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

CASE NO.: CA-06-0815
DIVISION: 55

JAMES T. TREACE and ANGELINE G. TREACE,

Plaintiffs/Garnishors,

vs.

MID-CONTINENT CASUALTY COMPANY,

Garnishees.

_____ /

PLAINTIFF/GARNISHORS' POST-TRIAL PROPOSED ORDER

Plaintiffs/Garnishors, JAMES T. TREACE and ANGELINE G. TREACE ("the Treaces"), as Ordered by the Court, hereby submit this proposed Order.

I. OVERVIEW/BACKGROUND

This is a garnishment action filed by the Treaces against Mid-Continent Casualty Company ("MCC") to satisfy the Final Judgment and the Order on Plaintiffs' Request for Attorneys' Fees and Costs ("Fee/Cost Order") rendered in the Treaces favor following a six (6) day trial ("Underlying Trial") and a jury verdict concerning property damage and construction defects at the Treaces' residence.

MCC is the commercial general liability ("CGL") insurer that undertook the defense of the general contractor that constructed the Treaces' residence, Defendant/Judgment Debtor, Stevenson Design & Development of Jacksonville, Inc. ("SDD").[1] It is undisputed that the

[1] MCC repeatedly advised the Court that it defended SDD under a reservation of rights ("ROR"). However, as pointed out by the Treaces at trial, the only ROR letter submitted into evidence by MCC in which MCC defended SDD under a ROR is Defendant's Trial Exhibit 4 dated 8/15/11. Treaces' counsel noted that there appears to have been another MCC ROR issued prior to Defendant's Trial Exhibit 4 that has not been offered into evidence by MCC. Although MCC requested other documents not on its trial exhibit list to be offered into evidence, at no time did it attempt to offer into evidence any ROR letter in which it agreed to defend SDD, other than Defendant's Trial Exhibit 4. MCC's ROR letters dated 12/22/06, 12/28/06 and 2/20/07, [Defendant's Trial Exhibits 1, 2 and 3], are inapplicable to the issues litigated in this garnishment action because in each of those ROR letters, MCC refused to defend SDD. As such, MCC's ROR letters issued prior to 8/15/11 [Defendant's Trial Exhibits 1, 2 and 3] cannot be relied upon by MCC in asserting any defenses that it defended SDD under a ROR.

Treaces' residence sustained significant damage as a result of defective construction. It is also undisputed that the Treaces were forced to expend considerable sums of their own money to repair the resulting damage.

The Treaces' home that is the subject of the Underlying Trial and this garnishment action was constructed in 2002. The Treaces moved into the home in January of 2003. In late 2005, after SDD failed to properly investigate and repair concerns the Treaces had regarding the home, the Treaces hired Kendale Design Build ("Kendale") to investigate these concerns. In the fall of 2005, Kendale 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 Damage"). SDD refused to repair the water damage and as a result, the Treaces were forced to hire Kendale to make repairs, at a cost of over $800,000.

This action was originally set for trial during the November 2013 trial term [Docket #609] but was reset for trial and was tried on February 18, 2014. The claims asserted by the Treaces in the Underlying Tction in 2006, up to and through the garnishment trial on February 18, 2014—over 7 years—were in short that defective subcontractor work resulted in water intrusion and that this water intrusion caused significant water damage and wood rot that the Treaces had to spend over $800,000 repairing. MCC began its investigation of the damage at the Treaces' home in December of 2006 [Defendant's Trial Exhibit 1], yet for over seven (7) years MCC presumably failed to retain any expert to investigate the water intrusion damage, as no such expert was called as a witness by MCC at the February 18, 2014 trial. In fact, MCC failed to call any witness at the February 18, 2014 trial to refute any of the Treaces claims and/or to counter Treaces' expert Brett Newkirk, P.E. Instead, MCC argued at trial that it just discovered on February 11, 2014, during a trial in Federal Middle District Court of Florida, that 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 amended its affirmative defenses at trial based on this testimony in order to assert a "Fungus, Mildew and Mold

Exclusion." The Court allowed this amendment over objection but has since been provided with a copy of Judge Magnuson's March 11, 2014 Order and concurs with the reasons for rejecting this same MCC argument, set forth at footnote 2 of Judge Magnuson's March 11, 2014 Order:

> 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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> Carithers v. Mid-Continent Cas. Co., No. 12-cv-00890-MMH-PDB, Docket # 126.

