

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

7

8

Maria Vasquez,

9

Plaintiff,

10

vs.

11

Ameriprise Insurance Company,

12

Defendant.

13

No. CIV 19-536-TUC-CKJ

ORDER

14

Pending before the Court is the Motion for Summary Judgment (Doc. 16) filed by Defendant Ameriprise Insurance Company (“Ameriprise”). Plaintiff Maria Vasquez (“Vasquez”) has filed a response and Ameriprise has filed a reply.

15

16

17

18

Factual and Procedural Background

19

On or about December 31, 2018, Vasquez's polybutylene plumbing system ruptured causing water damage to Vasquez's residence. Defendant's Statement of Facts (“DSOF”) (Doc. 17, ¶¶ 1-2). At the time, Vasquez was insured by Ameriprise under policy number HI01975533 (“Policy”). *Id.* at ¶ 1. This Policy covered Vasquez's residence. *Id.* Vasquez replaced the entire plumbing system, including portions that were not leaking. *Id.* at ¶ 4. Ameriprise denied coverage of the replacement costs. Complaint (Doc. 1-3, ¶ 6).

20

21

22

23

24

25

The Policy covers property damage which is defined as “physical injury to,

26

27

28

1 destruction of or loss of use of tangible property.” DSOF, Ex. A (Doc. 17-1, p. 15 of 27).¹

2 The Policy states:

3 **Exclusions**

4 We do not cover loss caused directly or indirectly by any of the following, whether
5 or not any other cause or happening contributes concurrently or in any sequence to
6 the loss:

6 * * * * *

7 Under Dwelling and Other Structures Coverages, **we** do not cover loss resulting
8 directly or indirectly from:

8 * * * * *

9 3. faulty, inadequate or defective:

- 10 a) construction, reconstruction, repair, remodeling or renovation;
11 b) materials used on construction, reconstruction, repair, remodeling
12 or renovation;
13 c) design, workmanship, specifications;
14 d) siting, surveying, zoning, planning, development, grading or
15 compaction; or
16 e) maintenance of a part or all of the residence premises or any other
17 property;

18 4. wear and tear; marring or scratching; deterioration; damage which
19 occurs over a period of time, or from lack of normal maintenance;
20 defective materials and workmanship; inherent vice; latent defect;
21 mechanical breakdown; rust; mold; fungus; wet or dry rot; discharge,
22 dispersal or release of **pollutants** or **contaminants**; smog; smoke from
23 agricultural smudging or industrial operations; settling, cracking,
24 shrinkage, bulging or expansion of pavement, patios, foundations,
25 walls, floors, roofs or ceilings; birds, vermin, rodents, insects or
26 domestic animals.

27 If any of these cause water damage not otherwise excluded, from a
28 plumbing, heating, air conditioning or automatic fire protective
sprinkler system or household appliance, **we** cover loss caused by the
water including the cost of tearing out and replacing any part of a
building necessary to repair the system or appliance. **We** do not cover
loss to the system or appliance from which this water escaped;

23 * * * * *

24 *Id.* at 19 of 27, *emphasis in original*. Vasquez acknowledges the Policy “does not cover
25 replacement of a defective system, [but asserts] it does provide coverage to access the
26

27 ¹The Court references the ECF pagination in referring to the exhibits attached to the
28 DSOF.

1 system which required nearly \$30,000 to access, remove and replace.” Complaint (Doc. 1-3,
2 ¶ 5).

3 Vasquez filed a Complaint against Ameriprise alleging claims of breach of contract
4 and breach of the duty of good faith and fair dealing in the Pima County Superior Court.
5 Complaint (Doc. 1-3). Vasquez seeks “tear-out” coverage for the cost of accessing the
6 entire system for replacement. The action was removed to this Court.

7 Ameriprise has filed a Motion for Summary Judgment (“MSJ”) (Doc. 16) in which
8 Ameriprise argues the Policy does not provide coverage for the replacement of the plumbing
9 system. Vasquez has filed a response; she argues the Policy provides coverage to access the
10 plumbing system. Ameriprise has filed a reply.

11
12 *Summary Judgment Legal Standard*

13 Summary judgment may be granted if the movant shows “there is no genuine dispute
14 as to any material fact and the movant is entitled to judgment as a matter of law.”
15 Fed.R.Civ.P. 56(c). The moving party has the initial responsibility of informing the court
16 of the basis for its motion, and identifying those portions of “the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together with the affidavits, if any,”
18 which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*
19 *v. Catrett*, 477 U.S. 317, 323 (1986); *Scheuring v. Traylor Bros.*, 476 F.3d 781, 784 (9th
20 Cir. 2007).

