IN THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

ZEPHYRUS AVIATION CAPITAL, LLC, et al.,

Plaintiffs-Appellants,

v.

BERKSHIRE HATHAWAY INTERNATIONAL INSURANCE LIMITED, et al.,

Defendants-Appellees.

Case No. 4D23-1815
Lower Tribunal No. CACE-2023-002230

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellees acknowledge their policy (the "Policy") covers Zephyrus against "all risks of physical loss or damage howsoever occasioned, sustained during the Policy Period unless as hereinafter excluded." *See, e.g.,* Appellees' Answer Brief ("Ans.") at 6, 16. This is the traditionally broad "all risk" formulation. The Policy covers Zephyrus against "*all* fortuitous losses not resulting from misconduct or fraud, unless [it] contains a specific provision expressly excluding the loss from coverage." *Egan v. Wash. Gen. Ins. Corp*., 240 So. 2d 875, 878 (Fla. 4th DCA 1970) (emphasis added).

Despite agreeing the Policy covers Zephyrus against "all risks of physical loss or damage," Appellees assert that Zephyrus identified "no actual language . . . making it an 'all risk policy.'" Ans. at 16. That is an unusual assertion since Appellees *themselves* quoted the Policy language covering Zephyrus against "all risks of physical loss or damage." That is the "actual language" making the Policy an "all risk" policy.[1]

[1] Appellees assert later in their brief that Zephyrus "characterizes" the Policy "as an 'all-risk' contract based on an *ipse dixit* and not its actual terms." Ans. at 15. Both sides, however, quoted the "actual" "all risk" terms in their briefs. Although Appellees are "defending" a trial court order in their favor, they are not exempt from the normal rules governing appropriate appellate advocacy. *See, e.g., Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 569-71 (Fla. 2005).

Appellees' next argument is also unmoored to the policy language they wrote. They contend the Policy is "still limited to the category of perils for which their terms provide coverage." Ans. at 17. In support, they invoke an example of a policy covering "all risk *of* fire" and state that such a policy only "covers the peril of fire, be it from electrical fire, brushfire, or some other operation of fire." *Id*. That is, of course, correct. The theoretical policy to which Appellees refer states it is a *fire* policy. The same would be true for a policy covering the insured against "all risk *of windstorm*" because it is a *windstorm* policy. The same would be true for a policy covering the insured against "all risk *of vandalism*" because it is a *vandalism* policy. And so on.

This Policy is not so limited, however. It does not cover Zephyrus against "all risks" of loss resulting from a specified peril. No specific perils are identified in the insuring agreement. Instead, the Policy covers Zephyrus "against all risks of physical loss or damage *howsoever occasioned*. . . except as . . . excluded." (R. 65) (emphasis added). The "howsoever occasioned" wording means the Policy covers Zephyrus against loss arising from "*all* perils" unless specifically excluded. Appellees do not grapple with the verbiage they wrote.

Consequently, to the extent that the trial court held that the Policy "did not contemplate the alleged *cause* of loss of 'wartime conflict' because it did

not cause 'physical loss or damage to the property under Florida law,"[2] the ruling is wrong. Appellees abrogated the need for Zephyrus to show that the "cause" of a loss resulted from a specifically covered "peril" when they inserted the "howsoever occasioned" wording into the Policy's insuring agreement. The burden of linking Zephyrus' loss to a specified "peril" is *on Appellees* if they wish to rely on an exclusion to avoid coverage.

Appellees' argument that Zephyrus can only recover if it shows that its *physically lost* aircraft is also *physically damaged* or *tangibly altered* fares no better. The Policy says recovery is afforded if an aircraft suffers *either* physical loss *or* physical damage. Zephyrus does not need to show both. Appellees are stuck with the policy they wrote – it covers "physical loss *or* damage" to property – and not the policy they now wish they wrote.

Consequently, Appellees' continued reliance on a plethora of COVID-19 business interruption cases to impose this supposed "double-proof" requirement onto Zephyrus is misplaced. Zephyrus does not allege, as the insureds alleged in the COVID-19 cases, that it lost the "use" of its property or lost profits because of a government restriction. It seeks recovery for the total "loss of" insured property because its lessee stole its aircraft.

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[2] Ans. at 15 (emphasis original).

