IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

CASE NO.: 5D16-2024

BLACK BEAR RESERVE HOMEOWNER'S ASSOCIATION, INC.,
BLACK BEAR RESERVE WATER CORPORATION, AND
BLACK BEAR RESERVE IRRIGATION CORPORATION,

Appellants,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,
SOUTHERN-OWNERS INSURANCE COMPANY,
AUTO-OWNERS INSURANCE COMPANY,
SCOTTSDALE INDEMINITY COMPANY, AND
THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY,

Appellees.

ON APPEAL TO THE FIFTH DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

THE CINCINNATI SPECIALTY UNDERWRITERS INSURANCE COMPANY'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. CINCINNATI'S CGL POLICIES

The Cincinnati Specialty Underwriters Insurance Company ("Cincinnati") issued a commercial general liability (CGL) policy to Appellant Black Bear Reserve Water Company ("BBR Water") that became effective on January 22, 2010, and was renewed on January 22, 2011. (R.5082-5149). Appellant Black Bear Reserve Irrigation Corporation ("BBR Irrigation") became an insured by endorsement to the policy on August 17, 2011. (R.5150-5228). Cincinnati never insured Appellant Black Bear Reserve Homeowner's Association ("BBR HOA").

As a result, only Appellants BBR Water and BBR Irrigation sought relief against Cincinnati in the trial court proceedings. (R.2013 at ¶ 31). BBR HOA did not. The arguments BBR HOA presses on appeal do not apply to Cincinnati.[1]

B. PROCEEDINGS BELOW

According to the Appellants' Second Amended Complaint, Cincinnati breached the terms of the policies by "failing to pay" the "defense costs"

[1] It is not clear why Appellants are referred to collectively as the "BBR Entities" in the Initial Brief (IB at 29). They have separate corporate identities. Some of the "BBR Entities" were insured by certain Appellees. Others were not.

incurred by BBR Water and BBR Irrigation during prior litigation. (R.2014). The "prior litigation" purportedly triggering Cincinnati's duty to defend actually began as two separate cases involving different parties and different claims. (R.2011). At a very basic level, the two cases shared the same underlying dispute, but there were notable differences between the proceedings.

The first lawsuit was brought *by* Appellants BBR HOA and BBR Water against the developer, Upson Downs, in case number 2011-CA-000842 (the "842 Litigation"). (R. 4950-4997). BBR HOA and BBR Water filed suit on February 22, 2011. (R.4996). Appellant BBR Irrigation was not a named party in the 842 Litigation.

The second lawsuit was brought by Upson against BBR Irrigation (not BBR HOA or BBR Water) on August 23, 2011, in Lake County Circuit Court, case number 2011-CA-2130 (the "2130 Litigation"). (R. 4942-4949). The claims asserted by Upson in the 2130 Litigation were for declaratory judgment, injunctive relief, accounting, damages, and civil theft. (R. 4942-4949). Travelers[2] provided defense coverage for BBR Irrigation throughout

[2] As explained below, Travelers is not a party to this appeal.

the 2130 Litigation, which concluded on February 10, 2012, when Upson voluntarily dismissed the suit. (R.8482-8485).

On February 9, 2012, the day before the dismissal of the 2130 Litigation, Upson filed a Counterclaim in the 842 Litigation. (R.38-200). Upson's Counterclaim in the 842 Litigation asserted claims against BBR HOA and BBR Water, which were already parties to the 842 Litigation. However, Upson's claims against BBR Irrigation mark the first time BBR Irrigation was implicated in the 842 Litigation.

In addition, Upson's Counterclaim alleged numerous intentional torts and contract-based claims that were not at issue in the 2130 Litigation. For instance, the Counterclaim included counts for breach of promissory note, foreclosure of mortgage and security agreement, breach of contract, permanent and temporary injunctive relief, accounting, conversion, reformation, trespass, tortious interference with contract and business relationship, declaratory judgment, civil conspiracy, and unjust enrichment. (R.38-73). Almost one year later, on January 14, 2013, Upson filed an Amended Counterclaim, which added counts for quiet title, declaratory judgment, and reformation. (R.5229-5273).

Although Appellants claim in their Initial Brief that they "timely notified" the "CGL Insurers of the Upson Downs Complaint" (IB at 2), the portions of the record to which they cite reflect no such notice, timely or otherwise, to Cincinnati. Appellants also claim "[a]ll four insurers unequivocally disclaimed any duty to defend." (IB at 2). The record suggests otherwise.

In the September 8, 2011 letter Appellants cite as Cincinnati's "unequivocal" disclaimer of coverage, Cincinnati explained that a claim regarding the 2130 Litigation had been *withdrawn* by the insurance agency that submitted it. According to the letter, the claim was mistakenly reported by the insurance agency, and should have been submitted to Travelers. (R.1859). In addition, Cincinnati explained that it had reviewed the lawsuit in the 2130 Litigation, but nothing appeared to trigger coverage. (R.1857-1859). Consistent with Cincinnati's letter, Traveler's provided defense coverage in the 2130 Litigation. (R.8482-8485).

