

IN THE THIRD DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

**CASE NO.: 3D23-0938**  
**L.T. Case No.: 2019-033925 CA 01**

AMERICAN COASTAL INSURANCE COMPANY,

Appellant,

v.

LA RIVE GAUCHE CONDOMINIUM ASSOCIATION, INC., et al.,

Appellee.

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ON REVIEW OF A FINAL ORDER OF THE CIRCUIT COURT OF THE  
11<sup>TH</sup> JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,  
FLORIDA

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**ANSWER BRIEF OF LA RIVE GAUCHE CONDOMINIUM  
ASSOCIATION, INC.**

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Date: April 3, 2024.

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## **STATEMENT OF THE CASE AND OF THE FACTS**<sup>1</sup>

### **The Claim**

On September 10, 2017, Plaintiff suffered extensive covered damage due to Hurricane Irma. For the next 26 months, Plaintiff complied with all post-loss obligations - a fact that was conceded by Defendant at the time of the evidentiary hearing on the motion to compel appraisal. R-1555:18-22. On October 13, 2017, Defendant met with the Plaintiff to inspect the Property and admitted coverage in an amount they have adamantly refused to disclose, somewhere below the policy's hurricane deductible of \$489,939.15. App.-255-56.

Shortly after the hurricane, the City of Miami Beach ("the City") inspectors identified multiple missing balcony railings and sought to inspect the property. R-1376-77. There were balcony railings visible from Collins Avenue. R-1397. The City issued multiple fines for damage to the Property. R-1430. These included fines for the balconies, fire alarm and sprinkler systems and elevators all of which

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<sup>1</sup> La Rive Gauche Condominium Association, Inc. will be referred to as "Plaintiff." American Coastal Insurance Company will be referred to as "Defendant." "R" refers to the record on appeal. "App" refers to the appendix to the motion to supplement the record filed with the Initial Brief.

were damaged during the hurricane. R-1430, 1433-35, 1460. On January 11, 2018, the City cited the Plaintiff for an unsafe structure due to the extensive damage to the Property. R-1442.

On February 27, 2018, the claim was assigned to Defendant's desk adjuster E. Earl Williams, Executive General Adjuster at CJW. R-1482-1483. After acknowledging assignment of the file, Mr. Williams emailed stating that he would review the file and call on or before March 2, 2018. R-1481.

On March 2, 2018, CJW was put on notice that this was a multi-million-dollar claim. The same day CJW wrote Plaintiff's counsel admitting coverage for a second time but claiming the damages did not exceed the 5% Wind Deductible and was waiting for an estimate from Plaintiff "so we may proceed with discussions and/or verification of the scope of damages as they relate to the loss date in question." R-1480. The policy does not require the Plaintiff to provide an estimate of damages. Defendant did not, and has not ever, provided the estimate of damages setting the amount of the Plaintiff's damages below the deductible.

To assist defendant, Plaintiff at its own expense, retained Al Brizuela Engineering, Inc. ("ABE") to inspect the property. R-1371.

Separately, Plaintiff was given a proposal of \$33,000.00 to make emergency repairs to the balconies and railings. *Id.* In order to undertake emergency repairs and due to the Defendant's failure to provide emergency funds, on March 22, 2018, Plaintiff made its first special assessment in the amount of \$63,900.00 to start certain immediate repairs. R-1366-71.

On May 5, 2018, Plaintiff received its first invoice from ABE in the amount of \$10,000.00. R-1371. Plaintiff spent a total of \$60,000.00 to provide Defendant with the engineering estimates it requested. On the same date, Defendant was informed that there were life-safety issues primarily relating to the balconies but also including other conditions on the property. R-1565.

Defendant hired Rimkus Consulting Group, Inc. to inspect the balconies and railings. On May 18, 2018, after being urged by Plaintiff for action as to the life-safety issues regarding the balconies and railings, Defendant's field adjuster forwarded a May 15, 2018, letter from Rimkus [R-1486] captioned "Notice of Potentially Unsafe Condition." R-1487. The letter stated that no access to any of the building's balconies should be allowed and that temporary shoring, bracing and temporary replacement of the railings should be done

immediately due to their “serious life-threatening condition.” R-1486. It also informed Plaintiff to forward the Notice to the Building Official at the Miami Beach Building Department pursuant to Florida Statute 471 and Rule 61G15 that regulates the engineering profession in Florida. *Id.* Defendant was certainly aware of this dangerous condition when it made its inspection on October 13, 2017, 7 months earlier as the damage to the balconies and railings were visible to the Miami Beach Building inspectors from street level on Collins Avenue. R-1376-77. CJW informed the Plaintiff that it was working on an estimate of the scope of damages. However, the Defendant never provided written estimates for damage to the property despite repeated promises and its prior assertion that the claim fell below the hurricane deductible of approximately \$490,000.00 on March 2, 2018. R-1480; 1487.

In May 2018, Defendant’s field adjuster requested a reinspection of the Property and Plaintiff agreed.

On May 21, 2018, Plaintiff, again at its own expense, hired ThyssenKrupp Elevator to inspect the elevators in the condominium. R-1431-33. ThyssenKrupp provided an estimate but could not make the repairs because Plaintiff had not been paid on the claim. *Id.* As a

result, the permits on the elevators remained open. *Id.* ThyssenKrupp ultimately estimated the cost to repair at \$150,000.00, which was included in Plaintiff's final estimate of damages as a bid item. R-1513, ABE Final Estimate.

On July 25, 2018, ABE provided its preliminary partial estimate of damages, which included sketches of the different unit configurations, in the approximate amount of \$1,100,000.00. App.-256.

### **The Final Estimate**

On October 3, 2018, the Plaintiff provided its engineer's Damage Assessment Report dated August 20, 2019, and Pre-Construction Estimate (the "Final Estimate"). R-1477-1480; 1488, Correspondence transmitting estimate and Final Estimate, respectively. Included in the Final Estimate is Plaintiff's damage model.

There were 24 units damaged by the hurricane. The building has 8 distinct unit floor plans. Because the damage was uniform throughout the 24 units that were damaged by Hurricane Irma, ABE used the Xactimate program, which is standard in the industry, to calculate the damages based on the 8 separate unit floor plans. Xactimate automatically applies the cost of construction materials in

South Florida. The cost to repair any damaged unit was dependent on which of the 8-unit floor plans were at issue. The 8 cost amounts were: 1) \$76,193.18; 2) \$60,563.24; 3) \$77,396.04; 4) \$76,193.18; 5) \$66,792.14; 6) \$71,831.96; 7) \$63,263.47; and 8) \$66,750.76. R-1513-1519. ABE then used the program to extrapolate the total damage to the 24 damaged units depending on each one's floor plan to create the Final Estimate in the amount of \$6,371,757.56 for interiors and balconies. R-1513, "Total Interior with Balconies." The roof damage totaled \$412,510.14. R-1513; 1515. There are 13 damaged hallways on the property. ABE used the damage calculation for one hallway in the amount of \$6,266.44 to extrapolate the uniform damage to each of the 13 damaged hallways in the building for a total of \$81,463.72. R-1513; 1515, "Hallways." The "Elevator and Mechanical" damage in the amount of \$150,000.00 is in the Final Estimate as a bid item provided by ThyssenKrupp. R-1513.

The damage model was based on the use of Xactimate to calculate the Final Estimate applying the exact dimensions of the damaged areas and simply reflects all reported damaged areas. *Id.* Meanwhile, Defendant did no adjusting work on the claim.

On October 4, 2018, the day after delivering the Final Estimate, Plaintiff's counsel again demanded Defendant's estimate.

Please note we have gone above and beyond. This is an approximately \$9,000,000.00 claim affecting more than 80 families. Most notably, we gave you notice that there are life-safety issues present. The policy does not require us to produce an estimate, nor an engineer's report. Obtaining these extraneous items create delay and significant recoverable expenses. However, you requested these items and we have produced them in good faith. I hope now, after over a year, you reciprocate in good faith and send payment immediately.

I would appreciate a response by no later than 4 pm tomorrow, Friday, October 4, 2018.

Let's please try to get this matter resolved.

R-1476.

On October 5, 2018, CJW's account manager responded.

Leo,

I am the account manager assigned to handle this claim. I am in receipt of the estimates you provided on behalf of the Insured. Now that we have additional damages being claimed, including the roof, we will need an additional inspection of the property. Mike Fuller with Sedgwick will contact you to schedule the inspection.

R-1476. Defendant falsely claimed to not know the full extent of the damaged property, including the damage to the roof, despite multiple inspections. Defendant knew or should have known about all of the damages being claimed in the Final Estimate, but chose to label these

damages as “additional damages” to support its scheme to launch an improper fraud defense by alleging some sort of improper inflation between the preliminary July 25, 2018 partial estimate of damages and the August 20, 2019 Final Estimate and to cause additional delay.

