Filing # 21212267 Electronically Filed 12/03/2014 07:29:20 PM

RECEIVED, 12/3/2014 19:33:48, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

JOHN ROBERT SEBO, individually and as Trustee under Revocable Trust Agreement of John Robert Sebo dated November 4, 2004, et al.,

Petitioner,

v.

AMERICAN HOME ASSURANCE COMPANY, INC.,

Respondent.
_____//

Case No.:	SC14-897
App. Case No.:	2D11-4063
L.T. Case No.:	07-0054 CA
consolidated with	07-1539 CA

PETITIONER JOHN ROBERT SEBO'S INITIAL BRIEF ON THE MERITS

CHEFFY PASSIDOMO, P.A.
Counsel for Petitioner
Edward K. Cheffy
FBN: 393649
David A. Zulian
FBN: 711012
Debbie Sines Crockett
FBN: 33706

821 Fifth Avenue South, Suite 201
Naples, FL 34102
Telephone: (239) 261-9300
Facsimile: (239) 261-9782

BOYLE, GENTILE & LEONARD, P.A.
Counsel for Petitioner
Mark A. Boyle
FBN: 0005886
Geoffrey H. Gentile
FBN: 898562
Michael W. Leonard
FBN: 0855626
Amanda K. Anderson
FBN: 0091297
Molly A. Chafe
FBN: 105798
2050 McGregor Blvd.
Fort Myers, FL 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674

TABLE OF CONTENTS

CITATION OF AUTHORITIES

Cases

Statutes

PREFACE

"APP" – Refers to the attached Appendix of Petitioner John Robert Sebo.

"T" – Refers to Trial transcript pages.

"R" – Refers to the Transcript of the Record on Appeal.

"TE" – Refers to Trial Exhibits.

"IB" – Refers to Insurer's Brief to the Second District Court of Appeal.

STATEMENT OF CASE AND FACTS

Introduction

This appeal arises from a three-week jury trial in Naples. In that trial, the Petitioner John Robert Sebo ("Sebo") sought to enforce the terms of his "all-risk" homeowner's insurance policy ("Policy") that he purchased from the Respondent, American Home Assurance Company ("Insurer"). The jury found that Sebo established "a loss within the terms" of the Policy and awarded a substantial verdict for losses attributable to "rain-based water intrusion" and "physical damage from water intrusion" resulting from historic rains prior to Hurricane Wilma, as well as "wind and/or water damage" resulting from Hurricane Wilma. [R. 18641-18624].

As explained in more detail below, the jury's verdict and the judgment entered by Judge Cynthia Pivacek ("Trial Court") were based, in part, on the Concurrent Cause Doctrine as set forth in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988) *rev. denied* 526 So. 2d 246 (Fla. 1988). The Insurer appealed, and the Second District Court of Appeal ("Second District") reversed the Trial Court's judgment, explaining that "we disagree" with *Wallach* and remanded for a new trial "in which the causation of Sebo's loss is examined under the efficient proximate cause theory" instead of the Concurrent Cause Doctrine. Based on the conflict between the Second District's opinion and the Third District's decision in *Wallach*, this Court accepted jurisdiction.

Sebo's Home

Sebo purchased the home at issue on April 19, 2005 for $11,200,000. Built in 2001, it consisted of a multi-story main house and a guest house which together had over 300 windows and sliding glass doors. [IB 1-2; T2389:19-24; T2392:7-9]. Sebo described walking through the front door of the home as "like walking into a Polynesian village" – it was "spectacular." [T2361:11-22]. A disclosure statement and marketing materials did not reveal any problems with the home. [IB 2; T2370:5-16; TE26]. Sebo's property manager, Becky Thorngate, did not notice any problems - no water stains, no visible mold growth, no musty odors, no dripping anywhere; she described the house as "meticulous. It looked awesome." [T433:8-T435:1]. An inspection by a home inspector did not reveal any water intrusion or leaks. [IB 2-3]. A mold study concluded that there were no unusual conditions. [T2389:2-14].

The Policy

On the day Sebo closed on his home in April 2005, he obtained insurance from Insurer. [T2392:10-18]. Wanting the "best insurance possible" and "to be fully protected from all risks," Sebo paid an initial annual premium of $47,721.00 for an "all-risks" Policy. [T2392:25-T2393:6; APP. 1]. In September 2005, after Insurer's agent, Dale Tomlinson, determined that the "replacement cost" for the home was $7,635,000, Sebo's annual premium was increased to over $50,000. [TE51; T22667:11-T22668:2; T22623:1-T22624:5; T2413:16-T2414:16]. Sebo

paid the increased premium, and Insurer was "happy to accept" his money. [T2414:13-16]. The Policy was written on a manuscript form, which Insurer controlled. [T22551:19-22; T22552:21-23]. According to Insurer's designated corporate representative, "[i]t's a policy that we created that reads the way we want it to read." [T22552:19-20]. Pertinent provisions of the Policy are discussed at the beginning of the Argument section of this brief.

The Rain

In May, 2005, a month after Sebo closed, the summer rains started. [T435:17-23; T439:14-T440:4]. During the month of June, 2005, the Naples area experienced multiple days of back-to-back heavy precipitation and one of the "top three rainfall amounts in Naples history," according to a meteorologist. [T1952:5-12; T1955:16-22]. These heavy rains caused a variety of problems, which Thorngate described in a letter. [TE 50]. In response, Sebo instructed her to hire contractors to fix them. [T2416:9-T2417:10; T473:22-T474:2; T475:6-19]. Contractors did a lot of repair work [Id.], but despite all efforts, the problems continued. Thorngate recalled:

> It was evolving. It was like – It was like globally. It was like the whole house. So it was just kind of like waiting for – you know – I cannot tell you an exact day, but it's like those areas kept repeating or it was a new area. It was like a similar – a similar issue, but a new spot.
>
> ***
>
> It was August timeframe, and we were – August/September timeframe, and we were kind of honing in on the main house being done. And then we had another rain, and a whole area along those windows that they had just painted, it just fell off the walls again. [T475:24-T476:19].

When Insurer's agent, Tomlinson, inspected the Sebo's home in September 2005, he noted areas with water stains. [TE 51]. A month later, on October 24, 2005, Hurricane Wilma hit and Sebo's home was damaged again, including from rain and wind. [T481:6-14, 15-22; T498:21-T499:8]. A meteorologist testified that "the Wilma event was simply an incredible amount of rain in a six hour period." [T1952:5-13]. Hurricane Wilma opened Sebo's eyes to the seriousness of his situation. [T2417:11-24]. Roof tiles were everywhere, landscaping was damaged, a sliding door was blown off, and there was water in the home and on the floors of both the main house and guest house. [T481:12-22; T498:21-T499:8].

Notice of Claim

In November/December 2005, Sebo engaged Craig Kobza with Aerial Companies (a reconstruction, remediation, restoration, painting and forensic company) to investigate. [T509:11-T510:6; T2418:7-13; T750:5-14; T754:13-23; T755:12-18; T756:16- T575:17]. On December 29, 2005, after Kobza saw evidence of "substantial water intrusion" and "resultant damage," Sebo's agent put Insurer on notice of his claim both by phone and with an ACCORD Property Loss Notice. [T856:1-12; T2419:11-15; T1594:5-9; TE 65].

