IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC06-779
L.T. CASE NO.: 05-10559-BB

AUTO-OWNERS INSURANCE COMPANY,

Appellant,

vs.

POZZI WINDOW COMPANY,

Appellee.

INITIAL BRIEF OF APPELLANT AUTO-OWNERS INSURANCE COMPANY

ON A QUESTION CERTIFIED FROM UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTRODUCTION

This brief is filed on behalf of Auto-Owners Insurance Company, which was the Defendant before U.S. District Court for the Southern District of Florida and the Appellant in the Eleventh Circuit Court of Appeals. Auto-Owners Insurance Company will be referred to as Auto-Owners or the insurer. James Irby and Coral Construction will be collectively be referred to as the insureds. Appellee Pozzi Window Company will be referred to as Pozzi or the manufacturer.

The citations to the record (D.E.) are those to the Record and Docket Entries in the District Court for the Southern District of Florida. The Eleventh Circuit has transmitted that record to this Court.

STATEMENT OF THE CASE

This case is before this Court on a question certified by the United States Court of Appeals for the Eleventh Circuit, pursuant to article V, section 3(b)(6), Florida Constitution.

Pozzi, as assignee of the insureds, Coral Construction of South Florida Inc. (Coral) and James Irby (Irby), sued Auto-Owners in the District Court for the Southern District of Florida for breach of contract and for bad faith. (D.E. 1) Auto-Owners had issued to Coral and Irby, its president, two Comprehensive General Liability (CGL) policies of insurance. (D.E. 1, Ex. C) Auto-Owners

moved to dismiss the complaint based on the pendency of a state court declaratory action which motion was denied. (D.E. 10, 20) Auto-Owners filed an Answer, Counterclaim and Third Party claim seeking declaratory relief against Pozzi, Coral, and Irby and for a determination that Auto-Owners owed no duty to defend Coral and Irby in the underlying claim that Pozzi had filed in state court against Coral and Irby. (D.E. 23)

Both Auto-Owners and Pozzi filed Motions for Summary Judgment on the issue of coverage for Pozzi's claims against the insureds under the insurance policy. (D.E. 64, 74) Coral and Irby filed a Motion for Judgment on the Pleadings, or in the Alternative for Summary Judgment on the Third Party claim. (D.E. 67, 68)

The district court judge granted Pozzi's Motion for Summary Judgment, denied Auto-Owners' motion, and granted judgment on the pleadings to Coral and Irby. (D.E. 91)

The parties consented to trial before the magistrate judge. (D.E. 96) Just prior to trial and after a status conference before the magistrate judge and after the taking the deposition of the 30(b)(6) corporate representative produced by Pozzi, Auto-Owners filed a Motion to Strike or Limit Damages. (D.E. 108) The hearing on the motion was held the week before trial. (D.E. 205) The magistrate denied

the motion but allowed Pozzi to file an amended complaint seeking punitive damages. (D.E. 123) Pozzi then filed an Amended Complaint (D.E. 124) and the case proceeded to trial as scheduled.

The case went to jury trial on the issue of the reasonableness of the consent judgment between Pozzi and the insureds and bad faith and damages. The jury found that the settlement between Coral, Irby and Pozzi was not the product of fraud or collusion, that the amount of the consent judgment was not reasonable or in good faith, and that $300,000 was a reasonable amount. (D.E. 146) The jury also found that Auto-Owners acted in bad faith and awarded Pozzi $500,000 in punitive damages. (Id.)

On post trial motions, the trial court granted in part and denied in part Auto-Owners' Motion for Judgment as a Matter of Law. (D.E. 180) The trial court granted Auto-Owners' motion as to bad faith and punitive damages (Id.) and entered an Amended Final Judgment for $300,000.00. (D.E. 181) This amended final judgment was later amended to include a joint calculation of prejudgment interest. (D.E. 189)

Auto-Owners filed an appeal to the Eleventh Circuit Court of Appeals, which issued its decision in *Pozzi Window Co. v. Auto-Owners Ins. Co.*, 446 F.3d 1178 (11th Cir. 2006). The Eleventh Circuit affirmed the granting of judgment as

a matter of law on the issues of bad faith and punitive damages. *Id.* at 1189. The Eleventh Circuit has certified the question of insurance coverage to this Court pursuant to article V, section 3(b)(6), Florida Constitution.

STATEMENT OF THE FACTS

Underlying case and proceedings:

The current case has its origin in a lawsuit where Jorge Perez (Perez), a homeowner and prominent real estate developer, sued Pozzi, a window manufacturer, in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, *Perez v. Pozzi Windows Co. et al.,* Case No: 97-23145 CA 21. (D.E. 1, Ex. 1) This is the "underlying case or claim." Perez asserted claims against Pozzi for negligence, strict liability, and breach of express warranty for the windows installed in the Perez home. In that state court suit, Pozzi filed an Amended Cross Claim against Coral and Irby. (D.E.1, Ex. B)

Coral and Irby had constructed a multi-million dollar house for Perez, which included windows manufactured by Pozzi and installed by a subcontractor. In the underlying claim by Pozzi against Coral and Irby, Pozzi alleged that Coral was the general contractor for the construction of the Perez home and that Coral had failed to adequately supervise the subcontractor's installation of the Pozzi windows at the Perez residence. (D.E. 1, Ex. B) Pozzi also sued Irby as the qualifier for the

project and claimed that Irby failed to oversee the installation of the windows. (Id.)

Pozzi settled part of Perez's claims and entered into a settlement agreement. (D.E. 1, Ex. B) As part of the settlement with the homeowner, Perez, "Pozzi agreed to remedy the defective installation of the windows. In exchange, Perez agreed that if he pursued damages against Pozzi, Pozzi's liability to Perez shall not exceed $20,000.00." (D.E. 1, Ex. B, ¶19)

Pozzi's Amended Cross Claim in the underlying case contained one count against Coral and one against Irby, both for equitable subrogation. (Id.) The Amended Cross Claim sought to recoup "the expenses associated with the repair and reinstallation of the Pozzi windows and the repair of certain damages to the Perez residence which Pozzi has undertaken in the Settlement Agreement." (D.E.1, Ex. B, ¶¶ 41, 50) The "Wherefore" clause in both counts sought "all damages or losses for which Pozzi has incurred in connection with the repair and replacement of the window units, including, but not limited to, attorneys' fees and costs." (D.E., Ex. B) The Settlement Agreement between Pozzi and Perez at paragraph 3(a)i-vii details the repair and replacement of the windows which Pozzi agreed to perform.

