

**In the District Court of Appeal
Fourth District of Florida**

CASE NO.: 4D24-1732

FELIPE EDUARDO GARCIA
and MIRIAM M. GARCIA,

Appellants,

v.

STATE FARM FLORIDA
INSURANCE COMPANY,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

Respectfully submitted,

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NOTE ABOUT CITATIONS IN THE BRIEF

Plaintiffs, Felipe Garcia and Miriam Garcia, are referred to individually by name or, collectively, as “Plaintiffs.” Defendant, State Farm Florida Insurance Company is referred to as “State Farm” or “Defendant.”

References to the Record on Appeal are designated (**R. [page #]**). References to the Appendix to this Answer Brief are designated (**Appx. [page #]**).

Unless otherwise indicated, all emphasis in this brief is supplied by undersigned counsel.

STATEMENT OF THE CASE AND FACTS

A. Introduction and Overview

Plaintiffs appeal the trial court's entry of summary judgment based on their material breach of the condition in their homeowners policy requiring them to give immediate notice of their claim. The facts are undisputed. Plaintiffs observed roof damage and interior damage to their house shortly after Hurricane Irma. They responded by making two substantial roof repairs, including completely resurfacing the flat portion of their roof, which is directly above their Florida room where they noticed water damage to the ceiling shortly after the hurricane. They did all of that repair work long before they reported a claim to State Farm in August 2020, almost three years after Hurricane Irma.

The issue in this appeal concerns the sufficiency of the expert affidavit that Plaintiffs submitted in opposition to State Farm's motion for summary judgment. The expert's affidavit was based on photographs taken by a third party, Plaintiffs' loss consultants, more than three years after the loss and after the extensive roof repairs had been completed. The trial court found the expert's affidavit was "not adequately supported by the record evidence" rendering the

opinions therein “conclusory and insufficient to rebut the presumption of prejudice to which State Farm is entitled.” State Farm submits the trial judge ruled correctly, and should be affirmed.

B. Relevant facts and proceedings

1. Relevant provisions of Plaintiffs’ Policy with State Farm

State Farm insured Plaintiffs’ house in Pembroke Pines, Florida, under a homeowners policy in effect from November 16, 2016 through November 16, 2017. (R. 214-72) (the “Policy”). The Policy contains the following provisions relevant to this appeal:

SECTION I – CONDITIONS

...

2. Your Duties After Loss. After a loss to which this insurance may apply, you shall see that the following duties are performed.

a. give ***immediate notice*** to us or our agent.

(R. 234)

6. Suit Against Us. No action shall be brought unless there has been compliance with the policy provisions...

(R. 235)

2. The allegations in Plaintiffs' complaint and State Farm's "immediate notice" defense

Plaintiffs filed suit on December 6, 2021, alleging that State Farm breached the Policy "by failing to provide necessary reimbursement for a covered loss." (R. 14). They sought to recover for damage allegedly caused by "wind and water" on September 10, 2017, which is the date Hurricane Irma passed through South Florida. (R. 14). Plaintiffs attached to their Complaint a copy of a repair estimate prepared by a company called Master Claims. (R. 77-95). The Master Claims Estimate is an 11-page line-item estimate, accompanied by six pages of photographs and a two-page sketch of the floor plan of Plaintiffs' house. (R. 77-95). State Farm is submitting a color copy of the Master Claims Estimate and the accompanying materials as a part of the Appendix to this brief. (Appx. 34-52).

State Farm filed its Answer & Affirmative Defenses on March 17, 2022. (R. 106-10). The Answer asserted that "Plaintiffs did not provide timely notice," noting that the Policy requires "immediate notice," but that "Plaintiffs did not notify Defendant of their alleged loss until August 21, 2020," which was nearly three years after the alleged date of loss. (R. 106-07 at ¶ 7). State Farm also raised

untimely notice as its First Affirmative Defense, stating in relevant part:

There is no coverage under the policy because the loss alleged to have occurred on September 10, 2017, was not reported by the Plaintiffs until August 2[1], 2020...Plaintiffs also repaired damage they contend was caused by Hurricane Irma and for which they demand insurance coverage before reporting the claim, thereby depriving STATE FARM of the opportunity to inspect the alleged damage...

As a result of the Plaintiffs' failure to comply with SECTION I - CONDITIONS, 2. Your Duties After Loss, STATE FARM's ability to determine the date of loss or whether any loss occurred during the policy period, the cause and existence of damage, and the amount of the loss was prejudiced. Prejudice is presumed to have occurred by operation of law. Such prejudice may include but is not necessarily limited to the following: If loss was caused by Hurricane Irma as Plaintiffs contend, then the evidence of such cause of loss became obscured or destroyed by the passage of time so that it could not be observed by STATE FARM or others inspecting the property at its request....Plaintiffs' repairs obscured the existence of loss and prejudiced STATE FARM's ability to determine whether a loss occurred during the policy period as alleged...

(R. 107-08).

3. The summary judgment evidence relating to Plaintiffs' delayed reporting of their hurricane claim

State Farm deposed both Plaintiffs and filed the transcripts of those depositions as exhibits to its motion for summary judgment. (See R. 309-83) (Dep. of Felipe Garcia, Ex. 4 to MSJ); R. 402-20 (Dep. of Miriam Garcia, Ex. 5 to MSJ)).

