FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 4D23-0242

RICHARD POLAKOFF and ROBIN POLAKOFF,

Appellants,

vs.

ACTION ROOFING SERVICES, INC.,

Appellee.

APPELLEE ACTION ROOFING SERVICES, INC.'S ANSWER BRIEF

On Appeal from the Seventeenth Judicial Circuit
Broward County, Florida

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CITATION TO THE RECORD

The Record is cited R. followed by the page number. The Appellants, Richard Polakoff and Robin Polakoff, will be referred to herein as "the Polakoffs". The Appellee, Action Roofing Services, Inc. will be referred to herein as "Action Roofing." The Initial Brief will be cited IB. followed by the page number.

STATEMENT OF THE CASE AND FACTS

Nature of the Case. This appeal follows a final summary judgment granted to a roofing subcontractor on a negligence claim where it was undisputed that the roofer complied with its scope of work, including the plans and specifications for the residence, and the Florida Building Code, resulting in a roof that did not leak. Notwithstanding, the homeowners sought to hold the roofer responsible for the alleged faulty design of the roof utilizing roof vents.

The Polakoffs Purchase a Lot; Have Home Constructed; and Allegedly Discover Mold and Dust Mite Conditions. The homeowners, the Polakoffs, entered into a contract with Toll FL V LLC ("Toll") to purchase a lot and have a home constructed in the development known as Parkland Golf & Country Club ("PGCC"). (R. 88-89.) After the Polakoffs moved into the home, they allegedly experienced the growth of toxic and/or allergenic fungi and dust mites in the home allegedly caused by moisture intrusion into the home. (R. 87-88.)

The Polakoffs Sue Multiple Parties Related to Alleged Mold Conditions in their Residence. (R. 86-336.) The Polakoffs sued the Architect and various trades under counts for professional negligence and

negligence related to the alleged fungi and dust mites conditions in the home. (R. 86-336.)

The Polakoffs Fifth Amended Complaint Alleged Single Count Against Action Roofing for Negligence. (R. 8022-8025.) The Polakoffs pleading alleged that "…[p]ursuant to its contract with Toll, Action Roofing designed, constructed and installed the roof and all related fixtures and/or appurtenances at the Residence, including the roof vents." (R. 7972.) In that single count, the Polakoffs alleged that Action Roofing breached its duty of care and did not perform its roofing work in a workmanlike matter, and/or its work was defective as follows:

> (a) defective, negligent and/or inadequate construction, installation and/or design, of the roof, and/or roofing components, including installation of roof vents;
>
> (b) all of which resulted in chronic water intrusion and systemic humidity into the walls, columns, ceilings, interstitial cavities and/or drywall and baseboard of the Residence which caused microbiological contamination in the form of the growth of toxic and/or allergenic fungi and dust mites which posed a serious health hazard to the occupants of the home, have caused personal injury to occupants of the home, and required evacuation of the occupants of the home for the repair and remediation of this serious health hazard.

(R. 8023.)

Action Roofing Files Answer and Affirmative Defenses. (R. 5481-5520.) Action Roofing denied that it was negligent or that it violated

any building codes. Action Roofing asserted several affirmative defenses, including but not limited to, that it obtained the required building permits, its work was inspected by the authority with jurisdiction, and passed all such inspections. (R. 5518.) Further, that Action Roofing complied with all the applicable drawings, plans, specifications and contracts. (R. 5518.)

The Polakoffs' Expert Prepares Report, is Deposed and Provides No Opinions as to Water Intrusion Caused by Action Roofing's Scope of Work. The Polakoffs filed their Expert Disclosures on December 13, 2019, listing their expert witness, David A. Wojcieszak ("Wojcieszak"). (R. 2302.) Wojcieszak authored one report as to the Polakoffs' residence dated January 24, 2019. (R. 9306-9322.) The January 24, 2019, report does not contain any references to water intrusion into the Polakoffs' residence through the roof and/or any interior damages to the Polakoffs' residence because of the work of Action Roofing. (R. 9306-9322.)

On January 29, 2021 (two years later), the parties deposed the Polakoffs' expert, Wojcieszak. Wojcieszak was not a roofing expert, and did not visualize any water intrusion into the Polakoffs' residence through the roof system. (R. 8934.) He did not have any opinions regarding Action Roofing's installation of roof vents at the residence. He testified that any issues with the attic were a result of a design defect:

Q. Now, I understand that your opinion today is - - and I'm going to just limit it to the attic. I wanted to make sure I have it right - - that the – a ventilated attic with certain HVAC ductwork in it is going to lead to sweating ducts, which will lead to moisture buildup in the attic system. Do I have that correct?
A. That is correct.
Q. And then when those ducts sweat, the moisture can then drip off of that, which can lead to condensation into the residence. Is that the generalization of your opinion?
That's pretty close.
Q. Okay. Then if I have this correctly - - and I'll stick with just the roofing – you don't have any opinions that Action Roofing didn't do their work in accordance with the Florida Building Code?
A. No, I do not.
Q. So we're not talking about any building code violations?
A. No, we're not.
Q. And this issue we're talking about, would you – this duct sweating would you classify this issue as a design issue?
A. Yes.
Q. And that's with whomever designed the attic and HVAC system. Is that fair?
A. That is correct.

(R. 8935; 9064-9066.)

Notwithstanding, Wojcieszak attempted to create a duty on the part of all subcontractors to be responsible for other unrelated subcontractors' scope of work:

Q. So it's your testimony that each subtrade should endeavor to know what the other subtrades are doing on the worksite?
A. That is correct.
Q. Okay. So what you're saying is somebody at Action Roofing in a superior position, prior to sending out a crew to waterproof the roof pursuant to the contract they had, should endeavor to obtain the plans for the house to understand the design of the attic to confirm that they can install roof vents?
A. That is correct.

Q. And vice versa, a superior from the HVAC company should then, instead of the - - in addition to the HVAC design, should then look at the attic design to determine if there's going to be roof vents or the insulation to then signal that could be a problem?
A. That is also correct.
Q. And then I guess you said earlier, the insulation guy has a similar responsibility to find out the design of the attic and the design of the HVAC to determine if the insulation they're installing per contract could have a problem in the home?
A. Absolutely.
Q. Okay. Thank you. And it's this combination together, that, obviously, causes the problem we're talking about?
A. I think you're the first one that understands that concept.

(R. 8936.)

Wojcieszak confirmed his opinions as to Action Roofing:

Q. So, again, to make sure I have your opinion correctly, that the roofing subcontractor who is retained to waterproof, you know, to put the materials on top of the wood - - the wood - - the plywood roof, and install - - and when I mean install, just drill a hole and put the roof vents in - - should know that by installing roof vents, that somewhere down the line, there is going to be a moisture buildup in the attic of this house?
A. I would hope that they would have known.
Q. Well, is that your opinion in this case?
A. Well, it's my opinion that there's enough information out there that - - about condensation in attics. There's been information that the – and we've spoke about this before. Florida Solar Energy Center did studies back in the '80s, and they determined that the moisture load of the house is most probably from the vented airstream in the attic.
Q. That's correct.
A. We've known about this for a long time. And the only thing that I think that – you know, you've discussed and other people have discussed is:
Why don't the roofing people know this?

