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

CASE NO.: CA06-815
DIVISION: 55

JAMES T. TREACE and
ANGELINE G. TREACE,
Plaintiffs,

v.

HARBOR ISLAND JOINT VENTURE III, JC DESIGN MANAGEMENT COMPANY, et al,
Defendants.
_____/

STEVENSON DESIGN AND DEVELOPMENT OF JACKSONVILLE, INC.,
Third-Party Plaintiff,

v.

RYSKCON CONSTRUCTION, INC., et al,
Third-Party Defendants.
_____/

JAMES T. TREACE and
ANGELINE G. TREACE,
Plaintiffs/Garnishors,

v.

MID-CONTINENT CASUALTY COMPANY,
Garnishees,
_____/

JUDGMENT IN GARNISHMENT PROCEEDING

Before this Court is a garnishment proceeding brought pursuant to Florida Statutes, chapter 77, in which the Plaintiffs/Garnishors seek to garnish benefits they assert are due under commercial general liability ("CGL") insurance policies, issued by Garnishee Mid-Continent Casualty Company ("MCC") to its insured Stevenson Design and Development of Jacksonville, Inc. ("Stevenson Design"). Prior to commencement of the instant garnishment action, a jury trial had been completed wherein the Garnishors sued Stevenson Design for damages as a result defects in the construction of their home (hereinafter referred to as the "merits trial"). The jury rendered an unallocated verdict in favor of the Garnishors in the amount of $810,280.00. (Dkt. #430) The Court subsequently entered Final Judgment in favor of Garnishors and against Stevenson Design in the amount of $1,016,187.00 based on the jury's verdict and prejudgment interest. (Dkt. #443) Stevenson Design was insured by MCC under CGL policies at all material times. MCC answered the garnishment writs (Dkt. #456 and #638) by denying the applicable CGL policies covering Stevenson Design provided coverage for all or part of the damages awarded in the merits trial. (Dkt. #456 and #638)[1] This Court

[1] The Garnishee sought to amend its Answer (Dkt. #638) to include additional affirmative defenses and a counterclaim for a declaratory judgment regarding MCC's coverage for the damages awarded below. On the morning of trial, the Court allowed the amendment to the affirmative defenses, finding no prejudice to the Garnishors; however, it did not permit the counterclaim. Because this garnishment proceeding involves a

conducted a non-jury trial on the Writ of Garnishment on February 18, 2014. The issue before this Court is whether the CGL insurance policies issued by MCC provided insurance coverage to the insured—Stevenson Design for the damages awarded in the merits trial. If MCC's policies provided coverage, the Garnishors would be entitled to recover the monies owed under the policies.

I. Burden of Proof

The parties agreed that the burden of proof in this matter is governed by the decision in *Duke v. Hoch*, 468 F.2d 973 (5th Cir. 1972). *Duke* likewise involved a garnishment action by a judgment creditor seeking to reach proceeds of liability policies that insured a judgment debtor. *Duke* involved a situation similar to this case wherein the insurer/garnishee asserted that some or all of the damages awarded in the merits trial were not be covered by the applicable insurance policies; however, the merits trial verdict did not allocate damages in a manner that enabled the parties to make a coverage determination. Thus, the Court in *Duke* concluded that in such a situation, the initial burden of proof rests with the insurer/garnishee to establish that part of the judgment was for damages not covered by the applicable insurance policies. If the insurer/garnishee satisfies its burden to establish the existence of non-covered damages in the judgment, the burden then shifts to the garnishor/judgment creditor to apportion or allocate the

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determination of MCC's insurance coverage under its policies, and the proposed declaratory judgment action sought a declaration of the same issues, the Court found the counterclaim to be unnecessarily duplicative.

damages awarded between covered and non-covered damages. The Court in *Duke* further explained that the judgment creditor would be relieved of its burden to allocate the damages awarded in the merits trial if the insurer failed to make known to its insured the availability of a special or allocated verdict and the divergence of interest between the insurer and insured arising from whether or not damages were allocated.

During pretrial proceedings in this garnishment proceeding, this Court determined as a matter of law, that MCC had fulfilled its requirement during the merits trial of advising the insured of the availability of an allocated verdict and the divergence of interest. (Dkt. #704) Therefore, if MCC is able to meet its burden by establishing that the merits trial verdict included non-covered damages, the burden shifts to the Garnishors to allocate between covered and noncovered damages, and they may only recover that part of judgment that can be attributed to covered damages.

