IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 10-13012-G

BRENDA and ALVIN McQUEEN,

Appellants,

vs.

AUTO-OWNERS INSURANCE COMPANY,

Appellee.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division
Civil Action Number: 2:07-cv-1041-MHT-CSC

BRIEF OF APPELLANTS

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McQueen v. Auto-Owners Insurance Company
No. 10-13012-G

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule Appellate Procedure 26. 1 and Eleventh Circuit Rule 26.1-1, Appellants list the following interested persons:

Auto-Owners Insurance Company

David Alexander Bright

Copeland, Franco, Screws & Gill, P.A.

Lee H. Copeland

Crumpton & Associates

Robert B. Crumpton, Jr.

H. Neal Farmer

Herman B. Franco

Mark A. Franco

C. Nelson Gill

Richard H. Gill

James G. Hawthorne, Jr.

John A. Henig, Jr.

Shannon L. Holliday

Daniel Ramond Klasing

Klasing & Williamson, P.C.

L. Thomas Development, LLC

Thomas M. Little

J. David Martin

Alvin McQueen

Brenda McQueen

Jo Karen Parr

Alan E. Rothfeder

Euel A. Screws, Jr.

Robert D. Segall

Smith, Spires & Peddy, P.C.

Lowell Thomas

The Honorable Myron H. Thompson

George W. Walker, III

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. The District Court's opinion erred in re-writing the arbitration award, to hold that an exclusion in the insurance policy relieved Appellee of its obligation to indemnify Thomas. Appellants believe that oral argument would be beneficial to the Court in understanding the issues regarding the insurance coverage in relation to the underlying arbitration award.

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STATEMENT REGARDING JURISDICTION

The District Court entered a final opinion and judgment after briefing by the parties, which constituted a final judgment as to all claims and all parties. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred when it determined that Appellants Brenda and Alvin McQueen's ("the McQueens") arbitration award against L. Thomas Development and Lowell Thomas, individually, for negligence resulting in personal injury to the McQueens was excluded under Appellee Auto Owners' commercial liability policy?

2. Whether the District Court improperly altered the holding of the arbitrator to support its judgment?

3. Whether the District Court even had proper jurisdiction to decide this case, when Auto Owners had previously intervened in the state court case seeking a same determination of coverage?

STATEMENT OF THE CASE

A. Nature of the Case

Appellants Brenda and Alvin McQueen ("the McQueens") are married individuals residing in Montgomery County, Alabama. The McQueens obtained an arbitration award against L. Thomas Development and Lowell Thomas, individually (jointly "Thomas"), in the amount of $600,000.00 for resulting damages to them caused by the negligence of Thomas. [Doc. 54-1].

The present case is a declaratory judgment action filed by Appellee Auto Owners Insurance ("Auto Owners") against Thomas and the McQueens. [Doc. 1]. L. Thomas Development purchased a commercial general liability insurance policy with Auto Owners.[1] [Id.]. Auto Owners filed this federal case seeking declaratory relief in November, 2007, nearly three years after the McQueens had filed suit against Thomas in Alabama State Court, and after Auto Owners had previously intervened in the state court case. In the federal Complaint, Auto Owners asked the District Court to declare that it was not required to defend or indemnify Thomas because its insurance policy did not cover fraud, breach of contract, conspiracy, breach of warranty or suppression. [Id.]. The arbitrator found Thomas liable to the McQueens for damages caused by Thomas' negligence, yet Auto Owners then asserted that its policy did not cover the arbitration award, either.

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[1] Although the Policy was for L. Thomas Development, the Policy also covered Lowell Thomas individually as an insured person.

B. Course of Proceedings and Disposition

The McQueens filed suit against Thomas, and other parties, in Alabama Circuit Court in February, 2005. [Doc. 61, p. 1]. At all times, Thomas was represented by counsel provided by Auto Owners. [Doc. 1, p. 8]. In the initial complaint, the McQueens asserted multiple claims against the differing defendants for their several wrongs. [Doc. 1].[2]

Auto Owners moved to intervene in the state court case in July, 2005, and the circuit court granted the motion. [Doc. 6, p. 2]. In the motion to intervene, which mirrors the federal complaint, Auto Owners stated that it was seeking to determine whether coverage was appropriate for some or all of the McQueen claims. [App. Tab 1]. Thomas and the other defendants immediately moved to compel arbitration, which ultimately resulted in a 2007 ruling by the Alabama Supreme Court compelling arbitration. [Doc. 62]. In the interim between the filing of the initial complaint and the Alabama Supreme Court's arbitration ruling, Thomas refused to respond to discovery requests from plaintiffs. [Docs. 27, 62]. After finally receiving discovery from Thomas, the McQueens amended their

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[2] Despite the fact that the McQueens had previously amended their state court complaint to include a claim of negligence against Thomas, Auto Owners attached only the original complaint to its declaratory judgment complaint, as if there were no count based on negligence. [Doc. 1, Ex. 1].

complaint in April, 2007 to add a claim of negligence against Thomas. [Id.; Doc. 25-1]. Arbitration was originally set for January, 2008.[3]

On November 27, 2007, however, Auto Owners filed the present declaratory judgment action against Thomas[4] and the McQueens. [Doc. 1, p. 1]. The McQueens and Thomas both filed motions to dismiss the action on jurisdictional and other grounds. [Docs. 6, 7]. The District Court never ruled on the motions to dismiss.

