Online Reference: FLWSUPP 3208ASHL

Insurance -- Commercial general liability -- Excess policies -- Exclusions -- Damage to property owned by insured -- Damage to "your work" -- Insurer had no duty to defend general contractor in underlying suits brought by homeowners alleging construction defects and violations in homes built by contractor where underlying complaints did not allege facts that would bring complaint within coverage of policy issued to general contractor -- Discussion of eight-corners rule, under which insurer's duty to defend arises from the "eight corners" of the complaint and the policy, and exceptions to that rule, including uncontroverted fact exception and exception for facts that would not normally be pled -- Policy clearly excluded coverage for damage to property that occurred when general contract was owner of homes -- Because undisputed record specifically established that contractor admitted ownership of each home prior to completion, any damages occurring to the homes during that period was excluded from coverage -- Damages that occurred after completion fell within exclusion for "your work" provision excluding damage to home caused by insured general contractor -- Because policy did not contain a subcontractor exception, exclusion applied even if the damages arose out of defective work of one of the insured's subcontractors -- Insurer's motion for partial summary judgment granted -- Priority of coverage -- Insured's motion for partial summary judgment on cross-claim is denied -- Separate and apart from exclusions, policy issued to general contractor was excess over "additional insured" coverage provided to general contractor by subcontractors' insurers -- Although contractor's policy stated that if no other insurer defended the general contractor, the general contractor's insurer would undertake the defense, contractor did not present any record citations to support conclusion that it was not defended by any insurer

ASHLEY HOMES, LLC, Plaintiff, v. ASH-BROOKE CONSTRUCTION, et al., Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2022-CA-000703. September 24, 2024. Steven B. Whittington, Judge. Counsel: Mark A. Boyle, Amanda K. Anderson, and George H. Featherstone, Boyle, Leonard & Anderson, P.A., Fort Myers, for Plaintiff. Todd M. Davis, Timothy H. Snyder, and Michael J. Zeigerman, Davis Law Firm, Jacksonville, for Defendant.

ORDER GRANTING SOUTHERN-OWNERS'

MOTION FOR PARTIAL SUMMARY JUDGMENT

AND DENYING ASHLEY HOMES' CROSS MOTION

FOR PARTIAL SUMMARY JUDGMENT

This cause came before the Court for hearing on August 27, 2024, on Defendant Southern-Owners Insurance Company's ("Southern-Owners") Amended Motion for Summary Judgment (Dkt. Ent. No. 260, filed May 9, 2024) and Plaintiff Ashley Homes, LLC's ("Ashley's") Cross-Motion for Summary Judgment (Dkt. Ent. No. 256, filed May 6, 2024). This Court, having heard the arguments of counsel, having reviewed the record, and being otherwise advised as to this cause, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Ashley Homes, LLC, served as a general contractor in the construction of six single family Homes. *See respectively,* Dec. Compl. Exhibit "A", "B", "C", "D", "E", "F" at ¶¶ 21 and 29, Dkt. Ent. No. 3.

2. At issue in the competing motions for partial summary judgment is whether Southern-Owners is required to defend Ashley against Underlying Complaints that have been dismissed with prejudice. *See respectively,* Underlying Plaintiff's Notices of Dismissal with Prejudice filed in 2020 CA 940, 2020 CA 945, 2020 CA 943, 2020 CA 935, 2020 CA 966, 2020 CA 944.

3. Southern-Owners and Ashley settled Ashley's additional insured claims under policies that Southern-Owners issued to Ashley's subcontractors.

4. The present motions for partial summary judgment only concern Ashley's own policies of insurance with Southern-Owners. *See generally,* Dkt. Ent. Nos. 256, 260, 269, 280, 281, 282.

Ashley Owned the Homes During Construction

5. Ashley built the Homes and the Underlying Plaintiffs "later closed on the Home(s)." *See respectively,* Dec. Compl. Exhibit "A", "B", "C", "D", "E", "F" at ¶ 13

6. Each Underlying Complaint states:

> "13. Defendant built the Home and Plaintiffs *later closed on the Home*."

See id. at ¶ 13 (emphasis added).

7. Each Underlying Complaint references a building permit issued to Ashley. *See respectively, id.* at ¶ 13. Each of the building permits referenced in each Underlying Complaint identifies Ashley as the owner of the Home. *See Building Permits,* Am. MSJ Comp. Exhibit 1-6.

