Third District Court of Appeal

State of Florida

Opinion filed October 28, 2026.
Not final until disposition of timely filed motion for rehearing.

No. 3D24-1000
Lower Tribunal No. 14-22252-CA-01

Homeowners Choice Property & Casualty Insurance Company,
Appellant,

vs.

Sandra Moise,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Migna Sanchez-Llorens, Judge.

Butler Weihmuller Katz Craig, LLP, and Mihaela Cabulea (Tampa), for appellant.

Alvarez, Feltman, Da Silva & Costa, P.L., and Paul B. Feltman, for appellee.

Before SCALES, C.J., and MILLER and BOKOR, JJ.

BOKOR, J.

After a verdict in favor of the insured, Homeowner's Choice Property & Casualty Insurance Company appeals the denial of its motion for summary judgment on the issue of exclusion for damages under the insurance policy's earth movement and settlement provisions. The insured's expert report claimed damage to the property from vibrations "without displacement of the earth." The insured also provided deposition testimony that she felt vibrations and shaking during the event caused by heavy construction equipment at the adjacent property. The trial court denied summary judgment for the insurer, concluding that the earth movement and settlement exclusions didn't encompass damages caused from vibrations without earth movement. For the reasons that follow, we affirm the orders on review.

I

This appeal challenges a final judgment in favor of the insured in an action for breach of a home insurance policy. The insurer provided coverage for the home, located in Miami, Florida. The applicable policy, which became effective May 8, 2013, provides that direct physical losses to the subject property occurring within the policy period are covered except where otherwise excluded. Relevant here, the policy excludes damages "caused directly or indirectly by any of the following . . . regardless of any other cause or event contributing concurrently or in any sequence to the loss," including:

b. Earth Movement and Settlement, meaning:

(1) Earthquake, including land shock waves or tremors before, during or after a volcanic eruption;

(2) Landslide;

(3) Mine subsidence;

(4) Mudflow or mudslide;

(5) Any other earth movement including "Sinkhole Loss", "Sinkhole Activity", earth sinking, rising or shifting;

(6) Clay shrinkage or other expansion or contraction of soils or organic materials;

(7) Decay of buried or organic materials;

(8) Settling, cracking or expansion of foundations;

(9) Erosion or movement resulting from improper compaction, site selection or any other external forces[.]

The policy also excludes damages for losses "involving collapse" or caused by "[s]ettling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings."

The insured brought the initial complaint on August 27, 2014, alleging that the insurer failed to cover damages to the property that occurred on March 1, 2014. Specifically, the insured claimed that the property incurred cracking and related damage to the floors, walls and ceiling because of vibrations from demolition activity at a neighboring house. In response to the

claim, the insurer commissioned an inspection from Bracken Engineering, Inc., which inspected the property on May 6, 2014, and concluded that the damages were caused by material shrinkage or settlement. The insurer's field adjuster also inspected the property on May 20, 2014, and denied the insured's claim on June 6, 2014, concluding that the damages were excluded as being caused by material shrinkage or settlement rather than vibrations.

The operative third amended complaint stylized the claim as a declaratory judgment action rather than a breach of contract claim, though the complaint still sought "damages attributable to the Loss, if covered." In response, the insurer filed an answer and affirmative defenses, including several defenses claiming that the insured failed to fulfill her post-loss obligation to timely report the loss, protect the property, and provide records. The insurer also claimed that the damages were excluded under the earth movement and settlement provisions of the policy because they were caused by cracking or settling of the foundations as a result of vibrations. The insurer subsequently moved for summary judgment on its sixth and seventh affirmative defenses, arguing that recovery was barred under the earth movement and settlement exclusions.

In support of summary judgment, the insurer proffered reports and deposition testimony from the insured's expert, Alfredo Brizuela, who

inspected the property on July 24, 2014. Brizuela's report concluded that the damages were caused by "the vibration created by the impact of the heavy construction equipment" at the adjacent property which "travelled through the lime rock subsoil strata and induced vibrations into the property foundation structure." He also attested that the damages were caused by "vibrations from the heavy machinery working in the vicinity of the property," which entered the frame of the property in the form of an energy wave and caused it to resonate, damaging rigid wood and tile structures. In his affidavit describing the report, Brizuela also clarified that the vibration was the sole case of the damages and "[t]he vibrations damaged the property *without displacement of the earth.*" (emphasis added). The insured had also testified at her deposition that she was in the property during the demolition, felt vibrations and observed picture frames shifting and shaking during the event, and first noticed the damage on March 3, 2014, a few days after the demolition next door. After a hearing, the court denied summary judgment for the insurer on December 6, 2019, in a brief order that also found that damage caused by "vibrations" was not among the exclusions under the policy's earth movement and settlement provisions.