Insurer's Investigation of the Claim

On December 30, 2005, Insurer "acknowledged receipt of a claim under your homeowner's policy." [TE 171]. Shortly thereafter, Insurer's assigned adjuster,

Louis "Jed" Usich, observed "areas of water damage" caused by rainwater, including areas "not just construction defect-oriented" [T22579:11-22580:21; T3197:3-13] and water damage which was separate from wind damage and mold. [T22627:6-9]. He identified 2 claims – an "April/May rain event" [T2881:2-16; T2885:2-9] and the hurricane or windstorm claim. [T2879:5-16]. He also observed "some ensuing water damage," and he identified 3 causes of loss – "the construction defects, Hurricane Wilma, and a May wind/rain event." [T2878:24-T2879:16]. Tomlinson returned in January and observed "significant damage to the home … caused by material and installation defects combined with water intrusion associated with weather-related events." [T22687:10-23].

Usich engaged an expert, Interscience, Inc., to help "evaluate and adjust this claim." [T22585:13-18]. Irving Lee Pack with Interscience observed "extensive moisture intrusion" and "the entry of copious volumes of moisture into the home." [TE 93]. Reporting on the cause and origin of the water intrusion, Lee Pack concluded that "sustained rainfalls associated with the 2005 hurricane season compounded the extensive moisture intrusion into the home." [T2799:20-25; TE 93; T2822:11-24; T22589:19-T22590:4]. By April 2006, Usich concluded that there was "an occurrence" which gave rise to a claim under the Policy [T22636:16-25] and that there was water damage, window damage and mold. [T2784:4-7].

Insurer's Denial of the Claim

Despite Interscience's and Usich's conclusions, Insurer stopped its investigation [T22761:5-15; T22762:7-13; T22747:9-20] without assessing the amount of water damage that was sustained at the home [T22943:4-8; T22583:17-T22584:11], and on April 19, 2006, Insurer issued a letter denying Sebo's claim. [TE 168]. Except for an offer to pay $50,000 for mold, Insurer stated "the balance of the damages to the house ... is not covered." [TE 168].

Sebo's Ongoing Investigation and Attempts to Remediate

Thereafter, Kobza followed a protocol that had been developed by Interscience to thoroughly investigate the home. [T1219:4-9]. Like Interscience and Usich, Kobza concluded that the water intrusion at various locations caused substantial damage to Sebo's home, including damage to the framing around the windows and doors, walls, roof, flooring, fasteners, nails and straps, and other structural elements. [T955:10-16; T973:1-3; T1430:16-22; T1439:11-25; T1445:5-9; T1469:16- T1470:8; T1695:18-T1696:8; T1744:13-23].

To remediate the water damage, Sebo needed to replace the roof, replace all the windows, and remove a majority of the drywall and ceilings, flooring, and subflooring along with "a lot of ... structural elements that were damaged by water." [T1391:1-T1392:1; TE 120]. Sebo was determined to repair his home rather than

demolish and rebuild it, and between March and June 2007, he submitted applications for permits to repair it. [T2420:9-T2422:13; TE 120]. However, the City of Naples rejected those applications because the cost of the repairs exceeded the 50% threshold imposed by FEMA. [T1178:4-T1179:25; T1184:9-T1185:4; T1186:24-T1187:23; TE 122]. With no other practical option, Sebo realized that he had to demolish his home.

Insurer's Ongoing Denial of the Claim

Throughout Sebo's investigation, Insurer was provided with access to Sebo's home and given opportunities to reconsider its coverage position. [T1862:25-T1869:8; T1879:8-T1903:4]. It was also provided with updated information about Sebo's experts' discoveries [T1893:25-T1903:4], updated projected cost estimates [T1879:8-T1893:24], and the City's rejection of the permit application to repair [T1893:4-24]. Instead of reconsidering its prior position on coverage, Insurer internally ordered its representatives to "stand down" and "stay clear of claims-related discussions." [T1891:10-T1893:9].

On May 12, 2008, Sebo renewed his claim and sent Insurer all relevant information including hundreds of pages of documents and photographs. [T1893:25-T1894:3]. Just three days later, Insurer again denied Sebo's claim, except for $50,000 for mold, dismissively stating "this concludes our handling of

this loss." [TE 127; T2493:5-8]. Sebo succinctly summarized his situation as follows: "I paid $50,000 for an all-risk Policy. I had a total loss, and they left me out to dry." [T2492:9-14].

At no time did Insurer ever (1) attempt to estimate the damages caused by water damage [T22943:4-8; T22583:17-T22584:11; T22690:10-19]; (2) attempt to determine whether the water damage occurred during the Policy period or outside the Policy period; or (3) attempt to determine the amount of damages that were excluded under the Policy. [T22499:21-T22501:8]. Insurer's denial letter explicitly denied the balance of Sebo's claims. [TE 168].

Sebo's Evidence at Trial

During the 3-week jury trial, Sebo offered substantial evidence to support his claim that there was no apparent water damage in his home prior to the Policy period and that there was massive water damage during the Policy period. While testifying about the pervasive damages caused by the water intrusion, Kobza acknowledged the existence of construction defects, but explained that "[i]f this house was in Arizona, in a drier climate, we may never even be talking about this." [T1383:14-T1384:1]. In order to repair the damage to the home caused by water, Kobza testified that Sebo would need to:

> ... put a new roof on it, replace all the windows, ... remove the majority of the drywall and ceilings, flooring, subflooring, ...
>
> You would have to replace a lot of damaged structural elements that were damaged by water ...
>
> You'd have to basically redo the electrical. Basically, everything we … denoted on that permit would have to be … redone. A substantial amount of work. [T1391:1-T1392:1].

Patrick Brannon, P.E., an expert hired by Sebo, independently supported Kobza's conclusions stating: "you can't just put back the stuff that was damaged by the water and weather. You need to come back and fix it all and bring it back up into code." [T2028:19-T2039:2]. Brannon testified that the total amount of damages suffered by Sebo was $11,653,931. [TE 151]. Brannon also testified that if the City had allowed Sebo to repair the home (which it did not do) he would have spent $4,430,831.29 just to fix "water/weather related" problems. [T2084:12-14; T2045:23-T2047:8; T2074:14-T2076:13].

Insurer's agent, Tomlinson, testified that the "replacement cost" of Sebo's home, based upon Insurer's definition, was $7,635,000. [TE 51; T22624:3-5; T22667:11-T22668:2; T22623:13-T22624:1]. An appraiser testified that the home had a rental value of $30,000 per month, so from March 1, 2006 through January 1, 2010 (45 months), Sebo had loss of use damages in the sum of $1,350,000. [T1989:10-T1992:9].

Insurer's Trial Strategy

Throughout the trial, Insurer repeatedly asserted the position that Sebo never filed a "claim" under the Policy. [T22943:4-8; T22497:10-15; T22501:9-12; T22509:3-22; T22529:12-23; T22533:16-T22534:4; T22615:2-6; R 18617-18629]. Insurer decided to pursue this strategy even though Insurer's files contained repeated references to receiving the claim, [TE 171], investigating the claim [T3197:3-13; T22577:16-T22578:3; T22585:13-18; T22589:19-T22590:4; T22636:16-25], rejecting the claim [TE 168], and the possibility of reopening the claim. [T2485:2-4]. Even Insurer's lawyer called it a "claim". [T22565:2-T22566:3].

Significantly, Insurer admitted during closing argument that:

> We know there was damage out there. We know – we saw pictures of water stains. We don't know how much it's worth but we saw pictures of water stains. We heard about peeling paint. We saw pictures of peeling paint. We know there was damage. [T3379:21-25].

However, notwithstanding this admission, Insurer did not call any witnesses to quantify the damages resulting from water intrusion [T22943:4-8; T22583:17-T22584:11; T22690:10-19], and Insurer never attempted to allocate any damages which might have been excluded by the Policy. [T22499:21-T22501:8].

