IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-897

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

Petitioner,

vs.

AMERICAN HOME ASSURANCE COMPANY, INC.,

Respondent.
_____/

L.T. Case No.: 2D11-4063

ON DISCRETIONARY REVIEW OF A DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT, AMERICAN HOME ASSURANCE COMPANY, INC.

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STATEMENT OF THE CASE AND FACTS

The principal issue in this case is whether, under a property insurance contract with Respondent, American Home Assurance Co., Petitioner, John Robert Sebo, can recover the policy limits for the constructive total loss of an $11.2 million second home. It is undisputed that the house had pervasive construction defects (an excluded peril) that combined with rainfall to cause the loss. The dispute is what causation rule applies to such a first-party insurance dispute where multiple perils, at least one of them excluded, combine to cause a loss.

The Second DCA held that a jury should apply the efficient proximate cause rule to determine the most substantial cause of the loss. If that cause is covered, the loss is covered. The opinion aligns Florida with 38 other states and respects the distinction between first-party property insurance and third-party liability insurance. And Sebo is not left without a remedy. Indeed, he can—and did—sue a host of defendants for construction defects and building-code violations.

A. Facts Relevant to the Appeal

The Sebos live primarily in Salem, Ohio (T19. 2350-51). In April 2005, Sebo paid $11.2 million for a second house in Naples, Florida, built in 2001 by Paul and Sarah Jacobson (A. 196, 200; T19. 2389, 2392).[1] The property included a

[1] "R#. #" refers to the volume and page number of the record. "SR#. #" refers to the volume and page number of the supplemental record. "T#. #" refers to the volume and page number of the trial transcript. "A. #" refers to the page number

7,563-square-foot main house and a 3,423-square-foot guest house, "arranged around a courtyard with 'lush landscaping, six waterfalls[, a swimming pool,] and four koi ponds'" (A. 197, 321). The houses had "expansive areas of window and sliding glass door[s]"—more than 300 windows in all (*id.*; T6. 780). After closing on the house, the Sebos occupied it for less than a week before leaving it in the care of their property manager, Rebecca Thorngate, who was to oversee certain renovations and modifications (A. 200).

At the time of closing, Sebo bought a property insurance contract from American Home (the "Policy") (T19. 2392). The Policy covered Sebo "against all risks of physical loss or damage to your house, contents and other permanent structures unless an exclusion applies" (A. 171). The Policy excluded any loss or damage from "faulty, inadequate or defective: a. Planning, zoning, development, surveying, siting; b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; c. Materials used in repair, construction, renovation or remodeling; or d. Maintenance; of part or all of any property whether on or off the residence" (*id.* at 177).

Within days of the Policy's effective date, after some "typical summer rains," Ms. Thorngate noticed water stains and peeling paint in the garage (T4. 439-40), and water "run[ning] through the garage door" (*id.* at 453). Paint was

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of the appendix filed with this brief. The record cites for documents in the appendix are in the appendix table of contents.

peeling off the walls in the foyer, master bedroom, living room, and an upstairs bathroom (*id.* at 455-57, 461-62). By the end of May 2005, the house suffered from major water leaks and related problems (*id.* at 529), and by June 11, she had identified leaks in the main house in the foyer, living room, dining room, exercise room, master bathroom, and an upstairs bathroom (A. 351-56). She informed Sebo of these problems in a June 22 memo faxed to him the next day (T4. 468-71; A. 357-58). Continued summer rains revealed a "global[]" problem with the "whole house" (T4. 475-76). After an August rainstorm, for example, new paint along certain windows "just fell off the walls again" (*id.* at 476).

Sebo hired professionals to determine the cause of the water intrusion. They found the house plagued by "pervasive" design, installation, and construction defects that caused it to "leak[] like a sieve" (A. 228; T8. 1117; T10. 1328-29, 1330-31). They found design and construction defects in the roof, walls, windows, and deck of the house, which had existed "from the first day Sebo took possession of the [p]roperty" (A. 224; T7. 853).

The roof was "more conceptualized than properly designed and engineered" (A. 282). The underlay materials were poorly adhered to the roof decking and flashing was not sealed, allowing water to intrude and migrate through adjoining walls and lower-level ceilings (*id.* at 279). The asphalt between membranes was poorly applied, and "temporary repairs . . . [were] well below acceptable quality

level" (*id.* at 281). In short, there were "no simple or cost effective fixes or repairs that could possibly restore integrity or water tightness to [the roofing] system," which needed to be "completely rebuilt with the proper design, engineering, and material application that should have been used from the start" (*id.* at 282).

The exterior walls were covered in stucco, which absorbs water, but they were built "with very little moisture storage capability, and no provision for drainage to the exterior from behind the stucco system" (*id.* at 189). Thus, "[w]ater that penetrates past the stucco is held in the wall assembly or directed towards the interior," and the entire wall structure was "at [a] high risk for problems associated with moisture intrusion" (*id.* at 189).

The windows and sliding glass doors were another "systemic" problem (T7. 948). Also defectively manufactured and installed, the windows allowed further water intrusion into both the main and guest houses (T7. 948-49; T8. 967; T17. 2132; A. 189-90, 326-27). Their installation did not allow water that penetrated through or around them to drain to the exterior, so that "water leakage through the windows is directed into the structure" (*id.* at 189). The improper installation of the sliding glass doors created a "major source of water penetration into the floor construction of the first floor" (*id.* at 190). Again, these defects were present when the house was built (T8. 968).

When Hurricane Wilma hit in October 2005, it caused additional water intrusion (T4. 480-81; A. 203). The hurricane caused water to enter both lanais; the living, dining and family rooms of the main house; and various rooms in the guest house (T4. 498-99, 503-04).

More than six months after receiving Ms. Thorngate's memo describing extensive water intrusion, Sebo notified American Home of a potential claim (A. 359). In April 2006, American Home sent Sebo a letter stating that "we respectfully advise that there is partial coverage for the damages to the house. Specifically, we are able to provide the $50,000.00 Increased Ensuing Fungi, Wet or Dry Rot extra coverage. The balance of the damages to the house, including any window, door, or other repairs, is not covered" (R54. 9673-77). Thereafter, Sebo's investigators continued to evaluate the property, and in spring 2007 Sebo applied for a building permit to repair the house (T10. 1339-43). The City of Naples rejected his application because the proposed repairs exceeded 50 percent of the property's appraised value (T10. 1350-52; T19. 2421-22). Sebo demolished the house in summer 2008 and built a new one, which was completed by spring 2010 (T19. 2422-23; T9. 1221).

