FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1217

AIR QUALITY ASSESSORS OF FLORIDA,

Appellant,

v.

SOUTHERN-OWNERS INSURANCE COMPANY,

Appellee.

On appeal from the County Court for Calhoun County.
Kevin Grover, Judge.

October 26, 2022

BILBREY, J.

Appellant Air Quality Assessors of Florida appeals a final order dismissing its amended statement of claim filed in small claims court, which alleged a breach of an insurance policy. We reverse and remand for further proceedings.

Air Quality, an assignee of the benefits of a property insurance policy, sought compensation after it performed services for the homeowner who was insured under the policy. According to the amended statement of claim, the homeowner/insured

sustained "water damage" on or about October 10, 2018.[1] Appellee Southern-Owners Insurance Company (Insurer) sought dismissal arguing that water damage is not a covered loss under the policy.[2] Insurer further argued that the services performed by Air Quality related to mold or mildew treatment, matters which are also excluded from coverage. The Insurer lastly argued that the assignment to Air Quality was invalid as the Insurer did not approve the assignment, as required by the insurance policy. The trial court dismissed the amended statement of claim, explaining that "[i]t is logical to conclude that if a loss is not covered under the policy then the cost to determine if such loss exists is also not covered."

Whether a complaint or statement of claim sufficiently states a cause of action is a question of law to be reviewed de novo. *See Malden v. Chase Home Fin., LLC*, 312 So. 3d 553, 554 (Fla. 1st DCA 2021). Such an analysis must generally be confined to the four corners of the pleading. *See id; Newberry Square Fla. Laundromat, LLC v. Jim's Coin Laundry & Dry Cleaners, Inc.*, 296 So. 3d 584, 589 (Fla. 1st DCA 2020).

Here, the contract between the homeowner and Air Quality was attached to the statement of claim and amended statement. However, the insurance policy was not attached to either one because the homeowner was allegedly no longer in possession of it. Ordinarily only a complaint (or here statement of claim) and its attachments may be considered when passing on a motion to

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[1] Although not alleged, this was when Category 5 Hurricane Michael struck the Florida Panhandle causing much devastation. Calhoun County was in the path of Hurricane Michael's destruction.

[2] The parties agreed to invoke the Florida Rules of Civil Procedure, which the trial court approved in an agreed order. *See* Fla. Sm. Cl. R. 7.020(c). With the Rules of Civil Procedure applying, the motion to dismiss was considered under rule 1.420(b) rather than rule 7.110(b), Florida Small Claims Rules. It was likely a distinction without a difference. But we consider this case under the Rules of Civil Procedure rather than the Small Claims Rules.

dismiss. *See Santiago v. Mauna Loa Inv., LLC*, 189 So. 3d 752, 756 (Fla. 2016). But when "the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *One Call Prop. Servs. Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015); *see also Tower Radiology v. Direct Gen. Ins. Co.*, 47 Fla. L. Weekly D1927, 2022 WL 4360173 (Fla. 4th DCA Sep. 21, 2022); *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249 (Fla. 2d DCA 2011). Accordingly, the trial court properly considered, and this court may also consider, the provisions of the insurance policy.

The amended statement of claim alleged that "[o]n or about October 10, 2018, Insured's Property and dwelling . . . [in] Altha, Florida 32421 **was damaged by water**. Said water event and ensuing **damages/tests** were covered under Insured's Policy issued by the Insurance Company to the Insured." (Emphasis added). The amended statement does not otherwise specify the nature or the source of the "water damage," nor are the alleged "damages/tests" more particularly described. Instead, the work performed by Air Quality is described as "engineering services." The motion to dismiss asserted that the policy provides in pertinent part:

> 3. EXCLUSIONS
>
> a. Coverage A - Dwelling and Coverage B - Other Structures and Coverage C - Personal Property
>
> **We do not cover loss to covered property caused directly or indirectly by any of the following**, whether or not any other cause or event contributes concurrently or in any sequence to the loss: . . .
>
> (3) **Water Damage**, **meaning:**
>
> **(a) flood, surface water, waves, tidal water or overflow of a body of water.** We do not cover spray from any of these, whether or not driven by the wind;

(b) water or sewage from outside the plumbing system . . . ;

(c) water which into and overflows from within a sump pump, . . . ;

(d) water below the surface of the ground . . . .

b. Coverage A - Dwelling and Coverage B - Other Structures

Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from: . . .

(4) (c) rust, corrosion or electrolysis, **mold or mildew**, or wet or dry rot; . . . .

(Emphasis added).

While the policy plainly excludes water damage caused by flood, surface water, waves, tidal water, or overflow of a body of water, the policy does not plainly exclude water damage caused by rain. Further, while the Insurer has argued that Air Quality provided services related to mold or mildew, neither the amended statement of claim nor the attached contract between Air Quality and the homeowner so specifies.

An insurance policy is to be construed in accordance with the plain language of the contract. *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). Generally, insurance coverage must be broadly construed in favor of the insured, while exclusions must be narrowly construed against the insurer. *See Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744 (Fla. 2002). Further, "[a]mbiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy," and "ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured." *Anderson,* 765 So. 2d at 34.

