IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 16-2009-CA-005750-XXXX-MA
Division: CV-F

JOHNSON-GRAHAM-MALONE, INC.,
a Florida corporation,

Plaintiff,

v.

AUSTWOOD ENTERPRISES, INC.,
a Florida corporation f/k/a HOLMES
LUMBER COMPANY; AMERICAN
AND FOREIGN INSURANCE COMPANY,
a Delaware insurance company; LIBERTY
MUTUAL INSURANCE COMPANY,
a Massachusetts insurance company;
AMERISURE INSURANCE COMPANY,
a Michigan insurance company; CRUM
& FORSTER INDEMNITY COMPANY,
a Delaware insurance company and
MID-CONTINENT CASUALTY COMPANY,
an Ohio insurance company,

Defendants.
_____/

ORDER GRANTING PLAINTIFF JOHNSON-GRAHAM-MALONE, INC. PARTIAL SUMMARY DECLARATORY JUDGMENT, AND DENYING DEFENDANT AMERISURE INSURANCE COMPANY'S MOTION FOR THE SAME

THIS CAUSE is before the Court upon:

(1) JOHNSON-GRAHAM-MALONE, INC.'s ("JGM") Motion for Summary Declaratory Judgment, or in the Alternative, Partial Summary Declaratory Judgment, dated November 19, 2010; and

(2) AMERISURE INSURANCE COMPANY's ("AMERISURE") Motion for Summary Judgment dated November 19, 2010.

The parties agree that they have completed all necessary discovery addressing the discreet issue at Bar; that there is no dispute as to material fact; and that the issue addressed herein is ripe for Summary Judgment as a matter of law.

It is, thereupon,

ORDERED and ADJUDGED:

I. UNDISPUTED MATERIAL FACTS

a. Background – the underlying action

JGM was the general contractor for the construction of garden style apartments located in Jacksonville, Florida, sometimes referred to as "Estates at Deerwood Park" and at other times "54 Magnolia" (the "Project"). Using only subcontractors to execute the work, JGM constructed the Project in 1997 and 1998.

On April 26, 2007, the then-current owner of the Project filed suit against JGM (the "Underlying Action,") alleging numerous construction defects which constituted deviations from, or violations of, the applicable state building code. The Complaint also alleged that all the deviations were latent in nature. The result of these defects was that various moisture barriers and sealing techniques were allegedly not properly used, and accordingly the building was subject to severe water damage.

Demand was made upon all of JGM's insurance carriers, including AMERISURE, to attend and participate in mediation of the underlying action. However, AMERISURE, having declined coverage, refused to participate; and refused to defend. Under a settlement subsequently entered into in the Underlying Action, the vast majority of the settlement amount was contributed by subcontractors and subcontractors' insurers. However, in order to conclude the settlement, JGM paid $50,000 of its own monies and

also agreed to release the other insurance carriers from its respective costs of defense claims.

The underlying investigation had revealed that there were certain deficiencies at the time of the original construction in 1997 and 1998 that were latent conditions not readily observable at the time the construction was completed. As a result of various deficiencies in the construction, water intruded into the building at each significant rain event during and after the time the building was constructed in 1997 and 1998. It is not disputed that during the period from January 1, 2002 to January 1, 2005, actual physical damage to the property occurred. This damage was capable of being identified during the time period from January 1, 2002 through January 1, 2005, only upon physical exposure of the latent conditions. These conditions were not exposed until 2005 - 2007.

b. Allegations of the Second Amended Complaint in the Underlying Action

In the Second Amended Complaint in the Underlying Action, plaintiff alleged that the at the time the plaintiff purchased the Project, "the construction defects...were not apparent or obvious from observations of the premises, but were hidden from [plaintiff's] knowledge and view by finished, trim carpentry, or other building surfaces. Accordingly, the subject construction defects were 'latent' in nature[,]" and "due to their latent nature, the construction defects did not begin to be discovered until approximately October 2005, when they began to manifest themselves outwardly." Notwithstanding when the Underlying Action complaint alleges the damages were found, the undisputed facts indicate that water intrusion based damages occurred from the time frame of the completion of the Project until "discovered" in October of 2005, including the years 2002, 2003, 2004, and January 1, 2005, when AMERISURE insured JGM.

c. The CGL Policies

AMERISURE issued four CGL policies to JGM (hereinafter collectively referred to as "AMERISURE's CGLs").