Just as in the Carithers' case, here MCC has had knowledge of the water damage and wood rot claims for years (over 7 years in this action) and is deemed to have knowledge of the definition of "rot", which is "decomposition from the action of bacteria or fungi." It was not incumbent upon the Treaces' expert to inform MCC of this definition of wood rot for MCC to be required to set forth its coverage defense that the water damage/wood rot is excluded under the policies "Fungus, Mildew and Mold Exclusion." [Defendant's Trial Exhibits 6 to 11, at ML 12 17 (04 01)]. Notably, MCC filed a motion to amend on February 22, 2013 [Docket #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, 2103 motion to amend is any request to assert a "Fungus, Mildew and Mold Exclusion." This Court finds, just as Judge Magnuson did in the Cartithers action, that 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

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).[2]

II. THE UNDERLYING TRIAL – APRIL 2012

In the merits trial, all evidence related exclusively to the existence of construction defects, the resulting property damage, and the necessary repairs. The defects, damage, and repairs consisted of two phases. Phase I concerned the front entryway and rear balconies of the home and was remediated in 2005 and 2006. Phase II concerned improper waterproofing and exterior stucco work and was remediated in 2010 and 2011. The insurance issues litigated in this garnishment action were not germane to the underlying case, which exclusively considered the existence of construction defects and the resulting damages.

Only days before the underlying merits trial, MCC appeared at docket sounding and announced the filing of its Motion to Intervene "for the limited purpose of submitting special interrogatories to the Court to be used by the jury...to determine, among other things, 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." See Motion to Intervene, ¶ 5 [Docket #326]. MCC asserted that the "factual determinations [were] necessary because, among other things, not all policies include the same terms and exclusions." Id. Notably, MCC did not provide the Court or the Treaces with copies of its proposed interrogatories until after the close of all evidence and the jury had commenced deliberations. The Treaces objected to MCC's attempt to intervene in order to avoid the resulting prejudice. The Court denied MCC's attempt to intervene, finding it "waited until the eve of trial to file the instant motion". With the Motion to Intervene denied, the jury returned an unallocated verdict in favor of the Treaces.

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[2] MCC cannot rely on the only operative ROR letter [Defendant's Exhibit 4] as it was issued on August 15, 2011, more than 30 days after notice of the 2006 Phase I Damages and notice of the 2010 Phase II Damages. The earlier ROR letters cannot be relied upon by MCC as notice of this fungi exclusion as MCC denied coverage in those ROR letters. [Defendant's Exhibits 1, 2, and 3].

The Treaces obtained a Final Judgment on June 26, 2012 in the amount of $1,016,187 based on the jury verdict (not including attorney's fees and costs) and a second Final Judgment on April 29, 2013 in the amount of $379,076 (for attorney's fees and costs). The current net unpaid judgment balance is roughly $1,500,000. SDD is out of business and unable to pay the amounts awarded to the Treaces. The Treaces seek to satisfy the Final Judgment and Fee/Cost Order through garnishment of insurance proceeds due and owing to SDD from MCC under several policies of insurance.

III. INSURANCE POLICIES AND COVERAGE

MCC insured SDD under seven (7) policies of insurance, each of which provided $2,000,000.00 of coverage for Products-Completed Operations. The first policy was effective from August 1, 2003 to August 1, 2004, and the last policy was effective from August 1, 2009 to August 1, 2010. All seven (7) policies commenced on August 1st of the respective year. The policies provided substantively identical coverage, except that beginning with the August 1, 2006 policy the policies contained a CG2294 endorsement that eliminated the "subcontractor exception" to the "damage to your-work" exclusion. For reasons more fully explained in Section V(E) of this opinion, the Court finds the CG2294 endorsement to be inapplicable and the latter policies to continue to provide coverage for property damage caused by subcontractor work.

The Court's interpretation "of insurance contracts, such as the CGL policies in this case, is governed by generally accepted rules of construction. Insurance contracts are construed according to their plain meaning, with any ambiguities construed against the insurer and in favor of coverage." U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 877 (Fla. 2007) (citations omitted). As stated in Westmoreland v. Lumbermens Mut. Cas. Co., 704 So. 2d 176, 179 (Fla. 4th DCA 1997):

> "Insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties, and ambiguities are interpreted liberally in favor of the insured and strictly against the insurer who prepared the policy. *Prudential Prop. & Cas. Ins. Co. v. Swindal,* 622 So.2d 467 (Fla.1993). Florida law is equally well-settled that insuring or coverage clauses are construed in the

broadest possible manner to effect the greatest extent of coverage. *Hudson v. Prudential Prop. & Cas. Ins. Co.,* 450 So.2d 565, 568 (Fla. 2d DCA 1984) (insurance coverage must be construed broadly and its exclusions narrowly); *Nat'l Merchandise Co. v. United Serv. Auto. Ass'n,* 400 So.2d 526, 532 (Fla. 1st DCA 1981) (terms in policy relating to coverage must be construed liberally in favor of insured); *Valdes v. Smalley,* 303 So.2d 342, 344 (Fla. 3d DCA 1974) (clause extending insurance to insured must be construed liberally in favor of insured)."