> And the answer to my question, there are many - - there's a lot of information that indicates that vented attics in warm, humid climates are not good, especially whenever you're talking about condensation. And, again, I explained that just because the roof doesn't have a liquid leak, these – the air that migrates into this roof can actually be, again, do more damage than a liquid leak.

(R. 9634-9635.)

Thus, Wojcieszak's opinions as to Action Roofing were that Action Roofing did not perform defective work on the roof. Instead, Action Roofing was somehow responsible for the design of the roof, which called for the installation of roof vents.[1] Wojcieszak had no other opinions as to any moisture intrusion allegedly caused by Action Roofing.

Action Roofing Moves for Final Summary Judgment. (R. 8924-9094.) The motion sought final summary judgment based on the undisputed facts that Action Roofing's scope of work complied with the plans and drawings, and applicable building codes. In the single count, the Polakoffs' asserted against Action Roofing, they alleged that Action Roofing's work was defective and/or inadequate and resulted in chronic water intrusion and systemic humidity into the residence. (R. 8928-8929.)

Action Roofing's motion noted that, despite the discovery conducted, no evidence existed to support any cause of action against Action Roofing.

[1] An identical argument was made in the *Kreichman* case, and rejected by Judge Tuter, in the order granting summary judgment to Action Roofing. (R. 9631.)

This was because Action Roofing's scope of work did not create the risk (moisture intrusion into the subject residence) and Action Roofing did not improperly install the subject roof. In support of its motion, Action Roofing highlighted the following undisputed evidence:

- Action Roofing's sole role and limited scope of work consisted of the installation of roof tiles over the plywood roof installed by others and the installation of roof vents in accordance with the architect's plans and the Florida Building Code;

- Action Roofing's Scope of Work Complied with the Master Construction Agreement regarding the installation of tile roofs and roof vents at PGCC;

- The Polakoffs (and their expert) do not allege (and no evidence exists) that Action Roofing's scope of work was defective or violated the Florida Building Code;

- The Polakoffs (and their expert) do not allege that Action Roofing's scope of work was defective resulting in water leaking into the residence;

- The architect testified that the location and type of roof vents was determined by it and specified in the drawings – further that Action Roofing's installation of the roof vents complied with the specifications and drawings; and

- Parkland Building Department Inspectors testified that Action Roofing's work complied with the applicable plans and Florida Building Code.

(R. 8929-8940.)

In sum, there was abundant testimony that Action Roofing complied with its scope of work pursuant to the Master Construction Agreement

("MCA"). Action Roofing's scope of work was to provide waterproofing to the roof system and install roof vents in accordance with the construction drawings provided by Toll Bros, Inc. The MCA provided that Action Roofing was responsible to perform all work in accordance with the latest revised construction drawings for each appropriate model. (R. 8929.) The Project Manager, Adam Rule, confirmed that Action Roofing was responsible for installing the roof vents in accordance with the Toll Bros, Inc. construction drawings. (R. 8929-8930.) And Action Roofing installed the roof vents in accordance with the construction drawings.

Further, Action Roofing submitted evidence that the Polakoffs and their expert affirmed that there was no water intrusion into the subject residence from the subject roof. (R. 8932.) The Polakoffs both testified that there was no water intrusion or leaking from the roof. The Polakoffs' expert, John M. Carroll, Jr. P.E. was retained to evaluate the residence and determine the underlying cause, origin, and extent of damages caused by moisture intrusion into the residence. Mr. Carroll inspected the residence and did not witness any water intrusion from the subject roof system. (R. 8932.) The Parkland Building Department approved the Toll Architecture Construction Plans and approved Action Roofing's scope of work. (R. 8933-8934.)

Finally, the Polakoffs' expert, Wojcieszak, testified that Action Roofing's scope of work did not cause or contribute to any moisture build-up at the Polakoffs' residence. Toll Bros.' expert had similar opinions. (R. 8934-8938.)

Action Roofing noted that the Polakoffs' pleading alleged that Action Roofing was somehow negligent in the installation of the roof system. But the uncontroverted evidence established that Action Roofing fully complied with its scope of work by correctly waterproofing the Polakoffs' roof system, and properly installing the roof vents in accordance with the Toll Architecture construction plans. Thus, as a matter of law, Action Roofing did not breach any duty to the Polakoffs. The Polakoffs' attempt to create a duty outside Action Roofing's scope of work vis-à-vis their expert's opinions fails and did not create issue of fact to preclude summary judgment. (R. 8941-8943.)

Action Roofing highlighted the Polakoffs' theory of liability against it – that somehow Action Roofing's correct installation of the roof vents called for in the plans and contracts was sufficient to show liability in this case. Assuming that this theory based on a non-existent duty was allowed to proceed, the Polakoffs would be unable to establish causation. There was simply no evidence that Action Roofing's scope of work caused any

moisture build-up in the residence. The Polakoffs could not meet Florida's "but for" causation standard. (R. 8943-8948.)

Finally, the Polakoffs improperly sought to stack inferences in order to impute negligence to Action Roofing. (R. 8949.)

The Polakoffs File Memorandum and Evidence Relied on in Cases Where Action Roofing Obtained Summary Judgment on Virtually Identical Claims. (R. 9136-9629.) The Polakoffs filed a memorandum in opposition that was nearly identical to the oppositions filed in two other circuit court cases where the trial court granted summary judgment in Action Roofing's favor.[2] They also relied on depositions from the other cases. (R. 9201; 9324-9385; 9387-9501; 9582-9629.)

The Polakoffs File Expert Affidavit Containing New Opinion as to Alleged Water Intrusion Through Door Pans Allegedly Installed by Action Roofing. The Polakoffs submitted Wojcieszak's affidavit, dated October 31, 2022, (three years after his report, and almost two years after his deposition). (R. 9110-9115.) In his affidavit, Wojcieszak stated in pertinent part:

[2] Both cases were subsequently affirmed on appeal. *Kreichman v. Engineered Air, LLC*, 336 So. 3d 726 (Fla. 4th DCA 2022); *Mesa-Taylor v. WCI Communities, Inc.*, 368 So. 3d 427 (Fla. 4th DCA 2023).

- I have been advised, and have been provided with documents confirming that Action Roofing was contracted to install the door pans. *See* composite "**Exhibit A**" annexed hereto.

- It is my opinion, to a reasonable degree of engineering probability, that these door pans were improperly installed, thereby facilitating the water intrusion and damages described above.

(R. 9112.)

