IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: CA17-90
DIVISION: 56

FRED and CAROLE PARKER,
Plaintiffs,

v.

FLORIDA FARM BUREAU CASUALTY
INSURANCE COMPANY,
Defendant.
_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This cause is before this Court pursuant to the Motion for Summary Judgment filed by Plaintiffs/Counter-Defendants Fred and Carole Parker ("Parkers") [DIN 82] and the Motion for Summary Judgment filed by Defendant/Counter-Plaintiff Florida Farm Bureau Casualty Insurance Company ("Farm Bureau") [DIN 115].[1] Having considered the parties' motions, submissions by the parties, the arguments of counsel, and being fully advised in its premises, the Court finds as follows:

The Parkers were insureds under a homeowners insurance policy issued by Farm Bureau at all times relevant to this action. The Parkers initiated this action by filing suit seeking a declaratory judgment from the Court of Farm Bureau's duties

[1] References to Court's docket identification number are referred to as "DIN" followed by the applicable number to identify the filing.

and obligations to pay benefits under the aforementioned insurance policy as a result of a loss suffered when the dock at their home was damaged. [DIN 7] Farm Bureau answered the Complaint by denying it has an obligation to pay benefits under the insurance policy, asserting affirmative defenses that exclusions under the insurance policy preclude coverage, and counterclaimed for a declaration of its rights, duties and obligations under the insurance policy. [DIN 73] The Parkers answered the Counterclaim by denying the existence of policy exclusions precluding coverage. [DIN 101] Both parties moved for final summary judgment. [DIN 82 & 115] This Court conducted a hearing on both motions for summary judgment on October 2, 2018. At that time, counsel for the parties agreed there are no material factual disputes and the issues remaining before the Court are questions of law, for which summary judgment is appropriate.[2]

Generally, a motion for summary judgment must meet the strict procedural requirements enumerated in Fla. R. Civ. P. 1.510. The requirements set forth therein are designed to protect the litigants' constitutional right to a trial on the merits of a particular claim. *Bifulco v. State Farm Mutual Auto. Ins. Co.*, 693 So.2d 707 (Fla. 4th DCA 1997). The Court may grant a motion for summary judgment if the

[2] At the hearing on the motions for summary judgment, while both parties agreed there were no material factual disputes precluding summary judgment, the Parkers asserted the Court needed to resolve their *Daubert* Motion to Exclude Expert Testimony, prior to determining the issues at that summary judgment. Shortly after that hearing, the Florida Supreme Court rendered its decision in *DeLisle v. Crane Co.*, __ So.3d __, SC16-2181 (Fla. Oct. 15, 2018), directing that the standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), should not be used by Florida courts to determine the admissibility of expert opinion testimony. Thus, this Court denied the Parkers' *Daubert* motion. [DIN 146]

pleadings, discovery, affidavits and other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). "The party moving for summary judgment has the initial burden of demonstrating the nonexistence of material issues of fact; after the movant has tendered competent evidence supporting its motion, the burden shifts to the other party to come forward with opposing evidence to show a question of material fact exists." *Hicks v. Hoagland*, 953 So.2d 695, 697 (Fla. 5th DCA 2007)(citing *Carnes v. Fender,* 936 So. 2d 11 (Fla. 4th DCA 2006)). The trial judge must draw every inference or resolve every doubt in favor of the party opposing the motion. *Petruska v. Smartparks-Silver Springs, Inc.*, 914 So.2d 502, 504 (Fla. 5th DCA 2005). Additionally, in order to be entitled to summary judgment as a matter of law, a party seeking affirmative relief must not only establish that no genuine issues of material fact exist as to the party's claims but must also either factually refute the affirmative defenses or establish that they are legally insufficient. *Sanchez v. Soleil Builders, Inc.,* 98 So. 3d 251, 254 (Fla. 5th DCA 2012). As for counterclaims, the trial court is required to consider them to determine if no genuine issue of material fact exists and if the moving party is entitled to a judgment as a matter of law. *Id.* Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law. *Snow v. Byron*, 580 So.2d 238 (Fla. 5th DCA 1991).

The undisputed material facts in the instant case reveal as follows. The Parkers own a home located on the St. Johns River in St. Johns County. There is a wooden dock on the Parkers' property that extends into the St. Johns River. In early October 2016, the Parkers left their residence in advance of Hurricane Matthew that was threatening the area. Hurricane Matthew passed near St. Johns County, causing damage to the area. The Parkers returned to their residence on October 9, 2016 to discover the wooden dock had been damaged with a large amount of wooden debris on, under and around the damaged dock. The debris consisted of sections of wooden boathouses, parts of boats, parts of other docks and large pilings. The Parkers made a claim with Farm Bureau for coverage under their homeowners insurance policy. Farm Bureau denied their claim.