II. Facts

During the non-jury trial of the garnishment action, this Court heard the testimony of Garnishor James Treace, Brian Wingate of Kendale Construction, and engineer Brett Newkirk. In addition, the Court received and considered the

stipulated evidentiary proffer of Jeffrey Chefan and the deposition testimony of Syvena Hoyer.[2] In addition, both parties introduced numerous items of evidence.

The Court has considered the relevant testimony of all the witnesses, considered all the exhibits, the arguments of counsel, as well as the parties' proposed orders (Dkt. #803 and #804). In considering the believability of witnesses and the weight to be given to their testimony, the Court has applied the criteria enumerated in §601.2(a), *Fla. Std. Jury Instructions for Civil Cases*.

In 2002 Mr. and Mrs. Treace purchased their home in Ponte Vedra Beach, St. Johns County, Florida for $4.3 million. Stevenson Design was the general contractor for the construction of the Treaces' home. All of the construction work on the Treaces' new home was performed by subcontractors hired by Stevenson Design. The Treaces moved into their home in January 2003. What the Treaces had hoped was their dream home would soon turn into a nightmare for them.

In April 2003 the Treaces noticed that during heavy rains (a common phenomenon in Florida) rainwater would cascade down to the front entrance of the home. Mr. Treace notified Stevenson Design who dispatched workers to the home that installed scuppers in a small roof over the entrance to divert water.

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[2] Ms. Hoyer is a claims specialist with MCC. Ms. Hoyer's deposition testimony submitted to the Court dealt only with the issue of MCC's request for an allocated verdict and notice of divergence of interest with their insured at the merits trial. Because the Court had already determined as a matter of law that MCC had satisfied this requirement, Ms. Hoyer's testimony had no relevance during the garnishment trial.

In late 2003, Mr. Treace noticed that wood molding around the inside of the dining room window at the front of the home had water damage. Mr. Treace again called Stevenson Design who sent out workers to repair the problem. At that time, Stevenson's subcontractors removed stucco at the bottom of the exterior of the dining room window and removed and replaced a small water damaged portion of the OSB wood structure of the home.

In 2004 Mr. Treace noticed a large crack in the stucco at the back of the house. He again contacted Stevenson Design who sent out subcontractors to repair the area which consisted of removing stucco, installing a patch and replacing the stucco.

In December 2005, Mr. Treace noticed cracks in the stone façade at the entrance to the home. Having concerns regarding the contractor's performance, Mr. Treace contacted a different construction company to diagnose the problems—Kendale Construction. Brian Wingate of Kendale Construction came to the Treace's residence. Kendale ultimately opened the kneewalls around the entrance to the residence and found extensive damage to the wood structure as a result of water intrusion. Beginning in early 2006, Kendale performed extensive repairs to the front of the Treaces' residence. Mr. Wingate testified that all the damage that was repaired in 2006 (as well as the earlier damage noted in 2003 and 2004) was caused by water intrusion as a result of defective workmanship in the construction

of the home. The 2006 repairs have been referred to by the parties as the Phase I damages.

The Treaces also hired an engineer to assist with the diagnoses and remediation of the Phase I damages—Brett Newkirk. Mr. Newkirk confirmed the extent of the damage to the front of the home and that it was caused by water intrusion caused by defective construction.

In 2006, while Kendale was performing the repairs to the front of the Treaces' home, Mr. Treace asked Mr. Wingate and Mr. Newkirk to inspect the rest of the house for any other possible problems. Based on their observations, Mr. Wingate and Mr. Newkirk suspected there was widespread wood damage caused by water intrusion to the entire exterior of the Treaces' home. Because the wood structure around the house was covered with stucco, it was impossible to confirm the extent of wood damage with just a visual examination. Mr. Wingate and Mr. Newkirk recommended that the Treaces commission destructive testing around the home to ascertain the extent of the damage. The testing would involve the removal of stucco in areas to look beneath the stucco wall covering to inspect the wood structure. Because of the cost involved in such destructive testing, the Treaces decided to not conduct the testing at that time. Eventually, they would be left no choice.