Action Roofing Files Reply in Support of Motion for Final Summary Judgment and Motion to Strike the Sham Affidavit of Wojcieszak in Opposition to Summary Judgment. (R. 9630-9646.) Action Roofing argued that Wojcieszak's affidavit was a sham that violated the *Ellison* rule. (R. 9632-9636.) Wojcieszak's report did not contain any reference to water intrusion through door pans and/or any interior damages to the residence because of water intrusion through door pans installed by Action Roofing, or by any party for that matter. Further, Wojcieszak did not provide any opinions as to water intrusion through door pans and resulting damage at his deposition. (R. 9632-9636.)

Wojcieszak's affidavit provided no basis to explain that for four years he never had any opinions regarding door pans related to Action Roofing's scope of work, but on the eve of the hearing on Action Roofing's motion for summary judgment, he suddenly has new expert opinions directly related to causation. Wojcieszak averred that he had been "advised" and "provided"

with documents confirming Action Roofing was contracted to install the door pans. But Wojcieszak did not allege the date(s) he was "advised" or "provided," the information, or otherwise aver that he did not previously have it. (R. 9632-9636.)[3]

Action Roofing argued that under the controlling authority, Wojcieszak could not suddenly present new opinions as to Action Roofing's scope of work and causation. Instead, his affidavit should be stricken under the *Ellison* rule. (R. 9632-9636.)

Further, Wojcieszak's affidavit violated Florida's summary judgment rule because it did not set out facts that would be admissible in evidence. The affidavit was not made on personal knowledge. (R. 9636-9638.)

The Trial Court Hears Motions and Subsequently Grants Action Roofing's Motion for Summary Judgment. (R. 10934-10966.) Action Roofing highlighted that the words, "door pan," were not mentioned in Wojcieszak's January 2019 report. Regardless, the Polakoffs failed to file any evidence from the Polakoff case linking the installation of door pans to Action Roofing, and failed to submit summary judgment evidence. (R. 10937-10949.)

[3] In fact, Action Roofing had produced its entire job file on September 13, 2019. (R. 1929-1942.)

The trial court subsequently entered a detailed order granting Action Roofing's motion for summary judgment, finding certain facts in pertinent part as follows:

> **Facts Related to Wojcieszak Affidavit**
>
> The outcome of this case turns on the sufficiency of a non-party Affidavit (the Wojcieszak Affidavit) in opposition to Action Roofing's Motion for Summary Judgment. Throughout the course of this Litigation against Action Roofing, which began on March 29, 2019, Plaintiffs have consistently maintained through their pleadings (five different complaints), and their experts, that Action Roofing's negligence is premised on the improper installation and/or design of the roof system.
>
> The Plaintiffs position was confirmed during the January 29, 2021, deposition of Mr. Wojcieszak wherein he affirmed that his opinions related to Action Roofing's scope of work were limited to the installation of the roofing; specifically the installation of a roof vent. Additionally, Mr. Wojcieszak authored one report regarding the Plaintiffs' residence dated January 24, 2019. The January 24, 2019 report does not have any references to water intrusion through "door pans" and/or any interior damages to the Plaintiffs' residence because of water intrusion through "door pans" installed by Action Roofing. The Plaintiffs now attempt to have Mr. Wojcieszak repudiate his own prior testimony, and create a disputed issue of fact as to negligence via his Affidavit. (R. 9823.)

The trial court also determined that the Wojcieszak affidavit was defective on multiple grounds and would not be considered. (R. 9823-9824.) First, the affidavit addressed matters outside the pleadings:

> Florida law is clear that issues that are not pled in a complaint cannot be considered by the trial court at a summary judgment hearing. *See Johnson v. Space Coast Credit Union,* 184 So. 3d 1247, 1249 (Fla. 4th DCA 2016)(internal citation omitted). Mr. Wojcieszak's Affidavit

> alleges that Action Roofing improperly installed "door pans" that led to water intrusion into the Plaintiffs' residence. The Plaintiffs' Fifth Amended Complaint only allege negligence against Action Roofing as it relates to the installation of the roofing and/or roofing components. Therefore, the Plaintiffs are precluded from relying on the October 31, 2022, Affidavit of Mr. Wojcieszak.

(R. 9823.)

Second, the affidavit ran afoul of the *Ellison* rule:

> A party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy (commonly referred to as the "Ellison rule"). (internal citations omitted).
>
> Here, given that Mr. Wojcieszak's testimony is contradicted by his October 31, 2022, Affidavit, the *Ellison* rule applies. The October 31, 2022, Affidavit of Mr. Wojcieszak makes no attempt to excuse, or explain, the glaring discrepancies between his January 24, 2019 report, his January 29, 2021, deposition testimony, and the October 31, 2022 Affidavit. Mr. Wojcieszak provides no basis to explain that for four years he has never had any opinions regarding "door pans" related to Action Roofing's scope of work, but on the eve of the hearing on Action Roofing's motion for summary judgment he [Mr. Wojcieszak] has provided new undisclosed expert opinions regarding "door pans," to create a disputed issue of fact.
>
> Thus, due to the lack of a credible explanation by Mr. Wojcieszak as to the reason for the discrepancy between his January 24, 2019 report, January 29, 2021, deposition testimony, and October 31, 2022, Affidavit, the Plaintiffs are precluded from relying on the October 31, 2022, Affidavit of Mr. Wojcieszak. (R. 9823-9824.)

The trial court also found that the affidavit failed to comply with the requirements of Florida's summary judgment rule:

> Assuming, *arguendo,* that the *Ellison* rule were inapplicable, the Wojcieszak Affidavit is still wholly insufficient to create a genuine disputed issue of material fact because it is in violation of Fla. R. Civ. P. 1.510(c)(4). Paragraphs 7 through 10 of Mr. Wojcieszak's Affidavit do not satisfy Fla. R. Civ. P. 1.510(c)(4) because Mr. Wojcieszak does not detail any evidentiary basis connecting Action Roofing's scope of work to the installation of allegedly leaking "door pans" at the Plaintiffs' residence. *See Johns v. Dannels,* 186 So. 3d 620, 622 (Fla. 5th DCA 2016).
>
> Specifically, Mr. Wojcieszak testified that "he has been advised, and have been provided with documents confirmed, that Action Roofing was contracted to install door pans." Mr. Wojcieszak does not detail whom "advised him," and what information he was advised of that would be admissible at trial to link the installation of door pans to Action Roofing's scope of work at the Plaintiff's residence. *See generally, Ham v. Heintzelman's Ford, Inc.,* 256 So. 2d 264, 268 (Fla. 4th DCA 1971).
>
> Mr. Wojcieszak then generally refers to an unauthenticated December 5, 2011, letter from Action Roofing and one unauthenticated Action Roofing Work order card that states "install door pan." Mr. Wojcieszak does not cite to any evidence from Action Roofing (or any other party) relating these two documents to "door pans" Mr. Wojcieszak alleges are leaking and caused damages to the interior of the Plaintiffs' residence were installed by Action Roofing. *See Id.*
>
> Mr. Wojcieszak's Affidavit does not cite to any admissible record evidence that links leaking "door pans" at the Plaintiffs' residence with Action Roofing's scope of work. Therefore, the Plaintiffs are precluded from relying on the October 31, 2022, Affidavit of Mr. Wojcieszak. (R. 9824-9825.)
>
> The trial court found that the undisputed evidence established Action