"Policy language is considered to be ambiguous . . . if the language 'is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting

coverage.'" *Travelers Indem. Co. v. PCR Inc.,* 889 So. 2d 779, 785 (Fla. 2004) (quoting *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003)). The Florida Supreme Court has reaffirmed that "in order for an exclusion or limitation in a policy to be enforceable, the insurer must clearly and unambiguously draft a policy provision to achieve that result." *Allstate Ins. Co. v. Orthopedic Specialists,* 212 So. 3d 973, 976 (Fla. 2017) (quoting *Geico Gen. Ins. Co. v. Virtual Imaging*, 141 So. 3d 147, 157 (Fla. 2013)).

The insurance policy does not clearly and unambiguously define the kinds of water damage subject to the exclusion to encompass rain. The policy does not exclude all water damage, only specified water damage such as that occurring from rising or tidal water or spray off those waters. Even if we were to find the policy to be ambiguous as to whether rain damage is excluded, applying the *noscitur a sociis* canon of construction, rain is not like the listed hazards which are excluded. *See Nehme v. Smithkline Beecham Clinical Labs., Inc.*, 863 So. 2d 201, 205 (Fla. 2003) ("a word is known by the company it keeps"); *see also Dunham v. State*, 192 So. 324, 326 (Fla. 1939).

Further, the amended statement of claim and its attachment do not make it plain that the claim pertains to mold or mildew so as to trigger that exclusion. Given the plain language of the policy and the allegations of the amended statement, it cannot be said on this record that the claim is excluded. That is, the policy language is reasonably susceptible to the interpretation that coverage is available given the allegations of the amended statement. *See Travelers Indem. Co.*, 889 So. 2d at 785.

The Insurer has further argued on appeal that the policy at issue contains an anti-concurring events exclusion which would also bar recovery. More particularly, Paragraph 3.b.(1) of the policy provides that the Insurer will not cover a loss directly or indirectly from the "[w]eather conditions which contribute in any way with any events excluded in exclusions 3.a.(1) through 3.a.(9)." But as already explained, it is not apparent on this record that the water damage alleged in the amended statement of claim is indeed

an excluded loss. Thus, it is not apparent that Paragraph 3.b.(1) would work to exclude the claim.[3]

Finally, as noted, the Insurer has also argued that the assignment to Air Quality was unauthorized, and so, Air Quality could not seek benefits under the policy. The policy provides that an interest in it may not be transferred without the Insurer's written consent. The trial court did not address the propriety of the assignment in its final order.

In *Security First Insurance Company v. State, Office of Insurance Regulation*, this court acknowledged the "unbroken string of Florida cases over the past century holding that policyholders have the right to assign" post-loss rights without an insurer's consent. 177 So. 3d 627, 628 (Fla. 1st DCA 2015); *see also Lexington Ins. Co. v. Simkins Indus., Inc.,* 704 So. 2d 1384, 1386 n. 3 (Fla.1998) ("[The insurer] concedes that an insured may assign insurance proceeds to a third party after a loss, even without the consent of the insurer."). However, in the last several years, the Florida Legislature enacted legislation which permits an insurer to restrict in whole or in part an insured's right to assign a post-loss property insurance benefit, provided certain conditions are met. *See* Chapter Law 2019-57, Laws of Florida (codified at § 627.7153, Fla. Stat. (2019)). The act had an effective date of July 1, 2019. *See* Ch. 2019-57, § 2, Laws of Fla. Since the Florida Supreme Court has described the new legislation as addressing issues on "a going-forward basis," the new legislation may not have retroactive effect and may apply only to a policy issued or renewed on or after July 1, 2019. *See Kidwell Group, LLC v. GeoVera Specialty Ins. Co.*, 328 So. 3d 994, 996 (Fla. 4th DCA 2021) (quoting

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[3] In its motion to dismiss, the Insurer did not specifically make the argument that the anti-concurrence provision precluded coverage. It is unknown whether that argument was raised in the hearing on the motion as there is no transcript of that hearing in the record. The argument has been raised on appeal, and we have considered it to determine whether the so-called Tipsy Coachman rule could apply here to permit affirmance. *See Dade Cnty. Sch. Bd. v. Radio Station WQBA,* 731 So. 2d 638, 644–45 (Fla. 1999); *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002).

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., nos. SC 18-1624, SC18-1623, 2019 WL 3403438, at *1 (Fla. July 29, 2019)).

The July 2019 effective date of Chapter 2019-57 was after the policy was issued, which had to have occurred before October 10, 2018, when the water damage allegedly occurred. But the assignment at issue, which occurred on April 21, 2020, occurred after the effective date of the new legislation. It is not apparent from the amended statement of claim if the insurance policy was still in effect on or after July 1, 2019. Further, there is nothing in the amended statement of claim which would indicate that any of the statutory prerequisites for issuing an insurance policy which limits the right of assignment have been met. *See* § 627.7153, Fla. Stat. (2019). Thus, an issue of fact remains as to whether section 627.7153 would apply to the policy assigned. Such a factual issue cannot be resolved by this court in the first instance, and factual issues cannot be resolved by the trial court when passing on a motion to dismiss. *See Andrew v. Shands At Lake Shore, Inc.*, 127 So. 3d 1289, 1289 (Fla. 1st DCA 2013) (explaining the purpose of a motion to dismiss is to "test the legal sufficiency of the complaint and not to determine issues of fact").

Accordingly, the final order of dismissed is reversed, and the cause is remanded for further proceedings.

REVERSED and REMANDED.

LEWIS and MAKAR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Chad A. Barr of Chad Barr Law, Altamonte Springs, for Appellant.

Justin N. Rost and Blaire Campbell Hammock of St. Denis & Davey, P.A., Panama City, for Appellee.