SEBO AND ITS EFFECT ON FLORIDA'S MULTIPLE PERIL LOSS ANALYSIS

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INTRODUCTION

Many will have you believe that, in 2016, the landscape in Florida of interpretation regarding the application of exclusionary provisions found within property insurance policies in matters concerning multiple causes of loss drastically changed. This belief comes from the release of the opinion in *Sebo v. Am. Home Assurance Co., Inc.*[1] (hereinafter "*Sebo*") by the Supreme Court of Florida. Of course, the *Sebo* opinion is replete with caselaw citations to long-existing precedent. This begs the question: was *Sebo* the landmark case many have held it to be or was it simply an amalgamation of existing maxims related to property insurance policies?

Throughout this examination, the origins of multi-peril loss analyses in Florida leading to the decision in *Sebo* will be explored. The *Sebo* decision will then be considered as well as the subsequent opinions which utilize *Sebo* to determine whether multiple perils, some covered and some not, converging into a single loss can ultimately lead to coverage under a property insurance policy.

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[1] *Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694 (Fla. 2016).

EFFICIENT PROXIMATE CAUSE VERSUS CONCURRENT CAUSATION

In order to truly appreciate the implications of *Sebo*, we must first understand the pre-*Sebo* landscape related to the analysis of coverage in matters involving more than one cause of loss. If all contributing losses are either covered or excluded, the analysis is simple – covered losses give rise to covered claims and excluded losses result in non-covered claims; however, "[i]n cases involving multiple causes that produce a loss, one of which is included while the other is excluded from policy coverage, the most common approaches to determining whether recovery should be allowed on the insurance contract are the efficient proximate cause rule and the concurrent cause rule."[2]

The "efficient proximate cause" analysis allows for recovery of "a loss caused by a combination of a covered risk and an excluded risk only if the covered risk was… the loss is the one that sets the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought."[3] Conversely, the "concurrent causation doctrine" allows for recovery whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk which is covered under the terms of the policy."[4]

FLORIDA'S MULTI-PERIL LANDSCAPE PRE-*SEBO*

In *Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n* (hereinafter "*Evansville Brewing*"), [5] the Supreme Court of Florida discussed the chain of causation without labeling it under the efficient proximate cause or concurrent causation monikers. Subsequently, but before *Sebo* was released, it seems that the first times these terms were used was in *Hartford Accident*

[2] 7 Couch on Ins. § 101:55 (3d ed.).
[3] *Id.*
[4] *Id.*
[5] *Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n*, 75 So. 196 (Fla. 1917).

and Indemnity Co. v. Phelps (hereinafter "*Phelps*")[6] where the First District Court of Appeal touched upon an efficient proximate cause analysis, and in the decision of *Wallach v. Rosenberg* (hereinafter "*Wallach*")[7] where the Third District Court of Appeal performed a concurrent causation doctrine analysis. Later, in *Paulucci v. Liberty Mut. Fire Ins. Co.* (hereinafter "*Paulucci*"),[8] the Middle District of Florida tied both opinions together and provided a roadmap for the eventual opinion in *Sebo*.

a. Fire Association of Philadelphia v. Evansville Brewing

In *Evansville Brewing*, the insured premises was destroyed by a fire, a covered cause of loss, and explosion, an excluded cause of loss; however, there was a question as to whether the fire caused the explosion or the explosion caused the fire.[9] In noting that the insurance carrier has the burden of pleading and proving that the loss was the result of the excluded cause of explosion, the court reasoned as follows:

> While the insurer is not liable for a loss caused by an explosion which was not produced by a preceding fire, yet if the explosion is caused by fire during its progress in the building, the fire is the proximate cause of the loss, the explosion being a mere incident of the fire, and the insurer is liable. Where an explosion is an incident to a fire already in progress, the burning of the building is a 'direct loss or damage by fire,' within the meaning of the policy. If the explosion is not caused by a pre-existing fire, the insurer is liable 'for the damage by fire only,' if any, after the explosion.[10]

While not specifically using the terms efficient proximate cause or concurrent causation, the *Evansville Brewing* court lay the foundation for such analyses in the future.