Roofing was entitled to final summary judgment in its favor:

> Action Roofing argues that summary judgment should be granted as a matter of law because there is no evidence to support any cause of

> action against Action Roofing. Action Roofing asserts that its scope of work did not create the risk (moisture intrusion into the subject residence), and that it did not improperly install the subject roof, or roof vents, necessary to impose liability pursuant to Florida law. Essentially, Action Roofing maintains that Plaintiffs' have failed to provide evidence that Action Roofing breached any duty regarding their scope of work for the Plaintiffs' residence. After careful review of the summary judgment evidence, the Court agrees.
>
> After review of the summary judgment evidence, the Court determines that summary judgment is appropriate in this case where the evidence shows that Action Roofing did not breach any duty regarding their scope of work for the Plaintiffs' residence as outlined in the Master Construction Agreement and that their scope of work did not create a broader zone of risk. Action Roofing's scope of work was to provide the waterproofing to the roof system and install roof vents in accordance with the construction drawings provided by the developer. The Court finds that the uncontroverted evidence is that Action Roofing fully complied with their scope of work by correctly waterproofing the Plaintiffs' roof system, and properly installing the roof vents in accordance with the construction plans.

(R. 9824-9825.)

Finally, the trial court found that causation evidence was lacking, and the Polakoffs' theories regarding causation were based on impermissible inference stacking:

> The Court also concludes that the [SIC] there is no issue of material fact that supports Plaintiffs' claim that Action Roofing caused their injuries. The Plaintiffs' have presented no evidence that the work of Action Roofing performed on the subject residence caused the Plaintiffs to suffer damages; therefore, causation is lacking. *Mesa Taylor v. WCI Communities, Inc.*, *et al.,* CACE16010404 (Fla. 17th Cir. Ct. Jan. 20, 2022)(internal citations omitted). The Plaintiffs' theories regarding causation are also based on impermissible inference stacking, which is prohibited under Florida law. *Id.*

(R. 9825.)

The Polakoffs' Motion for Rehearing is Denied. (R. 9759-9821; 9884.) This appeal followed. (R. 9862-9868.)

SUMMARY OF THE ARGUMENT

Action Roofing, a roofing subcontractor, was sued by the Polakoffs, the homeowners, in a pleading that included a single count against Action Roofing for negligence. In the complaint, the Polakoffs alleged defective workmanship, etc., related to Action Roofing's installation of the roof at their residence. Discovery confirmed that, notwithstanding the Polakoffs' pleading allegations to the contrary, that there were no defects with the roof, much less, any water intrusion or leaking of the roof. The undisputed evidence confirmed that Action Roofing fully complied with its scope of work under its contract, including compliance with the plans and specifications and the Florida Building Code. Action Roofing moved for final summary judgment based on this undisputed evidence.

In opposition, the Polakoffs admitted that there were no construction or installation defects with the roof. But the Polakoffs claimed that Action Roofing was responsible for the **design** of the roof which called for roof vents. According to the Polakoffs, Action Roofing should have known that this type of roof system contributes to moisture build-up in the home; and that instead of completing its work in exact accordance with the plans and specifications (which Action Roofing played no part in designing or preparing), Action Roofing should have refused the job.

Perhaps in light of Action Roofing prevailing on virtually identical grounds in two other cases, the Polakoffs attempted to create an issue of fact by submitting the affidavit of their expert, Wojcieszak. Wojcieszak claimed he had "…been advised, and have been provided with documents confirming that Action Roofing was contracted to install the door pans." Wojcieszak claimed that door pans installed by Action Roofing leaked.

Action Roofing moved to strike Wojcieszak's affidavit as a sham. It violated the *Ellison* rule in several ways. First, Wojcieszak's January 2019 report never used the words "door pans," much less stated that a single door pan was leaking, or that Action Roofing was responsible for same. Similarly, when asked for his opinions as to Action Roofing's scope of work as causing moisture intrusion at his deposition, Wojcieszak had no opinions related to door pans, much less, Action Roofing's responsibility for same.

Wojcieszak never explained why he was offering new opinions at the eleventh hour that repudiated and contradicted his earlier opinions. The documents attached to his affidavit had been produced by Action Roofing well before Wojcieszak's report or deposition, and were well known to all parties. The sham affidavit violated *Ellison* and no explanation was given for the new opinion offered on the eve of summary judgment.

Wojcieszak did not explain how, where, when or provide any details as to obtaining the documents, which again, were available to all for years leading up to the summary judgment hearing.

The affidavit failed to comply with Florida's summary judgment rule in that it relied on inadmissible evidence. Further, there was no summary judgment evidence related to any door pans, much less, tying Action Roofing to same. The unauthenticated documents attached to Wojcieszak's affidavit were not evidence that Action Roofing installed any door pans, much less, the single door pan that Wojcieszak pointed to. There was no testimony by Action Roofing (or anyone for that matter) verifying that it installed a single door pan, much less, a door pan that leaked.

The trial court did not abuse its discretion in striking Wojcieszak's affidavit under *Ellison.* But even if considered, it failed to comply with Florida's summary judgment rule.

The undisputed evidence plainly established that Action Roofing complied with the plans, specifications and Florida Building Code. It did not breach any duty to the Polakoffs as a matter of law. The Polakoffs' claim of an expanded duty under the guise of "standard of care" was properly

rejected by the trial court. An expert's opinion does not create a duty where one does not exist under the law.

The final judgment should be affirmed as in two virtually identical cases wherein Action Roofing prevailed on summary judgment.

ARGUMENT

I. Standard of Review.

A. Appellate Standard of Review.

This Court reviews a trial court's ruling on a motion for summary judgment *de novo*. *Orlando v. FEI Hollywood, Inc.,* 898 So. 2d 167, 168 (Fla. 4th DCA 2005).

The trial court's determination not to consider an expert affidavit submitted in opposition to summary judgment should be reviewed for an abuse of discretion. *Lesnik v. Duval Ford, LLC*, 185 So. 3d 577, 579 (Fla. 1st DCA 2016) ("…the admission and consideration of affidavits is a matter within the sound discretion of the trial court…"). In this regard, where reasonable minds can differ, by definition, there can be no abuse of discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)("In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial

judge should be disturbed only when his decision fails to satisfy the test of reasonableness.").

Further, under the tipsy coachman rule, this Court should affirm the final judgment regardless of the reasoning of the trial court if there is any basis which would support the judgment in the record. *Catalo v. Llano Financing Group, LLC,* 238 So. 3d 885, 886 (Fla. 4th DCA 2018).

In Florida, final judgments and the actions of the trial court are presumed correct. *Wright v. Wright*, 431 So. 2d 177 (Fla. 5th DCA 1983)("It is well established that the findings and judgment of the trial court comes to the appellate court with a presumption of correctness and may not be disturbed in the absence of a record demonstrating error.").