In July, 2008, Auto Owners moved for summary judgment. [Docs. 24, 25]. The McQueens and Thomas both filed responses. [Docs. 27 (McQueens), 28]. The motion for summary judgment was never ruled on by the District Court.

In September, 2008, the McQueens moved to stay the action pending the outcome of mediation in the underlying state court arbitration.[5] [Doc. 30]. The district court granted the motion. [Doc. 31]. In June, 2009, Auto Owners moved to lift the stay. [Doc. 43]. The District Court denied the motion. [Docs. 47, 53].

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[3] The arbitration was continued multiple times from its original setting.

[4] Counsel for Thomas in the declaratory judgment action, Robert Crumpton, was suspended from the practice of law by the Alabama State Bar in 2010, and his whereabouts are unknown. Despite being suspended by the State Bar, Crumpton has not withdrawn from this case and allowed Thomas to hire different counsel. As a result, no counsel has appeared in this appeal to represent the interest of Thomas. The counsel who defended Thomas in the arbitration is employed by Auto Owners, and has a conflict of interest, as he did at the arbitration.

[5] Ultimately, the McQueens reached a mediated settlement with all parties except Thomas and Quality Assurance Testing Laboratories.

In October, 2009, an arbitration trial was held in the underlying case between the McQueens and Thomas. After a three day hearing, the arbitrator found for the McQueens, and issued an award in favor of the McQueens and against Thomas (both L. Thomas Development and Lowell Thomas, jointly and severally) in the amount of $600,000.00. [Doc. 54-1]. The arbitration award was not appealed to an Alabama appellate court, and, to date, no part of the award has been paid.

According to the District Court's instructions, the McQueens filed the arbitration award in the present case. [Doc. 54]. Subsequently, the McQueens moved for leave to file for summary judgment. [Doc. 57]. The District Court denied the request and instead ordered that the parties file opposing briefs on the coverage questions. [Doc. 60].

On January 15, 2010, Auto Owners filed its brief in accordance with the District Court's order. [Doc. 61]. The McQueens and Thomas filed responses on January 29, 2010. [Docs. 62, 63]. Auto Owners was allowed to file a reply on February 1, 2010. [Doc. 64].

The District Court issued an Opinion and Final Judgment on June 9, 2010, finding that Auto Owners did not have to indemnify Thomas for all or any part of the underlying arbitration award. [Docs. 65, 66]. This appeal followed.

C. Statement of the Facts

1. The Underlying Arbitration.

Brenda and Alvin McQueen hired L. Thomas Development to construct their home in rural east Montgomery in 2004. [Doc. 54-1, p. 2]. L. Thomas Development is a corporation composed of one member, Lowell Thomas, and has no employees. [Doc. 27-1; Doc. 62, p. 14]. Thomas subcontracted all of the work in building the McQueens' home. [Id.]. Utilizing his chosen subcontractors, Thomas constructed the home, which still stands today, and the McQueens paid Thomas $440,000.00 at a closing in June, 2004. [Doc. 54-1, p. 2].

After moving into the home, the McQueens experienced extensive trouble with the home, which caused damages, fear and mental anguish to the McQueens. [Doc. 54-1, pp. 3, 7]. The root cause of the trouble with the home was ultimately determined to be that the type of foundation built was unsuitable for the location in which the home was built. [Doc. 54-1, p. 6 ("this Arbitrator finds that Thomas negligently used fill material that was not acceptable material for use in a foundation for a home being constructed where the Plaintiffs' home was constructed") (emphasis added)]. Thus, "fluctuations in moisture" underneath the home caused the foundation to move, thereby resulting in damage and injury to the McQueens. [Doc. 54-1, p. 7].

The arbitrator specifically held that Thomas had negligently chosen the materials for the foundation, and that the foundation, "when exposed to fluctuations in moisture has caused extensive resulting damage to the Plaintiffs (the McQueens)." [Doc. 54-1, p. 7]. On this basis, and this basis alone, the arbitrator awarded damages to the McQueens in the amount of $600,000.00. The arbitrator found in favor of Thomas on all of the McQueens other legal theories (breach of contract, fraud, etc.). [Doc. 54-1, p. 6, n.1].

2. The Declaratory Judgment Action

Auto Owners sold and issued a Commercial General Liability Insurance Policy ("the Policy") to L. Thomas Development. [Doc. 1-2].

Auto Owners filed this declaratory judgment action in November, 2007, nearly three years after the state court lawsuit had been filed, and after it had intervened in that state court proceeding to which it remained a party throughout. In its Complaint, Auto Owners asserted *only* that the McQueens claims of *fraud, breach of contract, conspiracy, breach of warranty and suppression* were not covered by its insurance policy. [Doc. 1]. Auto Owner's made no mention of the lack of coverage for negligence in its Complaint, and never amended the Complaint. [Id.]. Auto Owners cited to various portions of its policy and generally asserted that the above referenced claims did not constitute occurrences within its policy. [Doc. 1, pp. 3-8].

