

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

SHILOH CHRISTIAN CENTER,

Plaintiff,

v.

CIVIL ACTION: 6:20-cv-01774-CEM-LRH

ASPEN SPECIALTY INSURANCE  
COMPANY,

Defendant.

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**MOTION OF PLAINTIFF SHILOH CHRISTIAN CENTER FOR SUMMARY  
JUDGMENT**

Plaintiff, SHILOH CHRISTIAN CENTER (“Plaintiff” or “SHILOH”) pursuant to Federal Rule of Civil Procedure 56(a), moves this Court for entry of summary judgment as to coverage for damage caused by wind and rain during a hurricane. Plaintiff also moves for summary judgment as to the damages. In support of its Motion for Summary Judgment, Plaintiff relies upon the following:

1. The transcript of the deposition of John McGowan, Defendant’s corporate representative for the Hurricane Matthew claim and the exhibits thereto, attached to this motion as Exhibit A;
2. The transcript of the deposition of Linda Noonan, Defendant’s corporate representative for the Hurricane Irma claim is attached to this motion as Exhibit B;
3. The affidavit of meteorologist Glenn Richards, and the exhibits thereto, attached to this motion as Exhibit C;

4. The transcript of the deposition of Plaintiff's maintenance person Bufus Jefferson, attached to this motion as Exhibit D;

5. The affidavit of Plaintiff's representative, Senior Pastor Jacquelyn D. Gordon, attached to this motion as Exhibit E;

6. The affidavit of Plaintiff's Public Adjuster, Jeremy Dragon, attached to this motion as Exhibit F;

7. The affidavit of Independent Adjuster James Purcell, and the exhibits thereto, attached to this motion as Exhibit G;

8. The affidavit of engineer Freddy M. Andrade, and the exhibits thereto, attached to this motion as Exhibit H;

9. The transcript of the deposition of Steve Heidt, Defendant's adjuster, and the exhibits thereto, attached to this motion as Exhibit I;

10. The transcript of the deposition of Craig Kidder, Defendant's adjuster, and the exhibits thereto, attached to this motion as Exhibit J.

11. Defendant's response to request for admissions and the subject email are attached to this motion as Exhibit K.

**STATEMENT OF PLAINTIFF'S MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE FOR TRIAL**

**A. HURRICANE MATTHEW POLICY**

1. John McGowan appeared as Defendant's corporate representative for the Hurricane Matthew Claim and identified a true and accurate copy of the policy issued by Defendant to Plaintiff. (Ex. A, McGowan Depo. 11:1-20).

2. The policy was in effect from February 21, 2016 through February 21, 2017. (Ex. A, McGowan Depo. 11:5-8).

3. The policy contains the Causes of Loss Special Form CP 10 30 (04 02). (Ex. A, McGowan Depo., Ex. 2 page 5 of 56). This provision provides that:

**CAUSES OF LOSS – SPECIAL FORM**

**A. Covered Causes of Loss**

When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:

1. Excluded in Section **B.**, Exclusions; or
  2. Limited in Section **C.**, Limitations;
- that follow. (Ex. A, McGowan Depo., Ex. 2 page 42 of 56).

4. “Special” is also shown in the Declarations, which identifies the “Covered Cause of Loss” as “Special”. (Ex. A, McGowan Depo., Ex. 2 page 8 of 56). The Causes of Loss Special Form is also specifically listed as an applicable form. (Ex. A, McGowan Depo., Ex. 2 page 5 of 56).

5. Pursuant to this Endorsement, any “Direct Physical Loss” is covered unless excluded in Section B. (Ex. A, McGowan Depo., Ex. 2 page 42 of 56). No exclusions contained in Section B exclude wind damage or rain that results in water damage. (Ex. A, McGowan Depo., Ex. 2 pages 42-46 of 56).

6. There is no exclusion in the policy for wind and no exclusion for a “Named Windstorm”. (Ex. A, McGowan Depo., Ex. 2 page 5 of 56).

7. The policy’s exclusion for water includes only surface water and does not exclude water damage to the building caused by rain. (Ex. A, McGowan Depo., Ex.

2 page 43 of 56). Damage from rain is only excluded as to “personal property in the open.” (Ex. A, McGowan Depo., Ex. 2 page 44 of 56).

8. Prior to Hurricane Matthew, Defendant inspected the property on March 8, 2016. (Ex. A, McGowan Depo., Ex. 3 page 1 of 25).

9. The insured property is a religious organization serving the local community and was established on January 5, 1997, under the leadership of Senior Pastor Jacquelyn D. Gordon and husband, Haywood Gordon. (Ex. A, McGowan Depo., Ex. 3 page 3 of 25).

10. Defendant’s March 8, 2016 inspection produced a report that identified the condition of the property as “satisfactory” and Defendant specifically determined that the “roof was serviceable” and there were “no leaks on the inside.” (Ex. A, McGowan Depo., Ex. 3 page 4 of 25).