IV. BURDEN OF PROOF

A. The Treaces' Burden of Proof

The Treaces bear the initial burden to prove that coverage under the MCC policies exists. The Court finds that the Treaces have met this burden. The insurance policies clearly state that MCC will pay those sums that its insured, SDD, is legally obligated to pay as damages because of "property damage" caused by an "occurrence". The Supreme Court of Florida has held that defective work performed by a subcontractor that causes damages to the contractor's completed project constitutes "property damage" caused by an "occurrence" as those terms are defined in standard CGL policies like the ones at issue in this case. United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 875 (Fla. 2007). MCC and the Treaces previously stipulated that all of the work at the Treaces' residence was performed by subcontractors. See Joint Pretrial Statement [Docket #719]. Further, in the Underlying Trial, it was stipulated that this defective subcontractor work caused damage that the Treaces were required to repair. [Plaintiff's Trial Exhibit 42]. Thus, in accordance with J.S.U.B. and the stipulated facts from the Underlying Trial, coverage exists for the damages awarded in the Underlying Trial and made part of the Final Judgment since SDD is obligated to pay the Final Judgment to the Treaces because of property damage that occurred during a policy period as a result of defective subcontractor work. However, an issue remains in this garnishment action as to when the property damage occurred so as to determine what policy or policies are triggered and are required to respond to indemnify SDD for some or all of the Final Judgment.

The final coverage issues to consider are any coverage defenses properly preserved and raised by MCC. Because the Treaces' have established that the Final Judgment is covered, the burden shifts to MCC to establish and prove the existence and application of an exclusion to avoid MCC's obligation to indemnify SDD for some or all of the Final Judgment.

B. Trigger of Coverage

There are four theories used to determine when "property damage" occurs under a CGL policy: (1) exposure, (2) continuous trigger, (3) manifestation, and (4) injury-in-fact. Mid-Continent Cas. Co. v. Frank Casserino Constr., Inc., 721 F. Supp. 2d 1209, 1215-16 (M.D. Fla. 2010). In this case, the parties agree that manifestation is the appropriate theory to apply, but they disagree on the meaning of "manifestation." The Treaces argue that damage manifests when it is discoverable upon a prudent engineering inspection, whereas MCC argues that damage manifests when it is actually discovered.[3] [Trial Transcript 34:18-36:22]. Recent case law supports the Treaces' position.

In Mid-Continent Cas. Co. v. Siena Home Corp., the court concluded that "the 'manifestation' of the 'occurrence' of property damage, for purposes of determining coverage [under] the Mid–Continent policies..., is the time that such damage was discernable and reasonably discoverable either because it was open and obvious or upon a prudent engineering investigation, and not the time of actual discovery...." See also Mid-Continent Cas. Co. v. Frank Casserino Constr., Inc., 721 F. Supp. 2d 1209 (M.D. Fla. 2010) ("That no one saw or 'discovered' damage caused by water intrusion during the policy period is of no moment. Under Florida's applicable 'trigger' theory...the only relevant question is whether physical injury to the buildings manifested itself during the period of coverage."); United Nat. Ins. Co. v. Best Truss Co., 09-22897-CIV, 2010 WL 5014012 (S.D. Fla. 2010) (holding that proof of discovery of the

[3] MCC's position on this issue has apparently changed since its motion to intervene in the underlying merits trial, where it submitted its proposed jury questions to the Court, which included an excerpt from Mid-Continent Cas. Co. v. Siena Home Corp., 5:08-CV-385-OC-10GJK, 2011 WL 2784200 (M.D. Fla. 2011), holding that manifestation means the time at which the damage was discoverable. [Docket #791; Defendant's Trial Exhibit 15, ID only]

damage is not required to trigger coverage if the damage was capable of being discovered). The Court agrees that damage is deemed to have manifested/occurred at the time that it is reasonably discoverable and not the time of actual discovery.

