IN THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA
CASE NO.: 5D14-1522

MID-CONTINENT CASUALTY COMPANY,

L.T. CASE NO.: CA06-0815

Appellant/Cross-Appellee,

vs.

JAMES T. TREACE and ANGELINE G. TREACE,
Appellees/Cross-Appellants,

and

HARBOUR ISLAND JOINT VENTURE III, JC DESIGN MANAGEMENT CO., HUNTINGTON BUILDERS, INC., DOESN'T MEAN ANYTHING, INC., STEPHENSON DESIGN AND DEVELOPMENT, RYSKCON CONSTRUCTION INC., RAKE BROTHERS ENTERPRISES, INC., BARRY K. CHERRY, and ARCHITECURAL WINDOWS & CABINETS

Appellees.
_____/

ON APPEAL FROM THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES/INITIAL BRIEF OF CROSS-APPLELLANTS

WHELAN CONSTRUCTION LAW, P.A.

Edward M. Whelan
Florida Bar No. 187100
ed@whelanpa.com
anita@whelanpa.com
monique@whelanpa.com
2700 University Boulevard West,
Suite C2
Jacksonville, FL 32217
(904) 224-7026
(904) 224-7037 facsimile
Co-Counsel for Appellees/Cross Appellants James T. Treace and Angeline G. Treace

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075 Telephone
(904) 503-0441 Facsimile
Attorney for Appellees/Cross-Appellants James T. Treace and Angeline G. Treace

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

RULES AND OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal, designated by Appellant, consists of volumes 1 to 5. An example of a citation to the record is as follows: (R. Vol. 1, at pp. 199.)

A copy of the two-volume trial transcript from the garnishment action is contained entirely within volume 5 of the record. Appellant filed a mini-version of the transcript that is very difficult to read. To remedy this, Appellees have included in their appendix a full-sized version of the transcript. Citations to the trial transcript are as follows to the transcript page number: (Tr. 100.)

The supplemental record, designated by Appellees, consists of volumes 6 to 14. An example of a citation to the record is as follows: (Supp. R. Vol. 6, at pp. 1.)

On April 6, 2015, Appellees filed with this Court an opposed amended second motion to supplement the record. Attached to the motion was an appendix that Appellees proposed this Court accept as a second supplemental record to avoid any further delay. The primary (and perhaps only) item that Appellees have cited from this second supplemental record is the transcript of a hearing held on September 30, 2013 on Appellant's motions in limine. An example of a citation to the record is as follows: (2d Supp. R. p. 27.)

STATEMENT OF THE CASE AND FACTS

I. Overview

This is an appeal and a cross-appeal of a final judgment from a garnishment action by the Appellees/Cross-Appellants, James T. Treace and Angeline G. Treace (the "Treaces"), against Appellant/Cross-Appellee, Mid-Continent Casualty Company ("MCC"). As noted elsewhere in this statement, certain portions of MCC's statement of the case and facts are accurate. However, MCC's statement contains multiple omissions and misstatements; thus, the Treaces are required to re-state the facts.

MCC raises two issues on appeal: (i) whether the Treaces' costs to repair and replace property damage caused to their home by a subcontractor's defective work – including access, "get-to," "peel the onion" or "rip and tear" costs – were covered by MCC's insurance policies; and (ii) whether the "fungus, mold, and mildew" exclusion (the "fungus exclusion") in the policies excluded such costs from coverage. On cross-appeal, the Treaces raise a single issue: whether the Treaces' attorney's fees from the underlying litigation were covered under MCC's policies.

II. Background

Stevenson Design & Development of Jacksonville, Inc. ("SDD") constructed the Treaces' home in 2002, and the Treaces moved into the home in January 2003. (Supp. R. Vol. 11, p. 876.) By late 2005, after SDD failed to properly investigate

and repair concerns the Treaces had regarding water intrusion and resulting damage, the Treaces hired Mr. Brian Wingate and his company, Kendale Design Build ("Kendale"), to investigate these concerns. (*Id.*; Tr. 91; Tr. 94-95; Tr. 105.) In the fall of 2005, Mr. Wingate discovered significant water intrusion damage at the front of the home ("Phase I Damages") and then later, in 2010, additional water intrusion damage in the rear of the home ("Phase II Damages"). (Tr. 105-07.) After SDD refused to repair the water damage, the Treaces hired Kendale and Mr. Wingate to make repairs, at a cost of over $800,000. (Tr. 94, 106-07.)

III. The Underlying Action

The Treaces sued MCC's insured, SDD, in the underlying action in September 2006. (Supp. R. Vol. 11., p. 876.) They alleged construction defects had caused water intrusion and other related property damages to their home. (Supp. R. Vol. 8, pp. 344 ¶ 13; 349 ¶ 27.) MCC began investigating these allegations in 2006; however, the record does not indicate, during seven plus years of litigation, MCC ever retained an expert to investigate the water intrusion damage or its cause. (2d Supp. R., p. 27.)

More than five years into the underlying action and just a week before the jury trial, MCC moved to intervene. (Supp. R. Vol. 6, pp. 1-6.) In that motion, MCC asked to submit special interrogatories to the jury. (Supp. R. Vol. 6, pp. 2-3.) Specifically, MCC wanted the jury to determine "to what extent damages are

awarded for damage to the insured's work vs. property other than the work, and with respect to each type of alleged property damage, when such property damage occurred." (*Id*.) MCC did not ask for any questions related to the fungus exclusion or fungus, mildew, or mold damages. (Supp. R. Vol. 6, pp. 1-6.) The trial court denied MCC's motion to intervene, finding it had "waited until the eve of trial to file the instant motion." (Supp. R. Vol. 6, p. 8.)

At the underlying trial, the trial court instructed the jury that SDD had admitted that one or more of the construction defects caused damage to the home that required repair. (Supp. R. Vol. 6, p. 11.) The jury returned a verdict for the Treaces, awarding them $810,280.00 in damages. (Supp. R. Vol. 6, p. 27.) Thereafter, the court entered a final judgment against SDD and in favor of the Treaces in the amount of $1,016,187.00.[1] (Supp. R. Vol. 6, pp. 37-38.) Later, the court entered a separate final judgment against SDD and in favor of the Treaces for their attorney's fees and costs incurred in the underlying action; $316,528 of this judgment was for fees.[2] (Supp. R. Vol. 11, pp. 793-97.)

[1] The difference in the amounts between the final judgment and the verdict was due to the amount of pre-judgment interest. (Supp. R. Vol. 11, p. 875.)

[2] SDD appealed this fee judgment, and this Court affirmed. *Stevenson Design and Dev. v. Treace*, Case No. 5D13-2062, 147 So. 3d 1015 (Fla. 5th DCA 2014) (table).

IV. The Garnishment Action

A. Pre-trial proceedings

The Treaces commenced the garnishment action in July 2012 by way of a motion, in which it sought to implead MCC and to garnish the proceeds of MCC's insurance policies insuring SDD. (Supp. R. Vol. 6, pp. 52-90.) The Treaces twice amended their garnishment motion. (Supp. R. Vol. 7 & 8, pp. 93-358; Supp. R. Vol. 9 & 10, pp. 359-626.) In response to the second amended garnishment motion, MCC filed two motions to strike and dismiss, as well as an answer. (Supp. R. Vol. 10, pp. 627-735.) MCC did not raise a defense based on the fungus exclusion in either its two motions or its answer. (*Id*.)

The trial court ordered non-binding arbitration. (R. Vol. 4, p. 770.) The arbitrator awarded $600,000 to the Treaces plus interest, costs, and attorney's fees. (R. Vol. 4, pp. 773-84.) Pursuant to section 44.103(5), Florida Statutes and Florida Rule of Civil Procedure 1.820(h), MCC rejected the arbitrator's award and requested a trial. (Supp. R. Vol. 11, pp. 914-16.)

In the week before the trial, the parties filed two stipulations and a joint pretrial statement. (Supp. R. Vol. 11, pp. 860-62, 871-902.) In the second stipulation, the Treaces agreed to waive their right to a jury trial based on MCC's representation that only certain factual issues – unrelated to the fungus exclusion – were to be raised. (Supp. R. Vol. 11, pp. 871-73.) In particular, the only factual

issues preserved for trial in the stipulation were: (i) when did the Phase I and Phase II property damages occur; and (ii) whether the windows and doors were damaged by water intrusion. (*Id.*)

Neither the stipulations nor the joint pre-trial statement made any mention of any factual or legal issues related to fungus, mold, mildew, or the fungus exclusion. (Supp. R. Vol. 11, pp. 860-62, 871-902.) The pre-trial statement did mention that MCC had a pending motion for leave to amend its answer. (Supp. R. Vol. 11, p. 883.) But that motion said nothing about the fungus exclusion. (Supp. R. Vol. 11, pp. 762-65.) The pretrial statement also noted the following admissions: (i) [SDD] subcontracted all the work to construct the Treaces' home; and (ii) SDD assigned its insurance rights and benefits to the Treaces. (Supp. R. Vol. 11, pp. 876-78.)

B. The February 2014 Garnishment Trial

The garnishment trial was a one-day bench trial in February 2014. (Supp. R. Vol. 11, pp. 917-18.) Due to the assignment from SDD, the Treaces' claims included all claims that SDD would have had as an insured under MCC's insurance policies, with one exception immaterial to this appeal.[3] (Supp. R. Vol. 11, pp. 860-69.) Pages six to eight of MCC's initial brief accurately states the applicable policies and their language.

[3] MCC and the Treaces agreed any bad faith claims were reserved to be litigated later. (Supp. R. Vol. 6, p. 861 ¶ 5.)

Beginning with the second paragraph of page three of the initial brief running until the second paragraph of page five of that brief, MCC accurately describes the construction defects and the property damages they caused. (MCC's Initial Br. 3-5.) However, MCC's description is incomplete. In particular, the defective installation of control joints was not the *only* cause of the water intrusion (*contra* MCC Initial Br. 3), and more than just two defects caused the Phase II damages (*contra* MCC Initial Br. 5.). In his expert testimony, Mr. Brett Newkirk, a professional engineer, attested that several defects in the construction work caused the water intrusion, including: (i) defects in the balcony and roof structure; (ii) a lack of sealant at the window to stucco interface; (iii) the reverse lapping of the weather resistant barrier around the windows; (iv) the lack of a weep screed at the stucco termination; and (v) the lack of proper flashing, improperly constructed control joint, and defectively installed flashing and scupper work at the entry level roof. (Tr. 168-171.)