In July, 2008, Auto Owners moved for summary judgment. [Doc. 25]. On this occasion, Auto Owners, citing only the same policy provisions as before, now first mentioned all of the McQueens claims against Thomas and the other defendants, including negligence. However, Auto Owners made no assertion that negligence was not covered by its policy; it simply asserted that the McQueens' negligence claims, in its view, were actually claims for breach of contract. [Doc. 25, p. 13]. Auto Owners equated the McQueens' claims against Thomas as a "business dispute," and concluded that its policy did not cover such. [Id.]. Specifically, Auto Owners argued that general liability policies (*i.e.* the Policy), "customarily cover only property damage and bodily injury." [Doc. 25, p. 11 (emphasis added)]. Auto Owners also pointed out that a liability policy: "has, as its genesis, the purpose of protecting an individual or entity from liability for essentially accidental injury to another individual, or property damage to another's possessions." [Doc. 25, p. 17 (citing to Auto Owners Ins. v. Toole, 947 F.Supp. 1557, 1561 (M.D. Ala. 1996))].

After the arbitrator entered his award, finding negligence on the part of Thomas resulting in damages to the McQueens, Auto Owners then re-asserted its arguments, and added several more. [Doc. 61]. In its final submission to the District Court, Auto Owners, citing the same Policy portions as twice before, now argued that the arbitrator's negligence award was not for an "occurrence" under the

Policy, or, in the alternative, was excluded under the Policy's work product exclusion. [Id.]. No such claim *was ever* contained within its Complaint.[6] The McQueens and Thomas responded by showing that the negligence award for damage to the McQueens was covered by the Policy, and not excluded. [Docs. 62, 63]. However, the District Court ruled in favor of Auto Owners, finding that the work product exclusion applied. [Doc. 65].

D. Standard of Review

In Alabama, the interpretation of a contract, including an insurance contract, is a question of law reviewed de novo. Royal Ins. Co. of Am. v. Whitaker Contracting Corp., 242 F.3d 1035, 1040 (11th Cir. 2001). The District Court made no findings of fact, and therefore is not entitled to deference on any of its legal conclusions. Cotton v. Massachusetts Mut. Life Ins. Co., 402 F.3d 1267, 1277 (11th Cir. 2005). A pure question of law is reviewed de novo. Craven v. U.S., 215 F.3d 1201, 1204 (11th Cir. 2000) (citing In re Lewis, 137 F.3d 1280, 1282 (11th Cir.1998))

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[6] The McQueens and Thomas were defending a complaint for declaratory relief that they, without question, were entitled to win upon the award of the arbitrator (the Complaint seeks no determination that negligence causing bodily injury is not covered by the Policy, and it was not amended). That is why the McQueens moved for leave to file summary judgment (Doc. 57), which request was denied. Auto Owners changed its theory in the final filings of the case, and the District Court allowed it to prevail despite the procedural incorrectness and general unfairness.

Under Alabama law, the burden of proving applicability of an insurance policy exclusion rests on the insurer. See Acceptance Ins. Co. v. Brown, 832 So.2d 1, 12 (Ala. 2001). Exceptions to coverage are interpreted as narrowly as possible to maximize coverage, and are construed strongly against the insurer. See Porterfield v. Audubon Indem. Co., 856 So.2d 789, 806 (Ala. 2002); Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co., 480 F.3d 1254, 1263 (11th Cir. 2007) (noting that, under Alabama law, coverage exceptions are interpreted narrowly, and "clauses setting out exceptions must be construed most strongly against the company that issued the policy"). "If a given exclusion is ambiguous, it will be construed so as to limit the exclusion to the narrowest application reasonable under the wording." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Roberts Bros., Inc., 550 F.Supp.2d 1295, 1304 (S.D.Ala. 2008) (citation omitted).

SUMMARY OF THE ARGUMENT

The District Court held that the: "work product exclusion" in Auto Owners' Policy to Thomas relieved Auto Owners from having to indemnify Thomas for the $600,000.00 award by the arbitrator to the McQueens on account of the negligence of Thomas, which caused mental anguish and damage to the McQueens. The purchase price for the entire house was *$440,000.00*. Consequently, the District Court's finding that the arbitrator awarded damages for the "work product" of Thomas is facially unsupportable.

The arbitrator's holding and award is as follows:

> The evidence introduced at the arbitration clearly establishes that Thomas and L. Thomas Development, Inc. negligently used fat clay as fill in the foundation, and that such fill when exposed to fluctuations in moisture has caused extensive resulting damage *to the Plaintiffs*. Accordingly, and for the foregoing reasons, this Arbitrator finds that judgment is due to be entered in favor of the Plaintiffs and against Mr. Thomas, individually, and L. Thomas Development, Inc., in the amount of $600,000.00, jointly and severally. [Doc. #54-1, Arbitration Award, page 7 (emphasis added)].

This was a lawsuit in which Plaintiffs (the McQueens) alleged a tort (negligence) against Thomas, and sought damages for the injury caused to them. The arbitrator determined, and held, Thomas to be liable to the McQueens for negligence. The arbitrator expressly found that the negligence of Thomas caused the McQueens to be in the zone of danger and to suffer mental anguish injury and damages. In no shape or form does this award relate to the "work product"

exclusion in the liability insurance Policy. The district court erred by re-writing the arbitrator's award to fit its holding.