8. Each Certificate of Occupancy issued by the Clay County Building Department identifies Ashley as the owner of the Home. *See Certificates of Occupancy,* Am. MSJ Comp. Exhibit 1-6.

9. Ashley states in each of its notarized warranty deeds, filed with the Clay County Clerk of Court, that it "fully warrants" its "title to the property" as to each Home prior to sale. *See Warranty Deeds,* Am. MSJ. Comp. Exhibit 1-6.

10. Ashley has not offered or identified any evidence disputing the accuracy or authenticity of the building permits, its warranty deeds, or the Certificates of Occupancy. *See generally Ashley MSJ Response,* Dkt. Ent. No. 269.

Only Damages to the "Home" Alleged

11. The damages allegations in each Underlying Complaint are identical. *Id.* ¶¶ 21 and 29.

12. Paragraphs 21 and 29 of each Complaint state, respectively:

> 21. As a direct and proximate result of the construction defects and violations, *the Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. ¶ 21 (emphasis added).

> 29. As a direct and proximate result of the construction defects, deficiencies and violations, *the Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. ¶ 29 (emphasis added).

13. Each Complaint further states "Plaintiffs have been damaged in that the defects and violations substantially reduce the value of the *Home*." *Id.* at ¶ 22 and ¶ 30 (emphasis added).

Ashley's Additional Insured Claims Against Other Insurers

14. Ashley's Complaint attaches agreements with its subcontractors which require each subcontractor to name Ashley as an additional insured under that subcontractors' insurance Policy. These Agreements are attached to Ashley's Complaint as Exhibits “H,” “I,” “J,” “K,” “L,” “M.” *See Dec. Compl.,* ¶ 44, a.-g.

15. Specifically, the subcontracts attached by Ashley each state that Ashley “shall be named as an additional insured” on each subcontractor's policy. *See Dec. Compl.,* ¶ 44, a.-g., and, respectively, incorporated Exhibit H, Dkt. Ent. No. 79, Page 7; Exhibit I, Dkt. Ent. No. 80, Page 12; Exhibit J, Dkt. Ent. No. 81, Page 7; Exhibit K, Dkt. Ent. No. 82, Page 7; Exhibit L, Dkt. Ent. No. 83, Page 7; Exhibit M, Dkt. Ent. No. 84, Page 7 (collectively “Subcontracts”).

16. The subcontracts attached by Ashley also each state that Ashley's own Southern-Owners Insurance Policy is excess and that the subcontractor insurance policies are primary. Specifically, each subcontract states:

> The Subcontractor's insurance coverage shall be primary insurance as respects work on this project for Contractor [Ashley], its directors, officers and employees. **Any insurance or self-insurance maintained by Contractor shall be excess of the Subcontractor's insurance.**

See id. (bold emphasis added).

17. Ashley also attaches and incorporates its subcontractors' policies of insurance into each Count against Southern-Owners. *See Dec. Compl.* ¶ 45, note 3, and Dec. Compl. Ex. 1 (subcontractor policies “specifically incorporated” into the Complaint).

18. Specifically, Ashley attaches and incorporates the following subcontractor policies of insurance into its Counts against Southern-Owners:

a. National Builders Insurance Company (Ash-Brooke). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 3.

b. MCC (Capital). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 6.

c. FEDNAT (Capital) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 7.

d. IHIC (Capital). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 8.

e. Builders (Cercy) *See Dec. Compl*. ¶ 45, note 3, and *Dec. Compl.* Ex. 9.

f. Gemini (J&S Stucco). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 11.

g. Scottsdale (J&S Stucco) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 12.

h. Colony (J&S Stucco) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 13.

i. Endurance (K&G Construction) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 14.

j. USIC (K&G Construction) *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 15.

k. Cypress (Wolf). *See Dec. Compl.* ¶ 45, note 3, and *Dec. Compl.* Ex. 17.

19. As to the subcontractor insurance policies above, the priority of coverage and additional insured clauses in the subcontractor's policy state that the additional insured coverage provided by these other insurers to Ashley is primary and will not seek contribution from Ashley's own insurers. *See e.g., Response* Composite

Exhibit 9, *respectively,* pgs. 11 (National), 17 (American), 34 (Scottsdale), 44 (Endurance), 50, 57, 64, (United) (bold in original).