The Jury Instructions, Verdict and Judgment

The Trial Court instructed the jury pursuant to *Wallach*. [R 18617-18629]. Insurer did not submit jury instructions advocating the "efficient proximate

causation theory." [R 18188-18239; R 18594-18610]. On March 3, 2010, the jury rendered a verdict in favor of Sebo, specifically finding that he had sustained "a loss within the terms of the all-risks homeowner's insurance policy" and suffered substantial damages "as a result of physical damage from water intrusion" prior to Hurricane Wilma, as well as damages "as a result of Hurricane Wilma." [R 18641-18642]. The Trial Court entered a Final Judgment [R 21138-21146] on July 19, 2010, and an Amended Final Declaratory Judgment on November 10, 2011, incorporating the verdict and finding that Insurer breached the Policy and that Sebo's home "is deemed a constructive total loss." [R 21578A-21578I].

The Appeal

Having gambled and lost on its strategy of trying to convince the Jury that there was no claim, Insurer appealed to the Second District. On appeal, Insurer argued that the Concurrent Cause Doctrine should not be applied because the faulty construction and rain were intertwined or dependent, rather than independent, causes of loss. [IB 25]. Insurer did not argue that the Concurrent Cause Doctrine should be abolished in favor of the "efficient proximate causation theory." Insurer did not raise any other exclusions, other than the Defective Construction Exclusion, in its briefing to the Second District. [Id.].

After the Second District issued its opinion, Sebo filed a Motion for Rehearing, arguing that Insurer had not preserved for review the specific basis upon which the Second District reversed. Sebo also filed a Motion for Certification of Conflict and Certification of a Question of Great Public Importance to the Florida Supreme Court based on conflict between the Second District's opinion and *Wallach*. The Second District issued an order denying Sebo's Motion for Rehearing and Motion for Certification. The Second District also entered an order conditionally granting appellate fees to Insurer. Subsequently, the Trial Court entered an Amended Order Granting [Insurer's] Motion to Tax Appellate Costs and Final Costs Judgment. (The court filings and orders referenced in this paragraph are all attached to a Motion to Supplement the Record being filed contemporaneously with this brief.) Sebo timely sought jurisdiction of this Court, and this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The verdict and judgment in the Trial Court were based, in part, on the Concurrent Cause Doctrine established long ago by *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988) *rev. denied* 526 So. 2d 246 (Fla. 1988). In reversing the Trial Court's judgment in this case, the Second District stated, "we disagree with *Wallach's* determination that the concurrent cause doctrine should be applied in a case involving multiple perils and a first party insurance policy" and explained that it preferred to follow the "efficient proximate cause" theory set forth in a California case, *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395 (1989), even though *Garvey* "was underpinned by a California statute" and "Florida does not have such a legislative mandate." *American Home Assurance Co., Inc. v. Sebo*, 141 So. 3d 195 (Fla. 2d DCA 2014). This Court should reverse the Second District's decision for the following reasons.

First, *Wallach* is based upon – and it is completely consistent with – rules of construction that have been vetted and applied by Florida's courts, including this Court, for decades in cases involving "all-risk" policies. Prior to the Second District's decision in this case, no Florida court had criticized *Wallach*, every Florida appellate court had cited it, and two federal judges had praised its "sound reasoning" and "better reasoned analytical framework for determining the exclusionary policy construction." *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D.

Fla. 2002) and *Fid. & Cas. Co. of New York v. Lodwick*, 126 F. Supp. 2d 1375 (S.D. Fla. 2000).

The praise and lack of criticism are unsurprising because *Wallach* is based upon "well-established" precedents; it is consistent with longstanding rules of contract construction; it is well-reasoned; it protects consumers and their homes; and it presents no unmanageable risk to insurers because they can draft policies to avoid the Concurrent Cause Doctrine whenever they wish to do so. Accordingly, *Wallach*, which has been followed by trial courts throughout Florida for over twenty-five years, should be retained pursuant to the principles, policies and logic that underpin the doctrine of *stare decisis*.

The Second District, expressing concerns that the Concurrent Cause Doctrine might lead to coverage clauses "nullifying" exclusions, rejected *Wallach*, abolished the Concurrent Cause Doctrine and replaced it with the "efficient proximate cause theory," even though: (a) no party had even suggested, let alone argued, that the Concurrent Cause Doctrine should be abolished; (b) any insurer concerned about an exclusion being "nullified" by the Concurrent Cause Doctrine could merely add "anti-concurrent cause" language to avoid its application (just as Insurer did with regard to Sebo's Pollution exclusion); (c) the "efficient proximate cause theory" introduces a tort-based concept of determining and allocating percentages of

causation, to identify the primary cause of a loss, contrary to this Court's prior declaration in *Prudential Prop. and Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993) that "tort law principles do not control judicial construction of insurance contracts"; and (d) the "efficient proximate cause theory," when applied to "independent causes," would allow insurers to avoid paying for losses that are otherwise covered by "all-risks" policies, which is contrary to all of Florida's longstanding rules of construction.

The focus of this case must be on the specific language of Sebo's Policy and the "well-established" rules that Florida has followed for more than a century for interpreting insurance policies. Those rules, applied to the specific terms of Sebo's Policy, establish that the Policy was intended to and does cover losses resulting from the concurrent causes of construction defects, wind and rain – with or without consideration of the Concurrent Cause Doctrine, which merely embodies and applies those "well-established" rules.

This conclusion is confirmed by two cases, which are materially indistinguishable from the present case, decided by courts from jurisdictions that use rules of construction similar to Florida's but do not use the Concurrent Cause Doctrine. *McGrath v. American Family Mut. Ins. Co.*, 2008 WL 4531373 (N.D. Ill. 2008) and *Buscher v. Economy Premier Assur. Co.*, 2006 WL 268781 (D. Minn.

Feb. 1, 2006). The results of these cases demonstrate that the Concurrent Cause Doctrine is, in essence, a specific application of the general rule requiring exclusions in "all risks" policies to be strictly and narrowly construed against the insurer who drafted the policy.

If this case were to be retried pursuant to the "efficient proximate cause theory," as contemplated by the Second District's opinion, it is possible that a second jury, like the first jury, would conclude that millions of dollars of damages to Sebo's home were caused by wind and rain, which are "covered" causes. However, if that jury also determined that slightly more damages were caused, primarily, by construction defects, the jury might render a verdict in favor of Insurer, which would permit Insurer to completely avoid paying any damages, even damages resulting from causes that are clearly covered by the Policy. Such a result would be grossly unfair and completely inconsistent with the "well-established principles of insurance contract interpretation" applicable to "all risks" policies, as set forth by this Court in *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082 (Fla. 2005). There is no need for such a seismic shift in Florida law.

Finally, the argument that the Concurrent Cause Doctrine should be abolished, which forms the basis of the Second District's opinion, was not made to the Trial Court or to the Second District, so the argument was not preserved for appellate

review. *Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010). Moreover, the fact that the issue was not briefed or argued before the Second District elevates the lack of preservation to a constitutional issue, "as it is well settled that an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process." *SPCA Wildlife Care Center v. Abraham*, 75 So. 3d 1271 (Fla. 4th DCA 2011).

For all of these reasons, the Second District's decision should be reversed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY APPLIED THE CONCURRENT CAUSE DOCTRINE, WHICH IS BASED ON "WELL-ESTABLISHED" RULES OF CONSTRUCTION, SOUND LOGIC AND GOOD POLICY, AND THERE IS NO VALID REASON FOR THE SECOND DISTRICT'S ABOLITION OF THAT DOCTRINE, WHICH HAS GUIDED COURTS, JURORS, ATTORNEYS, INSURERS AND POLICYHOLDERS FOR MORE THAN A QUARTER OF A CENTURY.