Finally, arguments and issues not raised in the initial brief are waived and deemed abandoned. *McAllister v. Breakers Seville Ass'n, Inc.,* 981 So. 2d 566, 575 (Fla. 4th DCA 2008).

B. Standard for Summary Judgment.

The trial court properly applied Florida's new summary judgment standard as the trial court's summary judgment order was entered after May 1, 2021. *Halum v. ZF Passive Safety Systems US, Inc.,* 360 So. 3d 391 (Fla. 4th DCA 2023). Florida now applies the same standard as the federal courts. The federal standard closely mirrors the standard for

directed verdict, in which the focus of the analysis is "whether the evidence presents a sufficient disagreement to require submission to a jury." *Id.;* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

Florida's summary judgment rule now provides:

> **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record the reasons for granting or denying the motion. The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.

Fla. R. Civ. P. 1.510(a). Under this rule, a factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude the grant of summary judgment. *Anderson,* 477 U.S. at 247-248. An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Mize v. Jefferson City Bd. Of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996). A fact is material if it may affect the outcome of the suit under governing law. *Allen v. Tyson Foods, Inc.,* 121 F.3d 642, 646 (11th Cir. 1997).

II. Summary Judgment was Properly Granted to Action Roofing when Undisputed Action Roofing's Scope of Work Complied with Applicable Plans and Codes.

The Polakoffs sued Action Roofing in a singular count for negligence alleging that Action Roofing had a duty to perform its work in a competent and workmanlike manner. After exhaustive discovery, including numerous depositions, Action Roofing moved for final summary judgment asserting that the undisputed record plainly established that Action Roofing had performed its scope of work, i.e., to finish the roofing system, in accordance with the architect's plans and the Florida Building Code.

Notably, Action Roofing had been sued solely for alleged defective work related to the roof, in particular the installation of roof vents that allegedly allowed moisture into the home. Action Roofing had been sued in two previous other cases based on identical allegations. Summary judgments granted to Action Roofing in those cases were affirmed on appeal. Here, Action Roofing moved for summary judgment on identical grounds, namely, that it was undisputed Action Roofing's work complied with the applicable plans and codes.

Given summary judgment on the same grounds was due to be granted, the Polakoffs' filed their expert's affidavit on the twentieth day before the hearing. Their expert, Mr. Wojcieszak, nearly four years after

his expert report, and two years after his deposition, opines for the first time (without any justification) that Action Roofing improperly installed door pans that led to the water intrusion into the Polakoffs' residence.

As set forth herein, the trial court did not abuse its discretion in refusing to consider a sham expert affidavit. And the undisputed evidence that Action Roofing complied with the plans and its scope of work warranted the entry of summary judgment in its favor.

A. Trial Court Did Not Abuse its Discretion in Refusing to Consider Sham Affidavit.

Action Roofing argued Wojcieszak's affidavit should not be considered as it violated the *Ellison* rule. Further, the affidavit violated Florida's summary judgment rule in that it failed to set out facts that would be admissible in evidence and was not made on personal knowledge.

The Florida Supreme Court established the *Ellison* rule, finding that "…a party when met by a Motion for Summary Judgment should not be permitted by his own affidavit, or by that of another, to baldly repudiate his previous deposition so as to create a jury issue, especially when no attempt is made to excuse or explain the discrepancy." *Ellison v. Anderson,* 74 So. 2d 680, 681 (Fla. 1954); *see also Lesnik v. Duval Ford, LLC,* 185 So. 3d 577, 580 (Fla. 1st DCA 2016).

This Court has applied the *Ellison* rule even when the affidavit arguably creates an issue of fact. *Ondo v. F. Gary Gieseke*, 697 So. 2d 921 (Fla. 4th DCA 1997). The limited exception to the *Ellison* rule arises where there is a credible explanation by the affiant as to the reason for the discrepancy between his earlier and later opinions. But as explained by this Court, the limited exception to the *Ellison* rule must be substantiated by the record as a whole:

> A limited exception to this rule arises where there is a "credible explanation by the affiant as to the reason for the discrepancy between his earlier and later opinions."[internal citations omitted]. An unsubstantiated assertion is not sufficient to overcome the effect of the prior testimony, however, and the explanation must appear either in the affidavit itself or, viewed as a whole, the record must support the explanation.

Ondo v. F. Gary Gieseke, 697 So. 2d 921, 923-924 (Fla. 4th DCA 1997).

The Polakoffs argue that *Ellison* does not apply because the affidavit did not contradict Wojcieszak's previous testimony and report. Instead, they claim it merely supplemented his prior opinions. This argument is blatantly contradicted by the record.

1. Wojcieszak's Affidavit Contradicts Earlier Opinions.

The Polakoffs filed their Expert Disclosures on December 13, 2019, listing their expert witness, Wojcieszak. Wojcieszak authored a single report as to the Polakoffs' residence dated January 24, 2019. Wojcieszak's

report does not contain any references, much less, opinions as to water intrusion through door pans and/or any interior damages to the residence because of water intrusion through door pans installed by Action Roofing. The words “door pans” appear nowhere in the report.

Two years after he drafted his report, Wojcieszak was deposed. During his January 2021 deposition, Wojcieszak did not provide any opinions related to water intrusion through door pans and/or interior damages to the Polakoffs’ residence because of water intrusion through door pans installed by Action Roofing. Wojcieszak was asked to confirm his opinions as to Action Roofing’s scope of work. The entirety of his opinions as to Action Roofing were directed at the installation of the roof vents.

The Polakoffs argue that Wojcieszak’s affidavit does not contradict his earlier testimony. Instead, they claim that the affidavit merely supplements his prior opinions. Thus, the *Ellison* rule does not apply.

The Polakoffs’ argument is utterly without merit. First, the Polakoffs argue that Wojcieszak provided an affidavit “…based on specific documentation located and identified after his deposition.” (IB. 16.) But Wojcieszak provides no explanation as to where he got the information, from whom, and why it was only located and identified four plus years after

his report. Second, the affidavit utterly contradicts his testimony and opinions as cited in Action Roofing's motion for summary judgment. Wojcieszak's testimony and opinions were that the vented roof vents in the attic allowed moisture to enter the residence. He has no opinions that Action Roofing's scope of work was defective or violated any codes. Instead, it was the design of the roof that called for vented roof vents and installed by Action Roofing that was the problem. Not having an opinion for four-plus years, and then suddenly having an opinion (or epiphany) is the definition of contradiction. And as noted below, Wojcieszak does not explain why or how he now has an opinion as to leaking door pans allegedly installed by Action Roofing.

None of the *Ellison* rule cases cited by the Polakoffs support their claim that the trial court abused its discretion in striking the affidavit. *JVN Holdings, Inc. v. Am. Const. & Repairs, LLC,* 185 So. 3d 599, 600 (Fla. 3d DCA 2016) involved leave to amend a pleading, no blatant contradictions as in our case, and Florida's previous summary judgment standard which disfavored summary judgment. In *Peterson v. Lundin,* 148 So. 3d 784 (Fla. 2d DCA 2014) the affidavit and previous testimony were reconciled. Here, no explanation was provided by the affiant as to his late, newly arrived at opinion, much less, supported by admissible summary judgment evidence.