1) CPP138448700000 - January 1, 2002 and January 1, 2003;
2) CPP1384487010003 - January 1, 2002 and January 1, 2003;
3) GL 2017328000000 - January 1, 2004 through January 1, 2005;
4) GL2017328 - January 1, 2004 through January 1, 2005

The pertinent language is identical as each provides:

> SECTION 1 – COVERAGES...
> PROPERTY DAMAGE LIABILITY
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of ... "property damage" to which this insurance applies ...
>
> b. This insurance applies to ... "property damage" only if: ...
>
> 2. the ... "property damage" occurs during the policy period ...
> ...
> 2. Exclusions
> This insurance does not apply to:
> l. Damage to your work
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.
>
> SECTION V - DEFINITIONS
> ...
> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> ...
> 17. "Property damage" means:
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;...

II. CONCLUSIONS OF LAW

a. Summary Judgment Pursuant To Fla. R. Civ. P. 1.150

Summary Judgment is appropriate where there is no genuine issue of material fact. Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126, 130

(Fla. 2000); Fla. R. Civ. P. 1.510. Partial summary judgment is appropriate under the rule where there are no material disputed facts. Southern American Fire Ins. Co. v. I.B.H. Liquor Corp., 242 So.2d 731 (Fla. 3d DCA 1971).

b. Interpretation of Insurance Policies Under Florida Law – Generally

In the interpretation of insurance policies, it is axiomatic that a policy is construed against its drafter. Westmoreland v. Lumbermens Mutual Cas. Co., 704 So. 2d 176, 179 (Fla. 4th DCA 1997); Hudson v. Prudential Prop. And Cas. Ins. Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984); National Merchandise Co. v. United Services Auto. Assoc., 400 So. 2d 526, 532 (Fla. 1st DCA 1981). Specifically, provisions of an insurance policy which define insuring or coverage clauses are construed in the broadest possible manner to effect the greatest extent of coverage. See, Westmoreland, *supra* at 179. In contrast to insuring clauses, however, exclusionary clauses are always strictly and narrowly construed against the insurer in a manner that affords the insured the broadest possible coverage. Id. at 176; Demshar v. AAACon Auto Transport, Inc., 337 So. 2d 963, 965 (Fla. 1976). If coverage is to be excluded based upon the definition of coverage, or a policy exclusion, the policy should so state in clear, unmistakable language. Progressive Ins. Co. v. Estate of Wesley, 702 So.2d 513 (Fla. 2d DCA 1997).

Ambiguity exists whenever terms of the policy are subject to different reasonable interpretations, one of which provides coverage, and one of which does not; or where more than one interpretation may be fairly given to a policy provision. Weldon v. All American Life Ins. Co., 605 So.2d 911, 915 (Fla. 2d DCA 1992); Blue

Cross Blue Shield of Fla. v. Woodlief, 359 So.2d 883 (Fla. 1st DCA 1978); Ellsworth v. Ins. Co. of N.A., 508 So.2d 395, 399 (Fla. 1st DCA 1987).

When an insurer fails to define a term found in an exclusion or limitation, the insurer cannot insist upon a narrow, restrictive interpretation of the coverage and these terms must be liberally construed in favor of the insured. See, Westmoreland, *supra* at180; State Farm Fire and Cas. Co. v. CTC Devel't Corp., 720 So. 2d 1072 (Fla. 1998); Container Corp. of Amer. v. Maryland Cas. Co., 707 So. 2d 733, 736 (Fla. 1998).

c. The Duty To Defend

All doubts as to whether the duty to defend exists must be resolved in favor of the insured and against the insurer. Jones v. Fla. Ins. Guaranty Asso., 908 So. 2d 435 (Fla. 2005); Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299, 1307 (Fla. 1st DCA 1992). If the complaint alleges facts which are partially within and partially outside of coverage of the policy, the insurer is obligated to defend the entire lawsuit. Tropical Park, Inc. v. United States Fid. & Guar. Co., 357 So. 2d 253, 256 (Fla. 3d DCA 1978); Grissom, *supra* at 1307. An insurer must defend if the allegations in the complaint could potentially bring the allegations of the complaint within coverage under the subject policy. This is true even if the allegations in the complaint "at least marginally and by reasonable implication" can be construed to invoke a duty to defend. See, Grissom, *supra* at 1307; Tropical Park, *supra* at 256; Pentecost v. Lawyers Title Ins. Corp., 704 So. 2d 1103 (Fla. 1st DCA 1997); Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2d 999 (Fla. 4th DCA 2002).