In June 2010 the Treaces discovered additional problems with their home and again contacted Mr. Wingate with Kendale Construction. At that time, Mr. Wingate discovered widespread wood damage to the home requiring extensive repairs. It was determined that, as with the earlier damage, the widespread damage discovered in 2010 was the result of defective workmanship in the construction of the home. The stucco subcontractor reverse lapped the stucco lathing over the windows and control joints allowing for water to get between the stucco and wood structure of the home, rather than directing the water away from the house. In addition, weep screeds were improperly installed trapping water between the stucco and wood structure. The result was extensive wood rot damage as well as corrosion to the stucco lathing. In order to properly effectuate the repairs, Kendale had to remove nearly all the stucco on the house to get to the wood structure. Likewise, every window had to be removed in order to repair the damaged wood. Mr. Wingate and Mr. Newkirk testified that it was impossible to get to the water damaged wood and effectuate repairs without removing the stucco and windows and replacing the stucco and windows when the repairs were completed. The 2010 repairs to the Treace's home have been referred to by the parties as the Phase II damages.

The Treaces brought suit against the general contractor of the home—Stevenson Design, and other contractors for the defective construction causing the

extensive property damage.[3] (Dkt. #2) Following the merits trial, a jury awarded damages to the Treaces in the amount of $810,280. (Dkt. #430) Final Judgment was entered against Stevenson Design for $1,016,187 based on the jury's award and prejudgment interest. (Dkt. #443)

MCC is an insurance company that issued CGL insurance policies covering Stevenson Design. The parties have admitted that MCC's CGL policies that were in effect at material times are as follows:

> Policy #04-GL-12386, Effective 8/1/2003 to 8/1/2004 (the 2003 policy)
> Policy #04-GL-557139, Effective 8/1/2004 to 8/1/2005 (the 2004 policy)
> Policy #04-GL-598319, Effective 8/1/2005 to 8/1/2006 (the 2005 policy)
> Policy #04-GL-641070, Effective 8/1/2006 to 8/1/2007 (the 2006 policy)
> Policy #04-GL-683408, Effective 8/1/2007 to 8/1/2008 (the 2007 policy)
> Policy #04-GL-725574, Effective 8/1/2008 to 8/1/2009 (the 2008 policy)
> Policy #04-GL-764283, Effective 8/1/2009 to 8/1/2010 (the 2009 policy)

(Dkt. #719 at p.4; Plaintiffs' Exhibits 1-8)

It is undisputed that the aforementioned CGL policies provided coverage for property damage; however, the 2003, 2004, and 2005 policies provided coverage for property damage caused by the insured's subcontractors, while the 2006, 2007, 2008 and 2009 policies contained endorsement CG2294 which excluded coverage for property damage caused by subcontractors.

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[3] The Treaces first brought suit in September 2006. (Dkt. #2) The Treaces amended their Complaint in 2010 to include the Phase II damages. (Dkt. #202)

III. Analysis

The first step of the Court's analysis is to determine whether MCC has met its burden of proof that the damages awarded to the Treaces following the merits trial included damages not covered by the applicable insurance policies. MCC contends that it has met its burden by establishing that (a) the Phase II damages occurred during a policy period that excluded coverage for damages caused by subcontractors' work, (b) all the damages are excluded from coverage because it was all caused by fungus, and (c) some of the damages awarded were for items that do not constitute "property damage" under the policy. The Court will address these issues separately below, in order to determine whether MCC has met its burden of proof.

A. When did the Property Damage Occur?

An issue in this case is when the Phase II damages to the Treace's home are deemed to have occurred. The MCC insurance policies provide that it will pay for "property damage" caused by an "occurrence" during the policy period. Although MCC had policies in place from the time that the Treace's purchased the home through the discovery of all the damages, MCC contends that determining the date of occurrence, and thus, which MCC policy applies, is necessary because beginning with the 2006 policy (effective August 1, 2006), the MCC CGL policies contain a coverage exclusion for property damage caused by work performed by a

subcontractor—endorsement CG2294. MCC argues that all the Phase II damages occurred when they were actually discovered in 2010, when the policies excluded damage caused by subcontractor work; thus, all the Phase II damages are not covered. The Treaces contend that all the property damage occurred at a time when the MCC policies did not include the CG2294 endorsement excluding coverage for subcontractor work—prior to the commencement of the 2006 policy. Alternatively, the Treaces contend that even if the coverage trigger post-dates the effective date of the CG2294 endorsement, that endorsement is not valid and enforceable since MCC did not provide Stevenson Design with the required statutory notice of the non-renewal or partial non-renewal of the CGL policy. In order to resolve these issues, this Court must determine when coverage was triggered, and if necessary, whether the CG2294 subcontractor endorsement is valid and enforceable.