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[6] *Hartford Accident and Indemnity Co. v. Phelps*, 294 So. 2d 362 (Fla. 1st DCA 1974).
[7] *Wallach v. Rosenberg*, 527 So. 2d 1386 (Fla. 3d DCA 1988), *rev. denied* 526 So. 2d 246 (Fla. 1998).
[8] *Paulucci v. Liberty Mut. Fire Ins. Co.*, 190 F. Supp. 2d 1312 (M.D. Fla. 2002).
[9] *Evansvile Brewing*, 75 So. At 198.).
[10] *Id.* at 198-199.

b. *Hartford Accident and Indemnity Company v. Phelps*

The *Phelps* court was not the first in Florida to tackle any kind of analysis regarding the doctrines of causation involving multiple perils, but it seems to have been the first to have labeled the analysis accordingly. In *Phelps*, the insured's property sustained damages related to collapse and settlement as a result of a leak in an under-slab water line.[11] The insurance carrier denied coverage citing to a policy provision excluding damage caused by "water below the surface of the ground" and qualified that collapse coverage did not include "settling, cracking, shrinkage, bulging or expansion."[12] The *Phelps* court discussed numerous issues regarding the application of the exclusions, but the analysis regarding the multiple perils was fairly minimal. Citing only to the California Supreme Court in *Sabella v. Wisler*,[13] the *Phelps* court asserted that, "where there is a concurrence of different causes, the efficient cause — the one that sets others in motion — is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."[14] This finding served as the basis for the efficient proximate cause determination in Florida moving forward.

c. *Wallach v. Rosenberg*

In *Wallach*, the parties owned adjoining properties on an island encompassed by a continuous sea wall.[15] After a storm, the Wallach's sea wall was damaged and collapsed resulting in the collapse of a portion of Rosenbergs' sea wall.[16] The Rosenbergs filed suit against Wallach asserting that Wallach was in breach of his duty to exercise reasonable care in the maintenance of his property.[17] The Rosenbergs also filed a claim with Old Republic Insurance Company, their

[11] *Phelps*, 294 So. 2d at 363.
[12] *Id.*
[13] *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 (1963).
[14] *Id. quoting* 6 Couch, Insurance (1930), § 1466.
[15] *Id.* at 1386.
[16] *Id.*
[17] *Id.*

property insurance carrier, which was denied under the policy exclusion precluding coverage "for loss resulting directly or indirectly... from earth movement... or water damage…."[18] At trial, the Rosenbergs asserted that their loss was caused by Wallach's negligence which they argued was a covered cause of loss under the Old Republic insurance policy.[19] Old Republic and Wallach, seemingly in a joint effort, proffered that "the proximate cause of the Rosenbergs' loss was earth movement or water pressure caused by the storm—risks specifically excluded from coverage under the policy."[20] Ultimately, the jury was provided with an instruction that "Old Republic has the burden of proof to show by the greater weight of the evidence that the exclusion in the insurance policy was the sole, proximate cause of damage or loss to the property."[21]

On appeal, Old Republic and Wallach argued, in pertinent part, that the court committed error in denying their motions for directed verdict and in providing the above referenced jury instruction because there should not be coverage "where concurrent causes join to produce a loss and one of the causes is a risk excluded under the policy…."[22] The Third District Court of Appeal rejected this argument noting, in line with the Supreme Court of California in *State Farm Mutual Automobile Insurance Co. v. Partridge*,[23] that they were adopting "a better view — that the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not... the prime or efficient cause of the accident.'"[24]

In distinguishing itself from the *Phelps* opinion, the *Wallach* court opined that "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to

[18] *Id.* at 1386-7.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *State Farm Mutual Automobile Insurance Co. v. Partridge,* 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973).
[24] *Wallach*, 527 So. 2d at 1388 *quoting* 11 G. Couch, *Couch on Insurance 2d* § 44:268 (rev. ed. 1982).

find the loss covered by an all-risk policy even if one of the causes is excluded from coverage."[25] This holding further distanced itself from the *Phelps* opinion noting that "the efficient cause language set forth in *Sabella* and cited by [*Phelps*] offers little analytical support where it can be said that but for the joinder of two independent causes the loss would not have occurred."[26]

d. Paulucci v. Liberty Mutual Fire Insurance Company

More recently, in *Paulucci,* the Middle District of Florida compared both *Phelps* and *Wallach* in order to determine the proper method of analysis for claims involving multiple perils.[27] Of particular note, the court in *Paulucci* reasoned that the efficient proximate cause and concurrent cause doctrine analyses "are not mutually exclusive [and] apply to distinct factual situations."[28] The *Paulucci* court reasoned that the application of efficient proximate cause versus concurrent causation doctrine was reliant on whether the causes of loss were dependent or independent.