Auto-Owners sent a reservation of rights letter and defended Coral and Irby under a reservation of rights due to lack of coverage for the claim of construction

defects and repair of those defects. (D.E. 1, Ex. D; 214, page 96) Auto-Owners paid Perez for his claim against the insureds for damages to his property caused by the insureds. (D.E. 216, pages 37-38)

Auto-Owners also filed a declaratory action in state court. (D.E. 10, Ex. A and B) While the declaratory action was pending and after a mediation of the underlying case, Pozzi entered into a settlement agreement with Coral and Irby. (D.E.1, Ex. E) As part of the settlement, Pozzi obtained a consent judgment against Coral and Irby for $646,726. (D.E. 1, Ex. F) While the state declaratory action was still pending, Pozzi filed suit in federal court.

The Policy provisions:

The Auto-Owners' policy (D.E. 1, Ex. C) contains the following provisions:

> 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 any "suit" seeking those damages.
>
> * * *
>
> b. This insurance applies to "bodily injury" or "property damage" only if:
>
> (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "covered territory" . . . .
>
> * * *

2. Exclusions.

This insurance does not apply to:

* * *

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".

k. "Property damage" to "your product" arising out of it or any part of it.

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.

The policy defines the products-completed operations hazard as follows:

11. a. "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from the 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.

(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.

(D.E. 1, Ex. C).

The Policy defines "your work" as:

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

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

The Policy further states:

12. "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; 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.

(Id.)

Trial proceedings:

Pozzi, as assignee of the insureds Coral and Irby, sued Auto-Owners for breach of contract and common law bad faith. (D.E. 1)

Upon cross motions for summary judgment on the issue of insurance coverage under the insurance policy, the district court judge determined that coverage existed under the policy and that Auto-Owners had breached the policy. (D.E. 91) The district court judge determined that the CGL policy provided coverage for the repair and replacement damages sought by Pozzi. (D.E. 91) The order makes no reference to any case law, especially Florida case in existence at the time of the ruling.

The case went to jury trial on the issue of the reasonableness of the consent judgment and bad faith and damages.

At trial Pozzi called as a witness the attorney who had represented Pozzi in the underlying lawsuit brought by Perez and in its claim against Coral and Irby. Daniel Newman agreed that Perez alleged that the windows were defectively and

deficiently designed and manufactured. (D.E. 215, page 55). Mr. Newman had attended the mediation in the underlying state court action. At that mediation, Pozzi's attorneys, not Mr. Newman, relied on out of state decisions on the issue of insurance coverage in their presentation. (D.E. 215, page 57) Mr. Newman agreed that Florida law governed the Auto-Owners policy and that it was his understanding that there was no coverage under Florida law. (D.E. 215, page 58-59)

Over Auto-Owners' objection (D.E. 89; 215, page 86), Phil Gallagher testified as an expert for Pozzi. Mr. Gallagher testified as to the use of ISO forms as standard forms in the industry. (D.E. 215, page 93) He correctly explained CGL coverage: "Therefore, the contract or the service organization buys completed operations coverage to take care of the exposure that exists after he is finished with that work. In the case of a building, if a piece of roof fell off or something like that and injured a passerby; then the completed operations coverage would cover the contract. That type after an incident." (Id., page 96)

Coral and Irby's personal counsel, Stanley Klett, also testified. Mr. Klett explained that the reservation of rights letter sent by Auto-Owners (D.E. 1, Ex. D) was a typical letter sent by an insurance company to advise the insured that it was providing coverage but reserving the right to deny coverage at a later if something

comes up. (D.E. 214, page 96) Auto-Owners provided a defense to both Coral and Irby. (Id., page 104) Auto-Owners never said that there was no coverage under the policy but that it would pay whatever damages are determined that are covered under the policy. (Id. at page 133)

Auto-Owners filed the declaratory action because it could not guarantee that there was coverage for Pozzi's claim against Coral and Irby. (Id., page 107) Mr. Klett agreed that it was proper procedure for the insurance company to file the dec action. (Id., page 123-124)

On the issue of coverage, Mr. Klett had researched the issue and testified that, at the time of the mediation in the underlying case, Auto-Owners' position on coverage was consistent with all the case law in Florida at the time. (Id., pages 125, 127) At the mediation of the underlying state court case, Pozzi did not cite any Florida law, but cited Wisconsin and Minnesota cases. (Id., page 126) The attorneys for Pozzi stated at the mediation that Florida's interpretation of the coverage under the policy was wrong and that they would change Florida law. (Id.)

In-house counsel for Auto-Owners reviewed the policy and explained the coverage analysis that the duty to defend is based on the four corners of the pleadings. (D.E. 216, page 92) Auto-Owners uses standard ISO forms. (Id., page 93) CGL policies with products completed operations hazard coverage still do not

provide coverage for defective workmanship. (Id., page 95) The policy issued to Coral and Irby is the same policy issued to Tripp in *Auto Owners Ins. Co. v. Tripp Construction, Inc.*, 737 So. 2d 600, 601 (Fla. 3d DCA 1999), which had similar facts with the products completed operations hazard provision. (Id., page 97)

In reviewing coverage under its policies, Auto-Owners could not ignore the Third District Court of Appeal and its decision in *Tripp Construction*. (Id., page 98) Auto-Owners considered *Tripp*, *Home Owners Warranty*[1] and *Lassiter*[2]. (Id., pages 98-102) *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248 (M.D. Fla. 2002) involved an Auto-Owners' policy with the same products completed operations hazard provision. (Id., page 107)

At the time of trial, Auto-Owners' in-house counsel testified that other than the decision that has been made in this case on coverage, he was not aware of any other decision in the State of Florida interpreting exclusion l and a CGL policy with the products completed operation hazard coverage that had interpreted it to

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[1]*Home Owners Warranty Corp. v. Hanover Ins. Co.*, 683 So. 2d 527 (Fla. 3d DCA 1996), *rev. denied*, 695 So. 2d 700 (Fla. 1997).

[2]*Lassiter Construction Co. v. American States Ins. Co.*, 699 So. 2d 768 (Fla. 4th DCA 1997).

allow for coverage for repair and replacement of defective work. (Id., page 105)

The jury found in favor of Pozzi and awarded $300,000.00 in compensatory damages. (D.E. 146) The jury also found that Auto-Owners was guilty of bad faith and awarded $500,000.00 in punitive damages. (Id.) On post trial motions, the magistrate judge granted Auto-Owners' Motion for Judgment as Matter of Law on bad faith and set aside the punitive damage award. (D.E. 180) An Amended Final Judgment for $300,000.00 plus prejudgment interest was entered in favor of Pozzi. (D.E. 189) Auto-Owners filed an appeal from the Amended Final Judgment and Pozzi cross appealed.