B. Course of Proceedings

Sebo filed this action in January 2007 (R1. 36-55). He claimed that the house was riddled with construction defects and building-code violations, and

alleged claims for negligence and building-code violations against many entities and individuals involved in designing and building the house: the general contractor and its qualifying agent (Mike Shipley Homes, Inc., and Mike Shipley); the architect (Frank Neubek); the company that built the windows (Twin Windows, Corp.); the Florida licensed contractor that installed the windows (Bruce Tansey Custom Carpentry, Inc.); the company that installed the sliding glass doors (Omni Track, Inc.); the company that installed the roof (RLK Construction Company of Naples, Inc.); and the company that installed the HVAC system (Wiegold & Sons, Inc.) (*id.* at 36-38). Sebo also sued the Jacobsons, who sold him the house, for failure to disclose the defects (*id.* at 41). He did *not* sue American Home.

Almost three years later—nearly five years after he bought the house and discovered water intrusion from its shoddy construction—Sebo amended his complaint, naming American Home as a defendant for the first time (A. 10-67; *see also id.* at 128-31). In a count for declaratory judgment—pleaded "as an alternative to the Counts plead [sic] against the other Defendants arising out of the latent construction defects discovered at the Property," and "limited to the damages to the Property and the Insured caused by weather-related problems, including but not limited to Hurricane Wilma, not caused solely by construction defects" (*id.* at 59)—Sebo alleged he was in doubt as to his rights, duties, and obligations after American Home denied his claim (*id.* at 60-62). American Home's answer

alleged, among other things, that the Policy "does not provide" or "limits" coverage for Sebo's claim "in accordance with the Faulty, Inadequate or Defective Planning Exclusion" (R62. 10768-77).

American Home moved for summary judgment, arguing, in part, that Sebo could not establish a covered loss under the Policy because his claimed damages were caused by the excluded peril of construction defects (R75. 13039-74). Sebo also filed two motions for summary judgment (R104. 18176-77). The trial court granted Sebo's motions and denied American Home's, ruling that damage to the Sebo residence was caused by "a combination of rain based water intrusion and construction defects" (A. 139, 143). It further ruled that Florida recognizes the Concurrent Cause Doctrine ("CCD"), under which a loss is fully covered "when a covered loss and an uncovered or excluded loss combine to cause" the loss (*id.* at 142 (citing *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988))).

The sole defendant at trial was American Home. On the first day, Sebo raised the fact that he had settled with many of the original defendants (T1. 7-8). The confidential settlement documents, which show the amounts that Sebo recovered from those defendants, are in the record under seal (SR9. 22817-24). Sebo argued that the existence and substance of the settlements were "irrelevant," but American Home argued that the settlements were highly relevant to whether Sebo's alleged damages were caused by rain or construction defects (T1. 7-8, 9-

10). The trial court deferred ruling but raised the issue the next morning (T3. 278-84). Relying on a 2009 Florida Supreme Court case (unidentified but likely *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078 (Fla. 2009)), the court excluded evidence of settlements with other defendants (*id.* at 278).

From the beginning of trial, counsel for Sebo conceded that "we all agree there were construction defects[, and w]e all agree that these construction defects occurred when the house was built. . . . We all agree with that" (*id.* at 372). And witness after Sebo witness testified about the defects. Indeed, about half of his witnesses testified about construction defects. These included three building contractors (T5. 647-745; T6. 748-836; T16. 2008-93); three engineers (T11. 1409-1563, 1563-69; T13. 1764-66); two building consultants (T7. 902-58; T12. 1666-1704); and a painter (T5. 598-647). Their testimony showed that the Sebo house was a "'disaster' based on Collier County standards" (T10. 1330-31).

The evidence also showed that the water intrusion was "due to faulty, inadequate, or defective construction" (T17. 2156-60). For example, it was the "systemic problem" arising from the windows and doors, which were "defective from the manufacturing and the installation," that ultimately "produce[d] water leakage into the home" (T7. 948-49). Sebo's witnesses had "no idea" when exactly the water intrusion occurred (T10. 1247-48), acknowledging that it "would be very difficult" to determine the amount of water intrusion that was already

present when Sebo bought the house (*id.* at 1345). Sebo's counsel summarized the evidence as proving that the Sebo house "had water coming in through windows, doors, and the roof" (T25. 3340). At the close of trial, the court instructed the jury consistent with its rulings on summary judgment (*id.* 3321-27).

The jury returned a verdict for over $15 million, including $7,680,000 for "physical damage from water intrusion from the initial rain-based water intrusion," which in turn included $6,000,000 for "Repair/Reconstruction of house" (A. 144-45). As to "wind and/or water damage suffered as a result of Hurricane Wilma," the jury found only $30,600 (which is below the Policy deductible and which Sebo did not challenge on appeal) (*id.* at 145, 163). Nevertheless, the jury found damages of $7,710,600 for "Loss of Use" from Hurricane Wilma and the initial rain-based water intrusion (*id.* at 145). The jury found that the "time period" of the initial rain-based water intrusion was April 19 to October 23, 2005 (*id.* at 144). As to the issue of constructive total loss, the jury found that "the FEMA threshold that represented 50% of the value of the insured premises" was $3,400,000 (*id.* at 145).

After deciding post-trial motions, the trial court entered its amended final declaratory judgment in Sebo's favor (*id.* at 146-50). The court "incorporate[d] by reference" the jury's verdict form and the court's "findings of law and holdings in its" summary judgment order—including that Sebo's loss was due to a "combination of rain based water intrusion and construction defects" and that the

CCD applies here (*id.* at 139, 142, 147). The trial court ruled that Sebo made a claim to American Home for damages from: (1) the initial rain event, "which was deemed [by the jury] to [have] take[n] place from April 19, 2005 through October 23, 2005"; and (2) Hurricane Wilma, which "occurred on or about October 24, 2005" (*id.* at 148). The trial court also ruled that American Home breached its insurance contract with Sebo, and that the "Sebo residence is deemed a constructive total loss" (*id.*). The trial court awarded Sebo $8,070,000, including the policy limits of $6,600,000 for the constructive total loss of the house and $1,470,000 for loss of use (*id.*). American Home timely appealed (R1. 10-20).

C. Disposition in the Second DCA

The Second DCA held that it was error to apply the CCD to "a case involving multiple perils and a first-party insurance policy." *Am. Home Assurance Co. v. Sebo*, 141 So. 3d 195, 198 (Fla. 2d DCA 2013). The court disagreed with the holding in *Wallach*, 527 So. 2d 1386, because *Wallach* ignores the "important distinction between property loss coverage and tort liability coverage." *Id.* at 199.