In its analysis, the court in *Paulucci* explained that "[c]auses are independent when they are unrelated such as an earthquake and a lightning strike, or a windstorm and wood rot [and] are dependent when one peril instigates or sets in motion the other, such as an earthquake which breaks a gas main that starts a fire."[29] While not discussed in *Sebo*, perhaps because it is a federal opinion and, therefore, holds only persuasive precedential value, *Paulucci* seems to serve as footing for the analysis that was to follow.

It must be further noted that the *Paulucci* opinion was seemingly the first opinion to explicitly state that "parties can contract around the concurrent cause doctrine through an express

[25] *Id.*
[26] *Id.*
[27] *Paulucci, 190 F. Supp. 2d 1312.*
[28] *Id.* at 1318.
[29] *Id.* at 1319.

anti-concurrent cause provision."[30] As discussed further *infra*, this becomes an extremely important aspect of the multi-peril loss analysis.

THE *SEBO* OPINION

a. The facts of *Sebo*

In *Sebo*, the insured purchased a four-year-old property in April 2005 and obtained a customized "all risk" insurance policy from American Home Assurance Company (hereinafter "AHAC").[31] Shortly thereafter, the insured experienced water intrusion during rainstorms.[32] As the leaks continued and worsened, it was clear that the property suffered from construction and design defects.[33] In October 2005, after having reported the water leaks to their property manager, Hurricane Wilma caused additional damage to the property.[34] After the hurricane, the insured reported the loss to AHAC who provided coverage for mold related damages but denied the remainder of the claim under the faulty, inadequate, or defective workmanship exclusion.[35] The insured initially filed suit against the sellers of the property, the architect, and the construction company but, in 2009, added AHAC as a defendant and sought declaratory relief for coverage under the insurance policy.[36] At trial, the jury sided with the insured and found in favor of coverage.[37]

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[30] *Id.* at 1320 *citing Wallach* at 1388; *W. Am. Ins. Co. v. Chateau La Mer II Homeowners Ass'n*, 622 So.2d 1105, 1108 (Fla. 1st DCA 1993) (holding that pursuant to the subject insurance policy and Florida law coverage existed for damage to balconies which resulted from both a covered cause (hidden decay) and an excluded cause (faulty design) and expressly noting that there was "no contention here that the policy contains a provision which specifically excludes coverage where a covered and an excluded cause combine to produce a loss").
[31] *Sebo*, 208 So. 3d at 695.
[32] *Id. at 696.*
[33] *Id.*
[34] *Id.*
[35] The complete provision excludes "loss caused by faulty, inadequate or defective: a. Planning, zoning, development, surveying, siting; b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; c. Materials used in repair, construction, renovation or remodeling; or d. Maintenance; of part or all of any property whether on or off the residence." *Id.* at 700.
[36] *Id.* at 696.
[37] *Id.*

b. The Second District Court of Appeal Opinion

On appeal, the Second District Court of Appeal[38] disagreed with the rule outlined in *Wallach* as applied by the lower court and adopted an efficient proximate cause analysis because "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy."[39] This was based on the two previously referenced California cases[40] having been reconciled by the California Supreme Court in *Garvey v. State Farm*.[41] The appellate court also noted that, while the holding in *Garvey v. State Farm* was supported by the California Insurance Code and Florida's laws were different, "the majority of states have adopted the efficient proximate cause theory for analyzing this [multi-peril loss] issue."[42]

c. The Supreme Court Opinion

Subsequently, the Florida Supreme Court accepted jurisdiction to resolve a conflict between the Second District Court of Appeal's appellate decision and the Third District Court of Appeal's long established decision in *Wallach*. In their opinion, the Supreme Court of Florida performed an in-depth analysis of both the efficient proximate cause and the concurrent cause doctrine.

In discussing the *Evansville Brewing* opinion, the *Sebo* court noted that, despite not having previously labeled the analysis as an efficient proximate cause determination, that is exactly the type of analysis which occurred explaining that it previously "contemplated a chain of events

[38] *Am. Home Assur. Co., Inc. v. Sebo*, 141 So. 3d 195 (Fla. 2d DCA 2013), *review granted, decision quashed sub nom.*
[39] *Id.* at 201.
[40] *See Sabella*, *surpa,* and *Partridge*, *surpa*.
[41] *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal.3d 395, 257 Cal.Rptr. 292, 770 P.2d 704 (1989).
[42] *Am. Home Assur. Co., Inc. v. Sebo*, 141 So. 3d at 201 *citing* Michael C. Phillips & Lisa L. Coplen, Concurrent Causation versus Efficient Proximate Cause in First–Party Property Insurance Coverage Analysis, 36 Brief 32, 35 (Winter 2007) (listing thirty-four states that have adopted the efficient proximate cause model, and only seven, including Florida, that have applied the concurrent causation theory).