Similarly, in *Peng v. Citizens Prop. Ins. Corp.*, 337 So. 3d 488 (Fla. 3d DCA 2022), the expert prepared an affidavit immediately after his deposition that was sufficient to pass muster under a *Daubert* challenge. The expert's affidavit clarified rather than contradicted his deposition testimony.

Tellingly, here, the Polakoffs submitted Wojcieszak's deposition transcript from another case in opposition to Action Roofing's motion for summary judgment. And on rehearing, and on appeal, the Polakoffs never submitted Wojcieszak's deposition from this case but claim there is no contradiction. It is solely the Polakoffs burden to establish an abuse of discretion and present a complete record to this Court supporting same. *Thurman v. Davis*, 321 So. 3d 341, 344 (Fla. 1st DCA 2021)("The burden is on the appellant to demonstrate reversible error and present an adequate record for review."). They have failed to provide any explanation, or support, for their claim that there was no contradiction or repudiation of prior opinions as to Action Roofing's scope of work and resulting damages. The affidavit plainly conflicts and repudiates the testimony submitted to support Action Roofing's motion for summary judgment.

2. No Explanation Provided as to 4-Year Delay.

In *Ondo v. F. Gary Gieseke, P.A.,* 697 So. 2d 921 (Fla. 4th DCA 1997), this Court acknowledged a limited exception to the *Ellison* rule. As stated by this Court:

> A limited exception to this rule arises where there is a "credible explanation by the affiant as to the reason for the discrepancy between his earlier and later opinions. [internal citations omitted] An unsubstantiated assertion is not sufficient to overcome the effect of the prior testimony, however, and the explanation must appear in the affidavit itself or, viewed as a whole, the record must support the explanation.

Id. at 924.

Here, Wojcieszak provides no explanation as to why he (a) has opinions as to water intrusion through door pans and (b) concludes that Action Roofing installed the door pans in question four-plus years after his report, and two-years after his deposition. He does not aver that these opinions were set forth in his January 24, 2019, report. Instead, he states that he visited the residence on January 3, 2019, and visually observed the floors at the perimeters of the living, family, and master bedroom. He claims that he "…observed the effects of water intrusion at the base of the sliding glass doors and, in particular, through the door pans installed in connection with those doors." (R. 9111.) There is not a single reference to water intrusion through "door pans" in his report, nor does Wojcieszak claim to cover this in his report. The Polakoffs' attorneys claim that this is

covered in the report is not evidence. *Olson v. Olson*, 260 So. 3d 367 (Fla. 4th DCA 2018)("…the statements of an attorney are not evidence."). (IB. 7.) It is also inaccurate as the referenced seventeen pages do not contain the words "door pans."

Further, Wojcieszak does not state when he received the documents allegedly confirming Action Roofing installed door pan(s). In fact, Action Roofing's job file, including the documents referenced, was produced to the Polakoffs on **September 13, 2019**. (R. 1929-1942.) There is no evidence to the contrary. The Polakoffs' attorney's claim that, at the time of Wojcieszak's deposition, he did not have these documents is not evidence. (IB. 7.) It is also specious. Nowhere does Wojcieszak aver as to when he was provided with these records, much less, explain how he confirmed from the records that Action Roofing installed the door pans in question.

B. Affidavit Failed to Rely on Summary Judgment Evidence and Otherwise Violated Rule 1.510(c)(4).

Even assuming that the *Ellison* rule was not applicable (and it is), no summary judgment evidence was presented establishing that Action Roofing installed door pans at the residence, much less, that the door pans leaked. Florida's summary judgment rule provides that "…[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show

that the affiant or declarant is competent to testify on the matters stated." Fla. R. Civ. P. 1.510(c)(4).

Again, Wojcieszak's affidavit states he was "advised" and "provided" with documents confirming that Action Roofing was contracted to install door pans. But he does not identify who advised him; what was advised, and when. None of this is admissible summary judgment evidence. *Johns v*. *Dannels*, 186 So. 3d 620 (Fla. 5th DCA 2016); *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264 (Fla. 4th DCA 1971). There is simply no admissible evidence linking the alleged leaking first floor door pans to Action Roofing.

Merely attaching unauthenticated, unsworn documents to an affidavit does not transform them into competent, summary judgment evidence. *Gidwani v. Roberts,* 248 So. 3d 203, 208 (Fla. 3d DCA 2018)("Because 'only competent evidence may be considered by the court in ruling upon a motion for summary judgment,' a document attached to a motion for summary judgment or a document attached to an affidavit that is not otherwise authenticated is not competent evidence.")

The document attached to Wojcieszak's affidavit states, "SUPPLY AND INSTALL DOOR PANS, **WHERE NECESSARY."** (R. 9115.) (emphasis added). Similarly, the document entitled "Work Order Card"

includes a remark "Install Doorpan." (R. 9116.) These unauthenticated documents are not evidence that Action Roofing installed a single door pan at the residence, much less, at a certain location at the residence such as the first floor. There is no testimony by Action Roofing (or any other party) as to the installation of door pans at the residence, by Action Roofing, or anyone else.

The Polakoffs' claim that the documents were produced from Action Roofing's "own file" only underscores that the records were available to Wojcieszak years before he prepared his affidavit. In any event, this claim is not the equivalent of summary judgment evidence. Nor does it create an issue of material fact.

C. Trial Status is Irrelevant.

The Polakoffs argue that even if the affidavit contained new opinions, there was no basis to strike it because trial was not imminent. Thus, according to the Polakoffs, summary judgment should have been denied so Action Roofing could "…re-depose, cross-examine or prepare…" to address the affidavit at trial. (IB. 24.)

The Polakoffs argument makes little sense in light of Florida's current summary judgment standard. Summary judgment is no longer disfavored. "We agree with the Supreme Court that '[s]ummary judgment procedure is

properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole.'" *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192, 194 (Fla. 2020)(alteration in original (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). In response to a properly supported motion for summary judgment, the Polakoffs filed a sham affidavit containing new opinions unsupported by admissible summary judgment evidence. The trial court properly struck the affidavit and granted summary judgment to Action Roofing.

None of the authorities cited by the Polakoffs warrant a different result. *Florida Peninsula Ins. Co. v. Newlin*, 273 So. 3d 1183 (Fla. 2d DCA 2019) and *Shultheis v. Gotlin*, 919 So. 2d 546 (Fla. 5th DCA 2006) deal with new expert opinions disclosed at, or on the eve of trial. These cases have nothing to do with the sufficiency of an affidavit filed in opposition to a motion for summary judgment.

The Polakoffs have not met their burden to show that the trial court abused its discretion in striking Wojcieszak's affidavit.