Based on the evidence adduced at trial, it is apparent that all of the property damage at issue—Phase I and Phase II damage—manifested/occurred during multiple MCC policy periods. The Treaces were the only party to offer expert witness testimony on this issue. The Treaces' expert, Mr. Brett Newkirk, testified that based on the nature of the construction defects all of the property damaged at the Treaces' residence would have manifested itself and been discoverable by December of 2003.

> Q. Now, Mr. Newkirk, have you been asked to give an opinion to a reasonable degree of certainty as a forensic engineer as to when, in your opinion, the damage to the Treaces' home first manifested itself, when it first occurred?
>
> A. I have.
>
> Q. And have you come to that opinion?
>
> A. I have.
>
> Q. And what is that opinion?
>
> A. I believe it would have been around December, 2003.
>
> Q. Okay. And we talked about Phase I and Phase II damages. Is that opinion different for the Phase -- for the 2006 damage that was repaired versus the 2010?
>
> A. No.
>
> Q. It's the same opinion?
>
> A. Yes.

[Trial Transcript 181:23-183:14]. MCC does not contest this point. [Trial Transcript 245:17-24].

Mr. Newkirk further testified that the property damage would have continued to occur until the time that it was properly repaired.

Q. Do you have an opinion as to whether the Phase I area, damage beginning in December of 2003 -- whether that continued in 2004, 2005, up until 2006, when the work was repaired?

A. I do.

Q. And what is that opinion?

A. I believe that up until the dates that it was fixed the damage to the wood would have continued to occur.

Q. And does that include damage to areas that weren't previously damaged?

A. Yes.

Q. And does that also include more damage to areas that were already damaged?

A. Yes.

Q. Okay. And as it relates to the Phase II area, the 2010 work that was done, do you have an opinion as to -- the same question: do you have an opinion as to whether the damage continued from, in your opinion -- starting in December of 2003 up to 2010, when the repair work was done?

A. I do.

Q. And is it the same opinion as to Phase I?

A. The same answer. I mean, until you stop the wettings from occurring, the decay is going to progress.

Q. And would there be -- is your opinion new damage each year up until the point that the 2010 damage was fixed?

A. Yes.

[Trial Transcript 193:10-194:17].

The unrebutted testimony clearly indicates that property damage occurred at the Treaces residence each year from 2003 to 2010. Accordingly, the Court holds: (i) the Treaces have established coverage for the Phase I damages under each of the MCC policies issued from 2003 to 2006; (ii) the Treaces have established coverage for the Phase II damages under each of the MCC policies issued from 2003 to 2010.

MCC argues that the Court should apply a "time-on-the-risk" analysis to allocate the awarded damages amongst the various policies that are triggered. The Court disagrees with MCC for two reasons. First, by MCC's own admission/argument, courts that have implemented the "time-on-the-risk" analysis do so when applying the "injury-in-fact" trigger, not the manifestation trigger. [Trial Transcript 282:7-20]. Second, in CSX Transp., Inc. v. Admiral Ins. Co., 1996 U.S. Dist. LEXIS 17125 (M.D. Fla., Nov. 6, 1996), the court rejected the application of the "time-on-the-risk" approach in Florida. Accordingly, the Court will not engage in a pro-rata apportionment of the damages across each of the various MCC policies that are triggered. Rather, the Court agrees with the Treaces' argument and application of the garnishment statute.

As an aside, even if the Court held "manifestation" to mean the time at which the damage was actually discovered, the Phase I and Phase II damages would both still be deemed to have manifested/occurred prior to 2006, thereby establishing coverage and negating the need for any inquiry into the applicability of the CG2294 endorsement. The unrebutted testimony indicates that the Phase I damage was actually discovered in December 2005 by Kendale Design Build. [Trial Transcript 104:14-24; 105:5-8] and the Phase II damages were actually discovered by the original contractor, SDD, back in 2004. [Trial Transcript 84:21-88:17, 110:13-111:23, and Plaintiff's Trial Exhibit 35 – Photo P-04-003/1].

Because the Treaces have established coverage, the burden shifts to MCC to prove specific exclusions and defenses barring coverage.

V. MCC'S DEFENSES AND EXCLUSIONS

MCC raises a number of defenses and exclusions to avoid coverage liability. Each of the defenses is addressed in turn.

A. "Rip and Tear" Damages

MCC argues that damages associated with removing non-damaged property to get to covered property, commonly referred to as "rip and tear" damages, are not covered. [Trial Transcript 277:1-9]. According to MCC, this means that the costs of removing the stucco,

windows, tile, and defective subcontractor work to access the damaged property are not covered. As support for this proposition MCC relies upon Amerisure Mut. Ins. Co. v. Auchter Co., 673 F.3d 1294 (11th Cir. 2012); Auto-Owners Ins. Co. v. Pozzi Windows Co., 984 So. 2d 1241 (Fla. 2008); and Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F.Supp. 2d 1201 (S.D. Fla. 2008). However, these cases do not support MCC's position.