It is well established that aircraft comprise part of a "segment" of personal property covered by property insurance that "has mobility as its primary purpose." 10A COUCH ON INS. § 148:3 (3d Ed. Nov. 2023 Update). One of the "major risk categories" insured under policies covering mobile property is "deliberate theft." *Id*. Courts across the country have held *for decades* that theft *is* "physical loss or damage" for purposes of a property insurance policy. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Luke Ready Air, LLC*, 880 F. Supp. 2d 1299, 1307 (S.D. Fla. 2012) ("There is no dispute that there has been a direct physical loss of the Aircraft – the [stolen] Aircraft is nowhere to be found."); *Tuchman v. Public Service Mut. Ins. Co*., 387 N.Y.S.2d 803, 805 (N.Y. Cnty. 1976) ("It is clear, and this Court holds, that a small boat owner who takes out an 'all risk' policy which does not exclude theft has a right to assume he has purchased coverage for loss by theft.").

COVID-19 business interruption cases say this too:

> The policy at issue in this case is a commercial property insurance policy. The main purpose of such a policy is to insure the property that the insured uses in its business against direct physical loss or damage as a result (for example) of a fire, an earthquake, a tornado, an ice storm, a hail storm, a meteor strike, *theft*, vandalism, etc.

GPL Enter., LLC v. Certain Underwriters at Lloyd's, 276 A.3d 75, 83 (Md. App. 2022) (emphasis added); *see also Starr Surplus Lines Insurance Co. v. Eighth Judicial District*, 535 P.3d 254, 262, n. 5 (Nev. 2023) (requirement of

"harm" to show "physical loss or damage" "should not be construed to write out cases of theft").

Courts reject the position that Appellees continue to advance: that an insured seeking an "all risk" recovery for stolen property must *also* show a "physical alteration" of the property. In *Nautilus Group, Inc. v. Allianz Global Risks US*, 2012 WL 760940 (W.D. Wash. March 8, 2012), the insured sought an "all risk" recovery for valuable documents allegedly stolen by a disgruntled former employee. The insurer asserted that recovery was only available based on "proof that the property at issue has been physically altered." *Id*. at *6. The court rejected this assertion because the insured alleged "that the covered property was physically lost." *Id*. It then noted that:

> [I]f 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage.

Id. at *7.

The same is true here, as well. The Policy covers Zephyrus against physical loss or physical damage to covered property. Zephyrus need not allege that its physically lost property also was "tangibly altered" to recover.

There was no basis for the trial court to dismiss Appellants' Complaint, let alone with prejudice and without leave to amend. Zephyrus

alleged the physical loss of its aircraft valued in the eight-figures because its lessee stole the property. The dismissal order should be reversed.

II. ARGUMENT

A. Zephyrus Alleged It Suffered "Physical Loss" When Its Lessee Refused to Return and Therefore Stole Its Aircraft.

The insuring agreement in the Policy does three things:

1. It evidences Appellees' agreement to cover Zephyrus against "all risks of physical loss or damage" to covered property unless otherwise excluded.

2. It evidences Appellees' agreement to cover Zephyrus for its loss of covered property "howsoever occasioned."

3. It evidences Appellees' agreement to cover Zephyrus for its loss of covered property, "howsoever occasioned," during the period of the Policy.

The Policy does not identify any covered "perils" to which it responds. The Policy is indisputably an "all risk" or "all perils" policy limited *only* by its exclusions. 10A Couch on Ins. § 148:4 (3d Ed. Nov. 2023 Update) ("all-risk policies . . . cover all perils not specifically excluded").

Appellees assert that, "to state a claim, Zephyrus was required to allege a peril or cause of loss that caused 'physical loss or damage.'" Ans. at 14. Zephyrus did just that. Its Complaint alleged that it issued a default notice to its lessee and demanded return of its aircraft after Russia invaded

Ukraine and sanctions were imposed. (R. 28.) It alleged that the lessee refuses to return the aircraft. (*Id*.) It alleged that the lessee wrongfully maintains possession of the aircraft. (*Id*.) It alleged that it has been deprived of possession, control, and ownership of its covered property because of the lessee's theft. (R. 28-29.) These are allegations of "physical loss" under Florida law. *Luke Ready Air,* 880 F. Supp. 2d at 1307 (stolen aircraft satisfied policy's requirement of "physical loss").

Appellees make several remarkable arguments against this conclusion.

They first discuss *Fayad v. Clarendon National Insurance Co.*, 899 So. 2d 1082 (Fla. 2005). *Fayad* involved the application of a policy *exclusion*, so it is not particularly pertinent here. *Id*. at 1086. Appellees cited the decision, however, for its statement that an "all risk" policy is not an "all loss" policy. *Id*. at 1086. This is true since *every* "all risk" policy, including the Policy, contains coverage exclusions. That is not controversial.