III. Action Roofing's Motion for Summary Judgment Met Burden for Summary Judgment under Federal Standard.

The Polakoffs spent multiple pages covering the federal summary judgment standard attempting to equate it with "the slightest doubt" standard. In any event, even under the standard presented by the

Polakoffs, they were "…required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." (IB. 29.) Without question, they failed to do so. Instead, Action Roofing presented unrebutted, undisputed evidence that it complied with its scope of work as to the roof, and the roof conformed to the plans and codes. No evidence was submitted, much less, identified by the Polakoffs below or on appeal.

A. Trial Court did not Weigh Competing Evidence – There was None – Instead Undisputed Action Roofing Complied with Plans and Codes for Roof.

The Polakoffs sued Action Roofing in a singular count for negligence alleging that Action Roofing had a duty to perform its roofing work in a competent and workmanlike manner. After exhaustive discovery, including numerous depositions, Action Roofing moved for final summary judgment asserting that the undisputed record plainly established that Action Roofing had performed its scope of work in accordance with the architect's plans and the Florida Building Code.

The Polakoffs responded by filing evidence from other cases where Action Roofing prevailed on summary judgment. The Polakoffs never rebutted that Action Roofing's scope of work was plan and code compliant. Instead, the Polakoffs argued that Action Roofing had a duty not to install the type of roof vent called for by the plans and approved for installation by

the Florida Building Code. The crux of the Polakoffs argument was that the design and type of roof system specified in the plans contributed to attic moisture. Essentially, they sought to hold Action Roofing liable for the alleged faulty design of the roof.

After two circuit court judges had granted summary judgment to Action Roofing in virtually identical cases on virtually identical arguments, the Polakoffs submitted an eleventh hour affidavit of their expert in this case. The trial court properly disregarded the affidavit on the grounds stated herein.

Notwithstanding, the Polakoffs argue that the trial court improperly weighed competing evidence. But the only allegedly competing evidence the Polakoffs point to is Wojcieszak's affidavit. Again, for all the reasons set forth herein, the affidavit was properly stricken. So there was no competing evidence.

The Polakoffs vaguely characterize the deposition testimony of Dr. Lstiburek and Wojcieszak as "competing evidence" but point to no specific testimony. Again, the testimony and evidence proffered by Action Roofing was that its work was plan and code compliant. No contrary evidence was presented.

B. The Polakoffs' Causation Argument Fails.

The Polakoffs argue that Action Roofing's installation of the vented roofs was "…the primary contributor to the water damage and subsequent mold growth" in the residence. (IB. 34.) But as argued in the other circuit court cases, there was no dispute that the roof did not leak. Action Roofing installed the roof vents in accordance with the architectural plans and in conformance with the Florida Building Code. Multiple parties confirmed this including the Parkland Building Department inspectors; Wojcieszak; the Polakoffs' expert, John Carroll; and Toll Brothers' expert, Dr. Lsitburek. As set forth in Action Roofing's motion for summary judgment, Lsitburek concluded that moisture issues were the subject of a design issues and not a construction issue. (R. 8936-8940.) Wojcieszak also testified that any issues with the Polakoffs' attic were the result of a design defect. (R. 8935.)

Action Roofing argued, and the trial court properly found, that Action Roofing had no duty outside its scope of work. As determined by the trial court: "…the Court determines that summary judgment is appropriate in this case where the evidence shows that Action Roofing did not breach any duty regarding their scope of work for the Plaintiffs' residence as outlined in the Master Construction Agreement and that their scope of work did not create a broader zone of risk. Action Roofing's scope of work was to

provide the waterproofing to the roof system and install roof vents in accordance with the construction drawings provided by the developer. The Court finds that the uncontroverted evidence is that Action Roofing fully complied with their scope of work by correctly waterproofing the Plaintiffs' roof system, and properly installing the roof vents in accordance with the construction plans." (R. 9825.)

The Polakoffs' arguments as to causation ignore that no duty existed on the part of Action Roofing to design the roof or specify the type of vents, etc. Action Roofing correctly installed the roof vents selected by the architect, approved under the Florida Building Code and inspected by the Parkland Building Department. And, as noted below, the Polakoffs could not establish causation under Florida law.

IV. Action Roofing had no Duty Regarding Design of Attic Roof.

It is undisputed that Action Roofing completed its work in compliance with the plans and Florida Building Code. Notwithstanding, the Polakoffs sought to expand Action Roofing's duty to encompass the selection, type and design of the roofing system. In order to avoid the obvious, the Polakoffs' attempted to morph the issue of duty into an expanded duty, labeled "standard of care." The Polakoffs relied solely on expert testimony to create this "duty."

At the outset, expert testimony cannot create a duty where one does not exist under the law. *Luckman v. Wills*, 306 So. 3d 990, 994 (Fla. 3d DCA 2020)("To the extent that Dr. Swope's affidavit opined on legal issues that were entirely within the province of the trial court, the trial court did not abuse its discretion in striking Dr. Swope's affidavit. The issue of the existence of legal duty is a question of law that is outside the scope of expert opinion.")

The Polakoffs sued Action Roofing for negligence for its allegedly defective construction and installation of the roof, including roof vents. Accordingly, the Polakoffs were required to plead and prove the elements of a negligence cause of action: duty, breach, causation and damages. *Miller By and Through Miller v. Foster*, 686 So. 2d 783 (Fla. 4th DCA 1997). The problem for the Polakoffs is that none of the experts (or anyone for that matter) found any fault with Action Roofing's performance of its scope of work. Indeed, the evidence established that Action Roofing properly installed the roof, in accordance with the plans, specifications, and building code, and the roof did not leak. Notwithstanding, the Polakoffs were critical of the type and design of the roof system specified by the architect.

Knowing the foregoing facts would not support their negligence claim against Action Roofing, the Polakoffs attempted to have their experts testify

that even if Action Roofing's installation and workmanship was perfect, Action Roofing contributed to the moisture issue merely be installing the roof vents called for by the plans and specifications and allowed by the Florida Building Code. But this attempt by the Polakoffs was insufficient to establish the existence of a duty on the part of Action Roofing.

The determination of the existence of a duty of care in a negligence action is a question of law for the court. *Goldberg v. Fla. Power & Light Co.,* 899 So. 2d 1105, 1110 (Fla. 2005). In determining the existence of a legal duty, the "zone of risk" created by the defendant establishes the scope of the defendant's duty. *Napoli v. Buchbinder*, 685 So. 2d 46, 47 (Fla. 4th DCA 1996). In applying this test, the court should focus on whether the defendant's conduct will result in the type of injury suffered by the plaintiff. Here, the undisputed summary judgment evidence established Action Roofing's scope of work and compliance with its scope of work. The Polakoffs sought to expand Action Roofing's duty well beyond its limited role based solely on expert testimony as to the type and design of the roof that allegedly should have been specified in the plans. As a matter of law, Action Roofing was not responsible for breaching any legal duty to the Polakoffs. Nor did its conduct in merely complying with its contract and the code create a foreseeable "zone of risk."