i. Date of Occurrence

Under Florida law, in order to trigger coverage under a liability insurance policy, the accident or injury must occur during the time period of coverage. *Assurance Co. of America v. Lucas Waterproofing Co., Inc.*, 581 F. Supp. 2d 1201, 1206 (S.D. Fla. 2008) In determining the trigger date for coverage in this case, a review of Florida law provides limited guidance since courts interpreting Florida law have applied different theories to determine the date of occurrence.

There are four trigger of coverage theories used to determine when property damages occur under a CGL policy: (1) exposure; (2) manifestation; (3) continuous trigger; and (4) injury in fact. *Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co.*, 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002); *Assurance*, 581 F. Supp.2d at 1206. Under the exposure theory, property damage occurs upon installation of the defective product. *Id.* Under the manifestation theory, property damage occurs at the time damage manifests itself. *Id.* The continuous trigger approach defines property damage as occurring continuously from the time of installation until the time of discovery. *Id.* In the injury-in-fact approach (also referred to as damage-in-fact), coverage is triggered when the property damage underlying the claim actually occurs. *Id.* Florida courts have generally followed the rule that potential coverage under an insurance policy is triggered when property damage manifests itself, not when the negligent act or omission giving rise to damage occurs. *Id.* However, courts have applied different standards regarding when damage manifests itself. Some courts interpreting Florida law have held that damage manifests when the damage is actually discovered. Other courts have held the damage manifests itself when it was discoverable through reasonable inspection. *See Mid-Continent Casualty Co. v. Siena Home Corp.,* 2011 WL 2784200, *3 (M.D. Fla. 2011)(manifestation "is the time that such damage was discernible and reasonably discoverable either because it was open and obvious or upon a prudent

engineering investigation) citing *United Nat'l Ins. Co. v. Best Truss Co.,* 2010 WL 5014012 (S.D. Fla. 2010).

In this case, the parties have agreed that use of the manifestation theory is appropriate, but disagree on its meaning. Regardless of which version of the manifestation theory is applied, the trigger of coverage here was prior to the commencement of the 2006 policy which contained the CG2294 subcontractor exclusion endorsement. Mr. Treace testified that in late 2003 he noticed water damage in the area of his dining room at the front of the house. At that time Stevenson Design replaced water damaged rotted wood. Mr. Treace further testified that in 2004 he noticed a large crack in the stucco at the back of the house that the contractor came out and repaired. The Treaces' expert witnesses testified that these 2003 and 2004 problems were the result of the defective workmanship causing water intrusion. In December 2005, Mr. Treace noticed cracks in the stone front of his home. At that point, he contacted another contractor not involved in the home's construction (Kendale) to diagnose the problem. Mr. Wingate testified that when he came to the Treaces' home in late 2005 early 2006, he discovered extensive water damage to the front of the home and extensive repairs were commenced (Phase I damages). At that time, both Mr. Wingate and Mr. Brian Newkirk, recommended that the Treaces engage in destructive testing of the entire home because they suspected extensive defective workmanship and resulting water

damage based on the defects they observed. However, because of the cost of such testing, the Treaces did not move forward with their recommendation. In 2010, Mr. Treace noticed more problems in other portions of the home. At that time, the extensive property damage to the remainder of the home was discovered and extensive repairs were commenced (Phase II damages).

The property damage caused by the defective workmanship was first discovered or manifested in 2003, 2004 and 2005.[4] The fact that the full extent of the damage wasn't determined until 2010 is of no moment since the damage manifested itself years earlier, when it was both discovered and was reasonably discoverable.