where one peril directly led to a subsequent peril. In finding that coverage existed under the policy, we drew the distinction between a covered peril setting into motion an uncovered peril and an uncovered peril setting into motion a covered peril."[43] In completing its efficient proximate cause analysis, the *Sebo* court reasoned that "[c]overage exists for the former but not the latter."[44]

Then, the *Sebo* court performed a similar exercise with regards to the concurrent causation doctrine utilized in *Wallach.* Despite the Florida Supreme Court having previously utilized efficient proximate cause in *Evansville Brewing*, the *Sebo* court recognized that the concurrent causation doctrine utilized in *Wallach* had been continuously applied for nearly 30 years in the state of Florida until the Second District Court of Appeal's decision.

Ultimately, the Florida Supreme Court in *Sebo* did not hold that efficient proximate cause was superior to concurrent causation doctrine or vice versa. As there was no dispute that the hurricane winds and rain (covered causes of loss) combined with defective construction (an excluded cause of loss) to cause damage to the insured property, the court held that, because "there is no reasonable way to distinguish the proximate cause of Sebo's property loss . . . it would not be feasible to apply the efficient proximate cause doctrine because no efficient cause can be determined."[45] In light of the fact that no proximate cause could be determined, the *Sebo* court echoed *Wallach* in utilizing the concurrent causation doctrine stating "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage."[46]

Additionally, the court dismissed the Second District Court of Appeal's assertion that the concurrent causation doctrine would nullify all policy exclusions noting that "AHAC explicitly

[43] *Sebo*, 208 So. 3d at 697.
[44] *Id.*
[45] *Id.* at 700.
[46] *Id. quoting Wallach*, 527 So. 2d at 1388.

wrote other sections of Sebo's policy to avoid applying the concurrent causation doctrine. Because AHAC did not explicitly avoid applying the CCD, we find that the plain language of the policy does not preclude recovery in this case."[47] As with the opinion *Paulucci*, this seemingly innocuous section of text touched on a much greater tenet of policy analysis.

ANTI-CONCURRENT CAUSATION PROVISIONS

While they appear to be throwaway lines in the dicta of *Sebo* and *Paulucci*, the fact that a party may contract around the concurrent causation doctrine analysis is a massively important principle in policy interpretation.

First, it is important to note that there are two (2) distinguishable types of property insurance policies which are issued by insurers in the State of Florida: "all-risk" policies and "named perils" policies.[48] An "all-risk" policy insures against all direct losses except those explicitly excluded and, alternatively, a "named perils" policy protects against perils explicitly identified as included in the policy.[49] Typically speaking, coverage in an "all-risk" policy will include language such as "we provide coverage for all risks not otherwise excluded" whereas a "named perils" policy will contain language which generally states "we provide coverage caused by any of the following perils."

In every insurance policy, regardless of whether it is an "all risk" or "named perils" policy, or some kind of hybrid containing both in different sections, there will always be exclusions present serving to limit the liability of the carrier regarding certain types of losses. The question on how to interpret such exclusions depends on the language of the lead-in clause for the relevant exclusionary provision. Some exclusionary sections contain the following language: "We do not

[47] *Id.*
[48] *See generally Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014).
[49] *See id.*at 673, n.1. *See also Fisher v. Certain Interested Underwriters at Lloyds*, 930 So. 2d 756, 758 (Fla. 4th DCA 2006).

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."[50] As is evident therein, such language, while relating to an excluded cause of loss, provides coverage for ensuing damages, to wit, covered damages which result from such an excluded cause of loss.[51] Alternatively, some exclusions are found under the following lead-in language: "We do 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."[52] This latter language is referred to as an "anti-concurrent causation" clause. When an anti-concurrent causation clause prefaces an exclusion, all damages resulting from that excluded cause of loss, no matter the apportionment of fault or percent of contribution, are also excluded.[53]

***SEBO*'S IMPACT MOVING FORWARD**

There are two major Florida appellate opinions which have been released since *Sebo* which deal with differing aspects of *Sebo*'s multi-peril analysis. In *Jones v. Federated Nat'l Ins. Co.* (hereinafter "*Jones*"),[54] the Fourth District Court of Appeal addressed the burden of proof analysis when dealing with efficient proximate cause and concurrent causation doctrine. Subsequently, in *Security First Ins. Co. v. Czelusniak* (hereinafter "*Czelusniak*"),[55] the Third District Court of

