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THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA
CIVIL ACTION

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

Plaintiff,

vs.

CASE NO.: 07-0054 CA
Consolidated with: 07-1539 CA

PAUL A. JACOBSON, individually; SARAH T. JACOBSON, individually; MIKE SHIPLEY, individually; MIKE SHIPLEY HOMES, INC., a Florida corporation; FRANK NEUBEK, individually; TWIN WINDOWS, CORP., a Florida corporation; BRUCE TANSEY CUSTOM CARPENTRY, INC., a Florida corporation; WIEGOLD & SONS, INC.; OMNI TRACK, INC., a Florida corporation; and RLK CONSTRUCTION COMPANY OF NAPLES, INC., a Florida corporation, PHOENIX HOMES, INC. a Florida corporation, d/b/a PRECISION CONCRETE; ACCENT ELECTRIC SERVICE OF NAPLES, INC.; AMERICAN ENGINEERING CONSULTANTS, INC., and AMERICAN HOME ASSURANCE COMPANY, INC.,

Defendants.

FILED
COLLIER COUNTY, FLORIDA
2011 FEB 23 PM 1:17
CLERK OF COURTS
BY _____ D.C.

PLAINTIFF'S NOTICE OF FILING OF PROPOSED SPECIAL JURY INSTRUCTION #317 AS TO CONSTRUCTIVE TOTAL LOSS & MEMORANDUM OF LAW IN SUPPORT

COMES NOW, Plaintiff, JOHN ROBERT SEBO, INDIVIDUALLY AND AS TRUSTEE UNDER REVOCABLE TRUST AGREEMENT OF JOHN ROBERT SEBO DATED NOVEMBER 4, 2004 ("SEBO"), by and through its undersigned counsel, and provides this Notice of Filing Proposed Special Jury Instruction **#317** and Memorandum of Law in support (a copy of **#317** is attached as Exhibit "A") and states as follows:

FACTS

The subject manuscript all-risk policy of insurance issued by AMERICAN HOME provided coverage from April 18, 2005 to April 19, 2006 (the "Policy") for the residence owned by SEBO located at 450 Gulf Shore Blvd. North, Naples, Collier County, Florida 34102 (the "Home"). The subject policy of insurance also provided, as additional coverage, "Rebuilding to Code" (Part II, Property; C, Additional Coverages; 9 Rebuilding to Code). This section provides coverage in addition to the amount of coverage shown in the declarations page, and obligates AMERICAN HOME to pay the extra expense to obey any law or ordinance that regulates the repair, rebuilding or demolition of property damage by a covered loss. This action includes claims against AMERICAN HOME for declaratory relief asking for a declaration of rights under the Policy.

CONSTRUCTIVE TOTAL LOSS AND ITS RELATION TO THE VPL STATUTE

Succinctly put, the valued policy law ("VPL") as codified in §627.702. Fla. Stat. (2004), is a valuation statute not a causation statute. The VPL was and is intended to prohibit an insurer from challenging whether the value of the insured property is less than the full amount of coverage as stated in the policy based on depreciation of values and other causes, in the event of a total loss. **Fla. Farm Bureau Casualty Ins. Co. v. Cox, 967 So.2d 815 (Fla. 2007)** citing American Ins. Co. of Newark, N.J. v. Robinson, 120 Fla. 674, 163 So. 17 (Fla. 1935). The VPL has no application other than to conclusively establish the property's value when there is a total loss. Cox, 967 So.2d 815.

In determining a total loss, Florida uses two different tests. The first such test is the "identity test". A building is considered a total loss when the building has lost its

identity and specific character, and becomes so far disintegrated, it cannot be possibly designated as a building, although some part of it may remain standing. Lafayette First Ins. Co. v. Camnitz, 149 So. 653 (Fla. 1933). The second test used to determine whether a building is a total loss is the "constructive total loss test". A building may be deemed a constructive total loss when the building, although still standing, is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished. State Farm, Fla. Ins. Co. v. Ondis, 962 So. 2d 923, 925 (Fla. 1st DCA 2007).

