Filing # 212682837 E-Filed 12/11/2024 10:50:30 PM

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

| | |
|---|---|
| RODOLFO BAILETTI AND ANA SAEZ<br><br>Appellants,<br><br>v.<br><br>UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY<br><br>Appellee, | CASE NO.: 1D24-1695<br><br>LT CASE NO.: 2021-CA-001731 |

**INITIAL BRIEF**

Submitted on behalf of the Appellants,
**RODOLFO BAILETTI AND ANA SAEZ**

---

ON APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

---

Michael A. Cassel, Esq.
CASSEL & CASSEL, P.A.
Attorneys for Appellants
4000 Hollywood Blvd.
Suite 685-S
Hollywood, FL 33021
t: (954) 589-5504
f: (954) 900-1768
Service: pleadings@cassel.law

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## PRELIMINARY STATEMENT

Appellants, Rodolfo Bailetti and Ana Saez, shall hereinafter be referred to as the "Appellants" or "Insureds."

Appellee, Universal Property & Casualty Insurance Company, shall hereinafter be referred to as the "Appellee" or "Universal."

Any reference to the Record on Appeal will be cited as "[R. __]".

Any reference to the Transcripts will be cited as "[T. __]".[1]

[1] On December 11, 2024, the undersigned filed a Motion to Correct and Supplement the Record to include a paginated copy of the trial transcripts. As of the time of the instant filing, no order has been entered regarding same; however, in the interest of filing the instant brief timely pursuant to the December 5, 2024, Order on Appellants' Motion for Extension of Time, this brief is being filed prior to said ruling. The page numbers of the PDF match the paginations included by the Appellants in their indexed documents and, therefore, there should be no issue once the Motion to Correct and Supplement the Record is granted.

## STATEMENT OF THE CASE

This is an appeal coming after a trial which took place between May 20, 2024, and May 23, 2024. During the trial, the Appellee's own expert testified that the coverage afforded and amount of money paid by the Appellee was insufficient providing an opinion that the actual cash value of the damages was almost twice that which was initially paid. This was the only opinion provided by the Appellee as to the appropriate amount of damages. While there was conflicting evidence regarding the total damages between the parties, the opinion of the Appellee's expert should have served as the bare minimum of the amount due and owing to the Insureds. Despite this, the court denied the Appellants' Motion for Directed Verdict on the issue, improperly citing to the corporate representative's testimony despite the fact that he did not provide an opinion regarding the amount of damages. In fact, the only testimony provided by the corporate representative on the topic involved deferring to the field adjuster who did not show up to trial to testify.

Additionally, prior to the trial, the court entered orders limiting the damages to the actual cash value of the loss as opposed to allowing replacement cost value to be sought. In rendering such

rulings, the Court ruled that evidence of the replacement cost value was relevant and could be presented to the jury; however, during trial, the court prevented evidence of matching costs despite same being a part of the relevant replacement cost calculation. Such a limitation resulted in the Appellants being unable to present the full scope of damages to the jury thus serving to confuse the jury resulting in a verdict that was against the manifest weight of the evidence. Regardless, because the Appellee breached the contract through its initial underpayment and undervaluation of the claim, the proper measure of damages is the replacement cost value. Upon remand in line with the above referenced directed verdict, the jury instructions and verdict form should allow for full recovery of same.

Ultimately, the jury returned a verdict in favor of the Appellee. [R. 1819]. The lower court entered final judgment. [R. 1826]. The instant appeal follows. [R. 1878-9].

## STATEMENT OF THE FACTS

### I. Background and Policy Information

Universal issued an insurance policy (hereinafter the "Subject Policy"), to the Insureds for the property located at 7981 Coronet Drive, Pensacola, Florida 32514 (hereinafter the "Subject Property"), with effective dates of coverage between January 27, 2020, and January 27, 2021. [R. 1483-1451].

### II. The Claim

In September 2020, during the coverage period of the Subject Policy, Hurricane Sally caused direct physical loss the Subject Property. [T. 332]. Wind and rain caused shingles to be blown off the roof and water intrusion occurred through both the roof and the windows. [T. 332]. As a result of the damage, the Insureds hired a public adjuster who reported the claim on their behalf. [T. 397]. The claim was reported on October 7, 2020. [R. 1573].

On November 6, 2020, Universal sent correspondence requesting certain categories of documents, including a sworn proof of loss and "detailed repair estimate." [R. 1580]. Universal then sent a field adjuster to inspect the Subject Property on November 16, 2020. [T. 655]. By all accounts, this was the only compliance with

policy conditions requested and Universal did not assert that the Insureds failed to comply with same. [T. 654].