On October 5, 2018, Plaintiff’s counsel responded and made it clear that there were no “additional damages” and that Plaintiff had always sought “all damages” caused by the hurricane, including the roof. R-1475. In spite of Defendant’s failure to adjust the claim in good faith as required by statute, Plaintiff agreed to yet another inspection and wanted the date to be agreed to at that time. R-1474. Defendant’s adjuster responded the same day two (2) minutes later saying simply “thanks.” *Id.* Plaintiff responded within fifteen (15) minutes asking “[c]an we set up the inspection for today, please?” *Id.*

Defendant ignored the request and responded 10 days later on October 15, 2018, asking Plaintiff’s counsel to “give me a call to discuss.” R-1474. Incredibly, Defendant’s adjuster wrote later in the day: “I am still coordinating the engineers but it looks like 25-27 of October **to inspect all units and full building.**” R-1472 (emphasis supplied). Defendant now wanted to inspect the entirety of the

building inside and out despite its assertion that the new inspection was due to purported “additional damages,” further illustrating the falsity of Defendant’s position. It is evident that Defendant chose to do no real investigation or adjustment of the claim until almost a year after it first inspected the loss on October 13, 2017.

On October 16, 2018, Defendant requested all invoices for the repairs Plaintiff made out of pocket and the floor plans for the building. R-1472. On October 25, 2018, the property was reinspected. R-1566.

On November 6, 2018, Plaintiff again asked for Defendant’s “estimate and report of damages at this time.” R-1473. To which Defendant replied: “We’re working on the file.” *Id.* On November 28, 2018, Plaintiff again wrote and requested Defendant’s estimate and report of damages. R-1470. On November 29, 2018, Defendant wrote back: “Our engineers are in the process of making their determinations of findings and estimate preparation.” *Id.* This contradicts Defendant’s prior statements when it told Plaintiff as far back as October 13, 2017, one year earlier, and again on March 2, 2018, that it had determined that the claim was covered but below

deductible. R-1565-66. Later on November 29, 2018, Plaintiff wrote back: “It’s been months, when will it be done?”

### **Examination Under Oath**

It was a new year, 2019, and with it came a new request – an Examination Under Oath. Defendant was using the policy’s post-loss conditions as a moving target to continue prolonging this claim that was causing needless hardship to dozens of families. Nevertheless, Plaintiff agreed and on May 20, 2019, the association’s Vice President Jesus Bujan, Esq., a practicing lawyer in good standing with The Florida Bar since 1983, sat for the EUO. R-1328, EUO transcript. He executed a Sworn Proof of Loss in front of Defense counsel at that time in the same amount of ABE’s Final Estimate in the amount of \$8,557,292.42. R-1444-45. A Sworn Proof of Loss had not been requested until the EUO again demonstrating the “moving target” tactic. Mr. Bujan brought two phone book-sized volumes worth of information with him. R-1332-33, listed exhibits. The roof on the Property was replaced 12 years earlier in 2007 along with the main air conditioning unit on the roof, alarm system, security cameras, and electronic key openers. R-1342-44; 1417. The Plaintiff was

provided a twenty (20) year warranty for the roof starting December 14, 2007. R-1422.

The initial damage that was identified as a life-safety issue consisted of damaged balcony railings throughout the property that were blown off the building, hanging from the twelfth and fifteenth floor and visible at street level from Collins Avenue. R-1370; 1396-97. Mr. Bujan testified to the March 22, 2018, special assessment in the amount of \$63,900.00 and a subsequent assessment on December 19, 2018, in the amount of \$63,000.00. R-1366 and 1369-70, respectively. The special assessments were necessary to begin repairs to the extensive damage to the Property while awaiting funds from the Defendant. A third assessment was made on January 15, 2019. R-1374.

### **Water Damage**

The extensive water intrusion into the 3<sup>rd</sup> floor resulted in 12 inches of water into all of the units and the social room. R-1378. The water intrusion affected all of the units throughout the entire building. R-1384-85. Water came in through two large balconies, the windows, the elevator shaft and into the lobby. R-1387-88. "Every floor had water intrusion." R-1392:2; 1423. Water went into the

electrical room and came all the way down from the 11<sup>th</sup> floor. R-1400-01. Penthouse 6 facing Collins Avenue “looked like you were basically in the beach – The entire floor was full of sand.” R-1414:8-10. Every floor has resulting damage to the drywall and in the hallways. R-1423. The water also caused black mold so baseboards were removed. R-1426. Every floor was remediated for water damage. R-1430. On January 11, 2018, the Plaintiff was cited by the City for having an unsafe structure. R-1376; 1442-43.

### **Balconies and Railings**

Some balcony railings were completely blown off and others were hanging from the building and visible at street level. R-1370; 1396-97; 1406-11. The preliminary estimate to repair and shore up the balconies was \$33,000.00. R-1408; 1440. The Plaintiff hired a company to put up wood to attempt to secure the balconies and make temporary repairs as it was a life-safety issue for the residents. R-1375-76; 1403. For example, Mr. Bujan was living in the penthouse with two small children with no balconies. R-1440.

On October 19, 2017, the City cited Plaintiff for several violations related to the fire alarm and sprinkler suppression system (“the System”). R-1434. Four (4) months later in January 2018 the

City reported seventy-nine (79) problems with the System. R-1433-34. The System was brand new prior to the hurricane. *Id.* The water pumps for the System needed to be replaced. R-1435. The Plaintiff entered into a payment plan with the company repairing the System due to lack of funds. *Id.*

### **Elevator Damage**

The elevators in the building were severely damaged and are being repaired piecemeal. R-1430-31. Several people have been stuck in the elevators as they break down sporadically. R-1433. On May 21, 2018, ThyssenKrupp gave an estimate to repair the elevators but they have not been repaired because the claim has not been paid. R-1430-31. The damage to the elevators has resulted in another fine by the City. *Id.*

### **Electric Room Damage**

There was water intrusion into the electric room. R-1400-01. The unit in the room was replaced in 2012. *Id.* However, Plaintiff has been unable to afford to have the electrical room and the components related to it throughout the building inspected to determine life-safety issues due to lack of funds. R-1402.

### **Air Conditioner Damage**

The air conditioning unit on the roof of the building was damaged with doors on the unit being ripped off. R-1400.

### **Other Damage**

The southeast corner of the building facing the ocean came off. R-1404. Pieces of the building were falling off. R-1449. Cameras were ripped off or suffered water damage. 1373-74. The backup generator for the building was inspected immediately before the storm and was in working order. R-1378; 1437-38. It broke during the hurricane and needed to be repaired. *Id.* Drywall throughout the building has not been repaired. R-1415. And the building is still having water intrusion problems. R-1418. Attorney Bujuan's testimony concluded after four and a half hours. R-1329.

### **Continued Post-Loss and Extra Post-Loss Compliance**

On May 31, 2019, Plaintiff's counsel *sua sponte* provided defense counsel, Evelyn Merchant, Esq., the additional documents requested at the EUO and requested payment of the undisputed amount of the claim. R-1530.

On June 2, 2019, Plaintiff's counsel wrote defense counsel suggesting an undisputed payment now and then appraisal "might

be a good outcome.” R-1529. In fact, from May 31, 2019, to November 18, 2019, Plaintiff’s counsel asked for appraisal 3 times and an undisputed payment 7 times. R-1527-30. After continuing to attempt some sort of settlement Plaintiff’s counsel asked if he was being “coaxed into suing.” R-1526-27.

On November 6, 2019, Defendant responded to Plaintiff’s Civil Remedy Notice. R-1532. In the letter Defendant admitted coverage for a third time stating: “The Insured first gave notice of the loss on October 2, 2017. The Property was inspected on October 13, 2017, and covered damages were found not to exceed the applicable deductible . . .” *Id.* Once again, Defendant’s estimate of the damages and the basis for their finding that the damages were below deductible remained an unsolved mystery.

On October 11, 2019, Defendant asked for the extracontractual EUO of Plaintiff’s expert ABE. R-1538. After being challenged as to the impropriety of the requested EUO, Defense counsel conceded that she did not have the right to take ABE’s EUO pursuant to the policy. R-1537-38. On October 17, 2018, Plaintiff’s counsel reminded defense counsel that all post-loss obligations had been complied with and urged it to “pay additional funds (and express how much) or

stand on their original ‘covered but under deductible’ decision.” R-1536.

On November 15, 2019, Defendant wrote that it would be denying the claim but stated they would like to continue to discuss settlement – something completely at odds with the current position that the policy is void.

