Filed 11/14/17 Cohen v. Pacific Specialty Ins. Co. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SIMON COHEN et al., Plaintiffs and Appellants, v. PACIFIC SPECIALTY INSURANCE COMPANY, Defendant and Respondent.	B276060 (Los Angeles County Super. Ct. No. SC122191)

APPEAL from a judgment of the Superior Court of Los Angeles County. Nancy L. Newman, Judge. Affirmed.

Abir Cohen Treyzon Salo, Boris Treyzon and Cynthia Goodman for Plaintiffs and Appellants.

Shoecraft Burton, Michelle L. Burton and Sara A. McClain for Defendant and Respondent.

Appellants Simon and Shahrzad Cohen (hereafter collectively Cohen) filed an action against respondent Pacific Specialty Insurance Company (PSIC) alleging that the insurer had wrongly denied a portion of their first-party claim for rainwater damage to their home. The trial court granted PSIC's motion for summary judgment, and entered judgment accordingly. Cohen contend the trial court incorrectly applied the "efficient proximate cause doctrine" (see generally *Sabella v. Wisler* (1963) 59 Cal.2d 21 (*Sabella*); *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395 (*Garvey*)) in ruling that the portion of the damages claim in dispute was proximately caused by construction defects, a peril that was excluded from the coverage afforded under the parties' contract of insurance.

We affirm. We find, under the insurance policy in this case, a homeowner who is aware, long before a rainstorm occurs and causes damage, of possible leakage caused by construction defects cannot reasonably expect his or her insurer to pay for repairs on the theory that rainwater, and not the construction defects, caused the damage.

FACTS

Background

In early 2010, Cohen purchased a house on South Carson Road in Beverly Hills. At about the same time, Cohen bought a homeowner's insurance policy from PSIC. We discuss the language of the parties' insurance policy in more detail below; for present purposes, it is sufficient to note that the policy contained an exclusion stating that PSIC did not insure for property loss caused by faulty, inadequate or defective design, workmanship, repair, construction, renovation or remodeling. Further, the policy included a mold exclusion endorsement stating that the

policy did not provide coverage for any loss, damage, cost, claim, expense, or property damage "arising from or in any way involving, directly or indirectly . . . wet or dry rot . . . regardless of the cause."

In April or May 2010, Cohen noticed signs of water intrusion in the ceilings of a first floor bedroom and the kitchen.[1] In December 2010, Cohen again noticed signs of water, in areas under a second floor deck or balcony, this time in the kitchen and two first floor bedrooms. "There was a lot of water coming in." In December 2010, nine to ten inches of rain fell in the area of Cohen's home.

On December 29, 2010, Cohen's attorney, Kouros Lahooti, reported a claim to PSIC. As recorded in an internally prepared document, PSIC indicated that Lahooti had reported that Cohen had "water damage due to possible roof damage or construction defects."

PSIC retained an insurance adjusting company, Haig & Lewin, Inc. (Haig), to inspect Cohen's home, which Haig did on January 7, 2011. On January 11, 2011, Haig advised PSIC that "all parties present at the inspection, including [Cohen]'s contractors, agreed [that] defective construction allowed water to enter the home." In a letter report to PSIC dated January 14, 2011, Haig stated that it had observed evidence of "long-term seepage" from the balconies around Cohen's home, including rotted subfloors and organic growth, which caused damage in the

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[1] A home inspection report conducted at the time of purchase noted evidence of water stains in the kitchen and bedrooms, and signs that other water stains may have been covered over. The inspector recommended that Cohen have the situation evaluated further by a specialist.

kitchen and bedrooms. Further, Haig observed that the balconies sloped inward toward the home, that there was ineffective water sealing in the same area, and that the interior ceilings below these areas were saturated with water. Haig concluded that the "seepage, rot and deterioration [were] the result of construction defect, poor or faulty design or poor installation of the balconies," which "led to the observed water damages under pressure of consistent, heavy rains in the area during December 2010."

In accord with PSIC's "standard directives" to its adjustors, Haig also prepared an estimate of the costs of repairs for the water damage that Cohen reported to have occurred in the kitchen and bedroom flooring and drywall as a result of the recent rains. The estimate did not include costs of repairs to the exterior balcony or the interior balcony subfloor which had sustained long-term damage. At about this same time, PSIC "determined further investigation was needed regarding the cause of the loss."

In March 2011, Cohen retained a new lawyer, Alexander Cohen,[2] to deal with Cohen's ongoing claim with PSIC. In April 2011, Alexander wrote a letter to PSIC disputing that damage to the second floor deck or balcony of Cohen's home was caused by construction defects. In response to Alexander's letter, PSIC agreed to hire an engineer to inspect Cohen's property.