During the summary judgment hearing, despite counsel for Cincinnati's best efforts to limit his argument to the 8 corners analysis, trial counsel for the Appellants insisted on pressing the notice issue and describing it as a matter of law appropriate for summary adjudication.

(R.6338). Following entry of final summary judgment in Cincinnati's favor, Appellants moved for rehearing on the notice issue alone, which was denied. (R.6343).

Regardless, Appellants present no argument regarding the notice issue as to Cincinnati in their Initial Brief, so it is waived for purposes of this appeal. *See, e.g., Branch Banking and Trust Co. v. Kraz, LLC*, 114 So. 3d 273 (Fla. 2d DCA 2013). Likewise, Appellants did not appeal the order denying rehearing. (R.8573-8603).

On November 13, 2013, approximately 11 months after the Amended Counterclaim was filed, and almost 2 years after the original Counterclaim was filed, coverage counsel for the Appellants sent Cincinnati a request for insurance disclosure pursuant to section 627.9372, Florida Statutes. (R.1860). The November 13, 2013 letter is the first and only indication in the record of Cincinnati receiving notice of the 842 Litigation.

On December 31, 2013, Cincinnati responded to the disclosure of information request and listed various grounds for its decision not to defend. (R.5573-5574). On March 7, 2014, coverage counsel for Cincinnati sent a detailed letter to counsel for the insureds which explained Cincinnati's rationale for refusing coverage. (R.5576-5585).

On April 2, 2014, Appellants filed suit. (R.1). After Appellants twice amended their Complaint, four of the five insurers moved for summary judgment. (R. 4699-5048). Travelers did not. The trial court ultimately granted final summary judgment in favor of each Appellee. (R. 5871-5875). After the trial court's summary judgment rulings, Travelers settled with the Appellants. (R.8503). As a result, Travelers is not a party to this appeal.

SUMMARY OF THE ARGUMENT

This Court should affirm the trial court's entry of final summary judgment in favor of Cincinnati. There was no duty to defend under coverage A because the allegations relied upon by Appellants do not meet the definition of an "occurrence" under the policy. In addition, each allegation falls within the purview of the intentional injury exclusion provided in Cincinnati's policies. Likewise, there was no duty to defend under Coverage B. The allegations relied on by Appellants do not meet the definitions of "wrongful entry" or "disparagement" provided in Cincinnati's policies. Finally, Cincinnati had no duty to defend under Coverage A or B due to the "prior injury or damage" exclusion in Cincinnati's policies.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF CINCINNATI BECAUSE THE ALLEGATIONS APPELLANTS CHERRY-PICK FROM THE UPSON DOWNS AMENDED COUNTERCLAIM EITHER DO NOT GIVE RISE TO A DUTY TO DEFEND OR ARE SUBJECT TO BASIC POLICY EXCLUSIONS.

B. STANDARD OF REVIEW

"A trial court's ruling on a motion for summary judgment is subject to a *de novo* standard of review." *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. 5th DCA 2013).

B. THE "EIGHT CORNERS" ANALYSIS

An insurer's duty to defend arises from the "eight corners" of the complaint and the policy. *Mid-Continent Cas. Co. v. Royal Crane, LLC*, 169 So. 3d 174, 182 (Fla. 4th DCA 2015). "The general rule is that an insurance company's duty to defend an insured is determined solely from the allegations of the complaint against the insured." *Wilshire Ins. Co. v. Poinciana Grocer, Inc.*, 151 So. 3d 55, 57 (Fla. 5th DCA 2014) (quoting *W. Orange Lumber Co. v. Ind. Lumbermens Mut. Ins. Co.*, 898 So.2d 1147, 1148 (Fla. 5th DCA 2005)). Moreover, "if the pleadings show the applicability of a policy exclusion, the insurer has no duty to defend." *Id*.

C. THE ALLEGATIONS RELIED ON BY APPELLANTS DO NOT GIVE RISE TO A DUTY TO DEFEND UNDER COVERAGE A OR ARE BARRED BY EXCLUSIONS IN CINCINNATI'S CGL POLICY

Appellants argue that 5 paragraphs of the Amended Counterclaim[3] contain sufficient allegations of "property damage" to trigger Cincinnati's duty to defend under Coverage A. The following chart lists the allegations Appellants contend gave rise to Cincinnati's duty to defend, as well as the reasons the duty was not triggered, including any applicable exclusions.