On February 5, 2021, as a result of the inspection and satisfactory compliance with policy conditions, Universal issued a payment under Coverage A – Dwelling as follows:

| | |
|---|---|
| Replacement Cost Value | $18,185.93 |
| Depreciation | $6,145.81 |
| Windstorm Deductible | $6,008.00 |
| Total Payment | $6,032.12 |

[R. 1583]. At the time of the coverage payment, Universal was already on notice of a dispute in the scope and pricing of the claim adjustment based on the estimate presented by the Insureds' public adjuster. [T. 668]. The estimate, and accompanying proof of loss, presented total damages in the amount of $121,120.49. [R. 1588]. Despite being placed on notice of the dispute, Universal did nothing to adjust the differences between estimates other than to outright reject the Insureds' estimate. [T. 669, R. 1585].

On February 2, 2021, and again in or around May 2021, the Insureds demanded appraisal to resolve the differences in the scope and pricing of the claim; however, both such requests were rejected by Universal. [R. 1590-3]. On June 18, 2021, as a result of the

dispute, the Insureds initiated a cause of action for breach of contract. [R. 15].

Subsequently, the Insureds replaced their roof and HVAC system, both of which were damaged as a result of the hurricane. [T. 342-3]. The Insureds spent approximately $30,000 for the repairs. [T. 346].

**III. The Litigation**

In anticipation of trial, Universal filed a motion *in limine* seeking to prevent testimony regarding the replacement cost value and matching. [R. 361-5]. The court entered an order holding that "the witnesses may not reference an RCV estimate or present it in any way to the jury. . . . However, because the Plaintiffs have the burden of proving their damages by the greater weight of the evidence, witnesses, otherwise qualified, will be allowed to explain how they reached their ACV numbers." [R. 400]. Later, the court entered a subsequent order explaining that "[t]he Plaintiff may present testimony and introduce estimates of RCV for the purpose of determining ACV." [R. 1036]. The court further held that "there will be a need for a jury instruction stating that all damages that were not repairs are to be measured by ACV. The jury will determine the

RCV for the repair of the roof only as those costs have been incurred by the Plaintiffs." [R. 1037]. However, during trial, the court ruled that matching costs would need to be removed from the Insureds' expert's estimate and no testimony was to be elicited on the subject. [T. 157, 319-22].

## IV. Trial

### a. Universal's Evidence

During trial, two witnesses testified on behalf of Universal: Jimmy Casas, its corporate representative, and Jon Pruitt, its general contracting expert.

#### i. The Testimony of Jimmy Casas

Jimmy Casas appeared as the corporate representative of Universal. [T. 635]. Mr. Casas testified that the reasoning behind the fact that Universal did not do anything after the payment letter was issued was because Universal had never received an actual cash value estimate. [T. 698]. He also testified that Universal never requested an actual cash value estimate or advised that same was necessary. [T. 713]. In fact, Mr. Casas testified that the Subject Policy does not require an actual cash value estimate. [T. 720]. Mr. Casas did state that replacement cost value is a necessary

component of the calculation of actual cash value. [T. 646]. However, despite this, Universal never applied depreciation to the estimate submitted by the Insureds' public adjuster. [T. 707-10].

On the issue of damages, Mr. Casas testified as to the total amounts paid by Universal [T. 674]; however, Mr. Casas provided no opinion as to whether such amounts were reasonable or correct, instead choosing to defer to the field adjuster who did not testify during trial. [T. 710-2]. Mr. Casas went so far as to note that he was not a damages expert and did not know the basis of the estimate. [T. 716-7]. It must be noted that Universal chose not to call its field adjuster instead stating that the field adjuster would not be present as the Insureds did not properly serve their subpoena. [T.305-6].

**ii. The Testimony of Jon Pruitt**

As the field adjuster did not testify, the only opinion presented by Universal on the issue of damages was that of Jon Pruitt. Mr. Pruitt presented testimony that the proper actual cash value amount was $35,340.91 not including the deductible. [T. 789]. This was the amount attributed to the direct physical loss which occurred at the Subject Property but did not reflect the amount needed to perform repairs and return the Subject Property to its pre-loss state. [T. 790].

Mr. Pruitt agreed that Universal underpaid the roof. [T. 809]. He also testified that the actual cash value payment issued by Universal was "deficient." [T. 807]. While the amount proffered by the Insureds' contractor was higher than that to which Mr. Pruitt opined [T. 476-80, R. 1746-76], both experts' opinions reflected amounts higher than that which Universal initially paid. Mr. Pruitt also opined that matching costs are a inherently part of the replacement cost value. [T. 820].