In April 2011, PSIC issued a payment in the amount of $19,939.72 to Cohen for "recently occurring interior damages and water remediation work."

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[2] Because counsel and client have the same surnames, we hereafter refer to attorney Alexander Cohen by his first name Alexander. No familiarity or disrespect should be inferred.

In May 2011, Wade Sticht, a licensed engineer with Haag Engineering Co., inspected Cohen's property. Sticht concluded that water leaked through the decks and that the front and rear decks improperly sloped toward the house in some locations, especially above the rear bedroom, which allowed water to drain toward the home instead of away from the home. The areas with severe rotting in the deck plywood above the front bedroom, kitchen and rear bedroom corresponded with locations of improper construction. Sticht observed a ceiling/deck joist coated with roofing mastic, indicative of a prior leak above the rear bedroom which someone had tried to repair. There was also evidence of caulking and sealing at certain grout lines which had cracked and peeled away, indicating a previous attempt to repair the cracked grout lines.

Sticht concluded that the leaks were not the result of storm-related damage to either the decks or the building exterior in December 2010, and that water intrusion had been a long-standing problem at the Cohen property caused by gaps and cracks in the grout lines, improper weatherproofing and other construction defects. Ultimately, Sticht offered an opinion that the "efficient proximate cause" of the long-term water damage at the Cohen home was improperly designed or constructed decks.[3] In June 2011, Sticht prepared a report for PSIC which summarized the findings that are summarized above.

On June 27, 2011, a senior counsel in PSIC's legal department sent a letter to Cohen (through attorney Alexander) denying the portion of his claim that the insurer attributed to long-term water damage caused by construction defects and wet

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[3] We discuss Sticht's ultimate conclusion in more detail below in addressing Cohen's arguments on appeal.

or dry rot. Specifically, PSIC stated that it was declining coverage "for the repairs to the deck and interior framing" which the insurer attributed to "dry rot" caused from construction defects that allowed water intrusion into the interior of Cohen's home.

Cohen later placed a tarp over the exterior decks and submitted an invoice for the cost, which PSIC paid. The City of Beverly Hills subsequently required Cohen to remove the tarps from his home. In December 2012, attorney Alexander wrote a letter to PSIC to advise the insurer that there had been further water intrusion into the home after the tarps were removed.

In February 2013, Cohen sued the seller of the Carson Road home. Cohen's complaint alleged causes of action for breach of contract, breach of warranty, negligence in the construction, remodeling or repair of the home, and fraudulent representation that the home had been built to "very high construction standards." Cohen alleged that "the subject property was not adequately waterproofed, leading to significant flooding of the structure during heavy rains. In addition, the exterior decking around the house was improperly constructed and sloped so that rain water flowed toward and ponded against the improperly waterproofed exterior of the home, causing water to penetrate the interior of the home."

In addition to suing the seller, Cohen submitted a demand to PSIC for an appraisal hearing on the amount of his losses pursuant to Insurance Code section 2071 and the terms of his PSIC policy. Cohen and PSIC nominated appraisers, and the two appraisers in turn then selected a third appraiser to act as umpire. In April 2013, the appraisal panel issued a unanimous award with findings that the repair and replacement costs on

Cohen's dwelling were $269,775.70 ($258,095.70 actual cash value) and that the repair and replacement costs of damage to personal property and contents were $9,515.28 ($6,870.35 actual cash value). The appraisers found that Cohen's "content manipulation"[4] costs totaled $28,514.94, and that his living expenses for four months while repairs were undertaken totaled $42,828. Consistent with the purpose of a loss appraisal hearing pursuant to Insurance Code section 2071, the appraisal award expressly stated: "This award is made without consideration of any coverage issues, policy limits, policy deductibles or prior payments."[5]

In April 2013, PSIC issued three checks to Cohen: $93,442.73 for dwelling repairs based on the appraisal, as adjusted by PSIC; $27,614.94 for content manipulation costs; and $42,828 for living expenses. The parties' separate statements of fact in support of and in opposition to PSIC's summary judgment motion show that PSIC has paid a total of $127,523.48 to Cohen

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[4] Content manipulation meant packing, moving and storing property.