[50] *See, generally, Liberty Mut. Fire Ins. Co. v. Martinez*, 157 So. 3d 486 (Fla. 5th DCA 2015).
[51] *Id. at* 488 ("An ensuing loss is a loss that occurs separate from but as a result of an excluded loss."); *see also Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 167 (Fla. 2003) ("[A]n ensuing loss is one that occurs subsequent to the excluded loss").
[52] *Id.*
[53] *Id.* at 487, n. 1 ("An anti-concurrent cause provision is a provision in a first-party insurance policy that provides that when a covered cause and noncovered cause combine to cause a loss, all losses directly and indirectly caused by those events are excluded from coverage.").
[54] *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 941 (Fla. 4th DCA 2018).
[55] *Sec. First Ins. Co. v. Czelusniak*, 305 So. 3d 717 (Fla. 3d DCA 2020), *review denied,* SC20-1092, 2020 WL 6708664 (Fla. Nov. 16, 2020).

Appeal discussed the application of the doctrine of anti-concurrent causation as it relates to exclusionary provisions in insurance policies.

a. *Jones v. Federated National Insurance Company*

In order to appreciate the *Jones* opinion, the general burdens of proof pertaining to a first party property claim must be understood. Florida law is well established with regards to the burden of proof in actions stemming from a property insurance contract. Under an "all risk" policy, "an insured seeking coverage… must prove that a loss occurred to the property during the policy period. If the insured meets this initial burden, the burden shifts to the insurer to show that the loss resulted from an excluded cause."[56] "If the policy is a named perils policy, however, the insured has the burden of proving that the damage occurred by a covered cause."[57] Despite the long history of law on the burdens of proof in a property damage claim, no opinions specifically addressed how the efficient proximate cause and concurrent causation doctrine analyses would affect the burden of proof until *Jones*.

In *Jones*, the insureds filed a claim for damage to their roof under an "all risk" policy alleging that the damage was caused by hail, information that was presented through competent evidence at trial.[58] The carrier denied coverage for the claim, and, at trial, presented evidence that the damages were barred based on exclusionary provisions regarding "wear and tear, marring, deterioration"; "faulty, inadequate or defective design"; "neglect"; "existing damage"; or "weather conditions."[59] The carrier asserted that the efficient proximate cause doctrine should be applied citing to the now quashed Second District Court of Appeal *Sebo* opinion while the insured argued

[56] *Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014).
[57] *See Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 429 (5th Cir.1980); *Royale Green Condo. Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 07-21404-CIV-COOKE, 2009 WL 799429, at *2 (S.D. Fla. Mar. 24, 2009).
[58] *Jones* at 938.
[59] *Id.*

that the concurrent causation doctrine should apply.[60] During the charge conference, the insured argued that a jury instruction requiring them to prove that hail was the "most substantial or responsible cause" of damage was improper but the trial judge reasoned that "the correct rule to follow is that where there are multiple, possible causes, it is the efficient proximate cause, the one that is most likely the actual cause... of the damage... that controls."[61] Based on this jury instruction, a verdict was entered in favor of the carrier with the jury finding that the insureds could not satisfy their burden of proof.[62]

On appeal, the *Jones* court performed a multi-peril analysis under the concurrent causation doctrine in line with *Sebo*. In applying the analysis set forth in *Sebo*, the appellate court determined as follows:

> [W]e conclude that the trial court erred with respect to the jury instruction, which applied the efficient proximate cause doctrine without the jury first determining whether an efficient proximate cause could be determined. The jury instruction was crafted in such a way that the jury never decided whether there was an efficient cause. Proper jury instructions would have required the jury to first determine whether one efficient proximate cause could be identified and, if the answer was negative, a follow-up instruction would have applied the concurrent cause doctrine. Applying this causal doctrine, the jury would then decide if at least one of the concurrent causes was covered (i.e., not excluded from coverage) under the insurance policy.[63]

This ruling laid the groundwork for additional, more inclusive, jury instructions in Florida's first property damage claims moving forward.