To determine the scope of the water intrusion damage caused by these construction defects, both of the Treaces' experts, Messrs. Wingate and Newkirk, testified that it was necessary to undertake a "peel the onion" approach. (Tr. 124-25, 165-66.) Under this peel-the-onion approach, a repair contractor, like Mr. Wingate, incrementally removes "small areas" until it is determined that all the water

intrusion damage is located. (Tr. 165.) This approach avoided the need to knock down the entire structure and start over. (*Id.*)

An example of the peel-the-onion approach was Mr. Newkirk's testimony that he could not observe and determine the scope of the water intrusion and wood damage until the windows and portions of the stucco were first removed. (Tr. 174-76, 178-79.) Mr. Wingate gave similar testimony explaining why the windows and stucco had to be removed to repair the underneath water damage. (Tr. 107, 120-21, 147-48, 154-55.) As another example, Mr. Wingate explained how the non-damaged tiles on decks had to be removed and replaced in order to gain access to the wood rot underneath them. (Tr. 138-40.) Similarly, Mr. Wingate testified how the defectively installed stones were not damaged themselves, but there was significant wood rot in the structural frame under the stones that required the removal of the stones. (Tr. 131-33.) Mr. Wingate also had to open the sides of the balcony to investigate the extent of the water intrusion (Tr. 114), and Mr. Newkirk opined, as forensic engineer, that this investigation was appropriate (Tr. 166-67).

Critically, Mr. Wingate testified that approximately eighty percent of the total repair costs incurred by the Treaces was for "[e]verything that needed to be done *to get to* the damaged woodwork." (Tr. 149-150 (emphasis added).) The remaining twenty percent was "to actually replace the damaged wood." (Tr. 150.) This testimony was elicited by MCC's counsel during his cross-examination of Mr.

Wingate (Tr. 149-50), and MCC has argued this testimony was unrebutted.[4] (MCC Initial Br. 3.)

Both of the Treaces' expert witnesses also gave unrebutted expert testimony that all the Treaces' costs were reasonable and necessary to repair the water damage caused by the defective work of SDD's subcontractors. (Tr. 107, 120-21, 155, 158, 167, 171-72.) Both also gave unrebutted testimony that no less expensive method existed to repair the water damage. (Tr. 139, 155, 167, 179-80.) For example, Mr. Wingate testified that reusing the exterior tiles that were removed to perform the necessary repair work would have been more expensive than installing new tiles, as the Treaces did. (Tr. 139.) In a similar vein, Mr. Newkirk testified why it would not have been economical for the repair contractor to have tried to save some small areas of the stucco. (Tr. 179-80.)

[4] The Treaces agree with MCC that, based on Mr. Wingate's testimony, all the costs incurred by the Treaces either were to: (i) gain access to the damaged wood or other items damaged by the water intrusion or (ii) remove and replace the damaged wood or other items damaged by the water intrusion. The Treaces do not agree, however, that the 80%/20% ratio is accurate. The Treaces' other expert, Mr. Newkirk later testified that water intrusion and defective construction caused not only the wood rot, but also the stucco damage. (Tr. 166-69.) The trial court expressly relied on Mr. Newkirk's testimony in his written order to alternatively find that the stucco was damaged by water intrusion. (R. Vol. 3, p. 577 n. 5.) However, this alternative finding and the ratio of access costs versus costs to replace water-damaged items is relevant only if this Court agrees with MCC that access costs are not covered. In that event only, this Court should remand to the trial court to determine an accurate ratio. *Infra* at Argument I.D, at 43.

When cross-examining Mr. Newkirk, MCC's counsel asked several leading questions about the relation of wood rot, water, and fungus. (Tr. 216-17.) In response, Mr. Newkirk testified that, without water, wood rot could not occur. (*Id.*) But he also acknowledged that a "fungal agent" had to be "wetted" and present for wood rot to occur and that fungus caused wood rot. (*Id.*) MCC's counsel admitted that he asked these leading questions because of testimony he had observed given by Mr. Newkirk in a federal trial (the *Carithers* trial) the preceding week. (Tr. 216-17, 234, 236.) The Treaces' counsel later asserted that Mr. Newkirk's federal trial testimony occurred the day before the parties entered in their pre-trial stipulation (Supp. R. Vol. 12, pp. 927-58), which made no mention of fungus being a factual issue (Supp. R. Vol. 12, pp. 935-36). MCC's counsel never disputed this assertion. In the federal *Carithers* case, Mr. Newkirk filed an affidavit more than a year before that trial, attesting that "[d]ecay of wood components is the result of *decay-fungi* which consume the wood and are sustained by repeated wettings." *Carithers v. Mid-Continent Cas. Co.*, Case No. 14-11639, 2015 WL 1529038, slip op. at 15 (11th Cir. April 7, 2015) (emphasis added) (quoting Aff. of Brett Newkirk, DE 21–2 at ¶ 9).

After Mr. Newkirk concluded his trial testimony in this case, MCC orally moved for leave to amend its pleadings to conform to the evidence and to assert the fungus exclusion as an affirmative defense. (Tr. 233-34.) MCC's counsel asserted that Mr. Newkirk's testimony – which he himself had elicited on cross examination

– was the first instance in the litigation in which fungus had been mentioned. (Tr. 233-35.) Thus, MCC's counsel argued, there was "no way" that MCC could have previously raised the fungus exclusion as a defense. (Tr. 235.) But counsel later conceded to the trial court he had previously deposed Mr. Newkirk (and Mr. Wingate). (Tr. 270)

In making the oral motion, MCC conceded whether or not the exclusion applied was a question of fact for the trial court to decide. (Tr. 236 ("And I understand that you[, the court,] could find the exclusion completely inapplicable or you could find it partly applicable.")); (Tr. 240 ("All I'm asking to do, Your Honor, is to allow us to use the amendment to assert the fungus exclusion . . . and Your Honor can rule on its applicability. You can rule you know, however you want to rule on that.").) Furthermore, the trial court in its oral comments disagreed that Mr. Newkirk had testified that fungus, and not water, caused the wood rot. (Tr. 234.) Instead, the trial court found Mr. Newkirk's testimony to be that water and fungus were "codependent," i.e., fungus does not exist without water. (Tr. 234-35.)

The Treaces objected to MCC's oral motion to amend and argued they would be prejudiced. (Tr. 237-39.) They noted that MCC could have hired an expert at any time since 2006 to investigate and determine whether fungus was a cause of wood rot. (*Id.*) In its oral ruling allowing the amendment, the trial court made it

very clear that it believed the fungus-exclusion defense had no merit and thus could not prejudice the Treaces:

> This is a close call. And I'm going to allow it for what its worth. *I don't think it makes a hoot of difference in the raw outcome of this case*, but I'm going to allow the amendment at this stage to conform to the – allow the pleadings to conform to the evidence to allow you to assert an affirmative defense, if you will, with regards to that particular provision of the policy. You know, *I don't think it makes difference in the overall scheme of things*, so that's why I don't feel that the plaintiffs are prejudiced by allowing the amendment.

(Tr. 241-42) (emphasis added). Later, however, in its written ruling, the trial court exercised its discretion and did not allow MCC to rely on this defense because of its delay in raising it. (R. Vol. 3, pp. 574-76.)

Besides the expert testimony of Messrs. Wingate and Newkirk and the lay testimony of Mr. Treace (Supp. R. Vol. 11, pp. 917-18), the Treaces also offered into evidence fifty exhibits. (Tr. 5-8; 200-01.) These exhibits included: (i) photographs of the water damage (Exs. 23, 27-31, 35); (ii) Newkirk's engineering reports and design specifications setting forth the necessary repairs (Exs. 36, 44, 45); (iii) Kendale's daily reports documenting the water damage (Exs. 16, 23, 32, 33, 34); and (iv) invoices documenting the actual costs incurred to repair the water damage (Exs. 25, 38, 39, 40, 46, 47, 48).

In contrast, MCC did not call any expert witnesses for its defense. (Supp. R. Vol. 11, pp. 890-91; 917-18.) Instead, it merely presented: (i) the deposition testimony of MCC's adjustor and SDD's principal and (ii) twelve exhibits, many of

which are not in the record on appeal. (Tr. 10; Supp. R. Vol. 11, pp. 908-10; Tr. 201-02.) In summary, MCC failed to present any evidence, by way of witnesses or exhibits, to rebut Messrs. Wingate's and Newkirk's expert testimony that the costs incurred were all reasonable and necessary to repair the water damage and that no less expensive method existed to effectuate these repairs.

C. The Trial Court's Rulings and Judgments

In a 25-page "judgment,"[5] the trial court ruled largely in favor of the Treaces. (R. Vol. 3, pp. 558-83.) Germane to this appeal,[6] the trial court rejected MCC's "rip and tear" argument:

> While there is no dispute that there was extensive property damage to the Treaces' home as a result of defective workmanship by the subcontractors of the insured, . . . MCC argues that it is only legally responsible to pay for the repair of the property damage and *not for the tear out and replacement work necessary to facilitate the repairs*. The property damage in this case consisted primarily of extensive water damage to the wood structure under the stucco that covered the Treaces' home. It is undisputed that this damage was caused by the defective workmanship of the subcontractor that allowed for water intrusion. In order to *get to* the damaged wood, the Treaces' repair contractor had to remove the vast majority of the stucco around the home and remove all the windows in the home. Only after the stucco and windows were removed could the damage be repaired.

[5] Though titled a "judgment," it was not a final judgment because the trial court reserved on set-offs. (R. 582); *see Brown v. Ford*, 866 So. 2d 189, 190 (Fla. 1st DCA 2004). Thus, when MCC appealed this judgment, this Court in its order of July 8, 2014 relinquished jurisdiction to the trial court to determine set-offs and enter a final judgment.

[6] Two rulings – concerning when the damages occurred and the applicability of the subcontractor exclusion (R. Vol. 3, pp. 567-74) – are not germane to this appeal, as MCC has not challenged those rulings.

> MCC contends that the only covered items under the policy would be the repair of the damaged wood, since that was the only property damage caused by the subcontractor, and the removal of the stucco and windows to *get to* the damaged wood and the subsequent replacement of the stucco and windows are not covered items, since the stucco and windows were not damaged.
>
> This Court disagrees. MCC relies on *U.S. Fire Insurance Co. v. J.S.U.B.*, 979 So.2d 871 (Fla. 2007) and *Auto-Owners Ins. Co. v. Pozzi Windows Co.*, 984 So.2d 1241 (Fla. 2008). Such reliance is misplaced. In these cases, the Supreme Court explained that there is a distinction under a standard CGL policy between a claim for the costs of repairing or removing defective work, which is not property damage covered under a standard CGL policy, and a claim for the costs of repairing damage caused by the defective workmanship, which is a claim for property damage under the CGL policy. *See also Amerisure Mutual Ins. Co. v. Auchter Co.*, 673 F. 3d 1294 (11th Cir. 2012).
>
> . . . .
>
> This case does not involve merely the remediation of defective work, but it involves the cost of repair of damage caused by the defective work. If the Treaces had discovered the poor workmanship regarding the stucco installation prior to any damage occurring and sought recovery under the policy to replace the stucco system, that would not be covered under the MCC CGL policies. However, the facts here are drastically different. The CGL policies provided coverage not only for the repair of the damaged wood, but also for the work necessary to *get to* the property damage by removal and reinstallation of the stucco and windows.

(R. Vol. 3, p. 576-78 (emphasis added) (footnote omitted).)