A. Standard of Review

The standard of review for questions of law, including the interpretation of insurance contracts, is *de novo*. *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082 (Fla. 2005).

B. Background: the Issue Presented by Sebo's Policy.

Sebo's Policy is an "all risks" Policy which provides extremely broad coverage. The specific wording of the coverage clause is as follows:

> A. Insuring Agreement.
> This policy covers you against ***all risks*** of physical loss or damage to your house, contents and other permanent structures ***unless an exclusion applies***.

[APP 1.7]. (emphasis added).

The evidence established that the damage to Sebo's home resulted from the combined and concurrent causes of rain, wind and construction defects. These "risks" are covered by the clear wording of the "all-risks" Policy unless "an exclusion applies." There is no exclusion for wind, and there is no exclusion for

rain. In fact, the sixteenth exclusion in the Policy, titled "Temperature or Dampness" specifically states that: "This exclusion does not apply to loss caused directly by rain ...." [APP 1.14]. Thus, two of the three risks involved, rain and wind, are covered by Sebo's "all-risks" Policy.

However, there is an exclusion for defective construction. Specifically, the eighth exclusion in the Policy, which is referred to throughout this brief as the Defective Construction Exclusion, provides as follows:

> 8. Faulty, Inadequate or Defective Planning
> We do not cover any loss caused by faulty, inadequate or defective:
> a. Planning, zoning, development, surveying, siting;
> b. Design, specification, 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.

[APP 1.13]. Sebo acknowledged throughout the trial that construction defects were one of the causes of some of his damages. Conversely, the Insurer's agents, including Usich, Tomlinson and Pack, acknowledged that Sebo's home had significant damage from weather-related events, including "sustained rainfalls associated with the 2005 hurricane season," as discussed in pages 4 and 5 of the Statement of Facts.

Thus, the issue presented is whether coverage exists under Sebo's "all risks" Policy when a loss is caused by concurrent causes, at least one of which is covered by the Policy and at least one of which is excluded by the Policy. This is an extremely common issue in the world of insurance, and many insurers include "anti-concurrent cause" language in exclusions in order to communicate to the policyholder that losses caused concurrently by a covered cause and an excluded cause will not be covered. In fact, Insurer included such "anti-concurrent cause" language in the very first exclusion in Sebo's Policy titled "Pollution or Contamination," which states:

> We do not cover any loss, directly or indirectly, and ***regardless of any cause or event contributing concurrently*** or in any sequence to the loss, caused by the discharge, dispersal, seepage, migration or release or escape of pollutants.

[APP 1.12]. (emphasis added).

While there was no claim in this case that the "Pollution or Contamination" exclusion applied to any of Sebo's claims, the exclusion is extremely important because it demonstrates that insurers can and do include "anti-concurrent cause" language in policies when they wish to do so. In sharp and dramatic contrast to that exclusion, the Defective Construction Exclusion, which is at issue in this case, *contains no "anti-concurrent cause" language*. This fact is undisputed, and the Second District's opinion in *Sebo* acknowledged this by stating:

> Contrasted with the other exclusionary clauses in the same policy, AHAC's Defective Work Exclusions simply did not exclude losses arising from concurrent causes.

American Home Assurance Co., Inc. v. Sebo, 141 So. 3d 195, 202 (Fla. 2d DCA 2014).

The absence of "anti-concurrent cause" language in the Defect Construction Exclusion, along with the specific words that are used in that exclusion, and the broad "all-risks" coverage clause are critically important in this case, as are the rules that Florida has developed for more than a century for interpreting insurance policies.

C. Florida's "Well-Established" Rules for Interpreting Insurance Contracts.

More than a century ago, this Court explained that the "rule for the interpretation of insurance contracts" is that:

> In all cases the policy must be liberally construed in favor of the insured, so as not to defeat without plain necessity his claim to the indemnity, which in making the insurance it was his object to secure.

L'Engle v. Scottish Union & Nat. Fire Ins. Co., 48 Fla. 82, 37 So. 462 (Fla. 1904). More recently, in *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 950 (Fla. 2013), this Court explained:

> As we stated in *Berkshire Life Insurance Co. v. Adelberg*, 698 So. 2d 828 (Fla. 1997), "[i]t 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 construed liberally in favor of the insured and strictly against the insurer." *Id.* at 830. Thus where, as here, one reasonable interpretation of the policy provisions would provide coverage, that is the construction which must be adopted.

The rule that all insurance policies must be liberally construed in favor of the insured has special force when dealing with an "all risks" policy. In a case decided more than forty years ago, which has been cited with approval by this Court, the Fourth District Court of Appeal concluded that:

> The very nature of the term "all risks" must be given a broad and comprehensive meaning as to the covering of any loss other than a willful and fraudulent act of the insured.

Phoenix Ins. Co. v. Branch, 234 So. 2d 396 (Fla. 4th DCA 1970). The court in *Phoenix* cited 13 Couch on Insurance 2d, §48.138 (1965) for the following proposition:

> Such a policy is to be considered as creating a special type of coverage extending to risks not usually covered under other insurance, and ***recovery under the "all risk" policy will as a rule be allowed for all fortuitous losses not resulting from misconduct or fraud*** unless the policy contains a specific provision expressly excluding the loss from coverage. (emphasis added).

In *Fayad*, this Court cited *Phoenix* with approval and restated the general rule applicable to an "all risk" policy as follows:

> Unless the policy expressly excludes the loss from coverage, this type of policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts.

Fayad, 899 So. 2d 1082. In *Fayad*, this Court went on to explain that in deciding "whether an all risk policy excludes coverage for an insured's claimed damages, we are guided by "well-established" principles of insurance contract interpretation," including the following:

- "We begin with the guiding principle that insurance contracts are construed in accordance with 'the plain language of the polic[y] as bargained for by the parties.'"
- "However, if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous."
- "Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured."
- "Further, ambiguous 'exclusionary clauses are construed even more strictly against the insurer than coverage clauses.'"
- "Thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy."

Id.

One other important rule applicable to "all risks" policies is set forth in *Hudson v. Prudential Prop. and Cas. Ins. Co.*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984) as follows:

> Once the insured establishes a loss apparently within the terms of an "all risks" policy, the burden shifts to the insurer to prove that the loss arose from a cause which is excepted.

How should these rules be applied when a loss results from concurrent causes, at least one of which is excluded and at least one of which is covered, when the applicable exclusion contains no "anti-concurrent cause" language?

D. The *Wallach* Decision

In *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988) *rev. denied* 526 So. 2d 246 (Fla. 1988), the Third District Court of Appeal considered what rule to apply "where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy." Significantly, in considering this issue, the court noted that:

> There is no contention here that the policy contains a provision which specifically excludes coverage where a covered and excluded cause combine to produce a loss.

Id. at 1388. The court in *Wallach* concluded as follows:

> We … adopt what we think is 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." 11 G. Couch, *Couch on Insurance 2d* §44:268 (rev. ed. 1982).

Id. at 1387-1388.

In arriving at this holding, which is referred to throughout this brief as "the Concurrent Cause Doctrine," the Third District noted that the "prime or efficient cause" theory "offers little analytical support where it can be said that but for the

joinder of two independent causes the loss would not have occurred," and the court explained its preference for the Concurrent Cause Doctrine with the following example:

> Where 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. at 1388. This example is precisely on point in the present case, as Sebo's loss resulted from "weather perils" (wind and rain) combined with "human negligence" (negligent construction).