Appellate proceedings:

The Eleventh Circuit issued its opinion in *Pozzi Window Co. v. Auto-Owners Ins. Co.,* 446 F.3d 1178 (11th Cir. 2006). The court certified the issue of insurance coverage to this Court. The Eleventh Circuit stated: "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." *Id.* at 1187.

As to the cross-appeal, the Eleventh Circuit affirmed the granting of judgment as a matter of law in favor of Auto-Owners as to the issues of bad faith and punitive damages. *Id.* at 1188.

This case is now before this Court on the question certified by the Eleventh Circuit. This Court has jurisdiction pursuant to article V, section 3(b)(6), Florida Constitution.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review for this appeal on a question of the extent of coverage under the insurance policy and the interpretation of an insurance policy is *de novo*. *Coleman v. Florida Ins. Guar. Ass'n, Inc.*, 517 So.2d 686, 690 (Fla. 1988).

QUESTION CERTIFIED

> 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?

SUMMARY OF THE ARGUMENT

Clearly established Florida law provides that a CGL insurance policy does not provide coverage for repair and replacement of defective workmanship. *Auto Owners Ins. Co. v. Tripp Construction, Inc.*, 737 So. 2d 600, 601 (Fla. 3d DCA 1999). This principle of law does not change if the CGL policy provides for products completed operations hazard. *Lassiter Construction Co. v. American States Ins. Co.*, 699 So. 2d 768 (Fla. 4th DCA 1997); *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d 1248 (M.D. Fla. 2002).

Florida has chosen to align itself with the majority of states in its construction of these policy provisions. *LaMarche v. Shelby Mutual Ins. Co.*, 390 So. 2d 325 (Fla. 1980) and its progeny. The public policy of Florida is that CGL policies do not provide coverage for defective work, but for defective work that injures or damages other property. The products completed operations hazard simply extends the insured's coverage to incidents of property damage or personal injury which occur after the completion of the work by the insured or its subcontractors and caused by the poor workmanship, not the repair of the work itself. *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., supra*.

The decision of the district court judge in the current case and the decision of the Second District ion in *J.S.U.B., Inc. v. U. S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005) are contrary to existing Florida law and should be reversed.

The purpose of the CGL policies with PCOH coverage is to provide the contractor and its subcontractors with coverage for property damage or personal injury that occurs after the completion of the work. It is not intended to pay to redo the defective or poor work done by the insureds.

ARGUMENT

UNDER FLORIDA LAW A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY WITH PRODUCTS COMPLETED OPERATIONS HAZARD DOES NOT COVER DAMAGES FOR REPAIR AND REPLACEMENT DUE TO DEFECTIVE WORKMANSHIP OF THE GENERAL CONTRACTOR OR ITS SUBCONTRACTOR.

A. The manufacturer's claim in the underlying case did not trigger coverage under the Auto-Owners' policy.

At the time of the determination of coverage by the district court judge, Florida courts were uniform in their interpretation of the coverage afforded under a CGL policy. To wit that the policies, even those with products completed operations hazard coverage, did not provide coverage for the repair and replacement of defective workmanship. Pozzi, the window manufacturer, was sued by the homeowner for providing defective windows to the home and breach of its warranty to the homeowner. The manufacturer settled the homeowner's claim by replacing the windows and then suing the general contractor. With the assignments Pozzi obtained from the insureds, Pozzi now stands in the shoes of the insureds. The claim in its current factual posture also includes the replacement of the defective windows provided by the manufacturer to be installed by the general contractor and its subcontractors. Thus, this Court is addressing the question

whether the contractor and the manufacturer, which fail to complete their contractual obligations to the homeowner, can pass on the cost of repairing and replacing its defective work and product to the contractor's CGL insurer.

Coverage for a claim is determined by the "four corners" of the pleading in conjunction with the policy. Coverage determines the duty to defend. *See Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co.,* 227 F.Supp.2d 1248 (M.D. Fla. 2002); *State Farm Fire & Cas. Co. v. Compupay, Inc.,* 654 So. 2d 944 (Fla. 3d DCA 1995); *Fun Spree Vacations, Inc. v. Orion Ins. Co.,* 659 So. 2d 419 (Fla. 3d DCA 1995) (inferences from allegations in the complaint insufficient upon which to base duty to defend). In the present case, the relevant pleading was Pozzi's Amended Cross Claim against Coral and Irby. (D.E. 1, Ex. B) This pleading sought damages for the repair and replacement of the windows.

The duty to defend is more expansive than the duty to indemnify. However, if there is no duty to defend based on the four corners of the complaint against the insured, there can be no duty to pay.

> A liability insurance company has no duty to defend a suit where the complaint **upon its face** alleges a state of facts which fails to bring the case within the coverage of the policy. Consequently, the company is not required to defend if it would not be bound to indemnify the insured even though the plaintiff should prevail in his action.

National Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 535 (Fla.

1977) (emphasis added).

The claim asserted by the manufacturer against the insureds should not trigger coverage under the Auto-Owners' CGL policies.

B. Historically Florida law does not provide coverage for the repair and replacement of defective work under a CGL policy with products completed operations hazard.

The allegations of defective construction and poor workmanship in the installation of the windows in the Perez residence are classic examples of what is **not** covered under a commercial general liability policy in Florida. The policy of insurance Auto-Owners issued to Coral and Irby is a commercial general liability policy. The court stated in *Auto-Owners Ins. Co. v. Marvin Development Corp.*, 805 So. 2d 888 (Fla. 2d DCA 2001), when it construed an Auto-Owners' commercial general liability policy, "We also note that the Auto-Owners' insurance policies were not warranty policies providing coverage for construction deficiencies or defective workmanship. *Id.* at 893. The law is well settled that a CGL policy does not protect the insured from liability for replacement or repair of defective work or materials. *LaMarche, supra*; *Auto-Owners Ins. Co. v. Marvin Development Corp., supra*.

In *LaMarche*, this Court approved the district court opinion and held in that the comprehensive liability policy did not "cover an accident of faulty

workmanship but rather faulty workmanship which causes an accident."

