Supreme Court of Florida

No. SC06-779

AUTO-OWNERS INSURANCE COMPANY,
Appellant,

vs.

POZZI WINDOW COMPANY, et al.,
Appellees.

[December 20, 2007]

PARIENTE, J.

The United States Court of Appeals for the Eleventh Circuit has certified the following question of Florida law that is determinative of a cause pending in that court and for which there appears to be no controlling precedent:

> DOES A STANDARD FORM [COMMERCIAL] GENERAL LIABILITY POLICY WITH PRODUCT[S] COMPLETED OPERATIONS HAZARD COVERAGE, SUCH AS THE POLICIES DESCRIBED HERE, ISSUED TO A GENERAL CONTRACTOR, COVER THE GENERAL CONTRACTOR'S LIABILITY TO A THIRD PARTY FOR THE COSTS OF REPAIR OR REPLACEMENT OF DEFECTIVE WORK BY ITS SUBCONTRACTOR?

Pozzi Window Co. v. Auto-Owners Ins. Co., 446 F.3d 1178, 1188 (11th Cir. 2006). We have jurisdiction. See art. V, § 3(b)(6), Fla. Const. Our decision in

United States Fire Insurance Co. v. J.S.U.B., Inc., No. 05-1295 (Fla. Dec. 20, 2007), is dispositive. Although a subcontractor's defective work can constitute an "occurrence" under a post-1986 standard form commercial general liability policy, the defective work itself does not constitute "property damage." Accordingly, because there is no coverage for the costs of repair or replacement of the defective work, we answer the certified question in the negative.

FACTS AND PROCEDURAL HISTORY

The underlying facts are undisputed. Coral Construction of South Florida, Inc., and Coral's president James J. Irby ("Builder") constructed a multimillion dollar house in Coconut Grove, Florida. The house included windows that were manufactured by Pozzi Window Company ("Pozzi") and installed by the Builder's subcontractor. After moving into the house, the owner complained of water leakage around the windows, which was caused by the defective installation of the windows. The homeowner filed suit against Pozzi, the Builder, and the subcontractor who installed the windows.

Pozzi entered into a settlement with the homeowner, agreeing to "remedy the defective installation of the windows." Thereafter, Pozzi also settled with the Builder, and as the Builder's assignee, filed a lawsuit against the Builder's insurer, Auto-Owners Insurance Company ("Auto-Owners"). Auto-Owners had issued the Builder two identical commercial general liability (CGL) policies. The policies

provide coverage for the "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage'" caused by an "occurrence" within the "coverage territory" during the policy period. As defined in the policies, an "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," and "property damage" includes "[p]hysical injury to tangible property, including all resulting loss of use of that property." The policies also contain "products-completed operations hazard" coverage that

> [i]ncludes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> . . . .
>
> (2) Work that has not yet been completed or abandoned.[[1]]

The coverage provisions are limited by numerous exclusions. Of particular relevance are those exclusions, with their exceptions, that exclude coverage for damage to the insured's property and work:

> **j.** "Property damage" to:
>
> . . . .
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> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

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

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

. . . .

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

. . . .

l. "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Emphases supplied.)[2]

Pursuant to the policies, Auto-Owners paid the homeowner for personal property damage caused by the leaking windows, but refused to provide coverage for the cost of repair or replacement of the windows. In its complaint, Pozzi alleged that Auto-Owners breached its insurance contract by denying coverage, acted in bad faith, and that Pozzi, as assignee of Builder, was entitled to fees and

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2. The policies define "your work" as follows:

"Your work" means:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

"Your work" includes:

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

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

costs incurred by Builder in prosecuting this action. Auto-Owners filed a counterclaim seeking a determination that it had no duty to defend the Builder and that there was no coverage for the claims asserted.