E. *Wallach* is Based Upon Longstanding and "Well-Established" Florida Precedents.

The insurance policy in *Wallach*, like Sebo's Policy, was an "all-risk" policy, and the Third District cited *Phoenix* for the proposition that, "[t]he "term *all-risk* is given a broad and comprehensive meaning." *Id.* (emphasis in original). The court also quoted *Phoenix* for the following explanation of "all-risk" policies:

> An all-risk policy provides "a special type of coverage extending to risks not usually covered under other insurance" and ***coverage is available for all loss not resulting from the insured's willful misconduct or fraud*** unless the policy contains "a specific provision expressly excluding the loss from coverage."

Id. (emphasis added).

The court in *Wallach* relied upon a precedent from the Second District, *Hudson*, for the proposition that: "[o]nce the insured establishes a loss that appears

to be within the terms of the all-risk policy, the burden is on the insurer to prove that the loss was caused by an excluded risk." *Id*.

In addition, the court in *Wallach* cited to precedents from this Court for the "well-established" rules requiring strict construction of exclusionary clauses and construction of ambiguities against the insurer, explaining:

> Starting with the well-settled law in Florida that exclusionary clauses are construed more strictly that coverage clauses, *Demshar v. AAACon Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976), the insurer's burden is even heavier under an all-risk policy. Further, exclusionary clauses that are uncertain in meaning are construed in favor of the insured. *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986).

Id. at 1389. (parenthetical omitted). Thus, *Wallach* is based on well-settled rules of construction and longstanding Florida precedents.

F. The Limited Applicability of *Wallach* and the Concurrent Cause Doctrine in Florida.

Wallach and the Concurrent Cause Doctrine presently apply only to situations in which the "concurring causes" are "independent" rather than "dependent." This distinction is explained in *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312, 1319 (M.D. Fla. 2002), as follows:

> The concurrent cause doctrine and efficient proximate cause doctrine are not mutually exclusive. Rather, they apply to distinct factual situations. *The concurrent cause doctrine applies when multiple causes are independent.* The efficient proximate cause doctrine applies when the perils are dependent. Causes are independent when they are unrelated such as an earthquake and a lightning strike, or a windstorm

> and wood rot. Causes are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire. (emphasis added).

Whether concurrent causes are "dependent" or "independent" depends on their origins. If the two causes have independent origins, they are deemed to be independent for purposes of determining whether to apply the Concurrent Cause Doctrine. The example used in *Wallach* to illustrate "independent" causes is "*where weather perils combine with human negligence to cause a loss*," *Wallach*, 527 So. 2d at 1388 (emphasis added), and *Wallach* cited *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 555 (9th Cir. 1982), which explains:

> We believe Safeco misconceives what the Partridge court meant by "independent concurrent causes." As the Policyholder's note, the twin causes in Partridge ***were independent only in the sense that each cause had an independent origin, not that they did not interact with one another to cause the loss***. (emphasis added).

In the present case, the Trial Court applied *Wallach's* Concurrent Cause Doctrine because Sebo's loss resulted from two causes with independent origins that interacted with one another to cause the loss. [R 18176-18185]. More specifically, the origin of the construction defects was "human negligence" and the origin of the wind and rain (the "weather perils") was nature. In the words of the Trial Court, "the defective construction was neither directly 'caused by' nor the genesis of the rain." [R 18176-18185].

Thus, while *Wallach's* Concurrent Cause Doctrine currently has limited applicability, the concurrent causes in the present case, the wind and rain and the construction defects, had independent origins and are exactly the same causes that the court in *Wallach* used to illustrate "independent causes," so the Trial Court properly applied the Concurrent Cause Doctrine.

G. The Second District's Opinion

In reversing the Trial Court's judgment, the Second District stated that "we disagree with *Wallach's* determination that the Concurrent Cause Doctrine should be applied in a case involving multiple perils and a first party insurance policy" and explained that it preferred to follow the "efficient proximate cause" theory set forth in a California case, *Garvey v. State Farm Fire & Cas. Co*., 48 Cal. 3d 395 (1989), even though *Garvey* "was underpinned by a California statute" and "Florida does not have such a legislative mandate." *Sebo*, 141 So.3d 195.

The Second District attempted to justify its decision to reject long-standing Florida law by expressing concern that exclusions in all-risk policies might be overtaken by coverage provisions, explaining that: "taken to its extreme, the concurrent causation theory might have this policy [i.e., Sebo's all-risk manuscript Policy] cover flood damage in a hurricane when only a minor portion of the damages was caused by the covered peril of rain." *Id.* at 201.

There are several problems with the Second District's reasoning. First and foremost, no evidence was presented to suggest that the Concurrent Cause Doctrine has led to extreme results such as the one suggested or has otherwise caused unfair or unmanageable problems for insurers in Florida during the last twenty-five years or in any of the other states that have adopted the Concurrent Cause Doctrine.[1] Second, if an insurer is concerned about an exclusion being "nullified" by coverage provisions, all it has to do is add "anti-concurrent cause" language to the exclusion, just as the Insurer did in the "Pollution and Contamination" exclusion in Sebo's Policy. [APP 1.12]. Third, the Second District's theoretical concern about coverage language overshadowing exclusion language is inconsistent with longstanding Florida precedents requiring exclusionary clauses to be more strictly construed than coverage clauses, particularly when an "all-risk" policy is involved. *Wallach*, 527

[1]A significant number of other jurisdictions have chosen to follow a concurrent cause doctrine similar to the rule in *Wallach*, including: **Illinois**: *Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156 (Ill. App. Ct. 1983); **Minnesota**: *Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917 (Minn. 1983), followed by *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 63, 65 (Minn. 1992); **Missouri**: *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1269 (W.D. Mo. 1997); **New Jersey**: *Salem Group v. Oliver*, 607 A.2d 138, 140 (N.J. 1992); **Tennessee**: *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 887-88 (Tenn. 1991), followed by *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 906-07 (W.D. Tenn. 2001); **Wisconsin**: *Lawver v. Boling*, 238 N.W.2d 514, 520 (Wis. 1976); **Ohio**: *U.S. Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 716 N.E.2d 1201, 1205-06 (Ohio Ct. App. 1998); **Texas**: *Guar. Nat. Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 137 (5th Cir. 1990); *Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 215 (Tex. App. 2003); **Vermont**: *Vt. State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667, 669-70 (Vt. 1997). The Supreme Court of Canada adopted the *Wallach* approach for Canadian insurance cases in *Derksen v. 539938 Ont. Ltd.*, [2001] 3 S.C.R. 398 (Can.).

So. 2d at 1389 (citing *Demshar v. AAACon Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla. 1976) and *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986)).

Furthermore, by replacing the Concurrent Cause Doctrine with the "efficient proximate cause" theory, the Second District has introduced a tort-based concept of determining and allocating percentages of causation among independent causes that combine to form a single loss, which could lead to additional litigation and which is at odds with this Court's decision in *Prudential Prop. and Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993):

> Florida law has long followed the general rule that ***tort law principles do not control judicial construction of insurance contracts***. Insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties. Ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. (emphasis added).

It is hard to imagine how the Concurrent Cause Doctrine could present unmanageable problems for the insurance industry, as suggested by the Second District's opinion, in light of the fact that insurers can draft around the Concurrent Cause Doctrine whenever they wish to do so. Nevertheless, if such a problem exists, evidence should be presented to a court or to the Florida legislature so that an informed determination could be made as to whether a change in Florida's insurance laws is warranted. But the Second District, which heard absolutely no argument for

or against the abolition of the Concurrent Cause Doctrine, should not have taken upon itself to make a fundamental change in Florida law that has existed for a quarter of a century and apply that fundamental change, *ex post facto,* to Sebo.