¶	Count	Allegation	Purported Basis for Coverage	No Coverage	Exclusion
64	Count IV - Breach of Contract	"[Appellants] . . . caused . . . damages . . . by removing the pump and electrical equipment . . . for the purpose of damaging the irrigation system . . . ." (R. 5010).	Property damage. (I. 24).	Lack of Occ.	Intentional injury; Breach of contract
70	Count V - Permanent and Temporary Injunctive Relief	"[Appellants] . . . damage[ed] the facilities . . . so that there was no way to shut off the line between BLACK BEAR's well and [Counter-Plaintiffs'] irrigation system." (R. 5012).	Property damage. (I. 25).	Lack of Occ.; Not a Suit	Intentional injury

[3] "Coverage is determined from examining the most recent amended pleading, not the original pleading." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) (applying Florida law). Therefore, even though Appellants' Initial Brief cites the Counterclaim (R. 38-200), the analysis on appeal is properly limited to the Amended Counterclaim (R. 4998-5041), because it is the most recent amended pleading. *Id.* at 1230.

84	Count VII - Conversion	"[Appellants] have converted this equipment as well . . . ." (R. 5016).	Property damage. (I. 25).	Lack of Occ.	Intentional injury
121	Count XI - Trespass	"[Appellants] . . . entered without permission on to Tract E and deliberately caused damage to the irrigation system . . . ." (R. 5025).	Property damage. (I. 25).	Lack of Occ.	Intentional injury
130	Count XII - Tortious Interference with Contract	"[Appellants] . . . knew of the various contracts . . . [and] procured a breach of each of these contracts . . . ." (R. 67).	Property damage. (I. 26).	Lack of Occ.	Intentional injury; Breach of contract

These 5 allegations do not give rise to a duty on behalf of Cincinnati to defend under Coverage A for property damage. First, the allegations do not meet the definition of an "occurrence" under the policy. In addition, each allegation falls within the purview of either the breach of contract exclusion[4], or the intentional injury exclusion.

1. Lack of Occurrence

The Cincinnati policies provide coverage for property damage "only if" the property damage is caused by an "occurrence." (R.5091). An "occurrence" is specifically defined as "an accident." (R.5104). Moreover,

[4] In its summary judgment motion, Cincinnati argued that the breach of contract exclusions (R.5110) excluded the contract-based allegations. (R.5075-5076). Appellants did argue otherwise in their Initial Brief, and have therefore waived that issue on appeal.

the policies exclude coverage for an insured's intentional acts: "This insurance does not apply" to property damage "expected or intended from the standpoint of the insured." (R.5092).

It is well-settled in Florida that where a policy requires an "accident," intentional torts will not trigger coverage. *See, e.g., New Hampshire Indem. Co. v. Scott*, 910 F. Supp. 2d 1341, 1346 (M.D. Fla. 2012) (compiling cases standing for the "unremarkable and controlling proposition that the term 'accident' in an insurance policy excludes the insured's intentional torts…").

Even if the case law was less certain, the dictionary definition of "accident" would be sufficient to establish that the allegations Appellants rely on do not trigger a duty to defend under Coverage A. *Black's Law Dictionary* 15–16 (8th ed. 2004) defines "accident" as "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated" and "accidental" as "[n]ot having occurred as a result of anyone's purposeful act; esp., resulting from an event that could not have been prevented by human skill or reasonable foresight." *Webster's New Third International Dictionary* 11 (1981) defines (1) "accident" as "an event or condition

occurring by chance or arising from unknown or remote causes"; "lack of intention or necessity: chance—often opposed to design"; "an unforeseen unplanned event or condition"; and "a ... sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result" and (2) "accidental" as "happening or ensuing without design, intent, or obvious motivation or through inattention or carelessness." *The American Heritage Dictionary of the English Language* 11 (3d ed. 1992) defines (1) "accident" as "an unexpected undesirable event"; "an unforeseen incident"; "lack of intention" and (2) "accidental" as "occurring unexpectedly, unintentionally, or by chance."

Under any reasonable interpretation, the 5 allegations do not refer to an accident, or accidental behavior. None of the counts sound in negligence. Most are for intentional torts. Therefore, these allegations do not constitute an "occurrence" under Cincinnati's policies, and do not trigger a duty to defend.

2. Intentional Injury Exclusions

Moreover, Cincinnati's policies contain exclusions for intentional injury. (R.5092). A coverage clause (i.e. defining "occurrence" as an

accident) and an exclusionary clause addressing similar risks should be construed together, *State Farm Fire & Cas. v. CTC Development*, 720 So.2d 1072, 1074–75 (Fla. 1998), and an exclusionary clause creates no coverage. *LaMarche v. Shelby Mut. Ins.*, 390 So.2d 325, 326 (Fla. 1980).

The general rule in Florida is that injury or damage is caused intentionally and within the meaning of an intentional injury exclusion clause if the insured has acted with specific intent to cause harm to a third party. *Cabezas v. Florida Farm Bureau Casualty Ins. Co.*, 830 So. 2d 156, 159 (Fla. 3d DCA 2002). *See also State Auto Mutual Ins. Co. v. Scroggins*, 529 So. 2d 1194, 1195 (Fla. 5th DCA 1988) (finding the victim's injury fell within exclusion for intentional act when defendant pulled chair out from underneath plaintiff: "The fact that an unintended serious injury resulted from the intended fall is irrelevant to the issue of coverage.").