The Second District Court of Appeal[3] stated in its decision that the La Marches sought recovery for "structural defects and consequent secondary damage resulting from the defects." *Shelby Mutual Ins. Co. v. La Marche,* 371 So. 2d 198, 200 (Fla. 2d DCA 1979). Although the district court did not address the issue "as to whether the policy expressly provides coverage for the damage," this Court held that damages for poor workmanship did not come within the coverage of the comprehensive liability policy. The policy provisions in *LaMarche* are similar to the policies of Auto-Owners, in the current case, and of Hanover Insurance Company, interpreted by the Third District Court of Appeal in *Home Owners Warranty Corp. v. Hanover Ins. Co.*

This Court, in fashioning Florida law on coverage under CGL policies in *LaMarche,* relied on the interpretation of this type of insurance coverage by the New Jersey Supreme Court in *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979), which it still good and viable, where the Court stated:

> The insured-contractor can take pains to control the quality of the goods and services supplied. At the same time he undertakes the risk

[3]The Second District opinion contains the relevant policy language, similar to the Auto-Owners' policy, which was found not to be ambiguous. Ironically, this is the same court which rejected *LaMarche* and has issued the opinion in *J.S.U.B., Inc. v. U. S. Fire Ins. Co.*, 906 So. 2d 303 (Fla. 2d DCA 2005).

that he may fail in this endeavor and thereby incur contractual liability whether express or implied. The consequence of not performing well is part of every business venture; the replacement or repair of faulty goods and works is a business expense, to be borne by the insured-contractor in order to satisfy customers. (Citations omitted)

There exists another form of risk in the insured-contractor's line of work, that is, injury to people and damage to property caused by faulty workmanship. Unlike business risks of the sort described above, where the tradesman commonly absorbs the cost attendant upon the repair of his faulty work, the accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities. While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.

* * *

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, 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.

405 A.2d at 791-92.

Although the ISO form has changed since *LaMarche*, the Florida courts

have consistently continued to follow the policy to deny coverage for construction defects and the repair and replacement of poor workmanship. *See Home Owners Warranty Corp., supra*; *Lassiter, supra* (identical policy language); *U. S. Fire Ins. Co. v. Meridian of Palm Beach Condominium Ass'n, Inc.* 700 So. 2d 161 (Fla. 4th DCA 1997); *Auto Owners Ins. Co. v. Tripp Construction, Inc., supra* (same policy) and cases cited therein.

In *Home Owners Warranty Corp.*, the Court made it clear that "a claim for damages for the sums which would be required for repair and maintenance" was not covered under a comprehensive general liability policy. *Id.* at 528.

The legal principle that "poor workmanship" is not covered by a CGL policy is also well settled. As this Court in *LaMarche* stated and held:

> The majority view holds 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.
>
> 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.

Id. at 326; *Tucker Construction Co. v. Michigan Mutual Ins. Co.*, 423 So. 2d 525, 528 (Fla. 5th DCA 1982) (quoting *LaMarche*).

In *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, the court, in a declaratory action brought by Auto-Owners under the same CGL policy, extensively examined the Florida law applicable to the determination of coverage, duty to defend, and duty to indemnify and found that, consistent with well-established law, there was no coverage under the CGL. The court in *Travelers* rejected the argument that the change in the CGL policy language provided coverage for defective work.

> Reliance contends that *LaMarche* was decided under a former version of the CGL policy than the ones at issue in this case which it contends provide for coverage to repair or replace construction defects. Reliance submits that the Auto Owners and Northbrook policies contain (1) "products completed operations hazard" coverage that provides coverage for the repair or replacement of construction defects; and (2) the exclusion that excepts from coverage the repair or replacement of construction defects does not apply to defective work performed by subcontractors.
>
> Reliance is correct that the Auto Owners and Northbrook CGL policies are different from the CGL policy examined in *LaMarche.* [FN20] However, Florida courts examining the same CGL policies issued to Sun by Auto Owners and Northbrook in this case continue to hold that CGL policies do not cover the costs to repair and/or replace defective construction. *See Aetna Cas. & Surety Co. of America v. Deluxe Systems, Inc. of Florida,* 711 So.2d 1293, 1296 (Fla. 4th DCA 1998); *Home Owners Warranty Corp. v. Hanover Insurance Co.,* 683

> So.2d 527 (Fla.App.3rd DCA 1996); *Lassiter Construction Co. Inc. v. American States Insurance Co.*, 699 So.2d 768 (Fla.App.4th DCA 1997); and *United States Fire Insurance Company v. Meridian of Palm Beach Condominium Association, Inc.*, 700 So.2d 161 (Fla. 4th DCA 1997).
>
> FN20. A copy of Auto Owners' CGL policy is attached to Auto Owners' motion for summary judgment and Reliance's memorandum of law in support of its motion for summary judgment. Reliance attaches what it calls an "example" of both the Auto Owners and Northbrook CGL policies to its memorandum of law in support of its motion for summary judgment. Northbrook alleges that the policies it issued to Sun differ somewhat in specific terms but does not dispute that generally the policies provide the same coverage.

227 F.Supp. at 1262.

The Court in *Auto-Owners Ins. Co. v. Travelers Cas. & Sur. Co.* concluded that defective work, even if performed by a subcontractor, is not covered under the CGL policy.

> In *Home Owners Warranty Corp.*, the assignee of the builder argued that if the defective work is performed by a subcontractor, the costs to repair or replace the work is covered by the policy. *Home Owners*, 683 So.2d at 529. Specifically, the builder's assignee argued that the following exclusion and the exception to the exclusion provided coverage for the costs to repair defective workmanship:
>
> > 1. "Property damage" to your product 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.
>
> *Home Owners,* 683 So.2d at 529-530. The Home Owners' court

> rejected the argument and stated that the subcontractor exception eliminates subcontractors from the exclusion but does not, in and of itself, create coverage, 683 So.2d at 529-530.
>
> Similarly, in *Lassiter Construction Co., Inc. v. American States Insurance Co.,* a general contractor argued that exception (1) quoted in *Home Owners,* which is also in the Auto Owners and Northbrook policies, provides coverage for defective work performed by a subcontractor. *Lassiter,* 699 So.2d at 770.
>
> * * *
>
> The *Lassiter* court found that the exception in exclusion (1) did not create coverage because it was the exclusion in (j) above which excludes coverage for the costs to repair or replace construction defects. *Id.* The Auto Owners and Northbrook policies also contain the exclusion that the *Lassiter* court determined excluded coverage for the costs to repair and replace defective construction.