**B. HURRICANE MATTHEW CLAIM**

11. After Defendant’s issuance of the policy on February 21, 2016, and after Defendant’s inspection on March 8, 2016, the property was impacted by Hurricane Matthew. Hurricane Matthew impacted the property on October 6-7, 2016, with winds of 62 mph – 82 mph and 4.72” inches of rain. (Ex. C, Richards Aff. ¶¶ 5-6).

12. Bufus Jefferson has been Plaintiff’s maintenance person for thirteen years and was responsible for the insured property since it was purchased. (Ex. D, Jefferson Depo. 8:2-9:21). Bufus Jefferson has been in construction for over fifty years, beginning when he was fifteen years old. (Ex. D, Jefferson Depo. 10:19-25).

13. Bufus Jefferson maintained the property and there were no roof leaks prior to Hurricane Mathew. (Ex. D, Jefferson Depo. 44:12-17).

14. During Hurricane Matthew approximately forty people stayed at the property for shelter. (Ex. D, Jefferson Depo. 14:1-9; 30:5-14).

15. Bufus Jefferson was at the property during Hurricane Matthew and observed a lot of rain and wind damage. (Ex. D, Jefferson Depo. 31:2-11).

16. After the storm passed, Bufus Jefferson went on the roof and observed a large portion of the roof folded back which allowed the water intrusion. (Ex. D, Jefferson Depo. 39:9-40:13). The portion of the roof that was pulled back was four feet wide and fifty feet long and wind from Hurricane Matthew caused it to lift up and flip over. (Ex. D, Jefferson Depo. 41:9-12; 42:9-43:7).

17. Bufus Jefferson determined that when the wind blew the large roof piece lifted up which also caused seams in several other parts of the roof. (Ex. D, Jefferson Depo. 42:17-43:2).

18. Bufus Jefferson performed a roof repair after Hurricane Matthew by folding the roof piece back and sealing it with roof cement. (Ex. D, Jefferson Depo. 40:24-41:12).

19. Bufus Jefferson detailed the interior water damage caused by Hurricane Matthew. (Ex. D, Jefferson Depo. 32:1-34:12; 37:23-39:8)

20. On October 11, 2016, Defendant received notice of the claim for roof and interior water damage reportedly caused by Hurricane Matthew. (Ex. A, McGowan

Depo. 12:9-13:4). The claim was reported as water damage to ceilings, walls and flooring. (Ex. A, McGowan Depo., Ex. 4 page 4 of 18).

21. Defendant assigned Claim Number PR1670020569 to the claim and assigned Steve Heidt of Associated Claims Management as the adjuster. (Ex. A, McGowan Depo. 13:4-19).

22. Defendant had Steve Heidt inspect the property and an inspection occurred on October 14, 2016. (Ex. A, McGowan Depo. 16:23-17:1).

23. Steve Heidt performed a coverage analysis in his October 25, 2016 report which he sent to Defendant's adjuster, Kevin Igoe. (Ex. A, McGowan Depo., Ex. 4, pages 1-3 of 18).

24. Steve Heidt's report acknowledged that the policy includes the Causes of Loss Special Form CP 10 30 (04 02). (Ex. A, McGowan Depo., Ex. 4, page 1 of 18).

25. Steve Heidt's report stated that "coverage concerns were noted early in the claim evaluation" because "policy declarations speak to deductibles with regard to wind/hail excluding named windstorm." (Ex. A, McGowan Depo., Ex. 4, page 3 of 18).

26. Steve Heidt's report stated there were "ambiguities at hand" which required looking outside the policy and to a certificate of property insurance obtained from the agent. (Ex. A, McGowan Depo., Ex. 4, page 3 of 18).

27. When Steve Heidt appeared for a deposition, he was shown the policy and conceded that the policy does not contain a Named Windstorm exclusion at all. (Ex. I. Heidt Depo. page 40:22-41:3; 42:10-14).

28. On October 25, 2016, Defendant denied the claim. (Ex. A, McGowan Depo. 22:9-12). The denial letter effectively admitted that the policy provides coverage for interior damage caused by rain when wind first damages the building. The denial letter cited an exclusion for rain damaging the interior of the building unless the building first sustains damage by a Covered Cause of Loss to roofs or walls. (Ex. A, McGowan Depo., Ex. 4, page 5 of 18). Then, Defendant identified wind damage as such a covered loss by stating:

The above policy language indicates that the policy would not provide coverage for any type of interior damage without the building first sustaining damage from a covered cause of loss. As previously stated, there was no wind damage observed to the building or roof covering; as such the policy would not provide any coverage for any interior damage. (Ex. A, McGowan Depo., Ex. 4, page 5 of 18).