Amerisure simply stands for the proposition that replacement of defective work that does **not cause damage to other property** is not "property damage" and, therefore, is not covered under a standard CGL policy. The case does not address the issue of coverage for the removal and replacement of non-damaged property necessary to access and repair the damaged property or removal and replacement of defective work that causes damage to other property Unlike the Treaces, the owner of the property in Amerisure did not allege that the subcontractor's defective work ever caused damage to any other property and for this reason the court found no occurrence or coverage. The unrebutted testimony in this case is that defective work caused substantial damage to other property. Thus, Amerisure is inapplicable to any argument regarding "rip and tear" damages.

Consistent with Amerisure, Pozzi highlights the distinction between a claim for the cost of repairing defective subcontractor work and a claim for repairing damage to other property caused by the subcontractor's defective work. In Pozzi, the Court held that if the windows were defective prior to being installed, then there was no coverage under the CGL policy; but if the subcontractor's defective installation of the windows caused damage to the windows or other property, then the policy did provide coverage. 984 So. 2d at 1248. Pozzi simply applies J.S.U.B. by holding that for there to be an occurrence and coverage for defective subcontractor work, there are two requirements: (i) defective subcontractor work and (ii) resulting damage to other property caused by the defective subcontractor's work. Pozzi does not support any argument that MCC's policies do not cover "rip and tear" expenses that were a reasonable and necessary expenses incurred to repair covered property damage.

Lastly, in Lucas Waterproofing, the waterproofing subcontractor for a condominium construction project defectively performed its work, which resulted in damage to other property at the project. The waterproofing subcontractor's own insurer (not the general contractor's insurer) contested coverage under its policies. This is significant because the defective work was NOT performed by a subcontractor, but rather, by the insured itself, who happened to be a subcontractor. Thus, the subcontractor exception to the "your-work" exclusion would NOT apply since the defective work was performed by the insured and NOT a subcontractor of the insured. In the present case, it is the general contractor's insurance policies at issue and all of the defective work was performed by subcontractors, NOT the insured general contractor.

As long as the insured's liability arises from the need to effect repair of covered property damage, all the damages are "sums the insured becomes legally obligated to pay as damages ***because of***...'property damage' to which this insurance applies." 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).

The words "because of" in the policy indicate that if the insured's legal liability arises from property damage, then the policy will cover all consequential economic losses incurred to fix the property damage. As a result, the insurer must indemnify the insured against all damages awarded, including the cost to repair work that did not sustain property damage but that had be

repaired and/or replaced in order to get to and repair covered property damage. See Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 678 n.33 (Tex. App. 2006) (removal of EIFS (exterior of home) to access and repair underlying water damage or determine the areas of underlying damage necessary to repair underlying water damage are "damages because of...property damage" and covered) (abrogated by Gilbert Texas Const., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118 (Tex. 2010) as to the unrelated issue of a contractual liability exclusion).

The cases that hold otherwise are distinguishable because the reason the rip and tear costs were not covered was that the Court found no "occurrence" within the meaning of the policy, and as a result no covered property damage. The unrefuted testimony from Brian Wingate of Kendale and Brett Newkirk was that all of the dollars spent and included in the Final Judgment were reasonable and necessary costs to repair the covered property damage and that there was NO other method to repair this covered property damage in a less costly manner. MCC, having elected not to call any witnesees and/or offer up any counter expert testimony, has no basis to argue against the reasonableness of the amounts spent and included in the Final Judgment.[4]

As long as the damages were incurred to repair "property damage" caused by an "occurrence", the policy covers these economic losses, including the removal and replacement of non-damaged work necessary to get to and repair the property damage. Lee H. Shidlofsky & Patrick J. Wielinski, Commercial General Liability Coverage, in CONSTRUCTION INSURANCE: A GUIDE FOR ATTORNEYS AND OTHER PROFESSIONALS 67, 79 (Stephen D. Palley et al. eds. 2011). As previously discussed, Florida recognizes that damage resulting from defective subcontractor work qualifies as "property damage" caused by an "occurrence" as those terms are used in

[4] MCC's attempts to have Mr. Wingate quantify what percentage of the costs were to repair actual wood damage and wood rot versus costs that needed to be done to get to the damaged wood rot is irrelevant. What MCC failed to ask Mr. Wingate was whether any portion of the costs was incurred to repair defective work that was NOT necessary to repair the covered property damage. [Trial Transcript 149:10-150:4].

standard CGL policies. J.S.U.B., Inc., 979 So. 2d at 875. In this case, there is no dispute that defective subcontractor work caused property damage at the Treaces residence. The Treaces' experts testified that all of money spent by the Treaces was because of property damage and that there was not a cheaper way to repair the damage. [Trial Transcript 111:24-112:7; 155:9-15; 167:2-19; 171:15-25]. Therefore, absent some other exclusion, all of the damages awarded in the underlying jury verdict are covered under the MCC policies.

