**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, et al.

Appellees/Cross-Appellants,
_____/

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# APPELLANT MID-CONTINENT CASUALTY CO.'S CONSOLIDATED REPLY BRIEF AND ANSWER BRIEF TO CROSS-APPEAL

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## 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.]: [Page(s)]) indicating record volume and page numbers.

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.]: [Page(s)]) indicating supplemental record volume and page numbers.

## ARGUMENT

### I. REBUTTAL ARGUMENT TO ARGUMENTS PRESENTED IN THE TREACES' ANSWER BRIEF.

#### A. The Trial Court Erred As A Matter Of Law In Finding Coverage For The Removal And Replacement Of Defective Work.

As stated in MCC's initial brief, the trial court erred as a matter of law in ruling that all claimed damages other than the cost of new windows constituted "property damage" under MCC's CGL policies. The law in Florida, and in particular under *J.S.U.B.* and *Pozzi Windows*, is that there is no coverage for the removal and replacement of defective work. *See United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *See Auto-Owners Ins. Co. v. Pozzi Window Co.*, 984 So. 2d 1241 (Fla. 2008). There is only coverage for the removal and replacement of property damage caused by one subcontractor's defective work to a different component of the work, i.e., a different subcontractor's work.

Notwithstanding *J.S.U.B.* and *Pozzi Windows*, however, the trial court found coverage for the removal and replacement of defective stucco work, the removal and replacement of defective stone and deck work that was not physically damaged, and the removal and replacement of a defectively installed balcony. Finally, the court found coverage for the installation cost of new windows even though the court found that the windows were not damaged. MCC contends that

there is no controlling precedent that allowed the trial court to find coverage for those damages.

In their brief, the Treaces concede that under *J.S.U.B.* and *Pozzi Windows,* CGL coverage "extends to costs to repair damages caused by construction defects, but not to repair or replace the defective work itself." (Treace Answer Brief at 26-27).[1] That should be the end of the discussion, and this Court should reverse on that basis alone.

Having made that concession, the Treaces nevertheless contend that there should be coverage for the removal and replacement of defective work if that work must be removed to "get to" other damaged, nondefective components. However, the Treaces have not cited to, and cannot cite to, any controlling precedent for that proposition. Likewise, in its Judgment In Garnishment Proceeding, the trial court did not cite to any controlling precedent for the proposition that "get to" damages fall within a CGL policy's coverage. (R. III: 558-583).

The Treaces cite to a federal decision, *Carithers v. Mid-Continent Cas. Co.,* 782 F. 3d 1240 (11th Cir. 2014), for that proposition even though they also criticize the *Carithers* decision for virtually all of its other propositions, and even though the part of the *Carithers* appellate case they rely on is currently the subject

[1] The Treaces also attempt to argue that MCC has waived the issue by purportedly failing to address the trial court's reasoning, relying on cases stating that points must be raised on appeal in the argument section. MCC has indeed raised its points in the argument section of its initial brief, namely that the trial court ignored binding precedent, *J.S.U.B.* and *Pozzi Windows.* The Treaces' "waiver" argument is nonsensical.

of a petition for rehearing. Also, the Treaces argue that this Court should ignore that part of the *Carithers* decision discussing "components," that this Court should ignore the majority decision in *Amerisure v. Auchter*, and that the Court should instead adopt the dissenting opinion in *Auchter. See Amerisure Mutual Ins. Co. v. Auchter Co.,* 673 F. 3d 1294 (11th Cir. 2012). (Treace Answer Brief at 40).

The Treaces fail to note and/or fail to point out to this Court that the dissenting judge in *Auchter* was Chief Judge Carnes and that Chief Judge Carnes was also on the panel in *Carithers*, where the panel followed *Auchter* and Chief Judge Carnes did not dissent. In other words, the Treaces are asking this Court to adopt a dissenting opinion of a judge who no longer maintains the positions asserted in a prior dissent. This Court must reject that invitation.

The Treaces also cite four cases from other jurisdictions where courts have found coverage for "get to" damage while ignoring all of the decisions where courts in other jurisdictions have found no coverage for "get to" damage. (Treace Answer Brief at 35). Thus, the Treaces have demonstrated a complete lack of candor with this Court.