29. Defendant's claim denial claimed that the policy "excluded named windstorm as a covered peril." (Ex. A, McGowan Depo. 26:25-28:18 and Ex. 4, pages 4-6 of 18). Defendant's denial letter did not cite any purported policy exclusion or endorsement that excluded coverage for "a named windstorm." (Ex. A, McGowan Depo. 26:25-28:18 and Ex. 4, pages 4-6 of 18).

30. The policy did not actually contain an exclusion for "a named windstorm." (Ex. A, McGowan Depo. 26:25-28:18 and Ex. 4, pages 4-6 of 18).

31. The only portion of the policy Defendant could point to in support of the claim that "a named windstorm" was excluded by the policy was a reference to the deductible on the declaration page. (Ex. A, McGowan Depo. 27:9-28:10). This portion of the declaration page states:

**DEDUCTIBLE:** \$5,000 Per Occurrence, except; \$25,000 Per Occurrence as respects Wind and/or Hail (excluding Named Windstorm) (Ex. A, McGowan Depo., Ex. 2 page 9 of 56).

32. Contrary to Defendant's position, there is no "Named Windstorm" exclusion in the actual policy. Additionally, provisions that are in the policy, such as the Causes of Loss Special Form CP 10 30 (04 02) specifically provide coverage for damage caused by wind and water damage from rain. Further, Defendant's reference to the statement of the deductible on the declarations page is not helpful to Defendant's position, since the statement indicates that there is coverage for damage caused by wind but at an increased deductible of \$25,000 applies.

33. The policy does not define Named Windstorm or contain any exclusion for damage caused by a Named Windstorm.

34. The policy also does not rectify how there can possibly be coverage for wind from a windstorm but no coverage for wind from a Named Windstorm.

35. The policy also does not exclude water damage caused by rain or make any reference to water damage occurring during a Named Windstorm somehow being excluded.

**C. HURRICANE IRMA POLICY**

36. Linda Noonan appeared as the corporate representative for Defendant for the Hurricane Irma claim. (Ex. B, Noonan Depo. 5:21-25).

37. Defendant issued an insurance policy with effective dates of coverage from February 21, 2017 through February 21, 2018. (Ex. J, Kidder Depo. Ex. 2).



38. The Hurricane Irma policy also contained the Causes of Loss Special Form CP 10 30 (04 02). (Ex. J, Kidder Depo., Ex. 2 pages 5 and 43 of 59).

39. The policy also did not contain a “Named Windstorm” exclusion. (Ex. J, Kidder Depo., Ex. 2 page 5 of 59).

40. In fact, the policy did not even contain the term “Named Windstorm” when referncing the deductible, which was contained in the Hurricane Matthew policy when referencing the deductible. (Ex. J, Kidder Depo., Ex. 2 page 9 of 59). Instead, the deductible on the declaration page only states:

**DEDUCTIBLE:** \$5,000 Per Occurrence, except; \$25,000 Per Occurrence as respects Wind and/or Hail (Ex. J, Kidder Depo., Ex. 2 page 9 of 59).

41. Thus, the policy in effect during Hurricane Irma specifically confirms there is coverage for damage caused by wind, subject to a deductible of \$25,000.

#### **D. HURRICANE IRMA CLAIM**

42. On September 10-11, 2017, the insured property was impacted by winds of 55 mph – 83 mph and 4.72” inches of rain. (Ex. C, Richards Aff. ¶¶7-8).

43. Bufus Jefferson inspected the property after Hurricane Irma. (Ex. D, Jefferson Depo. 50:7-21).

44. Areas of the roof that were repaired after Hurricane Matthew were damaged again by Hurricane Irma which created seams and holes in the roof that resulted in water damage from rain. (Ex. D, Jefferson Depo. 50:7-21).

45. Bufus Jefferson detailed the interior water damage caused by Hurricane Irma, including damages that did not occur after Hurricane Matthew. (Ex. D, Jefferson Depo. 56:7-66:5).

46. Plaintiff did not initially report the Hurricane Irma claim to Defendant, because after Hurricane Matthew Defendant misrepresented that the policy contained an exclusion for wind and water damage occurring during a hurricane. (Ex. E, Gordon Aff. ¶ 14).

47. On September 11, 2018, Defendant was provided notice of Hurricane Irma damages by a Public Adjuster. (Ex. F, Dragon Aff. ¶7).

48. Public Adjuster Jeremy Dragon performed an inspection in September 2018. (Ex. F, Dragon Aff. ¶ 5).

49. Jeremy Dragon also attended an inspection with Defendant's adjuster, and he produced documents requested by Defendant. (Ex. F, Dragon Aff. ¶¶ 6, 9).

50. An estimate dated September 26, 2018, was prepared in the total amount of \$4,077,362.55. (Ex. F, Dragon Aff. ¶ 8).

51. Jeremy Dragon never represented to Defendant that the estimate prepared did not also include repairs needed as a result of Hurricane Matthew. (Ex. F, Dragon Aff. ¶ 10).