B. The Windows

MCC argues that any damages awarded to the Treaces in the Underlying Trial for replacement of the windows are not covered by the MCC policies because the windows were not "property damage" as that term is used in the insurance policies. But, MCC failed to advise its insured of any potential coverage defenses related to the windows within the time period prescribed by Florida's Claims Administration Statute. Fla. Stat. § 627.427. Consequently, MCC is now estopped from denying coverage for the windows.

The Claims Administration Statute precludes an insurance company from asserting any coverage defense that is not delivered, in writing, to the insured via registered mail or hand delivered within 30 days after the insurer knew or should have known of the coverage defense. Id. MCC learned of the Phase II damage in 2010 and, in fact, had already retained counsel to defend SDD. MCC failed to advise SDD of any potential coverage defenses related to the windows within 30 days. The only reservation of rights letter that addresses the Phase II damage concerning the windows is Defendant's Trial Exhibit 4, dated April 15, 2011, issued almost a year after notice of the Phase II damage. Consequently, MCC is estopped from denying coverage for the windows.

Even if MCC was not estopped from denying coverage for the windows, damages attributable to the windows are still covered under MCC's policies. The Treaces do not dispute that the windows themselves were not damaged, rather the unrefuted evidence at trial was that replacement of the windows was necessary to repair the Phase II property damage. The plain

language of the insurance policies and the unrebutted testimony of the Treaces' witnesses support the Treaces' position. At trial, Mr. Wingate testified that (i) removal of the windows was necessary to fix the property damage around the window and to properly waterproof the structure, and (ii) that once the windows were removed they could not be reused because they did not meet the building code requirements. [Trial Transcript 107:7-108:19; 115:1-115:18; 157:7-158:16].

Pursuant to the terms of the insurance policies, the damages associated with the replacement of the windows are sums that the insured, SDD, was legally obligated to pay as "damages ***because of***...'property damage' to which [the] insurance applies." (emphasis added). Mr. Wingate's unrebutted testimony is that removal and replacement of the windows was necessary to repair the property damage. Thus, similar the discussion above regarding "rip and tear", the damages attributable to removal and replacement of the windows are clearly "because of" or a result of property damage to which the insurance applies. There was no alternative to adequately repair the property damage. Consequently, the Court holds that damages attributable to the windows are covered under MCC's policies.

C. Damage to Subcontractor Work Caused by That Subcontractor's Own Work

MCC argues that the policies it issued to SDD do not cover damage to subcontractor work if the damage was caused by that subcontractor's own work. [Trial Transcript 145:23-146:3]. According to MCC, coverage only exists for subcontractor work that causes damages to other subcontractors' work. The Supreme Court of Florida has indicated otherwise.

In J.S.U.B., 979 So. 2d 871, 894 (Fla. 2007)(Lewis, C.J., concurring), a seminal case repeatedly relied upon by MCC for other issues, Justice Lewis explains the history and scope of the subcontractor exception to the "your-work" exclusion.[5] In 1976, the insurance industry

[5] Unlike MCC's counsel, who explicitly claimed to not care about Justice Lewis' concurring opinion, the Court cares about what the Florida Supreme Court has to say on this issue. See Trial Transcript 271:1-6 ("Now, there are two seminal Florida Supreme Court cases. One is what we call the J.S.U.B. case...We relied on that opinion and *we don't care about a concurring opinion.*") Interestingly, MCC's counsel used

introduced the Broad Form Property Damage Endorsement ("BFDE"), which extended coverage to general-contractor insureds for property damage caused by the work of their subcontractors. In 1986, the Insurance Services Office ("ISO") directly incorporated the BFDE language into its standard CGL policy in the form of the so-called subcontractor exception to the your-work exclusion.[6] The ISO issued a publication titled "Broad Form Property Damage Explained" in which it clarified the scope of coverage for an insured, stating:

> (1) The insured would have no coverage for damage to his work arising out of his work.
>
> (2) The insured would have coverage for damage to his work arising out of a subcontractor's work.
>
> (3) The insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.
>
> (4) The insured would have coverage for damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.

