IN THE SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 6D23-4243

DR. ANKE DOUBLON-WENZ,

Appellant/Cross-Appellee,

v.

LENNOX INDUSTRIES INC. and LENNOX INTERNATIONAL INC.

Appellees/Cross-Appellants.

REPLY BRIEF OF CROSS-APPELLANT, LENNOX INDUSTRIES, INC.

ON APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Cross-Appellant Lennox Industries, Inc. ("Lennox") incorporates the definitions set out in its June 13, 2024 Answer Brief and Cross-Initial Brief. Lennox will cite Wenz's Amended Initial Brief as "IB" followed by the page number; Lennox's Answer Brief and Cross-Initial Brief as "AB" followed by the page number; and Wenz's Cross-Answer Brief as "CAB" followed by the page number.

INTRODUCTION

Lennox will not rehash the reasons why the Court should affirm the Summary Judgment Order, which would obviate this conditional cross-appeal. In the event the Court reverses the Summary Judgment Order and remands this case for further proceedings, the Court should also reverse the trial court's Order Denying Leave.

In her Cross-Answer Brief, Wenz does not defend the Order Denying Leave. Tellingly, she does not even discuss the contents of that Order. That is by design: Wenz ignores the Order Denying Leave because it is reversible on its face. The trial court's sole rationale for its Order Denying Leave is that the Motion for Leave was "untimely and procedurally improper." (R:6656). This is insufficient as a matter of law to support denial. *See* AB 54–55 (collecting cases holding that untimeliness, without more, is insufficient to support denial).

Wenz does not contend otherwise. Instead, she argues the Order Denying Leave was correct because "[i]f the Trial Court had granted

the Motion for Leave," it "would have almost certainly resulted in prejudice to Wenz." CAB 28. This argument is both speculative and wrong. But more fundamentally, it is irrelevant. Even if Wenz were correct, the trial court did not even assess prejudice, let alone make any requisite findings about prejudice. This alone warrants reversal.

Wenz also "objects on the basis of futility." CAB 30. As explained in Lennox's Cross-Initial Brief, the Motion for Leave was not futile, and Wenz misstates the nature of Lennox's asserted third-party claims against Conditioned Air. *See* AB 63–66. But again, even if Wenz's futility arguments were correct, the trial court neither assessed futility nor made any requisite findings about futility. Thus, Wenz's argument cannot salvage the Order Denying Leave.

Recognizing that reversal is required, Wenz asks the Court to "order the [third-party] claim bifurcated from Wenz's claims against Lennox." CAB 31. But Wenz did not seek bifurcation below and cannot first make that request on appeal. If the Court remands this case, Wenz can present the question of bifurcation for the trial court to consider in the first instance.

ARGUMENT

I. THE ORDER DENYING LEAVE SHOULD BE REVERSED.

Wenz concedes the points that warrant reversal of the Order Denying Leave.[1] Among other things, Wenz concedes that (i) Florida has a policy of "liberally allow[ing] amendment to pleadings;" (ii) the trial court made no findings of prejudice, futility, or abuse of privilege to amend; and (iii) untimeliness, without more, cannot support the denial of the Motion for Leave. *See* CAB 25-30. Those concessions alone confirm that this Court should reverse the Order Denying Leave. Wenz's remaining arguments are irrelevant and incorrect.

A. The Trial Court's Sole Rationale for the Order Denying Leave Is Insufficient as a Matter of Law.

The Order Denying Leave is reversible on its face because it denies leave to amend based solely on timeliness without assessing prejudice, futility, or abuse of the privilege to amend. *See* AB 54–55.