In the Parkers' Complaint they allege that

> On or about October 7, 2016 floating wooden debris, dock pilings and boathouses (the "Wooden debris") slammed into and battered against and was deposited upon, on and around the Parkers' dock causing its deck, water, and electrical components to fail and collapse. The Wooden debris came from other failed wooden structures on the St. Johns River.

[DIN 7 ¶7]

The Parkers also submitted a sworn proof of loss to Farm Bureau which similarly provided

> A loss occurred on 10/7/2016. The cause and origin of the said loss were floating debris, dock and boat house wooden debris and pilings being slammed against and deposited in, or around the insured's dock

> causing its deck, water and electrical components to fail and collapse. The wooden debris came from other failed wooden structures on the St. Johns River.

Farm Bureau submitted the report of Scott Roberts, PE, in support of its own motion, together with other summary judgment evidence. Mr. Roberts' deposition was also provided to the Court. Mr. Roberts examined the damaged dock and reported his findings to Farm Bureau. Mr. Roberts opined the dock was damaged as a result of "hydrodynamic forces associated with moving flood water." Whether the dock was damaged directly by the actual flood water caused by Hurricane Matthew, as asserted by Farm Bureau, or as a result of the debris pushed into or onto the dock from the flood water, as asserted by the Parkers, is of no moment for disposition of the parties' summary judgment motions, as discussed below.[3]

The applicable homeowners insurance policy contains "Section I-Exclusions." This provision begins with the following paragraph before setting forth its specific coverage exclusions:

> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in sequence to the loss.

This section is referred to as an anti-concurrent causation provision. When a loss would not have occurred but for the joinder of independent covered and excluded causes, Florida law recognizes the concurrent cause doctrine which

[3] Because the Court need not determine whether the dock's damage was caused as described by Mr. Roberts, or as asserted by the Parkers, resolution of whether Mr. Roberts' opinion is admissible is unnecessary to determine if the parties are entitled to summary judgment.

mandates coverage. *Sebo v. American Home Assurance Co., Inc.*, 208 So.3d 694, 698-99 (Fla. 2016); *Paulucci v. Libery Mutual Fire and Ins. Co.,* 190 F.Supp.2d 1312, 1318 (M.D. Fla. 2002). However, parties to an insurance contract governed by Florida law may contract around the concurrent cause doctrine by expressly including an anti-concurrent causation provision in the policy. *Paulucci*, 190 F.Supp.2d at 1319-21 (citing *State Farm Fire and Casualy Co. v. Metropolitan Dade County*, 639 So.2d 63 (Fla. 3d DCA 1994))(enforcing anti-concurrent causation provision identical to that present in the instant case). Thus, this Court must consider whether the loss here was caused directly or indirectly by any excluded peril.

The Exclusions section of the policy goes on to exclude from coverage damage caused by water. In the "Amendatory Endorsement- Water Exclusion" the policy excludes damage caused by water in Section I.1.c, which it specifies as

> (1) Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge:
>
> * * * *
>
> (4) Waterborne material carried or otherwise moved by any of the water referred to in 1.c.(1) through 1.c.(3) of this Exclusion.

Thus, if any of the aforementioned water damage exclusions directly or indirectly contributed to the loss here, there would be no coverage. The Parkers contend that neither of these exclusions apply; therefore, there is no exclusion from coverage. Farm Bureau contends one or both exclusions apply. Determination of

the applicability of these exclusions is a question of law based on the undisputed material facts.

It is undisputed that the damage to the dock was caused either directly by the flood water causing hydrodynamic forces on the dock itself, or viewing the undisputed material facts in the light most favorable to the Parkers, by the debris that was pushed up to and on the dock by the moving flood water caused by Hurricane Matthew. The Parkers contend that because it cannot be determined that hydrostatic pressure caused the damage, and the term "waterborne material" is ambiguous, the policy must be interpreted in their favor for coverage.

This Court agrees that it cannot be undisputedly determined that the hydrostatic water pressure, by itself, caused the damage to the dock. However, that is not determinative. It is undisputed that *either* the water pressure from the flood water directly caused the damage, *or* the flood water moved the debris from other locations causing it to impact and/or rest on the dock and cause the damage. Regardless of which mechanism caused the damage, the flood water was a direct or indirect cause of the damage. Assuming the debris caused the damage as asserted by the Parkers, it was the flood water that moved the debris to the Parkers' dock and caused the debris to collide with or rest upon the dock causing the damage. Thus, the Court finds the exclusion in section 1.c.(1) of Section I- Exclusions is applicable.