In support of this ruling, the trial court expressly relied on a portion of an order from the federal district court in the *Carithers* case, in which MCC also denied a homeowner's claim under an identically worded policy. (R. Vol. 3, p. 576-78 (citing *Carithers v. Mid-Continent Cas. Co.*, Case No. 3:12-cv-00890 (M.D. Fla.), Dkt.

#126, at 7).) The Eleventh Circuit recently affirmed this portion of the federal district court's ruling. *Carithers v. Mid-Continent Cas. Co.*, Case No. 14-11639, 2015 WL 1529038, slip op. at 21 (11th Cir. April 7, 2015). MCC's counsel for this case has also been MCC's counsel in the *Carithers* case.

Alternatively, in a footnote, the trial court found that the stucco was damaged due to the water intrusion and thus qualified as "property damage" under MCC's policies on that additional basis. (R. Vol. 3, p. 577 n. 5.) But even if it did not so qualify, the removal and replacement of the stucco would still be covered under the policies because "the stucco had to be removed to *get to* the damaged wood." (*Id.* (emphasis added).)

The trial court rejected the Treaces' claim insofar as they sought the costs to purchase replacement windows, though it awarded the costs to install these windows. (R. Vol. 3, p. 581.) The trial court found that the original windows could have been reinstalled rather than replaced with the upgraded, more expensive windows. (R. Vol. 3, pp. 579-81.) The Treaces do not challenge this adverse ruling on their cross-appeal.

The trial court also rejected MCC's reliance on the fungus exclusion. (R. Vol. 3, p. 574-76.) It found that MCC knew of the Treaces' wood rot and water damage claims for many years and that, based on that knowledge, MCC could have raised the fungus-exclusion defense earlier in the litigation. (R. Vol. 3, pp. 575-76.)

Because MCC had not done so, the trial court ruled, "MCC cannot now rely on an exclusion that it has never before mentioned in this litigation." (R. Vol. 3, p. 576.) The trial court noted that MCC had just days before the trial moved to assert additional affirmative defenses, but notably absent from the motion to amend was any mention of the fungus exclusion. (*Id.*) Though the trial court cited to section 627.426(2)(a), Florida Statutes, its ruling was based on its discretionary power to deny such a late-raised defense, as is argued in the argument section. *Infra* at 44-55. Nowhere in the record did MCC seek reconsideration or rehearing of the trial court's ruling insofar as it relied on section 627.426(2)(a), Florida Statutes.

In support of its ruling on the fungus exclusion, the trial court again relied on the reasoning of the federal district court in the *Carithers* case (R. Vol. 3, p. 575 (citing *Carithers*, Case No. 3:12-cv-00890, Dkt. #126, p. 6, n. 2)), which also recently was affirmed by the Eleventh Circuit, *Carithers*, Case No. 14-11639, slip op. at 13-15. Quoting from the dictionary definition for "rot," the trial court found:

> Just in the *Carithers* case, MCC has had knowledge of the Treaces' water damage and wood rot claims for many years and is deemed to have knowledge of "rot," which is "decomposition from the action of bacteria or fungi." The scientific cause of wood rot was not just discovered in 2014. Since MCC has known for many years that the damage to the Treace's [sic] home was caused by wood rot, MCC could have notified the Treaces long ago of its reliance on this exclusion, but failed to do so.

(R. Vo. 3, pp. 575-76 (quoting the definition of the verb "rot" from www.merrriam-webster.com/dictionary/rot (visited on March 3, 2014).)

The trial court awarded the Treaces $660,280.00 as "the amount of the jury's verdict for covered damages." (R. Vol. 3, p. 581.) The court later added this amount to the pre-judgment interest and the amount of costs from the underlying trial to which the Treaces were entitled. (R. Vol. 4, pp. 766-68.) The resulting final garnishment judgment in favor of the Treaces was $906,648.00. (*Id*.)

V. Proceedings Related to Cross-Appeal: Treaces' claim against MCC for their attorney's fees from the underlying action.

MCC's policies had the following "supplementary payments" provisions:

> SUPPLEMENTARY PAYMENTS – COVERAGES A AND B
>
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> . . . .
>
> e. All costs taxed against the insured in the "suit". [sic]

(Supp. R. Vol. 8, pp. 499-500.) As previously mentioned, in the underlying action, a judgment was entered against MCC's insured, SDD, and in favor of the Treaces for $316,528 they incurred in attorney's fees. (Supp. R. Vol. 11, pp. 793-97.)

In the garnishment action, MCC asserted as an affirmative defense that Plaintiffs' attorney's fees from the underlying action were not covered under the insurance policies as either "damages" or "costs." (R. Vol. 1, p. 168.) MCC also filed a "motion in limine" that sought a "ruling that [the Treaces'] underlying attorneys' fees [were] not recoverable under any [MCC] policy of insurance." (R.

Vol. 1, pp. 8-9.) In that motion, MCC argued that attorney's fees were not "damages" and thus not covered under the policies. (R. Vol. 1, pp. 8-10.) Though citing several cases, MCC relied primarily on this Court's decision in *Scottsdale Insurance Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001). There, this Court held that attorney's fees could not be considered covered "damages" under a liability policy. *See id.* at 1009-10. This Court in its 2001 *Haynes* decision, however, did not address whether attorney's fees were covered "costs" under a supplementary payment provision like the one quoted immediately above. *See id.* at 1006-10. As we discuss later in the argument section, this Court very recently (after the filing of the notices of appeal and cross-appeal in this case) did address whether attorney's fees were covered "costs" under a similar policy provision. *Infra* Argument III, at 55-58 (discussing *Geico Gen. Ins. Co. v. Hollingsworth*, 157 So. 3d 365 (Fla. 5th DCA 2015)).

At the hearing on the motion in limine, MCC's counsel repeated the argument "that attorney's fees awarded to a Plaintiff [sic] are not damages because of property damage under a CGL policy." (2d Supp. R., p. 72.) MCC's counsel handed the trial court this Court's *Haynes* decision. (2d Supp. R., pp. 72-73.) MCC's counsel also relied on, and quoted from, a concurring opinion by Judge Gross of the Fourth District in which he opined that "attorney's fees are not 'damages' *or 'costs'* within the meaning of the policy." *GEICO Gen. Ins. Co. v. Williams*, 111 So. 3d 240, 248

(Fla. 4th DCA 2013) (Gross, J. concurring specially) (emphasis added). (*See* 2d Supp. R., p. 74.) In response, the Treaces' counsel relied primarily on a federal decision, *Assurance Co. of Am. v. Lucas Waterproofing Co. Inc.*, 581 F.Supp. 2d 1201 (S.D. Fla. 2008), in which a federal district court opined that this Court's *Haynes* decision was wrong and that attorney's fees were, in fact, "damages" under a liability policy. *See id.* at 1212-15. (2d Supp. R., pp. 75-76.)

Critically, however, for the cross-appeal, the Treaces' counsel also argued that his clients' attorney's fees from the underlying action were covered under the aforementioned supplementary payment provision: "There's also coverage under the supplemental coverage there, A and B, there are other portions of the policy that provide for coverage for costs and fees that result from -- in addition to the direct damages." (2d Supp. R., p. 76:6-10.) In rebuttal, MCC's counsel argued: "First thing is I cited several cases in my motion . . . . They all say attorney's fees are not damages. *They're also not costs . . . . Mr. Whelan[, the Treaces' counsel,] is incorrect on that argument.*" (2d Supp. R., pp. 76:20-77:1 (emphasis added).) When the Treaces' counsel was asked by the trial court whether he had any "state law cases" to support his arguments, the Treaces' counsel was unable to provide such a case. (2d Supp. R., p. 77:13-17.)

The trial court granted MCC's motion *in limine*. (R. Vol. 1, pp. 196-98.) The trial court's order *in limine* discussed this Court's decision in *Haynes* and how it was

bound by that decision and thus could not follow the federal decision in *Lucas*. (*Id.*) The trial court also cited with approval to Judge Gross's concurring opinion, which, as previously mentioned, rejected the argument that attorney's fees could be considered "damages" *or "costs"* under a liability policy. (R. Vol. 1, p. 197 (citing *Williams*, 111 So. 3d at 248) (Gross, J. concurring specially).) However, in its order *in limine*, the trial court did not specifically address the argument, made by the Treaces' counsel at the hearing, that the underlying attorney's fees were covered under the "supplemental coverage." (*Id.*) Later, at the garnishment trial, the Treaces' counsel repeated his position that "[a]ttorney's fees and interest are paid as supplemental payments anyway." (Tr. 263:21-23.)

SUMMARY OF ARGUMENT

An appeal is about whether the trial court's ruling, and its reasoning, were erroneous. MCC has overlooked this fundamental principle. The trial court ruled that MCC's policies provided coverage not only for the repair of the rotted wood, but also for the work necessary to "get to" that property damage by removing and re-installing or replacing items that blocked access to the rotted wood. The costs for such work may also be called access, "rip and tear," or "peel the onion" costs.

Rather than confront the trial court's "get" ruling and reasoning, MCC argues that the items blocking access (the stucco, windows, etc.) do not constitute "property damage" under the policies. This argument is irrelevant. It became irrelevant once MCC conceded that, barring an exclusion, the rotted wood was covered "property damage." The costs to repair the rotted wood, including the "get to" costs to access the rotted wood, were covered per the supreme court's *J.S.U.B.* and *Pozzi* cases. These were costs to repair "property damage" caused by a subcontractor's defective work, rather than the costs to repair the defective work itself.

MCC's concession meant that the issue to be tried and decided by the trial court was whether the Treaces' "get to" costs were "reasonably necessary." They clearly were. That was the unchallenged testimony given by the Treaces' experts.

MCC spends the bulk of its initial brief on a "component" argument that is not only irrelevant but also meritless. The "component" argument goes like this: If a subcontractor's defective construction causes damage only to his own work (a "component"), then such damage purportedly is not covered "property damage." This misguided argument stems from a dubious 2-1 decision from the Eleventh Circuit called *Auchter*. The dissent in *Auchter* properly applied our supreme court's precedent. If this Court is inclined to address the "component" argument (which it need not do), it should adopt the better reasoned dissent from that case.

MCC loses on the fungus exclusion for many reasons. Some arguments that it makes on appeal were not made below. MCC also had no valid excuse for raising the defense for the first time at trial after the close of the evidence. It knew about the Treaces' wood-rot claims from the inception of this lawsuit. The exclusion was not tried by consent. MCC's untimely raising of the defense prejudiced the Treaces and violated the pre-trial stipulation. Moreover, the defense was futile, as the trial court, the finder of fact, clearly was not persuaded by MCC's paucity of evidence. Finally, the Eleventh Circuit's recent *Carithers* decision provides a template on how this Court should affirm the trial court's rejection of MCC's untimely-raised defense.

On the cross-appeal, MCC steered the trial court wrong. The underlying judgment for attorney's fees was covered under the policies' supplementary payment provisions. This Court's recent decision in *Hollingsworth* governs.