Negligence causing resulting bodily injury and damage is clearly covered by the Policy, and, in fact, the purpose of the Policy. An arbitration award finding such is unquestionably not excluded by the Policy's work product exclusion.

In addition to the fact that the District Court's opinion is plainly wrong, the District Court should have never even considered this declaratory complaint because Auto Owners had intervened in the state court proceeding seeking to determine the scope of its coverage. Because Auto Owners intervened in the state court case, and did nothing other than observe the proceedings, it should be estopped from asserting that the arbitrator's award is excluded from the Policy.

The district court's holding is erroneous and this Court should reverse the judgment and enter judgment in favor of the Defendants (the McQueens and Thomas).

ARGUMENT

Brenda and Alvin McQueen filed suit against Lowell Thomas, L. Thomas Development and other defendants in February, 2005. As a result of delay in the Alabama Supreme Court, the actions of the defendants, this lawsuit, and other matters outside the control of the McQueens, the case did not come to arbitration until October, 2009. This was an arbitration requested - demanded - by Thomas and Auto Owners.[7] The arbitrator heard three long days of testimony, received evidence, and rendered his Opinion and Award in favor of the McQueens. The arbitrator specifically found Thomas to have been negligent, and he awarded $600,000.00 to the McQueens for damages caused to them on account of Thomas' negligence. [Doc. 54-1]. Now, after finally receiving a favorable ruling from the arbitrator, the McQueens have once again been deprived any relief on account of the District Court's erroneous ruling that Thomas' liability insurer, Auto Owners, does not have to indemnify Thomas for the award on account of an *exclusion* in the insurance Policy.

The District Court apparently, and by necessary implications, acknowledged that the negligence award against Thomas triggered coverage under the Policy; however, it then ruled that the following exclusion applied:

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[7] Their position to compel arbitration was ultimately upheld by the Alabama Supreme Court, reversing the decision of the Circuit Court and forcing the arbitration resolution which they now attack.

> 1. "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operation hazard".
>
> This exclusion does not apply if the damage work or the work out of which the damage arises was performed on your behalf by a subcontractor.
>
> [Doc. 61, p. 13; Doc. 65, p. 13 (District Court Opinion)].

Thus, the District Court's opinion holds that the arbitrator's award is excluded from payment under the Policy because it was for property damage to Thomas' work, *i.e.* the house, and not related to injury and damage to the McQueens. Without even addressing the legal issues, it is apparent that this holding is facially untenable for the following reasons:

- The arbitrator specifically held that Thomas' negligence caused resulting damage to the *McQueens*, and he awarded $600,000.00 in damages to the McQueens for the injury and mental anguish to them. The award made no mention of any award to repair the house. In other words, the arbitrator found that Thomas had committed a negligent act, which caused injury and damage to the McQueens – no different from a situation where Thomas negligently dropped a cigarette and burned down the house, causing injury and damage to the McQueens.

- The entire purchase price of the home, and land, was $440,000.00, therefore a damage award of $600,000.00 cannot conceivably be related to the work product exclusion.

- The arbitrator specifically found that the McQueens had suffered mental anguish (*i.e.* bodily injury) and were in the zone of danger due to the negligence of Thomas. Certainly, the McQueens' mental anguish and suffering cannot be the work product of Thomas.

- It is undisputed that Thomas subcontracted all of his work; therefore, the Policy exclusion, by its plain language, cannot apply.

The reality is that Auto Owners did not even argue that a finding of negligence, with an award for bodily injury and damage, was not covered by its Policy. Rather it essentially conceded that such an award was the purpose of the Policy. Instead, Auto Owners continuously took the position that the arbitrator's award was not *really* for negligence. [*e.g.* Doc. 61, p. 21 ("While the Arbitrator described the conduct as negligence . . . .")].[8] Auto Owners argued that this case involved nothing more than a business dispute. [Doc. 62, p. 6 (the McQueens pointing out that Auto Owner's requested relief *required* the District Court to re-write the arbitration award.). Unfortunately, the District Court followed Auto Owners down this inappropriate path. What the District Court did was to review

[8] The arbitrator's award is not subject to review through a faux appeal to the federal court as happened here. The District Court had no jurisdiction to review, disagree with or construe the arbitrator's award, which had been made in a proceeding to which Auto Owners was a party, having deliberately elected to make itself such.

and re-write the arbitrator's award to fit its Opinion, and to fit the Policy exclusion. Accordingly, the District Court's judgment is erroneous.

I. The work-product exclusion does not apply to the arbitration award.

In its Opinion, the District Court made little mention of the legal standard regarding insurance policy exclusions, and basically adopted the argument of Auto Owners. However, Alabama law does require a standard for reviewing policy exclusions. Under Alabama law, the burden of proving applicability of a policy exclusion rests with the insurer. See Acceptance Ins. Co. v. Brown, 832 So.2d 1, 12 (Ala. 2001). Exceptions to coverage are interpreted as narrowly as possible so to maximize coverage, and are construed strongly against the insurer. See Porterfield v. Audubon Indem. Co., 856 So.2d 789, 806 (Ala.2002); Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co., 480 F.3d 1254, 1263 (11th Cir.2007) (noting that, under Alabama law, coverage exceptions are interpreted narrowly and "clauses setting out exceptions must be construed most strongly against the company that issued the policy"). "If a given exclusion is ambiguous, it will be construed so as to limit the exclusion to the narrowest application reasonable under the wording." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Roberts Bros., Inc., 550 F.Supp.2d 1295, 1304 (S.D.Ala.2008) (citation omitted). The District Court did not follow any of these caveats, and, in fact, ignored every part of the arbitration award, and the Policy exclusion, that would render the work-product exclusion inapplicable.