**b. Jury Instructions**

As the court denied the motion for directed verdict on the issue of Universal's breach of contract through its failure to pay the appropriate actual cash value, the amount of damages was submitted to the jury. The Insureds requested that the following instruction be read:

**JURY INSTRUCTION NO. 23**

**DAMAGES**

> The next issue for your consideration is the issue of damages.
>
> If you find for Defendant, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, you will not consider the matter of damages. But if you find that the greater weight of the evidence supports the claim of Plaintiffs,

RODOLFO BAILETTI AND ANA L. SAEZ, you must award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Plaintiffs, RODOLFO BAILETTI AND ANA L. SAEZ, for their damages.

When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas.

In determining the extent of repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

The damages awarded shall be those covered under the relevant policy of insurance. Your Decision on these issues will be written on a verdict form, which I will give you at the end of the case.

[R. 485]. However, the court chose instead to read the following instruction on damages:

If you find Universal Property and Casualty Insurance Company did not breach the contract, damages. you will not consider the matter of But if you find for plaintiffs Rodolfo Bailetti and Ana L. Saez, you should award them an amount of money that the greater weight of the evidence shows will fairly and adequately compensate them for the monetary --- for the -- for the damages caused by the breach.

You should consider the following types of monetary damages.

> The first type of monetary damages, actual cash value, which is fair market value or replacement costs minus normal depreciation or depreciation is defined as a decline in an asset's value because of use where obsolescence or age. It does not include the cost generated to create a steady or continuous flow of matching to unrepaired building components.
>
> The second type of monetary damage is replacement cost value, which is the cost to repair or replace damaged property if the work has been done and the plaintiff's incurred the cost to repair or replace the damaged property. Replacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property.
>
> Any damages that were not actually repaired by the plaintiffs may be measured only by the actual cash value. You may only determine replacement cost value for damage actually repaired or replaced by the plaintiffs.

[R. 1810].

**c. Motions for Directed Verdict**

Given that Universal's own expert opined that the amount paid by Universal was deficient, and no testimony was provided regarding the accuracy of Universal's initial adjustment, the Insureds moved for directed verdict on the issue that Universal breached by failing to pay the adequate actual cash value. [T. 838-844]. While the court originally seemed inclined to grant the motion, the defense argued that Universal provided an opinion that its original estimate and

initial payment were correct. [T. 842]. It was based on this argument that the court denied said motion. [T. 842-3]. However, as noted above, no such testimony was ever presented by Universal as to the accuracy of its coverage payment. The Insureds filed a timely Motion for Judgment in Accordance with Motion for Directed Verdict or, in the alternative, Motion for New Trial. [R. 1847-69]. The court, without response from Universal, summarily denied the motion without hearing or explanation. [R. 1877].

## SUMMARY OF ARGUMENT

The Appellants raise the following arguments on appeal:

First, as there was undisputed and unrebutted testimony by Universal's own expert setting forth that Universal's initial payment was deficient, directed verdict should have been entered in favor of the Insureds. Given that the verdict form asked whether Universal "breached the contract by failing to pay the full value of damages to the Plaintiffs' property caused by Hurricane Sally" [R. 1819], and the undisputed testimony from both parties established that the answer to this question was "yes," directed verdict should have been entered in the Insureds' favor.

Furthermore, because the trial court improperly prevented the Insureds from presenting matching damages, a component of the replacement cost value, there was jury confusion warranting a new trial; however, once directed verdict on the issue of breach of contract is entered, the matter should be remanded to the court for a trial on damages only. In such an instance, because the breach of contract is adjudicated in favor of the Insureds, the proper measure of damages is the replacement cost value for the following reasons: the loss settlement provision relied upon by the Appellee is ambiguous

in nature as it deals with settlement, not an adjudication on damages, and coverage should be resolved in the light most favorable to the Insureds; next, as the loss settlement provision is a forfeiture, not coverage, provision, it can be waived by the carrier's actions; and, finally, as a breach of contract has occurred, the Insureds are entitled to an award of damages as of the date of breach which would allow them to repair the Subject Property and place it back in its pre-loss state, to wit, the replacement cost value. Quite simply, Universal, as a party to the contract, should not be allowed to benefit and limit recovery once it has breached the contract by undervaluing and underpaying the claim.

