage existed for damage resulting from a subcontractor's work. *French*, 448 F.3d at 701 (*citing Kvaerner Metals v. Commercial Union Ins. Co.*, 825 A.2d 641 (Pa.Super.Ct. 2003) and 9A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §129:18 (3d ed. 2004)). Specifically, *Couch* provides:

> Due to the increasing use of subcontractors on construction projects, many general contractors were not satisfied with the lack of coverage provided under commercial general liability policies where the general contractor was not directly responsible for the defective work. In 1976 the insurance industry responded by the introduction of the Broad Form Property Damage Endorsement, *which extended coverage to insureds for property damage caused by the work of their subcontractors*. The subcontractor exception to the "your work" was added directly to the body of the policy in 1986.

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316 (Fla. 4th DCA 1981).

[10] Presumably, an insurer also takes into account a contractor's claim history (including the number of times it has been sued for faulty workmanship) when rendering its decision to insure the risk and in calculating the appropriate premium.

Couch on Insurance §129:18 (3d ed. 2004) (emphasis added); *accord French*, 448 F.3d at 701 (quoting *Couch*); *American Girl*, 673 N.W.2d at 82-83.

The insurance industry was apparently not concerned with public policy in 1976 when it offered – for an additional premium – a Broad Form Property Damage endorsement that extended coverage "to the insured's completed work when the damage arose out of work performed by a subcontractor." *French*, 448 F.3d at 701 (citations omitted); *American Girl*, 673 N.W.2d at 83 ("Among other changes, the BFPD extended coverage to property damaged caused by the work of subcontractors"). Only after the BFPD endorsement was incorporated into the 1986 CGL policy "by inserting the subcontractor exception to the 'your work' exclusion," *American Girl*, 673 N.W.2d at 83, did insurers such as Petitioner express a concern that public policy may run counter to insuring the risk of a subcontractor's faulty workmanship. In other words, after the premium for the additional coverage provided under the BFPD endorsement was included within the overall 1986 CGL policy premium, Petitioner and its Amici began to challenge the nature and extent of the coverage sold to insureds such as Respondent.

Petitioner's professed fear that the 1986 CGL policy will act as a performance bond is equally unfounded. The 1986 CGL policy does not guarantee proper performance of a contract, "not because the allegations of negligent construction … do not fall within the broad coverage for property damage caused

by an 'occurrence,' *but because … the damages resulting from such practices are usually excluded from coverage by the standard exclusions found in such policies*." *Kvaerner Metals*, 825 A.2d at 654 (emphasis in original) (citations omitted). The 1986 CGL policy does not insure that the contractor will complete a project timely or in a workmanlike manner – it does, however, insure the contractor against losses to the project caused by a subcontractor's faulty workmanship.

CONCLUSION

This Court should not be distracted by Petitioner's attempted slight-of-hand and should instead focus, as the Second District did, on the 1986 CGL policy language. Damage caused by faulty workmanship is an occurrence under the 1986 CGL policy, provided it was not expected or intended by the insured. While several exclusions may bar coverage for a general contractor's faulty workmanship, property damage caused by a subcontractor's faulty workmanship is covered under the 1986 CGL policy, including property damage to a general contractor's work. Petitioner and its Amici cannot avoid the result of a plain reading of the 1986 CGL policy language, and their public policy arguments are nothing more than a distraction that have no merit and should be ignored by this Court. The Second District's decision was well-reasoned and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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