Additionally, seemingly in an attempt to set incontrovertible precedent,[64] the Fourth District Court of Appeal took the analysis one step further and discussed, in depth, the burdens of

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 938-9.
[63] *Id.* at 939.
[64] *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("[I]n the absence of interdistrict conflict, district court [of appeal] decisions bind all Florida trial courts.).

proof that should be considered when dealing with multi-peril losses such as those in *Sebo*. In performing such an examination, the *Jones* court held that "[i]t was not Homeowners' responsibility, in the context of an all-risk insurance contract, to prove by a preponderance of the evidence that a non-excluded peril was 'the most substantial or responsible cause of the damage to the roof.'"[65] Instead, the burden of proof was deconstructed and outlined as follows:

1. The insured has the initial burden of proof to establish that the damage at issue occurred during a period in which the damaged property had insurance coverage. If the insured fails to meet this burden, judgment shall be entered in favor of the insurer.[66]

2. If the insured's initial burden is met, the burden of proof shifts to the insurer to establish that (a) there was a sole cause of the loss, or (b) in cases where there was more than one cause, there was an "efficient proximate cause" of the loss.

3. If the insurer meets the burden of proof under either 2.(a) or 2.(b), it must then establish that this sole or efficient proximate cause was excluded from coverage by the terms of the insurance policy. If the insurer does so, then judgment shall be entered in its favor. If the insurer establishes that there was a sole or efficient proximate cause, but fails to prove that this cause was excluded by the all-risk insurance policy, then judgment shall be entered in favor of the insured.

4. If the insurer fails to establish either a sole or efficient proximate cause, and there are no applicable anti-concurrent cause provisions, then the concurrent cause doctrine must be utilized. Applying the concurrent cause doctrine, the insurer has the initial burden of production to present evidence that an excluded risk was a contributing cause of the damage. If it fails to satisfy this burden of production, judgment shall be entered in favor of the insured.

5. If the insurer does produce evidence that an excluded risk was a concurrent cause of the loss, then the burden of production shifts to the insured to present evidence that an allegedly covered risk was a concurrent cause of the loss at issue. If the insured fails to satisfy this burden of production, judgment shall be entered in favor of the insurer.

6. If the insured produces evidence of a covered concurrent cause, the insurer bears the burden of proof to establish that the insured's purported concurrent cause was either (a) not a concurrent cause (i.e., it had no (or a de minimis) causal role in the loss), or (b) excluded from coverage by the insurance policy.

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[65] *Id.* at 941.

[66] If the policy is a "named perils" policy, this portion of the burden of proof would change slightly in line with the appropriate precedent. *See* FN 57.

> If the insurer fails to satisfy this burden of proof, judgment shall be entered in favor of the insured.[67]

Accordingly, not only did the *Jones* court provide an in-depth analysis of the ramifications of *Sebo* as it relates to jury instructions, so too did the court provide a blueprint for the burden of proof in all similar cases moving forward.

b. *Security First Insurance Company v. Czelusniak*

In Czelusniak", the Third District Court of Appeal discussed the application of the doctrine of anti-concurrent causation as it relates to exclusionary provisions in insurance policies. While the appellate decision is somewhat minimal and does not delve into the facts in great detail, a review of the complaint shows that, in 2016, "heavy rains and wind caused roof and water damage" through the roof, windows, and doors.[68] The claim was denied due to the water damage exclusionary endorsement contained within Security First's policy which states, in pertinent part, that "water damage, meaning… water penetration through the roof system or exterior walls or windows" is "excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss."[69] The case went to trial and, ultimately, the court granted directed verdict in favor of the insured stating that, because the policy did not specifically exclude damage caused by water coming in through doors, coverage for such damages should be afforded.[70] The court "reasoned that although water entering through the door is not expressly excluded, the jury would be unable to separate the water that came in through the door (non-excluded cause) from water that came in through the walls and windows (excluded causes)."[71]

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[67] *Id.* at 941-2.
[68] *Czelusniak v. Sec. First Inc. Co.*, Case No. 2016-032003-CA-01 (Fla. 11th Jud. Cir.) [D.E. 2, ¶ 8].
[69] *Czelusniak,* 305 So. 3d at 719.
[70] *Czelusniak*, Case No. 2016-032003-CA-01 (Fla. 11th Cir. Ct. 2016) [D.E. 228, pg. 150-2].
[71] *Czelusniak,* 305 So. 3d at 718.