Indeed, the court held that "Property insurance is a contract between the insured and the insurer to cover property losses that are either caused by certain perils that are specifically named in the policy or are caused by 'all perils' except for those specifically excluded from coverage," and that "[a]n insured's reasonable expectations of coverage under the policy cannot reasonably include an

expectation of coverage in which the efficient proximate cause of the loss"—*i.e.*, "the most substantial or responsible factor in the loss"—"is an activity expressly *excluded* under the policy." *Id.* at 198-200 (alteration and internal quotation marks omitted; emphasis in original). The court found that the flaw in *Wallach* is that "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy." *Id.* at 201. Thus, the "coverage analysis in first-party claims, the subject of a contract between parties, should be decided on the basis of the contract: if the efficient proximate cause of the loss is a covered peril, the losses are covered; if it is an excluded peril, the losses are not covered." *Id.* The court reversed and remanded the case for a new trial in which the trial court should apply the efficient proximate cause doctrine ("EPC") to determine if Sebo's loss is covered under the Policy. *See id.*

The Second DCA also addressed the excluded evidence of settlements with the original defendants, holding that, under *Citizens Property Insurance Corp. v. Ashe*, 50 So. 3d 645 (Fla. 1st DCA 2010), American Home "should be allowed [on retrial] to introduce evidence that Sebo had settled claims for faulty construction and design with some of [American Home]'s former codefendants," because *Ashe* "ruled that evidence of benefits received for an uncovered peril was relevant to the issue of [which peril] caused the total loss of the home, and [] was therefore

admissible at trial." 141 So. 3d at 202-03 (citing *Ashe*, 50 So. 3d at 652). As such, the court "[left] all issues related to valued policy law, including the admissibility of benefits Sebo received from codefendants, to be clarified on retrial." *Id.* at 203. The court did not address American Home's other issues on appeal because "[t]he parties are free to again raise these issues in the circuit court to the extent that they may still be applicable at the retrial." *Id.*

D. Standard of Review

Whether to apply the CCD is a question of law reviewed de novo. *See D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). The interpretation of an insurance policy also is reviewed de novo. *See Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1005 (Fla. 2010). A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion. *See Baker v. State*, 71 So. 3d 802, 816 (Fla. 2011); *Shearon v. Sullivan*, 821 So. 2d 1222, 1225 (Fla. 1st DCA 2002).

SUMMARY OF ARGUMENT

The Second DCA properly reversed and remanded for retrial under the EPC. The CCD applies to third-party liability insurance disputes, but applying it to first-party disputes would nullify exclusions like the construction-defect exclusion. The EPC, however, gives effect to the expectations of parties contracting for insurance. Moreover, the CCD is not the law of Florida and is, by far, the minority rule. At

least 38 states follow the EPC rule in first-party disputes, and only three states (other than Florida in *Wallach*) have applied the CCD in the first-party context.

This Court also may approve the Second DCA's decision on other grounds. First, as Sebo concedes, the CCD only applies when the multiple perils are independent. Here, rain and the excluded peril of construction defects are *dependent* causes. Ordinary rain never would have caused damage but for the construction defects. Second, the Policy's plain language precludes coverage for Sebo's damages. Third, the trial court abused its discretion by excluding evidence that Sebo settled his claims against the original defendants in this action, all of whom were sued for construction defects. Although the trial court found that Sebo's house was a constructive total loss and awarded him the policy limits, Florida's valued policy law provides that Sebo is only entitled to those policy limits if he proves that the constructive total loss was entirely caused by a covered peril. Here, Sebo did not make that showing (and the jury did not make such a finding); and the trial court improperly excluded evidence of Sebo's construction-defect settlements, which were highly relevant to whether his constructive total loss was due entirely to a covered peril.

ARGUMENT

I. THE SECOND DCA PROPERLY APPLIED THE EFFICIENT PROXIMATE CAUSE RULE, BECAUSE IT IS A WORKABLE RULE THAT PROVIDES A FAIR RESULT WITHIN THE CONTRACTING PARTIES' EXPECTATIONS

Sebo argues at length that "all risks" insurance contracts "must be liberally construed in favor of the insured" and "given a broad and comprehensive meaning" as to coverage, whereas exclusionary clauses must be construed "more strictly" (br. at 21-23, 29-30, 42-43). But he does not dispute that the Policy clearly excluded loss from construction and design defects, and he "acknowledged throughout the trial that construction defects were one of the causes of his damages" (*id.* at 19). And his own authority shows that, under Florida law, "an 'all-risk' policy is not an 'all loss' policy, and thus does not extend coverage for every conceivable loss." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1086 (Fla. 2005). Indeed, he concedes (br. at 22) that an all-risk policy provides coverage "[*u*]*nless* the policy expressly excludes the loss from coverage." *Fayad*, 899 So. 2d at 1085 (emphasis supplied).

As we show below, (A) the CCD does not apply in the first-party property insurance context, and 38 states apply the EPC in such cases; (B) the CCD is not the law of Florida; (C) the parties preserved the issue of whether this case is governed by the CCD or the EPC; and (D) the Second DCA was not required to follow the Third DCA.

A. The CCD Applies in the Third-Party Liability Insurance Context but the EPC Rule Applies in the First-Party Insurance Context

There is no dispute that Sebo's loss was caused by multiple perils—rain combined with construction defects—and that the Policy excludes coverage for loss from construction defects. In such circumstances, Florida courts have applied two different rules to determine coverage. As the Second DCA observed, the CCD, stated in *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), provides that coverage exists where "two or more causes do appreciably contribute to the loss, and at least one of the causes is a risk which is covered under the terms of the policy," so long as the multiple causes are "independent of each other." *Sebo*, 141 So. 3d at 198 (citation & internal quotation marks omitted). Under the EPC rule, the "finder of fact, usually the jury, determines which peril was the most substantial or responsible factor in the loss. If the policy insures against that peril, coverage is provided. If the policy excludes that peril, there is no coverage." *Id*.