20. For purposes of providing but a few of several examples, the Priority of Coverage clauses in the National Builders Policy issued to subcontractor Ashbrooke, the American Builders Policy issued to Cercy, the Scottsdale Policy issued to J&S, and the Endurance American and United Specialty Policies issued to K & G, all state:

> 2. **Primary and Noncontributory**. The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:
>
> This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:
>
> **(1)** The additional insured is a Named Insured under such other insurance; and
>
> **(2)** You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

See Response Composite Exhibit 9, *respectively,* pgs. 11 (National), 17 (American), 34 (Scottsdale), 44 (Endurance), 50, 57, 64, (United) (bold in original).

Ashley's Southern-Owners Policy

21. Southern-Owners issued a Tailored Protection Commercial General Liability insurance policy to Ashley under policy number [Editor's note: Omitted by court]. *See* Ashley's Southern-Owners Policy, Dec. Compl. Ex. 4.

22. The Policy states that it only covers "bodily injury" and "property damage" to the extent it is "caused by an 'occurrence' that takes place in the 'coverage territory' . . . "during the policy period". *Id.* at Section I.A., ¶ 1.b. An "occurrence" under the Policy "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at Section V, ¶ 14.

A. "Property You Own" Exclusion

23. The Policy includes several relevant exclusions. In particular, the Policy excludes damage to property "you own, rent, occupy or use." Policy Form 55300 *at* Section I.A., ¶ 2.j.

24. Specifically, Policy Form 55300 *at* Section I.A., ¶ 2.j. excludes:

> **j. Damage to Property**
>
> "Property damage" to:
>
> (1) Property you own, rent, occupy or use, including any cost or expense incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

Policy Form 55300 at Section I.A., ¶ 2.j.

B. "Your Work" Exclusion

25. The Policy also contains a "Your Work" exclusion. Policy Form 55300 *at* Section I.A., ¶ 2.1. excludes:

> **1. 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."

Id. at Section I.A., ¶ 2.1.

The "products-completed operations hazard" includes "completed" or "abandoned" work. *See id.* at Section V ¶ 17.

C. Conditions of Coverage: Primary vs Excess

26. Separate and apart from the exclusions highlighted above, Section IV of Ashley's Southern-Owners Policy lists relevant "Conditions" of coverage. Policy Form 55300 at Section IV.

27. The Section IV conditions of coverage provide that Ashley's Southern-Owners' Policy is excess over:

> Any other primary insurance available to an insured, other than an additional insured, covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

See Response Exhibit 8, Dkt. Ent. No. 271. (This is an excerpt of Ashley's Declaratory Complaint Exhibit 4, Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

28. Ashley's Southern-Owners' Policy further provides:

> When this insurance is excess, we will have no duty under Coverage A or Coverage B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Id. at Section IV, ¶ 4.b.2.

LEGAL STANDARD

To be entitled to summary judgment, a movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). *Duran v. Crab Shack Acquisition, FL, LLC,* 384 So. 3d 821, 824 (Fla. 5th DCA 2024) [49 Fla. L. Weekly D914a]; *Synergy Contracting Group, Inc. v. People's Tr. Ins. Co.,* 49 Fla. L. Weekly D1236a (Fla. 2d DCA June 7, 2024).

If the moving party meets this burden, the burden then shifts to the nonmoving party to demonstrate that there are genuine factual disputes that preclude judgment as a matter of law. *Id.*

A. Determining Coverage Under Insurance Contracts

As an insurance policy is a contract, "contract principles apply to its interpretation." *Principal Life Ins. Co. v. Halstead as Tr. of Rebecca D. McIntosh Revocable Living Tr. Dated September 13, 2018,* 310 So. 3d 500, 502 (Fla. 5th DCA 2020) [46 Fla. L. Weekly D56a], *reh'g denied* (Jan. 29, 2021), *review denied sub nom. Halstead v. Principal Life Ins. Co.,* SC21-313, 2021 WL 2774746 (Fla. July 2, 2021).

Where the language in an insurance contract is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning so as to give effect to the policy as written. *See State Farm Mut. Auto. Ins.*

Co. v. Menendez, 70 So. 3d 566, 569-70 (Fla. 2011) [36 Fla. L. Weekly S469a]; *Washington Nat. Ins. Corp. v. Ruderman,* 117 So. 3d 943, 948 (Fla. 2013) [38 Fla. L. Weekly S511a].

Stated simply, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc. v. U.S. Fid. and Guar.,* 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a].