227 F. Supp. at 1262-63.

The court also rejected the argument that the "Products-completed operations hazard" provided coverage for repair and replacement costs.

> Reliance also contends that new CGL policies, like the Auto Owners and Northbrook policies, now contain "products-completed operations hazard" which provides for coverage for the costs to repair and replace defective construction. This argument was considered and rejected in *Lassiter.* There the builder argued that the exclusion in (j)(6) did not apply to "products-completed operations hazard." The court disagreed, holding that the exception for "products-completed operations hazard" does not create coverage for the cost to repair or replace defective construction. *Lassiter,* 699 So.2d at 770 citing *Tucker Construction Co. v. Michigan Mut. Ins. Co.,* 423 So.2d 525 (Fla. 5th DCA 1982).

227 F.Supp.2d at 1263.

In *Lassiter*, there was no coverage under a CGL policy for construction defects "where there are no allegations that the defective construction caused personal injury or damage to any property other than the school buildings which were being constructed." *Id*. at 769.

Auto-Owners addressed any doubts as to the status of coverage under the Auto-Owners' policy at trial. Both Daniel Newman, trial counsel for Pozzi in the underlying case, and Stan Klett, personal counsel for Coral and Mr. Irby, agreed that existing Florida law did not provide for coverage for Pozzi's claim against Coral and Mr. Irby. (D.E. 215, pages 58-59; 214, pages 125, 127) Both also agreed at trial that Pozzi's mediation presentation on coverage was based on law from out of state, including, Minnesota and Wisconsin. (D.E. 215, page 57; 214, page 126)

Auto-Owners' in-house counsel testified that the Auto-Owners' insurance policies, and those of other insurers using the ISO form, had consistently been construed as not providing coverage for repair and replacement of defective work in Florida.

To hold that CGL coverage does not cover poor workmanship is clear and consistent with the decisions of the Florida Supreme Court and of the district

courts of appeal which have construed the economic loss rule. In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), the homeowners unsuccessfully argued that the contaminated concrete which damaged the steel reinforcing rebar was "other property." This Court noted that the "product" purchased by the homeowners was a finished product, a home, not the separate components. *See also, Jarmoc, Inc. v. Polygard, Inc.,* 668 So. 2d 300 (Fla. 4th DCA), *aff'd*, 684 So. 2d 732 (Fla. 1996); *Comptech International, Inc. v. Milam Commerce Park, Ltd.,* 711 So. 2d 1255 (Fla. 3d DCA 1998).

Florida stands with the majority of states that hold that the purpose of commercial 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. *Tucker Construction Co. v. Michigan Mutual Ins. Co.*, 423 So. 2d at 528. The testimony at trial overwhelmingly supported entry of judgment in Auto-Owners' favor on coverage and, thus on all issues.

The reasoning and rationale for no coverage for defective workmanship under a CGL policy has not changed and should not change.

C. The exception to an exclusion cannot create coverage under the CGL policy where no coverage exists.

In the present case, the district court construed the CGL policy without

reference to Florida cases which have previously construed the same policy provisions.[4] The express language of the present Auto-Owners' policy has already been construed to exclude coverage of or for similar claims. In addition, the same legal argument, based on the same policy language, was rejected in *Lassiter* and *Auto Owners Ins. Co. v. Travelers Cas. & Surety Co.*

In *Lassiter* the court construed the same policy language and held: "We agree with the insurer that the exclusions relied on by the insured, some of which do have exceptions for work performed by subcontractors, cannot create coverage where there is no coverage in the first place." *Id.* at 770.

The court in *Lassiter*, further held:

> Exclusion j.(6), on which the insured relies because it does not apply to "property damage" included in the "Products-completed operations hazard," does not create coverage under this policy. Assuming there is "Products-completed operations hazard" coverage in this policy, such coverage does not cover the type of contractual liability alleged against the general contractor in this case. *Tucker Constr. Co. v. Michigan Mut. Ins. Co.*, 423 So.2d 525 (Fla. 5th DCA 1982).

Lassiter, supra at 770; *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d at 1263; *Home Owners Warranty Corp., supra.* As these cases clearly

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[4]The trial testimony confirmed that the Auto-Owners' policies at here are the same CGL policies with PCOH coverage as in *Tripp* and *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.* (D.E. 216 at pages 92, 107)

state in construing the identical policy language, under Florida law, the exception to the exclusion does not create coverage for poor workmanship where there is no coverage for defective workmanship in the policy. An exception to an exclusion cannot negate actual coverage and transform the commercial general liability policy into a warranty policy.

Even if there were any doubt of the absence of insuring language in the policy, its exclusions eliminate any such doubt by clearly explaining that the policy does not apply to "property damage" to the contractor's work or work done on the contractor's behalf, even if included in the PCOH clause. This is the conclusion reached by numerous Florida courts, both before and after the 1986 revisions to the standard CGL policy. *See Lassiter*, 699 So. 2d at 770; *see also, Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 740 (Fla. 2002) (reaffirming that "policy exclusions cannot create coverage where there is no coverage in the first place"); *Meridian*, 700 So. 2d at 162 (explaining that policy exclusions cannot create coverage).

The court in *Home Owners Warranty,* 683 So. 2d at 530, also rejected the argument that the subcontractor exception to exclusion l. could somehow create coverage that did not exist before. The Second District in *J.S.U.B.* accepted the argument rejected in *Home Owners Warranty* and other cases. The *Home Owners*

Warranty court relied on this Court's opinion in *LaMarche*, 390 So. 2d at 326, that "an exclusion does not provide coverage but limits coverage," and concluded that an exception to the exclusion could not, "in and of itself, create coverage." *Home Owners Warranty*, 683 So. 2d at 530.

In *J.S.U.B.*,[5] the Second District rejected *LaMarche* and its progeny and adopted the minority view that the CGL policy covered damages for the faulty workmanship by the insured and its subcontractors. The court in *J.S.U.B.* cited to case law from Minnesota, Wisconsin, Alaska and Kansas to support its construction of the coverage. This is the first case in Florida, with the exception of the order of the district court judge in the present case, to reach such a conclusion.

D. The change is the policy language should not change the result that there is no coverage to repair and replace defective work of a contractor of its subcontractors.