This Court applied the EPC in *Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n*, 75 So. 196 (Fla. 1917), as did the First DCA in *Hartford Accident & Indemnity Co. v. Phelps*, 294 So. 2d 362 (Fla. 1st DCA 1974). But few Florida cases address the circumstances under which one or the other rule applies. Other states, however, have explained that the crucial distinction is between first-party insurance disputes—where the EPC is the better rule—and third-party liability insurance disputes, which are governed by the CCD. As the Second DCA noted,

"*Wallach* did not differentiate between first-party coverage under a homeowners policy and a third-party tort liability policy." 141 So. 3d at 200. *Cf. Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2002) (citing the "fundamental differences between liability policies and first-party contracts"); *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 187 (2d Cir. 2003), *abrogated on other grounds by Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006) (declining to apply third-party liability insurance cases to a first-party property insurance case, noting that interpretation of liability contracts "is influenced by the public policy concern of ensuring adequate compensation for injured third-parties who are not parties to the insurance contract").

Indeed, as the California Supreme Court explained, "[p]roperty insurance . . . is an agreement, a contract, in which the insurer agrees to indemnify the insured in the event that the insured property suffers a covered loss," which is determined by "reference to causation, e.g., 'loss caused by . . .' certain enumerated perils." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989) (alterations in original; citation omitted). Thus, in the first-party context, the "insurer and the insured can tailor the policy according to the selection of insured and excluded risks and, in the process, determine the corresponding premium." *Id.* at 711. In the context of third-party liability insurance, "[o]n the other hand, the right to coverage . . . draws on traditional tort concepts of fault,

proximate cause and duty. This liability analysis differs substantially from the coverage analysis in the property insurance context, which [is based on the] . . . contract. In liability insurance, by insuring for personal liability, and agreeing to cover the insured for his own negligence, the insurer agrees to cover the insured for a broader spectrum of risks." *Id.* at 710; *see also Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563, 577-78 (D.N.J. 2001) ("[L]iability insurance, which indemnifies one from liability to third persons, is distinct from first-party coverage, which protects against losses sustained by the insured itself.").

Here, the Policy's construction-defect exclusion squarely applies to the pervasive construction defects that, according to Sebo's own witnesses, allowed massive water intrusion into his house. Yet applying the CCD in this case would "effectively nullif[y]" that exclusion, and "thereby . . . abrogate[] the limiting terms" of the Policy. *Garvey*, 770 P.2d at 705. Indeed, if the CCD is applied in the first-party property insurance context, "[i]n most instances, the insured can point to some arguably covered contributing factor," and the "presence of such a cause, no matter how minor, would give rise to coverage." *Id.* at 711. A Texas court has similarly held that the "[CCD] rationale is not proper in the first-party property insurance context because, in most cases, the insured can point to some arguably covered contributing factor. The presence of such a cause, regardless of how minor, would give rise to coverage." *Warrilow v. Norrell*, 791 S.W.2d 515,

527 (Tex. Ct. App. 1989) (citation omitted). In short, if the CCD is "extended to first-party cases, the presence of such a cause, no matter how minor, would give rise to coverage." *Garvey*, 770 P.2d at 711.

The EPC rule, by contrast, applies to first-party insurance disputes because it is "a workable rule of coverage that provides a fair result within the reasonable expectations" of the insurer and the insured. *Id.* at 708. *See also Hartford Cas. Ins. Co. v. Evansville Vanderburgh Pub. Library*, 860 N.E.2d 636, 647 (Ind. Ct. App. 2007) (the EPC "serves the end of understandable and predictable coverage in . . . all-risk policies"); *Findlay v. United Pac. Ins. Co.*, 917 P.2d 116, 120-21 (Wash. 1996) (holding that the EPC "provide[s] a workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer. . . . Therefore, if the contract is clear that a specific named peril . . . is excluded from coverage, then the rule simply acts to give effect to the articulated expectations of the parties.") (citations and internal quotation marks omitted). Thus, the EPC leads to the fairer result because the contracting parties' intentions—"as manifested in the distribution of risks, the proportionate premiums charged and the coverage for all risks except those specifically excluded—cannot reasonably include an expectation of coverage in property loss cases in which the efficient proximate cause of the loss is an activity expressly *excluded* under the policy." *Garvey*, 770 P.2d at 711 (emphasis in original).

Moreover, "if the insurer is expected to cover claims that are outside the scope of the first-party property loss policy, an 'all-risk' policy would become an 'all-loss' policy." *Id.* at 711. *See also Findlay*, 917 P.2d at 122 ("The [EPC] should be applied to enforce the reasonable expectations of the parties based on the language of the insurance contract and not to create a new contract for the parties."); *Warrilow*, 791 S.W.2d at 527 ("The reasonable expectations of the parties would not be served [by the CCD] when the efficient and predominating cause of the loss is expressly excluded by the terms of the policy."). Applying the CCD to this case would re-write the Policy into a warranty against construction defects, even though the Policy expressly excludes coverage for construction defects. Indeed, a "homeowners' insurance policy with [a construction-defects] exclusion . . . should not be interpreted as extending a warranty of fitness to materials used in construction or repair or as [] extending coverage to property loss arising from the negligence of third parties." *McDonald v. State Farm Fire & Cas. Co.*, 837 P.2d 1000, 1005-06 (Wash. 1992).

Sebo argues (br. at 30) that the EPC rule "introduce[s] a tort-based concept of determining and allocating percentages . . . at odds with this Court's decision in *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467 (Fla. 1993)." But in *Swindal* this Court only interpreted a single exclusion for intentional injury, *id.* at 468; the Court did not address or decide whether coverage existed for loss caused

by multiple perils in the first-party property insurance context. Moreover, it is the CCD—not the EPC rule—that would import a "tort-based concept" from third-party liability insurance cases into this first-party insurance contract case.

Sebo also argues that this Court should ignore *Garvey* because the opinion is "underpinned by a California statute" not present in Florida (br. at 28-31). But many states—even without an "underpinning statute"—have relied on *Garvey* to adopt the EPC. *See, e.g., Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1244 (Nev. 2011) ("We agree with the reasoning set forth by our sister state of California in our adoption of [the EPC]."") (citing *Garvey*, 770 P.2d at 707); *Warrilow*, 791 S.W.2d at 528 ("Conversely, in the third-party liability insurance context, the right to coverage is established by traditional tort concepts of fault, proximate cause, and duty.") (citing *Garvey*, 770 P.2d at 710). As the Second DCA noted, the "majority of states have adopted the [EPC rule] for analyzing" coverage when multiple perils cause a loss. *Sebo*, 141 So. 3d at 201.