ARGUMENT ON APPEAL

I. THE COVERED COSTS TO REPAIR PROPERTY DAMAGE CAUSED BY A SUBCONTRACTOR'S DEFECTIVE WORK INCLUDE THE COSTS TO ACCESS THE DAMAGED PROPERTY.

Standard of Review.[7] While this Court reviews *de novo* the trial court's rulings on the legal effect of a contract, it is bound by the trial court's findings of fact where, as here, they are supported by competent, substantial evidence. *See Castiello v. Sweetwater Homes of Citrus, Inc.*, 843 So. 2d 1019, 1021 (Fla. 5th DCA 2003); *Craigside, LLC v. GDC View, LLC*, 74 So. 3d 1087, 1089 (Fla. 1st DCA 2011).

Merits. MCC never addresses in its initial brief the reasons given by the trial court for its decision to find that the Treaces' repair costs were covered under MCC's policies. The trial court's ruling was premised on its finding that MCC's policies provided coverage "for the work necessary to *get to*" the rotted wood. (R. Vol. 3, p. 578.) MCC in its brief never analyzes whether such "get to" costs – also called access, "peel the onion," or "rip and tear" costs – constitute part of the covered "costs of repairing damage caused by the [subcontractor's] defective work." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 889 (Fla. 2007).

[7] MCC failed to comply with Fla. R. App. P. 9.210(b)(5). That rule requires a statement of the appellate standard of review be included in its initial brief. MCC should be precluded from arguing in its reply brief standards of review different than the ones argued herein. *See Hagood v. Wells Fargo N.A.*, 112 So. 3d 770, 772 (Fla. 5th DCA 2013) (holding new arguments not permitted in a reply brief).

Instead, MCC's first argument on appeal discusses Florida and federal case law on what constitutes "property damage" under the standard CGL clause at issue in this case. (MCC Initial Br. 12-17.) This discussion is accurate in part, but it misses the mark and never addresses the trial court's reasoning. The issue on appeal, based on the trial court's reasoning, is whether the covered costs to repair property damage caused by a subcontractor's defective work include the "get to" costs to gain access to the damaged property.

Accordingly, we discuss the same case law discussed by MCC but re-orient that discussion to the trial court's reasoning and the issue on appeal. *Infra* Argument I.A.1, at 24-27. We also argue that MCC's failure in its appellate brief to address the trial court's reasoning should result in a waiver on this first issue. *Infra* Argument I.A.2, at 28-30. We then explain why the trial court was correct when it ruled that the "get to" access costs at issue in this case are covered under MCC's policies. *Infra* Argument I.B., at 30-36. We next argue this "get to" ruling renders MCC's "component" argument irrelevant, and in any event, that argument is misguided because it is based on an Eleventh Circuit opinion, *Auchter*, that misconstrued the precedent of the Supreme Court of Florida. Judge Carnes' dissent in *Auchter* is more persuasive. *Infra* Argument I.C.1&2, at 37-43. Finally, we request this Court affirm on this first issue, but if it disagrees with our arguments,

we briefly state in subpart D our alternative requests for relief. *Infra* Argument I.D., at 43.

A. Preliminary Matters.

1. The issue on appeal is whether "get-to" costs are covered "costs of repairing damage caused by defective work."

The first issue on appeal turns on what the Supreme Court of Florida meant when it held:

> "[T]here is a difference between a claim for the costs of repairing or removing defective work [of a subcontractor], which is not a claim for 'property damage,' and a claim for **the costs of repairing damage caused by the defective work** [of a subcontractor], which is a claim for 'property damage.'"

Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241, 1248 (Fla. 2008) (emphasis added) (quoting *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 889 (Fla. 2007)) (quoted at MCC's Initial Br. 14). The former underlined costs are not covered under the standard CGL policy provision at issue here, while the latter bolded costs are covered under that provision. *See J.S.U.B.*, 979 So. 2d at 891.

The parties agree that, absent an exclusion, the rotted wood in the Treaces' home was covered "property damage," per *J.S.U.B.*, because it was caused by a subcontractor's defective work. (*See* MCC Initial Br. 19-20 (agreeing that, absent an exclusion, the Treaces were entitled to recover some money damages from MCC for the rotted wood).) The parties further agree that a significant percentage of the costs incurred to repair this rotted wood was the cost to "get to" the rotted wood –

that is, the costs to remove and then reinstall or replace items that blocked access to the rotted wood. (MCC Initial Br. 3; Tr. 149-50); *see supra* at 7-8 & n. 4. And the parties agree that the remaining percentage of costs incurred were solely to remove and replace the rotted wood itself (the admitted property damage). (MCC Initial Br. 3; Tr. 149-50); *see supra* at 7-8 & n. 4.

The parties differ, however, as to whether the "get to" costs may be included in the "costs of repairing damage caused by defective work." *See J.S.U.B.*, 979 So. 2d at 889. Stated another way, the issue is: Do the "costs of repairing property damage caused by the defective work," per *J.S.U.B.*, include the following?

A. *just* the costs to remove and replace the property *physically* damaged by the defective work; or

B. *in addition,* the costs to remove property – which may or may not be damaged – to gain access to the property damaged by the defective work and also the costs to re-install the removed property or replace it if re-installation is not practical or reasonable.

As previously stated, the parties agree that the costs in A – i.e., the costs to remove and replace the rotted wood in the Treaces' home – are part of the "costs of repairing property damage caused by the defective work" and thus are covered. (*See* MCC Initial Br. 18-20.) But MCC argues, in conclusory fashion with no meaningful analysis, that the costs in B – called "get to," access, "rip and tear," or "peel the onion" costs – are not part of the "costs of repairing property damage caused by the defective work," and thus, MCC says, they are not covered. For instance, MCC

argues that the Treaces' costs to remove and re-install (or replace) the stucco, stones, decks, balcony, and windows are not covered. (MCC Initial Br. 18-19.)

But MCC never explains why these "get to" costs are not covered. Instead, MCC discusses how courts, applying Florida law, have construed the standard CGL insurance clause defining "property damage." (MCC Initial Br. 12-17.) We agree with some (though not all) of this discussion. Most notably, we agree that the Supreme Court of Florida's decisions in *J.S.U.B.* and *Pozzi* are the seminal cases on what constitutes covered "property damage" under the standard CGL policy. (MCC Initial Br. 12.)

Construing the standard CGL clause, the supreme court in *J.S.U.B.* and *Pozzi* recognized two categories of damages:

(i) non-covered damages -- the costs of repairing or removing a subcontractor's defective work, as such defective work alone is not considered "property damage" under the CGL policy.

(ii) covered damages -- the costs of repairing damage caused by a subcontractor's defective work, as such damage is considered "property damage" under the CGL policy.

Pozzi, 984 So. 2d at 1248 (citing *J.S.U.B.*, 979 So. 2d at 889). As MCC succinctly and correctly states, coverage under the standard CGL policy "extends to costs to

repair damages caused by construction defects, but not to repair or replace the defective work itself." (MCC Initial Br. 15 (internal quotations omitted).)

But the remaining discussion in MCC's brief on the first issue serves only to distract the Court's attention. It does not address, as it must, the correctness of the trial court's reasoning on "get to" costs. For instance, MCC expands the two categories of costs established by the supreme court in *J.S.U.B.*, 979 So. 2d at 889, into three separate categories. Specifically, MCC lists in its brief: "(1) defective work that is not physically damaged [not covered], (2) defective work that only damages itself but not another component of the work [purportedly not covered according to MCC], and (3) defective work that damages another component of the work [covered]."[8] (MCC Initial Br. 9-10, 13.) MCC, however, never states under which category "get to" costs fall.

Another distraction is MCC's page-and-a-half discussion of the federal case of *Assurance Co. of Am. v. Lucas Waterproofing Co. Inc.*, 581 F. Supp. 2d 1201 (S.D. Fla. 2008). (MCC Initial Br. 15-16.) MCC's discussion of this case does nothing more than re-state the general rule stated by the supreme court in *J.S.U.B.*

[8] MCC's expansion from two to three categories is based on a non-binding, federal case from the Eleventh Circuit, which had a well-reasoned dissent. *See generally Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012). Later in this brief, we explain *Auchter* in more detail and argue that the majority misinterpreted Florida law while the dissent got it right. *Infra* Argument I.C.2, at 40-43. However, *Auchter* has nothing to do with the issue of "get to" costs on which the trial court's reasoning was premised. *Infra* Argument I.C.1, at 38-40.

Lucas says nothing about whether the "get to" costs to access covered property damage are part of the costs to repair the property damage.

2. MCC has abandoned any challenge to the trial court's ruling by failing to address in its brief the trial court's reasoning.

The "points covered by a decree of the trial court will not be considered by an appellate court unless they are properly raised and discussed in the briefs." *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959). "To obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely, and separately as points on appeal." *Fla. Emergency Physicians-Kang & Assocs., M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001) (internal quotations omitted). This Court does not permit appellants to raise errors in the statement of facts or argument section. *Id.* This Court will review only those issues that are clearly and separately set out in the appellant's brief as the issues on appeal. *Id.*

MCC has violated these established rules. Nowhere in its brief has it raised and discussed the trial court's ruling – that is, the Treaces' "get to" costs are covered under MCC's policies. (*See* R. Vol. 3, pp. 577-78.) Nowhere in its brief has MCC explained why the trial court's analysis on "get to" costs was error. *See, e.g.*, *Anheuser-Busch Companies, Inc. v. Staples*, 125 So. 3d 309, 311 (Fla. 1st DCA 2013) (declining to consider whether trial court's analysis under a rule was erroneous because the petitioner had failed to argue in its petition that the trial court's analysis under the rule was erroneous).

MCC is completely silent on the following cogent reasoning contained in the trial court's order:

> This case does not involve merely the remediation of defective work, but it involves the cost of repair of damage caused by the defective work. If the Treaces had discovered the poor workmanship regarding the stucco installation prior to any damage occurring and sought recovery under the policy to replace the stucco system, that would not be covered under the MCC CGL policies. However, the facts here are drastically different. The CGL policies provided coverage not only for the repair of the damaged wood, but also for the work necessary to *get to* the property damage by removal and reinstallation of the stucco and windows.

(R. Vol. 3, p. 578 (emphasis added).) Why was this reasoning by the trial court wrong? The answer to this question cannot be found in MCC's brief.

Rather than confront head-on the trial court's reasoning, MCC sticks its head in the sand and disregards the reasoning as if it does not exist. *See Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.) ("The ostrich is a noble animal, but not a proper model for an appellate advocate."). Even worse, MCC suggests that the trial court awarded damages for reasons that, in fact, were not a basis for its ruling. For example, it argues that "the cost of removing and .replacing the balcony because it caused damage to itself does not constitute 'property damage.'" (Initial Br. 19.) But the trial court never suggested that it was awarding the costs of removing and replacing the balcony "because it caused damage to itself" or that any damage to the balcony was "property damage."