21 Once the moving party has met the initial burden, the opposing party must "go
22 beyond the pleadings" and "set forth specific facts showing that there is a genuine [material]
23 issue for trial." *Celotex Corp.*, 477 U.S. at 248, *internal quotes omitted*; *see also United*
24 *States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (“a plaintiff
25 cannot rely on mere allegations but rather must “set forth” by affidavit or other evidence
26 “specific facts”). The nonmoving party must demonstrate a dispute “over facts that might
27 affect the outcome of the suit under the governing law” to preclude entry of summary
28

1 judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Further, the disputed
2 facts must be material. *Celotex Corp.*, 477 U.S. at 322-23. Further, "a party cannot
3 manufacture a genuine issue of material fact merely by making assertions in its legal
4 memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter*
5 *Kiddle & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

6 A dispute over material facts must be genuine. *Anderson*, 477 U.S. at 248, 106 S.Ct.
7 at 2510. A dispute about a material fact is genuine if "the evidence is such that a reasonable
8 jury could return a verdict for the nonmoving party." *Id.* A party opposing a properly
9 supported summary judgment motion must set forth specific facts demonstrating a genuine
10 issue for trial. *Id.* "[M]ere allegation and speculation do not create a factual dispute for
11 purposes of summary judgment." *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016)
12 (citation omitted). "If the evidence is merely colorable or is not significantly probative,
13 summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. However, the evidence
14 of the nonmoving party is to be believed and all justifiable inferences are to be drawn in his
15 favor. *Id.* at 255. Further, in seeking to establish the existence of a factual dispute, the non-
16 moving party need not establish a material issue of fact conclusively in his favor; it is
17 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the
18 parties' differing versions of the truth at trial." *Giles v. Gen. Motors Acceptance Corp.*, 494
19 F.3d 865, 872 (9th Cir. 2007) (citation omitted).

20 Additionally, the Court is only to consider admissible evidence. *Moran v. Selig*, 447
21 F.3d 748, 759-60 (9th Cir. 2006) (pleading and opposition must be verified to constitute
22 opposing affidavits); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 484 (9th Cir. 1991)
23 (declarations and other evidence that would not be admissible may be stricken). Moreover,
24 "[a]t the summary judgment stage, [courts] do not focus on the admissibility of the
25 evidence's form. [They] instead focus on the admissibility of its contents." *Fraser v.*
26 *Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). The Court will only consider the admissible
27 evidence that is supported by specific facts that may show a genuine issue of material fact.
28

1 *See Anderson*, 477 U.S. at 248 (1986).

2
3 *Interpretation of an Insurance Policy*

4 Under Arizona law, the interpretation of an insurance contract is a question of law.
5 *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534 (1982). “Provisions of an
6 insurance contract are construed according to their plain and ordinary meaning from the
7 standpoint of an ‘average layman who is untrained in the law or the field of insurance.’”
8 *London Bridge Resort LLC v. Illinois Union Ins. Co. Inc.*, No. CV-20-08109-PCT-GMS,
9 2020 WL 7123024, at *1 (D. Ariz. Dec. 4, 2020), *quoting Liristis v. Am. Fam. Mut. Ins. Co.*,
10 204 Ariz. 140, 143–44 (App. 2002); *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 215
11 Ariz. 80, 83 (App. 2007) (written terms of insurance contracts are construed to effectuate
12 the parties’ intent and to protect the reasonable expectations of an insured). “[I]f the
13 intention of the parties is clear from such a reading, there is no ambiguity.” *Harris v.*
14 *Harris*, 195 Ariz. 559, 562 (App. 1999). Any “ambiguity in an insurance policy will be
15 construed against the insurer”; however, this rule applies only to provisions that are
16 “actually ambiguous.” *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 46 (App.
17 2000), *internal citations and quotations omitted*.

18 If a policy provision is susceptible to different constructions, a court must first
19 attempt to determine the meaning of the clause by “examining the purpose of the [provision]
20 in question, the public policy considerations involved and the transaction as a whole.” *Id.*,
21 *citation omitted; see also Arizona Prop. & Cas. Ins. Guar. Fund v. Helme*, 153 Ariz. 129,
22 134-35 (Ariz.1987). *quoting Ohio Cas. Ins. Co. v. Henderson*, 189 Ariz. 184, 186 (1997)).