[5] As recently summarized in *Lee v. California Capital Ins. Co.* (2015) 237 Cal.App.4th 1154, 1166, the appraisal process is "limited in scope," and differs from a traditional arbitration. While an arbitrator typically exercises essentially judicial functions, including deciding issues of law, " 'an appraiser has authority to determine only a question of fact, namely the actual cash value or amount of loss of a given item.' " (*Ibid.*) " ' "The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret provisions of the policy." ' " (*Ibid.*, quoting from *Jefferson Ins. Co. v. Superior Court* (1970) 3 Cal.3d 398, 403.)

for repairs to his home. In a declaration in support of Cohen's opposition to PSIC's motion for summary judgment, attorney Alexander states: "To date, PSIC has failed and/or refused to make payment consistent with the appraisal award . . . . Specifically, PSIC has failed to pay and withheld $58,728.33 for the interior water damage, as set forth in the appraisal award."

At a date not clear from the record, Cohen hired a contractor to make repairs to the home. In making repairs to the balconies, and in replacing interior framing and rebuilding two bedrooms, Cohen's contractor prepared a summary of the work done which indicated that the repairs were needed because there had been water damage caused by "no waterproofing." In July 2015, Cohen's contractor prepared a document entitled 'Explanation of Work," which detailed all of the work done on the kitchen and two bedrooms at Cohen's home. This document stated that "[a]fter demolishing the [damaged areas], we noticed that [his] house originally did not have an[y] waterproofing in deck area that caused water damage" to the interior framing, insulation, drywall and flooring.[6]

The Insurance Coverage Case

Meanwhile, in March 2014, Cohen sued PSIC. Cohen's complaint alleged causes of action for breach of contract, declaratory relief, and tortious breach of the covenant of good faith and fair dealing. At its most basic level, Cohen's complaint alleged that he sustained structural and cosmetic damages to his

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[6] The statement of facts presented in Cohen's opening brief includes only a summary of the procedural facts of his first-party coverage dispute action against PSIC. Not one of the background facts summarized above is included in his opening brief.

home caused by "a wind and rain storm" in December 2010, and that PSIC had denied full coverage for the damages.

In January 2016, PSIC filed a motion for summary judgment, or in the alternative, a motion for summary adjudication of each of Cohen's causes of action. Collectively as to Cohen's whole action, and as to each of his causes of action, PSIC argued that it had no liability because Cohen's claimed loss was not covered by his homeowner's insurance policy in that the policy expressly excluded losses caused by design and construction defects. PSIC argued that the "efficient proximate cause" of the water damage to Cohen's home was faulty design, construction and/or workmanship. As to Cohen's tort claim, PSIC argued that, even if its coverage determinations "were incorrect, it still [could] not be liable for bad faith because at all times during the claim, there existed a genuine dispute regarding the cause of the loss as well as the scope and amount of repairs."

PSIC supported its motion with multiple declarations, including an expert declaration from Wade Sticht, the engineer who had inspected Cohen's home in May 2011, and who had concluded that the water damages for which Cohen sought coverage had been caused by long-term seepage of water due to construction defects.

Cohen filed an opposition to PSIC's motion, including objections to the Sticht declaration offered by PSIC. Further, Cohen presented evidence of the interior damage to his home and the costs, primarily through the appraisal award. Cohen did not present an expert's declaration to refute the opinion in the Sticht declaration (*ante*) that the efficient proximate cause of the damage to Cohen's home was construction defects which allowed water to flow into the interior of the premises.

In March 2016, the parties argued the matter to the trial court. In preparation for the hearing, the court issued a 22-page tentative ruling explaining its reason for granting PSIC's motion for summary judgment. On March 16, 2016, the court issued an order adopting its tentative ruling as its decision.

On April 20, 2016, the trial court signed and entered summary judgment in favor of PSIC and against Cohen.

Cohen filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

Summary judgment will be granted when the moving and opposing papers "show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) As a general rule, a defendant moving for summary judgment bears the burden of showing that one or more elements of a cause of action cannot be established, or that there is a complete defense to the action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

When the moving defendant makes this required showing, the burden shifts to the plaintiff to produce responsive substantial evidence sufficient to establish the existence of a triable issue of material fact on the plaintiff's cause of action. (See, e.g., *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261; *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.) Thus, a movant makes an initial showing on a motion for summary judgment when its evidence would be sufficient to sustain a judgment in that party's favor, and summary judgment is proper if the opposing party does not present evidence that is sufficient to present a triable issue. (See, e.g., *Nicewarner v. Kaiser Steel*

Corp. (1983) 143 Cal.App.3d 31, 35.) An issue of fact "can only be created by a conflict [in the] evidence . . . not . . . by speculation or conjecture." (*Horn v. Cushman & Wakefield Western, Inc*. (1999) 72 Cal.App.4th 798, 807.)