Fayad, however, also noted this salient point about "all risk" policies:

> The specific type of insurance policy involved in this case is . . . an all-risk policy. Unless the policy expressly excludes the loss from coverage, this type of policy provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts.

Id. at 1085. The principle is discussed *extensively* in Appellants' Initial Brief ("AIB"). AIB at 12-18. A decision supporting the *Fayad* court's statement, *Sun Insurance Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961), is also discussed *several times* in the AIB (*see* AIB at 7, 12, 15).

Appellees then rely on *LaMadrid v. National Union Fire Insurance Company of Pittsburgh, PA*, 567 F. App'x 695, 700 (11th Cir. 2014) for the proposition that an all-risk insured must "show that a loss arose from a covered peril" to recover. Ans. at 16-17. The concept of a "covered peril" as discussed in *LaMadrid* is "fortuity," and not a requirement that the insured link its loss to a particularized peril. *LaMadrid* so overwhelmingly supports Zephyrus' position that its inclusion in Appellees' brief is curious.

In *LaMadrid*, the insureds sought "all risk" coverage for a damaged yacht. The insured could not establish the cause of the damage and the insurer denied coverage based on a "wear and tear" exclusion in the policy. *Id.* at 697. The trial court entered judgment in favor of the insurer. *Id*. at 697-98. The Eleventh Circuit reversed, applying Florida law.

The court began by noting that an "all risk" policy:

> creates a special type of coverage that extends to risks not usually covered under other insurance; recovery under an all-risk policy will be allowed for all fortuitous losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage.

Id. at 700 (quoting *Dow Chem. Co. v. Royal Indem. Co*., 635 F.2d 379, 386 (5th Cir. 1981)). Nearly the *exact quote* appears in the AIB, although with a citation to *this Court's* decision in *Egan*, 240 So. 2d at 878. (AIB at 12.)

After noting that a recoverable loss must be based on a "covered peril," the *LaMadrid* court quoted *Morrison Grain Company v. Utica Mutual Insurance Company*, 632 F.2d 424, 430, n. 18 (5th Cir. 1980) for the principle that "to recover under an all-risk policy . . . the insured must necessarily demonstrate that the damage or loss was fortuitous." *Id*. at 701. The court then quoted *Egan*, among others, as establishing that a "Plaintiff's burden of proof under [an all-risk] policy is a light one." *Id*. at 701 (quoting *Egan*, 240 So. 2d at 876). This quote also appears in the AIB. (AIB at 13).

LaMadrid shows how "light" the insured's burden is in practice. The court reversed the judgment in favor of the insurer because the insured presented testimony establishing that the cause of the loss was essentially "unexplained." *LaMadrid*, 567 F. App'x at 702. It suffered a "fortuitous" loss. The court therefore held that:

> Because we find that Appellants have met their burden of demonstrating an accidental and fortuitous loss under the Policy, the burden on remand shifts to National Union to establish the applicability of one or more of the Policy's exclusions.

Id.

The same rationale should apply here, too.

Appellees' attempt to distinguish Zephyrus' other cases supporting reversal on this point is equally inapt.

For example, Appellees claim *Sun Insurance Office* is off-point because the loss resulted from one of the three *specifically identified perils* – theft, vandalism, malicious mischief – to which the "all risk" policy responded. Ans. at 17. The Policy covers each of those "perils," and a potentially infinite number of other since it covers physical loss or damage to Zephyrus' property "howsoever occasioned." (R. 65.) Appellees nevertheless state:

> The court characterized the policy as an 'all-risk' contract and held that 'in the absence of a provision expressly excluding from coverage loss caused by vandalism or theft on the part of the wife of the insured . . . the loss here sustained is within the coverage of an 'all risk' policy."

Ans. at 18 (quoting *Sun Ins. Office*, 133 So. 2d at 739).

That *exact point* is made throughout the AIB. The Policy covers *all* "physical loss or damage" to insured property, "howsoever occasioned," unless it is excluded. (R. 65.) The Policy therefore is many times broader than the policy at issue in *Sun Insurance Office*. Appellees gloss over this, but continue by asserting that:

> Because the cause of loss – vandalism and theft – was plainly within the policy's insured perils clause, the precise operation of those perils – carried out by a spouse – did not matter.

Ans. at 18.

It does not matter here, either. The "cause" of the loss is the lessee's theft of Zephyrus' covered property. The covered "peril" is the "fortuitous" loss of Zephyrus' aircraft. "The precise operation" of that "peril" therefore does "not matter." The dismissal order's conclusion to the contrary is wrong.