## STANDARD OF REVIEW

Rulings on motions for directed verdict are subject to *de novo* review. *Vitro Am., Inc. v. Ngo*, 304 So. 3d 379 (Fla. 1st DCA 2020).

A trial court's decision to give or withhold a proposed jury instruction is reviewed for abuse of discretion. *Howell v. Winkle*, 866 So. 2d 192 (Fla. 1st DCA 2004). However, questions of insurance policy interpretation and statutory construction are pure questions of law and are, therefore, subject to *de novo* review. *Trinidad v. Florida Peninsula Ins. Co.*, 121 So. 3d 433 (Fla. 2013).

Motions seeking a new trial due to the verdict being against the manifest weight of the evidence is subject to an abuse of discretion standard; however, when a motion for new trial deals with issues of law, the standard of review is essentially *de novo*. *State Farm Mut. Auto. Ins. Co. v. Williams*, 943 So. 2d 997 (Fla. 1st DCA 2006).

## ARGUMENT

### I. As there was undisputed testimony that the amount paid by the Appellee was insufficient, the Appellee breached the insurance contract as a matter of law and, therefore, the court erred in denying directed verdict in favor of the Appellants.

#### a. Based on the undisputed testimony, directed verdict should be entered in the Appellant's favor on the issue of breach of contract thereby remanding this matter to the trial court for a trial solely on damages.

"[A] trial court should grant a motion for directed verdict only when the evidence, viewed in the light most favorable to the non-moving party, shows that a jury could not reasonably differ about the existence of a material fact and the movant is entitled to judgment as a matter of law." *Philip Morris USA Inc. v. Allen*, 116 So. 3d 467, 469 (Fla. 1st DCA 2013) [citations and quotations omitted]. A motion for directed verdict is properly granted when two elements are met:

> (1) there are no conflicts in the evidence or no different reasonable inferences that may be drawn from the evidence and;
>
> (2) no view of the evidence, or inferences made therefrom, could support a verdict for the nonmoving party. In considering a motion for directed verdict, the court must evaluate the testimony in the light most favorable to the nonmoving party and every reasonable inference deduced from the evidence must be indulged in favor of the nonmoving party.

*Feldman v. Citizens Prop. Ins. Corp.*, 373 So. 3d 636, 639 (Fla. 4th DCA 2023) citing *JD Dev. I, LLC v. ICS Contractors, LLC*, 351 So. 3d 57, 60 (Fla. 2d DCA 2022), *rev. denied*, SC2023-0048, 2023 WL 2986878 (Fla. Apr. 18, 2023).

While there exists a conflict regarding the opinion as to the proper amount of damages between the parties' respective experts, there is no conflict on the issue of whether the initial actual cash value payment was sufficient. The only testimony proffered by Universal as to the correct actual cash value of damages was presented by their expert, Mr. Pruitt. As noted above, Mr. Pruitt's opinion was that the actual cash value payment issued was "deficient." [T. 807]. There was no testimony ever put forth that the original payment amount was proper; instead, the corporate representative deferred to the field adjuster who was not present to testify at trial.[2] Because the testimony of both parties established that the coverage afforded was an underpayment, the first element is met.

---

[2] It must be again noted that, while the Appellants attempted to subpoena the field adjuster, proper service could not be effectuated. Universal, having control over its own adjuster, chose not to present the field adjuster as a witness. [T.305-6].

Generally speaking, "a jury is free to weigh the opinion testimony of expert witnesses, and either accept, reject or give that testimony such weight as it deserves considering the witnesses' qualifications, the reasons given by the witness for the opinion expressed, and all the other evidence in the case, including lay testimony." *Wald v. Grainger*, 64 So. 3d 1201, 1205 (Fla. 2011). However, when evidence is "undisputed, unimpeached, or not otherwise subject to question based on the other evidence presented at trial, the jury is not free to simply ignore or arbitrarily reject that evidence and render a verdict in conflict with it." *Id.; see also Citizens Prop. Ins. Corp. v. Zamanillo*, 388 So. 3d 912, 914 (Fla. 3d DCA 2024) ("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.") *citing Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092, 1093–94 (Fla. 1994).

In *Wald*, the plaintiff presented expert testimony on the permanency of plaintiff's neck, back, right elbow, and right thigh injuries. *Wald*, 64 So. 3d at 1204. The defendant's expert testified that, while there was no permanency of the neck or back injuries, the damage to the right thigh was permanent. *Id.* The Florida Supreme

Court held that the jury was not free to reject the expert testimony regarding permanency of the thigh injury because, despite a difference in opinion as to the extent of the injuries sustained, both experts agreed that the thigh injury was permanent. *Id.* at 1207.