Even after 1986, when the standard CGL policy language was amended to include the exact language at issue here, Florida courts continued to construe such policies to exclude coverage for the defective product or workmanship of the general contractor and its subcontractors. *See, e.g., Sekura v. Granada Ins. Co.*, 896 So. 2d 861, 862 (Fla. 3d DCA 2005); *Tripp*, 737 So. 2d at 601; *Deluxe Systems*, 711 So. 2d at 1296; *Meridian*, 700 So. 2d at 162; *Lassiter*, 699 So. 2d at 769; *Home Owners Warranty Corp.*, 683 So. 2d at 529 (all explaining that policy

[5]The Court has accepted jurisdiction in *J.S.U.B.*, Case No. SC-05-1295, based on express and direct conflict. Article V, section 3(b)(3), Florida Constitution.

exclusions limit coverage and that exceptions to exclusions cannot create coverage that does not otherwise exist).

The Third District explained in *Tripp*: "Comprehensive general liability insurance policies, like the insurance policy in question here, only protect against *personal injury* or *damages to personal property* which might *result from* the defective workmanship." 737 So. 2d at 601.

In *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1262 (M.D. Fla. 2002), the U.S. District Court for the Middle District of Florida recognized the precedential effect of the above decisions, particularly *LaMarche.* While noting that other states had construed the post-1986 standard CGL policy language differently, the *Travelers* court nevertheless recognized that Florida's courts remained steadfast in holding that the policy language did not provide coverage to replace or repair the defective work of subcontractors.

E. *LaMarche* and the cases from the Florida district courts of appeal are consistent with the policy language and Florida public policy.

The interpretation of the CGL policy language in existing Florida decisions, with the exception of the decision of the Second District in *J.S.U.B.*, remains applicable and correct. The policy's Insuring Agreement provides coverage for "property damage," defined in relevant part as "physical injury to . . . property."

The PCOH coverage extends that coverage to physical injury to property "arising out of" the contractor's work or work done on the contractor's behalf after the work is completed. "Property damage" is defined in one way, and "your work" is defined in another, independent way. This language did not change in 1986, and it historically and consistently has been construed not to cover the contractor's defective work or defective work done on the contractor's behalf.

As the *LaMarche* court said:

> 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.

390 So. 2d at 326. As recently as 1996, the court in *Deluxe Systems*, 711 So. 2d 1296, noted that the conclusion reached by *LaMarche* was still valid in Florida as a "matter of public policy." *See also Meridian*, 700 So. 2d at 162 (emphasizing that such policies provide no coverage for defective construction).

In contrast to the consistent Florida authority, the Second District rejected the long term consistent Florida authority and the public policy of Florida on this type of coverage. To reach its conclusions, however, the court had to overlook the

coverage language, overlook the exclusion language, and skip to the exception language. That is precisely the analysis that this Court has held is erroneous.

The decision of the Second District in *J.S.U.B.* is incorrect. The Second District has improperly relied on out-of-state cases[6] and ignored Florida precedent to conclude that CGL policies now provide the coverage prohibited by *LaMarche* and its progeny. The decision reaches that result by allowing the exception to the exclusion to create coverage, explaining that the "exceptions to the exclusions would have no meaning if the policies are interpreted as providing no coverage. . . ." *Id.* at 310. No Florida authority exists for that interpretation.

This Court's decision in *State Farm Fire and Cas. Co. v. CTC Development Corp.*, 720 So. 2d 1072 (Fla. 1998) does not cause a different result and does not change Florida law on CGL coverage. First, *CTC Development Corp.*, is a duty to defend case that does not address the policy language at issue. *See Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F.Supp.2d at 1258. Second, it was "the neighboring property owners" who sued the contractor, not the owner of the property. The contractor's actions, in violating setback requirements, damaged the neighbors' property, not the home built by the contractor. Third, this Court cited

[6]The Court is *J.S.U.B.* incorrectly relies upon *Kalchthaler v. Keller Construction Co.*, 224 Wis.2d 387, 591 N.W.2d 169 (1999) to support its decision.

with favor to both *La Marche* and *Lassiter*[7]. 720 So. 2d at 1074-75.

This Court in *CTC Development* did not expand the insuring provisions as the Second District indicated in *J.S.U.B. Id.* at 308-09. The Court in *J.S.U.B*. is incorrect. This Court simply determined that the third/party neighbors' claims were covered under the CGL policy. The claims covered were not those of the homeowner to whom the contractor, such as Auto-Owners' insureds, would owe a contractual obligation.

In the present case, the homeowner sued the manufacturer for providing a defective product. The manufacturer settled with the homeowners and then sued the insureds for the cost of repairing and replacing the windows. To find coverage under Auto-Owners' policies is to make the insurer the warrantor of the manufacturer's product! Clearly, this is not and should not be the public policy of Florida. If CGL policies with PCOH are going to cover the cost to repair and replace the defective work of the contractor and its subcontractors, will the insurers be responsible to the homeowners for the punch list items? The rationale, logic and public policy clearly require a resounding "No."

Kalchthaler supports Auto-Owners' position on coverage. *See* Argument, *infra*.

[7]This Court could have questioned the continued viability of these cases had it so chosen. This Court also chose not to exercise discretionary jurisdiction in *Home Owners Warranty Corp. v. Hanover Ins. Co.*, 683 So. 2d 527 (Fla. 3d DCA

Florida stands with the majority of states that hold that the purpose of CGL 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. *See Tucker,* 423 So. 2d at 528; *see also, Reliance Ins. Co. v. Mogavero,* 640 F.Supp. 84 (D. Md. 1986); *Sawhorse, Inc. v. Southern Guaranty Ins. Co.,* 269 Ga.App. 493, 604 S.E.2d 541 (2004); *Nas Sur. Group v. Precision Wood Products, Inc.,* 271 F.Supp.2d 776 (M.D.N.C. 2003), and cases cited therein for some of the majority of jurisdictions[8] which find no coverage under CGL

1996), *rev. denied*, 695 So. 2d 700 (Fla. 1997).