On cross-motions for summary judgment, the federal district court found that the policies provided coverage for the repair or replacement of the defective windows. See Pozzi Window, 446 F.3d at 1181.[3] On appeal, the Eleventh Circuit concluded that under this Court's decision in State Farm Fire & Casualty Co. v. CTC Development Corp., 720 So. 2d 1072, 1076 (Fla. 1998), "[d]efective construction is an 'occurrence' under Florida law." Pozzi Window, 446 F.3d at 1184. However, the Eleventh Circuit recognized that this Court's earlier decision in LaMarche v. Shelby Mutual Insurance Co., 390 So. 2d 325 (Fla. 1980), used broad language and reasoning that indicated that CGL policies generally do not cover the costs of repair and replacement of defective work. See Pozzi Window, 446 F.3d at 1185. The Eleventh Circuit also noted that as a result of the Second District's decision in J.S.U.B., Inc. v. United States Fire Ins. Co., 906 So. 2d 303

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3. A jury trial before a magistrate judge resulted in a finding of bad faith and a punitive damages award of $500,000 against Auto-Owners. On Auto-Owners' motion for judgment as a matter of law, the magistrate judge concluded that there was insufficient evidence to support the jury's finding of bad faith and award of punitive damages. The Eleventh Circuit affirmed the magistrate's grant of judgment as a matter of law on these issues. See id. at 1189. Because these issues are not the subject of the question certified by the Eleventh Circuit, we decline to address them. See Hawkins v. Ford Motor Co., 748 So. 2d 993, 997 n.5 (Fla. 1999) (declining to address issues outside the scope of the certified question and already addressed by the Eleventh Circuit).

(Fla. 2d DCA 2005), there was a split in Florida case law on this issue. See Pozzi Window, 446 F.3d at 1186. Accordingly, the court certified to this Court the unsettled question of Florida law. See id. at 1188.

ANALYSIS

The question certified by the Eleventh Circuit asks whether a post-1986 standard form CGL policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage for the repair or replacement of a subcontractor's defective work. This is an issue of insurance policy construction, which is a question of law subject to de novo review. See Fayad v. Clarendon Nat'l Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005).

In addressing this issue, we first review our decision in J.S.U.B, which involved policy language that is identical in all material respects to the policies at issue in this case and addressed a question similar to the one posed by the Eleventh Circuit. We then apply our reasoning in J.S.U.B. to the facts of this case.

The J.S.U.B. Decision

In J.S.U.B., after the contractor completed the construction of several homes, damage to the foundations, drywall, and other interior portions of the homes appeared. See slip op. at 2. It was undisputed that the damage to the homes was caused by subcontractors' use of poor soil and improper soil compaction and testing. See id. at 2-3. The contractor sought coverage under its CGL policies

issued by United States Fire Insurance Company. The insurer agreed that the policies provided coverage for damage to the homeowners' personal property, such as the homeowners' wallpaper, but asserted that there was no insurance coverage for the costs of repairing the structural damage to the homes, such as the damage to the foundations and drywall. See id. at 5.

The issue presented to this Court was "whether a post-1986 standard form commercial general liability policy with products-completed operations hazard coverage, issued to a general contractor, provides coverage when a claim is made against the contractor for damage to the completed project caused by a subcontractor's defective work." Id. at 6. We addressed this question in two parts. We first determined whether faulty workmanship can constitute an "occurrence." See id. at 20. After reviewing our decisions in LaMarche and decisions from other jurisdictions, we held that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy." J.S.U.B., slip op. at 32. In doing so, we rejected the insurer's assertion that a subcontractor's faulty workmanship can never be an "occurrence," which is defined as "an accident," because faulty workmanship results in reasonably foreseeable damages and is a breach of contract not covered by general liability policies. We explained that we previously "rejected the use of the concept of 'natural and probable

consequences' or 'foreseeability' in insurance contract interpretation in CTC Development," id. at 20, and that nothing in the language of the insuring agreement differentiated between tort and contract claims. See id. at 22. We also noted that "a construction of the insuring agreement that precludes recovery for damage caused to the completed project by the subcontractor's defective work renders the 'products-completed operations hazard' exception to exclusion (j)(6) and the subcontractor exception to exclusion (l) meaningless." Id. at 28-29. Accordingly, we concluded that the subcontractors' defective soil preparation, which was neither intended nor expected by J.S.U.B., was an "occurrence." Id. at 32.