Mr. Garcia testified that he observed damage to “tiles on the roof and [a] water leak” inside his home sometime in September 2017 shortly after Hurricane Irma. (R. 319-20). He could not recall how many tiles were damaged. (R. 322-23). Mr. Garcia said he did not immediately report a claim to State Farm “because I didn’t expect it was going to be a huge damage.” (R. 320). Instead of reporting a claim, Mr. Garcia “contacted a handyman and the handyman fix[ed] the tiles.” (R. 320). Mr. Garcia testified that he paid the handyman \$2,000 to fix his tile roof, but he had no records related to that repair or even any information about the handyman that might enable State Farm to learn more about the repairs:

Q. Did you keep a record of that [\$2,000] expenditure?

A. No, sir.

Q. So you clearly did not provide to State Farm any proof or documentation of this expenditure, correct?

A. No.

Q. Do you remember the name of the handyman so that I might ask him specifically what he did.

A. No.

(R. 327).

Around the same time, in September or October 2017, Mr. Garcia also noticed water damage inside the Florida room of his house. (R. 329-30). The Florida room, which was also referred to as an “enclosed porch,” is directly beneath the flat portion of Plaintiffs’ roof—as opposed to the tile roof that covers the rest of the house. (R. 412-13). Ms. Garcia described the damage inside the Florida room as “wet spots” on the acoustic ceiling tiles. (R. 413-14).

Mr. Garcia said he did not immediately report a claim to State Farm upon noticing the water damage inside his Florida room because he “didn’t want to put a claim” and “because I didn’t [think] it was going to be that much damage.” (R. 331). Instead, he testified that he paid a handyman an additional \$2,000 to repair the flat portion of his roof above the Florida room. (R. 358). Mr. Garcia said

he had no documentation of those repairs, either, and no information about the handyman who performed them.

Q. We only have maybe a handyman whose name you don't remember; is that true?

A. Yes.

Q. And I bet you paid him in cash; is that true?

A. Yes.

Q. So you have no record at all of making a payment to that guy.

A. Yes.

Q. Meaning no, you don't.

A. No, I don't.

Q. And you received no receipt or itemized estimate or any other piece of paper saying what that guy did, correct?

A. Correct.

(R. 336-37).

State Farm established the timing of Plaintiffs' repairs to the flat roof via aerial photographs¹ and Mr. Garcia's testimony. (See R. 333-35 (deposition testimony); R. 426-43/Appx. 6-20 (aerial photos)). Mr.

¹ State Farm filed a "Notice of Intent to Rely Upon and Request for Judicial Notice of Aerial Images Pursuant to § 90.2035," on September 14, 2022. (R. 156-73). Plaintiffs never challenged the authenticity of the aerial images and State Farm subsequently filed them as an exhibit to its motion for summary judgment. (R. 426-43). State Farm is filing color copies of those aerial images as part of the Appendix to this brief. (Appx. 6-20).

Garcia agreed that the aerial photos taken on or before January 4, 2018 showed “ribs” or what appeared to be aluminum framing atop the flat, rectangular portion of his roof. (R. 333-34 (testimony); R. 429-35/Appx. 6-12 (pre-Jan. 4, 2018 aerial photos)). However, aerial photos taken on and after January 14, 2019 showed the flat roof with a smooth surface, without the aluminum ribs that had been visible in the earlier photos. (R. 334 (testimony); R. 436-43/Appx. 13-20 (post-Jan. 14, 2019 aerial photos)). Thus, the aerial photos and Mr. Garcia’s testimony established that Plaintiffs repaired the flat roof sometime between January 4, 2018 and January 14, 2019—*i.e.*, between 4 months and 16 months after Hurricane Irma. While Mr. Garcia insisted the flat roof had been “repaired” and not replaced, he agreed that there was “a completely new surface on it.” (R. 332). And the color versions of the aerial photographs confirm that. (*Compare* Appx. 12, *with* Appx. 13).

Mr. Garcia also confirmed that he never took any photographs of the alleged damage, whether to the interior or the roof of his house.

Q. Did you take any photographs near in time when you first discovered it [water damage inside the family room]?

A. No.

(R. 330)

Q: And before he [the handyman] did any of the repairs on your tile roof you took precisely zero photographs, correct?

A: Correct

Q: And before he did the repairs on the flat roof you took precisely zero photographs, correct?

A: Correct.

(R. 337)

Mr. Garcia testified that, sometime in 2020, he again noticed water leaking and additional water damage inside the Florida room under the recently-resurfaced flat roof. (R. 331-32). At some point thereafter, Mr. Garcia contacted a company called Master Claims because he was “looking for somebody to help me prepare a claim.” (R. 346). It is unclear exactly when Plaintiffs contacted Master Claims, but the Master Claims Estimate lists August 12, 2020 as the “Date Received” and September 29, 2020 as the “Date Entered.” (R. 913/Appx. 34). The Master Claims Estimate includes six pages of photographs, all of them showing the interior of the house, except for a single photo (on the last page of the estimate) taken from the street, that shows the front of the house. (See R. 924-29/Appx. 45-50). None

of the photos taken by Master Claims depict any portion of Plaintiffs' roof. (R. 924-29/Appx. 45-50).

Both Plaintiffs testified that, at no time since Hurricane Irma, did they ever place a tarp over their roof to prevent further water intrusion. (R. 349-50 (Mr. Garcia); R. 416 (Mrs. Garcia)). Accordingly, Ms. Garcia testified that water has leaked into their Florida room intermittently since 2017.

Q. And when did the damage on the ceiling in the Florida room occur?

A. I would think about after the hurricane.

Q. Has it worsened?

A. Lately, I mean I always see like the wet spots so I don't know if it's worsened, but I still see it, you know. I still see it.

Q. Now when you say the wet spots do you mean to say that they're actually still wet or are you simply saying that that's, you know, water staining?