In its Cross-Initial Brief, Lennox cited several cases for the proposition that untimeliness, without more, is an insufficient basis

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[1] Some of Wenz's concessions are explicit. *E.g.*, CAB 26 ("the policy in Florida is to liberally allow amendments to pleadings"). Others are the result of her failure to respond to Lennox's arguments in her Cross-Answer brief. *See, e.g.*, *Agee v. Brown*, 73 So. 3d 882, 886 (Fla. 4th DCA 2011) (citing *Anderson v. Ewing*, 768 So. 2d 1161, 1166 n.1 (Fla. 4th DCA 2000)) ("[W]e treat Brown's failure to address this issue in his answer brief as a concession[.]"); *Anderson*, 768 So. 2d at 1166 n.1 ("Anderson as much as conceded this issue by failing to address it at all in his answer brief.").

to deny a Motion for Leave. *See* AB 54 (collecting cases). For instance, in *Sorenson v. Bank of N.Y. Mellon as Trustee For Certificate Holders CWALT, Inc.*, 261 So. 3d 660 (Fla. 2d DCA 2018), the Second DCA held that the trial court abused its discretion by denying a motion for leave to amend filed "the day before trial" based on "the length of time that the case had been pending." *Id.* at 662. The Second DCA held that absent any "indication that the Bank would be prejudiced by allowing amendment," the trial court "abused its discretion in denying Sorenson the opportunity to amend to add new arguments solely because of the length of time the action had been pending." *Id.* at 663.

Likewise, in *Hall v. Hall*, 171 So. 3d 817 (Fla. 4th DCA 2015), the Fourth District held that the trial court abused its discretion by denying a motion for leave to amend where its stated rationale was that "eighteen months had passed…and the case was thirty days from trial." *Id.* at 823. The Fourth DCA reversed, holding that absent any "express finding that allowing [] leave to amend one month before the scheduled hearing would result in prejudice," the trial court "abused its discretion by denying [movant] leave to amend his answer." *Id.* at 824. *See also Reyes v. BAC Home Loans Servicing L.P.*, 226 So. 3d 354, 356 (Fla. 2d DCA 2017) (The "bare timing of a motion to amend…[is], at most, ancillary to the primary considerations of

prejudice to the opposing party, abuse of privilege, and futility of the proposed amended pleading.").

Wenz ignores these and other cases by arguing that the Motion for Leave was improper because Lennox allegedly waited too long. *See* CAB 23-24. As Lennox's cited cases hold—and as Wenz's scant cases confirm[2]—Wenz's argument is unavailing: untimeliness is an insufficient reason to deny a motion for leave absent a finding of prejudice, futility, or abuse of the privilege to amend.[3]

Wenz's argument is also mistaken. She chastises Lennox for not asserting a third-party claim against Conditioned Air as early as September 14, 2021—when Lennox was first named as a defendant—

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[2] Wenz's cited cases confirm that untimeliness, without more, is an insufficient rationale for denying a motion for leave. *See* CAB 28. For example, Wenz cites *Noble v. Martin Memorial Hospital Association, Inc.*, 710 So. 2d 567 (Fla. 4th DCA 1997). There, the Fourth District affirmed the denial of a motion for leave to amend where the movant sought to add a claim "for the sole purpose of defeating a motion for summary judgment." *Id.* at 568. In other words, the Fourth District affirmed the denial of leave to amend not because of untimeliness, but because the motion smacked of gamesmanship. The trial court made no such findings here, nor could it based on this record.

[3] *See, e.g.*, *Sorenson*, 261 So. 3d at 662 (trial court abused its discretion by denying motion for leave to amend filed the "day before trial" based solely on "the length of time the action had been pending"); *Hall*, 171 So. 3d at 823-24 (trial court abused its discretion denying motion for leave because "eighteen months had passed…and the case was thirty days from trial" absent any "express finding that allowing [] leave to amend one month before the scheduled hearing would result in prejudice").

but forgets that Conditioned Air was a codefendant at that time. *See* CAB 23–24. Indeed, for one year, Conditioned Air and Lennox were codefendants. (R:683-745, 780 (naming Lennox as defendant in September 2021); R:4742-43 (dismissing Conditioned Air in September 2022)). During that time, Lennox could not have asserted a third-party claim against Conditioned Air. Third-party claims apply against only third parties, not codefendants.