Indeed, Sebo argues that a "significant number of other jurisdictions have chosen to follow a [CCD] similar to the rule in *Wallach*" (br. at 29 n.1). But if Sebo is suggesting that the CCD is the majority rule, he is dead wrong. Indeed, although Sebo argues that nine states follow the CCD, at least *38 states* have applied the EPC rule, or some variation of it, to determine coverage under a first-

party property insurance policy where multiple perils cause a loss.[2] Moreover, of Sebo's nine states, only two applied the CCD in the *first-party* property

[2] **Alabama:** *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 313 (Ala. 1999); **Alaska:** *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1044 (Alaska 1996); **Arizona:** *Koory v. W. Cas. & Sur. Co.*, 737 P.2d 388, 390 (Ariz. 1987); **Arkansas:** *N.H. Ins. Co. v. Frisby*, 522 S.W.2d 418, 419 (Ark. 1975); **California:** *Garvey*, 770 P.2d at 713; **Colorado:** *Colo. Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 842 (Colo. Ct. App. 2008); **Connecticut:** *Sansone v. Nationwide Mut. Fire Ins. Co.*, 770 A.2d 500, 503 (Conn. Super. Ct. 1999); **District of Columbia:** *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1129-30 (D.C. Ct. App. 2001); **Georgia:** *Ovbey v. Cont'l Ins. Co.*, 613 F. Supp. 726, 727-28 (N.D. Ga. 1985); **Hawaii:** *Hawaii Land Co. v. Lion Fire Ins. Co.*, 13 Haw. 164, 169 (1900); **Indiana:** *Hartford Cas. Ins. Co. v. Evansville Vanderburgh Pub. Library*, 860 N.E.2d 636, 647 (Ind. Ct. App. 2007); **Iowa:** *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 130 N.W. 177, 181 (Iowa 1911); **Kansas:** *Hartford Fire Ins. Co. of Hartford, Conn. v. Nelson*, 67 P. 440, 441 (Kan. 1902); **Kentucky:** *Wright v. Louisville Store of Russellville*, 417 S.W.2d 242, 244 (Ky. Ct. App. 1967); **Louisiana**: *Cameron Parish Sch. Bd. v. RSUI Indem. Co.*, 620 F. Supp. 2d 772, 780-81 (W.D. La. 2008); **Maryland**: *Hartford Steam Boiler Inspection & Ins. Co. v. Henry Sonneborn & Co.*, 54 A. 610, 612 (Md. Ct. App. 1903); **Massachusetts**: *Jussim v. Mass. Bay Ins. Co.*, 610 N.E.2d 954, 955 (Mass. 1993); **Minnesota**: *Westling Mfg. Co. v. W. Nat'l Mut. Ins. Co.*, 581 N.W.2d 39, 44 (Minn. Ct. App. 1998); **Mississippi:** *Glens Falls Ins. Co. v. Linwood Elevator*, 130 So. 2d 262, 270 (Miss. 1961); **Missouri:** *Toumayan v. State Farm Gen. Ins. Co.*, 970 S.W.2d 822, 825 (Mo. Ct. App. 1998); **Montana**: *Park Saddle Horse Co. v. Royal Indem. Co.*, 261 P. 880, 884 (Mont. 1927); **Nebraska**: *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331 (Neb. 1995); **Nevada:** *Fourth St. Place, LLC v. Travelers Indem. Co.*, 270 P.3d 1235, 1237 (Nev. 2011); **New Hampshire:** *Terrien v. Pawtucket Mut. Fire Ins. Co.*, 71 A.2d 742, 745 (N.H. 1950); **New Jersey**: *Zurich Am. Ins. Co. v. Keating Bldg. Corp.*, 513 F. Supp. 2d 55, 70 (D.N.J. 2007); **New York**: *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 48 (2d Cir. 2006); **North Dakota:** *W. Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4, 7 (N.D. 2002); **Ohio:** *Holmes v. Emp'rs Liab. Assurance Corp.*, 43 N.E.2d 746, 753 (Ohio Ct. App. 1941); **Oklahoma:** *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, 133 (Okla. Civ. App. 2005); **Oregon:** *Naumes, Inc. v. Landmark Ins. Co.*, 849 P.2d 554, 555 (Or. Ct. App. 1993); **Pennsylvania:** *Marks v.*

context. *See Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156, 1161 (Ill. App. Ct. 1983); *Kraemer Bros., Inc. v. U.S. Fire Ins. Co.*, 278 N.W.2d 857, 863-64 (Wis. 1979). Another six applied it in the third-party liability context. *See Waseca Mut. Ins. Co. v. Noska*, 331 N.W.2d 917, 923 (Minn. 1983); *Cawthon v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1269 (W.D. Mo. 1997); *Salem Grp. v. Oliver*, 607 A.2d 138, 140 (N.J. 1992); *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991); *U.S. Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.*, 716 N.E.2d 1201, 1205 (Ohio Ct. App. 1998); *State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667, 671 (Vt. 1997). And contrary to Sebo's representation, Texas follows an apportionment scheme that holds an insurer liable only for damages caused by a covered peril. *See Warrilow*, 791 S.W.2d at 527 ("In Texas, if one force is covered and one force is excluded, the insured must show that the property damage was caused solely by the insured force, or he must separate the damage caused by the insured peril from that caused by the excluded peril.").

Lumbermen's Ins. Co., 49 A.2d 855, 856 (Pa. Super. Ct. 1946); **South Carolina:** *King v. N. River Ins. Co.*, 297 S.E.2d 637, 638 (S.C. 1982); **South Dakota:** *Lummel v. Nat'l Fire Ins. Co.*, 210 N.W. 739, 742 (S.D. 1926); **Tennessee:** *Hall & Hawkins v. Nat'l Fire Ins. Co.*, 92 S.W. 402, 402 (Tenn. 1906); **Utah:** *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1277 (Utah 1993); **Vermont:** *Sperling v. Allstate Indem. Co.*, 944 A.2d 210, 213 (Vt. 2007); **Washington:** *Safeco Ins. Co. of Am. v. Hirschmann*, 773 P.2d 413, 414 (Wash. 1989); **West Virginia:** *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 12 (W. Va. 1998).

B. The CCD Is Not the Law of Florida

Sebo argues that the CCD applied in *Wallach* is based on "well-settled rules of construction and longstanding Florida precedents" (br. at 24-26). But *Wallach* actually *departed from* Florida law. Indeed, in *Evansville Brewing*, 75 So. 196, this Court addressed whether coverage existed for the destruction of a building caused by the combination of a covered peril (fire) and an uncovered peril (explosion). This Court rejected the insurer's argument that the building was "substantially destroyed and fell as the result of an explosion, and not as the result of fire," because the evidence showed that the "explosion was an incident to a pre-existing fire." *Id.* at 197, 199. Applying the principles underlying the EPC rule, this Court summarized, "if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable." *Id.* at 198.