A. Well, there's water stains and there's sometimes I see a little bit of like wet.

Q. Like what?

A. Raining. When it rains a lot there's little wet spots.

Q. And how long has that been going on?

A. I mean that's been happening a few years, I guess since 2017.

(R. 414).

Plaintiffs finally reported a claim to State Farm on August 21, 2020—almost three years after Hurricane Irma—through their attorneys. (R. 302) (Plaintiffs’ Verified Answers to Interrogatories).

4. State Farm moves for final summary judgment based on its immediate notice defense

State Farm moved for summary judgment on May 19, 2023. (R. 194-206). The motion was accompanied by State Farm’s summary judgment evidence, which included: Plaintiffs’ Verified Answers to Interrogatories (R. 299-307); Mr. Garcia’s deposition transcript (R. 309-83); Ms. Garcia’s deposition transcript (R. 402-20); and the judicially-noticed aerial photos (R. 426-43/Appx. 6-20).

State Farm’s motion discussed much of the record evidence set out above and argued that: (i) Plaintiffs materially breached the “immediate notice” provision in the Policy by waiting almost three years to report their claim, thereby creating a legal presumption that State Farm was prejudiced; and (ii) there was no record evidence to rebut the presumption of prejudice, thereby entitling Defendant to a final summary judgment. (R. 201-05). The motion also argued that the record evidence affirmatively demonstrated that State Farm *had* been prejudiced. (See, e.g., R. 201 (“The repairs to the roof necessarily

obliterated the evidence of damage, if any existed.”); R. 205 (“State Farm was denied the opportunity to inspect the roof shortly after the storm and before Mr. Garcia’s handyman made repairs, simultaneously destroying evidence.”)).

5. Plaintiffs respond to the summary judgment motion, relying on the affidavit of their expert engineer, David Money

Plaintiffs filed a response to the summary judgment motion on December 5, 2023. (R. 827-37). The response got off to a rocky start, quoting a notice provision that does not appear in the Policy and, presumably, appears in the policy of some other insurer against whom Plaintiffs’ counsel has litigated. Specifically, the response quoted a provision that required the insured to “give ***prompt notice*** to us” and stated the insurer had no duty to provide coverage “if the failure to comply with [post-loss] duties ***is prejudicial to us.***” (See R. 832) (quoting some unknown insurer’s policy). However, the notice provision in the Policy at issue in this case requires Plaintiffs to “give immediate notice to us” and does not contain the “prejudicial to us” language. (See R. 234). This reliance on the wrong policy language is important because it led Plaintiffs to argue, incorrectly, that it was

State Farm's burden to show that it was prejudiced by Plaintiffs' untimely notice. (R. 835-36).²

In addition to their incorrect legal argument, Plaintiffs also relied on the affidavit of their expert engineer, David Benjamin Money, PE, which he signed on the same day Plaintiffs filed the response, December 5, 2023 (the "Money Affidavit"). (R. 900-912/Appx. 21-33).³ Plaintiffs argued the Money Affidavit created a genuine issue of material fact on the question of whether State Farm was prejudiced by their untimely notice. (*See* R. 830). The Money Affidavit offered two substantive opinions, reflected in paragraphs 16 and 17:

16. Based on my review of the aforementioned documents and sources..., I conclude to a reasonable degree of engineering certainty that the documented **damage to the subject roof**

² In this District, State Farm would, in fact, have borne that burden **if** the Policy had actually contained the language quoted in Plaintiffs' response. *See Perez v. Citizens Prop. Ins. Corp.*, 345 So. 3d 893, 896 (Fla. 4th DCA 2022) (holding presumption of prejudice does not apply and the insurer bears the affirmative burden to show prejudice where notice provision states there is "no duty to provide coverage under this Policy if the failure to comply...is prejudicial to us"). *But see Arce v. Citizens Prop. Ins. Corp.*, 388 So. 3d 205, 206 (Fla. 3d DCA 2024) (holding presumption of prejudice applies regardless of policy language and certifying conflict with *Perez*).

³ State Farm has filed a color version of the Money Affidavit, and the attachments thereto, as part of the Appendix to this brief.

covering was caused by wind borne debris, impacts and uplift pressures associated with the weather event on or about // September 10, 2017.

17. Based on the totality of the evidence reviewed, it is my professional opinion that no **better conclusions, other than that this damage was wind induced, could have been drawn by an inspection that occurred after the date of loss and before that which occurred on September 29, 2020.**

(R. 904-05/Appx. 25-26). Thus, both of Mr. Money's opinions concerned the **cause** of the claimed damage to Plaintiffs' house: (i) that it was caused by a weather event (Hurricane Irma) on September 10, 2017; and (ii) that any inspection conducted after the hurricane and prior to September 29, 2020 would not have yielded any better conclusions concerning the cause of the claimed damage—specifically, “that this damage was wind induced.” (*Id.*).

Regarding the *basis* for his opinions, Mr. Money attested that he “reviewed the facts and data regarding the damage in the aftermath of Hurricane Irma to [Plaintiffs' property], including certain records, reports, and *photographs of the damages* to the property in question.” (R. 901/Appx. 22). Mr. Money then specified:

12. Specifically, as it pertains to the property located at 16592 NW 16th Street, Pembroke Pines, Florida 33028, **I reviewed:**

- **Master Claims’ September 29, 2020, Report including estimate, roof sketch and photographs.** I also reviewed the Master Claims photographs, but [due to] the size of the file, I was unable to attach, but the most relevant are attached to my report.
- **Historic[al] aerial photographs** of the property via the Broward County Property Appraiser’s Website for years 2016 through 2022, and the most recently available photograph from 2023.