Appellees claim that *Egan*, *Morrison*, and several other decisions cited in the AIB, are also off-point because "there was no dispute that a peril causing physical loss or damage was the alleged cause of loss." Ans. at 18. They say:

> In none of the cases cited by Zephyrus did the court bypass or negate covered perils language requiring physical loss or damage and find coverage merely based on the existence of 'any conceivable loss.' Rather the cause of loss in each cited cases was plainly within the covered perils language.

Ans. at 19.

This court should not "bypass or negate covered perils language" here, either. The covered perils language in the Policy is "physical loss or damage" "*howsoever occasioned*" – *e.g.,* "any conceivable loss" – unless excluded. Zephyrus alleged the fortuitous loss of its aircraft via its lessee's theft. That is the covered peril. Nothing else is required.

B. Zephyrus' Stolen Aircraft Does Not Also Need to be "Tangibly Altered" For a Recovery to be Had.

Appellees assert that Zephyrus can only recover under the Policy if it can establish that its stolen aircraft was also "tangibly altered." This is akin to an automobile insurer telling its insured that it will pay for its stolen vehicle *only* if the insured can show that the vehicle was also stripped of its parts, had its windows smashed, its sound system removed, or its seats torn up. This, of course, would be nonsense, as is Appellees' contention that Zephyrus would need to allege, for example, that its aircraft was "stuck in a hailstorm or hit by a missile," in addition to being stolen, for "physical loss or damage" to exist. Ans. at 35.

Not only does the Policy not require this, but Appellees substantially misconstrue Zephyrus' Complaint. They assert that Zephyrus seeks recovery because a "change in law" – the imposition of sanctions by the United States, the European Union, and the United Kingdom – caused Zephyrus to lose profits:

> Before the outbreak of hostilities, the aircraft was in possession of the lessee, not Zephyrus. That condition is not new. The only new conditions are limitations on contractual payments under a lease and restrictions on the current ability to transfer the aircraft to a new, profitable lessee.

Ans. at 26. Appellees later say that the Complaint alleges that a "range of war-time sanctions and laws" currently "restrict use, transfer and profitability of the aircraft *that continues to fly its routes*." Ans. at 35 (emphasis added).

To the extent the aircraft "continues to fly its routes," it does so in the *unlawful possession* of the Russian lessee that stole the aircraft. That does not negate the existence of physical loss. A motor vehicle owner whose car is stolen still suffers a covered loss of property even if the thief uses the vehicle to deliver food in a foreign country. Stolen property is "lost" even if it remains operable. Nothing in the Complaint suggests that Zephyrus seeks insurance recovery for lost "contractual payments under a lease" or for its inability "to transfer the aircraft to a new, profitable lessee." Ans. at 26. Zephyrus does not seek a recovery because its lessee breached a lease. It seeks coverage because the lessee stole its aircraft.

Appellees are, by all accounts, fully aware of what this case is about. They insured dozens of lessors of aircraft across the world. Many had aircraft under lease in Russia during the "outbreak of hostilities." Many also sued Appellees seeking insurance recovery for their lost aircraft. Despite what they know to be true, Appellees re-engineered Zephyrus' Complaint to try to shoehorn it into COVID-19 business interruption cases. It does not fit. Appellees even quote a section from Couch on Insurance, often cited in

COVID-19 business interruption cases, stating that the requirement in property policies that a loss be "physical" is "widely held to exclude losses that are intangible or incorporeal." Ans. at 21.

Zephyrus' loss is hardly "intangible" or "incorporeal." It owned an aircraft valued at $20,000,000. (R. 41.) Its lessee stole the aircraft and refuses to return it. (R. 28.) Zephyrus' tangible, material property is gone. This is not a case about "the loss of use of property for its intended purpose." Ans. at 25-26. It is a case about the loss of the property itself.

Not one of the numerous COVID-19 business interruption cases Appellees cite in their brief has anything to do with this case. None of the barbershops, restaurants, salons, yogurt shops, spas, hotels, movie theaters, etc. in the business interruption cases alleged that their insured property was stolen. Appellees' discussion of the intricacies of those many cases, and their essay on how Florida law does not consider the inability to conduct intended business at real property following a "change in law" to constitute covered loss or damage,[3] is of no moment. A "change in law" did not cause Zephyrus' loss. Its lessee's theft did.

Appellees also drastically misconstrue the theft cases Zephyrus cited.

[3] Ans. at 20-27.