B. Determining Duty to Defend

An insurer has no duty to defend a lawsuit where the underlying complaint does not allege facts that would bring the complaint within the coverage of the policy. *Auto-Owners Ins. Co. v. Marvin Dev. Corp.,* 805 So. 2d 888, 891 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2486a]; *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.,* 358 So. 2d 533, 535 (Fla. 1977), *opinion adopted sub nom. Nat. Union Fire Ins. Co. v. Lenox Liquors,* 360 So. 2d 122 (Fla. 3d DCA 1978). The Court recognizes that the duty to defend is much broader than the duty to indemnify, as it is based solely upon the allegations in the complaint. *U.S. Fire Ins. Co. v. J.S.U.B., Inc.,* 979 So. 2d 871 (Fla. 2007) [32 Fla. L. Weekly S811a. The duty to defend is separate and apart from the duty to indemnify, and the insurer is required to defend the suit even if true facts later show there is no coverage. *Grissom v. Commercial Union Ins. Co.,* 610 So. 2d 1298 (Fla. 1st DCA 1992). Here, as will be further explained, the Court finds Southern Owners had no duty to defend Ashley in the underlying lawsuits.

C. Florida Recognizes Two Exceptions to the Eight Corners Rule

The Court generally must look only to the Underlying Complaints in determining the duty to defend. *See Marvin,* 805 So. 2d at 891.

Notwithstanding, Florida recognizes two exceptions which require the Court to look outside the "eight corners. *See Diamond State Ins. Co. v. Florida Dep't of Children & Families*, 305 So. 3d 59, 62 (Fla. 3d DCA 2019 [44 Fla. L. Weekly D2624a] (matter that would not normally be pled exception); *BBG Design Build, LLC v. S. Owners Ins. Co.,* 820 Fed. Appx. 962, 965 (11th Cir. 2020); *S.-Owners Ins. Co. v. Midnight Tires Inc.,* 2023 WL 6126491, at 4 (M.D. Fla. Sept. 19, 2023); *opinion clarified,* 2023 WL 8113239 (M.D. Fla. Nov. 22, 2023); *Nationwide Mut. Fire Ins. Co. v. Keen,* 658 So. 2d 1101 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1667a] (uncontroverted fact exception).

Uncontroverted Fact Exception

Florida recognizes a "common-sense" exception to the "eight corners" rule, that requires the Court to look outside the "four corners" of the Underlying Complaint to facts that are not subject to a genuine dispute. *See BBG Design Build, LLC v. S. Owners Ins. Co.,* 820 Fed. Appx. 962, 965 (11th Cir. 2020); *S.-Owners Ins. Co. v. Midnight Tires Inc.,* 2023 WL 6126491, at 4 (M.D. Fla. Sept. 19, 2023); *opinion clarified,* 2023 WL 8113239 (M.D. Fla. Nov. 22, 2023); *Nationwide Mut. Fire Ins. Co. v. Keen,* 658 So. 2d 1101 (Fla. 4th DCA 1995) [20 Fla. L. Weekly D1667a] .

In *Keen, supra,* Florida's Fourth District Court of Appeal looked to the insured's pre-suit communication admitting to the horsepower of his boat, in determining there was no coverage. *Keen,* 658 So. 2d. at 1103.

Plaintiff cites *Higgins,* arguing that *Higgins* prevents this Court from considering uncontroverted records of the Clerk of Court and public records of the County. *See Higgins v. State Farm Fire & Cas. Co.,* 894 So. 2d 5, 10, 20 n.2 (Fla. 2004) [29 Fla. L. Weekly S533a]. But *Higgins* explicitly recognizes exceptions to the "eight corners" rule.

In discussing the "eight corners rule" the Florida Supreme Court explained:

> We note, however, that there are some natural exceptions to this where an insurer's claim that

> there is no duty to defend is based on factual issues that would not normally be alleged in the underlying complaint.

Id. See also Diamond State Ins. Co. v. Florida Dep't of Children & Families, 305 So. 3d 59, 62 (Fla. 3d DCA 2019) [44 Fla. L. Weekly D2624a](Court must look beyond the pleadings if the fact is not one that would normally be pled in the Complaint.)

In *Midnight, supra,* the federal court was sitting in diversity and applying Florida Law. *See Midnight,* 2023 WL 6126491, at 3.

Coverage turned on ownership of a vehicle and the insured's argued that Southern-Owners must defend because ownership of the vehicle could not be determined from the "four corners" of the Underlying Complaint. *See Midnight,* 2023 WL 6126491, at 4.