(R. 902/Appx. 23). But, the only materials filed with the Money Affidavit were the Master Claims Estimate, with its accompanying photos and sketch (R. 913-31/Appx. 34-52), and the aerial photographs (R. 932-36/Appx. 53-57). At no point in the proceedings below did Plaintiffs ever file any “report” by Mr. Money or any other photographs on which he purported to have based the opinions in his affidavit. (See R. *passim*). Nowhere in his affidavit, does Mr. Money state that he ever conducted a physical inspection of Plaintiffs’ property. (See R. 900-912/Appx. 21-33).

6. State Farm files a reply and the general magistrate recommends partially granting State Farm’s summary judgment motion

State Farm filed a reply in further support of the summary judgment motion on December 16, 2023. (R. 937-49). The reply noted

Plaintiffs' reliance on language that did not appear in the Policy and their resulting erroneous argument concerning the burden of proving prejudice. (R. 939-41). State Farm also argued that Mr. Money's affidavit was insufficient to create a fact question on the issue of prejudice. (R. 943-48). The reply noted that the Money Affidavit made no mention of the prior repairs to Plaintiffs' roof, and that he could not have relied on any pre-repair photographs of any damage because Mr. Garcia had testified that no such photographs existed. (R. 945-46). State Farm argued that a "conclusory affidavit like Mr. Money's is not admissible and does not adequately oppose summary judgment." (R. 946).

The trial judge referred State Farm's summary judgment motion to a general magistrate (R. 708-10), who held a hearing on December 18, 2023. (R. 970-1019). During the hearing, Plaintiffs' counsel appeared to concede that the Garcias had failed to give timely notice, but argued that the motion should be denied because there remained a triable question of fact regarding prejudice. (*See* R. 994) ("[W]hile I understand that the Court may find that there was not timely notice, the Court should deny partial summary judgment as to the prejudice issue.").

The general magistrate issued her Report and Recommendation (“R&R”) on February 1, 2024, recommending that State Farm’s motion be granted in part, and denied in part. (R. 954-58). The R&R found that “Plaintiffs failed to comply with this [immediate notice] provision, and the excuse given by Mr. Garcia for the delay is not legally sufficient.” (R. 955). However, the general magistrate found that the Money Affidavit “provides sufficient basis to raise an issue of material fact to rebut the presumption of prejudice and deny final summary judgment.” (R. 955).

7. The trial court grants State Farm’s exceptions to the general magistrate’s report and recommendation, and enters final summary judgment for State Farm

State Farm timely filed exceptions to the general magistrate’s R&R. (R. 959-62). State Farm argued that the Money Affidavit “did not rebut the presumption of prejudice because it was purely conclusory and not founded upon any admissible evidence in the court record or attached to the affidavit.” (R. 959-60). State Farm further argued:

Mr. Money also claims to have reviewed photographs of the roof, but only one photograph of the exterior of the home is attached to his affidavit (taken from ground level at the end of the driveway where no roof

surface can be seen), and no photographs in the court record are otherwise identified as a factual basis for his conclusion that the roof was damaged by Hurricane Irma. Mr. Money did not address the established fact that roof tiles were repaired shortly after the hurricane, and that the flat roof over the damaged interior was replaced before the claim was reported to Defendant. The court record established that Mr. Money could not have seen any photographs of the roof taken after Hurricane Irma and before repairs were made, because Mr. Garcia testified that no such photographs were taken.

(R. 960).

The trial judge entered an order on May 16, 2024, agreeing with State Farm's exceptions, and finding that the Money Affidavit "is not adequately supported by the record evidence and therefore the conclusions expressed therein are conclusory and insufficient to rebut the presumption of prejudice to which State Farm is entitled."

(R. 1036). Accordingly, the trial judge entered final summary judgment in State Farm's favor. (R. 1036).

8. The trial court denies Plaintiffs' rehearing motion and Plaintiffs notice this appeal

Plaintiffs timely filed a "motion for rehearing" of the summary judgment. (R. 1052-55). Though styled as a motion for rehearing, the motion cited Rule 1.540(b)(1) and argued that "Plaintiff's counsel's

staff mistakenly failed to attach the documents that Plaintiffs’ expert, David Benjamin Money, PE, used to make his determination that the roof of Plaintiffs’ property had sustained damage from Hurricane Irma.” (R. 1052-53). The motion asked the Court to “excuse Plaintiffs’ counsel’s mistake and excusable negligence [*sic*] and grant Plaintiffs’ motion for rehearing.” (R. 1053). Notably, Plaintiffs did not attach to their motion any additional photos upon which Mr. Money had purportedly based his opinions—*i.e.*, the photos that Plaintiffs’ counsel’s staff allegedly had mistakenly failed to file with the Money Affidavit—and no such photos can be found anywhere in the record on appeal. (*See R. passim*).

The trial court denied Plaintiffs’ rehearing motion on the same day it was filed. (R. 1135-37). Plaintiffs timely noticed this appeal. (R. 1138-39).

SUMMARY OF THE ARGUMENT

This Court should affirm based on the undisputed summary judgment evidence. Plaintiffs’ three-year delay in reporting their Hurricane Irma claim was a material breach of the Policy’s notice provision, as a matter of law. As a result, there arose a legal presumption that State Farm was prejudiced by the untimely notice,

shifting the burden onto Plaintiffs to show that State Farm was not prejudiced. They failed to do so. The Money Affidavit was insufficient to carry Plaintiffs' burden on the issue of prejudice for evidentiary and substantive reasons.