The only arguable challenge by MCC to the trial court's "get to" ruling is buried in the argument section of MCC's brief:

> With respect to stone and decks, the undisputed testimony was that the stone and decks were not physically damaged. Therefore, as with the stucco defect discussed above, the trial court erred as a matter of law in ruling that the cost of removing and replacing the nondamaged stone and decks to *get to* the rotted wood was a claim for "property damage."

(MCC Initial Br. 18-19 (emphasis added) (internal record citations omitted).) This argument lacks any citation to any legal authority. It fails to explain why, under the law or MCC's policies, an insured or homeowner may not recover "get to" costs. It is not separately stated as a point on appeal. Thus, under this Court's binding case law, this argument should be deemed abandoned or waived. *See Fla. Emergency Physicians-Kang*, 800 So. 2d at 636.

In the abundance of caution, however, we next address why the trial court's reasoning on the Treaces' "get to" costs was correct.

B. The trial court correctly reasoned that the Treaces' "get to" costs were covered.

Our analysis, like the trial court's analysis, starts with MCC's fatal concession. That is, barring an exclusion, the rotted wood was "property damage" covered under MCC's policies. (MCC Initial Br. 19.) As such, under *J.S.U.B.*, MCC admits that, for this property damage, it must pay the Treaces' "cost for removing and replacing [the] rotted wood." (*Id.*) But, inexplicably, MCC denies that it must pay for the costs to "get to," or access, that rotted wood. (*See* MCC Initial Br. 17-

20.) Specifically, MCC denies that it must pay the Treaces' "rip and tear" costs to remove the balcony, tiles, stucco, windows, etc. so that their contractor could access and replace the rotted wood. (*See id.*) MCC further denies that it must pay for the costs to reinstall or replace the balcony, tiles, stucco, windows, etc. that had to be removed to access the rotted wood. (*See id.*) MCC provides no principled reason why the costs to actually remove and replace the rotted wood are covered but the costs to access that rotted wood are not covered.

Under MCC's policies, MCC had to pay for any damages that its insured, SDD, was "legally obligated to pay [the Treaces] as damages because of . . . property damage." (MCC Initial Br. 7 (quoting Section I, Coverage A, Paragraph 1.a of MCC's policies).) As MCC has admitted that the rotted wood was "property damage," the only remaining question then is whether SDD was legally obligated to pay as damages the Treaces' costs to access that rotted wood. The judgment and the verdict from the underlying action established that SDD was so legally obligated. (Supp. R., Vol. 6, at pp. 24-27, 29-33.)

Florida law also established that MCC's insured, SDD, was legally obligated to pay the Treaces' access costs. For construction contracts, "[i]f defective construction can be repaired, the proper measure of the owner's damages is the cost to repair which substantially gives the owner that to which he is entitled either under [the] contract. *Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552

So. 2d 228, 231 (Fla. 5th DCA 1989). Stated another way, "a recognized measure of damages is the reasonable cost of performing construction and repairs in conformance with the original contract's requirements." *Centex-Rooney Constr. Co., Inc. v. Martin County*, 706 So. 2d 20, 27 (Fla. 4th DCA 1997) (citing *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037, 1039 (Fla. 1982)); *accord Temple Beth Sholom & Jewish Ctr., Inc. v. Thyne Constr. Corp.*, 399 So. 2d 525, 526 (Fla. 2d DCA 1981). Simply put, the awarded damages should "restore the injured party to the condition he would have been in if the contract had been performed." *Grossman Holdings*, 414 So. 2d at 1039.

Under these elementary principles, the Treaces were entitled to damages that compensated them for their "reasonably necessary" costs to remove and replace the rotted wood, including any reasonably necessary "get to" or "rip and tear" costs. *See Centex-Rooney*, 706 So. 2d at 27. The trial court faithfully carried out its duty to ensure that MCC was ordered to pay only such "reasonably necessary" costs. For example, the trial court denied the Treaces' claim to replace the removed windows with more expensive, upgraded windows. (R. Vol. 3, at pp. 578-80.)

The trial court's determination of the "reasonably necessary" costs to repair the rotted wood was a question of fact, and it must be affirmed because it was supported by competent substantial evidence. *See, e.g., Pearce & Pearce, Inc. v. Kroh Bros. Dev. Co.*, 474 So. 2d 369, 371 (Fla. 1st DCA 1985) (deferring to the trial

court's determination on whether costs to repair water damage were reasonable and noting that such a determination is generally a question of fact). That competent substantial evidence was the Treaces' expert witnesses. They testified as to why they had to take a "peel the onion" approach to repair the rotted wood. *See supra* at 6-7. This "peel the onion" approach required the removal of various items (windows, stucco, stones, etc.). *See supra* at 7. These experts also testified that the Treaces' costs were reasonable and necessary to repair the water damage. *See supra* at 8. Based on this expert testimony, the trial court found, as a factual matter, that "[i]n order to *get to* the damaged wood, the Treaces' repair contractor had to remove the vast majority of the stucco around the home and remove all the windows in the home." (R. Vol. 3, p. 577.)

Because the trial court's factual finding was supported by competent substantial evidence, this Court must affirm. *See e.g.*, *Pearce & Pearce*, 474 So. 2d at 371. Additionally, at no point in the trial or appellate proceedings has MCC challenged the sufficiency of the trial court's findings. This failure means that MCC has waived any such challenge.[9] Also, having failed to raise such a challenge in its

[9] MCC has not argued in its appellate brief that the trial court's findings were insufficient; thus, it has waived any such challenge on appeal. *See Fla. Emergency Physicians-Kang & Assocs.*, 800 So. 2d at 636. MCC also failed to properly preserve such a challenge in the trial court. This Court, in family law cases, requires any objections to the sufficiency of a trial court's findings be preserved by a motion for rehearing filed in the trial court. *See, e.g. Spreng v. Spreng*, 5D14-2369, 2015 WL 376395, at *1 (Fla. 5th DCA Jan. 30, 2015); *see also Esaw v. Esaw*, 965 So. 2d 1261,

initial brief (or in the trial court), MCC is precluded from raising it in its reply brief for the first time. *E.g.*, *Hagood v. Wells Fargo N.A.*, 112 So. 3d 770, 772 (Fla. 5th DCA 2013).

The recent *Carithers* opinion from the Eleventh Circuit involving MCC demonstrates that this Court must affirm the trial court's factual finding. *See Carithers v. Mid-Continent Cas. Co.*, Case No. 14-11639, 2015 WL 1529038, slip op. at 21 (11th Cir. April 7, 2015).[10] There, the trial court found that the homeowners' balcony was defectively constructed, and this defect caused damage to the garage. *Id.* Similar to the defects in the Treaces' home, the defect in the *Carithers* balcony allowed water intrusion into the garage's ceilings and walls, which in turn caused wood rot. *Id.* at 6. Even though the defectively constructed balcony was not "property damage" under MCC's policy, the district court found that, to repair the garage, the balcony had to be rebuilt. *Id.* at 21. On appeal, MCC argued that no coverage existed for any defective work, "even where repairing that

1265 (Fla. 2d DCA 2007) (noting that lack of required findings in a dissolution case does not constitute fundamental error). Other Florida appellate courts have imposed this same preservation requirement in civil cases when an arguable error appears for the first time on the face of the trial court's order. *See GEICO Gen. Ins. Co. v. Williams*, 111 So. 3d 240, 246 (Fla. 4th DCA 2013); *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011) (citing cases). This Court should do the same.

[10] As noted previously, the trial court expressly relied on, and quoted from, the federal district court's decision in *Carithers* to support its ruling on "get to" costs. (R. Vol. 3, p. 578.)

work is a *necessary* cost of repairing work for which there is coverage." *Id.* (emphasis added).

The Eleventh Circuit rejected MCC's argument and held:

> We hold that the district court did not err in awarding damages for the cost of repairing the balcony. Under Florida law, the [homeowners] had a right to "the costs of repairing damage caused by the defective work . . . ." *J.S.U.B*, 979 So.2d at 889. Since the district court determined that repairing the balcony was part of the cost of repairing the garage, which was defective work, the [homeowners] were entitled to these damages.

Id. The rulings of other courts, construing others states' laws, comport with this holding by the Eleventh Circuit that access, "rip and tear," and "get to" costs are covered, as the authorities cited in the foonote exemplify.[11]

The Eleventh Circuit's holding is on "all fours" with the instant case. In its brief, MCC argues that the items removed to gain access to the rotted wood (i.e., the stucco, the balcony, etc.) were not "property damage" under the CGL policies, and

---

[11] *See Indian Harbor Ins. Co. v. Transform LLC*, No. C09-1120 RSM, 2010 WL 3584412, at *5-6 (W.D. Wash. 2010) ("rip and tear" damages were covered third-party damages resulting from insured's defective work); *Riverfront Landing Phase II Owners' Ass'n v. Assurance Co. of Am.*, No. C08-0656RSL, 2009 WL 1952002, at *6 (W.D. Wash. 2009) (cost to remove and repair insured's work to "get to" and repair resultant damage is covered consequential damages); *Clear, LLC v. Am. & Foreign Ins. Co.*, No. 3:07-CV-00110 JWS, 2008 WL 818978, at *7 (D. Alaska 2008) (finding coverage for costs of removing and replacing other materials to gain access to the damaged property); *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 674 (Mo. Ct. App. 2007) (finding coverage for costs of removing and replacing non-defective sub-floor and framing to access and repair defective concrete foundation).

thus, MCC contends, the cost to remove and replace or re-install these items was not covered. (MCC Initial Br. 17-20.) The Eleventh Circuit's holding repudiates any such argument. It is not relevant whether or not the various removed items were themselves "property damage" under MCC's policy. *Carithers*, Case No. 14-11639, slip op. at 21. Indeed, in *Carithers*, the removed item (the balcony) was not "property damage." *Id.* All that matters is whether the removal of the items was a *necessary part of the cost* to repair the covered property damage. *Id.*; *see also Centex-Rooney*, 706 So. 2d at 27 (holding that the awardable damages are those "reasonably necessary" costs for effectuating the repairs).

Applying the Eleventh Circuit's *Carithers* holding to this case, MCC has admitted the rotted wood in the Treaces' home was covered "property damage." (MCC Initial Br. 19.) Like the federal district court in *Carithers*, the trial court here factually found that the removal and reinstallation or replacement of several items were necessary to gain access to, and repair, the rotted wood. (R. Vol. 3, pp. 576-78.) Because these findings were supported by competent substantial evidence (and have not been challenged by MCC as insufficient), this Court must affirm under the rationale of *Carithers* (and under the supreme court's *J.S.U.B.* and *Pozzi* decisions).

Granted, *Carithers* was not a total loss for MCC. It won in *Carithers* on its "component" argument. Slip op. at 15-20. But, as we explain next, MCC should lose on that argument in this case.

C. The trial court's "get to" ruling renders MCC's "component" argument irrelevant, and that argument is misguided, as it is based on an Eleventh Circuit decision that misconstrued our supreme court's precedent.