As discussed in MCC's initial brief, the courts make significant distinctions between (1) defective work that is not physically damaged, (2) defective work that only damages itself but not another component of the work, and (3) defective work that damages another component of the work. Only the latter category, i.e.,

physical damage caused by one subcontractor's work to the work of a different subcontractor, i.e., a different component of the general contractor's work, constitutes "property damage" under *J.S.U.B.*, *Pozzi Windows* and their progeny. The first two categories, however, do not constitute "property damage" under the case law. For those categories of damages, one need not even consider exclusions because the policy's insuring agreement, i.e., the grant of coverage requiring "property damage," has not been met.

### B. There Is No Coverage For The Removal And Replacement Of The Stucco, Stone, Decks, And Balcony, Or The Installation Costs Of The Windows.

Throughout their brief the Treaces attempt to suggest that there is coverage for the removal and replacement of defective work if it needs to be removed in order to "get to" other damaged components of the work. As stated above, the Treaces have not cited to a single controlling precedent for that proposition. Further, they cite to a federal case, *Carithers,* which is currently the subject of a petition for rehearing. Finally, they cite to four cases applying the law of other jurisdictions and finding coverage for "get to" damage while ignoring the cases finding no coverage for "get to" damages. (Treace Answer Brief at 35).

As a matter of first impression in Florida, this Court should consider whether it serves public policy to allow coverage for "get to" damages and the potential consequences of such a finding. Under *J.S.U.B., Pozzi Windows,* and *Auchter,*

there is no "property damage" and therefore no coverage where a contractor's defective work only damages itself. But if the work is so defective that it not only damages itself but also damages another component of the work, then the contractor gets the benefit of coverage for the removal and replacement of the other components. That is the law of *J.S.U.B.* and *Pozzi Windows.* But the legal position the Treaces are asking this Court to take is to reward the contractor for his defective work by finding coverage not only for the removal and replacement of the other component but also for the contractor's defective work. Such a finding would encourage sloppy workmanship, clearly an undesirable result.

Second, finding coverage for "get to" damages necessarily circumvents a coverage analysis and applies instead a liability analysis, i.e., it treats the removal and replacement of defective work as either "reasonably necessary" or as a measure of the damages for replacing the other components. But whether a contractor must pay "reasonably necessary" costs to a property owner has nothing to do with a coverage analysis. Instead, finding coverage for defective workmanship because it is "reasonably necessary" in order to get to covered damage would result in allowing coverage indirectly for what is not covered directly under *J.S.U.B.* and *Pozzi Windows*. At least as of this date, there is no controlling precedent for doing so, and this Court should not venture beyond the controlling Supreme Court precedent.

As stated above, the Treaces cite four cases from other jurisdictions where courts have found coverage for "get to" damages, without discussing contrary authority. MCC asks this Court to consider the following cases where courts in other jurisdictions found no coverage for "get to" damages. (Treace Answer Brief at 35).

In *H.E. Davis & Sons, Inc. v. North Pacific Ins. Co.,* 248 F. Supp. 2d 1079 (D. Utah 2002), a federal court applied Utah law and found no coverage for redoing the insured's defective soil compaction work even though another contractor's concrete footings had to be removed because there was no "occurrence," i.e., no "accident" and no "property damage" under Utah law and because the policy excluded "damage to your work."

In *OneBeacon Ins. Co. v. Metro Ready-Mix, Inc.,* 427 F. Supp. 2d 574 (D. Md. 2006), a federal court applied Maryland law and found that where the insured's defective grout work necessitated the removal and destruction of other work, there was no coverage because there was no "occurrence," i.e., no "accident" and no "property damage." In *Desert Mountain Properties Limited Partnership v. Liberty Mutual Fire Ins. Co.,* 236 P. 3d 421 (Ariz. App. 1st Div. 2010), the court found that the damage to otherwise non-defective property was a cost of removing and replacing the contractor's defective soil compaction, and defective work is not covered.

Also, although it involves slightly different facts than this case, *NAS Surety Group v. Precision Wood Products, Inc.,* 271 F. Supp. 2d 776 (M.D.N.C. 2003) is informative. In that case, in order to replace defective cabinetry and millwork the contractor necessarily cause property damage to other components of the work. The court ruled that such damage was not for an "occurrence" because it was not "accidental" or "unexpected." The same is true in this case. In order to "get to" the rotted wood, the contractor removed undamaged stone and decks. The removal and destruction of the stone and decks was intentional and therefore not an "occurrence," i.e., not "accidental."