The VPL only relates to the payment of a total loss in accordance with the pre-agreed upon amount stated in the policy of insurance. **Section 627.702 Fla. Stat. (2004)** states:

> *In the event of the total loss of any building, structure, mobile home as defined in s. 320.01(2), or manufactured building as defined in s. 553.36(12), located in this state and insured by any insurer as to a covered peril, in the absence of any change increasing the risk without the insurer's consent and in the absence of fraudulent or criminal fault on the part of the insured or one acting in her or his behalf, the insurer's liability, if any, under the policy for such total loss shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid.*

The VPL has nothing to do with determining covered perils. In determining covered perils under the VPL, the Florida Legislature repeatedly relies on the terms of the parties' insurance contract when it discusses covered perils. Cox, 967 So.2d at 821. In the case *sub judice*, AMERICAN HOME issued to SEBO an all-risk policy of insurance, insuring SEBO's residence against all risks of physical loss or damage to his house, contents and other permanent structures, unless excluded. (See Part II—Property Damage, Paragraph A. Insuring Agreement). It is important to note that this all

risk policy of insurance is a manuscript policy. According to the testimony of Kathleen Spinella, the corporate representative of AMERICAN HOME, a manuscript policy is "***a policy that we created that reads the way we want it to read***". (See **Deposition of Kathleen Spinella, dated November 10, 2010, page 153, lines 18 and 19**). Because this all risk policy of insurance is a manuscript policy, AMERICAN HOME had the ability to draft the terms, exclusions and conditions as they, in their sole and absolute discretion, deemed fit.

Carriers have the ability, to circumvent the VPL, to alter the scope of coverage under a policy by limiting liability through clauses that apply when multiple perils destroy a home. **Georgia State Law Review, 24 Ga. St. U.L. Rev. 1043 (Summer 2008).** Carriers can do this by using anti-concurrent cause clauses. Id. at 1052. A typical anti-concurrent cause clause typically provides that the coverage afforded under the policy "excludes loss caused directly or indirectly by an excluded cause regardless of any other cause that concurrently or in any sequence contributes to the loss". Id.

With respect to the SEBO Policy, AMERICAN HOME certainly had the ability to include such anti-concurrent cause language. AMERICAN HOME chose not to include any such language as the policy of insurance which is the subject matter of this action does not contain any such anti-concurrent cause language. Therefore, when a covered loss and an excluded loss combine to cause property damage, even if the covered loss is not the prime cause of loss, such is deemed a concurrent cause, such as the case with the AMERICAN HOME manuscript all risk policy. See **Wallach v. Rosenberg, 527 So.2d 1386 (Fla. 3d DCA 1988).**

It is interesting to note that AMERICAN HOME, in its jury instruction excludes losses incurred as a result of concurrent causation, and cites three cases to support the use of said jury instruction. The first case cited by AMERICAN HOME is **Citizens Prop. Ins. Corp. v. Hamilton, 43 So.3d 746 (Fla. 1st DCA 2010)**. In the Hamilton case, the policy of insurance was not an all risk policy. Id. Furthermore, the Hamilton policy of insurance contained an anti-concurrent cause clause. In addition, the insured, having already collected the full policy limits under their flood policy of insurance, was attempting to double dip; in other words to also collect the full policy limits under the named peril Citizen policy. Id. at 747.

Likewise, in the second case cited by AMERICAN HOME, **Citizens Prop. Ins. Corp. v. Ashe, 50 So.3d 645 (Fla. 1st DCA 2010)**, the subject policy of insurance was not an all risk policy, but instead a named peril policy of insurance. Id. at 652. Although not specifically stated, this Citizen policy of insurance, like the Hamilton policy of insurance, would also have contained an anti-concurrent cause clause. Again, like Hamilton, the insured in Ashe had also already received payment for the full policy amount of the flood insurance. Id. at 649.