A. A plain reading of the arbitration award shows that the award was for damage and injury to the McQueens on account of the negligence of Thomas, and not for damages to the work product of Thomas.

First, as oft-repeated herein, how can a $600,000.00 award for "damage to the McQueens" be related only to Thomas' work product which consisted of a house and land worth $440,000.00? If the house had fallen in and nothing remained except a pile of rubble, the work product damages could not exceed the purchase price. The arbitration award necessarily was for damages separate and distinct from the cost of repairs to the house. Certainly, problems with the home were mentioned in the arbitrator's opinion, but the evidence at the arbitration was not that Thomas built poor walls, or poor bathtubs, or septic systems (which needed repairs),[9] but that Thomas made a negligent decision that resulted in damage and injury to the McQueens:

> The evidence introduced at the arbitration clearly establishes that Thomas and L. Thomas Development, Inc. negligently used fat clay as fill in the foundation, and that such fill when exposed to fluctuations in moisture has caused extensive resulting damage to the Plaintiffs. Accordingly, and for the foregoing reasons, this Arbitrator finds that judgment is due to be entered in favor of the Plaintiffs and against Mr. Thomas, individually, and L. Thomas Development, Inc., in the amount of $600,000.00, jointly and severally. [Doc. #54, Arbitration Award, page 7 (emphasis added)].

[9] Thomas, in fact, built none of these things, as he hired subcontractors for all of the work. [Doc. 62, p. 13; Doc. 27-1].

The arbitrator's decision addressed the injury to and suffering of the McQueens, the fear and anguish which the McQueens had experienced, and the fact that the McQueens lives had essentially been ruined by the negligence of Thomas. Did the fact that sludge was pouring out of McQueens' bathtub, or that the McQueens thought that the house was worthless, or that one expert said that the foundation could never be fixed, weigh into the arbitrator's damage award? Perhaps, but the District Court had no jurisdiction to make some arbitrary determination that the award related only to Thomas' work product, essentially acting as an appellate court. Plainly, the Arbitrator awarded damages for damages to the McQueens, not to the work product of Thomas.

Furthermore, the arbitration award specifically found mental anguish, and that the McQueens were in the "zone of danger," thus satisfying the requirements for an award for mental anguish under Alabama law. Auto Owners conceded that mental anguish was considered to be "bodily injury" under its Policy, and under Alabama law. [Doc. 61, p. 19 ("Auto Owners recognizes that mental anguish is considered 'bodily injury' under Alabama law")]; American States Ins. Co. v. Cooper, 518 So.2d 708, 710 (Ala. 1987). How can bodily injury be the "work product" of Thomas? It, of course, cannot. In its summary judgment motion (notably absent from its final arguments), Auto Owners acknowledged, in an attempt to argue that fraud and breach of contract were not covered by its Policy,

that general liability policies (*i.e.* the Policy), "customarily cover only property damage and bodily injury." [Doc. 25, p. 11]. Could this arbitration award be for anything else? On what basis was the District Court here within its jurisdiction to review that award, or to second guess it?

Thomas is a general contractor. He builds houses, and nothing else. The Policy is a commercial general liability policy which requires Auto Owners to "pay those sums that the insured [Thomas] becomes legally obligated to pay as damages because of "bodily injury" or "property damage." Thomas has no business being on anyone's property, unless he was building their house. Therefore, he can only negligently cause property damage to whatever he is building, or bodily injury to the persons on the property. If this Policy is read to exclude this arbitration award, then the coverage is illusory, and Thomas was not insured for anything.

In its Opinion, the district court primarily supported its holding with the cases of Berry v. South Carolina Ins. Co., 495 So.2d 511 (Ala. 1985), United States Fidelity & Guaranty Company v. Bonitz Insulation Company of Alabama, 424 So.2d 569 (Ala.1982) and Auto Owners Ins. v. Toole, 947 F.Supp. 1557 (M.D. Ala. 1996). Berry, a case involving only contract claims, has no application to the present negligence award. Likewise, Toole involved only claims of fraud and breach of contract. The District Court in Toole (Thompson, J.) specifically pointed out that a commercial liability policy, "has, as its genesis, the purpose of protecting

an individual or entity from liability for essentially accidental injury to another individual, or property damage to another's possessions . . . ." Toole, 947 F.Supp. at 1564. That is exactly what the arbitrator found in this case.

Bonitz is a case that facially appears to have some relevance to the district court's holding, but, a close analysis shows that it does not support applying the work product exclusion in this case. In Bonitz, the circuit court merely noted that if only damages to repair the roof (the product which was built by Bonitz) were claimed, then the work product exclusion would deny coverage to Bonitz. However, the circuit court held that if Bonitz' negligence caused other damage (to the party suing Bonitz), then the exclusions would not apply. Bonitz involved no assertion (or award) of personal injury damages or bodily injury.