In an insurance coverage dispute, the insurer may move for summary judgment on the ground the insured's claim is excluded, in which case the insurer bears the initial burden to prove that the claim falls within an exclusion. (*Medina v. GEICO Indemnity Co.* (2017) 8 Cal.App.5th 251, 259.) To satisfy this burden, the insurer need not disprove every possible cause of the loss, and, once the insurer's evidence establishes that the claim is excluded, the burden shifts to the insured to show that a triable issue of material fact exists that the claim is not excluded. (*Id*. at pp. 259-260.)

On an appeal of summary judgment in favor of a defendant, we review the matter de novo, " ' "considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 717.) We "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Ibid*.) At the same time, we "take the facts from the record that was before the trial court when it ruled on that motion" (*id*. at 716-717) and disregard any new contentions on appeal. (*Havstad v. Fidelity National Title Ins. Co*. (1997) 58 Cal.App.4th 654, 661.) " ' "Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal." ' " (*Ibid*.)

II. The Insurance Policy

The insuring provisions of the parties' contract of insurance reads as follows: "[PSIC will] insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property." Coverages A and B refer to Cohen's dwelling and other structures on his property, with express language stating that PSIC did not cover losses caused by certain events, for example, water damage from plumbing failures, vandalism if the dwelling was vacant for more than 30 consecutive days, and domestic animals.

A section of the policy under the title "**EXCLUSIONS**" reads as follows:

> "[PSIC does] not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."

Within the exclusions section of the policy, the following language is implicated in Cohen's present case:

> "2. [PSIC does] not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.
>
> "[¶] . . . [¶]
>
> "c. **Faulty, inadequate or defective**:
>
> "[¶]
>
> "(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction . . ."

III. The Efficient Proximate Cause Doctrine

The insurance coverage dispute in Cohen's present case involves the so-called "efficient proximate cause doctrine." In *State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123 (*Von Der Lieth*), the Supreme Court restated the principles embraced in the efficient proximate cause doctrine using this language: "As we explained in *Garvey, supra,* 48 Cal.3d at pages 406-407, the scope of coverage under an all-risk homeowner's policy includes all risks except those specifically excluded by the policy. When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. (*Id*. at p. 402.) As we further explained, the question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause. (See *id*. at p. 412.)" (*Von Der Lieth, supra,* 54 Cal.3d at pp. 1131-1132.)

The efficient proximate cause doctrine is a reflection of Insurance Code section 530 (hereafter section 530). Section 530 provides:

> "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

In making the determination whether a loss is covered or excluded under a policy when there is a concurrence of different causes, the efficient proximate cause is the cause to which the

loss is attributed because that cause is the "predominant, or most important cause of [the] loss." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 754.) "By focusing the causal inquiry on the most important cause of a loss, the efficient proximate cause doctrine creates a 'workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer.' " (*Ibid.*, quoting *Garvey*, *supra*, 48 Cal.3d at p. 404.)

IV. Analysis

Cohen contends the trial court erred in granting summary judgment because "there was a triable issue of fact as to the efficient proximate cause of the interior damage." We find no error.

1. PSIC Met its Initial Burden on its Motion for Summary Judgment

In granting PSIC's motion for summary judgment, the trial court found that Cohen's damages were "caused by the accidental rainfall (a covered risk) and the constructional defects and dry rot (not covered risks)." The court concluded that summary judgment in favor of PSIC was warranted because (1) the insurer's evidence, including the declaration of its expert, Wade Sticht, established that the construction defects were the efficient proximate cause of the loss, and because (2) Cohen submitted no evidence disputing Sticht's conclusion regarding the cause of the loss.

Cohen contends the trial court's ultimate decision to grant summary judgment was incorrect because the Sticht declaration was, as a matter of law, too speculative and vague to satisfy PSIC's initial burden on summary judgment. In making his

arguments, Cohen highlights the following conclusions in Sticht's declaration:

> "The water *most likely* leaked into the interior along the edges of the decks and through small gaps in the grout and caulking. The fact that leaks occurred *suggests* either improper or complete lack of waterproofing on the decks. [¶] It was, and still is, my professional opinion that the *efficient proximate cause* of the water intrusion at the Property was improperly designed and/or constructed decks." (Italics added.)

Cohen argues Sticht's declaration was insufficient to carry PSIC's initial burden to establish that Cohen's insurance claim was excluded. As stated by Cohen: "Sticht went from speculating about the 'most likely' sequence of events, to 'suggesting' certain defects, to a full blown legal conclusion that went to the heart of [Cohen's] claim." Cohen argues Sticht's declaration was too "speculative and lacking in foundation" to satisfy the initial showing required for summary judgment.