After *Evansville Brewing*, the First DCA applied the EPC in *Phelps*, 294 So. 2d at 364, where loss was caused by a covered peril (water leakage) and an uncovered peril (settling of the earth). The court found coverage, but only because settling was due to a covered peril (water leakage) which was the "proximate and efficient cause of the loss." *Id.* The court stated that "where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it,

and operate more immediately in producing the disaster." *Id.* (citation and internal quotation marks omitted). This Court has not revisited the issue since the Third DCA departed from these cases in *Wallach* by applying the CCD.

Sebo contends that *Wallach* is "'Well-Established' Florida Precedent[]" and "well-reasoned," because it has been cited by various Florida courts (br. at 31). But many of the cases Sebo cites (*id.* at 31 n.2) do not even address the CCD. For example, two cite *Wallach* for the general proposition that exclusionary clauses are construed strictly. *See Triano v. State Farm Mut. Auto. Ins. Co*., 565 So. 2d 748, 749 (Fla. 3d DCA 1990); *Ohio Gen. Ins. Co. v. Woods*, No. 89-30177, 1991 WL 640067, at *3 (N.D. Fla. June 25, 1991). Another two cite it for the similarly basic principle that it is the insurer's burden to prove that a loss is excluded. *See Warfel v. Universal Ins. Co. of N. Am.*, 36 So. 3d 136, 138 (Fla. 2d DCA 2010); *W. Best, Inc. v. Underwriters at Lloyds, London*, 655 So. 2d 1213, 1214 (Fla. 4th DCA 1995). One case merely cites *Wallach* when discussing general principles of "all-risk" policies. *See Fayad*, 899 So. 2d at 1085-86. And another mentions it only in a dissent. *See Hagen v. Aetna Cas. & Sur. Co*., 675 So. 2d 963, 971 (Fla. 5th DCA 1996) (Goshorn, J., dissenting).

Sebo's remaining cases do not support application of the CCD in this case. Indeed, all but one of them involved third-party liability insurance. *See Transamerica Ins. Co. v. Snell*, 627 So. 2d 1275, 1276 (Fla. 1st DCA 1993); *Fid. &*

Cas. Co. of N.Y. v. Lodwick, 126 F. Supp. 2d 1375, 1377-78 (S.D. Fla. 2000); *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1322 (11th Cir. 2005). Sebo's final case, *Paulucci v. Liberty Mutual Fire Insurance Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. Feb. 20, 2002), found that the CCD "is the prevailing standard under Florida law," but only because, after acknowledging *Phelps's* application of the EPC rule, it preferred the "sound reasoning" of *Wallach*. *Id.* at 1318-19. *Paulucci* also found that the "[CCD] and the [EPC] are not mutually exclusive. . . . The [CCD] applies when multiple causes are independent. The [EPC] applies when the perils are dependent." *Id.* at 1319. But the court did not determine whether the alleged causes were dependent or independent and did not determine coverage, because it found that the cause of the loss was a factual issue for trial. *Id.* at 1323-25.

C. The Issue of Whether the EPC Rule or the CCD Applies in This Case Was Fully Presented Below

Sebo argues that the "Second District should have not considered" the issue of whether the CCD should be "aboli[shed]" or "abandoned," because that issue was never argued to the trial court (br. at 44 (citing *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010))). But there was no need for American Home to argue that the trial court should "abandon" or "abolish" the CCD—which the trial court had no authority to do—because, on cross-motions for summary judgment, the parties

argued over whether the CCD or the EPC rule governed this case (*see* R75. 10362-71; R94. 16364-69). Indeed, the trial court expressly held, relying on *Wallach*, that the CCD applied (A. 142). Sebo's preservation argument is simply not credible. *See, e.g.*, *Williams v. State*, 414 So. 2d 509, 511-12 (Fla. 1982) (stating that "magic words are not needed to make a proper objection," and holding that a challenge to the retroactive application of a statute was properly raised in the trial court even though trial counsel did not specifically cite to the prohibition against *ex post facto* laws). Even less credible is Sebo's argument (br. at 45), relying solely on *SPCA Wildlife Care Center v. Abraham*, 75 So. 3d 1271 (Fla. 4th DCA 2011) (where the appellant was denied an evidentiary hearing), that this "preservation problem" violates due process.

D. ***Stare Decisis* Does Not Apply Here**

Sebo next argues that, although "the doctrine of *stare decisis* is not directly applicable . . . 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" (br. at 32-34). But Sebo's own authority shows that *stare decisis* refers to "the obligation of a court to abide by *its own* precedent." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003) (emphasis supplied). To state the obvious, the Second DCA was not bound by the Third DCA's opinion in *Wallach*. Nor does *Wallach*

bind this Court. If anything, the converse is true—the Third DCA was bound by this Court's decision in *Evansville Brewing*, 75 So. 196, applying the EPC rule.

II. THE CONCURRENT CAUSE DOCTRINE DOES NOT APPLY BECAUSE THE COVERED AND UNCOVERED PERILS THAT COMBINED TO CAUSE SEBO'S LOSS ARE NOT INDEPENDENT

Even if the CCD applied to first-party property insurance cases in Florida, it would not apply here because the perils that combined to cause Sebo's loss—rain and construction defects—are *dependent* causes. Sebo concedes that the CCD has "[l]imited [a]pplicability," because "*Wallach* and the [CCD] presently apply only to situations in which the 'concurring causes' are 'independent' rather than 'dependent'" (br. at 26). *See Paulucci*, 190 F. Supp. 2d at 1319 ("The [CCD] applies when multiple causes are independent. The [EPC rule] applies when the perils are dependent.").

Sebo argues that, "[w]hether concurrent causes are 'dependent' or 'independent' depends on their origins," and "[i]f the two causes have independent origins, they are deemed to be independent" (br. at 27). But Sebo cites only *Safeco Insurance Co. of Am. v. Guyton*, 692 F.2d 551, 555 (9th Cir. 1982), which the California Supreme Court later found to have been wrongly decided. *Guyton* "was actually 'a classic case of dependent causation' requiring use of [an EPC rule] analysis. Because the damage caused by the defective flood control system was

necessarily dependent on flooding, the Ninth Circuit misapplied [the CCD] to find coverage." *Garvey*, 770 P.2d at 713.