The MCC policies at issue in this case are standard CGL policies promulgated by the ISO. See the bottom of the pages of Defendant's Trial Exhibits 5 through 11, indicating the policies are copyright property of ISO. As demonstrated by ISO's own explanatory circulars, and as noted by the Florida Supreme Court, implicit in the drafting history is the recognition that the policies provide coverage for damage to subcontractor work arising out of that subcontractor's work. By using the ISO forms, MCC adopted the scope of coverage intended by the ISO and cannot now deny coverage for property damage to an insured's subcontractor's work arising out of that subcontractor's work when the ISO has explicitly stated that it intended to include coverage for such damage. Because all of the work at the Treaces' residence was performed by

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the concurring opinion in Geico General Insurance Co. v. Williams, 111 So. 3d 240 (Fla. 4th DCA 2013), to support MCC's motion in limine concerning the Treaces' entitlement to prevailing party attorney's fees. [Hearing Transcript dated 9/30/13, 19:24-20:21].

[6] As the Florida Supreme Court explained, the ISO is "an industry organization that promulgates various standard insurance policies that are utilized by insurers throughout the country, including the standard CGL policy at issue in this case." J.S.U.B., Inc., 979 So.2d 871, 879 n. 6 (Fla.2007) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772, 113 S.Ct. 2891, 2896, 125 L.Ed.2d 612 (1993)).

subcontractors, all of the property damage resulting from defective work is covered under the MCC policies issued to SDD, barring some other exclusion.

D. Fungus Exclusion

See above: Section I – Overview/Background

E. CG2294 Endorsement – Non-renewal

MCC argues that there is no coverage for the Phase II property damage because the damage manifested/occurred in 2010 and the insurance policies in effect at that time contained the CG2294 endorsement that excluded coverage for damage resulting from subcontractor work. MCC's argument fails for a number of reasons.

First, because the Court has already held that the Phase II damage manifested/occurred during each of the policy periods from 2003 to 2010, the issue of the CG2294 endorsement is effectively moot. The three policies issued by MCC from 2003 to 2006—prior to MCC's incorporation of the CG2294 endorsement—*each* provide up to $2,000,000.00 of Completed Operations coverage. This is more than enough coverage to satisfy the Treaces' outstanding judgments against SDD without ever needing to consider the 2006 to 2010 policies containing the CG2294 endorsement.

Second, the Court finds that the CG2294 endorsement is inapplicable in this case because its use by MCC constituted a non-renewal of the previous year's policy for which MCC failed to provide its insured with the requisite statutory notice. MCC's addition of the CG2294 endorsement materially changed the terms and conditions of the previous year's policy by removing coverage for property damage resulting from defective subcontractor work. Mid-Continent Casualty Co. v. Dwight Holloway & Co., Civ. No. 6:09-CV-2009 (Docket No. 210) (M.D. Fla. Oct. 31, 2011). In an opinion that is binding precedent on this Court, Florida's Fifth District Court of Appeal held that a policy that materially changes the terms and conditions of the prior year's policy is deemed a "nonrenewal." U.S. Fire Ins. Co. v. S. Sec. Life Ins. Co., 710 So. 2d 130, 132 (Fla. 5th DCA 1998) (citations omitted). Because MCC's addition of the

CG2294 endorsement was a nonrenewal, MCC was obligated to disclose to its insured (i) the fact of the endorsement and (ii) the reason for the endorsement. Fla. Stat. § 627.4133; see Mid-Continent Casualty Co. v. Dwight Holloway & Co., Civ. No. 6:09-CV-2009 (Docket No. 210) (M.D. Fla. Oct. 31, 2011).

MCC failed to provide its insured with the statutorily required notice. See Stipulation to Proffered Testimony of Jeffrey Chefan ¶¶ 6-8 [Plaintiff's Trial Exhibit 50]. Merely attaching the endorsement to the policy sent to the insured—as MCC did—is insufficient to inform the insured of significant policy changes. U.S. Fire, 710 So. 2d at 132. Consequently, the terms of the previous year's policy remain in effect, which means that property damage resulting from subcontractor work remains covered. Fla. Stat. § 627.4133; North Point Cas. Ins. Co. v. Arden Ins. Assoc., Inc., 75 So. 3d 798, 799 (Fla. 4th DCA 2011); Mid-Continent Casualty Co. v. Dwight Holloway & Co., Civ. No. 6:09-CV-2009 (Docket No. 210) (M.D. Fla. Oct. 31, 2011).