On appeal, the Third District Court of Appeal noted that the water damage exclusionary endorsement contained ACC language, that is, language which excluded the loss "regardless of any other cause or event contributing concurrently or in any sequence to the loss." Accordingly, the appellate court held as follows:

> While there is no provision in the policy expressly excluding damage from water penetrating through the doors of the dwelling, the policy expressly excluded damage from water penetrating through the "roof system or exterior walls or windows . . . ." Because evidence of water entering through the exterior walls and windows was undisputed and is expressly excluded by the policy, the entire loss is excluded from coverage due to the anti-concurrent cause provision regardless of any other cause or event contributing concurrently or in any sequence to the loss. Accordingly, the anti-concurrent cause provision, coupled with the undisputed evidence that the loss was caused by a combination of both excluded and covered perils, foreclosed the analysis of whether the jury could legally or factually separate the damage caused by water coming through the door from water coming through the walls and windows."[72]

At first glance, it appears as though the Third District Court of Appeal wholly overextended the ACC doctrine as it relates to different damages which occur during a claim. While this may be somewhat true, this was in no small part due to the arguments proffered by the insured's counsel guiding the lower court's reasons for granting directed verdict.[73] Based on a deeper review of the trial court docket and the appellate briefs,[74] it appears as though the biggest issue in the *Czelusniak* opinion is the inability for all involved to separate what it means to be a cause of loss versus an element of damage.

In Security First's initial brief, they cite to testimony of the insured's engineer who opined that wind caused an opening in the window allowing water to enter the property.[75] Conversely,

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[72] *Id*. at 719.
[73] *Czelusniak*, (Fla. 11th Cir. Ct. 2016) [D.E. 228, pg. 131-152].
[74] It must be noted that the appeal concerns many more issues which were wholly unaddressed by the 3d DCA including compliance with post-loss conditions and other policy defenses. Essentially, the 3d DCA found the one argument it wanted to address and ignored everything else.
[75] *Czelusniak*, (Fla. 11th Cir. Ct. 2016) [D.E. 224, pg. 88].

they assert that their own engineer testified that water intruded through the windows and doors as a result of improper installation.[76] Yet, for some reason, despite wholly differing opinions proffered through the competent testimony of competing experts, the lower court entered an order of directed verdict in favor of the insured.[77]

Furthermore, it is wholly problematic as the water damage exclusionary endorsement is grossly underquoted in the *Czelusniak* opinion. In the Third District Court of Appeal's opinion, the water damage exclusion is cited as follows:

> 1. We do not insure for loss causes 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:
>
> * * *
>
> c. Water Damage, meaning:
>
> * * *
>
> (6) Water penetration through the roof system or exterior walls or windows….[78]

However, the full relevant text of the water damage exclusionary endorsement states as follows:

> 1. We do not insure for loss causes 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:
>
> * * *
>
> c. Water Damage, meaning:
>
> * * *
>
> (6) Water penetration through the roof system or exterior walls or windows, whether or not driven by wind, unless the water penetration is a direct result of damage caused by a Peril Insured Against other than water, and not otherwise excluded in this policy.[79]

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[76] *Id.* at [D.E. 227, pg. 57-63].

[77] A directed verdict is a substantive ruling finding that "no verdict of any kind is necessary when the judge determines that there is no issue for a jury to try." *Meus v. Eagle Family Disc. Stores, Inc.*, 499 So. 2d 840, 841 (Fla. 3d DCA 1986). Specifically, the "directed verdict is a ruling that a reasonable-minded jury could not differ as to the existence of a material fact, that therefore no factual determination is required, and that judgment must be entered for the movant as a matter of law." *Id.* "A trial court should grant a motion for directed verdict when the evidence, viewed in the light most favorable to the non-moving party, shows that a jury could not reasonably differ about the existence of a material fact and the movant is entitled to judgment as a matter of law." *Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009); *see also Christensen v. Bowen*, 140 So. 3d 498, 501 (Fla. 2014). A motion for directed verdict should be granted when there is no competent evidence to support any other verdict. *See De Mendoza v. Bd. Of Cnty. Comm'rs*, 221 So. 2d 797, 798 (Fla. 3d DCA 1969).

[78] *Czelusniak,* 305 So. 3d at 719.

[79] *Czelusniak*, (Fla. 11th Cir. Ct. 2016) [D.E. 15, policy no. SFIH7121180-07-0000, form SFIV HO3 WD 09 12].

As can only be discerned in reviewing the full text of the applicable provision, this is not an absolute exclusion; instead, it serves as pseudo-exclusionary limitation for ensuing water damage that is typically otherwise covered in a policy when it occurs as a result of things such as wear and tear, deterioration, faulty workmanship, etc. The language in the endorsement provides that, if a covered peril causes damage to the property, any water which penetrates through the roof, windows, or walls would still be covered. In this case, the insured's engineer testified that wind caused damage to the window which allowed water to enter.[80] Based on this testimony, there would be coverage for the ensuing water damages regardless of the language in the endorsement. Of course, the insurer's expert proffered a different opinion[81] and, as such, there remained facts at issue for the jury to consider. This leads me to the conclusion that directed verdict was probably not appropriate in the first place.[82]