Florida law is clear that intentional torts do not give rise to coverage if the policy at issue contains an intentional injury exclusion. "[T]here is no such thing as the 'negligent' commission of [an] 'intentional' tort, such as battery." *Essex Insurance Co. v. Big Top of Tampa, Inc.*, 53 So.3d 1220, 1223 (Fla. 2d DCA 2011). "A duty to defend cannot be triggered merely by

labeling an intentional act 'negligent.'" *Wilshire*, 151 So.3d 55, 58 (Fla. 5th DCA 2014) (Orfinger, J., concurring specially).

All 5 of the allegations Appellants rely on are excluded under the intentional injury exclusion in Cincinnati's policies. For instance, paragraph 64 of the Amended Counterclaim, which appears in Count IV for Breach of Contract[5], reads:

> 64. [Appellants] have also caused thousands of dollars in damages to the irrigation system by removing the pump and electrical equipment, digging up irrigation water lines, damaging and/or converting irrigation master meters at the irrigation site, plugging irrigation water lines and introducing foreign substances into the water lines <u>for the purpose of damaging the irrigation system</u> of the end users (the homeowners in the Black Bear Reserve subdivision).

(R. 5010) (emphasis added).

The plain language of this paragraph indicates that Appellants acted for the express purpose of damaging property. (R. 5010). Because this paragraph alleges that Appellants took actions "for the purpose" of damaging property, it is clear that Appellants "expected or intended" such damage to occur. These actions are excluded from coverage under Cincinnati's policies.

[5] These allegations are clearly excluded under the breach of contract exclusions in Cincinnati's policy (R.5110). As explained above, any argument in opposition has been waived by the Appellants.

Appellants also argue that paragraph 84 of the Amended Counterclaim, which appears in Count VII for Conversion, triggered "property damage" under Coverage A. (R. 5016). Paragraph 83 incorporates paragraph 64, discussed immediately above. (R. 5015). Referring to paragraph 64's allegation that Appellants acted "for the purpose of damaging the irrigation system," paragraph 84 reads: "[t]o the extent any of the irrigation equipment that was confiscated or forcibly removed or damaged is determined to be personal - not real property, [Appellants] have converted this equipment as well, for all of which [Counter- Plaintiffs] have been damaged." (R. 5016). As explained above, paragraph 64 clearly alleges Appellants caused damage that Appellants "expected or intended" to cause. (R. 5010). Paragraph 84 simply adds an allegation that if any of the property described in paragraph 64 was personal instead of real, Appellants converted this property as well. (R. 5016). In addition, the conversion allegations are excluded from coverage because conversion is an intentional tort. *See, e.g.*, *Essex*, 53 So.3d at 1223 (Fla. 2d DCA 2011) ("[T]here is no such thing as the 'negligent' commission of [an] 'intentional' tort…").

Similarly, paragraph 70 of the Amended Counterclaim, which appears in Count V for Permanent and Temporary Injunctive Relief, alleges that

Appellants "interfered with [the Counter-Plaintiffs'] legitimate operation of the irrigation water system, including, but not limited to, damaging the facilities used to withdraw water from the lake and stopping up the valves so that there was no way to shut off the line between [Appellants'] well and [Counter-Plaintiffs'] irrigation system." (R. 5012) (emphasis added). These allegations indicate that Appellants "expected or intended" damage to the irrigation system to occur, thereby triggering the "intentional injury" exclusion.

In addition, Cincinnati argued in its summary judgment motion that the allegations in the non-monetary or equitable claims, including those related to injunctive relief, were excluded from coverage. (R.5077-5076). Appellants did not argue otherwise in their Initial Brief, and have therefore waived that issue on appeal.

Paragraph 121 of the Amended Counterclaim, which appears in Count XI for Trespass, reads:

> 121. During these various trespasses, the [Appellants], or their agents, entered without permission on to Tract E and deliberately caused damage to the irrigation system, including, but not limited to, deliberately cutting irrigation lines, fouling the irrigation lines and removing components of the irrigation system such that it rendered the irrigation system unable to function.

(R. 5025) (emphasis added). *Black's Law Dictionary* (10th ed. 2014) defines "deliberate" as "[i]ntentional; premeditated; fully considered." The only plausible interpretation of the allegations in paragraph 121 is that Appellants intentionally damaged the irrigation system. Therefore, paragraph 121 is excluded under the "intentional injury" exclusion.

Finally, paragraph 130 appears in Count XII for Tortious Interference with Contract. (R. 5028-5029). The allegations in Count XII indicate that Appellants intentionally damaged the Counter-Plaintiffs' property. This is unsurprising, as tortious interference with contract is an intentional tort. *See, e.g., Heavener, Ogier Servs., Inc. v. R. W. Florida Region, Inc.*, 418 So. 2d 1074, 1076 (Fla. 5th DCA 1982) (holding that tortious interference with contract can be broken down into the following elemental parts as: (1) an advantageous (2) business relationship (3) under which plaintiff has legal rights, plus (4) an intentional and (5) unjustified (6) interference with that relationship (7) by the defendant which (8) causes (9) a breach of that business relationship and (10) consequential damages) (emphasis added).