In Holloway, the court held that MCC's use of the CG2294 endorsement constituted a nonrenewal of the initial policy because it materially altered the insured's coverage. As a result, MCC was obligated to disclose to its insured (i) the fact of the endorsement and (ii) the reason for the endorsement. Fla. Stat. § 627.4133. MCC's failure to provide such notice to its insured was a breach of its statutory obligations. Consequently, the terms of the previous year's policy remained in effect.

The Court agrees with the holdings of U.S. Fire and Holloway and finds: (i) MCC's use of the CG2294 endorsement constituted a nonrenewal; (ii) MCC failed to provide its insured with the requisite statutory notice; and (iii) the terms of the previous year's policy, which provided coverage for damage caused by subcontractor work, remained in effect. Consequently, even if the Phase II damages were deemed not to have manifested/occurred until 2010, the 2010 policy would still provide coverage for property damage caused by defective subcontractor work.

VI. ATTORNEY'S FEES BASED UPON ASSIGNMENT

The Treaces, as the assignee of MCC's insured, seek to recover attorney's fees incurred in pursuing recovery from MCC. On December 13, 2013, the insured, SDD, assigned to the Treaces (the "Assignment") all rights and benefits of any kind available to SDD under the various insurance policies issued to it by MCC, including all proceeds due or to become due under the insurance policies and the right to exercise all options, privileges, remedies and choses in action available to the insured.. Pursuant to Fla. Stat. § 627.428, the Treaces, as the assignee of SDD, are entitled to recover any attorney's fees they have incurred in pursuing recovery from MCC, regardless of whether the fees were incurred as part of this garnishment action or the separate declaratory judgment action filed by MCC that was previously dismissed. Allstate Ins. Co. v. Regar, 942 So. 2d 969, 972 (Fla. 2d DCA 2006) ("[A]ttorney's fees clearly are available to an assignee of an insured's coverage under section 627.428...[A]n assignee of an insurance claim...logically should be entitled to an attorney's fee when he sues and recovers on the claim.") (citing All Ways Reliable Bld. Maintenance, Inc. v. Moore, 261 So. 2d 131, 132 (Fla. 1972)). MCC does not disagree that Fla. Stat. § 627.428 provides that an assignee of an insured can be awarded attorney's fees, but MCC contests the validity of the Assignment. MCC argues that the assignment is invalid because SDD was administratively dissolved at the time of its execution and it lacked consideration. MCC is incorrect.

For the reasons set forth in the Treaces' Reply to MCC's Response for Reconsideration or Clarification on Entitlement to Attorney's Fees (Docket #793), the Court finds that the Treaces are entitled to all attorney's fees incurred in pursuing MCC, both in this garnishment action and the previously dismissed declaratory judgment action.

VII. CONCLUSION

Accordingly, **IT IS ORDERED** as follows:

1. MCC seven policies issued from 2003 – 2009 [Plaintiff's Trial Exhibits 1 to 8] provide coverage for the damages included in the Final Judgment;

2. As a judgment creditor and assignee, the Treaces have all rights and claims that SDD has under the seven policies;

3. MCC is obligated under the seven policies to indemnify SDD for the full amount of the unpaid Final Judgment. The unpaid Final Judgment shall be determined post-trial in an evidentially hearing or by stipulation of the Parties and shall include all amounts awarded hereunder, including costs, interest and attorneys' fees;

4. Because this is a garnishment action, in accordance with Florida Statute §77.083, the Treaces shall take from MCC the amount awarded as damages as calculated per this Order or the amount unpaid on the Final judgment, whichever is less. Any amounts paid by MCC under its seven policies to satisfy this Order shall be set off against the Final Judgment per Florida Statute §77.083 and there shall be no set off by MCC by or between any of the seven policies of insurance;[7]

5. MCC is also liable for all taxable costs incurred in the Underlying Trial and this garnishment action; and,

6. MCC is also liable for all attorney's fees incurred by the Treaces in pursuing MCC in this garnishment action and the declaratory judgment action. The amount of such attorney's fees shall be determined post-trial in an evidentially hearing or by stipulation of the Parties.

DONE AND ORDERED this _____ day of _____, 2014.

_____
HOWARD M. MALTZ
CIRCUIT COURT JUDGE

[7] As noted by the Treaces, this is a garnishment action and the Treaces are entitled to recover from each policy of insurance to the extent it provides coverage for the Final Judgment just as if the policies of insurance were bank accounts.