In summary, the removal of an insured's defective workmanship, whether damaged or not, to "get to" another damaged non-defective component of the work is not "property damage" under *J.S.U.B.* and *Pozzi Windows.* Treating the removal and replacement of defective work as the cost or removing and replacing non-defective work would allow coverage indirectly for what is not covered directly under *J.S.U.B.* and *Pozzi Windows* by circumventing a coverage analysis altogether. Moreover, the result would be that although a contractor is not entitled to coverage for damaging only his own work, he gets the benefit of coverage for his own defective work if he is fortunate enough to have also damaged the work of others. There is no logical rationale for providing such benefit to contractors. It is contrary to the policy language and contrary to common sense, and it would allow

the contractor to avoid what is his business risk. This Court should not venture beyond the controlling Supreme Court precedent of *J.S.U.B.* and *Pozzi Windows* to find coverage for noncovered damage.

Further, because Treace Expert Wingate testified that 80% of the total repair costs was for everything that needed to be done to "get to" the damaged woodwork, this Court should award, at most, only 20% of the Treaces' damages. As stated in MCC's initial brief, Wingate's 80/20 testimony was unrebutted. In their answer brief the Treaces now "do not agree ... that the 80%/20% ratio is accurate." (Treace Answer Brief at 8). They suggest this Court can remand to the trial court "to determine an accurate ratio." *Id.* Unfortunately, the Treaces are incorrect. The case has been tried and Wingate's testimony was unrebutted. The Treaces do not get another chance at revising their own numbers through new testimony.

### C. There Is No Coverage For The Installation Of Windows.

As stated in MCC's initial brief, the trial court properly found that the cost of new windows was not covered, although its reasoning was flawed. The court concluded that the original windows could have been reused. (R. III: 558-583). The court should have instead concluded that because the unrebutted testimony was that the windows were not damaged, their replacement was not for "property damage." The court also erred as a matter of law in finding that the installation

cost, i.e., the cost of removing and reinstalling windows was for "property damage," in light of the case law discussed above.

### D. The Trial Court Erred As A Matter Of Law In Finding An Estoppel Under An Inapplicable Statute.

As stated in MCC's initial brief, the trial court allowed MCC to amend the pleadings to assert its fungus exclusion, but the court refused to apply the exclusion based on Section 627.426, Florida Statutes (Claims Admin. Act). In other words, the court found an estoppel under that statute.

The Treaces contend that the trial court's ruling "was based on its discretionary power to deny such a late-raised defense." (Treace Answer Brief at 15 and 44). The Treaces miss the point completely, because the trial court did not deny the amendment, it allowed the amendment but later found the exclusion inapplicable based on a statutory estoppel theory. Therefore, rather than the abuse of discretion standard that the Treaces seek, the standard is de novo, i.e., whether the trial court's reliance on section 627.426 constituted legal error.

Also, although the Treaces contend that the trial court stated that fungus and water were "codependent" in causing wood rot, that basis is not asserted in the Judgment In A Garnishment Proceeding. (Treace Answer Brief at 10). (R. III: 558-583). The sole basis is section 627.426. In addition, whether or not water and fungus are "codependent" does not change the applicability of the endorsement, because the endorsement provides that the insurance "does not apply to …

'property damage' … arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus… ."

The Treaces also argue that MCC is making the argument against section 627.426 "for the first time on appeal." (Treace Answer Brief at 44-45). They are correct, because the applicability of that statute never came up until the court issued its judgment. MCC was not required to file a motion for rehearing when it had the option of appealing the issue. A motion for rehearing is an option, not a requirement.

The Treaces also point out that the trial court relied on *Carithers,* where that court also relied on section 627.426, and that this Court should do so as well. The argument has no merit, for three reasons. First, two wrongs do not make a right. Second, *Carithers* is not controlling precedent. Third, in *Carithers* the trial court denied MCC's motion for leave to amend, whereas in this case the trial court granted the motion. The Treaces try to get around that significant distinction by arguing that the trial court in this case "retracted" from its ruling in allowing the amendment such that it finally denied the amendment. (Treace Answer Brief at 47 and 53). The argument is based on a completely false premise, because in the Judgment In A Garnishment Proceeding the trial court acknowledged that it allowed the amendment but decided the exclusion did not apply based on

section 627.426. (R. III: 558-583). Nowhere does the trial court "retract" its prior order. The Treaces' disingenuous argument must be rejected.