First, the Money Affidavit was not supported by record evidence, rendering the opinions therein conclusory and not competent evidence to oppose summary judgment. State and federal courts have routinely rejected similar affidavits as insufficient in untimely notice cases where the expert lacked personal knowledge of the condition of the property at or near the time of the loss and the insureds had made repairs before the expert's review of the property. Those are precisely the facts presented here. Mr. Money's opinions are based on his review of the Master Claims photos, which were taken more than three years after the loss and after Plaintiffs made extensive repairs to their roof. Thus, the Money Affidavit was not competent evidence and this Court should affirm on that ground.

Second, even assuming the Money Affidavit were competent summary judgment evidence, it nevertheless fails to rebut the presumption that State Farm was prejudiced. Mr. Money's opinions are limited to causation and whether Plaintiffs' untimely notice

prejudiced State Farm's ability to determine the *cause* of the loss. But this Court and others have recognized that untimely notice also prejudices an insurer's ability to evaluate the *extent* of covered damage, particularly when the insured has made repairs before giving notice. The Money Affidavit is silent on that aspect of prejudice and, accordingly, does not create a material issue of fact to preclude summary judgment.

STANDARD OF REVIEW

This Court reviews a trial court's grant of a motion for summary judgment under a de novo standard of review. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

ARGUMENT

I. Law applicable to an insurer's policy defense based on the insured's failure to give timely notice of a claim

"An insured's failure to give timely notice under such a provision is 'a legal basis for the denial of recovery under the policy.'" *Laquer v. Citizens Prop. Ins. Corp.*, 167 So. 3d 470, 473 (Fla. 3d DCA 2015) (quoting *Ideal Mut. Ins. Co. v. Waldrep*, 400 So. 2d 782, 785 (Fla. 3d DCA 1981)).

The substantive test governing this appeal is well established and not in dispute:

A two-step analysis determines whether an insured's untimely reporting of loss results in the denial of coverage. The first step focuses on whether the insured provided timely notice. If the insured provided timely notice, of course, coverage cannot be denied. But even if the insured's notice was untimely, the insured has the ability to prove that the insurer was not prejudiced by the untimely notice. During this step, prejudice to the insurer is presumed and the insured bears the burden of proving otherwise.

Laquer, 167 So. 3d at 473-74 (internal citations omitted).

II. Plaintiffs' notice to State Farm almost three years after they observed alleged storm damage and made substantial repairs was untimely, as a matter of law

Mr. Garcia's own testimony established that Plaintiffs materially breached the Policy, as a matter of law, by not giving State Farm immediate notice of the loss. Although the Policy does not define "immediate notice," this Court (and other Florida state and federal appellate courts) have consistently interpreted the term in the same manner:

Notice is necessary when there has been an occurrence that should lead a reasonable and prudent [person] to believe that a claim for damages would arise. Notice is said to be prompt when it is provided with reasonable dispatch and within a reasonable time in view of all of the facts and circumstances of the particular case.

Himmel v. Avatar Prop. & Cas. Ins. Co., 257 So. 3d 488, 492 (Fla. 4th DCA 2018) (internal citations and quotation marks omitted). See also, e.g., *Laquer*, 167 So. 3d at 474 (same); *Yacht Club on the Intracoastal Condo. Ass'n, Inc. v. Lexington Ins. Co.*, 599 F. App'x 875, 879 (11th Cir. 2015) (same; applying Florida law).

Although the question of whether notice is timely “often presents an issue of fact,” *Arguello v. People’s Trust Ins. Co.*, 315 So. 3d 35, 41 (Fla. 4th DCA 2021), the issue is frequently resolved as a matter of law “when damage is caused by a known event, such as a hurricane, or when the insured was on-site when readily apparent problems developed.” *Yacht Club*, 599 F. App’x at 879-80 (collecting cases). Florida courts, including this one, have repeatedly affirmed summary judgments in prompt notice cases. *See, e.g., De La Rosa v. Florida Peninsula Ins. Co.*, 246 So. 3d 438 (Fla. 4th DCA 2018) (affirming summary judgment for insurer where notice was given 15 months after plumbing loss); *Hope v. Citizens Prop. Ins. Corp.*, 114 So. 3d 457 (Fla. 3d DCA 2013) (affirming summary judgment for insurer where notice was given approximately four years after hurricane loss); *1500 Coral Towers Condo. Ass’n, Inc. v. Citizens Prop. Ins. Corp.*, 112 So. 3d 541 (Fla. 3d DCA 2013) (affirming summary judgment for insurer where notice was given approximately five years after hurricane loss); *Kramer v. State Farm Fla. Ins. Co.*, 95 So. 3d 303 (Fla. 4th DCA 2012) (affirming summary judgment for insurer where notice was given approximately five years after hurricane loss).

Plaintiffs do not appear to challenge the trial court’s finding that they materially breached the Policy by waiting nearly three years after Hurricane Irma to file a claim with State Farm. Their counsel appeared to concede the point below (R. 994), and they do not argue the point in the Initial Brief. Nevertheless, to the extent they seek to contest this issue based on Mr. Garcia’s testimony explaining why he waited to report the claim, the Court should reject that argument out of hand. Mr. Garcia justified the delay by stating he “didn’t expect it was going to be a huge damage” (R. 320), “didn’t want to put a claim” and “didn’t [think] it was going to be that much damage.” (R. 331).