The District Court apparently made light of Appellants example that this case was no different from a situation in which Thomas drove a truck into the home, causing it to fall and injure the McQueens,[10] but one could take the example a step further. What if there was a change in only one fact in this case, from the fact that Thomas' negligence caused suffering and mental anguish to the

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[10] The district court stated that the McQueens did not hire Thomas to drive a truck. Of course, driving the truck would have been an inherent part of building what is asserted to be the work product. The McQueens did not hire Thomas to determine the type of foundation either, and the arbitrator did not award any damages to repair the foundation (the consensus was that it was simply the wrong foundation for the location). The McQueens hired Thomas to build a house, which he without question did.

McQueens, to a situation where Thomas' negligence caused the house to fall in and kill the McQueens? Would anyone reasonably contend that any award recovered by the estate of the McQueens was not covered under the Policy? The arbitrator's award is identical to that situation, except that, fortunately, the McQueens are not dead.

The District Court's "interpretation" of the award simply does not comport with the plain language of the award, nor does that interpretation lie within that Court's province.

B. The District Court improperly re-wrote the arbitration award.

In its Opinion, the District Court acknowledged that the arbitration award was the same as a final judgment in state court, and that the doctrines of res judicata and collateral estoppel apply to the arbitration award. [Doc. 65, p. 10]; Old Republic Ins. Co. v. Lanier, 790 So.2d 922, 928 (Ala. 2000). The district court specifically noted that: "**Auto-Owners is estopped from challenging the arbitrator's finding that the defendants were negligent.**" [Id. (emphasis added)]; See *1 Insurance Claims and Disputes 5th* § 6:22 (March, 2009) ("As a general rule, once a final judgment has been entered on behalf of the party suing the insured, the insurer may not, absent collusion, reopen the factual or legal basis of the judgment when the insured makes a coverage claim.") (emphasis added). Why, then, is Auto Owners not estopped from challenging the arbitrator's finding

of damage to the McQueens, resulting from that negligence? The District Court's holding is that Auto Owners cannot challenge the finding of negligence, but it can challenge the award for damage and bodily injury?

Despite this initial finding, the District Court spent some of its Opinion discussing whether or not the arbitration award constituted intentional conduct, which is completely contradictory. Negligence does not constitute intentional conduct. See Employers Ins. Co. of Ala. v. Rives, 264 Ala. 310, 87 So.2d 653, 658 (Ala. 1955) (negligent conduct requires some act of human volition, but does not preclude the existence of an occurrence under the insurance policy); Morgan v. South Cent. Bell Telephone Co. 466 So.2d 107, 114 (Ala. 1985) (misfeasance subjects one to tort liability). However, after apparently (and necessarily) concluding that the award was not for intentional conduct, the District Court improperly modified the arbitration award to support its conclusion that the work product exclusion applied.

In the "work product" section, *i.e.* the holding, the district court made no mention of the arbitrator's finding of mental anguish or injury to the McQueens.[11] The district court made no mention of the fact that what the arbitrator actually held

[11] Auto Owners essentially conceded that some part of the award was covered under its Policy, and it was seeking to have the district court remit the amount of the award that it was responsible for, which is clearly improper, but it is a recognition of the error that is present here. [Doc. 61, p. 21]. Whether this Court takes Auto Owners' position, or the McQueens', the District Court's opinion is wrong in either instance.

was that Thomas had negligently decided to utilize the wrong type of materials for a foundation for *where* the McQueens lived, and that his negligence had caused "damage to the *[McQueens]*." There is no escaping that the arbitrator's opinion makes its award for damage to the McQueens themselves, and not for damage to Thomas' work product (the house).

Thomas, and Auto Owners, chose the arbitration forum. The McQueens fought arbitration for two years in the Alabama Supreme Court, ultimately losing. Thomas, through its Auto Owners counsel, did not appeal the arbitrator's award, which it could have done under Alabama law (Auto Owners had itself intervened in the case, and no appeal was made). The District Court cannot sit as some sort of appellate court to re-write the arbitration award. The award found Thomas liable for negligence causing damage to the McQueens. That holding is covered under the policy, and the work product exclusion does not apply.

C. The work product exclusion cannot apply because Thomas subcontracted all of the work.

Although the District Court's judgment is wrong based upon its improper interpretation of the arbitration award, it is also wrong upon a plain reading of the Policy. The district court found that the following exclusion applied:

> 1. "Property damage" to "your work" arising out of it or any part of it and including in the "products-completed operation hazard".

> **This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.**

[Doc. 61, p. 13; Doc. 65, p. 13 (District Court Opinion) (emphasis added)].[12]

The McQueens advised the District Court on multiple occasions, including in their final brief, and provided evidence, that Thomas subcontracted all of his work. Thomas is a one-man outfit:

> Q. How many employees do you have?
>
> A. You're looking at him.
>
> Q. So you would use subcontractors in regard to however many homes you were building?
>
> A. I subcontract one hundred percent of my work.