[8]For more cases that hold that there is no coverage under a CGL policy for defective construction fo the work provided by the contractor, whether done by the contractor or subcontractors. *See also, U.S. Fidelity & Guar. Co. v. Warwick Development Co. Inc.,* 446 So. 2d 1021 (Ala. 1984); *U.S. Fidelity & Guar. Corp. v. Advance Roofing & Supply Co.,* 788 P.2d 1227, 1233 (Ariz. 1989); *St. Paul Fire & Marine Ins. Co. v. Coss,* 145 Cal.Rptr. 836, 839 (Cal Ct. App. 1978); *Union Ins. Co. v. Hottenstein,* 83 P.3d 1196, 1202 (Col. App. 2003); *Brosnahan Builders Inc. v. Harleysville Mut. Ins. Co.,* 137 F.Supp.2d 517, 526 (D. Del. 2001) (applying Delaware law); *Custom Planning & Development v. American Nat. Fire Ins. Co.,* 606 S.E.2d 39 (Ga. App. 2004); *Owens Ins. Co. v. James,* 295 F.Supp.2d 1354 (N.D. Ga. 2003); (applying Georgia law); *Indiana Ins. Co. v. Hydra*, 615 N.E.2d 70, 73-74 (Ill. App. Ct. 1993); *Amerisure, Inc. v. Wurster Const. Co., Inc.,* 818 N.E.2d 998, 1005 (Ind. App. 2004); *Pursell Construction, Inc. v. Hawkeye-Security Ins. Co.,* 596 N.W.2d 67, 71 (Iowa 1999); *Standard Fire Ins. Co. v. Chester-O'Donley & Assoc.,* 972 S.W.2d 1, 9 (Tenn. Ct. App. 1998) (applying Kentucky law); *U. S. Fire Ins. Co. v. Milton Co.,* 35 F.Supp.2d 83, 86 (D.D.C. 1998) (applying Maryland law); *Harbor Court Assoc. v. Kiewit Construction Co.,* 6 F.Supp.2d 449, 455-57 (D. Md. 1998) (applying Maryland law); *Hawkeye-Security Ins. Co. v. Vector Construction Co.,* 460 N.W.2d 329, 331 (Mich. Ct.

policies with PCOH for repair and replacement of defective work. These states, along with Florida, find it eminently reasonable to construe the CGL coverage so as not to allow the contractor to be paid for shoddy workmanship, keep the money and then have the insurer pay to redo the work. Such coverage would be available under a performance bond or warranty policy but not a CGL policy which provides protection against damages, personal injury and property damage, caused by the defective work. The "products completed operations hazard" extends this coverage to the occurrence of property damage or personal injury which occurs after the completion of the work.

The public policy of this state has been set since *La Marche* and its progeny.

App. 1990); *American States Ins. Co. v. Mathis,* 974 S.W.2d 647, 649-50 (Mo. Ct. App. 1998); *Auto-Owners Ins. Co. v. Home Pride Companies,* 684 N.W.2d 571, 578-80 (Neb. 2004); *McAllister v. Peerless Ins. Co.*, 474 A.2d 1033, 1036-37 (N.H. 1984); *J.Z.G. Resources Inc. v. King,* 987 F.2d 98 (2d Cir. 1993) (interpreting NY law); *Wm. C. Vick Const. Co. v. Penn. Nat. Mut. Cas. Ins. Co.,* 52 F.Supp.2d 569 (E.D.N.C. 1999); *Heile v. Herrman,* 736 N. E. 2d 566, 568 (Ohio Ct. App. 1999); *Solcar Equipment Leasing Corp. v. Penn. Manuf. Assoc. Ins. Co.,* 606 A.2d 522, 527-28 (Pa. Super. Ct. 1992); *L-J Inc, v. Bituminous Fire and Marine Ins. Co.*, 621 S.E.2d 33, 36 (S.C. 2005); *Vernon Williams & Son Construction v. Cont'l Ins. Co.*, 591 S.W. 2d 760, 762-64 (Tenn. 1979); *H.E. Davis & Sons, Inc. v. North Pacific Ins. Co.,* 248 F.Supp.2d 1079 (D. Utah 2002); *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.,* 526 S.E.2d 28 (W. Va. 1999); *Burlington Ins. Co. Oceanic Design & Construction Inc.,* 383 F.3d 940 (9th Cir. 2004) (interpreting Hawaii law); *ACS Construction Co. v. CGU,* 332 F.3d 885 (5th Cir. 2003) (construing Mississippi law).

The contractor has received payment for the work it has done and has kept that money. The work was poorly done and needed to be redone. The insurer should not have to pay for the repair and replacement of the shoddy work. The CGL coverage with products completed operations hazard (PCOH) does provide the insured with valuable coverage when the poor or defective work causes personal injury or damage to other property after the completion of the work.

F. Florida's interpretation of CGL coverage is consistent with that of the majority of other jurisdictions.

Courts in different jurisdictions have used different theories to reach the same result when interpreting CGL coverage. *See generally, Reliance Ins. Co. v. Mogavero, supra,* (public policy argument that defective workmanship not occurrence and not covered under CGL policy); *Sawhorse, Inc. v. Southern Guaranty Ins. Co., supra,* (business risk borne by contractor to repair or replace defective work excluded from CGL policy); *Nas Sur. Group,* 271 F.Supp.2d at 783(law of South Carolina clear that damages for repair and replacement of faulty workmanship not covered under CGL policy). In *Sawhorse,* the repair and replacement of defective work done by a subcontractor were not covered under the CGL policy with "products-completed operations hazard." The damages caused to the other portion of the building due to the defective work were covered.

In *Kalchthaler v. Keller Construction Co.*, 224 Wis.2d 387, 591 N.W.2d 169 (1999), water entering through leaky windows damaged drapery and wallpaper. Keller was the general contractor and a subcontractor had performed the work. Aetna, Keller's insurer, denied coverage. The issue before the court "was whether the damage to the building and its interior was covered by Keller's Aetna policy." 591 N.W.2d at 171. The issue was not the cost of repair. A Florida court would have reached the same conclusion. In *Nas Sur. Group,* the court noted that *Kalchthaler* involved "CGL coverage where leaky windows damaged drapery and wallpaper and thus damages extended beyond the scope of contractor's original work." 271 F.Supp.2d at 783. Thus, the damages sought in *Kalchthaler* were within the policy since this was not repair of the original work but covered damages to other property as in *Tripp, supra.*

In *Reliance Ins. Co. v. Povia-Ballantine Corp.,* 738 F.Supp. 523 (M.D. Ga. 1990), the court interpreted Georgia law on CGL coverage to exclude claims for property damage for the repair and replacement of that product constructed in an unworkmanlike manner and cited with approval to *LaMarche* and noted the difference between damage to the product and damage caused by the product. *See generally, Qualls v. Country Mutual Ins. Co.,* 123 Ill.App.3d 831, 462 N.E.2d 1288 (1984)(policy with PCOH coverage does not cover cost of remedying insured's

work product). The court in *Qualls* cited favorably to both *LaMarche* and *Weedo v. Stone-E-Brick,* 81 N.J. 233, 405 A.2d 788 (1979).