Under the correct analysis, causes of loss are independent "when the causes are not related and dependent, but rather involve separate and distinct risks." *N.H. Ins. Co. v. Krilich*, 387 F. App'x 940, 942-43 (11th Cir. July 20, 2010). For example, in *Krilich*, a vessel developed a keel fracture (a covered peril) that allowed seawater to pass into the sewage holding tank. *Id.* at 941. That keel fracture combined with an excluded peril—the negligent failure to secure a watertight cover for the tank—to cause water to overflow the tank and sink the vessel. *Id.* The court found that these causes were dependent and therefore that the CCD did not apply because "[a]ll of the experts at trial agreed that [the insured] yacht 'would not have sunk as quickly or in the manner that it did if the sea chests had been secured watertight.'" *Id.* at 942-43. Thus, the "keel fracture was not a separate and distinct risk. Instead, it was a link in the chain of related and dependent causes." *Id.* at 943.

That is the case here. The rain and construction defects were not "separate and distinct risks"; the construction defects were essential links in the chain that allowed water intrusion to cause so much damage to Sebo's house. Without the construction defects, rain would not have caused loss or damage—houses typically are built to withstand normal rainfalls. Such a cause of loss that does not pose its

own risk is, by definition, dependent on another cause to produce a loss. *See, e.g.*, *Am. Sur. & Cas. Co. v. Lake Jackson Pizza, Inc.*, 788 So. 2d 1096, 1100 (Fla. 1st DCA 2001) (rejecting application of the CCD to a general liability policy where the multiple causes—an automobile accident combined with "corporate policies and practices" of the insured that encouraged unsafe driving—were "related and dependent"); *Sparta Ins. Co. v. Colareta*, 990 F. Supp. 2d 1357, 1369 (S.D. Fla. 2014) (holding that the CCD did not apply to a dispute over a commercial general liability policy because "[n]either negligent act, alone, would have precipitated [claimant]'s fall"); *All State Ins. Co. v. Safer*, 317 F. Supp. 2d 1345, 1353-54 (M.D. Fla. 2004) (declining to apply the CCD to a dispute over a commercial general liability policy where the causes were "actually dependent," because "the negligent creation of a parking space, by itself, could not have obstructed the intersection"); *Ohio Cas. Ins. Co. v. Cont'l Cas. Co.*, 279 F. Supp. 2d 1281, 1284 (S.D. Fla. 2003) ("Since the loss would not have occurred but for the use of the motor vehicle, [the plaintiff] is precluded from resorting to the [CCD].").

In a similar case where the insured had an all-risk, first-party homeowner's insurance policy that excluded construction defects, and construction defects led to water intrusion and damage, the court held that "[w]ater intrusion is not independent of the construction defects." *Friedberg v. Chubb & Son, Inc.*, 832 F. Supp. 2d 1049, 1058 (D. Minn. 2011). And the court held that the exclusion

barred the insured's claim because "water infiltration is certain when not prevented by proper construction," and "[n]o reasonable jury could reach the conclusion that anything other than a construction defect was the overriding cause of the [insureds'] loss." *Id.*; *see also TMW Enters., Inc. v. Fed. Ins. Co.*, 619 F.3d 574, 576-77 (6th Cir. 2010) ("When a policy excludes loss or damages caused by or resulting from faulty workmanship or construction of a building, it should come as no surprise that the botched construction will permit the elements—water, air, dirt—to enter the structure and inside of the building and eventually cause damage to both.") (alterations and internal quotation marks omitted). In short, ordinary rain and construction defects are not separate and distinct risks. Without the construction defects, there never would have been such atypical water intrusion, and ordinary rain would not have damaged Sebo's house.

III. THE PLAIN LANGUAGE OF THE POLICY DOES NOT COVER THE LOSS

This Court may also approve the Second DCA's decision because the Policy's plain terms exclude coverage. Sebo argues that the Policy does not "'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" (br. at 35). He argues that the Policy's exclusion—which states, "[w]e do not cover any loss caused by faulty, inadequate or defective: . . .

construction" (A. 177)—"is not interpreted as broadly as other phrases such as 'arising out of'" (br. at 36 (citing *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 293 (Fla. 2007))). But *Garcia* did not construe similar language.

Sebo argues that two cases with exclusions "materially identical" to the one here allowed coverage for water damage resulting from construction or design defects (br. at 36-40 (citing *Buscher v. Econ. Premier Assur. Co.*, No. Civ. 05-544, 2006 WL 268781 (D. Minn. Feb. 1, 2006), and *McGrath v. Am. Family Mut. Ins. Co.*, No. 07 C 1519, 2008 WL 4531373 (N.D. Ill. Apr. 29, 2008))). But the language in those cases was different. The exclusion in *Buscher* stated that the "Policy doesn't cover loss to property insured by the Policy caused by" design or construction defects. 2006 WL 268781, at *3 (alterations omitted). Similarly, the exclusion in *McGrath* stated that the policy "does 'not insure for loss caused by faulty, inadequate or defective construction or design.'" 2008 WL 4531373, at *5 (alterations omitted). Here, the Faulty, Inadequate or Defective Planning exclusion provides: "[w]e do not cover *any* loss caused by faulty, inadequate or defective: . . . construction" (A. 177 (emphasis added)).

The Policy's construction-defects exclusion is similar to the exclusion in *Friedberg*, which "excludes '*any* loss caused by' faulty construction, whereas the *Buscher* policy only excluded 'loss to property caused by' faulty construction. The word 'any' in the Policy before 'caused by' expands the Construction Defects

Exclusion." 832 F. Supp. 2d at 1058 (alterations and citations omitted; emphasis in original). *Friedberg* concluded that the construction-defects exclusion unambiguously precluded recovery of both the cost of replacing faulty construction and any loss resulting from it. *Id.* As in *Friedberg*, the plain terms of this exclusion preclude recovery.

Sebo also argues that the "[i]nsurer's decision to include 'anti-concurrent cause' language in one exclusion, but not in the Defective Construction Exclusion . . . 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" (br. at 40-41). But the absence of such language in the construction-defects exclusion "only shows that the parties did not contract around concurrent causation; it does not undermine the plain language of the [present e]xclusion." *Friedberg*, 832 F. Supp. 2d at 1057. Nor does it affect the Florida law that applies to multiple-peril losses in first-party property insurance disputes.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF SEBO'S SETTLEMENTS WITH THE ORIGINAL DEFENDANTS, WHICH WAS RELEVANT TO WHETHER A COVERED PERIL ENTIRELY CAUSED THE CONSTRUCTIVE TOTAL LOSS OF HIS HOUSE

Even if this Court concludes that the Policy's construction-defects exclusion does not preclude coverage for Sebo's loss, retrial is nevertheless required because the trial court improperly excluded evidence of Sebo's settlements with the initial

defendants, all of whom were sued for construction defects. That evidence is critical to whether, under Florida's valued policy law ("VPL"), Sebo's constructive total loss was entirely caused by a covered peril.