[Doc. 27-1, pp. 2-3; Doc. 62, p. 14].

The only response to this that Auto Owners could muster was to argue that it was not true, or that because the arbitrator found Thomas responsible for the problems, the exclusion still applied. [Doc. 64, p. 5]. Certainly Thomas was negligent and legally responsible; he was the general contractor. However, the work product exclusion cannot apply if he did not personally build the foundation, the walls, or any part of the house. The exclusion states unambiguously that the work product

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[12] The district court appears to have confused several provisions of the Policy, mixing in the "other property" exclusion along with the work product exclusion early in its Opinion (Doc. 65, pp. 5-6); however, there is no question that the district court held that the "work product" exclusion applied. [Doc. 65, p. 13].

exclusion does not apply if: "the work out of which the damage arises was performed on your behalf by a subcontractor."

The District Court quoted part of the Policy exclusion, but left this decisive part out. [Doc. 65, p. 6 (omitting subcontractor portion)]. The District Court's opinion is erroneous.

D. The Jurisdiction of the District Court

On July 13, 2005, the Defendant Auto-Owners filed a "Motion to Intervene" in the state court action, expressly for the "purpose of determining whether there is insurance coverage for Defendant L. Thomas Development, Inc. and Lowell Thomas."[13]

In that motion, the insurer also averred: "It is Auto-Owners position there is no coverage for some or all of the allegations contained in the complaint against the Thomas Defendants." It sought, and was granted, the right to intervene, to participate in discovery, to submit special verdict forms and special interrogatories to the jury, "which requires [sic] the jury to specify which theories of recovery, and

---

[13] The motion is attached as App. Tab 1. Auto-Owners' intervention in the state proceedings was called to the District Court's attention (see, e.g., Doc. 6, ¶ 5), when both the McQueens and the Thomas parties moved to dismiss the federal case. Those motions were never ruled on by the District Court, whose jurisdiction has never been established.

After the arbitration, the McQueens again argued to the District Court that it could not sit in review of the arbitrator's findings and award (Doc. 62), an issue not applied in the District Court opinion.

under which counts, the jury is returning the verdict, and requiring the jury to itemize and specify the types of damages being returned . . . ."

Not only is that pleading a recognition that certain parts of the potential damages, such as bodily injury, would be covered,[14] but, because it elected to litigate the coverage issues in the state court (and ultimately in the state-court-ordered arbitration), it cannot seek review of that award by going to federal court.

One of the attributes of arbitration - which Thomas and Auto-Owners insisted on - is that there is virtually no review.

The arbitration forum chosen by the Defendants acts in lieu of a jury trial, and Auto-Owners, which remained a party throughout, could have - but did not - avail itself of seeking the same special verdict or special interrogatories that it asked for (and obtained the right to) in the state proceeding.

This same sort of thing occurs frequently in the context of Uninsured Motorist claims, where the insurer for the injured plaintiff may intervene to determine if the potential award against the uninsured motorist is covered by the policy. When such intervention occurs, the insurer is then bound by the outcome. See Lowe v. Nationwide Insurance Co., 521 So.2d 1309, 1310 (Ala.1988). The posture here is not different. The carrier intervened, then apparently decided to

[14] The state court motion mirrors Auto Owners' Complaint in this case, wherein it, again, clearly acknowledges that certain damages and claims would be covered, and makes no argument that the current arbitration award would not be covered. [Doc. 1].

hedge its bet, and nearly three years later, filed the present federal action, in which it failed to advise the Court that it was sued for negligence, a clearly covered arena.

The Courts have gone to great lengths to uphold arbitration as an alternative means of resolution, but those who seek - indeed, demand - arbitration, such as Auto-Owners and the Thomas Defendants here, cannot have it both ways: they cannot abandon arbitration after losing, demand rights of review such as has occurred here, and get a do-over.

The District Court here was without jurisdiction to review the arbitration award, to parse its fact-finding or to re-characterize the nature of the damages awarded. If the arbitrator had made an award for costs of repair to a cracked wall in the house, *the insurer could have asked the arbitrator for a finding that that portion was not covered*, but, perhaps realizing through its lawyer who it furnished to the insured, that the evidence at the trial was disastrous to it on the issue of negligence and bodily injury, which would be binding on it, and non-reviewable, chose instead to seek a kind of quasi-appellate review in the federal court. See Casale v. Tillman, 558 F.3d 1258, 1260 (11th Cir.2009) (district courts lack jurisdiction to review state court judgments).

The District Court should, upon the filing of the arbitration award, have simply dismissed the federal case as being outside its purview.

II. The arbitration award is covered under the Policy, and Auto Owners did not satisfy its burden in attempting to apply the work product exclusion.

The Policy states in its opening clause:

> We [Auto Owners] will pay those sums that the insured [Thomas] becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. [Doc. 1-2].

The insured, Thomas, is now legally obligated to "pay as damages" the arbitrator's award finding "bodily injury and property damage" to the McQueens. The insurance policy is construed against the drafter and any ambiguities are to be liberally construed in favor of the insured. See Blackburn v. Fidelity and Deposit Co. of Maryland, 667 So.2d 661, 667 (Ala. 1995). The burden of proving the applicability of an exclusion rests with the insurer. See Brown, 832 So.2d at 12. Exceptions to coverage are interpreted as narrowly as possible to maximize coverage, and are construed strongly against the insurer. See Porterfield, 856 So.2d at 806. How can this arbitration award have possibly been construed to trigger an exclusion under Auto Owners' Policy?