To be sure, Lennox could have filed a crossclaim during that time. But Lennox reasonably concluded that a trial with two codefendants would involve an apportionment of liability and damages that obviated the need for contribution and indemnity crossclaims against Conditioned Air. But once Wenz settled with Conditioned Air and changed her theory of the case to hold Lennox solely liable for her whole-house renovation costs, Lennox sought leave within a few months to pursue a contribution and indemnity claim against Conditioned Air. As a result, Wenz's claim that Lennox delayed for an "approximate twenty (20) month period" is not just irrelevant but also simply wrong. CAB 32.[4]

[4] For the same reasons, Wenz's passing reference to the "invited error" doctrine is inapposite. CAB 29–30. There was no undue delay, and even if there was, under Florida law timeliness is not an "error" sufficient to deny motion for leave to amend. *See supra* at 3–5.

B. Wenz's Prejudice Argument Is Irrelevant and Wrong.

Wenz argues that the Order Denying Leave was correct because "[i]f the Trial Court had granted the Motion for Leave," it "would have almost certainly resulted in prejudice to Wenz." CAB 28. As explained above, the trial court made no such findings, instead basing its Order Denying Leave exclusively on purported timeliness concerns. (R:6655-56); *see* AB 54–55. As a result, Wenz's prejudice argument is irrelevant. *See supra* Section I.A.

Wenz's prejudice argument is also wrong. The only purported prejudice Wenz can muster is speculation about what Conditioned Air might have done had the Motion for Leave been granted:

> If the Trial Court had granted the Motion for Leave, Conditioned Air, after the time it took to be served, was sure to seek to dismiss the Third-Party claim, seek to engage in discovery on the third-party claim, and seek to retain an expert, all of which would have almost certainly resulted in prejudice to Wenz.

CAB 28.

As an initial matter, Wenz's speculation is unfounded. She overlooks that Conditioned Air already had retained a mechanical engineering expert and a forensic engineering expert. *See* AB 10–11. It had also engaged in extensive discovery, including, but not limited to, serving numerous interrogatories, serving document requests and receiving thousands of documents in response thereto, deposing Plaintiff and her spouse, deposing Plaintiff's experts, and inspecting

Plaintiff's home and HVAC equipment. *Id.* Given that Conditioned Air had already conducted extensive discovery, there is no reason Conditioned Air would have to take any discovery—let alone extensive discovery—if Lennox's Motion for Leave were granted.

Moreover, Wenz conflates potential delay with prejudice. As explained in its Cross-Initial Brief and above, it is far from clear that granting Lennox's Motion for Leave would have delayed proceedings, particularly where five months remained before the trial was set to commence. *See* AB 56–59. But even if the Motion for Leave would potentially have caused delay, the proper course is for a trial court to grant a continuance—not to deny the Motion for Leave. *See, e.g.*, *Dimick v. Ray*, 774 So. 2d 830, 833-34 (Fla. 4th DCA 2000) (holding that potential prejudice could be "easily addressed by allowing additional time for appellees to research the appropriate legal standards involved"); *Carter v. Ferrell*, 666 So. 2d 556, 557 (Fla. 2d DCA 1995) (reversing denial of leave where "[a]ny potential prejudice…could have been cured by granting a continuance").

Notably, Wenz does not respond to the argument that Lennox's indemnification and contribution claims against Conditioned Air could not cause Wenz any prejudice because they have no bearing on Wenz's claims or the amount of damages she could seek to recover from Lennox. *See* AB 59–61. By failing to respond to this argument, Wenz waived any defense thereto. *Supra* at 3 n.1.