Therefore, with the trial court having allowed the amendment, and having found an estoppel based on section 627.426, which as explained in MCC's initial brief does not apply to any defenses other than defenses based on policy conditions such as late notice per the Florida Supreme Court case of *AIU Ins. Co. v. Block Marina Investment, Inc.,* 544 So. 2d 998 (Fla. 1989), this Court must proceed from the fact that the trial court allowed the amendment and it must find as a matter of law that the trial court erred in finding an estoppel based on section 627.426. As such, this Court must address the applicability of the exclusionary endorsement to the facts, and in particular Treace expert Newkirk's testimony that wood rot cannot exist in the absence of fungus. It is clear that the rotted wood was "'property damage' arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to any fungus." As a result, the removal and replacement of rotted wood is excluded from coverage.

Further, assuming solely for the sake of argument that This Court does not agree with MCC's position on "get to" damages, this Court must take an additional step. Because the fungus exclusion bars coverage for the removal and replacement of the rotted wood, the costs of removing and replacing the insured's defective work were not costs in order to "get to" covered "property damage." Instead, those

costs were for the costs of removing noncovered defective work to "get to" excluded "property damage." As such, there is no coverage for the removal and replacement of any property whatsoever.

## II. ARGUMENT IN RESPONSE TO ARGUMENTS PRESENTED IN THE TREACES' CROSS-APPEAL.

### A. There Is No Coverage For The Treaces' Underlying Attorney Fees That Were Awarded Under The Construction Contract.

As explained in MCC's initial brief, the trial court granted MCC's motion in limine, ruling that the Treaces' underlying attorney fees are not covered. (R. I: 195-199). The court's ruling was expressly based on controlling precedent, i.e., the Fifth District's decision in *Scottsdale Ins. Co. v. Haynes,* 793 So. 2d 1006 (Fla. 5th DCA 2001). The court also relied on a concurring opinion in *GEICO Gen. Ins. Co. v. Williams,* 111 So. 3d 240 (Fla. 4th DCA 2013), which stated that the case relied on by the Treaces, *Assurance Co. of America v. Lucas Waterproofing Co., Inc.,* 581 F. Supp. 2d 1201 (S.D. Fla. 2008), did not accurately reflect Florida law.

On appeal, the Treaces are now relying on a decision that occurred subsequent to the trial of this action, *GEICO Gen. Ins. Co. v. Hollingsworth,* 157 So. 3d 365 (Fla. 5th DCA 2015), for the proposition that the Treaces' underlying fees are covered as "taxed costs" under the policy's supplementary payments provisions. Their reliance is misplaced, because *Hollingsworth* and the cases it relied on are factually distinguishable from this case. Moreover, to apply the

reasoning of *Hollingsworth* to this case would require this Court to ignore the nature and specific wording of the underlying judgments.

In the underlying construction defect action that preceded this garnishment action, the jury awarded damages to the Treaces and the court entered judgment. (Supp. R. VI: 037-039). Subsequently, the trial court issued a second judgment in which the court awarded the Treaces their attorneys' fees pursuant to a prevailing party provision in the contract between the Treaces and Stevenson Design, and it also awarded the Treaces their taxed costs pursuant to the Uniform Guidelines. (Supp. R. XI: 793-798).

In deciding what amount of fees the Treaces were entitled to, the underlying trial court looked to the factors set forth in *Florida Patient's Compensation Fund v. Rowe,* 472 So. 2d 1145, 1150 (Fla. 1985). After considering those factors and the evidence presented the trial court awarded fees in the amount of $316,528.18 plus post-judgment interest.

Then, turning to the issue of costs, the court looked to the Florida Supreme Court's Statewide Uniform Guidelines For Taxation Of Costs In Civil Actions. *See In re Amendments to Uniform Guidelines for Taxation of Costs*, 915 So. 2d 612 (Fla. 2005). Pursuant to the Uniform Guidelines, the court allowed costs for, among other things, document copies, the mediator's fees and expenses, filing fees,

expert witness fees, and trial exhibits. The court awarded the Treaces those taxable costs in the amount of $49,860.68.

Thus, it is clear and inarguable that the trial court treated fees as fees and treated taxed costs as taxed costs, and that there is no ambiguity in the court's judgment as to how the court applied two completely different standards to fees vs. costs. Thus, the Treaces' request that this court treat their underlying fees as "taxed costs" would require this Court to ignore the clear and unambiguous language of the trial court's judgment.

In addition, the *Hollingsworth* court based its decision in part on the fact that the term "court costs" was an undefined term in the policy at issue in that case. As a preliminary matter, the lack of a definition in a policy does not necessarily make a term ambiguous. *State Farm Fire & Cas. Co. v. CTC Development Corp.,* 720 So. 2d 1072 (Fla. 1998). More importantly, however, the policy at issue in this case does not use the term "court costs," it uses the term "costs taxed against the insured." The only costs that were "taxed" against the insured were expressly taxed pursuant to the Uniform Guidelines. There is no provision in the Uniform Guidelines allowing a court to tax a party's attorneys' fees as taxable costs. In fact, the Supreme Court expressly disallowed even attorney expenses, such as travel expenses, as taxable costs. *See* 915 So. 2d 612.