Summarizing the "Uncontroverted Fact" Exception, the Midnight Court explained:

> [A] court may consider extrinsic facts 'if those facts are undisputed, and, had they been pled in the complaint, they clearly would have placed the claims outside the scope of coverage.'

Id. at 3.

Further, noting that there was no actual factual dispute as to ownership of the vehicle, the Court granted summary judgment in Southern-Owners' favor explaining:

> Thus, this is just the scenario where the exception to the eight corners rule is appropriate, for the fact that "[a]t some point in legal pleadings, common sense should prevail, which is in essence the basis for the limited exception to the four corners rule.

Id. (internal citations omitted). *See also BBG,* 820 Fed. Appx. at 965.; *Keen,* 658 So. 2d at 1101 (applying Florida's undisputed fact/common-sense exception to the "eight corners" rule).

"Fact That Would Not Normally be Pled" Exception

Diamond, supra, highlights Florida's second exception to the "eight corners rule." Where coverage turns on a fact that would not normally be pled in an Underlying Complaint, the Court must look beyond the four corners. *Diamond*, 305 So. 3d at 62. Put in other words, if a fact is relevant to coverage but not an element of the Underlying Claim, the Court may look outside the "four corners" of the underlying complaint. *Id.*

Diamond concerned Policy Exhaustion. Noting that this is not a fact that would ordinarily be pled in an Underlying Complaint, the Diamond Court explained this second exception:

> Because the existence and exhaustion of policy limits is not a matter normally addressed in a complaint, it would be impossible to enforce the bargain reached by the parties if the court refused to look beyond the pleadings. For this reason, a case like this one presents a narrow exception to the general rule that the duty to defend is determined by looking only at the pleadings. In order to resolve a duty to defend dispute which turns on whether the policy limits were exhausted, courts must look to the actual facts behind the pleadings.

Id.

LEGAL ANALYSIS

A. Exclusion "j": "Property You Own" Exclusion Excludes all Damage Prior to Sale

The Policies at issue in this case are Commercial General Liability Policies rather than owners policies and therefore exclude damage to "property you own." Policy Form 55300 at Section I.A., ¶¶ j.(1).

Florida Courts have found this exact exclusion to be clear and unambiguous. *See Danny's Backhoe Serv., LLC v. Auto Owners Ins. Co.,* 116 So. 3d 508, 511 (Fla. 1st DCA 2013) [38 Fla. L. Weekly D1185c]; *See also Nationwide Mut. Fire Ins. Co. v. Cypress Fairway Condo. Ass'n, Inc.,* 6 : 13-CV-1565-ORL-31, 2015 WL 4496148, at 3 (M.D. Fla. July 23, 2015).

Nationwide, for instance, concerned an identical exclusion "j" to that at issue in the present case. *Id.* Cypress owned an apartment complex but later sold the property. When it was sued for failing to prevent water intrusion and resulting damage that occurred prior to sale, Cypress sought coverage under its Nationwide Policy. *Id.* at 1.

Noting that exclusion "j" is unambiguous and specifically excludes coverage for damage to property that was owned by the named insured at the time the damage occurred, the Court entered summary judgment in Nationwide's favor. In issuing this ruling, the Court rejected Cypress' contention that the exclusion only applies if it still owns the property. *Id.* at 3.

Here, Plaintiff does not dispute that the "property you own" exclusion excludes damage that occurred during Ashley's ownership of the Homes. Instead, Plaintiff argues this Court is not permitted to consider the building permits referenced within the four corners of the Underlying Complaint, the notarized warranty deeds filed with the Clay County Clerk of Court, or the Clay County Certificates of Occupancy all identifying Ashley as the owner of the Homes.

In particular, Ashley attempts to distinguish *Keen, BBG, Midnight,* and *Diamond, supra,* by arguing that the record shows that it never admitted to ownership of the Homes. *See Ashley Response,* at pg. 23 ¶ 1.

However, Plaintiff's arguments are contradicted by the record. Ashley does not identify a single record citation showing that it disputes its ownership of the Homes. *See generally, id.* On the contrary, the record reveals notarized warranty deeds filed with the Clay County Clerk of Court in which Ashley "fully warrants" its "title to the property" as to each Home. *See Warranty Deeds,* Am. MSJ. Comp. Exhibit 1-6.