Finally, in **Greer v. Owners Ins. Co., 434 F. Supp.2d 1267 (N.D. Fla. 2006)**, the insured sought duplicative damages both from the windstorm carrier and the flood insurance carrier. Again, the windstorm carrier's policy of insurance contained an anti-concurrent cause clause. Id. at 1273.

AMERICAN HOME, in support of its jury instruction, cites to no case (a) that relates to an all risk policy of insurance, (b) that does not have anti-concurrent cause clause contained within the policy, or (c) wherein the insured was not attempting to

recover twice for the same loss. The table below better illustrates these important distinctions.

	All Risk Policy of Insurance?	Anti-Concurrent Causation Clause?	Double Recovery Sought by Insured?
Citizens v. Hamilton, 43 So. 3d 746 (Fla. 1st DCA 2010)	NO	YES	YES
Citizens v. Ashe, 50 So. 3d 645 (Fla. 1st DCA 2010)	NO	YES	YES
Greer v. Owners, 434 F. Supp. 2d (N.D. Fla. 2006)	NO	YES	YES
Sebo v. American Home	**YES**	**NO**	**NO**

Again, in determining a total loss under the AMERICAN HOME manuscript all risk homeowner's insurance policy issued to SEBO, as it relates to the VPL statute, one must look at the parties policy of insurance in determining covered perils. Cox, 967 So.2d at 821. Furthermore, the VPL statute does not apply to supplemental ordinance or law coverage. **Ceballo v. Citizens Prop. Ins. Corp., 967 So.2d 811 (Fla. 2007).**

As noted in Ceballo, decided the same day as Cox, the primary purpose of Florida's VPL was:

> [T]o require an actual dollar amount of coverage be designated in the policy as the value of a structure in order to remove any uncertainty as to the amount an insured is entitled to recover for a total loss of the structure.

Ceballo, 967 So. 2d at 814. In the Ceballo case, the Supreme Court was faced with the question of whether or not the VPL applied to certain supplemental coverages, and noted that because the primary purpose of the statute, as set forth above, was not implicated by the VPL, the VPL had no affect on evaluating the availability of

supplemental coverage under the facts of the case. Id. at 814. There is no reason this logic would not apply to our circumstance. The core purpose of the VPL has nothing to do with the question of whether or not two concurrent causes combined to cause a single loss. Essentially, AMERICAN HOME is claiming that the VPL statute somehow trumps Florida's Concurrent Causation Doctrine. Crucially, as stated previously, the Policy does not contain anti-concurrent causation language. Thus, when two perils, one excluded and one not, combine to create an indivisible loss, the peril is covered under the policy of insurance. Wallach, 527 So. 2d 1386; Safeco Ins. Co. v. Guyton, 692 F.2d 551 (9th Cir. 1982)(coverage was available where a covered risk and negligent maintenance of flood control structures combined with an excluded risk, a flood, to cause a loss).

The Cox decision does not alter this result. In Cox, the Cox home was undisputedly a total loss as a result of suffering both wind and flood damage. Cox, 967 So. 2d 815 at 817. The Coxes' policy with Florida Farm Bureau covered wind damage, but did not cover losses based on floods. Id. The Coxes made a policy limit demand to Florida Farm Bureau who rejected the same claiming that wind had only caused insignificant damage to the home. Id. The Coxes' claim that the VPL required the entire policy limits to be extended because a covered loss was "part" of the total loss of the residence. Id. The factual background of the instant case is, crucially, distinguishable from Cox. In Cox, the Coxes were affirmatively claiming that the VPL increased and/or augmented the available coverage under their policy. Id. AMERICAN HOME' s purported advancement of the VPL in its proposed jury instruction runs

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completely contrary to the major purpose of the VPL statute as set forth in the Ceballo case. As stated by the Florida Supreme Court in Cox:

> A plain reading of the statute in its 2004 form shows that the statute intended only to set the value of property insured by the policy in order to conclusively establish the property's value when there is a total loss. Under the VPL an insurer cannot challenge the value of a property after the loss has occurred.