We then addressed whether the subcontractors' defective soil preparation caused "property damage" within the meaning of the policy. See id. We held that faulty workmanship or defective work that has damaged the completed project has caused "physical injury to tangible property" within the plain meaning of the definition in the policy. See id. at 33. In reaching this conclusion, we rejected the insurer's arguments that faulty workmanship that injures only the work product itself does not result in "property damage" and that "there can never be 'property damage' in cases of faulty construction because the defective work rendered the entire project damaged from its inception." Id. at 32-33. We also observed that "[i]f there is no damage beyond the faulty workmanship or defective work, then

there may be no resulting 'property damage.'" Id. at 33. Because structural damage to the completed homes was caused by the defective work, we concluded that there was "physical injury to tangible property" and thus the claim against the contractor for the structural damage was a claim for "property damage" within the meaning of the policies. See id. at 35.

This Case

The discrete issue of whether Auto-Owners' policies provide coverage for the repair or replacement of the defective windows is different from the issue we decided in J.S.U.B., in which the contractor was seeking coverage for structural damage to the completed homes caused by faulty soil preparation. This difference is dispositive.

Similar to the CGL policies at issue in J.S.U.B., the CGL policies issued by Auto-Owners to the Builder in this case provide coverage for an "occurrence" that causes "property damage." Our analysis of the term "occurrence" is controlled by our decision in J.S.U.B., in which we held that "faulty workmanship that is neither intended nor expected from the standpoint of the contractor can constitute an 'accident' and, thus, an 'occurrence' under a post-1986 CGL policy." Id. at 32. Auto-Owners does not contend, and there is no indication in the record, that the Builder expected the windows to be defectively installed. Thus, as was the faulty soil preparation in J.S.U.B., the defective installation of the windows in this case,

which the Builder did not intend or expect, was an "occurrence" under the terms of the CGL policies. However, as we noted in J.S.U.B, in order to determine whether the policies provide coverage, we must also address whether the "occurrence" caused "property damage" within the meaning of the policies. See id. It is the analysis of this issue that distinguishes this case from J.S.U.B.

The CGL policies define "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." In J.S.U.B., we explained that other courts have also "recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for 'property damage,' and a claim for the costs of repairing damage caused by the defective work, which is a claim for 'property damage.'" Id. at 34. For example, in West Orange Lumber Co. v. Indiana Lumbermens Mutual Insurance Co., 898 So. 2d 1147, 1148 (Fla. 5th DCA 2005), a lumber company sought coverage under a CGL policy when it failed to provide the proper grade of cedar siding. There was no damage to the construction itself. The Fifth District Court of Appeal concluded that there was no allegation of "property damage" when the only damage alleged was the cost of removing and replacing the wrong grade cedar siding that had been installed. See id.

Unlike J.S.U.B., which involved a claim for the costs to repair structural damage to homes caused by the subcontractor's defective work, this case involves

a claim for the costs to repair or replace the defectively installed windows. As the Supreme Court of Tennessee recently explained:

> [A] "claim limited to faulty workmanship or materials" is one in which the sole damages are for replacement of a defective component or correction of faulty installation.
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> . . . [The contractor's] subcontractor allegedly installed the windows defectively. Without more, this alleged defect is the equivalent of the "mere inclusion of a defective component" such as the installation of a defective tire, and no "property damage" has occurred.

Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 310 (Tenn. 2007) (emphasis supplied). Because the subcontractor's defective installation of the windows is not itself "physical injury to tangible property," there is no "property damage" under the terms of the CGL policies. Accordingly, there is no coverage for the costs of repair or replacement of the defective work.

CONCLUSION

We conclude that a post-1986 standard form CGL policy with products-completed operations hazard coverage, issued to a general contractor, does not provide coverage for the costs of repair or replacement of a subcontractor's defective work because the defective work itself does not constitute "property damage." We therefore answer the certified question in the negative and return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

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

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

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

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

I have provided my view on the extent of coverage afforded by post-1986 standard-form commercial general liability policies ("CGL") concerning faulty subcontractor work that damages the completed project in my concurrence in the result only in United States Fire Insurance Co. v. J.S.U.B. Inc., No. SC05-1295 (Fla. Dec. 20, 2007). With regard to this case, I agree in principle with the majority that the installation of a faulty component, which does not cause any damage to the completed project, does not cause "property damage" within the meaning of a CGL policy.

Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit - Case No. 05-10559-BB

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