In their Initial Brief, Appellants contend that the allegations in these 5 paragraphs do not fall within the purview of the intentional injury exclusion. (IB at 37-38). But even the Appellants' characterization of these allegations

establishes that the intentional injury exclusion applies. For instance, Appellants describe the allegations in paragraph 130 as follows: "paragraph 130 alleges that the BBR Entities and others encouraged residents to disable water meters so that [Counter-Claimant] Rapid Retrieval could not properly bill for water service." (AB at 38). Somehow, based on that description of paragraph 130, Appellants conclude that there "is no allegation that the BBR Entities intended for residents to damage the meters, or that the BBR Entities knew residents would damage the meters when disabling them." (AB at 38). How could the BBR Entities "encourage" residents to "disable" working water meters and not intend that the meters be damaged?

The plain language of paragraph 130 and the other allegations relied on by Appellants do not trigger a duty to defend under Coverage A. This is true even when the allegations are assessed in isolation and taken completely out of context because none of them describes an "accident" which resulted in property damage. Any inkling that the allegations might appear to address unintentional behavior dissipates when the allegations are assessed in context.

The majority of the allegations Appellants rely on are buried within causes of action for intentional torts. There are no claims for negligence in

the Amended Counterclaim. None of the tort claims in the Amended Counterclaim allow recovery for unintentional acts or "accidents." There is no basis for a duty to defend under Coverage A. The trial court was correct to enter summary judgment in Cincinnati's favor. This Court should affirm.

D. THE ALLEGATIONS RELIED ON BY APPELLANTS DO NOT GIVE RISE TO A DUTY TO DEFEND UNDER COVERAGE B OR ARE BARRED BY EXCLUSIONS IN CINCINNATI'S CGL POLICY

1. Wrongful Entry

Appellants argue that 2 paragraphs of the Amended Counterclaim (¶ 120 and ¶ 121) (IB at 27) contain sufficient allegations to trigger a duty to defend claims for "wrongful entry" under Coverage B. They do not.

Cincinnati's duty to defend based on a "wrongful entry" allegation is limited to a claim that injury resulted from the "wrongful entry into" a "dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor." (R.5104) (emphasis added). Paragraphs 120 and 121 of the Amended Counterclaim do not trigger Cincinnati's duty to defend for "wrongful entry," because the Counter-Plaintiffs alleged unequivocally in the Amended Counterclaim that they - not BBR Irrigation or BBR Water - owned the land at issue (Tract E).

Paragraph 120 of the Amended Counterclaim, which appears in Count XI for Trespass, provides:

> In the years 2009, 2010, and 2011, BLACK BEAR, BLACK BEAR HOA, BLACK BEAR WATER, FUG and/or IRRIGATION CORPORATION trespassed on the real property on which is situate [sic.] an irrigation system and which real property and which irrigation system are both wholly owned by UPSON DOWNS and/or RAPID RETRIEVAL . . . .

(R. 5024-25).

Paragraph 121 of the Amended Counterclaim, which also appears in Count XI for Trespass, provides: "During these various trespasses, the Counter Defendants, or their agents, entered without permission on to Tract E." (R. 5025).

Coverage B addresses "wrongful entry" to premises "committed by or on behalf of its owner, landlord or lessor." (R.5104). The Amended Counterclaim alleged that the Counter-Plaintiffs owned Tract E and the irrigation system located on Tract E. (R. 5024-25). The Amended Counterclaim further alleged that Appellants trespassed on Tract E. (R. 5024-25). The Amended Counterclaim did not allege that Appellants were the owners, landlords, or lessors of Tract E. These allegations cannot be

construed reasonably to meet the definition of "wrongful entry" provided in Cincinnati's policies. (R.5104).

Given that inconvenient truth, Appellants simply ignore the policy's definition of "wrongful entry," and instead claim, based on definitions that are not contained in the policy, that wrongful entry "is commonly defined to include trespass." (IB at 30). Then Appellants assert that courts "have consistently found coverage for 'wrongful entry' where an underlying complaint alleged a trespass claim." (IB at 31). As support for that sweeping statement, Appellants provide one of many long string-cites in the Initial Brief that are unaccompanied by even a parenthetical explanation of the facts. (IB at 31). The cases are not helpful.

For instance, one of them, *Scottish Guarantee Ins. Co., Ltd. v. Dwyer*, 19 F. 3d 307 (7th Cir. 1994) involves a totally different definition of "wrongful entry" that does not include the concept of ownership. *Id*. at 310. The tort alleged in *Scottish* was not trespass, it was negligent trespass. *Id*. In this case, however, the policy clearly provides that to fall within the meaning of "wrongful entry," the claim must include an allegation that the owner, or someone on the owner's behalf, did the entering, not the other way around.