With all of this said, the analysis set forth by the Third District Court of Appeal seems misguided with regards to its application of the anti-concurrent causation language in the policy in asserting that the location through which water entered was determined to be the cause of loss. With this reasoning serving as the basis of the anti-concurrent causation analysis, it is no wonder that the result would be equally as confounding. Applying the concurrent causation doctrine is not necessitated unless there is more than one cause of loss.[83] If there is a single, undisputable cause of loss, there can be no concurrent cause and, therefore, no need for any kind of concurrent causation analysis; however, when there is a question as to multiple causes of loss, one must first attempt to determine the efficient proximate cause.[84] As noted in *Sebo*, "[t]he [efficient proximate

[80] *See* FN 75, *supra*.
[81] *See* FN 76, *supra*.
[82] *See* FN 77, *supra*.
[83] *Paulucci, 190 F. Supp. 2d at 1318.*
[84] *Sebo*, 208 So. 3d at 700 (Fla. 2016) *quoting Wallach*, 527 So. 2d at 1388.

cause doctrine] provides that where there is a concurrence of different perils, the efficient cause - the one that set the other in motion - is the cause to which the loss is attributable."[85] "When independent perils converge and no single cause can be considered the sole or proximate cause, it is appropriate to apply the concurring cause doctrine."[86] Only in this event can anti-concurrent causation language then be addressed. In the event no efficient proximate cause can be determined and there is no anti-concurrent causation language prefacing an exclusion for any of the causes of loss, the loss is covered.[87] Conversely, if there is anti-concurrent causation language with regards to an excluded cause of loss, coverage should be denied.[88]

In *Czelusniak*, the Third District Court of Appeal performed no such multi-peril analysis. Instead, they, in following the trial court's reasoning, treated water intrusion through the doors as a separate and concurrent cause of loss to water intrusion through the roof, walls, or windows. These are clearly not different causes of loss as much as they are different instances of ensuing loss. A more thorough analysis would have considered whether the loss was caused by wind as asserted by the insured or improper installation as asserted by the carrier. Then the question would be whether the ensuing damages were otherwise excluded under the policy. In the case of *Czelusniak*, if the insurer was correct in that the water penetration was caused by improper installation, the water which entered through the roof, walls, or windows would be excluded as "the water penetration [was not] a direct result of damage caused by a Peril Insured Against.

With that said, the water damage through the door is not limited or excluded by the water damage exclusionary endorsement and, as such, any damage stemming from such water should be

[85] *Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d at 697 (Fla. 2016) citing *Fire Ass'n of Phila. v. Evansville Brewing Ass'n*, 75 So. 196 (1917).
[86] *Id*.
[87] *Jones,* 235 So. 3d at 941.
[88] *Id*.

covered. The fact that the trial court reasoned that "the jury would be unable to separate the water that came in through the door (non-excluded cause) from water that came in through the walls and windows (excluded causes)"[89] has nothing to do with the cause of loss; it only pertains to the damages sustained. It seems as though the case should have been given to the jury with an instruction in line with the holding in *Jones* advising that, if the jurors found that the damage was the result of improper installation, the jurors should only consider damages sustained solely as a result of water coming through the door. Conversely, if the jurors were unable to separate the damages, the insured will have failed to rebut the carrier's established defenses thereby warranting a finding of no coverage. Interestingly, despite the issues outlined herein, the Supreme Court of Florida declined to accept jurisdiction on the insured's request to elevate the appeal.[90]

CONCLUSION

While there was precedent regarding the multi-peril analyses of efficient proximate cause and concurrent causation before *Sebo*, no Florida state court had ever analyzed the two doctrines side by side let alone determined that there is a place for both evaluations in any case involving a question of multiple perils converging to cause a loss. To that point, the *Sebo* opinion was not as much a groundbreaking opinion as a consolidation of theories to be utilized moving forward; however, the *Jones* court's expansion of the burdens of proof to include consideration for both efficient proximate cause and concurrent causation doctrine may be seen as a more profound contribution to legal precedent as it provides a specific blueprint for jury instructions. Of course, such an opinion never would have come to light without *Sebo* serving as its foundation. For that reason, *Sebo* will remain one of the most significant opinions to have been released in the recent history of first party property litigation.

[89] *Czelusniak*, 305 So. 3d at 718.
[90] *Czelusniak v. Sec. First Ins. Co.*, SC20-1092, 2020 WL 6708664 (Fla. Nov. 16, 2020).