23 Additionally, an insured generally “bears the burden to establish coverage under an
24 insuring clause, and the insurer bears the burden to establish the applicability of any
25 exclusion.” *Bhattacharya v. HISCOX Ins. Co.*, No. CV-19-02780-PHX-ESW, 2020 WL
26 6363726, at *2 (D. Ariz. Oct. 29, 2020), *quoting Keggi v. Northbrook Prop. and Cas. Ins.*
27 *Co.*, 199 Ariz. 43, 46 (App. 2000).

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

The Policy – Anti-Concurrent Cause Exclusion

The first statement under the Exclusions portion of the Policy states:

We do not cover loss caused directly or indirectly by any of the following, whether or not any other cause or happening contributes concurrently or in any sequence to the loss[.]

DSOF, Ex. A, p. 19 of 27. Ameriprise may limit its liability with an anti-concurrent causation lead-in clause to the exclusions. *Millar v. State Farm Fire & Cas. Co.*, 167 Ariz. 93 (App. 1990); *Cooper v. Am. Fam. Mut. Ins. Co.*, 184 F. Supp. 2d 960, 962 (D. Ariz. 2002). Vasquez does not address this principle in her Response. In other words, neither a well-taken legal argument nor disputed material evidence has been presented to the Court. In light of the applicable case law and the express language in the Policy, the Court finds, if Vasquez’s loss is excluded pursuant to either Exclusion 3 or Exclusion 4, Ameriprise need not cover the loss.

The Policy – Polybutylene Pipes as “Defective”

As applicable in this case, Exclusion 3 of the Policy excludes coverage for a loss caused by faulty, inadequate or defective construction or faulty, inadequate or defective materials used in construction, design or specifications. Additionally, Exclusion 4 states losses caused by defective materials and workmanship are not covered under the Policy. Defective can mean having a flaw or defect or imperfect in form, structure, or function. Defective, Merriam Webster Dictionary (Last visited Mar. 30, 2021). Also, a product can be defined as defective when it is not fit for the ordinary purposes for which it is sold and used. Defective, Black's Law Dictionary (5th ed. 1981); *see also* Defective, Black’s Law Dictionary (11th ed. 2019) (“containing an imperfection or shortcoming in a part essential to the product's safe operation”). Vasquez asserts through her expert witness that polybutylene pipes are “inherently defective.” Further, Ameriprise appears to agree, stating: “Accepting Plaintiff’s position that the polybutylene plumbing system was defective, her

1 house has now been greatly improved – it now has an entirely new, non-defective plumbing
2 system.” MSJ, p. 9. In these circumstances, the Court finds the pipes are defective within
3 the meaning of Exclusion 3 and Exclusion 4.

4
5 *The Policy – Exclusion 3*

6 Exclusion 3 of the Policy indicates that the insurance agreement between the parties
7 provided that Ameriprise did not cover losses resulting directly or indirectly from faulty,
8 inadequate or defective “a) construction, reconstruction, repair, remodeling or renovation;
9 b) materials used on construction, reconstruction. repair, remodeling or renovation; c)
10 design, workmanship, specifications . . .” DSOF, Ex. A, p. 19 of 27. The plain and ordinary
11 meaning of this provision is that Vasquez’s losses caused directly or indirectly from the
12 defective polybutylene pipes were not covered by the Policy. Further, this Exclusion does
13 not contain an exception similar to that contained in Exclusion 4. Indeed, had the parties
14 agreed, the insurance agreement could have included a similar “tear-out” provision as to
15 Exclusion 3. As it is, the plain and ordinary language of the Policy only applies to
16 Exclusion 4; there is no similar language in Exclusions 1-3 or 5-9. There is no ambiguity
17 to present a need for the Court to attempt to determine the meaning of the clause – the
18 meaning is already clear.