C. Wenz's Futility Argument Is Irrelevant and Wrong.

Wenz also "objects on the basis of futility," arguing cursorily that "Lennox's third-party claim against Conditioned Air is futile because Lennox is essentially attempting to end-run around the Default Judgment to re-argue liability." CAB 30. As explained above, the trial court made no such findings, instead basing its Order Denying Leave on purported timeliness concerns. (R:6655-56); *see* AB 54–59. As a result, Wenz's futility argument is irrelevant. *See supra* Section I.A.

It is also wrong. Wenz does not respond to the arguments in Lennox's Cross-Initial Brief anticipating her futility argument and thus concedes them. *See Agee*, 73 So. 3d at 886. Lennox contended:

> Wenz argued below that the Motion for Leave was futile because it attempted to circumvent the Default Judgment, which established liability and struck Lennox's *Fabre* defenses. (R:6247). But Wenz's analogy to the *Fabre* defense is wrong.…
>
> [T]he point of a *Fabre* defense is to allocate fault to a nonparty on the verdict form and thereby reduce the damages attributed to the primary defendant. That is not what Lennox sought to do. Instead, Lennox sought to litigate the "damages Wenz is entitled to recover from Lennox," which was explicitly permitted by the Sanctions Order, and which required Wenz to prove the requisite connexity between Lennox's alleged liability and her damages. (R:5543). Then, assuming *arguendo* that the factfinder would find some entitlement to damages against Lennox, then Lennox would pursue its crossclaims for contribution or indemnity against Conditioned Air. This is

> not an end-run around the Default Judgment, but instead an efficient means for all parties to pursue related claims in a single proceeding.

AB 65–66.

There is nothing futile about Lennox's asserted indemnification and contribution claims against Conditioned Air, particularly given Wenz's judicial admission that she had "conclusively established" that Conditioned Air (and not Lennox) "directly caused" the mold growth and resulting damage to her Property. (R:234, 324, 755, 1741); *see, e.g.*, *Fish Tale Sales & Serv., Inc. v. Nice*, 106 So. 3d 57, 62 (Fla. 2d DCA 2013) ("[A] tortfeasor who shares a common legal liability to a plaintiff with another tortfeasor may seek contribution from the second tortfeasor."); *Claudio v. Regalado*, 116 So. 3d 451, 454 (Fla. 2d DCA 2013) (finding error by trial court in denying amendment to add counterclaim and observing that amendment is particularly appropriate where the joint tortfeasor is the "central, if not the most important, party[]").

D. Wenz Concedes Judicial Economy Supports Reversal.

Wenz does not dispute (and thus concedes) Lennox's argument that judicial economy supports reversal of the Order Denying leave. AB 66–67. Florida law favors deciding all claims on their merits in one proceeding. *See Dimick*, 774 So. 2d at 834 ("The decided preference of the modern rules [is] for all claims to be brought in one action."). That rule applies with special force when coupled with

Florida's liberal amendment policy. *See Ranger Constr. Indus., Inc. v. Martin Companies of Daytona, Inc.*, 881 So. 2d 677, 681 n.1 (Fla. 5th DCA 2004) (quoting *Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla., Inc.*, 637 So. 2d 968, 970 (Fla. 5th DCA 1994)) ("Leave to amend should be freely given, the more so when…the amendment is based on the same conduct, transaction and occurrence upon which the original claim was brought.").

Left undisturbed, the Order Denying Leave would force Lennox to file a separate and largely duplicative lawsuit against Conditioned Air, in which case both parties would have to repeat much of the discovery that has already taken place and the trial court (and perhaps a jury) would hear the same evidence and arguments twice. Moreover, given that the Wenz family lives overseas, there are genuine concerns about Lennox's ability to obtain trial testimony from them in a separate standalone trial against Conditioned Air. It would be far more efficient for a single court to have all the claims and crossclaims relating to Wenz's Property resolved in a single trial.