While Ashley attempts to distinguish *Keen, BBG, Midnight, and Diamond,* by arguing that its notarized statement of ownership filed with the Clay County Clerk of Court is not an admission and not admissible, this argument reflects a misunderstanding of Florida's rules of evidence. *See* § 90.803, Fla. Stat. ¶ (8), (15), & 18.[1]

"Statements in documents affecting an interest in property" are an exception to the hearsay rule. *See §* 90.803, Fla. Stat. ¶ (15). "Public records and reports" are also an exception to the hearsay rule. *See §* 90.803, Fla. Stat. ¶ (8). An admission is a statement that is offered against a party and is the "party's own statement in either an individual or representative capacity." *See §* 90.803, Fla. Stat. ¶ (18).

Furthermore, each of these public records is properly before the Court. Southern-Owners gave Ashley more than three-months-notice of its request that the Court take judicial notice of these County records. *See* Dkt. Ent. No. 260, n. 1-6. Ashley does not dispute the authenticity of the County Records. Therefore, the Court's judicial notice of these public records is mandatory pursuant to Florida Statutes § 90.202(6) and 90.203. *See Fla. Stat. §* 90.202(6) and 90.203. *See also, Keen, BBG, Midnight, and Diamond* (for proposition that consideration of these undisputed records is proper).

Here, the undisputed record specifically establishes that Ashley admits ownership of the Homes prior to completion. *See Warranty Deeds,* Am MSJ. Comp. Exhibit. 1-6. As Ashley admits ownership of the Homes prior to completion, the Court need not resolve whether the building permits referenced inside the four

corners of the Underlying Complaints are within the "four **c**orners."

Rather, applying the precedent set forth in *Keen, BBG, Midnight,* and *Diamond, supra,* and the undisputed fact that Ashley owned each Home until after completion, the Court finds that any damages occurring prior to completion are excluded by Ashley's Southern-Owners Policy. *See Danny's,* 116 So. 3d at 511; *Nationwide* 2015 WL 4496148, at 3.

B. Exclusion "l": "Your Work" Exclusion Excludes Damage to Homes after Completion

Having concluded that damages prior to completion are excluded under the "property you own" exclusion, the question becomes whether damages after completion are excluded by the exclusion "l", "your work" exclusion.

Here, Ashley was the general contractor and, as to each Home at issue, built the entire Home. *See Dec. Compl.* ¶ 38 a. - f. and attached Exhibit "A", "B", "C", "D", "E", "F" at ¶¶ 6 - 13. In this case, the parties agree that Ashley elected to purchase a policy with a "Your Work" Exclusion that does not have a subcontractor exception. *See Policy Form 55300 at Section I.A., ¶ 2.i.*

The parties also agree that without the subcontractor exception, Exclusion "l" acts to exclude all damage to the home caused by an insured general contractor, even if the damages arise out of one of the insured's subcontractor's defective work. *See e.g., Auto-Owners Ins. Co. v. Elite Homes, Inc.,* 160 F. Supp. 3d 1307, 1314 (M.D. Fla. 2016), *aff'd,* 676 Fed. Appx. 951 (11th Cir. 2017); *J.B.D. Const., Inc. v. Mid-Continent Cas. Co.,* 571 Fed. Appx. 918, 925 (11th Cir. 2014).

Rather, the disagreement between the parties hinges on whether the Underlying Complaints allege damage other than damage to the Homes. The Kohn, Luna, North, Obasa, Queen, and Schedlbauer Complaints each contain identical allegations as to damages. Each Complaint asserts, in pertinent part:

> the *Home* has suffered damages not only to the exterior stucco, but also to the underlying wire lath, paper backing, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

Id. at ¶ 21 and ¶ 29 (emphasis added).

Each Complaint further states "Plaintiffs have been damaged in that the defects and violations substantially reduce the value of the *Home*[.]" *Id.* at ¶ 22 and ¶ 30 (emphasis added).

As noted in Southern-Owners' Amended Motion for Summary Judgment, while the Underlying Complaints include the phrase "and/or other property" this phrase is qualified by the fact that it is part of a description of damage to the "Home" rather than an allegation of damage to property other than the Home. *Id.* at ¶ 21 and ¶ 29.

Further, even ignoring that the words "other property" specifically refer to damage to the Homes, *Elite Homes* reflects a consensus in Florida that "buzz words" do not trigger coverage. *See Elite,* 160 F. Supp. 3d at 1312; *see also e.g. Keen v. Florida Sheriffs' Self-Ins.,* 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1900a]; *Glob. Travel Intl, Inc. v. Mount Vernon Fire Ins. Co.,* 2022 WL 16753564, at 2 (11th Cir. Nov. 8, 2022) (use of "buzz words" in a complaint will not trigger coverage).