None of the authorities cited by the Polakoffs warrant a different result. They are not remotely applicable. For example, the Polakoffs cite to *Ins. Co. of the West v. Island Dream Homes, Inc.*, 679 F.3d 1295 (11th Cir. 2012) in arguing that an expert is needed to establish the standard of care of a roofer. (IB. 38-39.) But *Island Dream* dealt with an unlicensed roofer whose method of work involved cutting veneer allegedly causing the veneer to collapse. *See Sunset Beach Investments, LLC v. Kimley-Horn and Associates, Inc.*, 207 So. 3d 1012, 1016 (Fla. 4th DCA 2017)(Noting *Island Dream Homes* involved an unlicensed roofer). The district court ruled that an ordinary juror would not know what the proper standard would be, i.e., the method of cutting veneer, without an expert. The Eleventh Circuit affirmed this ruling. *Island Dream*, 679 F.3d at 1298-1299.

These considerations are absent from the present matter. Again, the issue is not with Action Roofing's workmanship or scope of work, but the design of the roofing system specified in the plans. An expert may testify that a different roofing system should have been specified but that does not expand or create a duty upon the roofing subcontractor who complied with its contract, plans and specifications to the letter.

The Polakoffs cite two cases where the correct or proper standard of care was in dispute and expert testimony was admissible as to whether the

defendant adhered to same. *Salas v. Palm Beach County Bd. of County Commissioners*, 484 So. 2d 1302 (Fla. 4th DCA 1986) does not stand for the proposition that an expert may create or invent a standard of care where one does not exist. In *Salas*, an expert was allowed to testify as to whether the county adhered to the standard of care. The expert did not create or invent a standard of care that was non-existent under the law. And *AMH Appraisal Consultants, Inc. v. Argov Gavish Partnership*, 919 So. 2d 580 (Fla. 4th DCA 2006) merely recognizes that expert testimony is proper when the subject matter is beyond the understanding of the average layperson.

Again, the existence of a duty of care in a negligence case is a question of law for the court. The trial court properly found that Action Roofing did not breach any duty regarding their scope of work. Expert testimony is inadmissible to impermissibly expand or create a duty under the guise of "standard of care." The Polakoffs sought to hold Action Roofing responsible for the design and selection of the roof via their expert's testimony. The trial court properly rejected this attempt.

V. The *Slavin* Doctrine is Inapplicable.

The Polakoffs' futile attempt to create a duty based on *Slavin* is also properly rejected. The Polakoffs essentially argue that the purpose of

Slavin is to create unlimited liability for contractors as to latent defects. (IB. 44). In fact, "…*Slavin* exists to limit the liability of contractors because it would be unfair to continue to hold the contractor responsible for patent defects after the owner has accepted the improvement and undertaken its maintenance and repair." *McIntosh v. Progressive Design and Engineering, Inc.*, 166 So. 3d 823 (Fla. 4th DCA 2015).

Here, *Slavin's* application is academic. There were no **construction** defects as to the roof, whether patent or latent. The undisputed evidence was that Action Roofing's work was not defective. Again, the Polakoffs are trying to assert a duty as to the design of the roof that is simply inapplicable to a roofing subcontractor that perfectly complied with its scope of work.

VI. The Polakoffs Could Not Establish "But For" Causation.

Action Roofing was also entitled to summary judgment based on the Polakoffs inability to prove proximate causation. Again, the Polakoffs have conceded that there was no defect in Action Roofing's installation of the roof vents. The roof does not leak. But they claim liability exists not withstanding simply by the installation of the roof vents.

Critically, there has been no evidence that the proper installation of roof vents solely caused the alleged excessive moisture build-up inside the residence. Again, it is undisputed that the roof and roof vents were

properly installed and did not leak. The Polakoffs' cause and origin expert, Mr. Carroll, testified that the only moisture intrusion observed was from the first floor (lack of weep holes and high soil levels), and not from the roof.

Regardless, the Polakoffs argue that Action Roofing's plan and code compliant installation of roof vents substantially contributed to the alleged excess moisture. But this standard of causation does not apply to establish liability in a tort claim. Instead, Florida requires it be shown that the defendant's act or omission was a cause-in-fact of the plaintiff's claimed injuries. *Stahl v. Metro. Dade County,* 438 So. 2d 14, 17 (Fla. 3d DCA 1983). The Polakoffs cannot substitute substantial contributing factor causation for "but for" causation. The substantial factor exception applies only "…where two causes concur to bring about an event in fact, **either one of which** would have been sufficient to cause the identical result." *Tieder v. Little*, 502 So. 2d 923, 925-926 (Fla. 3d DCA 1987)(emphasis added). No such evidence exists.

None of the cases cited by the Polakoffs warrant a different result. Action Roofing did not engage in wrongful conduct, much less, set in motion a chain of events resulting in injury to the Polakoffs. Action Roofing simply and correctly installed roof vents called for by the plans in

compliance with the Florida Building Code. No jury question is presented based on these undisputed facts.

VII. Improper Stacking of Inferences was Properly Denied by Trial Court.

The Polakoffs sought to stack inference upon inference by their claim that Action Roofing's proper installation of the subject roof vent was the sole cause of the moisture build-up in the residence. On appeal, the Polakoffs argue that expert opinions can be based on inferences so long as the circumstantial evidence comes from **the facts of the case**. (IB. 53.)

That is precisely the problem. There are no facts **in this case** upon which the Polakoffs' experts base their opinions. They concede that Action Roofing properly completed its scope of work. They concede that the plans called for the exact roof vents installed. They concede no codes were violated. They agree that the type of roof vents to be installed was specified in the plans and not determined by Action Roofing. Yes, the Polakoffs seek to have the jury infer that the proper installation of the roof vent was the sole cause of the moisture build-up in the residence. This undoubtedly would result in the impermissible stacking of inferences. *Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008)("The rule that an inference may be stacked on another inference is designed to protect litigants from verdicts based upon conjecture and speculation.").

VIII. Polakoffs Rely on Evidence in Other Cases Where Summary Judgment in Favor of Action Roofing Affirmed on Appeal.

The Polakoffs' admonishment not to rely on the two cases where Action Roofing prevailed on virtually identical grounds is specious given that **all** of the depositions relied on by the Polakoffs were taken in those two cases. (R. 9201.) The Polakoffs did not rely or cite to their' experts' depositions taken in this case. In any event, Action Roofing fully recognizes that a *per curiam* affirmance is not binding. However, given the overlapping records and virtually identical arguments, the cases are referenced for informative purposes only and not as binding authority.

CONCLUSION

The final judgment in favor of Action Roofing should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court on December 8, 2023 via the E-filing Portal:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b) and Florida Rule of Appellate Procedure 9.210(a)(2)(B), I hereby certify that this Answer Brief was prepared using proportionately spaced Arial 14-point font and complies with the applicable font and word count limit requirements.

/s/ Carol M. Rooney
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