State and federal courts have expressly rejected these arguments. For example, the Third District has held that “[w]hen an insurance contract contains a provision which applies to notice of the damage claim, an insured must give notice of the loss that implicates a **potential claim** without waiting for the full extent of the damages to become apparent.” *1500 Coral Towers*, 112 So. 3d at 543. The court expressly rejected the insured’s excuse that it waited to notify the insurer “because initially there was a question of whether the damages would exceed the policy deductible.” *Id.* at 543. *See also Yacht Club*, 599 F. App’x at 880 (“Prompt notice is not excused

because an insured might **not be aware of the full extent of damage** or that **damage would exceed the deductible.**”); *SFR Servs., LLC v. Hartford Ins. Co. of the Midwest*, 609 F. Supp. 3d 1287, 1292 (S.D. Fla. 2022) (same); *Adderly v. Hartford Ins. Co. of the Midwest*, 2020 WL 4915575, *4 (S.D. Fla. Aug. 21, 2020) (“[A] plaintiff’s belief that the loss **did not meet the deductible** would not relieve it from providing prompt notice of the loss under the policy.”); *Lehrfield v. Liberty Mut. Fire Ins. Co.*, 396 F. Supp. 3d 1178, 1183 (S.D. Fla. 2019) (same); *Kendall Lakes Towers Condo. Ass’n, Inc. v. Pacific Ins. Co., Ltd.*, 2012 WL 266438, *4 (S.D. Fla. Jan. 30, 2012) (“[A]n insured’s good faith belief that the **damage is trivial or not covered** by the policy is insufficient to justify non-compliance with the policy’s notice provision.”).

In sum, the trial court correctly found that Plaintiffs failed to give “immediate notice” of their loss, as a matter of law, thereby materially breaching the Policy.

III. The Money Affidavit was insufficient to create a genuine issue of material fact as to whether State Farm was prejudiced by Plaintiffs’ untimely notice

Plaintiffs’ material breach of the notice provision in the Policy triggered a legal presumption that State Farm was prejudiced, which

Plaintiffs bore the burden to rebut. *De La Rosa*, 246 So. 3d at 441. The trial court correctly found that the Money Affidavit was insufficient to carry that burden.

A. The Money Affidavit is not competent summary judgment evidence because it was not based on any record evidence that could support his conclusions

The trial judge correctly found that the Money Affidavit “is not adequately supported by the record evidence and therefore the conclusions expressed therein are conclusory and insufficient to rebut the presumption of prejudice to which State Farm is entitled.” (R. 1036).

As discussed above, Mr. Money offered two opinions, specifically (i) that the claimed damage to Plaintiffs’ house was caused by Hurricane Irma, and (ii) that any inspection conducted after the hurricane and prior to September 29, 2020 would not have yielded any “better conclusions, other than that this damage was wind induced.” (R. 904-05 at ¶¶16-17/Appx. 25-26 at ¶¶ 16-17). To offer those conclusions, Mr. Money would necessarily require some knowledge of the condition of Plaintiffs’ house immediately after Hurricane Irma and whether the condition of the property had been altered (*e.g.*, repaired) during the three-year interval between the

hurricane and the inspection on September 29, 2020. The record evidence shows that Mr. Money had no such knowledge.

To begin, there is no evidence that Mr. Money ever inspected Plaintiffs' property at all. His affidavit does not say that he did; instead, it deftly tiptoes around the subject. For example, Mr. Money attests that he "reviewed facts and data regarding the damage" (R. 901/Appx. 22), that "[d]igital evidence was provided to me" (R. 902/Appx. 23), and that "[c]racked and displaced roofing tiles were documented." (R. 906/Appx. 27). Tellingly, the only "inspection" referenced in the Money Affidavit is the one that "occurred on September 29, 2020" (R. 905/Appx. 26), which is the date listed on the Master Claims Estimate. (R. 913/Appx. 34). Thus, it is clear that Mr. Money (who signed his affidavit on December 5, 2023) based his opinions on that September 29, 2020 inspection conducted by Master Claims, which occurred more than three years after the loss.

Even more significantly, the Money Affidavit fails to discuss the fact that Plaintiffs had made \$2,000 worth of repairs to the tile roof shortly after Hurricane Irma and then paid another \$2,000 to completely resurface the rectangular flat roof sometime between January 4, 2018 and January 14, 2019. Indeed, the Money Affidavit

suggests that Mr. Money was not even aware of those repairs, as they are not mentioned. Importantly, all of those repairs were done long **before** the September 29, 2020 inspection by Master Claims that is the source of Mr. Money’s knowledge about Plaintiffs’ property.

In fact, Mr. Money expressly acknowledged that he relied on the photographs taken by Master Claims. (See R. 902 at ¶ 12/Appx. 23 at ¶ 12). But none of those photographs are competent evidence to support his opinions. Again, those pictures merely depict the condition of Plaintiffs’ house when Master Claims inspected on September 29, 2020, more than three years after Hurricane Irma and after Plaintiffs already had made substantial repairs to their roof. Furthermore, the Master Claims photographs include just one image of the exterior of Plaintiffs’ property—a view of the front of the house, apparently shot from the street, that does not depict the condition of the roof at all. (R. 929/Appx. 50).

The only other photographic evidence cited in the Money Affidavit—the “historic[al] aerial photographs of the property” that he obtained from the Broward Property Appraiser’s website (R. 902/Appx. 23)—supports State Farm’s position. Those photos confirm that Plaintiffs replaced the flat roof sometime between

January 4, 2018 and January 14, 2019. (See R. 932-36/Appx. 53-57). But they are far too distant to support any causation opinions, and Mr. Money never cites the aerial photos as support for those opinions in his affidavit, anyways.

Finally, there is no evidence that Mr. Money was able to review any photographs of the claimed damage taken *before* Plaintiffs made the roof repairs. To the contrary, Mr. Garcia affirmatively testified that he never took any such photos (R. 330, R. 337), and there is no evidence in the record that such photos were taken by anyone else. (See R. *passim*).