Therefore, all the damages "occurred" while the 2003, 2004 and 2005 policies were in place, all prior to the 2006 policy with the CG2294 subcontractor exclusion endorsement.

ii. Enforceability of Endorsement CG2294

Even if this Court was to conclude that the Phase II damages manifested or occurred after the 2006 policy went into effect, the CG2294 endorsement wouldn't bar recovery. MCC urges the Court to find that the Phase II damages are not covered because the subcontractor exclusion applies to those damages. MCC did

[4] While the greater weight of the evidence demonstrates that property damage manifested in 2003, 2004, and 2005, the Court need not assign the occurrence to a specific policy period during these years because none of the policies during those three years had the CG2294 subcontractor exclusion endorsement. Likewise, the extent of coverage for each policy year, standing alone, provides sufficient coverage to pay for the damages awarded following the merits trial.

not establish by the greater weight of the evidence that it properly notified its insured (Stevenson Design) of the change or reduction in coverage as a result of the CG2294 endorsement.

Florida Statutes, section 627.4133(1)(a) provides

> An insurer issuing a policy providing coverage for workers' compensation and employer's liability insurance, property, casualty, except mortgage guaranty, surety, or marine insurance, other than motor vehicle insurance subject to s. 627.728, shall give the first-named insured at least 45 days' advance written notice of nonrenewal or of the renewal premium. If the policy is not to be renewed, the written notice shall state the reason or reasons as to why the policy is not to be renewed. This requirement applies only if the insured has furnished all of the necessary information so as to enable the insurer to develop the renewal premium prior to the expiration date of the policy to be renewed.

A "nonrenewal" under section 627.4133 includes the issuance or intended issuance of a subsequent policy with material changes in terms and conditions from the prior policy, including endorsements which exclude coverage that previously existed. *U.S. Fire Ins. Co. v. Southern Security Life Ins. Co.,* 710 So. 2d 130, 132 (Fla. 5th DCA 1998).

In *Mid-Continent Casualty Co. v. Holloway and Co.,* No: 6:09-CV-2009-ORL-35KRS (M.D. Fla. 2011) United States District Court Judge Mary Scriven, concluded that MCC's inclusion of the CG2294 subcontractor exclusion endorsement was a new policy or non-renewal that required notice under section 627.4133. Judge Scriven stated:

> The one thing that does not appear to me to be in dispute is the nature of the notice and disclosures given by Mid-Continent upon its efforts to impose a new policy on the defendants (insured) at the point of, quote renewal, closed quote. My reading of the Florida case law and my reading of the statute (section 627.4133) and my review of the deposition of Mid-Continent's corporate representative establishes, as a matter of law, that the second policy was not a renewal, but was a new policy offered by Mid-Continent, because it had material changes from the old policy, the old policy offering essentially full coverage for our purposes. The second policy offering coverage, minus subcontractor coverage.
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> All subcontractor coverage appears to me, by the terms of the endorsement of the new policy, to be excluded. Whereas, in the prior policy I guess there was a provision that accepted subcontractor coverage from the exclusions of subcontractor coverage such that before the defendants had subcontractor coverage and after they would not have subcontractor coverage. And as I understand the law, statutory law, Mid-Continent had an obligation to disclose the fact of the endorsement and the reason for the endorsement at the point at which it attempted to impose the endorsement on its insured.

Id. at Dkt. #210, p.4-5. This Court agrees with Judge Scriven's analysis.

This Court received testimony in the form of a stipulated proffer from Jeffrey Chefan. Mr. Chefan was the principal of the insured (Stevenson Design) who testified that he does not recall ever receiving notification from Mid-Continent prior to issuance of the 2006 policy of any change or reduction in the policy coverage eliminating coverage for subcontractor damage. (Dkt. #721 at ¶¶6-8) Likewise, MCC introduced no evidence during the trial to indicate that it provided any statutory notification to the insured of the policy change with the CG2294 endorsement eliminating subcontractor coverage.

Thus, this Court concludes that the CG2294 endorsement was a material change in the policy resulting in a reduction of coverage which required statutory notice under section 627.4133. This Court further concludes that MCC failed to provide the requisite statutory notice to Stevenson Design prior to the commencement of the 2006 policy, or at any time thereafter. Therefore, the CG2294 endorsement excluding coverage for property damage caused by subcontractor work is not applicable here. Thus, even if the Phase II damages were considered to have occurred in 2010, property damage caused by the work of subcontractors of the insured are covered by the applicable insurance policy.