While Cohen states a generally correct rule that a reviewing court may find an expert's testimony does not constitute substantial evidence in support of a judgment, citing to *Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191-1192 (*Wise*), he offers no cogent discussion of any case in which such a finding was rendered, and offers no comparison of Sticht's declaration to the expert's testimony in such a case. In short, Cohen discusses no case in which expert testimony similar to that which is found in Sticht's declaration was found insufficient to support a judgment, or, more specifically, was found insufficient

to support a party's burden in moving for summary judgment. As a result, Cohen's argument is simply too undeveloped to demonstrate error.

Wise discusses two cases — *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 and *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739 — in which experts' testimony was found to be insufficient to support claims for lost profits. In *Sargon*, an expert offered an opinion about the expected future profits from a start-up company. In *Greenwich*, an expert offered an opinion about the expected profits from a planned real estate development. (See *Wise, supra*, 220 Cal.App.4th at pp. 1196-1197.) In both cases, the reviewing courts found that experts' opinions were based, in essence, on guesses about the future. (*Ibid.*) The situation in Cohen's present case is not akin to speculating about the future. Instead, we have an expert offering an opinion based on his actual, physical inspection of Cohen's home.

We find PSIC's position, based on *Hinckley v. La Mesa R.V. Center, Inc.* (1984) 158 Cal.App.3d 630 (*Hinckley*), the better reasoned. In *Hinckley*, the buyers of an RV sued the seller after the vehicle caught fire and was destroyed. The buyers alleged that the seller failed to make proper electrical repairs after two previous, smaller fires. At trial, the buyers' expert testified about the cause of the final fire as follows:

> " 'All right. *Several probabilities* as to fire cause: *The first probability that I would consider the strongest*, based on the facts as outlined, would be that we had an electrical fire originating on the left front underneath portion of the vehicle. [¶] *The other probability that I would consider* would be the

> possibility of a damaged high-pressure power steering hose, which would allow hydraulic fluid to leak from the system, and if the fluid came in contact with the engine manifold, a fire could have ensued. [¶] Considering the fact that there was no apparent leak when Mr. Hinckley examined his vehicle on the day before, it would — *this probability is probably the least likely*, unless something went wrong with the power steering hoses after his examination.' " (*Hinckley, supra*, 158 Cal.App.4th at p. 638, italics added.)

The trial court granted a motion for nonsuit at the end of the plaintiffs' case, finding that the expert's opinion failed to amount to "credible evidence to support a recovery on any of the plaintiffs' theories." (*Hinckley, supra,* 158 Cal.App.4th at p. 634.) The Court of Appeal reversed the nonsuit, ruling that the proffered testimony about the "strongest probability" for the cause of the fire was sufficient to present an issue of fact for the jury on the plaintiffs' claim that improper electrical repairs caused the fire. (*Id*. at pp. 638-639.)

Inasmuch as testimony about the "strongest probability" for a certain event is sufficient to survive a motion for nonsuit because such testimony would constitute substantial evidence to support a jury verdict at trial in favor of a plaintiff, it follows by parity of reasoning that testimony as to the "most likely" cause of an event is sufficient to meet a movant's initial burden on a summary judgment motion. We are amply satisfied that Sticht's

declaration was sufficient to support PSIC's initial burden on its motion for summary judgment.[7]

2. Cohen Failed to Show a Triable Issue of Fact

Cohen next contends that the record contains evidence showing the existence of a triable issue of fact as to the efficient proximate cause of the interior damage to his home. Cohen argues "there was compelling circumstantial evidence that the intense . . . storms [in December 2010] were the efficient proximate cause of the damage [to the interior of his home.]" We are not persuaded.

PSIC presented evidence on the efficient proximate cause of the interior damage to Cohen's home through the declaration of its expert, Wade Sticht. In addition, PSIC offered supporting evidence in the form of the initial claim report by Cohen's first lawyer, which indicated possible construction defects were the cause of water inside Cohen's home. Further, there was evidence of the inspection by the adjustor, including the statement that all parties who were present at the inspection, including Cohen's contractor, attributed the water damage to construction defects. Finally, there was the "work done" summary by the contractor who ultimately did repairs at Cohen's home, with the notation

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[7] Cohen tells us generally that he objected to Sticht's declaration on multiple grounds, including lack of personal knowledge and lack of foundation, and that the trial court overruled his objections. We decline to construe Cohen's passing comments as a challenge on appeal to the trial court's evidentiary rulings because it is too undeveloped, and is not supported by proper references to the pertinent parts of the record. It does not cite the specific portion of evidence objected to or the corresponding objection, and does not set out proper legal citations.

that the repairs were necessary because of water damage from construction defects.