Even if the flood water exclusion in section 1.c.(1) of Section I- Exclusions was not applicable, as asserted by the Parkers, the waterborne material exclusion in section 1.c.(3) of Section I- Exclusions would apply. As the Parkers correctly note, the term "waterborne material" is not defined in the policy. However, the fact that a term is not defined in an insurance policy does not necessarily mean that it creates an ambiguity. Whether an ambiguity exists in an insurance policy is a question of law for the court to decide. *Kohl v. Blue Cross and Blue Shield of Fla., Inc.,* 955 So.2d 1140 (Fla. 4th DCA 2007); *Escobar v. United Auto. Ins. Co.,* 898 So.2d 952 (Fla. 3d DCA 2005). When an insurer has not defined a term in an insurance policy, the common definition of the term should prevail. *Liebel v. Nationwide Ins. of Fla.*, 22 So.3d 111 (Fla. 4th DCA 2009). Courts may consult references commonly relied upon to supply such accepted meanings of words, including dictionaries. *Penzer v. Transportation Ins. Co.,* 29 So.3d 1000 (Fla. 2010); *Garcia v. Federal Ins. Co.,* 969 So.2d 288 (Fla. 2007); *Oak Ford Owners Ass'n v. Auto-Owners Ins. Co.,* 510 F.Supp.2d 812 (M.D. Fla. 2007).

The Parkers assert that the term "waterborne material" is subject to more than one meaning since some of Farm Bureau's own employees who were deposed in this action understood it to mean only material backed up in sewers or drains. The fact that certain employees of Farm Bureau may believe the term has another meaning is not conclusive, since whether there is an ambiguity in an insurance policy is a

question of law, not fact. The plain everyday meaning of "waterborne material" is any material moved by or carried by water.[4] The confusion by Farm Bureau's employees and the Parkers likely arises from language in the "Additional Coverages" portion of the policy, which provides

> 11. **Water Back Up and Sump Discharge or Overflow.** We insure, up to $5000, for direct physical loss, not caused by the negligence of an "insured," to property covered under Section I caused by water, or water-borne material, which:
> a. Backs up through sewers or drains, or
> b. Overflows or is discharged from a:
> (1) Sump, sump pump, or
> (2) Related equipment; . . .

This section doesn't define "waterborne material" to mean material as a result of a sewer back up or overflow, but specifies the limited type of water borne material and circumstances where coverage will be provided. This provision, when read in conjunction with the rest of the policy, does not create an ambiguity.

The debris that ended up colliding with and/or being deposited on the Parkers' dock was conveyed or carried by the flood water, and therefore, falls within the plain and ordinary meaning of "water borne material." Thus, the damage to the dock caused by the debris is excluded from coverage under the water borne material exclusion.

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[4] The Cambridge English Dictionary defines "waterborne" as something carried by or through water. *https://dictionary.cambridge.org/us/dictionary/english/waterborne.* The Oxford Dictionary defines it as something conveyed by, travelling on, or involving travel or transport on water. *https://en.oxforddictionaries.com/definition/waterborne.* Lastly, the Merriam-Webster Dictionary defines it as something supported, carried, or transmitted by water. *https://www.merriam-webster.com/dictionary/waterborne.*

Because it is undisputed that the damage to the Parkers' dock was caused either directly by the water pressure from the flood water, or from the water borne debris conveyed by the flood water, the exclusions discussed above apply.

The Parkers further contend the ensuing loss provision of the policy provides coverage. The policy provides "any ensuing loss to property described in Coverage A and B, *not excluded or excepted in this policy* is covered." (emphasis added) Because the Court has determined an exclusion to coverage applies, the ensuing loss provision is inapplicable. Likewise, the debris removal provision in the policy, also relied on by the Parkers, would not apply since the damage was not caused by a covered peril. Lastly, the Parkers' claim of a confession of coverage is without merit since Farm Bureau had not confessed or admitted coverage but consistently denied coverage.

THEREFORE, for the foregoing reasons, it is ORDERED and ADJUDGED as follows:

1. Final Summary Judgment is GRANTED in favor of Defendant/Counter-Plaintiff Florida Farm Bureau Casualty Insurance Company, and this Court declares that under the insurance policy which is the subject of this action (Home Owner's Policy HO [redacted], the insured is not obligated to pay benefits for the loss at issue.

2. Plaintiffs/Counter-Defendants Fred and Carole Parker's Motion for Summary Judgment is DENIED.

3. The Court reserves jurisdiction of the issue of attorneys' fees and taxable costs, if appropriate.

DONE AND ORDERED in chambers, in St. Johns County, Florida, on 08 day of November, 2018.

CIRCUIT JUDGE

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