B. Does the "Fungus, Mildew and Mold" Exclusionary Endorsement Preclude Coverage?

During the trial of this garnishment action, MCC for the first time sought to entirely avoid coverage by asserting that the "fungus, mildew and mold" exclusion endorsement in the CGL policies preclude coverage. This endorsement provides

> This insurance does not apply to . . . "property damage" . . . arising out of, resulting from, caused by, contributed to, attributed to, or in any way related to fungus . . ."

MCC argued during the garnishment trial that it just discovered on February 11, 2014, during a trial in United States District Court—Middle District of Florida, that the Treaces' expert Brett Newkirk opined that wood rot and water damage is not caused by water intrusion but as a result of microscopic "critters" that are "fungi." MCC moved to amend its affirmative defenses at trial based on this

testimony in order to assert a "fungus, mildew and mold" exclusion. This Court allowed this amendment over objection; however, this exclusion does not bar coverage in the instant case.

This Court has been provided a copy of United States District Court Judge Magnuson's March 11, 2014 Order in *Carithers v. Mid-Continent Cas. Co.*, No.: 12-cv-00890-MMH-PDB (M.D. Fla.) and concurs with the reasons for rejecting this same argument made by MCC in that case. Judge Magnuson's Order states:

> One of the Plaintiff's witnesses, Brett [Newkirk], testified that the wood rot in Plaintiff's garage developed because the water incursion allowed microscopic "critters" such as fungi to grow in the wood. (T. at 113) Mid-Continent then argued that the Policy would exclude coverage for damage to the garage because the Policy contains a "Fungus, Mildew and Mold Exclusion." (Policy at ML 12 17 (04 01). But Mid-Continent has been aware since the inception of this matter that the damage to the garage was caused by wood rot, which is by definition "decomposition from the action of bacteria or fungi." Definition of verb "rot." www.merriam-webster.com/dictionary/rot (last visited March 3, 2014). Mid Continent cannot now rely on an exclusion that it has never before mentioned in this litigation. See Fla. Stat. § 627.426(2)(a) (prohibiting insurer from denying coverage based on a coverage defense unless insurer gives written notice to insured within 30 days after insurer knew or should have known of the coverage defense).
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> *Id.* at Dkt.#126, p.6, n.2.

Just as 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 the definition 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 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. Notably, MCC filed a motion to amend its answer on February 22, 2013 (Dkt. #576) to assert additional policy affirmative defenses. MCC moved at trial to have these defenses added, some of which the Court granted, but missing from MCC's February 22, 2013 motion to amend is any request to assert a fungus, mildew and mold exclusion. MCC cannot now rely on an exclusion that it has never before mentioned in this litigation. See Fla. Stat. § 627.426(2)(a) (prohibiting insurer from denial of coverage based on a coverage defense unless insurer gives written notice to insured within 30 days after it knew or should have known of the coverage defense). Therefore, the Fungus, Mildew and Mold exclusionary endorsement does not bar coverage of any of the damages here.

C. Did the Verdict in the Merits Trial Award Damages for Items that do not Constitute Property Damage?

While there is no disputing that there was extensive property damage to the Treaces' home as a result of defective workmanship by the subcontractors of the insured, in furtherance of its attempt to meet its burden to establish that some of the damages awarded in the merits trial were for non-covered items, 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.

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.[5] 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

[5] At trial, the Treaces' expert engineer (Newkirk) testified that the stucco was also damaged as a result of corrosion that formed on the metal stucco lathe from the intrusion of water. Therefore, the stucco would likewise fall within the definition of property damage. However, even if the stucco was not damaged, the Court does not agree with MCC's position that the stucco removal and replacement is not a covered damage since the stucco had to be removed to get to the damaged wood.

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). In *Carithers, supra.*, Judge Magnuson, explained

> In discussing insurance policies substantively identical to the [policy in this case], the Florida Supreme Court has explained that the cost of repairing defective work is not "property damage," but the *cost of repairing damage* to the completed project "that occurs as a result of the defective work" is "property damage" under the Policy.

Carithers, Dkt. #126 at p.7 (emphasis added), citing *U.S. Fire Insurance Co. v. J.S.U.B.*, 979 So.2d 871, 890-91 (Fla. 2007).

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.

i. New Windows

An issue in this case is whether installation of new upgraded windows rather than reinstallation of the existing windows was necessary to facilitate the repairs.