Based on this undisputed summary judgment record, the Money Affidavit was not supported by record evidence, rendering it incompetent to oppose summary judgment. The Third District's holding in *Perez v. Citizens Prop. Ins. Corp.*, 343 So. 3d 140 (Fla. 3d DCA 2022), is directly on point. There, the court affirmed a summary judgment for Citizens based on a notice defense where the plaintiff reported the claim "over two years after her claimed date of loss from Hurricane Irma" and, prior to reporting the claim, she had conducted repairs that included "patching various sections of the roof," but "maintained no records of these repairs." *Id.* at 141. The insured

plaintiff opposed summary judgment by submitting an affidavit from her expert that detailed his observations during his investigation of the property in July 2020 (three years after Hurricane Irma), which included “‘missing, torn and creased shingles’ on multiple areas of the roof and granular loss ‘due to the windborne debris and/or hail stone impacts,’” as well as “damage due to interior moisture in multiple areas of the residence.” *Id.* at 142.

The *Perez* court rejected the plaintiff’s expert’s affidavit as insufficient. The Third District began by noting that “no weight may be accorded [to] an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning.” *Id.* at 143 (brackets in original). The court then found the plaintiff’s expert’s affidavit to be “conclusory and not adequately supported,” and explained:

Ms. Perez’s expert did not have access to any information as to the state of the roof immediately following the Hurricane. There was no investigation following the initial loss because Ms. Perez waited over two years to report her claim to Citizens. Instead, [the expert] **Mr. Renne formed his opinion based solely on his investigation conducted nearly three years after the incident, after repairs had already been conducted on the roof. This lapse in time, as well as the**

intervening repairs, rendered Mr. Renne's opinion wholly conclusory as to whether the current damage was caused by the Hurricane or some other event from the intervening three years.

Mr. Renne's affidavit was insufficient to rebut the presumption of prejudice to Citizens resulting from Ms. Perez's delay in reporting the claim.

Perez, 343 So. 3d at 143-44. The Third District re-affirmed that holding in a decision issued just last week, which quoted the exact same language from *Perez* that appears in the block text above. *Sotolongo v. SafePoint Ins. Co.*, __ So. 3d __, 2024 WL 4610486, *1 (Fla. 3d DCA Oct. 30, 2024).⁴

Thus, although the expert in *Perez* personally inspected the property and made detailed observations of the conditions he observed, the Third District made clear that the problem was with the ***timing*** of that inspection and the ***intervening repairs***. This case is even more compelling than *Perez*. While both cases involve intervening repairs and a similar lapse in time between the hurricane and inspection (approximately three years), Mr. Money did not

⁴ Counsel for the plaintiffs in *Sotolongo* are the same attorneys who represent the Garcias in this case.

personally inspect Plaintiffs' property, instead relying on the Master Claims photographs, none of which even depict Plaintiffs' roof.

Several federal courts applying Florida law also have affirmed summary judgments for insurers in late notice cases after concluding that the insureds' opposing affidavits lacked sufficient evidentiary support. In *Lehrfield v. Liberty Mut. Fire Ins. Co.*, the insured opposed the insurer's summary judgment motion with an affidavit from her public adjuster that stated "had an inspection taken place closer to the occurrence of the loss, nothing materially different would have been revealed than what was seen by [Liberty Mutual's] field adjuster." 396 F. Supp. 3d 1178, 1184 (S.D. Fla. 2019) (brackets in original). The district judge rejected the affidavit as incompetent for summary judgment purposes and stated:

The problem with this conclusion is that it's not based in fact; indeed, the Lehrfields did not seek [the public adjuster] Koots' assistance with the Claim until December 2017—eight months after the loss occurred. Without knowledge of the nature of the Property in April 2017, Koots cannot factually opine as to what Liberty Mutual would have discovered had it investigated the Property at that time. Because Koots' declaration is conclusory and not based on personal knowledge, it is not admissible at summary judgment as evidence of the condition of the Property in April 2017.

Id. (internal record citation omitted). At least two other federal district judges have applied the same analysis as the courts in *Perez* and *Lehrfield* to find the insureds' expert affidavits incompetent evidence to oppose summary judgment.

In *Garcia v. Scottsdale Ins. Co.*, the insured reported a Hurricane Irma claim in May 2020, about two years and eight months after the storm. 2022 WL 4594121, *1 (S.D. Fla. Aug. 18, 2022). The insured opposed summary judgment with an affidavit from her expert, who “never physically inspected the Property” and whose “opinion was based solely on Plaintiff’s statements, photographs taken in 2020 and 2021, and aerial satellite imagery.” *Id.* at *4. Citing the Third District’s holding in *Perez*, the federal district judge found the insured’s expert’s affidavit insufficient to defeat summary judgment, and stated:

Plainly [the expert’s] opinion is conclusory in nature and made without any personal knowledge of the condition of the Property in the immediate aftermath of Hurricane Irma. Under similar circumstances, numerous Florida and federal courts have held that an inspector’s affidavit cannot rebut the presumption that the insurer was prejudiced by the late notice of the claim where the inspector’s opinion is based on an investigation conducted years after the alleged date of loss, especially where the

investigation is conducted after repairs have been made.

Id. (collecting cases).

Likewise, in *Hemingway Villa Condo. Owners Ass'n, Inc. v. Scottsdale Ins. Co.*, 2021 WL 7541799 (S.D. Fla. Aug. 19, 2021), the court rejected the affidavits of the insured's two experts where "over one thousand (1,000) days elapsed between the date of the alleged loss and the first instance in which one of Plaintiff's experts personally observed the condition of the property." *Id.* at *7. On those facts, the district judge found that the experts "have no personal knowledge as to the condition of the Property in the immediate aftermath of Hurricane Irma" and, accordingly, "[w]ithout personal knowledge, [the experts'] assertions that hurricane damage remains constant are conclusory and do not create a genuine issue of material fact in this case." *Id.* at *8.