Therefore, considering the provisions of the Uniform Guidelines and the Supreme Court's comments thereto, and considering the nature of the trial court's separate awards of fees and taxed costs under two completely different standards, the Treaces cannot legitimately contend that underlying fees are "taxed costs."

The Treaces' reliance on *Hollingsworth* is misplaced, not only because it involved different policy language, but also because it is factually distinguishable from this case for additional reasons. In *Hollingsworth*, the plaintiff moved for fees based on obtaining a judgment against GEICO's insured in excess of the amount of a proposal for settlement. *Id.* at 366. In determining the existence of coverage for these fees under the supplementary payment section of GEICO's policy, this Court relied in part on *Tri–State Insurance Co. of Minnesota v. Fitzgerald,* 593 So. 2d 1118 (Fla. 3d DCA 1992). The Third District ruled in *Fitzgerald* that a sanction, which included attorney's fees and was entered pursuant to Florida Rule of Civil Procedure 1.380, constituted taxed costs. The court said: "Simply stated, it represents 'costs' assessed against [the Insured] in a case being defended by the [Insurer's] assigned counsel." *Hollingsworth,* 157 So. 3d at 366 (citing *Fitzgerald*, 593 So. 2d at 1119). The *Hollingsworth* court also relied on *GEICO Gen. Ins. Co. v. Rodriguez,* 155 So. 3d 1163 (Fla. 3d DCA 2014), where the Third District treated fees awarded as sanctions as taxed costs.

It seems apparent that the *Hollingsworth* court considered fees awarded under a proposal for settlement similar to fees awarded as sanctions where the insured was defended by the insurer's retained counsel. One might infer that the *Hollingsworth* court may have considered whether the insurer-retained counsel played a role in the sanctions in the cases it relied on. But those are not the facts of this case. In this case the fees were awarded pursuant to a prevailing party provision in the contract between the Treaces and the insured. Thus, the insured effectively became immediately subject to the Treaces' prevailing party fees because of its conduct in constructing a defective premises, not because of retained counsel's conduct during litigation.

This case is instead on point with this Court's decision in *Haynes* where the plaintiff's fees were awarded pursuant to a prevailing party provision in a statute. Although the *Haynes* court did not discuss whether the prevailing party fees might be "taxed costs" in that action, this Court did take note of another decision, *Scottsdale Ins. Co. v. Deer Run Property Owner's Association, Inc.*, 642 So. 2d 786 (Fla. 4th DCA 1994), where the Fourth District reversed the lower court's determination that Scottsdale's policy afforded coverage for an award of plaintiff's attorneys' fees against its insured but affirmed the trial court's finding that the policy covered costs as "taxed costs." Therefore, it is clear that the *Haynes* court was aware of supplementary payments provisions involving "taxed costs."

In summary, this case involves the award of prevailing party fees as in *Haynes,* not fees awarded under a proposal for settlement or as sanctions. For that reason, *Hollingsworth* and the other cases relied on by the Treaces are off-point. In addition, the Supreme Court has stated what costs should be taxed and what costs should not be taxed. Thus, whether or not the *Hollingsworth* court's finding the term "court costs" to be ambiguous was correct, there is no ambiguity as to what the term "taxed costs" means when the Supreme Court says what it means and adopts the Uniform Guidelines setting forth what costs are, or are not, taxable. Finally, this Court cannot rewrite the underlying trial court's judgment treating fees and costs separately and applying different legal standards to each. The Treaces never appealed that judgment, and therefore, they are bound by its language. Thus, the trial court's ruling in this garnishment action denying coverage for the Treaces' underlying fees must be affirmed.

## CONCLUSION

For the reasons stated herein, this Court should reverse the trial court's findings of covered damages and direct the trial court to enter judgment in favor of MCC. In addition, this Court should affirm the trial court's ruling on MCC's motion in limine.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served by *e-mail and/or U.S. Mail* on this **14th day of May, 2015**, on all counsel or parties of record on the attached Service List below.

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## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that this Reply Brief and Answer Brief to the Cross-Appellant's Brief, is in compliance with the font requirements of Fla. R. App. P. 9.100(1).

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