Here, the Court has before it a nearly identical scenario, albeit regarding different kinds of damages. While the parties' respective experts both calculated different actual cash value amounts, the undisputed and unimpeached evidence was such that no question existed as to whether the amount initially paid was proper. Both parties' experts provided an opinion that the amount initially paid was insufficient and, therefore, the jury was not free to render a verdict in conflict with it. Because no view of the evidence, or inferences made therefrom, could support a verdict for Universal that the amount initially paid was proper, the second element regarding directed verdicts is met. While a directed verdict on the amount of damages would have been inappropriate, a directed verdict on the fact that a breach of contract occurred should have been entered.

By denying the Insureds' motion for directed verdict, the trial court erred as a matter of law. This error must result in a new trial on the sole issue of damages with instructions that the trial court is

to set the minimum amount of damages at $35,340.91. To rule otherwise would be to ignore the undisputed and unimpeached evidence presented at trial.

**b. In the new trial solely on damages, the proper measure of damages should be the replacement cost value.**

**i. The Subject Policy is a replacement cost policy.**

There is no doubt that the Subject Policy is an all risk policy as it relates to the coverages at issue in this matter. [R. 1506] ("We insure against direct physical loss to property described in Coverage **A** and **B**. . . . We do not insure, however, for loss: . . . [c]aused by:"). As it is an all risk policy, all loss is covered unless otherwise excluded. *See Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014). In an "all risk" policy, "an insured seeking coverage . . . must prove that a loss occurred to the property during the policy period. If the insured meets this initial burden, the burden shifts to the insurer to show that the loss resulted from an excluded cause." *Id.* Once the insured meets its initial burden of proof, the carrier is then tasked with the burden of proving its defenses. *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936, 941 (Fla. 4th DCA 2018). This is because "the burden of proof, meaning the obligation to establish the truth of the

claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue." *In re Ziy's Est.*, 223 So. 2d 42, 43 (Fla. 1969).

Furthermore, the Subject Policy is a replacement cost policy. The Loss Settlement provision states "[c]overed property losses are settled as follows: . . . Buildings . . . covered under Coverage A or B at replacement cost without deduction for depreciation, subject to the following." [R. 1513]. The Loss Settlement provision goes on to state that the insurer will pay "at least the actual cash value of the insured loss." *Id.* This does not affect the coverage afforded by the policy but rather it serves to set forth additional conditions for the settlement of a covered claim and, accordingly, must be treated similar to an exclusion or limitation. Furthermore, while the above analysis regarding burdens applies to coverage, in looking at the Loss Settlement provision, the same principles are at play with regard to the presentation of damages.

**ii. The Loss Settlement provision is ambiguous and must be resolved in the light most favorable to the Insureds as the non-drafting party to the Subject Policy.**

The Subject Policy which goes to the heart of this matter states "[c]overed property losses are **settled** as follows:" [R. 1513] [emphasis added]. The term "settled" is not used in the statute nor is it defined in the Subject Policy.

Florida law is clear that "insurance contracts must be construed in accordance with the plain language of the policy," and "coverage under an insurance contract is defined by the language and terms of the policy." *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003) citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000). The Court must construe the homeowner's insurance policy in a reasonable, practical, sensible, and just manner. *First Profs. Ins. Co., Inc. v. McKinney*, 973 So. 2d 510 (Fla. 1st DCA 2008). In this light, the Court must give everyday meanings to undefined words, reading the terms of the policy in light of the skill and experience of everyday people. *Direct Gen'l Ins. Co. v. Morris*, 884 So. 2d 1077 (Fla. 1st DCA 2004). Furthermore, it is well established that "[a]mbiguities are construed against the insurer and in favor of coverage." *Taurus Holdings, Inc. v. United States Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005).

The undefined term "settled" can mean multiple things. The Britanica Dictionary defines "settle," in pertinent part, as both "to end (something, such as an argument) by reaching an agreement" and "to pay money that is owed." *Settle*, The Britanica Dictionary (Online ed. 2024). Both such definitions can be inserted into the Loss Settlement provision seamlessly with one meaning to pay and the other meaning to come to an agreement.