19 The losses in this case (the need for repair/replacement of plumbing, water damage,
20 and tear-out costs) were all caused directly or indirectly by the defective polybutylene pipes.
21 Because Exclusion 3 makes clear Ameriprise does not cover losses caused directly or
22 indirectly from defective construction or materials, Exclusion 3 precludes coverage. In
23 arguing this Court should find there is a material factual dispute as the court did in
24 *Guadiana v. State Farm Fire & Cas. Co.*, 2008 WL 4078767 (D.Ariz. 9/2/2008), Vasquez
25 does not acknowledge that the court in *Guadiana* did not discuss whether any anti-
26 concurrent cause exclusion precluded coverage. Indeed, a review of the policy in *Guadiana*
27 indicates that, while similar language was included in that policy, it was not identical to the
28

1 language in the Policy of this case. *See Guadiana v. State Farm Fire & Cas. Co.* CV 07-
2 326-FRZ-LAB, Defendant’s State of Facts (247-3, pp. 12-14 of 47).²

3 Moreover, the anti-concurrent clause states Ameriprise does not cover a loss caused
4 directly or indirectly . . . whether or not any other cause or happening contributes
5 concurrently or in any sequence to the loss.” DSOF, Ex. A, p. 19 of 27. In an unpublished
6 memorandum decision, the Court of Appeals of Arizona has recognized that where one
7 cause may be covered but another is not, “the covered cause must provide the basis for a
8 cause of action in and of itself and must not require the occurrence of the excluded risk to
9 make it actionable.” *Am. Strategic Ins. Corp. v. Clark*, No. 1 CA-CV 12-0881, 2013 WL
10 6726264, at *5 (Ariz.App. Dec. 19, 2013), as amended (Jan. 6, 2014), *quoting American*
11 *Family Mut. Ins. Co. v. Schmitz*, 330 Wis.2d 263, 793 N.W.2d 111, 118 (Wis.Ct.App. 2010).
12 Indeed, the exception to Exclusion 4 specifically states it only applies if the water damage
13 cause is not otherwise excluded. Coverage is not “reinserted” for an excluded loss simply
14 by the inclusion of the exception to Exclusion 4. *Cooper v. Am. Fam. Mut. Ins. Co.*, 184
15 F. Supp. 2d 960, 964 (D. Ariz. 2002) (a resulting loss provision does not reinsert coverage
16 for excluded losses, but reaffirms coverage for secondary losses or injuries ultimately caused
17 by separate and independent excluded perils).

18 The Court finds Exclusion 3 excludes coverage for the losses suffered by Vasquez.

19
20 *The Policy – Exclusion 4*

21 Even if the Court did not find Exclusion 3 excluded coverage, a plain and ordinary
22 reading of Exclusion 4 would similarly exclude coverage. The applicable portion of the
23 Exclusion states that Ameriprise will “cover loss caused by the water including the cost of
24 tearing out and replacing any part of a building necessary to *repair* the system or appliance.”
25 DSOF, Ex. A (Doc. 17-1, p. 15 of 27), *emphasis added*. As stated by another district court

26
27 ²The Court references the ECF pagination in referring to the exhibits attached to the
28 DSOF in CV 07-326-FRZ-LAB.

1 judge in a similar case, Vasquez “elected to replace the plumbing system because [she was]
2 concerned that leaks might recur. This concern appears to have addressed a latent or
3 inherent defect in the system, which is not covered by the policy.” *Bond v. American*
4 *Family Ins. Co.*, 2008 WL 477873 *2 (D. Az. 2008). A plain and ordinary meaning of the
5 provision of the insurance agreement between the parties specifically limits the tear-out
6 coverage to repair. The Court does not agree with Vasquez that an expert opinion changes
7 the plain and ordinary meaning of “repair,” from the “standpoint of an average layman who
8 is untrained in the law or the field of insurance.” *London Bridge Resort LLC*, 2020 WL
9 7123024 at *1. The Court finds there is no material factual dispute at issue as to whether
10 Exclusion 4 allows for coverage of Vasquez’s losses. Summary judgment in favor of
11 Ameriprise and against Vasquez is appropriate.

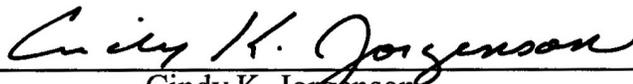
12 Accordingly, IT IS ORDERED:

13 1. The Motion for Summary Judgment (Doc. 16) is GRANTED. Summary
14 judgment is entered in favor of Ameriprise and against Vasquez.

15 2. The Clerk of Court shall enter judgment and shall then close its file in this
16 matter.

17 DATED this 30th day of March, 2021.

18
19
20
21
22
23
24
25
26
27
28


Cindy K. Jorgenson
United States District Judge