Subsequently, the insured also moved for summary judgment as to the five affirmative defenses relating to the alleged failure to comply with post-

loss obligations (affirmative defenses 2, 3, 4, 5, and 14), alleging that those defenses were waived by denying coverage on the basis of the cause of the damages. The insured's motion also argued that several other affirmative defenses predicated on different policy exclusions were inapplicable, relying on additional deposition testimony and an affidavit from David Compton, the president of Bracken Engineering, who testified that the cause of the damages was soil movement in the foundations resulting from vibration. The court granted summary judgment as to those defenses on January 10, 2020.

Prior to trial, the insured moved in limine to exclude all testimony relating to both the post-loss obligations and "that vibration is an excluded loss under the policy's earth movement and settlement provision," pursuant to the court's December 6, 2019 order finding that vibration was not an excluded cause of loss. The court granted these motions. The case ultimately proceeded to a jury trial from November 7–18, 2022, and the jury returned a verdict finding that the damages were not excluded under the policy. Final judgment was entered May 1, 2024. The insurer timely appealed.

II

The insurer first claims that the trial court erred by denying summary judgment under the earth movement and settlement provision, as well as

ruling that "vibrations" were not an excluded cause of loss and limiting admission of related evidence at trial. We review the trial court's summary judgment order de novo. Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). We review the trial court's discretionary rulings on the motions in limine for abuse of discretion. Patrick v. State, 104 So. 3d 1046, 1056 (Fla. 2012).

The insurer relies on Hernandez v. Citizens Property Insurance Corp., 306 So. 3d 137, 138 (Fla. 3d DCA 2020), which affirmed summary judgment for the insurer under a similar policy containing an earth movement provision that excluded coverage for losses "caused directly or indirectly by any of the following," including "Earth sinking, rising or shifting" or "settling, cracking, or expansion of foundations." There though, the insurer's engineer attested that the damages were "caused by the off-site blasting vibrations [that] led to the house shifting, resulting in cracks in walls and flooring." Id. at 139. The losses in Hernandez were unambiguously excluded under the plain terms of the policy. Id.; see also State Farm Fire & Cas. Co. v. Castillo, 829 So. 2d 242, 247 (Fla. 3d DCA 2002) ("Castillo I") (directing summary judgment for insurer and finding that the earth movement and settlement provision at issue there unambiguously excluded damages caused by earth movement resulting from blasting); Castillo v. State Farm Florida Ins. Co., 971 So. 2d 820, 822–

23 (Fla. 3d DCA 2007) ("Castillo II") (finding no exclusion under similar policy that involved allegations that "vibrations and shockwaves caused by blasting and without displacement of the earth resulted in damage to an insured dwelling"). Here, relying on materially identical policy language and like Castillo II, the insured's expert opined that the damage was caused not by earth movement, settling, or any other excluded cause, but by "vibrations . . . without displacement of the earth."

This court also dealt with a similar situation more recently in Tower Hill Prime Insurance Co. v. Bermudez, 388 So. 3d 165 (Fla. 3d DCA 2023). In Bermudez, this court affirmed the denial of the insurer's motion for directed verdict (the trial equivalent of summary judgment) where the insured's expert testified that the damage was caused by "land shock waves from blasting" at a nearby quarry, not by soil or earth movement. Id. at 170. The court held that the case presented a battle of the experts, and that a directed verdict in favor of the insured was not appropriate where the jury could reasonably have concluded that shock waves alone caused the damage. Id. at 171.