Based on the maxims of *Florida Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc.*, 83 So. 3d 850 (Fla. 4th DCA 2011), the second definition regarding an agreement being reached is a reasonable and practical reading of the provision. In *Somerset*, the appellate court held that "'[a]s replacement cost policies are intended to operate, following a loss, both actual cash value and the full replacement cost are determined. The difference between those figures is withheld as depreciation until the insured actually repairs or replaces the damaged structure.'" *Somerset*, 83 So. 2d at 851 *quoting Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684, 690 (Fla. 2d DCA 2008). This stands to reason that, if the replacement cost is not determined and agreed upon, there remains a dispute which must be adjudicated and, based on existing precedent, "a homeowner is

entitled to dispute the scope of repairs before the repairs are completed." *Diaz v. Fla. Peninsula Ins. Co.*, 204 So. 3d 460, 462 (Fla. 4th DCA 2016) *reh'g denied* August 16, 2016. Therefore, as the reasonably utilized definition of "settle" which necessitates an agreement provides broader coverage than the definition related to payment, an ambiguity exists in the Subject Policy resulting in the Court having to resolve the ambiguity in favor of a definition meaning an agreement must be reached. Ergo, the Loss Settlement provision should have no bearing on the presentation of evidence or outcome of litigation when a dispute exists.

**iii. The Loss Settlement Provision is a forfeiture provision, not a coverage provision, and, as such, can be waived through the conduct of the Insurer.**

As noted above, the coverage afforded by the Subject Policy is for property damage not otherwise excepted or excluded on a replacement cost basis. The damages available for a breach of contract fall in line with same. This is apparent through a more complete analysis of *Somerset*. In *Somerset*, the insured association sustained damages as a result of two hurricanes. *Id.* at 851. When the original carrier declared insolvency, FIGA took over its responsibilities. *Id.* Both the original carrier and FIGA issued partial

payments on the claim. *Id.* The insured association then invoked the appraisal provision of the policy and filed suit to enforce same. *Id.* It is important to note that, unlike in the instant matter, there was never any mention of breach of contract in the *Somerset* opinion.

It must be pointed out that, because *Somerset* involved appraisal, it is easily discerned that there were no coverage issues analyzed therein. At the time of *Somerset*, the trial court was required to resolve all coverage issues before appraisal was available. *Citizens Prop. Ins. Corp. v. Michigan Condo. Ass'n,* 46 So. 3d 177 (Fla. 4th DCA 2010). If the Loss Settlement provision was a coverage provision, appraisal could not have gone forward until all outstanding issues were resolved.

As noted *supra*, in approaching its analysis in *Somerset*, the appellate court found that "'[a]s replacement cost policies are intended to operate, following a loss, both actual cash value and the full replacement cost are determined. The difference between those figures is withheld as depreciation until the insured actually repairs or replaces the damaged structure.'" *Somerset*, 83 So. 2d at 851 *quoting Goff,* 999 So. 2d at 690. This necessarily includes matching as part of the replacement cost calculation.

"[T]he effect of an improper denial of coverage may operate to waive an insurer's right to claim as a complete defense that the insureds failed to comply with certain contractual conditions precedent to recovery." *Citizens Prop. Ins. Co. v. Amat*, 198 So. 3d 730, 733 (Fla. 2d DCA 2016). While such a waiver cannot create coverage, "[p]rovisions that forfeit insurance coverage . . . can be waived by the insurer's conduct." *Axis Surplus Ins. Co. v. Caribbean Beach Club Ass'n*, 164 So. 3d 684, 687 (Fla. 2d DCA 2014). In *Lloyds Underwriters at London v. Keystone Equip. Fin. Corp.*, 25 So. 3d 89 (Fla. 4th DCA 2009), the court, relying upon *Axis,* differentiated coverage and forfeiture provisions as follows:

> The distinction between a provision of forfeiture and one of coverage has been said to turn upon whether the loss was covered by the contract in the first instance and is asserted to have been lost or nullified as a consequence of the actions of the insured; if this is the case, then the provision is one of forfeiture. . . . Generally, "clauses that are inclusionary or exclusionary [as to the types of risks covered], that outline the scope of coverage, or that delineate the dollar amount of liability" are described as pertaining to coverage, while "forfeiture clauses often include provisions such as filing a timely notice of claim and submitting proofs of loss, and are invoked to avoid liability for existing coverage."

*Keystone*, 25 So. 3d at 92-3 [citations omitted]. Because the Loss Settlement provision relied upon by Universal "outlines neither the

covered scope of loss nor dollar limits of coverage [but,] rather, it imposes post-loss procedural requirements with which the insured must comply to receive payment for existing coverage," *Axis*, 164 So, 3d at 687, the Loss Settlement provision is not a coverage provision but a forfeiture provision which can be waived through the insurer's conduct.