Leo,  
Sorry, don’t think we will have a bow. Client does not want to go to appraisal. They have instructed that we deny the claim based on the claim being grossly inflated beyond its reasonable value. I am 70% done with the denial letter. I will finish over the weekend, but thought you deserved our response as promised. **They did tell me that they would consider discussing settlement, but our numbers are not even close. I am happy to discuss a number.** Call if you want over the weekend.

R-667, November 15, 2019, email (emphasis supplied). So, the sole issue was the amount of the loss.<sup>2</sup> And, once again, Defendant never provided what its “number” was or an estimate.

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<sup>2</sup> Defendant’s first denial letter was sent on January 28, 2020, two months after the filing of the lawsuit and 848 days after the initial claim. R-1540. A second denial letter was sent on July 7, 2020. R-1543.

## **The Lawsuit**

On November 18, 2019, Plaintiff filed suit. R-22. On December 12, 2019, Plaintiff moved to compel appraisal. R-102. On March 26, 2020, Defendant filed its Amended Answer and Affirmative Defenses to Plaintiff's Complaint. R-179. Defendant's seventh affirmative defense stated that "Plaintiff has falsely inflated the claim well beyond its actual value which constitutes an intentional misrepresentation and/or concealment of a material fact." R187. Of note, no allegation of fraud or misrepresentation was claimed other than the Defendant's belief the Final Estimate was too high. Defendant did not comply with Fla. R. Civ. P. 1.120(b) requiring: "In averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances permit." With multiple inspections performed, thousands of documents reviewed, multiple interviews taken, and hundreds of pictures reviewed, one would think Defendant would have been able to comply with the Rule.

On January 31, 2020, Plaintiff filed its Reply to Affirmative Defenses. R-208. In paragraph 5 Plaintiff replied to Defendant's seventh affirmative defense of fraud as follows:

Defendant's affirmative defenses are avoided based on Defendant's failure to plead fraud and misrepresentation with specificity as required by Fla. R. Civ. P. 1.120(b). Affirmative defenses of fraud that are not plead with particularity are deemed waived. *Zikofsky v. Robby Vaport Systems*, 846 So. 2d 684 (Fla. 4<sup>th</sup> DCA 2003).

R-209. Therefore, Defendant was on notice for more than 3 years prior to the January 31, 2023, motion for summary judgment hearing that its fraud affirmative defense was defective as a matter of law before seeking to amend it on April 24, 2023, 3 months after the trial court ruled in favor of Plaintiff on its motion for summary judgment.

On March 26, 2020, Defendant filed its Amended Answer and Affirmative Defenses to Plaintiff's Complaint. R-212. The legally deficient seventh affirmative defense of fraud remained the same in spite of being on notice of its defective nature. On March 27, 2020, Plaintiff filed its Reply to Amended Affirmative Defenses and again set forth the lack of specificity in the seventh affirmative defense. R-225-226.

On July 23, 2019, Defendant filed its Amended Response in Opposition to Plaintiff's Motion to Compel Appraisal. App.-254. Because Defendant did not understand, or chose to ignore how the Final Estimate was formulated, Defendant argued that Plaintiff had

falsely inflated the claim from the July 25, 2018, preliminary estimate of \$1.1 million to the Final Estimate dated August 20, 2018, in the amount of \$8.2 million. App.-256. In the Amended Response’s “Statement of Facts” it claimed that its inspection of the property revealed damage to the balconies, but no damage to the roof or interiors. App.-255-56. This marked the first time that Defendant made any indication, albeit a vague and factually inaccurate indication, as to what it adjusted during the claim process. Moreover, Defendant’s position disregarded attorney Bujan’s EUO testimony regarding the extensive damage to the interior of the property and the pictures showing water intrusion throughout the building clearly revealing Defendant’s position to be wrong. Defendant stated that it “advised that it estimated the cost to repair the covered damages to the property did not exceed the Policy’s \$489,939.15 deductible.” *Id.* To date, Defendant has never disclosed an estimate or even the amount of its initial adjustment of the loss.

### **Hearing on Motion to Compel Appraisal**

On July 27, 2020, the trial court held a hearing on the Motion to Compel Appraisal and Abate Action. R-1551, hearing transcript. In Plaintiff’s opening, the trial court was informed that Defendant had

admitted there was coverage on October 13, 2017, March 2, 2018, and on November 6, 2019, but that Defendant claimed the loss was below deductible. R-1554-55. Defense counsel agreed that post-loss obligations had been complied with – “[w]e agree that they substantially complied with post-loss conditions to the extent that they gave an EUO, they allowed inspections, blah, blah, all of those things. That’s not our position” R-1555:18-22. Defense counsel went on to argue there was no need for the hearing on post-loss compliance stating that it denied the claim due to an alleged inflation in Plaintiff’s Final Estimate. R-1555-56. None of the cases cited by Defendant in support of its fraud argument contained a fraud allegation based merely on the Defendant disagreeing with an insured’s estimate. *Id.* In all of Defendant’s distinguishable cases, there were supplemental facts and arguments connected to the alleged fraud: missed post loss obligations, deception regarding the occurrence of the loss, inclusion of damage known not to be related to the underlying cause, and other issues, which coincided with a question of amount. R-1561-1564 None of Defendant’s distinguishable fraud cases deal solely and exclusively with an amount of loss difference – such as here. *Id.*

Plaintiff's counsel pointed out that Ms. Merchant had made the same exact argument that inflation of a claim by itself is enough to void the policy in *200 Leslie Condominium Association, Inc. v. QBE Ins. Corp.*, 965 F. Supp. 2d 1386 (S.D. Fla. 2013), but the district court rejected that argument. R-1563. Plaintiff's counsel walked the trial court through the claim from the admission of coverage through the lawsuit and demonstrated that there had been no inflation of the amount of the damages. R-1565-66. In response to questioning from the trial court Defense counsel stated:

MS. MERCHANT: Your Honor, we have alleged that they included damage that was in their amount that is not damaged, and it was not damaged by the hurricane. We also set forth –

THE COURT: Let me make sure I understand that. So what you're saying is in the sworn proof of loss and the 8 million, and let's just say whatever it may be, roof damage you're claiming – I made up the roof damage – but you're claiming – although it may be accurate – they're claiming that that damage is by the hurricane, and you're saying they know that it's not and it's fraudulent that they're putting it in; is that what your argument is?

MS. MERCHANT: That's one of the arguments, yes, Your Honor.

THE COURT: Okay.

MS. MERCHANT: Same goes for windows and sliding glass doors, I believe, as well as replacement of the roof in its entirety.

This is a relatively new roof in the sense that it was only ten years old. It was replaced after Wilma.

R-1568:1-23.<sup>3</sup> Plaintiff pointed out the obviousness of Defendant's strategy which is to gut the appraisal clause from the policy by claiming if there is a difference in each parties' amount of loss then the claim must be fraudulent. R-1579. The trial court ruled that the appraisal issue and fraud would go forward simultaneously on a dual track and that the jury may not see the appraisal award if the Defendant prevails on its fraud claim at trial. R-1579-82.

Defendant moved for a stay which was granted by the trial court for 30 days. R-1269.

## **Appeal**

Defendant filed a Motion to Stay and this Court ordered a response. After the filing of the response, the stay was denied.

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<sup>3</sup> Defendant was trying to attribute a motive to or incentive for Plaintiff to claim the roof was damaged by the hurricane. That makes absolutely no sense since Mr. Bujan told Ms. Merchant during his EUO that the roof has a 20-year warranty that will run out in 2027. If there was damage to the roof not caused by the hurricane, it would presumably be covered under the 20-year warranty.

Thereafter the parties fully briefed the issue of whether the appraisal could move forward. Defendant's position was that it had wholly denied the coverage based upon an overinflated estimate i.e., an amount/valuation issue, as a result appraisal could not move forward. Plaintiff argued, among other things, that coverage was admitted three times and that the matter should proceed on a dual track. Since Defendant had never asked, Plaintiff also explained the damage model based on ABE's use of Xactimate to extrapolate the damages in its response to motion for stay and Answer Brief. Defendant at no time argued that the damage model was fraudulent. In fact, even after the damage model was explained to Defendant it did not state that it was the basis for its fraud defense in its motion to stay, Initial Brief, or Reply Brief. The Defendant's fraud defense has been an ever changing theory. In any event, when coverage was denied on January 28, 2020, 848 days after the initial claim it was not due to the damage model in the Final Estimate. R-1540. Defendant simply disagreed with the amount. *Id.*

On May 26, 2021, this Court affirmed the order granting the motion to compel appraisal. *American Coastal Ins. Co. v. La Rive Gauche Condo. Assoc.*, 321 So. 3d 346 (Fla. 3d DCA 2021) ("La Rive

I”). Defendant filed a motion for certification on June 23, 2021, which was denied by order dated June 29, 2021.