In *Elite Homes, supra,* Elite Homes, Inc. contracted to build a single-family home. After the house was completed, the windows leaked, causing damage to the home. The homeowners sued Elite Homes alleging "extensive damage to other property includ[ing] the frame subsurface, sheathing, insulation, drywall, and interior finishes"; "damage to interior portions of the home"; and "damage to other property including, but not limited to, exterior wood framing, wood substrate, vapor barriers, insulation, drywall, and interior

finishes."

Noting that all damage to the home fell within the same "your work" exclusion at issue here, and finding there was no duty to defend, the Court explained:

> Nothing on the face of the Croziers' amended complaint suggests that the water intrusion damaged anything beyond Elite Homes' work, as defined in the "your work" exclusion. Any other reading of the amended complaint would require the Court to give credence to conclusory "buzz words," and to indulge in impermissible inferences.

Id. at 1314; *See also e.g. Keen v. Florida Sheriffs' Self-Ins.,* 962 So. 2d 1021, 1024 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D1900a]; *Glob. Travel Int'l, Inc. v. Mount Vernon Fire Ins. Co.,* 2022 WL 16753564, at 2 (11th Cir. Nov. 8, 2022) (use of "buzz words" in a complaint will not trigger coverage).

Ignoring that the words "other property" specifically refer to damage to the Homes, Ashley asks the Court to speculate as to damages that the Underlying Homeowners could have suffered. But this invitation is both not contextual and a clear contravention of binding Florida precedent. *See e.g., Keen,* 962 So. 2d at 1024. *See also, Glob. Travel Int'l, Inc.,* 2022 WL 16753564, at 2 ("buzz words" do not trigger coverage).

Under Florida law:

> "[C]onclusory 'buzz words' unsupported by factual allegations are not sufficient to trigger coverage.

Glob. Travel at 2 (internal citations omitted). *See also e.g., Keen,* 962 So. 2d at 1024.

C. The "Property you Own" and "Your Work" Exclusions Overlap

Finally, as the Underlying Complaints do not allege covered property damages, the timing of property damage is irrelevant. *Auto-Owners Ins. Co. v. Marvin Dev. Corp.,* 805 So. 2d 888, 891 (Fla. 2d DCA 2001) [26 Fla. L. Weekly D2486a] (no coverage for property damage that is excluded).

Policy exclusion "j(l)" excludes coverage for damage to property that was owned by the named insured at the time the damage occurred. Policy Form 55300 at Section I.A., ¶ 2.j. The Exclusion "l" "your work" Exclusion likewise excludes damages to the Homes after completion of the Homes. As the record establishes that Ashley owned each Home until after completion, the two exclusions overlap and Ashley's "timing" caselaw is not on point.

D. Priority of Coverage

As a final matter, the Court notes that Southern-Owners has raised priority of coverage in response to Ashley's Cross Motion for Summary Judgment. Separate and apart from the exclusions highlighted above, Section IV of Ashley's Southern-Owners Policy lists relevant "Conditions" of coverage. Policy Form 55300 at Section IV. The Section IV conditions of coverage provide that Ashley's Southern-Owners' Policy is excess over:

> Any other primary insurance available to an insured, other than an additional insured, covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

See Response Exhibit 8, Dkt. Ent. No. 271. (This is an excerpt of Ashley's Declaratory Complaint Exhibit 4, Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

Ashley's Southern-Owners' Policy further provides:

> When this insurance is excess, we will have no duty under Coverage A or Coverage B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Id. at Section IV, ¶ 4.b.2.

To counter Ashley's Cross Motion for Summary Judgment, Southern-Owners offers Ashley's written subcontracts with its subcontractors which 1) require the subcontractors to provide Ashley with additional insured coverage and 2) state that Ashley's Southern-Owners Policy is excess over the additional insured coverage provided to Ashley by the subcontractor insurers. *See Dec. Compl.* Ex. "H", "I", "J", "K", "L", "M."

Southern-Owners further offers the Policy Excerpts set forth in Composite Exhibit 9, for purposes of establishing 1) that Ashley qualifies as an additional insured under the subcontractor's policies of insurance and 2) that the priority of coverage clauses in the: a) National Builders Insurance Company (Ash-Brooke), b) MCC (Capital), c) FEDNAT (Capital), d) IHIC (Capital), e) Builders (Cercy), f) Gemini (J&S Stucco), g) Scottsdale (J&S Stucco), h) Colony (J&S Stucco), i) Endurance (K&G Construction), j) USIC (K&G Construction), and k) Cypress (Wolf) policies make the additional insured coverage provided by these policies primary and Ashley's own Southern-Owners Policy excess. *See Am. Resp.* Comp. Ex. 9.