Here, such conduct was the knowing underpayment of the claim and failure to afford coverage in line with the appropriate scope of damages resulting in a breach of contract thus waiving further compliance with policy conditions. *Wegener v. Int'l Bankers Inc. Co.*, 494 So. 2d 259, 259-60 (Fla. 3d DCA 1986); *Castro v. Homeowners Choice Prop. & Cas. Ins. Co.*, 228 So. 3d 596, 599 (Fla. 2d DCA 2017); *Ifergane v. Citizens Prop. Ins. Corp.*, 232 So. 3d 1063, 1065 (Fla. 3d DCA 2017); *Aristonico Infante v. Preferred Risk Mut. Ins. Co.*, 364 So. 2d 874 (Fla. 3d DCA 1978). To allow Universal to rely upon a forfeiture provision to limit coverage after it has breached the contract would fly in the face of all existing precedent on the damages recoverable in a breach of contract action.

### iv. Because a breach of contract occurred through the knowing underpayment and refusal to accept the proper scope of damages, the Insureds are thereby entitled to recover the damages which existed as of the date of breach.

Property insurance policies are contracts of indemnity (not reimbursement) which provide coverage for the amount necessary to return damaged properties to their pre-loss conditions. *See generally Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828 (Fla. 1949); *Sperling v. Liberty Mut. Ins. Co.*, 281 So. 2d 297 (Fla. 1973). The terms, conditions, and other provisions contained within these policies embody the agreement between the parties, *Imperial Fire Ins. Co. of London v. Coos County*, 151 U.S. 452 (1894), and courts interpret them under the standard principles of contract interpretation. *American Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184 (Fla. 2d DCA 2006). Because the standard principles of contract interpretation are at play, this Honorable Court can, and must, look to all manners of breach of contract case law.

Basic contract principles hold that "[d]amages for a breach of contract should be measured as of the date of the breach." *Shearson Loeb Rhoades, Inc. v. Medlin*, 468 So. 2d 272, 274 (Fla. 4th DCA 1985) *quoting Grossman Holdings v. Hourihan*, 414 So. 2d 1037, 1040 (Fla.

1982). This maxim, however, is not without flexibility. The Restatement (Second) of Contracts states that "[c]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." Restatement (Second) of Contracts § 347 (1981); *see also Capitol Environmental Svcs., Inc. v. Earth Tech, Inc.*, 25 So.3d 593, 596 (Fla. 1st DCA 2009) ("It is well-settled that the injured party in a breach of contract action is entitled to recover monetary damages that will put it in the same position it would have been had the other party not breached the contract."); *Sharick v. Se. University of the Health Sciences, Inc.*, 780 So.2d 136, 139 (Fla. 3d DCA 2000) ("Damages recoverable by a party injured by a breach of contract are those which would naturally result from the breach and can reasonably be said to have been contemplated by the parties at the time the contract was made.").

Furthermore, an insurance company is not entitled to greater protections under the law than the policyholder to which insurance is provided. In *Diaz*, *supra*, the carrier afforded coverage and invoked

its option to repair the property itself in lieu of a cash payment. *Id.* at 461. When the insured disputed the scope of repairs, the carrier denied the claim due to the failure to sign the contractor's work authorization contract. *Id.* During litigation, the trial court abated the action to allow the repairs to be performed in line with the carrier's unilateral determination of the scope of same resulting in the filing of a writ of certiorari. *Id.* The court held that the abatement was improper, in pertinent part, because "a homeowner is entitled to dispute the scope of repairs before the repairs are completed." *Id.* at 462. Based on *Diaz*, a homeowner is entitled to file suit over the scope of repairs in a situation where coverage has been afforded. This is a wholly reasonable process as "insureds rely upon proceeds from contracted-for insurance coverage to pay for the expense suffered." *State Farm Florida Ins. Co. v. James*, 374 So. 3d 934, 940 (Fla. 5th DCA 2023) (Soud, J., specially concurring). Without knowledge of the full scope and breadth of coverage afforded, homeowners would need to spend money with the hopes, but no guarantee, that the insurance company would reimburse them later. This is violative of the very nature of property insurance.

To the extent Universal wanted a different kind of estimate pre-suit lest the Insureds forfeit coverage, Universal could have, but did not, request same. As the court in *Keystone* held:

> [L]ogic and fairness dictate that while an insurer is free to require its insured to warrant or promise to behave in a particular manner, the insurer has a duty to inform the insured of such warranty or promise before the insurer can insist upon compliance with the same and impose the penalty of a forfeiture of all coverage for the insured's noncompliance.