PCOH coverage is a valuable coverage option for contractors. It can offer protection for claims brought after the completion of the work. What is does not do is allow the contractor or subcontractor to receive payment for shoddy work, keep the payment, and then have the insurance company pay to redo the work. To do so would turn CGL coverage into what it is not- a builder's risk policy, performance bond, or warranty coverage.

The court in *Monticello Ins. Co. v. Wil-Freds Const., Inc.,* 277 Ill.App.3d 697,709-10, 661 N.E.2d 451,459-60, 214 Ill.Dec.597, 605-06 (Ill.App. 2 Dist. 1996) provides a good analysis of the issue:

> Indeed, as numerous courts have noted, if insurance proceeds could be used to pay for the repair or replacement of poorly constructed buildings, a contractor could receive initial payment for its work and then receive subsequent payment from the insurance company to repair or replace it. (See, e.g., *Centex Homes Corp. v. Prestressed Systems, Inc.* (Fla.App.1984), 444 So.2d 66, 67.) This "would transform the [CGL] policy into something akin to a performance bond." (*Qualls,* 123 Ill.App.3d at 834, 78 Ill.Dec. 934, 462 N.E.2d 1288.) To hold that a CGL policy is the effective equivalent of a performance bond would cause injustice to the CGL insurer who, unlike the surety on a performance bond, has no recourse against a contractor for the use of defective materials or poor workmanship. See *Knutson Construction Co. v. St. Paul Fire & Marine Insurance Co.* (Minn.1986), 396 N.W.2d 229, 234; see also *Hartford Accident & Indemnity Co. v. Pacific Mutual Life Ins. Co.* (10th Cir.1988), 861

F.2d 250, 252-53 (CGL policy not intended to function as a performance bond); Tinker, *Comprehensive General Liability Insurance-- Perspective & Overview*, 25 Fed'n Ins.Couns.Q. 217, 224 (1975) ("[t]he CGL policy does not serve as a performance bond, nor does it serve as a warranty of goods or services").

Another court succinctly addressed the issue of allowing such coverage under a CGL policy when it stated: "To allow indemnification under the facts here would have the effect of making the insurer a sort of silent business partner subject to great economic risk in the economic venture without any prospects of sharing in the economic benefit. The expansion of the scope of the insurer's liability would be enormous without corresponding compensation." *Redevelopment Authority of Cambria County v. International Ins. Co.*, 454 Pa. Super. 374, 392-93, 685 A.2d 581, 590 (1997); *see also*, *Amtrol, Inc. v. Tudor Ins. Co.*, 2002 WL 31194863 (D.Mass., Sept 10, 2002).

The contractor is the one who is able to control his work and that of the subcontractors on the job. The insurer, such as Auto-Owners, does not. An excellent discussion of the issue is contained in C. Burke, *Construction Defects and the Insuring Agreement in the CGL Policy–There Is No Coverage for a Contractor's Failure to Do What it Promised,* Practising Law Institute, Real Estate Law and Practice Course Handbook Series, 742 PLI/Lit 73 (May 2006). The author states: "In fact, it is the building industry's interpretation that is

unreasonable because [it] has the practical effect of making the general contractor's CGL carrier the de facto insurance carrier for every subcontractor for any property damage that occurs to the project itself after it is completed. This approach seriously undermines the insurer's ability to determine with whom they will contract. This is further proof that the interpretation is unreasonable." *Id*. at 104 (footnotes omitted). This author addresses and knocks down in *seriatim* the legal fallacy behind each of the arguments advanced to support the interpretation that CGL policies with PCOH coverage will pay to repair and replace the defective work of the contractor or its subcontractors.

The majority view is still "that under one theory or another, defects in one's own work are not intended to be covered by CGL policies." W. Lyman, *"Is Defective Construction Covered Under Contractors' and Subcontractors' Commercial General Liability Policies?"* 525 PLI/Real 151, 166 (April 2006).

As one leading and widely accepted treatise on insurance has noted:

> The majority of jurisdictions have held that breach of contract is not an occurrence. In essence, this principle stems from the fact that commercial general liability insurance policies are intended to provide coverage only for events which are fortuitous, unforeseeable events, and not for the foreseeable results of an insured's deliberate conduct, which would include a claim for breach of contract. A commercial general liability policy is designed and intended to provide coverage to the insured for tort liability for physical injury to the person or property of others. A commercial general liability policy is not

> intended to provide coverage for the insured's contractual liability which merely causes economic losses.
>
> Similarly, a claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident. Instead, 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. In other words, although a commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, the policy does provide coverage if the faulty workmanship causes bodily injury or property damage to something other than the insured's work product.

9A *Couch on Insurance* §129:14 (3d ed. 2006)(footnotes and citations omitted).

Defective work, standing alone, which only damages the contractor's work, is not an occurrence. *See L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33 (S.C. 2005). Consistent with this Court's ruling in *LaMarche*, the South Carolina Supreme Court held that the CGL policy is not a performance bond. *Id.* at 36-37. The court noted that faulty workmanship is not covered, but that where faulty workmanship causes a third party bodily injury or damage to other property, there may be coverage. *Id.* at 36 n.4. *Accord, ACS Construction Co. v. CGU, supra; Viking Construction Management, Inc. v. Liberty Mut. Ins. Co.*, 831 N.E.2d 1 (Ill. Ct. App. 2005).

A general contractor enters into a contract to build a home, as in the present

case, or another type of building. The contractor hires, controls, and should supervise the subcontractors. The CGL policy should pay for the property damage to other property or personal injury which occur during construction, or with PCOH coverage after completion. Coverage under a CGL policy with PCOH coverage is triggered when the defective work of the contractor or its subcontractor damages that part of the home, building, or project which is not the essence of the contractor's contractual obligation to provide.

CONCLUSION

This Court should answer the certified question in the negative. Florida should reaffirm its position with the majority of jurisdictions that standard form comprehensive general liability policies with product completed operations hazard coverage, issued to a general contractor, **do not** cover the general contractor's liability to a third party for the costs of repair or replacement of defective work by the contractor or its subcontractor.

This Court should continue to interpret CGL coverage as providing protection for the claims of damage to persons or property caused by the contractor or its subcontractors.

CERTIFICATE OF SSERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief has been prepared with Times New Roman 14-point font and is in compliance with Fla. R. App. P. 9.210(a)(2).

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