### **Proceedings on Remand**

On October 26, 2021, the Appraisal Award was entered signed by Defendant’s appraiser and the umpire. R-1292. The award set RCV at \$3,100,000.00 and ACV at \$2,350,000.00. *Id.*

On January 23, 2022, Defendant’s counsel emailed Plaintiff’s counsel stating that Defendant will pay the ACV amount per the award, however, the payment was “being made without waiver” of its defenses. R-1324. As a result the monies are being held in trust and Plaintiff cannot use them to repair the property.

On May 27, 2022, the Plaintiff filed its Motion for Final Summary Judgment. R-1300. After setting forth the factual background and reviewing its post-loss compliance, Plaintiff made 4 general arguments.

Plaintiff’s first argument was that Defendant and its counsel in this matter are using this and other cases in the Second District as test cases to advance the argument that a mere disagreement with an insured’s estimate is enough to deny a claim and thwart appraisal. *See American Capital Assurance Corp. v. Leeward Bay at Tarpon Bay*

*Condominium Assoc., Inc.*, 306 So. 3d 1238 (Fla. 2d DCA 2020); *Villaggio at Estero Condo. Ass'n, Inc. v. American Capital Assurance Corp.*, --So. 3d --, 2021 WL 1432160 (Fla. 2d DCA 2021); and *American Capital Assurance Corp. v. Cayman I at Tarpon Bay Condo. Ass'n, Inc.*, 313 So. 3d 847 (Fla. 2d DCA 2021). In each case, the defense counsel was the same, and the insurer sought to deny appraisal and coverage claiming fraud in the estimate. In each of those cases the insurer and their counsel failed to prevent appraisal from going forward. R-1314.<sup>4</sup>

Second, Plaintiff argued that a dispute solely as to the amount of the loss is not fraud. R-1316. Third, Defendant had an

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<sup>4</sup> Review was granted by the Supreme Court in *Leeward Bay*. However, American Capital went insolvent and FIGA took over the corporation. FIGA rejected ACIC's coverage determination and decided to pay the claim and dismissed the appeal. The Petitioner's Request to Dismiss Appeal states in-part: "FIGA has completed its investigation of the claim and has made a coverage determination. FIGA has rejected American Capital's position on the claim. Instead of denying the supplemental claim presented by Respondent, FIGA is trying to clarify the scope of the repairs needed to remedy the covered claim presented herein. Since there is no longer any 'wholly denied' claim, the issues raised in this appeal seem moot and FIGA believes the appropriate step is to dismiss the appeal." *Florida Ins. Guar. Ass'n v. Leeward Bay*, SC20-1766, D.E. November 16, 2022. This Court may take judicial notice of the records of the Supreme Court pursuant to § 90.202 (6), Fla. Stat.

independent duty to timely evaluate and pay benefits owed with the valuation process taking place as an arm's length transaction; thereby precluding the valuation of the claim rising to fraud. R-1319. Fourth, Defendant's payment of the appraisal award was a confession of judgment despite any reservation language in the letter transmitting same. R-1324.

On July 25, 2022, Defendant filed its Response in Opposition to Motion for Final Summary Judgment. R-1591. The factual argument of Defendant in the response is utterly refuted by Mr. Bujan's EUO testimony given over 2 years earlier on May 20, 2019.

On October 22, 2022, the trial court held a hearing on Plaintiff's motion for summary judgment. App.-184. Defendant sought to delay the hearing in order to take Mr. Bujan's deposition. Plaintiff made it clear to the Court and again put the Defendant on notice that it had failed to properly set forth its fraud defense with specificity. App.-195-200.

Again, I am in 100 percent on this particular version of the fraud pleading does not meet the rules required in civil procedure by Florida law. And Your Honor should grant summary judgment because of the deficient nature on its face.

App.-196:13-18. Plaintiff also argued that this case was one of several where Defendant's firm incorrectly argued that a disagreement in valuation constituted fraud. App.-197-200. The Court did not rule and allowed Mr. Bujan's deposition to go forward.

On January 20, 2023, Mr. Bujan, Esq. gave his deposition. R-1835.<sup>5</sup> He explained the damage model to the best of his ability when asked whether the damage was the same to each unit.

A. Well, that's what I am trying to – no. The answer is no. Then I would need to explain myself as to what is my understanding of how he came about this. He did what I think is referred in the field as extrapolation. He went into some of the units, and that's how he came up with the number. He found that same information or similar damage in similarly sized units, and then he extrapolated it to all of the other remaining units.

R-1837:7-16. Mr. Bujan is a practicing attorney but has never practiced in the area of first party insurance. R-1838. The damage in his unit was consistent with water intrusion that damaged the

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<sup>5</sup> Mr. Bujan's deposition was over 4 hours long and consisted of 125 pages. R-1835. Defendant filed only 7 pages of the deposition in its opposition to the motion for summary judgment. The portions that were relied on in the Amended Response in Opposition to Motion for Final Summary Judgment were cherry-picked. The answers given in his EUO fully represent the actual damage to the building and the portions relied upon and set forth in the amended response and Initial Brief are not complete recitations of his answers to the few questions relied upon by Defendant.

sheetrock and electrical box in his unit resulting in it rusting. R-1838-39. He lives on the top floor so the only place for the water to enter his apartment and cause the described damage was through the roof. R-1839. He has not replaced the windows in his unit as it is one of the items that the association is getting estimates for. R-1841. He has temporary railings on his balcony as they were blown away in the hurricane. R-1842. This was the only information to glean from the four hour deposition as the complete transcript was never filed by the Defendant.

On January 30, 2023, one day before the hearing on Plaintiff's motion for summary judgment, Defendant filed its Amended Response in Opposition to Motion for Final Summary Judgment. R-1724. Defendant did not file any evidence that the damage model used by ABE was incorrect or fraudulent. It was simply argument of counsel.

### **Hearing on Motion for Summary Judgment**

On January 31, 2023, the trial court held a hearing on Plaintiff's Motion for Final Summary Judgment and granted same. App.-14, transcript. Plaintiff's counsel covered each of the areas briefed in the motion for summary judgment. Defendant claimed the damage was

below deductible and the appraisal award came back in the \$3,000,000 range with an additional \$6,000,000 for law and ordinance. App.-23. Regarding the ACV payment Defendant made, the Plaintiff cannot use that money to make repairs, so the association has had to take loans and obtain bids for the work done. App.-25. In summarizing Mr. Bujan's deposition testimony on the cost of repairs counsel stated:

We couldn't use that money. It's sitting in an account. In fact, only a small amount has been given to the association with relation to being able to show the bank, because they had to take a loan, that they have some moneys in reserve for the repairs process.

Mr. Bujan has obtained – and that came out of the depo. That was good information that came out of the depo.

There was multiple estimates and bids that Mr. Bujan procured, it was procured as a volunteer for the association, some of them exceeding the initial estimate.

So between third-party folks and contractors and roofers and what have you and window folks and exterior stucco folks that Mr. Bujan has worked with, we're talking about eight to \$9 million in fair market bids. We're talking about an appraisal award 3.X million dollars plus a potential another three to \$6 million.

So we don't have an inference of fraud. You're going to hear that, oh, Mr. Bujan said they added it to the estimate without there actually being a roof leak. Mr. Bujan said, look, I'm relying on an expert and he's my agent. Ms. Merchant will ask – will say that you're responsible for your

agent. Of course, you're responsible for your agent. Public adjuster, lawyer, engineer, nobody is disputing that. It's almost like a red herring for them to say.

Mr. Brizuela is allowed to come up, the engineer, with a concept and a theory; and he did. He wrote an estimate that's about 45 pages and it was about \$1.1 million.

There's only eight types of units in this building, eight floor plans. He wrote each floor plan. There's eight floors. He wrote 1 point something, 1.1, give or take. And he extrapolated that predicated on the damage.

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This is how Mr. Brizuela, and why with an affidavit, he was able to extrapolate what the damages were.

Ms. Merchant will say, look, you're extrapolating, then you don't know if there was damage there or not. Inaccurate. Mr. Brizuela said I looked at the building, the exterior envelope and I walked it and there was damage, effectively, everywhere, some visible, some invisible, however, there are tail-tell signs that tell you the building was shot.<sup>6</sup>

The appraisal award backs that commentary up, and new-found bids backs that commentary up.

App.-25-27. Regarding the affirmative defense of fraud:

Oh, I noticed in the amended response Ms. Merchant attempts to expand the method or the way in which her

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<sup>6</sup> Defendant raises the damages that are not visible to the naked eye to suggest that there was something wrong with the P.E.'s analysis. However, part of the inspection used infrared thermography, among other things, to determine the extent of water damage/intrusion at the property. R-1495-1498.

affirmative defenses are pled. I implore your Honor to hold Ms. Merchant to her pleadings.