The Court must not only look to the facts alleged in the complaint, but their implications as well, in determining whether the complaint may represent a covered occurrence. See, Grissom, *supra* at 1307, fn. 5; Biltmore Constr. v. Owners Ins. Co., 842 So. 2d 947 (Fla. 2d DCA 2003)(duty to defend because of the existence of doubt as to the scope of the claim; and the allegations gave rise to the possibility of a covered claim); Beville, *supra*; State Farm Fire & Cas. Co. v. Edgecumbe, 471 So. 2d 209, 210 (Fla. 1st DCA 1985). See also, Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F. 2d 810 (11th Cir. Fla. 1985); Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F. 3d 750, 754 n. 13 (11th Cir 1998), citing Trizec, (noting that Florida courts have rejected the "manifestation trigger of coverage" approach in favor of an approach under which coverage is triggered by property damage alone taking place during the policy period).

In order to avoid its duty to defend on the basis of an exclusionary clause, an insurer must establish that the allegations of the complaint fall "solely and entirely" within the exclusion which is used as the basis to avoid the duty of defense. Lime Tree Village Community Club Assoc., Inc. v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1405-07 (11th Cir. 1993); Baron Oil Company, 470 So. 2d 810, 815 (Fla. 1st DCA 1985).

d. Coverage for Construction Defects in Florida

The availability of coverage for construction defects has been expanded by the Florida Supreme Court's decisions in U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007) and Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241 (Fla. 2008). These cases grant coverage for general contractors when the

work of their subcontractors results in covered property damage occurring after operations are complete.

e. The Issue at Bar: What triggered coverage here?

The dispute between the parties in these motions is over the so-called "trigger of coverage". JGM claims that the correct trigger is the "actual injury/injury-in-fact trigger" – meaning that it is when the property damage actually happened, as contrasted with when the property damage was found. AMERISURE advances the "manifestation trigger" which dates the occurrence based on when the property damage was found or observed. The Court recognizes that cases interpreting Florida law in support of both positions exist.[1] The Court finds that the damages in the instant case constitute latent defects. It is in the determination of coverage for latent defects precisely where the two trigger rules of coverage diverge.

The Court is primarily guided here by the decision of Travelers Insurance Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199 (Fla. 1st DCA 1979). There, the First District held:

> [t]he phrase 'caused by an occurrence' informs the insured that an identifiable event other than the causative negligence must take place during the policy period. The term 'occurrence' is commonly understood to mean the event in which negligence manifests itself in property damage or bodily injury, and it is used in that sense [in the policy].

Id., at 1202. The Court finds that the key term in the decision is 'event', which refers to the actual occurrence of the damage. Although the First District used the term 'manifests' in

[1] See generally, Koikos v. Travelers Ins. Co., 849 So. 2d 263 (Fla. 2003); New Amsterdam Casualty Co. v. Addison, 169 So. 2d 877 (Fla. 2d DCA 1964); Hertz Corp. v. Pugh, 354 So. 2d 966, 969 (Fla. 1st DCA 1978); Travelers Insurance Co. v. C.J. Gayfer's & Co., 366 So. 2d 1199 (Fla. 1st DCA 1979); Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 754 n. 13 (11th Cir 1998); CSX Transp. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. 1996); Mid-Continent Cas. Co. v. Frank Casserino Constr., 721 F. Supp. 2d 1209 (M.D. Fla. 2010); C.f., Auto Owners Insurance Co. v. Travelers Casualty & Surety Co., 227 F. Supp. 2d 1248 (M.D. Fla. 2002); Harris Specialty Chems., Inc. v. United States Fire Ins. Co., 2000 U.S. Dist. LEXIS 22596 (M.D. Fla. July 7, 2000); Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F. Supp. 2d 1201 (S.D. Fla. 2008); North River Ins. Co. v. Broward County Sheriff's Office, 428 F. Supp. 2d 1284, 1289-90 (S.D. Fla. 2006), Amerisure Ins. Co. v. Albanese Popkin the Oaks Dev. Group, L.P., 2010 U.S. Dist. LEXIS 125918 (S.D. Fla. Nov. 30, 2010).

its decision, this Court finds that the First District's use of the term 'manifests' is not designed to communicate the "manifestation trigger;" but instead is used to denote the actual occurrence of the injury. This finding is also consistent with the plain meaning of the policy language and terms of AMERISURE CGLs. As noted previously, this holding is also consistent with other Florida cases. See generally, Boardman Petroleum, 135 F. 3d 750; Trizec, 767 F. 2d 810; CSX Transp. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. 1996). Such cases, interpreting Florida law, have held that the "actual injury/injury-in-fact trigger" applies.