H. *Wallach* itself is a "Well-Established" Florida Precedent that Embodies Sound Logic and Good Policy.

Wallach has been the law of Florida for over twenty-five years. During those twenty-five years, this Court, every District Court of Appeal in Florida, every federal District Court in Florida, and the Eleventh Circuit Court of Appeals have all cited *Wallach*.[2] Prior to the Second District's decision in the present case, not a single Florida case had criticized *Wallach*, presumably because it is based upon "well-established" precedents; it is consistent with longstanding rules of contract construction; it is well-reasoned; it protects consumers and their homes; and it presents no unmanageable risk to insurers because they can draft policies to avoid the Concurrent Cause Doctrine whenever they wish to do so.

---

[2] *Fayad v. Clarendon Nat. Ins. Co*., 899 So. 2d 1082 (Fla. 2005); *Transamerica Ins. Co. v. Snell*, 627 So. 2d 1275 (Fla. 1st DCA 1993); *Warfel v. Universal Ins. Co. of N. Am.*, 36 So. 3d 136, 137 (Fla. 2d DCA 2010) app'd, 82 So. 3d 47 (Fla. 2012); *Triano v. State Farm Mut. Auto Ins. Co.*, 565 So. 2d 748 (Fla. 3d DCA 1990); *W. Best, Inc. v. Underwriters at Lloyds, London*, 655 So. 2d 1213 (Fla. 4th DCA 1995); *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963 (Fla. 5th DCA 1996)(in dissent); *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317 (11th Circ. 2005); *Ohio Gen. Ins. Co. v. Woods*, 1991 WL 6400067 (N.D. Fla. 1991); *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002); *Fid. & Cas. Co. of New York v. Lodwick*, 126 F. Supp. 2d 1375 (S.D. Fla. 2000).

When an insurer challenged the Concurrent Cause Doctrine in *Paulucci,* 190 F. Supp. 2d 1312, Judge Kevin Duffy rejected the very argument adopted by the Second District in the present case, saying: "I adhere to the *sound reasoning* of Florida's Third District Court of Appeal in *Wallach"* and "I am not persuaded by the Supreme Court of California's decision in *Garvey* ..."

Similarly, Judge Peter Fay, writing for a panel of judges (Susan Black and Stanley Marcus), cited and quoted *Wallach* with approval in *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc*., 420 F. 3d 1317, 1330 (11th Cir. 2005). Likewise, in *Fid. & Cas. Co. of New York v. Lodwick*, 126 F. Supp. 2d 1375 (S.D. Fla. 2000), Judge Daniel Hurley accepted "the concurrent causation approach as the *better reasoned analytical framework* for determining the exclusionary policy construction." (emphasis added).

I. The Concurrent Cause Doctrine, Established by *Wallach* Twenty-Five Years Ago, Should be Retained Based Upon the Policies, Principles and Logic that Underpin the Doctrine of *Stare Decisis*.

Florida law recognizes the importance of precedents and the need for predictability in our legal system. The doctrine of *stare decisis*, which is "grounded on the need for stability in the law," has been "a fundamental tenet of Anglo-American jurisprudence for centuries." *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003). While Sebo

acknowledges that the doctrine of *stare decisis* is not directly applicable (because *Wallach* was decided by the Third District Court of Appeal rather than the Second District, which rejected it), the policies, principles and logic underpinning *stare decisis* nevertheless apply because trial courts throughout Florida have been bound to follow *Wallach* for over twenty-five years. During that quarter of a century, consumers, insurers, lawyers, judges, jurors and businesses have relied upon and adjusted to the Concurrent Cause Doctrine that *Wallach* established.

In *North Florida*, this Court identified the following three questions to be considered before departing from an established precedent:

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without legal justification?

Id. at 637.

With regard to the first question, no evidence, whatsoever, was presented to either the Trial Court or the Second District that the Concurrent Cause Doctrine has "proved to be unworkable due to reliance on an impractical legal fiction." *Id.* Likewise, with regard to the third question, no evidence was presented that "the factual premises underlying" the decision in *Wallach* had "changed so drastically as

to leave the decision's central holding utterly without legal justification." *Id.* With regard to the second question, if the Second District's decision stands, there would be "serious injustice" to Sebo, who relied on the twenty-five-year-old law to prosecute and win a long and expensive lawsuit, and all purchasers of insurance policies may be impacted. *Id.*

"The presumption in favor of *stare decisis* is strong," *Id.* at 637-8, and there is no compelling reason in this case to depart from the "sound reasoning" set forth in *Wallach,* a quarter of a century ago, or to abolish the "better reasoned analytical framework for determining the exclusionary policy construction" as set forth in the Concurrent Cause Doctrine that *Wallach* established. *See Paulucci,* 190 F. Supp. 1312; *Lodwick,* 126 F. Supp. 2d 1375.

For all of these reasons, the Court should reverse the decision of the Second District, retain the Concurrent Cause Doctrine, and reinstate the Trial Court's Amended Final Declaratory Judgment.

II. PURSUANT TO FLORIDA'S "WELL-ESTABLISHED PRINCIPLES OF INSURANCE CONTRACT INTERPRETATION" APPLICABLE TO "ALL-RISKS" POLICIES, SEBO'S PARTICULAR MANUSCRIPT POLICY, AS DRAFTED BY THE INSURER, MUST BE INTERPRETED TO COVER DAMAGES RESULTING FROM CONCURRENT CAUSES OF WIND, RAIN AND CONSTRUCTION DEFECTS, WITH OR WITHOUT THE CONCURRENT CAUSE DOCTRINE.

A. Standard of Review

The standard of review for the interpretation of insurance contracts is *de novo*. *Fayad*, 899 So. 2d 1082.

B. Damages not "Clearly" Excluded are Covered

Sebo's "all risks" Policy covers "all risks" of damage to his home unless an exclusion applies. This coverage is to be interpreted broadly; any and all ambiguities are to be construed against the Insurer, and the Insurer "is held responsible for ***clearly setting forth*** what damages are excluded from coverage under the terms of the policy." *Id.* (emphasis added).

Does Sebo's Policy "clearly set forth" that damages to his home resulting from the concurrent causes of wind and rain (which are covered) and construction defects (which are not covered) are excluded? The answer is "No," and this is apparent when Florida's "well established principles of insurance contract interpretation," as set forth in *Fayad*, are applied to the particular language in Sebo's Policy. *Id*.

While the beginning point of this analysis is the coverage clause (which states that "all risks" are covered unless an exclusion applies), there are two additional key components to the analysis. The first of these key components is the use of the phrase "caused by" in the Defective Construction Exclusion, and the second is the absence of "anti-concurrent cause" language in the Defective Construction Exclusion. [APP 1.13]. As noted above in the Statement of Facts, Sebo's Policy is not a standard insurance services office ("ISO") HO 3 policy form. Rather, the Policy was written on a manuscript form. Insurer controlled the drafting of the Policy and acknowledged that "[i]t's a policy that we created that reads the way that we want it to read." [T22551: 19-22; T22552: 19-23].

C. *Buscher* and *McGrath* Demonstrate that the Damages are Covered by the Policy

The Defective Construction Exclusion provides, in pertinent part:

> 8. Faulty, inadequate or defective planning.
>
> We do not cover any loss ***caused by*** faulty, inadequate or defective: … construction.