If she was going to amend them – or her client, not Ms. Merchant, but we act for your clients. If American Coastal was going to amend them, they could have done so any time from 2019 forward. And to allege now that they should be read in a way that they were not pled or expanded or otherwise, I think is incredibly inappropriate and prejudicial.

App.-27-28. The failure to put forth any evidence to support the fraud argument was discussed along with the fact that all the trial court was going to hear was argument of defense counsel.

We filed the motion for summary judgment. Everything you're going to hear is going to be in Ms. Merchant's argument as good or bad or in the middle, as it may be, it's argument of Ms. Merchant. She doesn't have, she has not put forward an iota or scintilla of evidence in support of her position of neither materiality, nor – no actual fraud or misrepresentation.

There's a bunch of inferences that she's going to try to piece together based on what Mr. Bujan said, but there's no corporate representative that I've seen, unless I missed it, or affidavit from an engineer or any other insurance company representative, agent or otherwise, that says whatever happened here was material, number one, and whatever happened here seems to be fraud, number two, or mis-rep, number three.

App-32.

Where's is Ms. Merchant's evidence in support of materiality other than Ms. Merchant's argument? It doesn't exist.

So Ms. Merchant could have gotten an affidavit from an engineer that drew attention or a problem with Mr. Brizuela's methodology. It's absent. She could have drawn an affidavit from an engineer that said look at all the fraud over here, they're looking for a free building. Absent. She could have got an affidavit from a corporate representative or agent or otherwise that said, by the way, this is material, we relied on the statements of Mr. Bujan, and he's so sharp that he tricked us, we almost paid \$8.5 million without checking.

But, you know, she can't say that. There has to be an affidavit of reliance and materiality. It's absent.

App.-62. In making its ruling the trial court made it clear that the Defendant failed to properly plead the fraud defense and in any event there was no evidence in the record to support same.

THE COURT: All right. At this point – okay. Let me begin by saying I think what we all agree is that the appraisal award leaves the law and ordinance open. We all agree to that.

The only issue for this Court is to determine is the fraud defense. It's already been stipulated by both sides that the other defenses are not at issue.

So as to the fraud defense, whether there was a material misrepresentation, this is a – pretty much a case where there was coverage extended. There were two post-suit denial letters that were issued. The defense raised in its answer the defense that, "The amount of damage was inflated beyond its actual value."

This sounds like a valuation argument and not necessarily a fraud dense. The Court agrees that a difference in

valuation or an inflated amount – and also relying on the Tony Alvarez case that talks about overestimating or exaggeration of valuation does not necessarily constitute or rise to the level of material misrepresentations.

We all know that fraud and material misrepresentation does require a heightened standard of pleading. The material misrepresentation, I would agree, is an issue for the trier of fact if it's pled with the specificity to allege that the exaggeration or the overestimation was, in fact – of the loss, excuse me, was, in fact, done with the intent to defraud. And I think that's the operative language here and the operative term because there has to be an intent to defraud or to commit the fraud.

In this case, the Court finds there was no evidence there was such fraud. The defense is asking the Court to make a finding based on inferences. The Court cannot do this. I can't just infer from – I think it would be a stretch for this Court to say there was fraud because the estimate that Ms. Merchant cited to is suspect, especially, again, when I don't find that the defense was raised to the level that it's required to. So the Court cannot impose its own opinion and listen to whether, you know, one penthouse had X amount and the other one had either the same amount or near the same amount and that that in and of itself constitutes a fraud.

So for those reasons, the Court is going to grant the motion for summary judgment finding that the defense has just not met its burden and has not sufficiently rebutted the evidence put forth by the plaintiff in support of its MSJ.

App.-68-70 (emphasis supplied).

On April 24, 2023, 3 months after the hearing on the motion for final summary judgment and granting of same, 6 months after the

first hearing on the motion for summary judgment where the adequacy of the defense was raised again, 9 months after the motion for summary judgment was filed, 2 years and 3 months after Plaintiff filed its 2 replies to affirmative defenses regarding the inadequacy of the fraud defense, and 1 day before the entry of the Final Judgment by Judge, Defendant filed its Motion for Leave to Amend Answer and Affirmative Defenses and to Deem Defendant's Answer and Affirmative Defenses Filed. R-1847. Incredibly, in spite of the issue of the inadequacy of the affirmative defense being central since the start of the case Defendant stated:

5. At no time did Plaintiff challenge the pleading of the Seventh Affirmative Defense and has waived any right to challenge same.

6. At hearing on Plaintiff's Motion for Summary Judgment was the first time Plaintiff raised any deficiency in ACIC's Seventh Affirmative Defense.

R-1848.

On April 25, 2023, the trial court entered its Final Judgment By Judge. R-2885.

On May 10, 2023, Defendant filed its Motion for Rehearing, Motion to Amend Affirmative Defenses and/or Motion to Vacate Final Judgment. R-1888. In addition to making the arguments on appeal,

the Defendant submitted the Declaration of Adam Locke, P.E. to attempt to cure the fact that, other than argument of counsel, it presented zero evidence to support its fraud argument. R-1914. But, Mr. Locke did not state that ABE's damage model was fraudulent. Rather, he stated that the method used by ABE was "neither appropriate nor reliable." R-1915.

On May 11, 2023, Defendant filed a second Motion for Rehearing, Motion to Amend Affirmative Defenses and/or Motion to Vacate Final Summary Judgment. R-2213. This time, in order to make up for its lack of evidence in support of its fraud argument, Defendant attached the Declaration of Kevin Huff the Director of Claims at Sedgwick Delegated Authority. R-2540. The Declaration parroted the response to the motion for summary judgment for the most part, including the factual argument that is utterly refuted by Mr. Bujan's May 2019 EUO testimony. The reason for the Declaration was to attempt for the first time to include expert testimony alleging "materiality" to support the fraud defense. Mr. Huff's Declaration states in conclusory fashion: "Plaintiff's grossly inflated claim is material to a claim being made under this coverage part." R-2543.

However, on appeal Defendant does not argue the trial court should have considered that testimony.

On May 23, 2023, Defendant filed its Notice of Appeal. R-2546.

On July 3, 2023, this Court entered an Order relinquishing jurisdiction to the trial court to rule on the pending motion for rehearing and ordered the parties to brief the issue of jurisdiction. App.-7.

On July 28, 2023, the trial court denied the motion for rehearing. App.-9.

The parties briefed the jurisdictional issue before this Court agreeing that the appeal should proceed as an appeal from a final order.

### **SUMMARY OF THE ARGUMENT**

The Loss Payment provision of the policy dictates when Defendant is required to make payment. The trial court is bound to follow the terms of the policy that the Defendant drafted, which requires payment within 30 days of receipt of a sworn proof of loss and either: 1) the filing of an appraisal award; or 2) entry of a final judgment. The Loss Payment provision requires payment under two defined circumstances. Both have occurred. Defendant argues the

Final Judgment is not final as further judicial labor is necessary on the merits of Plaintiff's claims regarding RCV and Ordinance or Law. Those pending claims do not affect the payment of ACV at this time. The law in the state of Florida and the Policy in this matter do not require the payment of RCV until it is incurred. Conversely, the Policy requires the payment of ACV at this time. Plaintiff did not purchase a reimbursement policy to fund ACV, RCV and Ordinance or Law. Payment of ACV is not contingent on RCV being incurred, but that is exactly what the Defendant is arguing for in this matter.

Defendant did not put forth any evidence of fraud at the time of the summary judgment hearing. No affidavit from an engineer, corporate representative, or agent that said the Final Estimate on damages was fraudulent. The trial court correctly found there was no evidence of fraud and merely argument of counsel that would require a finding of fraud based on inferences – something the trial court is not permitted to do.

This case is solely a dispute as to the amount of the loss (to this date the Defendant has never provided a single estimate of damages). By the Defendant's own words, it simply thinks the estimate was too high or that certain items should not be included in the scope of

damages. The Defendant does not agree to Plaintiff's number. That is not fraud – it's a disagreement that has now been determined by appraisal.

The law in this district requires an allegation that the fraud be willfully false, which Defendant never did. Instead, on April 24, 2023, 3 months post hearing on summary judgment and granting of same, 6 months after the first hearing on summary judgment where the adequacy of the defense was raised again, 9 months after the motion for summary judgment was filed, 2 years and 3 months after Plaintiff filed its 2 replies to affirmative defenses regarding the inadequacy of the fraud defense, and 1 day before the entry of the Final Judgment, Defendant filed its motion for leave to amend. Plaintiff needs to fix the property and Defendant seeks to continue prevent that by its last minute motion to amend. The trial court did not abuse its discretion denying the motion and putting an end to Defendant's dilatory conduct pre and post suit.

The law on calculation of prejudgment interest is that it is payable from the date of the loss when the claim is denied. The trial court's granting of interest from the date of the loss until the date of the appraisal check (even though that amount has never been in

Plaintiff's possession) is the correct calculation of interest and should be upheld regardless of any due process arguments since the result will be the same on remand and any error is harmless.