The Court has also recognized cases interpreting Florida law that have held that the "manifestation trigger" applies. However, some of those decisions appear to use a form of the verb 'manifests' as a synonym for 'results or leads to' rather than drawing a distinction between the actual occurrence of damage and later discovery or obviousness of damage. When such cases are carefully reviewed, they are more aligned with the "actual injury/injury-in-fact trigger" as opposed to the "manifestation trigger". Other cases interpreting Florida law do in fact adopt the "manifestation trigger." However, this Court respectfully declines to follow those cases.

Clearly, the AMERISURE CGLs links coverage to damage, not damage detecting, in grafting a "manifestation trigger". To limit coverage by conditioning coverage on the observations made by a claimant, would blur the distinctions between claims-made and occurrence based policies. Looking to the actual date of injury is the only trigger consistent with the policies terms of AMERISURE CGLs. In addition, the "actual injury/injury-in-fact

trigger" is the both the majority rule[2] and consistent with the vast majority of scholarly authority[3].

III. HOLDINGS

Based on the foregoing, the Court finds as follows:

(1) JGM's Motion for Summary Declaratory Judgment, or in the Alternative, Partial Summary Declaratory Judgment as to Amerisure's Duty to Defend and Duty to Indemnify JGM for Damages Which Occurred "In Fact" During the Amerisure Policy Period(s) dated November 19, 2010 is hereby **GRANTED**;

a) AMERISURE owed a duty to defend to JGM in the Underlying Action. More specifically, the operative complaint in the Underlying Action gave rise to at least a potential that covered property damage actually occurred during one or more of AMERSURE's CGLs. The allegations of the Second Amended Complaint in the Underlying Action, taken as a whole, did not completely and entirely fall within any policy exclusions, and thus a duty to defend existed;

b) Relative to the duty to indemnify, the Court finds that any "property damage", as defined by the Florida Supreme Court in U.S. Fire Ins. Co. v. J.S.U.B., 979 So. 2d 871, 888-889 (Fla. 2007) and Auto-Owners Ins. Co. v. Pozzi Window, 984 So. 2d 1241 (Fla. 2008), which actually occurred during the policy periods of AMERISURE's CGLs, constitute a covered loss unless

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[2] Don's Building Supply, Inc. v. OneBeacon Insurance Co., 267 S.W. 3d 20 (Tex. 2008).Gruol Construction Co. v. Insurance Co. of North America, 524 P.2d 427 (Wash. Ct. App. 1974); Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 486 S.E.2d 89, 91 (S.C. 1997); Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001); Am. Employer's Ins. Co. v. Pinkard Constr. Co., 806 P. d 954, 955-56 (Colo. Ct. App. 1990); Sentinel Ins. Co. v. First Ins. Co. of Haw., 875 P.2d 894, 915-17 (Haw. 1994)

[3] John G. Buchanan, III, Richard D. Shore & Steven F. Benz, The Trigger of Coverage Under CGL Policies, 477 PRACTICING L. INS. 145, 159 n. 3 (Sept. 30, 1993); Ronald R. Robinson, "The Best of Intentions;" Drafting the 1966 Occurrence and 1973 Pollution Exclusion Policy Language, 4 ENVTL. CLAIMS J. 367, 375 (1992); Elliot, The New Comprehensive Gen. Liability Policy, in Liability Ins. Disputes 12-5 (S. Schreiber ed. 1968); Steven Rawls and Rebecca C. Appelbaum, Coverage Trigger: Getting It Right for the Right Reason, IRMI.com (October 2008).

AMERISURE can meet its burden of proof that one or more policy exclusions bar any covered "property damage";

(2) AMERISURE's Motion for Summary Judgment dated November 19, 2010 is hereby **DENIED**.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 29th day of April, 2011.

Hugh A. Carithers
Circuit Judge

ORDER ENTERED

APR 29 2011

/s/ Hugh A. Carithers

Copies furnished to:

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