For example, the court in *Luke Ready Air* said this: "There is no dispute that there has been a direct physical loss of the Aircraft – the [stolen] Aircraft is nowhere to be found." 880 F. Supp. 2d at 1307. That is a simple, concise statement: "theft" itself is "physical loss." Appellees assert, however, that "the aircraft in *Luke Ready* experienced *multiple tangible alterations* in the form of being at least *physically carried off* by third parties." Ans. at 29 (emphases added). The act of being "physically carried off" by a third party, without more, does not result in a "tangible alteration" to the stolen property. All that happened in *Luke Ready* was theft and confiscation – physical loss under the policy.

Appellees assert that *C.A.B. St. George v. Harris*, 440 So. 2d 62 (Fla. 1st DCA 1983) also "involved an aircraft that experienced multiple tangible changes." Ans. at 30. Per Appellees, the "tangible changes" to the aircraft were (1) "being physically taken from its owner in Destin, Florida," (2) being "involved in drug trafficking in South America," and (3) being "physically seized by law enforcement in Georgia." Ans. at 30-31. None of that amounts to a "tangible alteration" of property. It was just theft.

Appellees assert that *Intermetal Mexicana v. Insurance Company of North America*, 866 F.2d 71 (3d Cir. 1989) "similarly" shows that an insured must show "tangible changes" to stolen property to recover under a property

insurance policy. Ans. at 31. Here, the "tangible changes" supposedly happened when a creditor of the insured (1) "'took possession of the [insured] equipment,'" (2) removed the equipment to a "fenced lot under the [creditor's] control," (3) refused to admit the insured onto the fenced lot, and (4) "threatened . . . physical violence." Ans. at 31. None of this is even close to a "tangible change" to the stolen property.

Consequently, it is not true that the law of Florida, or elsewhere, holds that "the underlying facts of a theft . . . can amount to physical loss or damage" only "if they otherwise meet the requirement of tangible alteration." Ans. at 31. No case says that. Appellees invented it.

And, if that was not enough, Appellees' argument falls apart even more when they attempt to justify it by invoking examples of demonstrably intangible intellectual property interests such as "a restaurant whose competitor takes and misappropriates its name and logo." Ans. at 32. Appellees assert that, while a restaurant whose name and logo is stolen certainly suffered an economic loss, it did not sustain "physical loss or damage." *Id*. This is true because a business trade name and a logo are not "physical" property assets. The loss of non-physical property is, of course, not "physical loss."

C. Appellees' Ten-Page Discussion of Leave to Amend is Astonishing.

Appellees assert that Zephyrus did not "preserve" for appeal the issue of the right to amend because, among other things, it did not seek a re-hearing or challenge, at the trial court level, the with-prejudice dismissal. Ans. at 36. Appellees contend further that Zephyrus did not present new facts or a proposed "amended complaint" to the trial court justifying an amendment. *Id*.

Zephyrus did not need to do any of those things because it had the *absolute right* to amend its Complaint before a responsive pleading is filed. *Williams v. Gaffin Indus. Services, Inc*., 88 So. 3d 1027, 1030 (Fla. 2d DCA 2012) (quoting *Boca Burger*, 912 So. 2d at 567). The motion to dismiss Appellees filed in the trial court was not a "responsive pleading." *Id.* Zephyrus' "absolute right" to amend its Complaint under the circumstances has been "clear" under Florida law for nearly two decades. *Id.* (quoting *Boca Burger*, 912 So. 2d at 563).

Appellees' discursive discussion attempting to justify the trial court's with-prejudice dismissal following their first motion to dismiss and before they filed a responsive pleading therefore is wasted effort. None of it applies to this case. Zephyrus did not need to "preserve" anything,

although it requested with its opposition leave to file an amended complaint if the court granted the motion to dismiss. (R. 316.)

There is simply no need for Zephyrus to grapple with Appellees' 10-page off-point discussion. Zephyrus had the "absolute right" to file an amended complaint. The trial court's with-prejudice dismissal before a responsive pleading was filed was wrong as a matter of law and is reversable error.

III. CONCLUSION

The trial court's dismissal order is legally erroneous in multiple ways. It should be reversed.

Dated: February 7, 2024

Respectfully submitted,

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I hereby certify that on the 7th day of February, 2024, a true and correct copy of the foregoing was filed electronically with the Clerk of this Court via Florida's E-Filing Portal and was additionally sent by electronic mail to the counsel identified in the attached Service List.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the applicable font and word count limit requirements and is comprised of 3,980 words, excluding words in the caption, coverage page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block, in accordance with Fla. R. App. P. 9.045.

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