### **STANDARD OF REVIEW**

Plaintiff agrees with Defendant that the standard of review of the entry of summary judgment is de novo and denial of a motion for leave to amend affirmative defenses is reviewed for an abuse of discretion. Initial Brief at 26.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT FOR THE AMOUNT OF THE ACTUAL CASH VALUE OF THE LOSS WHICH IS PAYABLE IMMEDIATELY PURSUANT TO THE TERMS OF THE POLICY**

In general piecemeal review of cases is not favored by an appellate court, and care should be exercised by trial judges to avoid, so far as possible, the necessity for successive appeals. *Sax Enterprises, Inc. v. David & Dash, Inc.*, 107 So. 2d 612, 613 (Fla. 1958). In this matter, payment of ACV is due now pursuant to the terms of the Policy. That fact coupled with Defendant's improper conduct in the handling of the claim and failure to make proper payment of ACV makes this an instance where it is not possible to

avoid the procedural posture of this appeal. Plaintiff did not purchase a reimbursement policy and should not be saddled with the unenviable feat of paying for extensive damages out of pocket to earn the benefits under the policy.

Under Florida law, an insurance policy is treated like a contract, and therefore ordinary contract principles govern the interpretation and construction of such a policy. *Graber v. Clarendon Nat'l Ins. Co.*, 819 So. 2d 840, 842 (Fla. 4<sup>th</sup> DCA 2002). The interpretation of an insurance contract is a question of law. *Travelers Indem. Co. of Illinois v. Hutson*, 847 So. 2d 1113 (Fla. 1<sup>st</sup> DCA 2003). In addition, “[u]nder Florida law, insurance contracts are construed according to their plain meaning.” *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). *Gilmore v. St. Paul Fire & Marine Ins.*, 708 So. 2d 679, 680 (Fla. 1<sup>st</sup> DCA 1998) (“The language of a policy should be read in common with other policy provisions to accomplish the intent of the parties.”). “[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision.” *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5<sup>th</sup> DCA 1996).

The Loss Payment provision of the policy dictates when Defendant is required to make payment. The trial court is bound to follow the terms of the policy that the Defendant drafted, which requires payment within 30 days of receipt of a sworn proof of loss and either: 1) the filing of an appraisal award; or 2) entry of a final judgment. The Loss Payment provision reads as follows:

H. The **Loss Payment** Condition dealing with the number of days within which we must pay for covered loss or damaged is replaced with the following:

Provided you have complied with all the terms of this Coverage Part, we will pay for covered loss or damaged upon the earliest of the following:

- (1) Within 20 days after we receive the sworn proof of loss and reach written agreement with you;
- (2) Within 30 days after we receive the sworn proof of loss and:
  - (a) There is an entry of a final judgment;  
or
  - (b) There is a filing of an appraisal award with us; or

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R-832. Hence, the Loss Payment provision requires payment under two defined circumstances. Both have occurred. However, Defendant claims the Final Judgment is not final as further judicial labor is necessary on the merits of Plaintiff's claims regarding RCV and Ordinance or Law. IB at 27. Those pending claims do not affect the

payment of ACV at this time. The law in the state of Florida and the Policy in this matter do not require the payment of RCV until it is incurred. Conversely, the Policy requires the payment of ACV at this time.

Defendant relies on *Pedersen v. Citizens Prop. Ins. Corp.*, 157 So. 3d 431 (Fla. 4<sup>th</sup> DCA 2015), but in that matter the Citizens moved for summary judgment on Ordinance or Law. Pedersen challenged a summary judgment entered in favor of Citizens in an action to compel appraisal. *Id.* at 432. During the pendency of litigation the parties engaged in appraisal and the umpire awarded \$154,736.78 for building damages and, additionally, provided for ordinance or law damaged if incurred. *Id.* Citizens paid the award and moved for summary judgment. *Id.* Pedersen objected due to the pendency of ordinance or law. *Id.* The trial court entered summary judgment as the appraisal was performed, the insured was paid, and there was no evidence of ordinance or law damage. *Id.*<sup>7</sup> The appellate court found

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<sup>7</sup> The court stated the “decision is without prejudice for the insured to seek recompense for any incurred ordinance or law damage; unfortunately, should the parties fail to agree on amount, an additional arbitration to set the amount of loss may be required.” *Id.* at 433.

that the well-settled law is that ordinance or law, and the policy language makes clear, that the recovery of supplemental ordinance or law damages is predicated on the insured having “incurred” such expenses. *Id.* at 433 citing *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007). Here, Defendant could have moved for summary judgment as Citizens did in *Pedersen*. But Defendant sat on its hands and now wants to be rewarded for same.

Defendant cites to *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So. 3d 1280, 1284 (Fla. 3d DCA 2020), where this Court found that the insurer “did not yet have an obligation to pay any remaining amounts beyond actual cash value . . . because Ms. Vazquez had not begun making repairs or performing work on the property and had not incurred any expenses.” The converse should also hold. The ACV is payable, in this matter upon filing of the appraisal award, or entry of final judgment. Insurers in the state of Florida cannot use the terms of the policies they draft as a sword and a shield to thwart payment under the guise of jurisdictional principles. *See e.g., Citizens Prop. Ins. Corp. v. Tio*, 304 So. 3d 1278, 1280 (Fla. 3d DCA 2020) (insurer may not wrongfully deny claim causing suit for damages then limit damages by enforcing terms of policy at its convenience).

The Replacement Cost provision states that Defendant will not pay on a replacement cost basis for any loss or damage “[u]ntil the lost or damaged property is actually repaired or replaced.” R-861. The ACV provision obviously has no such requirement. Plaintiff did not purchase a reimbursement policy to fund ACV, RCV and Ordinance or Law. Payment of ACV is not contingent on RCV being incurred, but that is exactly what the Defendant is arguing for in this matter. It is a continued pattern of delay that has occurred since the beginning of the claim. The trial court’s entry of Final Judgment must be affirmed.

## **II. THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NO EVIDENCE OF FRAUD**

Defendant presented no evidence of fraud prior to or during the hearing on the Motion for Final Summary Judgment. It was merely argument of counsel that a difference between valuations of the amount of a loss constituted fraud. More incredible than that was the fact the Defendant never provided an estimate of its valuation of the loss and merely waited until Plaintiff had expended tens of thousands of dollars producing one so it could claim fraud. In any

event, mere disagreement as to the amount of loss alone does not constitute fraud.

**A. Defendant did not put Forward any Evidence of Fraud**

During the summary judgment hearing, Plaintiff pointed to the fact that the Defendant put forth no evidence of fraud. No affidavit from an engineer, corporate representative, or agent that said the ABE report on damages was fraudulent. As set forth in the Statement of the Case and Facts, the trial court correctly found there was no evidence of fraud and merely argument of counsel that would require a finding based on inferences. App.-69-70. It is no doubt the reason that Defendant's first motion for rehearing included the declaration of Mr. Locke. R-1914. But, Mr. Locke did not state that ABE's damage model was fraudulent but, rather, that it was "neither appropriate nor reliable." R-1915. Defendant took another stab at presenting evidence of fraud when, the next day, it filed its second motion for rehearing. R-2213. This time Defendant filed the Declaration of Mr. Huff. R-2540. For the first time Defendant presented expert testimony stating: "Plaintiff's grossly inflated claim is material to a claim being made under this coverage part." R-2543. That too falls short. Even if it did not, on appeal the Defendant does not argue the

trial court should have considered the Declarations because it would be admitting it presented no evidence of fraud. That leaves just argument of counsel. This Court recently recognized that, under the summary judgment standard, argument of counsel is insufficient to carry the day.

In *Citizens Prop. Ins. Corp. v. Zamanillo*, No. 3D22-1564, 2024 WL 172611 (Fla. 3d DCA Jan. 17, 2024), this Court reviewed an order granting summary judgment in favor of the insureds. There the insureds' offered testimony along with their expert that a bathroom in the home was unusable due to collapse. 2024 WL 172611 \*1. Citizens contended that the expert's testimony was ripe for cross-examination. *Id.* In rejecting that argument this Court found:

Citizens' argument fails for two reasons. First, Citizens offered argument, but no evidence. It didn't offer a contradictory expert report or any evidence to create an issue of fact regarding the Zamanillos' contention, buttressed by their expert, that the toilet and shower didn't work. While a jury may be free to weigh expert testimony—indeed, a jury may weigh any testimony—a jury must have some basis in the evidence presented to reject the testimony. See *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092, 1093–94 (Fla. 1994) (holding that it was within jury's province to reject uncontroverted medical testimony where the plaintiff gave conflicting testimony in a workers' compensation hearing and gave confusing medical histories raising the possibility that their medical opinions were based on

inaccurate predicates). Perhaps the expert's testimony was lacking, ripe for a battle of the experts, or another Daubert hearing, but here, we have nothing in the record to create an issue of fact.