More recently, in Izquierdo v. Universal Insurance Co. of North America, 429 So. 3d 1122, 1124 (Fla. 3d DCA 2026), this court reaffirmed this principle and reversed summary judgment in favor of the insurer where a factual dispute existed as to whether "the cracking damage was caused by

land shock waves, without attendant earth movement." Under such circumstances, like here, if a jury were to make such a finding, then "the subject earth movement exclusion will not apply." Id. Here, the parties presented conflicting evidence, with the insurer's expert indicating that the damage was caused by material settlement or other preexisting conditions, and the insured's expert attesting that the damages were caused solely by vibration.

The insurer next argues that notwithstanding the summary judgment ruling, the trial court reversibly erred in granting a motion in limine limiting the presentation of evidence at trial related to vibration, effectively precluding the insurer from arguing the applicability of the earth movement and settlement provision at all. However, this overstates the impact of the court's ruling. The court's ruling only held that "vibration," specifically, was not among the exclusions, and the court did not limit other evidence relating to the earth movement provision generally. Moreover, the insurer's position throughout the case was not that vibration did not occur at all, but that soil settlement was the cause of loss, rather than vibrations alone. The insurer's expert, Mr. Compton, testified to this effect at trial as the insurer's only expert witness, agreeing that vibration occurred but that "vibration did not cause this damage." Other than identifying a possibly overbroad ruling in limine, the

insurer does not identify either how its defense was limited or any evidence or testimony it was unable to present because of these rulings. Even if the court erred in limiting hypothetically relevant evidence or testimony, it does not appear that the insurer was prejudiced by such exclusion. And an error is harmless when there is no reasonable possibility it contributed to the verdict. See, e.g., Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1256 (Fla. 2014).

The insurer then argues that the court improperly granted partial summary judgment as to the affirmative defenses relating to the post-loss obligations. But "[a]n insurer's repudiation of coverage waives the insurer's right to insist upon the insured's compliance with policy conditions, such as filing a proof of loss." Goldberg v. Universal Prop. & Cas. Ins. Co., 302 So. 3d 919, 925 (Fla. 4th DCA 2020) ("Here, by failing to pay any amount for the personal property loss, Universal effectively denied coverage for that loss. Such a denial of coverage waives the insurer's right to insist upon the insured's compliance with policy conditions, such as submitting supplemental claims."). The parties do not dispute that the damages occurred on March 1, 2014, that the insured made the claim and submitted proofs of loss on April 22, 2014, that the insurer inspected the property on May 6, 2014, and that the insurer denied the claim on June 6, 2014. While

the denial letter indicated that there was additional documentation not received, the letter was a "declination of coverage" based on a substantive determination that specifically indicated that "there is no coverage for the cracking/settlement damage because the causes for the damage determined by Bracken are specifically excluded under your policy," citing both the earth movement and settlement provision and separate provisions for preexisting damages and regular wear and tear.

The denial letter included an additional section indicating that the insured had not yet received all requested documentation from the insured, as well as boilerplate language indicating that the insured does not intend to waive any of its rights under the policy; however, even that disclaimer language specifically described the letter as a "declination of coverage." The inclusion of this language referencing the post-loss obligations and reservation of rights was likely not sufficient to avoid a finding of waiver for denying the claim. See, e.g., Castro v. Homeowners Choice Prop. & Cas. Ins. Co., 228 So. 3d 596, 599 (Fla. 2d DCA 2017) ("When an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered loss has not occurred, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment.").

Finally, we note that the court did not err by awarding money damages in the judgment. The insurer claims that because the third amended complaint was stylized as a declaratory judgment action, the trial court improperly granted relief not requested by the parties by also awarding the insured the $240,000 in damages found by the jury verdict, plus prejudgment interest. However, as the insured notes, the complaint here also claims that the insurer improperly denied coverage and requests money damages "attributable to the Loss, if covered." Moreover, "[a] money judgment may be obtained for damages sought as incidental or supplemental relief pursuant to a declaratory decree." McAllister v. Breakers Seville Ass'n, Inc., 41 So. 3d 405, 408 (Fla. 4th DCA 2010) (quotation omitted); see also § 86.061, Fla. Stat. ("Further relief based on a declaratory judgment may be granted when necessary or proper."). Because monetary damages were sought in the operative complaint, we affirm this aspect of the judgment as well.

III

For the reasons explained above, we affirm the orders on appeal in all respects.

Affirmed.