II. WENZ MUST RESERVE HER BIFURCATION REQUEST FOR THE TRIAL COURT TO CONSIDER ON REMAND.

Recognizing that reversal is required, Wenz asks the Court to "order the [third-party] claim bifurcated from Wenz's claims against Lennox." CAB 31. As with her primary appeal, Wenz asks this Court

to decide issues that are not properly before it and that should instead be considered by the trial court in the first instance.

In her primary appeal, Wenz asks this Court to resolve the purportedly novel question of whether a contractual consequential damages bar is an affirmative defense. *See* IB 46–54. But that question is not properly before this Court. Instead, the question here is whether the trial court struck the Consequential Damages Bar *sub silentio* when it entered the Default Judgment. That question is easily resolved because the trial court expressly answered it twice. In its Summary Judgment Order and in its order denying Wenz's motion for reconsideration, the trial court explicitly stated that when it entered its Default Judgment it did not intend to strike, and did not strike, the Consequential Damages Bar. The trial court had discretion (within the confines of Florida law) to fashion what it deemed to be an appropriate sanction under the circumstances and, of course, the trial court is in the best position to construe the scope of its own Sanctions Order.

By reframing the issue as an abstract question of law, Wenz effectively asks this Court to ignore the trial court's own statements about its Order and to retroactively enhance the sanction that the trial court imposed. Even if this Court were to agree with Wenz that a contractual limitation of damages is an affirmative defense, the proper remedy would be to remand for the trial court to amend its

Default Judgment to make clear it does not purport to strike the Consequential Damages Bar.

Likewise, Wenz's bifurcation request is beyond the scope of this appeal. If this Court remands this case for further proceedings, Wenz can present the bifurcation question for the trial court to consider in the first instance. Florida law makes clear that the trial court is in the best position to determine trial management issues such as bifurcation. *See Roseman v. Town Square Ass'n, Inc.*, 810 So. 2d 516, 521 (Fla. 4th DCA 2001) ("[T]he law is well settled that bifurcation is subject to the sound discretion of the trial court."). Indeed, even Wenz's own cited case provides that "**the trial court** does have discretion to sever a third party claim pursuant to Florida Rule of Civil Procedure 1.270(b)." CAB 31 (emphasis added) (quoting *Attorneys' Title Ins. Fund, Inc. v. Punta Gorda Isles, Inc.*, 547 So. 2d 1250, 1252-53 (Fla. 2d DCA 1989)).

Wenz cites no case in which an appellate court ruled on a bifurcation request in the first instance, and research has revealed none. As with her primary appeal, this Court should permit the trial court to consider Wenz's new arguments in the first instance. *See Century-National Ins. Co. v. Frantz*, 369 So. 3d 739, 746 (Fla. 2d DCA 2023) (quoting *Akers v. City of Miami Beach*, 745 So. 2d 532, 532 (Fla. 3d DCA 1999)) ("An appellate court 'should not ordinarily decide issues not ruled on by the trial court in the first instance'"); *see also*

Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (An appellate court is "a court of review, not of first view."); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016, 1032 (Fla. 4th DCA 1996) (Farmer, J. dissenting) (original emphasis) ("Appellate review is, after all, just that: *review*, not the first view.").

CONCLUSION

For the foregoing reasons, and as explained more fully in Lennox's Answer Brief and Cross-Initial Brief, this Court should affirm the trial court's grant of summary judgment to Lennox. In the event the Court reverses that judgment, it should also reverse the trial court's denial of Lennox's Motion for Leave.

(Attorney's Signature Appears on the Following Page)

Dated: August 21, 2024

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CERTIFICATE OF SERVICE

I certify that on August 21, 2024, I electronically filed the foregoing with the Clerk of Court via the Florida E-Filing Portal, which shall cause a copy to be served via email to the following:

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CERTIFICATE OF COMPLIANCE

I certify this brief complies with the typeface and type style requirements of Rule of Appellate Procedure 9.045(b) and 9.210(a)(2). This brief uses Bookman Old Style 14-point typeface and contains 3,243 words.

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