Appellants' next line of defense on the "wrongful entry" front is that the provision is ambiguous. Once again, Appellants start with an authoritative statement about the law: "Many courts have addressed this language, and most have concluded that this language is ambiguous." (IB at 33). And once again, support for the argument comes in the form of a lengthy string-cite to cases around the country with no explanation, parenthetical or otherwise, regarding the facts and law afoot in each case.

These cases do not support the Appellants' ambiguity argument. In each one, the policy at issue defined "personal injury" to include "the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor." *See New Castle Cnty., DE v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 243 F.3d 744, 748 (3d Cir. 2001). Under this definition of personal injury, various courts have held the phrase "by or on behalf of" to be ambiguous, because it could conceivably be interpreted as modifying either "invasion" or "occupies." *See, e.g., New Castle Cnty., Del.*, 174 F.3d at 340-52. These cases are irrelevant to this case because the policies at issue here involve a different definition of personal injury.

Appellants also assert that the "additional words 'committed by' before the phrase 'on behalf of' [in Cincinnati's policy] does not resolve the ambiguity." (IB at 34). Once again, Appellants dispatch another string-cite as support, without any accompanying details. (IB at 34). The cases Appellants rely on do not help explain or in any way support this conclusory argument.

On the other hand, in *Camp Richardson Resort, Inc. v. Philadelphia Indemnity Ins. Co.*, 150 F.Supp.3d 1186 (E.D. Cal. 2015) the court dealt with legal issues pertinent to this case, under similar factual circumstances. In *Camp Richardson*, a third party alleged that the insured had been "using and/or trespassing" on a road owned by the third party. *Id*. at 1194. Like the cases Appellant relied on (but unlike the definition in Cincinnati's policy) "personal injury" was defined as "the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor." *Id.*

The Insurer claimed this did not trigger coverage because the third party - not the Plaintiff - was the "owner, landlord or lessor" of the premises that was invaded. *Id.* The Plaintiff argued the policy was ambiguous, and the

court noted that there was some support for Plaintiff's argument. Nonetheless, the court found no ambiguity, explaining:

> However, when interpreting a policy provision, this Court must give its term their ordinary and popular sense unless used in a technical or otherwise special way, and terms must be interpreted in context and with relation to one another. The Court notes that, in 1998, the word "committed" was added to CGL forms to "clarify that the 'wrongful eviction' offense must be 'committed by or on behalf of the owner, landlord or lessor.' " One would not "commit" the private occupancy of a premises, while one would "commit" the act of wrongful entry, eviction, or invasion. Under its ordinary and popular reading, the owner of the roadway would have to commit a wrongful invasion of the right of private occupancy of the roadway in order for Coverage B to apply. However, if the third-party complainant is stating that it—the Jameson Beach Property Owners' Association and others—and not Plaintiff, owns the roadway, then Plaintiff is not the owner committing the wrongful invasion. Therefore, Coverage B would not apply in this scenario.

Id. at 1194-1195 (internal citations omitted). For these reasons, this Court should reject the Appellants' argument that the "wrongful entry" provision is ambiguous.

Finally, Appellants' fallback position is that even if Cincinnati's position is correct, some of the allegations in the Amended Counterclaim could be interpreted to suggest that BBR HOA has the requisite ownership interest to trigger a duty to defend under the "wrongful entry" provision. (IB at 34-35). The allegations do not support such an interpretation, but even if

they did, it would not impact Cincinnati, because Cincinnati never insured BBR HOA.

2. Disparagement

Appellants argue that 2 paragraphs in the Amended Counterclaim (¶ 126, which incorporates by reference Exhibit K, and ¶ 134) contain sufficient allegations to trigger a duty to defend claims for "disparagement" under Coverage B. (IB at 27). They do not.

Coverage B of Cincinnati's policy provides coverage for "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services . . . ." (R.5104).

"Disparagement" coverage is not triggered unless a plaintiff alleges an insured denigrated or maligned the plaintiff's goods, products or services. *See Wake Stone Corp. v. Aetna Cas. & Sur. Co.*, 995 F. Supp. 612, 616-17 (E.D. N.C. 1998) ("even viewing the allegations in the light most favorable to [the insured], this case deals with [the insured's] assertions about the way Martin Marietta circumvented certain political processes, not about the quality of its "goods, products or services." Therefore, coverage

under the 'disparagement' language in the policy would also not be available.").

In the instant case, there are simply no allegations about Appellants' goods, products, or services. Of the 173 paragraphs in the Amended Counterclaim, none references the quality of the irrigation water or the quality of the irrigation services provided by Appellants. Paragraphs 126 and 134 refer to statements about which entity owned the irrigation system and thus had the right to provide services related to that system.

According to paragraph 126, Appellants told residents of the Black Bear Reserve Subdivision that Counter-Plaintiffs were not the rightful owners of the irrigation system. (R.5027). Paragraph 134 alleges that Appellants also told the residents that because Appellants were the rightful owners of the irrigation system, only Appellants had authority to provide or bill for services related to that irrigation system. (R.5030-31). Similarly, in the letter attached to the Amended Counterclaim as Exhibit K, Appellant BBR Water challenged the Counter-Plaintiffs' right to provide services related to the irrigation system, but did not disparage the Counter-Plaintiffs' goods or services. (R. 5387).