Cox, 967 So. 2d at 819.

Immediately after this portion of the Cox decision, the court quoted from the dissent of Judge Polston in the case of Mierzwa v. Florida Windstorm Underwriting Ass'n, 877 So. 2d 774 (Fla. 4th DCA 2004), wherein Judge Polston explained that causation was not mentioned in the VPL. Thus, the court noted that the amount of damages available under the insurance policy were based on insurance law conceptions of causation based on the policy language as opposed to reference to the VPL statute. Id.

AMERICAN HOME is claiming, by virtue of their proposed jury instruction, that the VPL somehow affects the causation analysis of damages in this case. Instead, the evaluation of the claim in the instant case should be made based on (1) the policy language; and (2) case law interpreting such policy language in Florida which recognizes the availability of coverage in a concurrent causation setting. It is important to note that the Supreme Court explicitly noted that its holding in the Cox decision was limited to those cases in which a covered peril **did not** cause a total loss or constructive total loss. Thus, the question is whether wind and rain based water intrusion damages suffered by the subject residence caused, by itself or in combination with other causes,

sufficient damage for the house to be considered either a total loss or constructive total loss.

In short, both Cox and Ceballo recognize the limited purpose of the VPL statute. As stated by later courts interpreting both Cox and Ceballo, the VPL is merely a valuation requirement and does not alter the Concurrent Causation Doctrine or other policy standard methods of interpreting insurance policies. **Fla. Farm Bureau Cas. Ins. Co. v. Mathis, 33 So. 3d 94 (Fla. 1st DCA 2010).**

As an aside, and important to evaluating the damages in this case, are the portions of the holdings in the Mierzwa District Court decision, which recognized that if an ordinance requires the remains of a structure to be torn down in order to comply with local codes, such ordinances are said to "prohibit or prevent" repair, thus making such structures a constructive total loss for the purpose of Florida insurance law. See Mierzwa, 877 So. 2d at 776-77, disapproved on other grounds by Cox, 967 So. 2d at 821. See also, Hamilton, 43 So.3d 746.

CONCLUSION

In the case sub judice, if a covered cause of loss and an excluded cause of loss combine to cause the residence to be deemed a Constructive Total Loss, then SEBO is entitled to the entire amount that it would cost to replace or rebuild the residence at the same location with materials of like kind and quality.

WHEREFORE, for all of the reasons cited above, SEBO respectfully requests SEBO's **PROPOSED SPECIAL JURY INSTRUCTION #[illegible]** be given to the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been to counsel identified below on this 21 day of February, 2011.

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EXHIBIT "A"

[redacted]

CONSTRUCTIVE TOTAL LOSS

Mr. SEBO is claiming that his residence was rendered a Constructive Total Loss. This Court instructs you, as a matter of law, that a "constructive total loss" occurs when Mr. SEBO's residence, although still standing, is damaged to the extent that ordinances or regulations in effect require its demolition or prohibit or prevent its repair, such that the residence had to be demolished.[1]

If you find that a covered cause of loss and an excluded cause of loss combined to cause the residence to be deemed a Constructive Total Loss, then Mr. SEBO is entitled to the entire amount it would cost to replace or rebuild the residence at the same location with materials of like kind and quality.

If you find that Mr. SEBO's residence was not a Constructive Total Loss, then you must determine the total amount to restore or repair Mr. SEBO's residence.

Authority: Fla .Farm Bureau Cas. Ins. Co. v. Cox, 967 So.2d 815 (Fla. 2007); [1]Fla. Farm Bureau Cas. Ins. Co. v. Mathis, 33 So.3d 94 (Fla. 2010); Citizens Prop. Ins. Corp. v. Hamilton, 43 So. 3d 746 (Fla. 1st DCA 2010).

GIVEN:_____
MODIFIED:_____
DENIED:_____
WITHDRAWN:_____

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