Cohen's opposition to PSIC's motion for summary judgment offered evidence from various sources about *the existence* of water damage inside his home. For example, he regularly referenced the appraisal award showing the kinds of damages and the costs to repair those damages. However, Cohen did not present an expert declaration to refute the expert conclusions offered by PSIC in the Sticht declaration. Accordingly, we agree with the trial court's decision that summary judgment was appropriate in this case. The critical issue in the present case is not the *existence of damages* inside Cohen's home; damages plainly existed. The critical issue was the *cause* of those damages. PSIC's motion for summary judgment offered evidence on this issue; Cohen's opposition did not.

Cohen contends that because there was only minor water leakage and staining in his home before the heavy rains in December 2010, this allows for a reasonable inference that the heavy rains, and not construction defects, was the efficient proximate cause of the major interior water damage to his home manifested in December 2010. We disagree.

Whether one looks at light rains or heavy rains, the instrumentality that caused the interior damages was the defects in construction that allowed rains to enter the home. Cohen's argument itself acknowledges that "construction defects apparently existed over time," which he acknowledges caused "some minor interior damage." In our view, all of this lends support for Sticht's opinion that it was long-term seepage of water into Cohen's home from construction defects that caused the disputed interior damage to his home. Cohen seems to accept

that the "minor damage" which had been occurring over time from light rains was not covered. Nevertheless, he then argues that the further damage became covered as a result of the heavy rains. We read nothing in the efficient proximate cause doctrine cases to support such a proposition. Whether there was light or heavy rain, it is the construction defect that is the predominant cause of the damages by allowing rain to enter the premises. As we have noted, Cohen did not present any evidence to dispute the cause of the damages.

Cohen cites two cases in which the courts of appeal ruled there were triable issues of fact as to the efficient proximate cause of the insureds' losses. However, in each of those cases, there were competing experts' evidence about the efficient predominate cause of the insured's damages. *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446,[8] is a summary judgment case which involved a homeowner's policy that covered losses from fire. State Farm denied a claim, taking the position that its insured's home was damaged by a mudslide, which is earth movement and not covered under the policy. The insured introduced evidence from a geotechnical expert who concluded the slope would not have failed if it had not been denuded by fire. The Court of Appeal ruled that the expert opinion offered by the insured was sufficient to raise a triable issue of fact as to whether the fire was the efficient proximate cause of the landslide. As the court observed, "a reasonable juror could find that the burning of the slope was the 'predominating cause' or the one that set the others in motion." (*Id.* at pp. 1459-

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[8] *Howell* was disapproved on another ground by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.)

1460.) Cohen offered no such evidence in his opposition to PSIC's motion for summary judgment.

Garvey, supra, 48 Cal.3d 395, is also an insurance coverage case involving earth movement. There, the trial court granted a directed verdict in favor of the plaintiffs based on its finding the evidence showed "concurrent causes" of damage, and its understanding of the law that, in such a situation, an insured will be covered. The Supreme Court reversed, ruling that the trial court had erred in applying a concurrent cause analysis. The Supreme Court in *Garvey* rejected the plaintiffs' argument that the directed verdict could be affirmed in any event because the record did not show evidence to support the insurer's position on non-coverage. Here, the Supreme Court noted that the record showed "marked disagreement" between competing experts regarding the causes of the plaintiffs' damages, one leading to coverage, the other not. (*Id*. at p. 412.) As the Supreme Court explained, where such a dispute exists in the parties' evidence as to the cause of a loss, it "presents a classic *Sabella* situation [and c]overage should be determined by a jury under an efficient proximate cause analysis. Accordingly, *bearing in mind the facts here*, we conclude the question of causation is for the jury to decide." (*Ibid,* italics added, fn. omitted.) In short, the cause of the damages in *Garvey* was a jury question "because sufficient evidence was introduced to support both possibilities" of the cause of the loss. (*Id*. at p. 413.) The difference in Cohen's present case is that he did not offer any evidence disputing PSIC's expert's cause of the loss.

In summary, Cohen failed in opposing PSIC's summary judgment motion to present evidence creating a triable issue of fact as to the efficient proximate cause of the disputed interior

damages to his home. For this reason, the trial court did not err in PSIC's summary judgment motion.

3. The Concurrent Cause Doctrine

Cohen next argues we should adopt the concurrent cause doctrine, as is done in Florida, and discussed in *Sebo v. American Home Assurance Co., Inc.* (Fla. 2016) 208 So.3d 694. We are compelled by the doctrine of stare decisis to reject Cohen's suggestion that we should apply Florida's concurrent cause doctrine.