MCC prevailed in *Carithers* on what can best be characterized as a "component" or "single subcontractor" argument. *See* slip op. at 15-20. This argument, as *Carithers* explains, is premised on an earlier Eleventh Circuit decision, *Auchter*, in which that court "narrowly" construed our supreme court's *Pozzi* decision. *See* slip op. at 16-17 (discussing *Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012) and *Auto-Owners Ins. Co. v. Pozzi Windows Co.*, 984 So.2d 1241 (Fla. 2008)). MCC has sprinkled its brief to this Court with "component" arguments. (*See, e.g.*, MCC Initial Br. 12, Heading A, arguing for a distinction between repair of "other components" damaged by a subcontractor's defective work as opposed to repair of a "subcontractor's own work" (capitalization altered); *id.* at 13 (arguing coverage exits only if "defective work . . . damages another component of the work"); *id.* at 17 (arguing that the same subcontractor applied the stucco to the lathe and installed the control joints and weep screed and that "all of this work together constituted a system that constituted only one component of work").) This "component" argument is irrelevant in light of the trial court's finding on "get to" costs. *Infra* Argument I.C.1, at 38-40. In any event, the "component" argument is wrong; the *Auchter* dissent, not the majority, correctly applied our supreme court's *Pozzi* decision. *Infra* Argument I.C.2, at 40-43.

1. The "component" argument is irrelevant in light of the trial court's "get to" ruling.

In essence, the "component" argument goes like this. If a subcontractor's defective construction causes damage only to his own work (a "component"), then such damage is not "property damage" under the standard GCL policy according to the Eleventh Circuit. *See Carithers*, slip op. at 16-20. The Eleventh Circuit's *Auchter* and *Carithers* cases best illustrate the nature of the "component" argument.

In *Auchter*, the roofing subcontractor's defective installation of the roof tiles caused damage to the defectively installed tiles themselves when they flew off during a storm, and these flying tiles, in turn, also damaged other tiles on the same roof. 673 F. 3d at 1296. The *Auchter* majority rejected coverage for any roof damage because, it held, a subcontractor's defective work must cause damage to some other "component" – i.e., some other subcontractor's work – to constitute covered "property damage" under the standard CGL clause. *See id.* at 1309-10; *see also Carithers*, slip op. at 20 (noting that "*Auchter* held that there is no coverage for a defective installation where there is no damage beyond the defective work of a single sub-contractor"). In *Carithers*, the negligent application of brick coating caused damage to the bricks. Slip op. at 17. Because the brick coating and brick installation were performed by the same subcontractor, the Eleventh Circuit held the damage to the bricks caused by the defective brick coating was not "property damage" under CGL policy. *Id.* at 17-19. Similarly, because the mud base and tiles

were installed by the same subcontractor, the damage to the tiles caused by the defective mud base installation did not constitute "property damage." *Id.*

In *Auchter* and *Carithers*, the owners/insureds failed to establish that the roof, bricks, and tiles were "property damage." Thus, the owners/insureds were not entitled to recover the costs to repair the roof, bricks, and tiles. In contrast, here, the Treaces have established, and MCC has admitted, that the rotted wood was "property damage" under the CGL policy. (MCC Initial Br. 19.) Thus, the Treaces are entitled to recover their reasonably, necessary costs to repair the rotted wood, including the cost to access the wood. *See supra* Argument II.B., at 46-55.

A hypothetical demonstrates why the trial court's "get to" ruling renders MCC's argument irrelevant. If the Treaces reasonably needed to erect scaffolding to access the rotted wood, it would be absurd for MCC to argue that it was not required to pay the costs for the scaffolding simply because the scaffolding was not "property damage." But that is essentially the (absurd) argument that MCC is making. MCC is arguing that, because the stucco, windows, etc. are purportedly not "property damage," it is not required to pay for the costs to remove these items, even though the removal of such items (like the erection of scaffolding) is reasonably necessary to access the rotted wood. As previously explained, *Carithers* rejected this exact same argument made by MCC in the context of the removal of a balcony

(that was not covered "property damage") to gain access to a garage (that was covered "property damage"). *See supra* at 34-35.

MCC's "component" argument is more than just irrelevant. It is also wrong, as we explain next.

2. The Eleventh Circuit in *Auchter* misconstrued Florida law and the supreme court's *Pozzi* decision. If this Court is going to address MCC's irrelevant "component" argument, it should adopt the *Auchter* dissent.

As the Eleventh Circuit acknowledged in *Carithers*, the "single subcontractor" or "component" argument originates in that court's *Auchter* decision, which "narrowly" interpreted our supreme court's *Pozzi* decision. *Carithers*, slip op. at 16-17 (discussing *Amerisure Mut. Ins. Co. v. Auchter Co.*, 673 F.3d 1294 (11th Cir. 2012) and *Auto-Owners Ins. Co. v. Pozzi Windows Co.*, 984 So. 2d 1241 (Fla. 2008)). This Court, of course, is not bound by a federal court's interpretation of Florida law. It may adopt the *Auchter* dissent as better reasoned. *See, e.g.*, *State v. Dwyer*, 332 So. 2d 333, 334-35 (Fla. 1976) (holding that lower federal court rulings are only persuasive, not binding, on Florida courts).

Auchter is a shaky precedent. It was 2-1 decision, with the majority opinion authored by Judge Tjoflat and the dissent authored by Judge Carnes. *Auchter*, 673 F. 3d at 1295, 1310. Judge Hill, the deciding vote, expressed doubts in his concurring opinion about whether the majority opinion that he joined was correct, and he would have preferred to have certified a question to the Supreme Court of

Florida. *Auchter*, 673 F. 3d at 1310 (Hill, J. concurring *dubitante*). The Eleventh Circuit in *Carithers* applied *Auchter*'s reasoning only because, unlike this Court, the *Carithers* panel was bound by *Auchter*. *Carithers*, slip op. at 16.

Judge Carnes' dissent is better reasoned than the majority opinion. As this Court must do, Judge Carnes faithfully applied the binding precedent of the supreme court's *Pozzi* decision rather than create a new strand of "component" jurisprudence. *See Auchter*, 673 F. 3d at 1311-13 (Carnes, J. dissenting). Judge Carnes' opinion is worth a read, as we cannot state his reasoning any better than he did.

Judge Carnes correctly interpreted *Pozzi* as follows. While an insured cannot recover the cost to repair a subcontractor's defective installation, an insured can recover the costs to repair any damage caused by the defective installation, including damage to the subcontractor's own work, or "component." *See id.* (Carnes, J. dissenting). The "defective component" language from *Pozzi* relied on by the *Auchter* majority precluded recovery only if the item being installed by the subcontractor was "*defective both prior to installation and as installed*." *Id.* at 1312 (Carnes, J. dissenting) (quoting *Pozzi*, 984 So. 2d at 1248).

In this case, no evidence exists in this record that windows or stucco, or any other item installed by a subcontractor, was defective "prior to installation." Thus, any property damage caused by a subcontractor's defective installation is covered,

even if that defective installation caused damage to a subcontractor's own work or "component." *See Auchter*, 673 F. 3d at 1311-13 (Carnes, J. dissenting).

Judge Carnes' broad, pro-insured reading of *Pozzi* comports with the insurance industry's own broad reading of the standard CGL policy. As Justice Lewis has noted:

> The ISO[,[12] issued by the insurance industry,] explains the broad form endorsement is intended to exclude only damages caused by the named insured[,i.e., the general contractor] *to his own work.* Thus, the insured would have coverage for damage to his work arising out of a subcontractor's work **and the insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.**

U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 894 (Fla. 2007) (Lewis, J. concurring in result) (second emphasis added) (internal quotations, alternations, and ellipses omitted). Judge Carnes' dissent also comports with the bedrock principle of Florida insurance law that any ambiguities in the insurance policy should be construed against the insurer and in favor of coverage. *E.g.*, *id.* at 877.

Accordingly, not only was the rotted wood covered "property damage," but so was the stucco, as the trial court factually found in the alternative. (R. Vol. 3, p. 577 n. 5.). Therefore, the costs to remove and replace the rotted wood and the stucco would be covered, even if, assuming *arguendo*, this Court were to reverse the trial

[12] MCC admits in its brief that the policies at issue here are ISO form policies. (*See* MCC Initial Br. 9.)

court's finding that the Treaces' "get to" costs were properly part of the recoverable costs to repair the rotted wood.

D. Alternative Requests for Relief

We request that this Court affirm the trial court's judgment with respect to the first issue. In the abundance of caution, however, we briefly state our alternative requests for relief if this Court were to disagree with our arguments. MCC's "component" argument is its only challenge to the trial court's alternative finding that the stucco damage was "property damage" covered under MCC's policies. Therefore, if this Court reverses the trial court's finding on the "get to" costs (which it should not do) but rejects MCC's component argument, then this Court should remand so the trial court can determine the costs to remove and replace the rotted wood and stucco minus the costs to access these two items. *See supra* at 7-8 & n. 4. As a second alternative, if this Court reverses the trial court's finding on "get to" costs (which it should not do) and accepts some variation of MCC's "component" argument (which it should not do), then it should remand for the trial court to determine: (i) the costs to merely remove and replace the rotten wood and (ii) the costs to be awarded for the damaged stucco in accordance with this Court's opinion.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING MCC'S UNTIMELY ASSERTION OF ITS FUNGUS-EXCLUSION DEFENSE.

Standard of Review. A trial court's decision on whether to allow an amendment to the pleadings to conform to the evidence is reviewed for an abuse of discretion. *E.g.*, *Hartong v. Bernhart*, 128 So. 3d 858, 861 (Fla. 5th DCA 2013); *see also supra* note 7 (discussing MCC's failure to state any standards of review in its initial brief and that it should be required to accept the standards in this brief).

Merits. The trial court found as a factual matter that MCC could have raised the fungus exclusion defense much earlier in the litigation. (R. Vol. 3, p. 575-76.) Because MCC delayed in raising the defense until after all the evidence had been submitted at trial, the trial court ruled it would not permit MCC to rely on the defense. (*Id.*) This ruling was not an abuse of discretion.

MCC's arguments for reversal should be rejected for two reasons. First, MCC makes arguments for the first time on appeal that were not preserved below. *Infra* Argument I.A., at 24-30. Second, the trial court did not abuse its discretion for a number of reasons. *Infra* Argument I.B., at 30-36.

A. MCC makes arguments for the first time on appeal that were not preserved below.

1. MCC's appellate argument on section 627.426(2)(a) was not preserved below.

MCC argues on appeal that section 627.426(2)(a) "cannot deprive MCC of the exclusion as a defense." (MCC Initial Br. 24-25.) MCC, however, never cites where in the record it made this argument. "In Florida, it is well-settled that '[t]o be preserved for appeal, the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.'" *Robinson v. State*, 963 So. 2d 254, 255 (Fla. 5th DCA 2007) (quoting *Spann v. State*, 857 So.2d 845, 852 (Fla.2003)). MCC is arguing on appeal a construction of section 627.426 that it never argued to the trial court.