Auto Owners filed its Complaint, its summary judgment brief and, in reality, its final submissions, and never argued that an award finding damages for negligence would not be covered under its Policy. That is because it is. See Moss v. Champion Ins. Co., 442 So.2d 26 (Ala. 1983). As Auto Owners stated, the Policy: "has, as its genesis, the purpose of protecting an individual or entity from

liability for essentially accidental injury to another individual, or property damage to another's possessions." [Doc. 25, p. 17 (citing to Auto Owners Ins. v. Toole, 947 F.Supp. 1557, 1561 (M.D. Ala. 1996))]. If this Policy does not cover the present arbitration award, it is illusory. See Shrader v. Employees Mutual Casualty Co., 907 So.2d 1026 (Ala. 2005) (insurance contracts must be interpreted to avoid illusory coverage).

In Alabama, an insured is entitled to the protection that he reasonably expects from the policy of insurance that he purchases. Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705, 713 (Ala. 2007) (internal citations omitted); Aetna Cas. & Sur. Co. v. Chapman, 240 Ala. 599, 200 So. 425 (Ala. 1941). Expectations that contradict a clear exclusion will not succeed; however, in the present case, there can be no question that it is objectively reasonable that Thomas would have believed that his insurance policy covered an award finding him liable for negligence. In fact, he argued this to the District Court. [Doc. 63]. Under Auto Owners theory, the Policy covers absolutely nothing. [See Docs. 1, 25, 61, 64 (Auto Owners asserting that the Policy does not cover breach of contract, fraud, suppression, breach of warranty, the arbitration award . . . .)].

As argued by Auto-Owners, this business policy in fact excludes coverage for all occurrences arising from, associated with, or resulting from any part of the business. The carrier seeks to have charged and received its premiums for years,

but now to leave its insured subject to a judgment which will bankrupt the company and Mr. Thomas personally, and will also leave the injured victims without redress. This is a result that cannot have been intended by the parties to the insurance contract. See BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So.2d 203, 216 (Ala.2001) ("It is the duty of the Court to construe the contract so as to express the intent of the parties."). Furthermore, it is a disastrous and unfair result to the McQueens.

In its final Reply to the District Court, Auto Owners could not even come up with one example as to what it thought the Policy covers, stating only generally: "Auto Owners *could* offer a laundry list of situations and damages covered by its policy . . . ." [Doc. 64, p. 3 (emphasis added)]. Whether or not Auto Owners "could" offer a laundry list, in fact it offered not one of item of that laundry – not a sock, a tee shirt or a pair of pants.

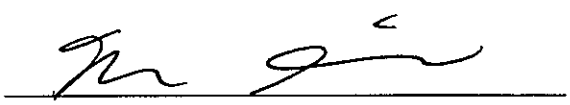
The damages award for tort liability is covered by the Policy and the District Court's judgment is erroneous. This Court should reverse the judgment and render judgment in favor of the defendants.

CONCLUSION

If the filings of Auto Owners in the District Court are reviewed, it is clear that Auto Owners is aware that an arbitrator's award finding negligence, and awarding damages against its insured for bodily injury and damage to the

McQueens is covered under its Policy. That is precisely why Auto Owners asked the District Court to alter the arbitrator's award to fit into the Policy exclusions. Auto Owners final argument to the District Court, asking the District Court to remit its liability for the arbitration award to $160,000.00, concedes that the award cannot be entirely excluded under the Policy. Certainly, the McQueens do not wish for Auto Owners' liability to be remitted, but the argument of Auto Owners clearly shows that the District Court's opinion is wrong and cannot be upheld, under any circumstance.

Auto Owners does not like the arbitrator's award, but that does not allow the District Court to change the award to relieve Auto Owners. Auto Owners chose the arbitration forum, and the arbitrator's decision is final. The arbitrator awarded damages to the McQueens for their damages, injuries and suffering. Such holding does not trigger the work product exclusion under the Policy. The award is covered by the Policy, and this Court should reverse the District Court's judgment, and order that judgment should be entered in favor of the Defendants.



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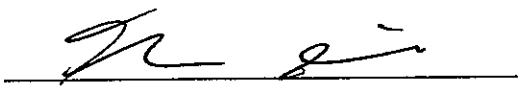
CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word-processing system used to prepare this brief, Microsoft Word, the brief contains 7,470 words, not counting the Table of Authorities, Table of Contents, and Certificate of Service. This brief, therefore complies with Rule 32(A)(7)(B) of the Federal Rules of Appellate Procedure.



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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of August, 2010, an original and six (6) copies of the foregoing Brief were filed with the Clerk, United States Court of Appeals for the Eleventh Circuit, by Federal Express, and that one (1) copy of the foregoing Brief was served on the following by Federal Express:

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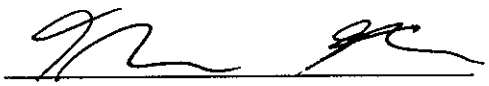

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