The Supreme Court has spoken more than once on the issue tendered by Cohen. For example, the Supreme Court explained: "In *Sabella* [*v. Wisler* (1963)] 59 Cal.2d 21, we held that section 530 incorporated the [efficient proximate cause doctrine] as the preferred method for resolving first party insurance disputes involving losses caused by multiple risks or perils, at least one of which is covered by insurance and one of which is not." (*Julian v. Hartford Underwriters Ins. Co.*, *supra*, 35 Cal.4th at p. 753, citing *Sabella, supra*, 59 Cal.2d at pp. 31-33.)

Further, in *Garvey, supra*, 48 Cal.3d 395, the Supreme Court explained that applying a "concurrent causation approach" in the context of a first party property insurance coverage dispute was incorrect because it "allows coverage . . . whenever a covered peril is a concurrent proximate cause of the loss, without regard to the application of specific policy exclusion clauses. Such reasoning ignores the criteria set forth in Insurance Code sections 530 and 532, the relevant analysis in *Sabella* and the important distinction between property loss coverage under a first party property policy and tort liability coverage under a third party liability insurance policy. Indeed, because a covered

peril usually can be asserted to exist somewhere in the chain of causation in cases involving multiple causes, applying [a concurrent causation] approach to coverage in first party cases effectively nullifies policy exclusions in 'all risk' homeowner's property loss policies, thereby essentially abrogating the limiting terms of insurance contracts in such cases." (*Garvey, supra*, 48 Cal.3d at p. 399, fns. omitted.)

Because the Supreme Court has ruled that California insurance law adheres to the efficient proximate cause doctrine, we will not apply Florida's concurrent cause doctrine. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [decisions of the Supreme Court are binding on all lower courts].)

We disagree with Cohen's argument in his reply brief that the Supreme Court has "left the door open" for application of a "concurrent cause analysis" in an "appropriate case." To support this argument, Cohen quotes a footnote in *Garvey, supra*, 48 Cal.3d 395, which states: "In the unusual event that analysis under *Sabella, supra*, 59 Cal.2d 21, would not be useful in a first party property loss case because separate excluded and covered causes simultaneously join together to produce damage — a situation we have yet to address — we may then consider developing an appropriate doctrine of concurrent causation to apply in the property loss context. For example, *if property loss were to result from the simultaneous crash of an aircraft into a structure (a covered peril in a typical all risk homeowner's policy) during an earthquake (typically excluded from coverage when it operates alone to cause a loss)*, it might be impossible to determine (under a *Sabella* analysis) which cause was the efficient proximate cause of the loss. In that 'novel' case, we might consider developing [an] . . . independent concurrent

causation standard in analyzing coverage under the policy. It would be imprudent to reach such a hypothetical issue here, however, and hence we leave discussion of such a doctrine to a future first party property loss case, should one arise." (*Garvey, supra*, 48 Cal.3d at p. 410, fn. 9, italics added.)

In Cohen's case, we are presented with common perils, namely, rain and construction defects, and it is possible to determine which cause was the efficient proximate cause. Thus we see no "novel" circumstances (such as an airplane crashing into a house during an earthquake) that would justify departing from the doctrine as established by the Supreme Court. Applying a concurrent cause doctrine in Cohen's case would effectively nullify the policy exclusions included in the parties' homeowner's property loss policy, thereby essentially abrogating the limiting terms of the insurance contract. (See *Garvey, supra*, 48 Cal.3d at p. 399.)

V. The Ensuing Loss Provision

As noted above, the parties' insurance contract included the following language in the section dealing with exclusions: "2. [PSIC does] not insure for loss to property described in Coverages A and B caused by [construction defects]. *However, any ensuing loss to property described in Coverages A and B is not excluded or excepted in this policy is covered*." (Italics added.) The parties refer to this italicized language as the ensuing loss provision.

Cohen contends summary judgment in favor of PSIC must be reversed because a jury could find that "a reasonable insured would interpret the ensuing loss provision to cover the interior damage [to his home.]" We disagree.

An ensuing loss provision such as that contained in the contract of insurance between Cohen and PSIC applies "to the situation where there is a 'peril,' i.e., hazard or occurrence which causes a loss or injury, separate and independent but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues." (*Acme Galvanizing Co. v. Fireman's Fund Ins. Co.* (1990) 221 Cal.App.3d 170, 179-180 (*Acme*), italics added.) In other words, an ensuing loss provision may be said to be a type of exception to an exclusion. Generally speaking, the purpose of an ensuing loss provision is to provide coverage for a type of peril, for example, a fire, which, on its own would be covered, but, because it ensued or arose from an excluded event, for example a construction defect, would otherwise not be covered under the terms of the policy and the efficient proximate cause doctrine. (*Ibid.*) Accordingly, to be covered under an ensuing loss provision, the claimed loss must: (1) result from a peril separate and distinct from and in addition to the original excluded peril; and (2) not be excluded elsewhere in the policy. (*Ibid.*; and see also *Murray v. State Farm Fire & Casualty Co.* (1990) 219 Cal.App.3d 58, 65.)