None of the nineteen counts in the Amended Counterclaim seeks relief for disparagement, libel, slander, or defamation. This was a dispute between the Counter-Plaintiffs and the Appellants over which party owned the irrigation system and had the right to bill the residents of the Black Bear Reserve subdivision for irrigation water. The allegations have nothing to do with libel, slander, defamation, or disparagement. Due to the absence of any allegations in the Amended Counterclaim regarding disparagement of goods, products, or services, Cincinnati had no duty to defend under Coverage B. This Court can affirm on this basis alone.

3. The Breach of Contract Exclusion

Cincinnati's "breach of contract" exclusion in Coverage B excluded coverage for the "disparagement" claims purportedly appearing in paragraph 126 and Exhibit K of the Amended Counterclaim. (R.5110)[6].

E. CINCINNATI HAD NO DUTY TO DEFEND UNDER COVERAGE A OR B DUE TO THE "PRIOR INJURY OR DAMAGE" EXCLUSIONS

Cincinnati's policies contain exclusions for "prior injury or damage" that apply to bodily injury, property damage and personal and advertising injury. (R.1030). Excluded from coverage is property damage or personal

[6] As explained above, Appellants waived any argument that summary judgment was not appropriately granted based on the applicability of Cincinnati's breach of contract exclusions.

and advertising injury that "first occurred" or was "first committed" before the policy went into effect. (R.5126). This exclusion, which applies to all continuing injury or damage that arises from the same cause, or a similar cause, or that occurs at the same or adjacent location, and whether or not an insured knew or should have known that damage or injury had occurred or begun to occur, provides:

COVERAGE A

This insurance does not apply any ”bodily injury” or ”property damage” that:

1. first occurred prior to the Effective date of this Coverage Part; or

2. is alleged to be in the process of occurring as of the Effective date of this Coverage Part.

This exclusion applies to all continuing injury or damage:

1. arising from the same or similar cause, including continuous or repeated exposure to substantially general harmful conditions; or

2. at the same or adjacent location; or

3. from the same or similar work.

4. from the same product or service

COVERAGE B

This insurance does not apply to ”personal and advertising injury” that:

1. first committed prior to the Effective date of this Coverage Part; or

2. is alleged to be in the process of being committed as of the Effective date of this Coverage Part.

This exclusion applies to all continuing injury or damage:

1. arising from the same or similar cause, including continuous or repeated exposure to substantially general harmful conditions; or

2. at the same or adjacent location; or

3. from the same or similar work.

4. from the same product or service

Cincinnati's CGL policy with BBR Water first became effective on January 22, 2010, and was renewed on January 22, 2011. (R.5082-5149). BBR Irrigation became an insured by endorsement to the policy on August 17, 2011. (R.5150-5228). Thus, for purposes of assessing Cincinnati's duty to defend, this exclusion applies, and no defense responsibility attaches, if the allegations indicate that damage or injury first occurred or was committed before January 22, 2010, for BBR Water, or August 17, 2011, for BBR Irrigation.

The 2130 Litigation was filed against BBR Irrigation on August 24, 2011 (R.4942), one week after BBR Irrigation became an insured. Upson alleged that control of BBR HOA was turned over from the developer "[o]n or about December 8, 2009," and that "[b]y virtue of such transfer, [BBR Irrigation] forcibly took over operation of the irrigation system installed by [Upson].'" (R.4942). An exhibit to the 2130 Litigation was a letter from counsel for Upson that included the following statement: "When the water company took over control of the potable water system, in December 2009, it also illegally took possession of the irrigation system and threatened representatives of Upson Downs with arrest if they interfered." (R.411). Because the alleged misconduct first began to occur long before the policy

became effective for BBR Irrigation, the prior injury exclusion precludes coverage for all claims asserted in the 2130 Litigation.

The same conclusion applies to the claims in the 842 Litigation, which include the following allegations in the Amended Counterclaim:

> Paragraph 54 → On or about *December 8, 2009*, control of Black Bear HOA was taken over by the homeowners from the then developer, Upson Downs. By virtue of such transfer, [BBR Water], which, at all times material hereto, was owned by Black Bear HOA and at the direction of Black Bear HOA, forcibly took over operation of the irrigation system installed by Rapid Retrieval and/or Upson Downs. (R.5009) (emphasis added).
>
> Paragraph 84 → *From December 2009 to the present*, [BBR Water), Black Bear HOA... and/or [BBR Irrigation) converted to their own use the accounts receivables of Rapid Retrieval and/or Upson Downs and wrongfully continue to bill for the irrigation system at Black Bear Reserve and have wrongfully collected money from billing the homeowners at the Black Bear Reserve subdivision for irrigation even though they have no ownership interest in the irrigation system, are not the permitee under the terms of the irrigation system and [BBR Water] and Black Bear HOA have acknowledged same in the Reuse Agreement. (R.5015) (emphasis added).
>
> Paragraph 120 → *In the years 2009, 2010 and 2011*, [BBR Water), Black Bear HOA... and [BBR Irrigation] trespassed on the real property on which is situate an irrigation system and which real property and which irrigation system are both wholly owned by Upson Downs and/or Rapid Retrieval... (R.5025) (emphasis added).