[APP 1.13]. This Court has previously noted that the phrase "caused by," when used in an insurance policy, is not interpreted as broadly as other phrases such as "arising out of." *Garcia v. Federal Ins. Co.*, 969 So. 2d 288, 293 (Fla. 2007). The significance of this phrase in an insurance policy like the one purchased by Sebo is illustrated by the case of *Buscher v. Economy Premier Assurance Co.*, 2006 WL

268781 (D. Minn. 2006), in which the court interpreted an all-risk policy containing a defective construction exclusion, which provided that the policy does not:

> "[c]over loss to property insured by [the Policy] ***caused by*** one or more of the following: . . . . construction."

Buscher, 2006 WL 268781 at *4 (emphasis added). In interpreting this exclusion, which is materially identical to the Defective Construction Exclusion in Sebo's Policy, the *Buscher* court heard the following arguments:

> [insurer] interprets the construction defect exclusion to exclude any loss remotely connected to a construction defect, whether or not otherwise covered under the policy. According to Plaintiffs, however, the exclusion applies to "only that portion of the claim attributable to the defective construction i.e., the cost of making good faulty or defective workmanship, construction, etc. Therefore, the exclusion does not... serve as a basis for the denial of the interior water damage sustained by [Plaintiffs], even if that covered damage resulted or ensued from water penetrating the exterior building envelope due to defective construction."

Id. at *4-5. After considering these arguments, the court in *Buscher* held:

> ***[T]hat the construction defect exclusion does not exclude water damage resulting from a construction defect***. Nothing in the language of the construction defect exclusion indicates that it extends to any loss resulting, however remotely, from construction defects. The wording of ***the exclusion is limited to "loss to property... caused by***" construction defects. This is in contrast to some of the other exclusions in the policy which exclude, for example, "loss caused directly or indirectly...," and to the coverage provision of the policy which applies to "loss or damage."… There is no dispute that water damage is covered under the Policy. And the plain language of the construction defect exclusion applies to loss caused by the construction defect itself, not to other causes of loss otherwise covered under the Policy. ***Accordingly, the Court determines that the construction defect exclusion does not exclude coverage for otherwise covered water loss that may have some indirect relation to construction defects.***

Id. at *19 (citations omitted) (emphasis added). The holding in *Buscher* is completely consistent with Florida law and indistinguishable from the present case.

Similarly, *McGrath v. American Family MUI. Ins. Co.*, 2008 WL 4531373 at *9 (N.D. Ill. 2008), also involved an all-risk policy with a defective construction exclusion which provided:

> … [t]hat the [insurer] does 'not insure for loss ***caused by*** ... faulty, inadequate or defective construction ... [or] design.' (emphasis added).

As in *Buscher*, the insurer in *McGrath* claimed its defective construction exclusion barred claims for resulting water damage, and the court held:

> ***[w]e read the exclusion narrowly against [insurer] and find that the construction and design defects exclusion does not apply to [insured's] loss from moisture intrusion that occurred as a result of construction or design defects***.

Id. (citations omitted; emphasis added). *McGrath*, too, is indistinguishable from the present case. Neither *Buscher* nor *McGrath* relied upon the existence of an ensuing loss provision to support the availability of coverage, nor did the two cases rely upon either the Concurrent Cause Doctrine or the efficient proximate cause theory. Instead, these cases relied upon established rules of construction applicable to insurance policies, such as those relied upon in *Wallach*.

Buscher and *McGrath* demonstrate that the Concurrent Cause Doctrine is merely a specific application of the general rule requiring exclusions in "all-risks" policies to be narrowly and strictly construed against the insurer who drafted the

policy. Neither of the jurisdictions at issue in *Buscher* or *McGrath* have explicitly adopted the Concurrent Cause Doctrine. Nonetheless, both courts narrowly construed the exclusions at issue by applying insurance construction principles, along with *in pari materia* and *expression unius est exclusion alterius* canons. *See* Fla. Stat., §627.419 ("every insurance contract shall be construed according to the entirety of its terms and conditions. . . ."); *United States Fire Ins. Co. v. J.S.U.B.*, 979 So. 2d 871, 877 (Fla. 2007) (applying the *in pari materia* canon); and *Shumrak v. Broken Sound Club, Inc.*, 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005) (applying the expression *unius est exclusio alterius* or negative implication canon). The result should be no different under Florida's "well established" rules of policy interpretation set forth in *Fayad*, *supra*.

Buscher and *McGrath* establish that the use of the phrase "caused by" in the Defective Construction Exclusion is insufficient to exclude damages resulting from the concurrent causes of wind, rain and construction defects. *At a minimum*, those cases establish ambiguity in the Defective Construction Exclusion, as they, at least, establish one reasonable construction of ambiguous language. *See J.S.U.B., Inc.*, 979 So. 2d 871 (recognizing that conflicting interpretations of "occurrence" in a CGL policy meant that the term was, at a minimum, ambiguous); and *Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA

1981) (stating that the fact that courts have arrived at opposite conclusions on essentially the same language is "proof of [the] pudding" of ambiguity). The ambiguity, of course, must be construed against the Insurer. *Fayad*, 899 So. 2d 1082.

D. The Absence of "Anti-Concurrent Cause" Language Confirms that the Damages are Covered by the Policy.

In reaching its decision in *Wallach*, the Third District noted that: "[t]here is no contention here that the policy contains a provision which specifically excludes coverage where a covered and excluded cause combine to produce a loss." *Wallach*, 527 So. 2d at 1388. Many policies do contain provisions which specifically exclude coverage for such losses, and in *Paulucci*, Judge Kevin Duffy, applying Florida law, ruled that "anti-concurrent cause language" is valid and enforceable, explaining: "when a peril is concurrently caused by a covered and an excluded cause, coverage does not exist if the contract contains an anti-concurrent cause provision." *Paulucci*, 190 F. Supp. 2d at 1318. Thus, insurers in Florida may draft policies in a way that avoids the application of the Concurrent Cause Doctrine.

In drafting Sebo's Policy, Insurer, as noted above, included "anti-concurrent cause" language in the Policy's first exclusion related to Pollution but chose not to do so in the Defective Construction Exclusion. Insurer's decision to include "anti-concurrent cause" language in one exclusion, but not in the Defective Construction Exclusion – in a state that has recognized the Concurrent Cause Doctrine for more

than twenty-five years – should be viewed as confirmation that the Policy was intended to cover and does cover damages resulting from the concurrent causes of wind, rain and construction defects.

E. This Court's Decision in *Fayad* Establishes that the Damages are Covered by the Policy

In light of the broad coverage clause in Sebo's Policy, the use of the narrowly construed phrase "caused by" in the Defective Construction Exclusion, and the absence of "anti-concurrent cause" language in that exclusion, Sebo's Policy does not "clearly" exclude losses resulting from construction defects and a covered concurrent cause. In fact, the Second District's opinion specifically states that the Defective Construction Exclusion in Sebo's Policy "simply did not exclude losses arising from concurrent causes." *Sebo*, 141 So. 3d at 202.

Since "losses arising from concurrent causes" are not "clearly" excluded, they are covered, according to *Fayad*, *supra*. ("[T]he insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.") Accordingly, Florida's "well-established" principles of contract construction applicable to "all risks" policies, as set forth in *Fayad*, establish that Sebo's losses are covered by his Policy, even if the Concurrent Cause Doctrine is not considered in the analysis.

However, if this case were to be retried pursuant to the "efficient proximate cause theory," as contemplated by the Second District's opinion, it is possible that a second jury, like the first jury, would conclude that millions of dollars of damages to Sebo's home were caused by wind and rain, which are "covered" causes. If that jury also determined that slightly more damages were caused, primarily, by construction defects, the jury might render a verdict in favor of Insurer, permitting Insurer to completely avoid paying any damages, even damages resulting from causes that are clearly covered by the Policy.