*Keystone*, 25 So. 3d at 93-4. Of course, such a requirement is, by Universal's own admission, not found within the terms of the Subject Policy [T. 720] and "courts are not free to rewrite the terms of an insurance contract . . ." *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 Fed. Appx. 659, 663 (11th Cir. 2010) *citing Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565 (Fla. 1st DCA 2010).

The Subject Policy contains only one reference to the type of estimate that must be presented—a detailed repair estimate. [R. 1513]. This requirement falls under the post-loss condition that a proof of loss accompanied by such an estimate be provided after requested by the carrier. In line with this, in *Buckley Towers*, the court noted that "the insurance contract does not affirmatively obligate the insured to include depreciation in its initial proof of loss."

*Buckley Towers*, 395 Fed. Appx. at 666; *see also 7635 Mandarin Drive, LLC v. Certain Underwriters at Lloyd's, London, Subscribing to Policy No. B050719MKSC000018-00,* 392 So. 3d 592 (Fla. 4th DCA 2024) (approving the trial court's finding that the insureds were not required to submit an estimate including actual cash value pursuant to the terms of the policy).

It stands to reason that, because the policy does not require the insured to present an actual cash value estimate, and the Loss Settlement provision provides for payment on a replacement cost value basis subject to limitations, in line with the coverage analysis outlined above, it is the carrier's obligation to use the estimate presented by the Insureds and calculate depreciation in order to determine the actual cash value. Here, while there was evidence of the total depreciated amount from Universal's initial payment, there was no opinion provided as to how same was calculated with the corporate representative instead deferring to the field adjuster who did not testify. Had the Appellants been able to appropriately present replacement cost benefits, Universal would then have the burden of applying depreciation to the replacement cost amount, something which it did not do pre-suit. [T. 707-10].

By giving the jury instruction presented by the Appellee and not the instruction requested by the Appellant, the court caused tremendous confusion and prejudice and essentially shifted the burden to the Insureds to proactively reduce their claim. This was an abuse of discretion. As the court should have entered directed verdict in favor of the Appellants on the issue of breach, when this Court remands same for a trial solely on damages, the proper instruction given should be that which was proposed by the Appellants and replacement cost value, including all matching damages, should be recoverable.

## CONCLUSION

It is for the above stated reasons that the orders and final judgment should be reversed. There was undisputed evidence that Universal breached the terms of the Subject Policy by failing to adequately pay the actual cash value of the claim and rejecting the Insureds' presentation of damages. Accordingly, directed verdict must be entered on the issue of breach leaving only the amount of damages to be determined by the trial court.

And given that a breach of contract occurred, Universal cannot insist upon compliance with the ambiguous Loss Settlement

provision as same is a forfeiture provision which can be waived by the insurer's conduct. Instead, the Insureds are entitled to recover all damages which existed as of the date of the breach, including matching damages, as a result of Universal's breach of contract. Quite simply, Universal cannot seek to enforce the provisions of the Subject Policy once it has already breached said provisions. Accordingly, a new trial should be ordered and, in line with the directed verdict, it should be limited to the issue of damages only with the insured able to recover the replacement cost value, including all matching costs, due to the breach of contract which occurred.

WHEREFORE, Appellants, Rodolfo Bailetti and Ana Saez, respectfully request that this Honorable Court enter an Order reversing the trial court's orders and final judgment as discussed herein and for any and all other relief this Court deems just and proper.

**{Signature Block located on next page}**

Respectfully submitted this day, December 11, 2024,

CASSEL & CASSEL, P.A.
Attorneys for Appellants
4000 Hollywood Blvd.
Suite 685-S
Hollywood, FL 33021
t: (954) 589-5504
f: (954) 900-1768
Service: pleadings@cassel.law

BY: /s/*Michael A. Cassel*
**Michael A. Cassel, Esq.**
Florida Bar No. 97065

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by E-Mail on December 11, 2024, to all counsel and parties of record as follows:

Paulo R. Lima, Esq.
RUSSO LIMA APPELLATE FIRM, P.A.
Counsel for Appellee
7300 North Kendall Drive
Suite 600
Miami, FL 33156
Service: prl@russoappeals.com

BY: /s/*Michael A. Cassel*
**Michael A. Cassel, Esq.**
Florida Bar No. 97065

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.045(e), this document has been prepared in 14-point Bookman Old Style font as required by Fla. R. App. P. 9.045(b) and contains 6,734 words as required by Fla. R. App. P. 9.210.

BY: /s/*Michael A. Cassel*
**Michael A. Cassel, Esq.**
Florida Bar No. 97065