*Id.* at \*2. Here, Defendant did not offer a contradictory expert report and only offered argument of counsel. Because there is no triable issue of fact, on the record before the Court, it must affirm the Final Judgment. *See, e.g., In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 309 So. 3d 192, 193 (Fla. 2020) (“If the evidence [presented by the nonmovant] is merely colorable, or is not significantly probative, summary judgment may be granted.”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

**B. A Mere Disagreement as to Amount of the Loss is not Fraud**

This case is solely a dispute as to the amount of the loss. More specifically, it is a dispute as to the amount of damages Plaintiff has estimated and the Defendant's disagreement with that amount (to this day the Defendant has yet to provide a single estimate of damages despite numerous verbal confirmations that they were being prepared). The Defendant inspected the property multiple times and acknowledged coverage on three separate occasions before “denying

coverage.” According to the Defendant, coverage was acknowledged, however, it fell below the Policy’s deductible. The Defendant never claimed the damage sustained to the subject property was the result of an exclusion under the policy until the Plaintiff submitted its estimate of damages as requested by the Defendant. Once the estimate was submitted, Defendant denied coverage as admitted by Defendant’s own counsel in its November 25, 2019, email to Plaintiff’s counsel:

Leo,  
Sorry, don’t think we will have a bow. Client does not want to go to appraisal. They have instructed that we deny the claim based on the claim being grossly inflated beyond its reasonable value. I am 70% done with the denial letter. I will finish over the weekend, but thought you deserved our response as promised. **They did tell me that they would consider discussing settlement, but our numbers are not even close. I am happy to discuss a number.** Call if you want over the weekend.

R-667.

“Contractors or adjusters may significantly differ in their estimates, and [the court] cannot presume that one estimate, merely because it is excessively higher, is rife with fraud.” *Anchor Prop. & Cas. Ins. Co. v. Trif*, 322 So. 3d 663, 673 (Fla. 4<sup>th</sup> DCA 2021) (citing *El-Ad Residences at Miramar Condo. Ass'n v. Mt. Hawley Ins. Co.*, No.

09-60723-CIV, 2010 WL 8961438, at \*7 (S.D. Fla. Sept. 28, 2010)). “Mere overvaluation is not, in the absence of fraud, such a misrepresentation as will avoid the policy.” *Id.* Reasonable persons “may differ as to the values which they place in particular objects, the rule voiding a policy of insurance will not apply in its severity unless the proof of the false swearing was such that no other conclusion can be drawn that a purposeful misrepresentation was intended.” *Id.*

Mere mistakes or errors in calculations or errors will not suffice to void coverage “when these flow from the mistaken good faith judgment or opinion of the assured or his agents.” *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1372 (11<sup>th</sup> Cir. 1982) (quoting *Chaachou v. Am. Central Ins. Co.*, 241 F.2d 889, 893 (5<sup>th</sup> Cir. 1957)); see also H.D. Warren, Annotation, *Overvaluation in Proof of Loss of Property Insured as Fraud Avoiding Fire Insurance Policy*, 16 A.L.R.3d 774 (1967) (“It is well settled that where an insured person, in making proof of loss ..., overestimates through mistake or inadvertence, the value of the property destroyed, the overvaluation does not amount to fraud sufficient to avoid the policy.”). See also *Alvarez v. State Farm Florida Ins. Co.*, 305 So. 3d

5, 8 (Fla. 3d DCA 2019) (an insured must make an intentional misrepresentation after a loss to void coverage).

There is no case in Florida that supports Defendant's position that a disagreement solely over the amount of the loss constitutes fraud, misrepresentation, or concealment. The law of the state of Florida requires fraud or misrepresentation be of a material fact, rather than a mere opinion or misrepresentation of the law. *Chino Elec., Inc. v. U.S. Fid. & Guar. Co.*, 578 So. 2d 320, 323 (Fla. 3d DCA 1991); *see also Thor Bear, Inc. v. Crocker Mizner Park, Inc.*, 648 So. 2d 168, 172 (Fla. 4<sup>th</sup> DCA 1994). Plaintiff has its opinion as to the scope and amount of the loss and Defendant, presumably, has its own, which can only be assumed because Defendant failed to provide an estimate. This leads to the very reasonable assumption that Defendant has never created an estimate and merely "eye-balled" its below deductible opinion to Plaintiff. And yet, Defendant has the audacity to accuse Plaintiff's reasoned and calculated estimate of being fraudulent. As set forth in *Chino Elec.*, 578 So. 2d at 323, a difference of opinion cannot constitute fraud. By the Defendant's own words, it simply thinks the estimate was too high or that certain items should not be included in the scope of damages. The Defendant

does not agree to Plaintiff's number. That is not fraud – it's a disagreement that has been determined by appraisal.

In fact, current case law states that even large discrepancies in estimates alone does not constitute fraud after an admission of liability. *See People's Trust Inc. Co. v. Tracey*, 251 So. 3d 931 (Fla. 4<sup>th</sup> DCA 2018) (defendant's estimate of \$4,354.00 versus plaintiff's estimate of \$55,718.85); *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess and Surplus Lines Ins. Co.*, 916 So. 2d 12 (Fla. 3d DCA 2005) (defendant's estimate in the amount of less than \$1,000.00 versus plaintiff's for \$716,000.00); *ABC University Shops, LLC v. Scottsdale Ins. Co.*, 2018 WL 6271839 (Fla. S.D. 2018) (defendant's estimate in the amount of \$1,266.68 versus plaintiff's estimate of \$996,000.00). Further, Defendant failed to put forth or articulate the exact alleged fraud other than a disagreement as to amount throughout the entirety of the adjustment of this claim and litigation.

### **III. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO AMEND ITS AFFIRMATIVE DEFENSES**

Defendant's argument regarding amending its fraud defense is twofold the first one having multiple shotgun subparts. First,

regarding the failure to adequately plead fraud Defendant argues: 1) the issue was not raised in the motion for summary judgment; 2) the trial court should have granted Defendant's "repeated requests" to correct its deficient fraud defense; and 3) there is no showing of prejudice to Plaintiff by allowing the amendment. IB at 38. Second, as it pertains to the lack of legal support for its defense, Defendant alleges the Plaintiff's damage model contained in its estimate constitutes fraud. *Id.* These arguments will be taken in order.

**A. The Defenant was on Notice that it Failed to Adequately Plead Fraud Before the Filing of and in the Motion for Summary Judgment**

As set forth in the Statement of the Case and Facts *supra*, Plaintiff filed replies to Defendant's January 29, 2020 [R-179] and March 26, 2020 [R-212] affirmative defense of fraud, and each time clearly put Defendant on notice that its defense was legally deficient. R-209 and 226, January 31, 2020 and March 27, 2020, replies. Therefore, Defendant was on notice nearly 3 years prior to the January 31, 2023, motion for summary judgment hearing that its fraud affirmative defense was defective as a matter of law before seeking to amend it on April 24, 2023, 3 months after the trial court ruled in favor of Plaintiff on its motion for summary judgment.

On May 27, 2022, the Plaintiff filed its Motion for Final Summary Judgment. R-1300. Defendant was again put on notice that it failed to properly allege fraud as an affirmative defense. Plaintiff set forth the following in its Motion for Final Summary Judgment:

60. Defendant's 7<sup>th</sup> affirmative defense stated that "Plaintiff falsely inflated the claim well beyond its actual value which constitutes an intentional misrepresentation and/or concealment of a material fact." Of note, no other allegations of fraud or misrepresentation was claimed other than the Defendant's belief that the Final Estimate was too high. In other words the nuanced issue was purposefully crystallized. Plaintiff suspects now that Defendant's singular position on "fraud" has failed, Defendant will attempt to move the goal post by expanding or modify (sic) their position, though same has yet to be seen.

61. Defendant did not comply with Fla. R. Civ. P. 1.120(b) requiring: "In averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances permit." With multiple PLOs completed, inspections performed, thousands of documents reviewed, multiple interviews taken, and hundreds of pictures reviewed, one would think Defendant would have been able to comply with the Rule.

R-1311. Further, Plaintiff concluded its fraud argument in Section II of the Motion for Final Summary Judgment stating: "...Defendant has failed to put forth or articulate the exact alleged fraud is throughout the entirety of the adjustment of this claim, litigation, and even the

appeal of the Court’s Order Compelling Appraisal. Defendant has failed to articulate a winning basis for its fraud argument.” R-1319. Indeed, Defendant has never once stated what it claimed to be its estimate of the damages while causing the Plaintiff to pay thousands of dollars for an estimate – which is not a condition of the Policy – and took that as a basis for its specious fraud argument. Faced with all the arguments that the fraud defense was defective, including during the first hearing on summary judgment on October 22, 2022 [R-196:13-18], Defendant still did not move to amend it. It waited until April 24, 2023, after the trial court had ruled in favor of Plaintiff, to move to amend.