Such a result would not be consistent with the terms of the insurance contract. It would not be fair, and it would not be consistent with the "well-established principles of insurance contract interpretation" applicable to "all risks" policies, as set forth by this Court in *Fayad,* 899 So. 2d 1082. In particular, such a result would violate: the rule requiring policies to be construed in favor of the policyholder and strictly against the insurer who drafted the policy; the rule requiring ambiguities to be resolved against the insurer; the rule requiring exclusionary clauses to be construed even more strictly against the insurer than coverage clauses; the rule requiring the phrase "all risks" to be interpreted broadly; and the rule requiring the insurer to "clearly set forth what damages are excluded from coverage." *Id.* If this Court were to affirm the Second District's opinion, it would be retreating from

Fayad and more than a century of jurisprudence upon which *Fayad* is based.

There is no need for such a seismic shift in Florida law, especially when insurers can avoid the application of the Concurrent Cause Doctrine whenever they choose by merely adding "anti-concurrent cause" language to their exclusions. Accordingly, this Court should reverse the Second District's decision, retain the Concurrent Cause Doctrine, and rule, as a matter of law, that the Policy covers losses resulting from the concurrent causes of rain, wind and construction defects.

III. THE ARGUMENT THAT THE CONCURRENT CAUSE DOCTRINE SHOULD BE ABANDONED WAS NOT MADE TO THE TRIAL COURT OR TO THE SECOND DISTRICT

A. Standard of Review

Questions involving preservation of errors for appeal are reviewed *de novo*. *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010).

B. Lack of Preservation

A threshold problem with the Second District's opinion is that no one argued in the Trial Court that the Concurrent Cause Doctrine should be abandoned. While Insurer claimed that the concurrent causes were dependent, rather than independent, and, therefore, argued that the efficient proximate cause theory should apply, Insurer never challenged the validity of the Concurrent Cause Doctrine or argued for its abolition. Because the Insurer did not make that argument, it was waived, and the Second District should not have considered it. "[T]o be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'" *Id*.

Insurer has suggested that it makes no difference *why* it argued for the application of the efficient proximate cause theory so long as it made some argument for its application. But the "why" – the grounds, the reasoning, the basis for the argument – is critical for the purposes of preservation. *Aills* makes this very point

by emphasizing that "the specific legal ground" upon which a claim is based must be raised at trial for preservation purposes. *Id*.

C. Violation of Due Process

Moreover, this preservation problem is compounded and elevated to a constitutional issue by the fact that no one argued in the Second District that the Concurrent Cause Doctrine should be abandoned. As a result, Sebo never had an opportunity – at either the Trial Court or the Second District – to respond to the argument. According to *SPCA Wildlife Care Center v. Abraham*, 75 So. 3d 1271 (Fla. 4th DCA 2011):

> Procedural due process requires both fair notice and a real opportunity to be heard. It is well settled that an order adjudicating issues not presented by the pleadings, noticed to the parties, or litigated below denies fundamental due process.

In this case, a multi-million dollar judgment was taken from Sebo with no due process. Because an argument to abolish the Concurrent Cause Doctrine, which forms the basis of the Second District's opinion, was not properly preserved in the trial court (and was not even discussed before the Second District), the Second District's decision should be reversed.

CONCLUSION

For all of the reasons set forth above, the decision of the Second District Court of Appeal should be reversed, the Concurrent Cause Doctrine should be retained, and the Trial Court's Amended Final Declaratory Judgment dated November 10, 2011 should be reinstated.

In an abundance of caution and to avoid any possibility of waiver, Sebo also asks this Court to vacate the Second District's Order dated September 18, 2013 conditionally granting Insurer's Motion for Appellate Attorneys' Fees, vacate the Second District's Order dated April 3, 2014 awarding appellate costs to Insurer, vacate the Trial Court's Order dated October 30, 2014 determining the amount of costs, and order Insurer to refund to Sebo all amounts paid pursuant to those Orders.

CHEFFY PASSIDOMO, P.A.
Counsel for Petitioner

By: */s/ Edward K. Cheffy*
Edward K. Cheffy
FBN: 393649
EKCheffy@NaplesLaw.com

David A. Zulian
FBN: 711012
DAZulian@NaplesLaw.com

Debbie Sines Crockett
FBN: 33706
DSCrockett@NaplesLaw.com

821 Fifth Avenue South, Suite 201
Naples, FL 34102
Telephone: (239) 261-9300

BOYLE, GENTILE & LEONARD, P.A.
Counsel for Petitioner

Mark A. Boyle
FBN: 0005886
MBoyle@BoyleGentileLaw.com
Geoffrey H. Gentile
FBN: 898562
Michael W. Leonard
FBN: 0855626
Amanda K. Anderson
FBN: 0091297
Molly A. Chafe
FBN: 105798

2050 McGregor Blvd.
Fort Myers, FL 33901
Telephone: (239) 337-1303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December, pursuant to Fla. R. Jud. Admin. 2.516, Administrative Order AOSC13-7, and AOSC 13-49, a true and correct copy hereof was electronically filed and will be served via the Florida Courts E-Filing Portal to: RAOUL G. CANTERO, ESQUIRE, DAVID P. DRAIGH, ESQUIRE and RYAN A. ULLOA, ESQUIRE (Counsel for American Home Assurance), White & Case, LLP, 2000 South Biscayne Blvd., Suite 4900, Miami, FL 33131-2352, rcantero@whitecase.com, ldominguez@whitecase.com, ddraigh@whitecase.com, mgaulding@whitecase.com, rulloa@whitecase.com, and miamilitigationfileroom@whitecase.com; ANTHONY RUSSO, ESQUIRE and EZEQUIEL LUGO, ESQUIRE, (Counsel for American Home Assurance), Butler Pappas Weihmuller Katz Craig LLP, 777 S. Harbour Island Boulevard Suite 500, Tampa, FL 33602-5729, arusso@butlerpappas.com, eservice@butlerpappas.com, and elugo@butlerpappas.com; and JANET L. BROWN, ESQUIRE and SUSAN B. HARWOOD, ESQUIRE (Co-Counsel for American Home Assurance), Boehm Brown Harwood, P.A., 1060 Maitland Center Commons Boulevard, Suite 365, Maitland, FL 32751, jbrown@boehmbrown.com and sbharwood@boehmbrown.com.

CHEFFY PASSIDOMO, P.A.
Counsel for Petitioner

By: */s/ Edward K. Cheffy*
Edward K. Cheffy
FBN: 393649
EKCheffy@NaplesLaw.com

David A. Zulian
FBN: 711012
DAZulian@NaplesLaw.com

Debbie Sines Crockett
FBN: 33706
DSCrockett@NaplesLaw.com

821 Fifth Avenue South, Suite 201
Naples, FL 34102
Telephone: (239) 261-9300
Facsimile: (239) 261-9782

BOYLE, GENTILE & LEONARD, P.A.
Counsel for Petitioner

Mark A. Boyle
FBN: 0005886
MBoyle@BoyleGentileLaw.com
Geoffrey H. Gentile
FBN: 898562
Michael W. Leonard
FBN: 0855626
Amanda K. Anderson
FBN: 0091297
Molly A. Chafe
FBN: 105798

2050 McGregor Blvd.
Fort Myers, FL 33901
Telephone: (239) 337-1303
Facsimile: (239) 337-7674

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is in Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

By: */s/ Edward K. Cheffy*
Edward K. Cheffy
FBN: 393649