The policies also condition coverage for property damage on an insured's lack of knowledge that damage had occurred, in whole in part,

prior to the policy period. (R.5091, Sec. I, 1.b-d). Damage is deemed to have been known to have occurred at the earliest time when any insured receives a written or verbal demand or claim for damages, or becomes aware by any other means that damage has occurred or is beginning to occur. *Id*.

The absence of coverage for prior injury or damage, including continuing damage, is a contractual codification of the "fortuity doctrine," which forbids insuring against known losses. "An agreement to assume a known loss is not insurance." *Interstate Fire & Casualty Co. v. Abernathy*, 93 So.3d 352, 359 (Fla. 1st DCA 2012). *See also National Union Fire Ins. Co. of Pittsburgh, PA v. Stroh Cos, Inc.*, 265 F.3d 97, 107 (2d Cir. 2001) ("fortuity and known loss principles are integral to the nature of insurance and thus apply as a matter of public policy, irrespective of specific [insurance] policy terms."). *Sosebee v. Certain Underwriters at Lloyds London*, 566 Fed.Appx. 296, 297 (5th Cir. 2014) ("the fortuity doctrine precludes coverage for two categories of losses: known losses and losses in progress.").[7]

[7] The provision eliminating coverage for known injury applies to property damage that was known to have occurred, in whole or in part, before the policy period. Application of this provision to the 2010-2011 policy for BBR Water, therefore, carries with it the necessary conclusion that it also applies to the 2011-2012 renewal policy.

Exhibit K to the Amended Counterclaim corroborates the allegations that damage occurred in 2009 and earlier, and establishes that BBR Water was aware that damage had occurred or begun to occur.[8] Exhibit K features BBR HOA board meeting minutes from 2009 and 2010. The minutes allude to numerous BBR HOA decisions and strategies that read like a blueprint for the claims raised by Upson and its affiliates in the 2130 Litigation and the 842 Amended Counterclaim.

For instance, Exhibit K contains BBR HOA minutes from a December 9, 2009 "Emergency Meeting due to pilferage of water company." (R.5379). At the "Emergency Meeting," a "Motion for termination of the water company management group – Chalcophyrite" was approved. (R.5379).

Exhibit K also contains BBR HOA minutes dated January 4 and 9, 2010 which refer to Mark Carson, a controversy regarding "$100,000 of equipment and water parts," a call to "police" and the "attorney general for prosecution," direction from board members that residents should not pay

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[8] When a party attaches exhibits to the complaint, those exhibits become part of the pleading and the court will review those exhibits accordingly." *Ginsberg v. Lennar Florida Holdings*, 645 So. 2d 490, 494 (Fla. 3rd DCA 1994). "Exhibits attached to the complaint are controlling, where the allegations of the complaint are contradicted by the exhibits, the plain meaning of the exhibits will control." *Id*.

water bills issued by the developer, and a decision to "issue trespassing warrants for anyone from [the] previous water company who tries to turn off resident water meters." (R.5382). In addition, a letter from Rapid Retrieval to the Black Bear Reserve homeowners, also included in Exhibit K, states that the "dispute between the Carsons/Rapid Retrieval, Chalcopyrite etc. and the Homeowners of Black Bear Reserve started long before December 2009." (R.5389-5394).

As part of the Amended Counterclaim, Exhibit K further demonstrates that the alleged injury or damage had occurred or begun to occur before the policies became effective.[9] The applicability of the exclusions is unaffected by continuing injury or damage, including injury or damage that is alleged to be in the process of occurring when the policies went into effect.

As a result, if the exclusions for either prior injury or known loss apply, which is established through the allegations and exhibits, there is no duty to defend under Coverage A or Coverage B. The prior injury or

[9] "Under the loss-in-progress or 'known loss' doctrine, '[i]f the insured knows or has reason to know, when it purchases a comprehensive general liability policy, that there is a substantial probability that it will suffer a loss, the risk ceases to be contingent and becomes a probable or known loss that will not be covered by the policy.'" *Interstate Fire*, 93 So. 3d at 360, *quoting USAA Casualty Ins. Co. v*, *Mcinerney*, 960 N.E. 2d 655, 664 (Ill. App. Ct. 2011).

damage exclusion warrants affirmance of the summary judgment entered in Cincinnati's favor.

CONCLUSION

This Court should affirm the trial court's entry of final summary judgment in favor of Cincinnati.

DATED this 13th day of January, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by electronic mail to all counsel of record on January 13, 2017.

/s/ Michael M. Brownlee
Michael M. Brownlee, B.C.S.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Michael M. Brownlee
Michael M. Brownlee, Esquire