The Treaces' home was built in 2002. According to Mr. Wingate, at the time the Phase II repairs were being performed in 2010, a different Building Code was in place that required installation of impact resistant windows. Mr. Wingate testified that because of the change in the Building Code all the windows had to be replaced with new impact resistant windows and the old windows could not be reinstalled.

None of the parties introduced any of the applicable Building Code provisions as an exhibit. However, a review of the applicable 2010 Florida Building Code, which this Court takes judicial notice of pursuant to Fla. Stat. §90.202, does not indicate that the windows had to be replaced with impact resistant windows rather than reinstalling the original windows.[6] Plaintiffs' Exhibit 45 likewise indicates that reinstallation of the original windows was permissable. Plaintiffs' Exhibit 45 is the construction agreement between Kendale and the Treaces for the Phase II damage repairs. Page 23 of the agreement (Bates Stamp TR000597) provides that Kendale would "reinstall exterior windows removed during demolition." On page 28 of the agreement (Bates Stamp TR000602), the Treaces were given upgrade alternatives regarding the windows. Alternate 1 gave the Treaces the option to "upgrade all other windows to white PGT Vinyl Winguard Architectural series 520 fixed and series 540 operable casement windows" for an increased cost of $118,163.00 Alternate 2 gave the

[6] See 2010 Fla. Building Code – Existing Structures, §502.1

Treaces the option to "upgrade windows to Marvin Clad Ultimate Casement Stormplus Impact Zone 3 windows" at an increased cost of $173,934. The Treaces chose alternate 2 for the windows, as indicated by Mr. Treaces' signature on that page. The greater weight of the evidence establishes that while the windows needed to be removed to facilitate the repair of the property damage, they could have been reinstalled. Therefore, the replacement upgraded windows were not necessary and the Court finds that they are not covered damages under the policy. However, the labor cost for removal and installation of windows would have been the same regardless of whether the old windows were reinstalled or new windows used; therefore, the labor involving the windows is a covered repair expense under the policies.

Thus, MCC has met its burden to establish that the judgment following the merits trial included non-covered damages under the policy-the upgraded replacement windows. As such, the burden shifted to the Plaintiff/Garnishors to allocate the merits trial judgment between covered and non-covered damages.

D. Plaintiff/Garnishors Allocation between Covered and Non-covered Damages

As discussed in *Duke, supra.,* the Insurer/Garnishee having met its burden to establish that the judgment below included non-covered damages, the burden shifted to the Plaintiff/Garnishors to allocate the damages awarded between covered and non-covered items. While in many situations this might be an

impossible task, as acknowledged by counsel for MCC during his closing argument, it is not an impossible task here. This Court concludes that the only non-covered item of damages awarded in the merits trial was for the upgraded replacement windows. It was stipulated by the parties during the trial of the garnishment proceeding that the actual cost of the new windows was $150,000.00.[7] Therefore, Plaintiff/Garnishors have met their burden of allocating damages. The merits trial judgment will be allocated for purposes of this garnishment proceeding to reflect the covered damages by reducing $150,000 from the verdict to $660,280, with prejudgment interest to be calculated on that amount.

IV. Conclusion

MCC has met its burden to establish by the greater weight of the evidence that the jury's verdict and Final Judgment following the merits trial awarded damages for non-covered items under the MCC CGL policies. Likewise, the Treaces met their burden to allocate the damages in the jury's verdict and Final Judgment between covered and non-covered damages. The Treaces shall be entitled to recover from MCC $660,280 reflecting the amount of the jury's verdict for covered damages, and interest shall be calculated using that amount.

[7] Although Plaintiff's Exhibit #45 revealed the cost of the new upgraded windows was $173,934, the parties stipulated that the window cost was actually $150,000, apparently as a result of a decreased actual cost determined during repair construction.

Therefore, it is ORDERED AND ADJUDGED that:

Pursuant to Florida Statutes, section 77.083 the Plaintiffs/Garnishors shall be entitled to judgment against Garnishee in the amount of $660,280 plus interest. The parties are directed to calculate the interest applicable to this amount and submit their calculations to the Court.

The Court reserves jurisdiction to determine any applicable set offs to which the Garnishee may be entitled, as well as determinations regarding the award of costs and fees, if applicable.

DONE and ORDERED in chambers, at St. Augustine, St. Johns County, Florida, this 28th day of March, 2014.

Howard M. Maltz, Circuit Judge

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