Under basic preservation rules, MCC was required to first present its statutory argument to the trial court to give it an opportunity to correct the alleged error. *See, e.g.*, *Dorsey v. Reddy*, 931 So. 2d 259, 265 (Fla. 5th DCA 2006) ("To provide a trial court with the opportunity to correct errors, a timely objection is necessary.") Admittedly, the mention of section 627.426 may have arisen for the first time in the trial court's "garnishment" order. (R. Vol. 3, at 576.) Assuming this is true, MCC should have brought the alleged error to the attention of the trial court by way of a motion for rehearing or reconsideration. *See GEICO Gen. Ins. Co. v. Williams*, 111 So. 3d 240, 246 (Fla. 4th DCA 2013); *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d

321, 324 (Fla. 1st DCA 2011); *supra* at 33 n. 9. Because MCC never gave the trial court an opportunity to correct this alleged statutory error, MCC waived any argument on this alleged statutory error. *See Robinson*, 963 So. 2d at 255.

2. MCC did not argue below that the fungus exclusion applied as a matter of law.

On appeal, MCC has argued for the first time that the fungus exclusion applied "as a matter of law." (MCC Initial Br. 23.) But it cannot point to anywhere in the record that it ever argued that the fungus exclusion applied as a matter of law. MCC never filed a motion for summary judgment on the fungus exclusion, or any other similar motion. In fact, when he asked for permission to untimely assert the exclusion, MCC's counsel suggested to the trial court that it was an issue of fact that it could decide. (Tr. 236, 240); *see supra* at 10. MCC cannot make a "matter of law" argument on appeal when it failed to make that argument to the trial court in the first instance. *See, e.g.*, *Robinson*, 963 So. 2d at 255.

B. The trial court acted within its discretion when it denied MCC leave to amend the pleadings to conform to the evidence.

1. This Court should affirm for the same reasons the Eleventh Circuit did in *Carithers*.

MCC acknowledges that the trial court's ruling barring the fungus exclusion was adopted from, and based on the reasoning of, the federal district court's order in *Carithers*, which also barred MCC from raising the fungus exclusion as a defense because of MCC's delay in raising it. (MCC Initial Br. 22; R. Vol. 3, p. 575 (citing

Carithers, Case No. 3:12-cv-00890, Dkt. #126, p. 6, n. 2)). Just as it did in the Eleventh Circuit *Carithers* case, MCC argues as if the trial court's sole basis for barring the exclusion was section 627.426. (*Compare* MCC Initial Br. 22 *with Carithers*, Case No. 14-11639, slip op. at 13-15.) This Court should reject this argument, just as the Eleventh Circuit did.

The Eleventh Circuit in *Carithers* read the reasoning in the federal district court's ruling – which the trial court here adopted – as "denying the motion to amend." Slip op. at 14. By reading the trial court's order in this manner, the Eleventh Circuit found it unnecessary to address whether the district court's reliance on section 627.426(2)(a) was error. *Id.* This Court should read the trial court's written order in this case in the same manner. (R. Vol. 3, pp. 574-576.) At any time before the entry of a final judgment, the trial court was permitted to change its oral ruling at trial permitting the amendment. *See, e.g.*, *Seigler v. Bell*, 148 So. 3d 473, 478 (Fla. 5th DCA 2014) (noting that a trial court has the "inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment"). Accordingly, the trial court's written order receded from its oral order permitting the amendment. (R. Vol. 3, p. 576; Tr. 241-42)

The Eleventh Circuit in *Carithers* affirmed the district court's decision denying leave to amend. Slip op. at 13-15. This Court should do the same with

respect to the trial court's identical decision. The reasoning and circumstances given by the Eleventh Circuit for affirming are equally applicable to the instant case:

> [MCC] raised this issue[, the fungus exclusion,] for the first time at the close of the [homeowners'] case, after the [homeowners] had finished presenting evidence. Long before he testified at trial, the [homeowners'] expert had attested in an affidavit that "[d]ecay of wood components is the result of *decay-fungi* which consume the wood and are sustained by repeated wettings." (Aff. of Brett Newkirk, DE 21–2 at ¶ 9) (emphasis added). The [homeowners] filed the expert's affidavit containing that statement more than a year before the trial as a document in support of their motion for summary judgment. We agree with the district court that [MCC] was on notice of this issue since the inception of the case, and find no abuse of discretion in the district court's denial of the motion to amend its pleadings based on [MCC's] unreasonable delay.

Id. at 14-15.

Just as in the *Carithers* case, MCC in this case improperly waited until the close of all the evidence to assert for the first time the fungus exclusion defense. (Tr. 233-34.) MCC's representation to the trial court – there purportedly was "no way" it could have raised the fungus exclusion earlier (Tr. 235) – is belied by the *Carithers* opinion. Mr. Newkirk, who was the expert for both the Treaces and the *Carithers* homeowners, attested about "decay-fungi" long before the Treaces' trial and the *Cartihers* trial. *See supra* at 48. Moreover, MCC previously has raised this fungus exclusion as affirmative defense in other cases alleging property damage from water intrusion and wood rot. *See, e.g.*, *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d. 1293, 1312, 1320, 1345 (S.D. Fla. 2010).

Accordingly, MCC had no valid excuse for its failure to raise the fungus exclusion earlier. The trial court did not abuse its discretion when it found that, long before it raised the fungus exclusion, MCC knew the following: (i) the Treaces' had claimed water damage and wood rot for many years; (ii) that "rot," as defined by a dictionary, was the "decomposition from the action of bacteria or fungi;" and (iii) the scientific cause of wood rot. (R. Vol. 3, pp. 575-76.) MCC could have asked Mr. Newkirk about fungus at his deposition. It could have retained its own expert to investigate the Treaces' wood rot. It could have moved for leave to amend its defense before trial, or it could have included such a defense in the pre-trial statement. But what MCC was not permitted to do was to lie in wait, elicit testimony at trial from Mr. Newkirk about fungus, and then wait until after the close of the evidence to raise the fungus exclusion as a defense. Given these facts, the trial court here, like the federal district court in *Carithers*, did not abuse its discretion when it denied MCC permission to rely on the fungus exclusion as an affirmative defense.

2. The Court should affirm based on Florida pleading and procedural law.

Affirmance of the trial court's decision to deny the fungus exclusion is not only supported by the *Carithers* opinion, but also by several other reasons grounded in Florida law.

a. *The Treaces never consented to try the fungus exclusion.*

A party may be granted leave to amend to conform to the evidence only if the new claim or defense was "tried by express or implied consent of the parties." Fla. R. Civ. P. 1.190(b); *see also Frenz Enters., Inc. v. Port Everglades*, 746 So. 2d 498, 503-04 (Fla. 4th DCA 1999) (affirming trial court's denial of leave to amend in part because the newly raised issue was not tried by express or implied consent of the parties). At no time did the Treaces consent to trying the fungus exclusion, either expressly or impliedly. To reiterate, MCC unilaterally tried the fungus issue for the first time when cross examining Mr. Newkirk, the last witness to testify at the trial. (Tr. 217.) The Treaces' counsel never asked any question of any witness concerning fungus, expect during the re-direct examination of Mr. Newkirk in response to MCC's cross-examination. (Tr. 217-18.)

b. *MCC's delay in raising the fungus exclusion prejudiced the Treaces.*

While generally courts liberally construe Rule 1.190(b) to allow amendments, that rule of liberal construction does not apply when the "proposed amendment would change the basic issue in the case or materially vary the originally asserted grounds for relief." *Frenz Enters.*, 746 So. 2d at 503-04. Similarly, the proposed amendment should not be allowed where, as here, a party seeks to add an "entirely new" cause of action or defense. *See Black v. Brown*, 812 So. 2d 581, 582 (Fla. 3d

DCA 2002). Such amendments materially prejudice the party opposing the amendment. *See Frenz Enters.*, 746 So. 2d at 503-04.

Here, the basic issues for trial were limited and specifically set forth in the parties' pre-trial stipulations and statement. (Supp. R. Vol. 11, pp. 860-62, 871-902.) The stipulated factual issues were: (i) when did the Phase I and Phase II property damages occur; and (ii) whether the windows and doors were damaged by water intrusion. (Supp. R. Vol. 11, pp. 871-872.) These stipulated factual issues were very different from the factual issues related to MCC's fungus exclusion. The fungus exclusion involved a factual issue as to whether fungi had caused the wood rot. The Treaces were not prepared to try this brand new factual issue raised by MCC after the close of the evidence. By waiting so late to raise the fungus exclusion, MCC prejudiced the Treaces because they had no opportunity to prepare their case to rebut this exclusion.

c. *The pre-trial stipulations and statement precluded MCC from trying the fungus exclusion.*

Before the trial, the parties filed two stipulations and a joint pretrial statement. (Supp. R. Vol. 11, pp. 860-62, 871-902.) In one stipulation, the Treaces agreed to waive their right to a jury trial based on MCC's representation that only certain factual issues – unrelated to the fungus exclusion – were to be raised. (Supp. R. Vol. 11, pp. 871-73.) These stipulations and statement should have been strictly enforced and barred MCC from raising the fungus exclusion at trial.

A pretrial stipulation is a case management tool governed by Fla. R. Civ. P. 1.200. *See Cent. Square Tarragon LLC v. Great Divide Ins. Co.*, 82 So. 3d 911, 914 (Fla. 4th DCA 2011). A stipulation "that limits the issues to be tried amounts to a binding waiver and elimination of all issues not included." *Id*. The stipulation prescribes the issues to be tried, is "binding upon the parties and the court, and *should be strictly enforced*." *Id.* Further, the courts have a policy to "encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes." *Id.*

This case presents a perfect example of a pre-trial stipulation that minimized litigation and thus should be strictly enforced. In particular, in the pre-trial stipulation, the Treaces relinquished their right to a jury trial on the condition that only the factual issues mentioned in the stipulation would be tried. (Supp. R. Vol. 11, pp. 871-73.) Had the Treaces known that the fungus exclusion also was going to be part of the trial, they may not have waived their right to a jury trial. By waiving their right to a jury trial, the Treaces conserved judicial resources by avoiding the additional expense and time involved in a jury trial. They also reduced litigation because, without a jury sitting, the trial court did not have to prepare jury instructions or be as concerned about evidentiary rulings; both these areas (jury instructions and evidentiary rulings at jury trials) often trigger additional litigation at the trial and appellate level. Fairness and reasonable expectations would counsel that the parties'

pre-trial stipulation be strictly enforced. Allowing MCC to amend would have violated the stipulation and all of the aforementioned judicial policies.

d. *Any amendment would have been futile and thus any alleged error in disallowing the amendment was harmless.*

The trial court correctly denied the amendment because it would have been futile. *See Kalmanson v. Lockett*, 848 So. 2d 374, 381 (Fla. 5th DCA 2003) (affirming denial of leave to amend where amendment would have been futile). Alternatively and in a similar vein, any error in disallowing the amendment was harmless. *See generally, e.g., Estate of Vazquez v. Avante Groups, Inc.*, 880 So. 2d 723, 725-26 (Fla. 5th DCA 2004) (affirming under harmless error doctrine). For both these reasons, the trial court's decision should be affirmed.