In *Acme, supra*, the insured owned a steel kettle which failed, causing molten zinc to leak from the kettle and damage surrounding equipment. The insurance company denied the insured's claim for the loss of its equipment, taking the position that a design defect in the kettle, an excluded risk, caused the damages to the equipment. At trial, the court rejected the insured's contention that the damage to its equipment was covered as an ensuing loss, and granted nonsuit in favor of the insurance company. The Court of Appeal affirmed, reasoning that "there was no peril separate and in addition to the initial

excluded peril of the welding failure and kettle rupture. The spillage of the molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril which the ensuing loss [provision] covered." (*Acme, supra*, 221 Cal.App.3d at p. 180.)

We come to the same conclusion in Cohen's case here. There is no new peril causing the damage to Cohen's home that is separate and distinct from and in addition to the excluded peril of construction defects that caused rainwater to seep in and damage the home. Without a subsequent peril, the ensuing loss provision does not apply.

We acknowledge Cohen's argument that falling rain should be viewed a separate, covered peril, and that he is not directly seeking coverage to repair the construction defects to his home. However, we view the rain water that caused the damage to Cohen's home as analogously to the molten zinc in *Acme*. Where in *Acme* a construction defect allowed molten zinc to escape and cause damage to the interior of the insured's premises, so too did a construction defect in this case allow rainwater to escape, or leak into, and cause interior damage to Cohen's premises. There is no analytical distinction between the construction defect and the damage to allow for the ensuing loss provision to apply. The water leaking into Cohen's house did not cause an independent peril such as a fire. (*Acme, supra*, 221 Cal.App.3d at p. 180.)

In summary, an excluded peril did not cause a second, covered peril in Cohen's case. Instead, an excluded peril, construction defects, directly led to the water damage for which

Cohen seeks recovery. The water damage did not arise from an ensuing event. The construction defect exclusion would be essentially meaningless if Cohen could recover for water damages in the form of rotted framing or cracking concrete which resulted directly from the defective construction.

To the extent Cohen suggests that *Acme* is distinguishable because it involved a first-party commercial premises policy, whereas he seeks coverage under a homeowners' policy, we are not persuaded. Cohen does not cite any authority to support the proposition that an ensuing loss should be viewed differently in a commercial versus residential context. In addition, PSIC cites two California federal district court cases that applied *Acme*'s analysis of "ensuing loss" to homeowners' insurance policies with relevant language substantively similar to the language in PSIC's policy. (See *Sapiro v. Encompass Ins. Co.* (N.D. Cal. 2004) 221 F.R.D. 513, 522 [observing that California courts have long defined an ensuing loss as a loss separate and independent from an original peril]; *Loughney v. Allstate Ins. Co.* (S.D. Cal. 2006) 465 F.Supp.2d 1039, 1042 [an ensuing loss provision creates coverage only if an excluded cause of loss resulted in a secondary peril (such as a fire) that itself is covered by the policy, and this secondary peril caused a loss].)

Finally, we reject Cohen's argument that PSIC's policy is ambiguous, and, as such, and should be construed in favor of coverage. A policy term is ambiguous when it is susceptible to two or more reasonable interpretations. (*Foster-Gardner, Inc. v. National Union Ins. Co.* (1998) 18 Cal.4th 857, 868.) The fact that a particular term is not defined in a policy does not mean that the term is necessarily ambiguous. (*Ibid.*) Here, Cohen has not offered any alternative interpretation of the ensuing loss

clause in PSIC's policy other than his arguments that coverage always existed for rainwater damage. For the reasons discussed above, we do not accept Cohen's position. Under the facts in this case, rainwater was the means by which Cohen's home was damaged, not its cause.

Ultimately, the court did not err in finding coverage was excluded in this case. Cohen, was aware of possible leakage caused by construction defects — long before a rainstorm occurred and caused damage. Given this knowledge, he could not reasonably expect his insurer to pay for repairs on the theory that rainwater, and not the construction defects, caused the damage. Cohen's position in the present case demonstrates the reasonableness of PSIC's exclusion for construction defects.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.