**B. Defendant Never Requested to Amend the Defense Until After the Trial Court Ruled on Summary Judgment**

Defendant did not make “repeated requests” to amend. It never articulated why it believed the amount of the estimate was fraudulent and not merely a disagreement about the amount of the loss. The law in this district requires an allegation that the fraud be willfully false. *Lopes v. Allstate Indem. Co.*, 873 So. 2d 344, 347 (Fla. 3d DCA 2004) (“[U]nder Florida law, if there is a willful false statement of a material fact, there is no requirement that an insurer show

prejudicial reliance in order to enforce the contract provision.”);<sup>8</sup> *Prudential Ins. Co. of Am. v. Whittington*, 98 So. 2d 382, 388 (Fla. 2d DCA 1957) (holding that “honesty and fair dealing are essential and that even without requiring proof of prejudicial reliance by the insurer, if there was a willful false statement of a material fact, liability does not attach to the company” (citing *Chaachou*, 241 F.2d at 894)); *see also Mich. Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 923 (11<sup>th</sup> Cir. 1998) (holding that the insurer was not required to “demonstrate that it relied on the insured's misrepresentations when asserting a policy defense based on fraud”; the insured perpetrating a material fraud in pursuing an insurance claim was sufficient). The Fourth District also recognizes the element of willfulness. In *Trif*, 322 So. 3d 663, the appellate court reviewed the allegations an insurance company must make and prove in order to prevail on a fraud defense: ...“the [insurance company] would be required to show, not only that the plaintiff swore falsely, but that her oath was knowingly and willfully

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<sup>8</sup> Defendant relies on *Lopes* regarding there being no requirement of prejudice; however, it ignores the element of willfulness that was not plead.

false and made for the purpose and with the intent of deceiving and defrauding the [insurance company].” *Id.* at 674 citing *U.S. Fire Insurance Co. v. Dickerson*, 82 Fla. 442, 90 So. 613, 618 (1921). The fraud defense as pleaded by the Defendant makes no allegation of willfulness. It merely states: “Plaintiff has falsely inflated the claim well beyond its actual value which constitutes and intentional misrepresentation and/or concealment of material fact.” R-221. The Defendant’s cases are unhelpful to its argument.

For example, in *Nova Hills Villas Condo. Ass’n, Inc. v. Aspen Specialty Ins. Co.*, No. 07-60939-CIV, 2008 WL 179878 (S.D. Fla. Jan. 21, 2008), the insurer brought a counter-claim for fraud seeking to void the policy. *Id.* at \*1. The counter-claim alleged that the insurer disbursed approximately \$650,000 under the policy and a supplemental claim was made for \$3.2 million and the insured demanded the difference. *Id.* During its investigation the insurer found that the insured failed to disclose in its supplemental proof of loss that the roofing repairs and replacements had been made to the property after the hurricane at a cost substantially less than what the claim represented. *Id.* It further alleged that the insured knew the true value of the replacements and failed to disclose same. *Id.* The

counter-claim concluded that the “supplemental claim ... was an intentional concealment, misrepresentation, or fraud with the full express knowledge of the insured; that said act was for the purposes of wrongfully obtaining the proceeds of the insurance policy. This intentional concealment, misrepresentation or fraud is in violation of the above stated provision of the policy and voids coverage under the policy from and after the effective date.” *Id.* Nothing remotely close to those facts were alleged to occur in this matter.

*Lopes*, 873 So. 2d 344 is unhelpful and Defendant’s reliance on it is misplaced as set forth *supra*. The Defendant did not allege willfulness.

Defendant’s reliance on *American Integrity Ins. Co. v. Estrada*, 276 So. 3d 905 (Fla. 3d DCA 2019), is misplaced. In that matter the trial court granted an ore tenus motion to strike a fraud affirmative defense that was not plead with particularity. *Id.* at 909. This Court found the striking of the defense for lack of particularity was not proper on an ore tenus motion as there was no notice of hearing on same. *Id.* The Court found that the defense should be allowed as there was no clear danger of prejudice, abuse, or futility. *Id.* More importantly, the request to amend was made before trial commenced,

not three months after the entry of summary judgment as Defendant attempted here. Allowing the post-judgment amendment in this matter results in a clear prejudice. Plaintiff did not purchase a reimbursement policy but is self-funding the ACV, RCV, and Ordinance or Law at this point. That and the tortured adjustment of the claim, the attempt to prevent appraisal, the failure to amend when on clear notice of the deficiency, will result in prejudice to Plaintiff. Defendant wants to start the litigation over. Plaintiff needs to fix the property. Defendant has done nothing but attempt to thwart that through its pre and post suit actions. It should not be rewarded for its conduct by further delaying this matter by starting over.

**C. The Trial Court did not Abuse its Discretion in Denying the Defendant's Attempt to Cure its Pleading Deficiency Post Ruling**

In addition to the arguments against amendment of the fraud defense, *supra*, the facts of the case do not support allowing an amendment. The fraud defense was never properly alleged. As it is alleged post-ruling on the summary judgment it is now an amalgamation of misconstrued testimony and the after the fact inclusion of Plaintiff's damage model. The final judgment was properly entered as set forth in Section II, *supra*, and the amendment

should not be allowed, given the tortured history of Defendant's attempts to thwart recovery in this matter.

#### **IV. INTEREST IS PAYABLE FROM THE DATE OF LOSS**

The interest calculation attached to the Final Judgment is from the date of loss, September 10, 2017, through the date the check for the appraisal award was issued. R-2879. Defendant argues that it should owe interest, if at all, from the date of the entry of the appraisal award. IB at 34. Alternatively, Defendant claims that it should only have to pay interest from the date it improperly claimed that Plaintiff committed a fraud when it disagreed with Plaintiff's damage calculation because it initially extended coverage before denying same. IB at 35. Both arguments fail.

The law on calculation of prejudgment interest is that it is payable from the date of the loss when the claim is denied, which is exactly what the Defendant did in this matter – deny the claim. *N. Pointe Ins. Co. v. Tomas*, 16 So. 3d 977, 978–79 (Fla. 3d DCA 2009) (“Once the insurer denies coverage, it is deemed to have waived the policy provision for deferred payment and, should it pay, becomes responsible for prejudgment interest from the date of loss.”). Defendant relies on *Jugo v. American Security Ins. Co.*, 56 So. 3d 94

(Fla. 3d DCA 2011), arguing that interest should run from the date of the appraisal award alleging Defendant accepted coverage and did not deny the claim. IB at 34. That argument reveals the disjointed, procedural acrobatics Defendant has employed throughout this matter as Defendant is simultaneously attempting to allege it did and did not deny the claim. *Jugo* is unhelpful to Defendant as it took an appeal to avoid appraisal and, when it lost and was forced to go to appraisal, it did not pay the Plaintiff without recourse but, rather, paid it subject to court order and the ability to recover same from Plaintiff.

Defendant's reliance on *Green v. Citizens Prop. Ins. Corp.*, 59 So. 3d 1227 (Fla. 4<sup>th</sup> DCA 2011), fails for the same reason. There, Citizens paid the award without recourse within sixty days pursuant to the terms of the policy. *Id.* at 1228. Defendant relies on *Epic Metals Corp. v. Samari lake East Condo. Ass'n, Inc.*, 547 So. 2d 198 (Fla. 3d DCA 1989), claiming that the trial court should have considered income or investment income earned on Defendant's prior payment. IB at 35. Defendant refused to pay Plaintiff any monies precluding Plaintiff from making repairs much less income or investment income.

The trial court's granting of interest from the date of the loss until the date of the appraisal check (even though that amount has never been in Plaintiff's possession) is the correct calculation of interest and should be upheld regardless of any due process arguments since the result will be the same on remand and any error is harmless. *See e.g., Dade County School Bd. V. Radio Station WGBA*, 731 So. 638, 644 (Fla. 1999) (if a trial court reaches the right result for the wrong reason it will be upheld if a basis to affirm the judgment in the record).

## **V. CONCLUSION**

For the foregoing reasons, the final judgment must be affirmed.

Respectfully submitted,

/s/ Paul B. Feltman

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed on April 3, 2024, via the Florida Courts E-Filing Portal and sent via e-mailed to:

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**CERTIFICATE OF COMPLIANCE**

I certify that this Answer Brief has been submitted in Bookman old Style 14-Point font, and that the number of words in this brief total 12,950 in compliance with Fla. R. App. P. 9.045.

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