Ashley attached each of the above exhibits to its Declaratory Action Complaint and also authenticated several of these exhibits through affidavit. *See Affidavits,* Dkt. Ent. Nos. 189, and 240.

However, Ashley now attempts to attack its own Complaint and exhibits, arguing that the Court cannot consider Ashley's own attachments that it incorporated into the Complaint. *See Ashley Reply,* Dkt. Ent. No. 282, at pg. 7. Ashley further argues that its own exhibits and its own incorporated allegations as to these other insurers are unsupported. *See generally,* Ashley Reply, Dkt. Ent. No. 282.

However, there are several problems with Ashley's arguments. First, as Ashley attached and incorporated these exhibits into its own Complaint and allegations against Southern-Owners, these exhibits are part of the Complaint and control over contrary allegations. *See* e.g., *Fladell v. Palm Beach County Canvassing Bd.,* 772 So. 2d 1240, 1242 (Fla. 2000) [25 Fla. L. Weekly S1102b]; *Skupin v. Hemisphere Media Group, Inc.,* 314 So. 3d 353, 355 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D2393a] ("[I]ncorporated exhibits" are part of the complaint and control over allegations.) *See also* Rule 1.130, Fla. R. Civ. P.

Thus, Ashley's effort to challenge the authenticity of the exhibits that Ashley incorporated into and attached to its own Declaratory Complaint, is not supported by Florida law. *Id.*

Second, the parties apparently agree that Ashley settled these claims against other insurers. Ashley now contends that its allegations against the other insurers are unsupported. Ashley does not, however, present the settlement agreements with the other insurers or contend that these other insurers did not fund a defense. *See generally,* Ashley Reply, Dkt. Ent. No. 282. Thus, there are questions of fact related to priority of coverage that are unresolved.

Ashley also argues that the subcontractor policies of insurance do not cover the same risk as its own policy. However, this is again a contradiction of Ashley's own factual position as alleged in its own Declaratory Complaint. Ashley states:

> The HOMEOWNERS' claims of construction defects and damages implicated the work of the TRADES[.]

Dec. Compl. ¶ 39.

As the allegations "implicated the work of the TRADES" Southern-Owners Policy is excess over the subcontractor policies. *See e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Travelers Ins. Co.,* 214 F.3d 1269, 1272 (11th Cir. 2000); *Zurich Am. Ins. Co. v. Nat'l Specialty Ins. Co.,* 246 F. Supp. 3d 1347, 1364 (S.D. Fla. 2017).

Ashley next points out an exception to the priority of coverage clause which states:

> If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Policy Form 55300 *at* Section IV, ¶ 4.b.2.)

Ashley does not present any record citations to support the conclusion that it was not defended by any insurer. *See generally* Ashley Cross-MSJ, Dkt. Ent. No. 256. Rather, Ashley argues that Southern-Owners must disprove the exception to the priority of coverage condition. However, under Florida law, it is the insured's burden to prove exceptions. *Florida Windstorm Underwriting v. Gajwani,* 934 So. 2d 501, 506 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a]. *See also, Marvin Dev. Corp.,* 805 So. 2d at 891.

Even if the Priority of Coverage *condition* of coverage were an exclusion, which it is not, it is the insured's burden to prove exceptions to policy provisions. *Id.* In *Gajwani,* for instance, Florida's Third District Court of Appeals explained:

> As the insured has the burden to prove an exception to an exclusion contained within an insurance policy, and the Gajwanis did not offer any evidence to support an exception to the unambiguous exclusion in the policy, they clearly did not meet their burden.

Gajwani, 934 So. 2d at 506 (internal citations omitted).

Accordingly, the Court finds that Southern-Owners' priority of coverage evidence and arguments are separate grounds for denying Ashley's Cross Motion for Summary Judgment.

Accordingly, it is:

ORDERED and ADJUDGED

That Southern-Owners Motion for Partial Summary Judgment is granted and Ashley's Cross Motion for Summary Judgment is denied.

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[1]Southern-Owners Amended Motion for Summary Judgment requested that the Court take judicial notice of these County Records as permitted under Fla. Stat. § 90.202(6). As these are Clay County Records, no authentication is required. *Id.*

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