MCC, as the insurer, bore the burden of proving the fungus exclusion. *See Wilshire Ins. Co. v. Poinciana Grocer, Inc.*, 151 So. 3d 55, 57 (Fla. 5th DCA 2014). Here, the plain language of the insurance policy required MCC to prove that fungus caused the property damage, i.e., the wood rot. (*See* MCC Initial Br. 8 (quoting the fungus exclusion as barring coverage when the "property damage . . . [is] arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus").) Generally, questions of proximate causation are questions of fact that must be resolved by the finder of fact. *See, e.g., Olson v. Crowell Plumbing & Heating Co., Inc.*, 48 So. 3d 139, 143 (Fla. 5th DCA 2010) ("The circumstances

under which a court may resolve proximate cause as a matter of law are extremely limited" (internal quotations omitted).)

In this case, MCC never argued to the trial court that, as a matter of law, fungus caused the wood rot. To the contrary, when seeking leave to assert the fungus exclusion, MCC's counsel repeatedly stated that it would be up to the trial court – which was sitting as the finder of fact – to decide whether the exclusion applied. (Tr. 236, 240); *see supra* at 10. The only evidence that MCC presented of causation was the cross-examination testimony of Mr. Newkirk, the Treaces' expert. *See supra* at 9.

The trial court plainly was not persuaded, as a finder of fact, by MCC's only evidence on causation. In its oral comments, the trial court disagreed that Mr. Newkirk had testified that fungus, and not water, caused the wood rot. (Tr. 234.) Instead, the trial court found Mr. Newkirk's testimony to be that water and fungus were "codependent," i.e., fungus does not exist without water. (Tr. 234-35.) Then, twice, the trial court commented that allowing MCC to assert the fungus exclusion would not "make[] a hoot of [a] difference," or words to that effect. (Tr. 241-42.) Clearly, the import of all these comments was the trial court, sitting as finder of fact, was not persuaded that MCC had proven that the fungus caused the wood rot. Thus, any amendment allowing the fungus exclusion would have been futile, and any error in not allowing the amendment was harmless.

* * * * *

In conclusion on the second issue, this Court should affirm the trial court's decision on the fungus exclusion. Some arguments raised by MCC on appeal (its construction of section 627.426(2)(a) and that the exclusion applies as "a matter of law") were not made below and thus were not preserved. Based on the reasoning in the Eleventh Circuit's *Carithers* opinion, the trial court did not abuse its discretion in denying MCC's motion to untimely raise the fungus exclusion as an affirmative defense. The trial court's decision also was not an abuse of discretion because: (i) The Treaces never tried the exclusion by consent; (ii) the Treaces would have been prejudiced by the untimely amendment; (iii) the amendment violated the parties' pre-trial stipulation; and (iv) the amendment would have been futile and the failure to allow it, if error, was harmless.

ARGUMENT ON CROSS-APPEAL

III. THE TREACES' CLAIM FOR ATTORNEY'S FEES FROM THE UNDERLYING LITIGATION WAS COVERED UNDER MCC'S POLICIES.

Standard of Review. This issue was decided by the trial court pre-trial, without an evidentiary hearing, when ruling on MCC's motion *in limine*. *See supra* at 16-19. The issue involves strictly an interpretation of an insurance contract.

Thus, a *de novo* standard of review applies. *E.g.*, *State Farm Florida Ins. Co. v. Campbell*, 998 So. 2d 1151, 1153 (Fla. 5th DCA 2008).

Merits. The Treaces win on this issue because of this Court's recent decision in *Geico General Insurance Co. v. Hollingsworth*, 157 So. 3d 365 (Fla. 5th DCA 2015). There, this Court addressed whether a liability insurance policy covered an attorney's fees judgment entered against an insured under a policy provision materially indistinguishable from the supplementary payment provision at issue in this case. *See id.* at 366. The *Hollingsworth* provision stated as follows:

> ADDITIONAL PAYMENTS WE WILL MAKE UNDER THE LIABILITY COVERAGES
> ....
> 2. All court costs charged to an *insured* in a covered lawsuit.

Id. This Court concluded this language meant that the insurer had to cover the attorney's fees judgment entered against the insured in the underlying suit. *Id.*

In reaching this conclusion, this Court relied primarily on two cases from the Third District in which attorney's fees taxed against an insured in an underlying action were deemed covered under a liability policy. *Id.* at 366-69 (citing *Geico Gen. Ins. Co. v. Rodriguez*, 155 So. 3d 1163, 1172 (Fla. 3d DCA 2014) and *Tri-State Ins. Co. of Minnesota v. Fitzgerald*, 593 So. 2d 1118, 1119 (Fla. 3d DCA 1992)). The policy language in *Rodriguez* was identical to the policy language in *Hollingsworth*. *Id.* at 367 & n.2. The policy language in *Fitzgerald*, though not identical, was very similar to the policy language in *Hollingsworth*; specifically it

stated as follows: "in addition to the applicable limit of liability: [A]ll costs taxed against the Insured, in any suit defended by the Insurer(s)." *Id.* at 367 (quoting *Fitzgerald*, 593 So. 2d at 1119).

Comparing the pertinent policy provisions from these three cases (where coverage was found under a liability policy) to the provision in this case highlights how similar all these provisions are to one another:

Hollingsworth and *Rodriguez* cases
"All court costs charged to an *insured* in a covered lawsuit."

Fitzgerald case
"All costs taxed against the Insured, in any suit defended by the Insurer(s)."

Treaces' case
"All costs taxed against the insured in the 'suit'."

The provision in this case cannot be materially distinguished from the provision in *Hollingsworth* or the provisions in the two cases on which *Hollingsworth* relied.

Accordingly, this Court's *Hollingsworth* decision finding coverage controls the outcome of this case. Thus, the supplementary payment provision in MCC's policies covered the judgment for $316,528 in attorney's fees entered in the underlying action against SDD (MCC's insured) and in favor of the Treaces. (Supp. R., Vol. 8, at p. 500; Supp. R. Vol. 11, pp. 793-97.)

In response, MCC may note that the focus of the litigation in the trial court was not on the supplementary payment provision, but rather on whether attorney's fees from the underlying suit were covered "damages" under the general "property

damage" provision and this Court's decision in *Scottsdale Insurance Co. v. Haynes*, 793 So. 2d 1006 (Fla. 5th DCA 2001). *See supra* at 16-18. Though this is true, it is irrelevant. The Treaces preserved their argument about the supplementary payment provision when their counsel argued as follows: "There's also coverage under the supplemental coverage there, A and B, there are other portions of the policy that provide for coverage for costs and fees that result from -- in addition to the direct damages." (2d Supp. R. 76:6-10.) MCC's counsel understood the exact provisions to which the Treaces were referring and the nature of their argument when he shot back: "They're . . . not costs. Mr. Whelan[, the Treaces' counsel,] is incorrect on that argument." (2d Supp. R. 76:20-77:1 (emphasis added).) Accordingly, the Treaces' argument was sufficiently preserved.[13]

CONCLUSION

For the reasons argued in Arguments I and II above, this Court should affirm the trial court's judgment in the garnishment action insofar as it requires MCC to pay the Treaces $906,648 plus applicable interest. If this Court is inclined to reverse

[13] As former Judge Padovano has stated in his treatise:

> Given the differences between a trial and an appeal, the legal arguments made in the lower tribunal are usually not as detailed as the arguments ultimately presented to the appellate court. The preservation of error requirement does not demand that trial attorneys prepare arguments or objections in the trial court as if they were points in an appellate brief.

Philip J. Padovano, *Florida Appellate Practice*, § 8:1 (2015 ed.)

this judgment for the reasons set forth in MCC's initial brief, then the Treaces request the alternative relief set forth in Argument I.D., *supra* at 43. On the cross-appeal, the trial court should be reversed insofar as it ruled that MCC's insurance policies did not cover the judgment in the underlying action for attorney's fees entered against SDD and in favor of the Treaces. On remand, the trial court should be instructed by this Court to enter a new judgment or amended judgment against MCC and in favor of the Treaces for $316,528 plus all applicable pre-judgment and post-judgment interest.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/ *Bryan S. Gowdy*
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
(904) 350-0075 Telephone
(904) 503-0441 Facsimile
Attorney for Appellees/Cross-Appellants
James T. Treace and
Angeline G. Treace

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished to the following counsel of record by e-mail on April 13, 2015:

John R. Catizone
catizone@litchfieldcavo.com
hudson@litchfieldcavo.com
Dara L. Schottenfeld
schottenfeld@litchfieldcavo.com
ftlsec@litchfieldcavo.com
Litchfield Cavo, LLP
600 Corporate Drive, Suite 600
Fort Lauderdale, FL 33334
Attorneys for Appellant/Cross-Appellee Mid-Continent Casualty Co.

Edward M. Whelan
ed@whelanpa.com
anita@whelanpa.com
monique@whelanpa.com
Whelan Construction Law, P.A.
2700 University Boulevard West, Suite C2
Jacksonville, FL 32217
Co-Counsel for Appellees/Cross Appellants James T. Treace and Angeline G. Treace

Lanny M. Feldman
lfeldmanpa@aol.com
71 N.E. 27th Avenue
Larry M. Feldman, P.A.
Pompano Beach, FL 33062
Attorney for Defendant Doesn't Mean Anything, Inc. and Garnishee Lee Rautenberg

Tracy L. Wenzel
wenzel@jax-law.com
ltodd@jax-law.com
Heekim, Malin & Wenzel, P.A.
P.O. Box 477
Jacksonville, FL 32201
Attorney for Architectural Windows & Cabinets, Inc.

James E. Kallaher
jkallaher@bnlaw.com
Law Office of Bodhan Neswiacheny
151 College Drive, Ste. 1
Orange Park, FL 32065
Attorney for Stevenson Design and Development

Harbour Island Joint Venture III
c/o JC Design Management Company as Managing Venturer of Harbor Island Joint Venture, III
5301 N. Federal Highway, Suite 380
Boca Raton, FL 33487
VIA U.S. MAIL

Carl D. Dawson
cdd@dawsonorr.com
Dawson Orr, P.A.
50 N Laura Street Ste. 1675
Jacksonville, FL 32202
Attorney for Ryskcon Construction Inc.

JC Design Management Company
c/o Ms. Judy Chefan
5301 N. Federal Highway, Suite 380
Boca Raton, FL 33487
VIA U.S. MAIL

Huntington Builders, Inc.
c/o Stephen F. Chefan
15650 Enstrom Road
Wellington, FL 33414
VIA U.S. MAIL

/s/ Bryan S. Gowdy
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Bryan S. Gowdy
Attorney