Finally, the Initial Brief argues repeatedly that "neither the Federal nor State rules require...photographs relied on by an expert to be attached to his or her affidavit." (Initial Br. at 11; *see also id.* at 14 ("there is no pleading requirement for affidavits that suggest that such documents must be attached to the affidavit")). That may be

true, but it misses the point. As the authorities discussed above make clear, it is not the failure to attach photographs that dooms the Money Affidavit. Instead, it is the fact that the evidence he relied upon, whether attached to his affidavit or not, does not provide the required factual basis to support his opinions. That is, photos taken in September 2020—more than three years after Hurricane Irma and after Plaintiffs had made extensive repairs to their roof, including completely resurfacing the flat roof—do not give him personal knowledge of the condition of Plaintiffs’ property in the immediate aftermath of Hurricane Irma.

Based on the above, the trial court correctly rejected the Money Affidavit as insufficient to oppose summary judgment.

B. The Money Affidavit only discusses causation and does not even attempt to rebut the prejudice to State Farm’s ability to evaluate the extent of Plaintiffs’ claimed loss

Even if the Court were to find that the Money Affidavit was competent evidence that should have been considered on summary judgment, the **substance** of the affidavit does not support denial of summary judgment. Assuming, *arguendo*, that it was competent evidence, the Money Affidavit only addresses the issue of whether

State Farm was prejudiced in determining the cause of Plaintiffs' loss. It does not even attempt to rebut the prejudice as it relates to State Farm's ability to determine the extent of the covered loss—a task that was hopelessly foiled by Plaintiffs' intervening roof repairs and the intermittent leaks over the years that continued to cause water damage due to Plaintiffs' failure to tarp the roof.

As this Court has recognized, an insured's untimely notice of a claim can prejudice the insurer in its ability to determine both the cause of the loss as well as the extent of the loss. *See De La Rosa*, 246 So. 3d at 442 (“[E]ven though there may be disputed issues of fact as to whether the insurer was prejudiced in determining the **cause** of the loss, the facts, even as presented by the insured's adjuster and engineer, show that the insurer would be prejudiced by the passage of time in investigating the **extent** of the loss, and thus, the cost of repair.”) (emphases in original). *See also Adderly v. Hartford Ins. Co. of the Midwest*, 2020 WL 4915575, *4 (S.D. Fla. Aug. 21, 2020) (“Although Plaintiff established a disputed issue of fact with respect to the cause of the damage, Plaintiff offers no evidence to rebut that Defendant was prejudiced by a delay in investigating the

claim because it would not be able to determine the damage immediately following the incident.”) (citing *De La Rosa*).

Where there have been intervening repairs, the prejudice to the insurer’s ability to evaluate the extent of covered damage (and the attendant cost of making covered repairs) is even more apparent. See *Yacht Club on the Intracoastal Condo. Ass’n, Inc. v. Lexington Ins. Co.*, 599 F. App’x 875, 881 (11th Cir. 2015) (“Moreover, the Yacht Club undertook certain repairs before filing a claim with Lexington. Lexington was prejudiced by not being able to investigate prior to those repairs and by not participating in the repair of those damages.”); *Hemingway Villa*, 2021 WL 7540799, at *8 (“Additionally, the evidence in the record shows that the intervening repairs have complicated Defendant’s ability to evaluate the damages. There can be no doubt that conclusions regarding the evidence could have been reached more easily but for Plaintiff’s substantial delays in reporting its loss to Defendant.”).

Here, the Money Affidavit only attempted to rebut the prejudice concerning causation. (See R. 904 at ¶ 16/Appx. 25 at ¶ 16 (opining the “documented damage to the subject roof covering was caused by wind borne debris impacts and uplift pressures associated with the

weather event on or about [September 10, 2017”]; R. 905 at ¶ 17/Appx. 26 at ¶ 17 (opining “no better conclusions, other than that this damage was wind induced, could have been drawn by an inspection that occurred after the date of loss and before that which occurred on September 29, 2020”). The Money Affidavit contains no discussion about the extent of the covered damage or whether State Farm’s ability to assess the covered damage was impacted by Plaintiffs’ three-year delay in reporting the claim.

And the Money Affidavit does not even mention the two significant roof repairs and, therefore, does not address their obvious impact on State Farm’s ability to determine the extent of any covered damage. To be clear, the aerial photos submitted by State Farm and the aerial photos attached to the Money Affidavit both showed that Plaintiffs completely re-surfaced the flat roof—*i.e.*, the portion directly above the Florida room where Plaintiffs reported interior damage in 2017 and 2020. (See R. 429-43/Appx. 6-20 (State Farm’s judicially-noticed aerial photos); R. 932-36/Appx. 53-57 (aerial photos attached to the Money Affidavit)). Yet, the Money Affidavit is silent as to whether those repairs impacted State Farm’s ability to

evaluate the claimed damage to the roof and to the interior of the house directly below the flat roof repair.

In short, it was Plaintiffs' burden to show that there was no prejudice to State Farm's ability to determine both the cause **and extent** of the loss. The Money Affidavit addressed only the former and ignored the latter. Because Plaintiffs have failed to introduce evidence that would create an issue of material fact concerning prejudice, the summary judgment should stand.

CONCLUSION

For all the reasons stated above, this Court should affirm the final summary judgment in favor of State Farm.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby respectfully certifies that the foregoing Answer Brief complies with Fla. R. App. P. 9.210 and has been typed in Bookman Old Style 14-point font. This brief contains 7,961 words.

_____/s/ Paulo R. Lima