The VPL provides that, "[i]n the event of the total loss of any . . . structure . . . located in this state and insured by any insurer as to a covered peril, . . . the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy." § 627.702(1)(a), Fla. Stat. (2005). "[A] building may be deemed a total loss . . . if it is rendered a constructive total loss," which "occurs when a building, although still standing, is damaged to the extent that ordinances or regulations in effect at the time of the damage actually prohibit or prevent the building's repair, such that the building has to be demolished." *Greer v. Owners Ins. Co.*, 434 F. Supp. 2d 1267, 1279 (N.D. Fla. 2006) (citing *Netherlands Ins. Co. v. Fowler*, 181 So. 2d 692, 693 (Fla. 2d DCA 1966)).

The VPL unquestionably applies. The Naples ordinances in effect in 2005 provided that a property was a constructive total loss if necessary repairs exceeded a FEMA threshold of 50% of the premises' value, which was $6.8 million (T16. 1987-89). The jury found damages for repair and reconstruction of $6 million, which well exceeded the $3.4 million threshold also found by the jury (A. 144-45). And the trial court's amended final declaratory judgment, which "incorporates by

reference the Verdict Form signed by the jury," found that the "Plaintiff Sebo residence is deemed a constructive total loss," and awarded the policy limits of $6.6 million (*id.* at 148).

Under the VPL statute, however, where "a loss was caused in part by a covered peril and in part by a noncovered peril, ... the insurer's liability under this section *shall be limited to the amount of the loss caused by the covered peril*." § 627.702(1)(b), Fla. Stat. (2005) (emphasis supplied); *see also Fla. Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815, 820 (Fla. 2007) ("[W]e conclude that the statute intends that an insurer is liable for a loss by a peril covered under the policy for which a premium has been paid."). The statute limits the total recovery so that "[t]he insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss." *Id.*

In determining whether covered perils alone would have caused the total loss, it is an abuse of discretion to exclude evidence of settlements or payments from parties responsible for damages stemming from excluded perils. *See Citizens Prop. Ins. Corp. v. Ashe*, 50 So. 3d 645 (Fla. 1st DCA 2010). In *Ashe*, the insured had separate homeowner policies for wind and flood insurance, and flood damage was an uncovered peril under the wind policy. The insured's home was destroyed by a hurricane. *Id.* at 647. Although the insured "received payment of the full

policy amount . . . from the flood carrier," he claimed that his home was a total loss because of wind damage and that "he was entitled to recover a total loss under his wind-only VPL policy." *Id.* at 647-48 (internal quotation marks omitted). The trial court granted the insured's motion in limine to exclude any reference to flood insurance coverage or payments made by the flood insurer. *Id.* at 649. The First DCA reversed, holding that "[e]vidence that such flood insurance benefits were received was relevant to the issue of whether flood or wind caused the total loss of the home, and the trial court abused its discretion in excluding such evidence. Where Ashe now claims that his house was totally destroyed by *wind* [the covered peril], the jury can and should be allowed to hear evidence that [the insured] sought and accepted payment from his flood insurer." *Id.* at 652-53 (emphasis in original). Indeed, the First DCA found that "to hold otherwise would contradict the thrust of the holding in *Cox*, in which the supreme court made it clear that a VPL insurer is not required to pay for damages caused by 'excluded or noncovered perils.'" *Id.* at 653 (quoting *Cox*, 967 So. 2d at 820).

That is precisely the case here. Sebo seeks reinstatement of the judgment, which awarded him the policy limits for the constructive total loss of his house (br. at 46). But, under the VPL, Sebo is entitled to the policy limits only if he showed that the constructive total loss was caused *entirely* by a covered peril. As shown above, however, Sebo adduced reams of evidence that his loss was caused in large

part by the excluded peril of construction defects, and the jury did not determine whether the constructive total loss was caused entirely by a covered peril. Nor could it have, because the trial court excluded any mention that Sebo had settled with numerous original defendants—all of whom were sued for construction defects (T1. 7-13; T3. 278-84). That evidence was highly relevant to whether some or all of Sebo's loss was caused by an excluded peril, and therefore whether he was eligible to receive the policy limits as damages under the VPL. The trial court's exclusion of that evidence was an abuse of discretion. Moreover, because the excluded evidence would have been so probative of whether Sebo's loss was due to a covered peril, Sebo cannot meet the substantial burden of proving "that there is no reasonable possibility that the error contributed to the verdict," and the error is not harmless. *Special v. W. Boca Med. Ctr.*, 39 Fla. L. Weekly S676, at *4 (Fla. Nov. 13, 2014).

This Court's decision in *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009), on which the trial court apparently relied, is not to the contrary. *Saleeby* addressed only whether section 768.041, Florida Statutes, prohibited evidence of a settlement for impeachment purposes; it was not an insurance case and did not address the VPL. Moreover, section 768.041 applies only to joint tortfeasors. *See State Farm Mut. Auto. Ins. Co. v. Williams*, 943 So. 2d 997, 1000 (Fla. 1st DCA 2006) ("By its relatively clear language, it is apparent that the

legislature intended section 768.041 to apply only to cases involving joint tortfeasors."). Although the Second DCA held that these VPL issues must be addressed on retrial, it also stated that "it is not completely clear whether this is a valued policy law case," because American Home "argued valued policy law in some motions, [but] it seems that at some point it questioned whether the property suffered a total loss." 141 So. 3d at 203. In a motion for partial directed verdict, however, American Home argued that the house did not suffer a total constructive loss, and stated that "[o]ur sole disagreement is what numbers can go into that amount to achieve your 50 percent to say that you have a constructive total loss. That's all we're arguing about" (T20. 2597; *see also* T20. 2592-2622). Moreover, when the jury found that the 50% FEMA threshold had been exceeded, American Home agreed that, "based upon the determination of damages by the jury, the constructive total loss of the Sebo residence would be applied" (SR3. 21526). And the trial court awarded damages based on the constructive total loss (A. 148). In short, American Home never receded from the position that the VPL applies.

CONCLUSION

For the reasons stated above, this Court should affirm the opinion of the Second DCA and remand the case for a new trial.

Respectfully submitted,

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I certify that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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