52. Jeremy Dragon attempted to obtain documents related to the Hurricane Matthew claim but did not have access to the documents in Defendant's possession such as photographs taken after Hurricane Matthew. Thus, the estimate prepared

included repairs needed for the damages present during the inspections performed after Hurricane Irma. (Ex. F, Dragon Aff. ¶¶ 8, 12).

53. Defendant assigned the claim to Craig Kidder of Associated Claims Management. (Ex. B, Noonan Depo. 13:16-17). Craig Kidder sent Linda Noonan a first report on December 28, 2018. (Ex. J, Kidder Depo., Ex. 4 pages 1-4 of 72). The report acknowledged that the policy includes the Causes of Loss Special Form CP 10 30 (04 02). (Ex. J, Kidder Depo., Ex. 4 pages 1 of 72). The report stated:

All losses are subject to a \$5,000.00 deductible with the exception of wind/hail which is \$25,000; Previous versions of this policy have listed wind/hail and the policy has contained the contract Named Windstorm exclusion which is still currently listed in the application and signed binder. It appears to have been inadvertently left off of our copy. We seek clarification and the correct policy for this insured. (Ex. J, Kidder Depo., Ex. 4 pages 1 of 72).

54. The report identified “conflicting coverage wording” between the binder which referenced a Named Windstorm exclusion and the policy which does not contain such an exclusion. (Ex. J, Kidder Depo., Ex. 4 page 2 of 72). The report also identified ambiguities in the policy and stated:

As previously stated, coverage concerns were noted early in the claim evaluation. The policy declarations speak to deductibles with regard to wind/hail. With ambiguities at hand, the agent provided a certificate of property insurance which clearly states the peril of named windstorm is excluded for this location. However, this is not stated on the policy. (Ex. J, Kidder Depo., Ex. 4 page 3 of 72).

55. On January 16, 2019, Linda Noonan sent an internal email which stated: “After reviewing the current policy, it appears the (excluding Named Windstorm)

language was inadvertently left off the policy declarations when the policy was issued.” (Ex. K, Defendant’s response to Request for Admissions ¶ 4). Linda Noonan asked if the policy was revised and asked if a revised policy would be issued to the insured. (Ex. K, Defendant’s response to Request for Admissions ¶ 4).

56. Defendant took no action to correct the alleged error in the policy, did not revise the policy and did not advise Plaintiff of the alleged error.

57. On February 28, 2019, Defendant sent a denial letter. (Ex. J, Kidder Depo., Ex. 6 page 5 of 72). The denial letter represented that “this policy specifically excludes Named Windstorm as a covered peril.” (Ex. J, Kidder Depo., Ex. 6 page 7 of 72).

58. Contrary to the alleged and uncited exclusion for Named Windstorm, the denial letter effectively admitted that the policy provides coverage for interior damage caused by rain when wind first damages the building. (Ex. J, Kidder Depo., Ex. 6 page 7 of 72). The denial letter cited an exclusion for rain damaging the interior of the building unless the building first sustains damage by a Covered Cause of Loss to roofs or walls. Then, Defendant identified wind damage as such a covered loss by stating:

The above policy language indicates that the policy would not provide coverage for any type of interior damage without the building first sustaining damage from a covered cause of loss. As previously stated, there was no wind damage observed to the building or roof covering; as such the policy would not provide any coverage for any interior damage. (Ex. J, Kidder Depo., Ex. 6 page 7 of 72).

59. When Defendant denied the claim, it was aware that a Named Windstorm exclusion was not actually in the policy, but this was not mentioned in the

denial letter. Defendant was also aware that ambiguities existed, including between the policy and the binder but this was not mentioned in the denial letter. Further, Defendant did not mention that the policy's deductible removed the reference to Named Windstorm and only stated "\$25,000 Per Occurrence as respects Wind and/or Hail."

60. Craig Kidder sent Linda Noonan a third report on March 1, 2019. (Ex. J, Kidder Depo., Ex. 6 page 1 of 72). This report stated:

All covered losses are subject to a \$5,000.00 deductible, with the exception of wind/hail, which is \$25,000 per occurrence. Named Windstorm has been excluded on binders and applications for each policy period. We have noted that the term "(excluding Named Windstorm)" was included in the declarations page originally, but those words were left off this specific policy period, apparently by oversight. (Ex. J, Kidder Depo., Ex. 6 page 1 of 72).

**E. LAWSUIT**

61. On September 1, 2020, Plaintiff filed a lawsuit that included Count I Petition for Declaratory Relief seeking a declaration that Defendant's attempt to exclude damages with a purported Named Windstorm exclusion is improper and that Defendant must provide coverage for damage caused by Hurricane Matthew and Hurricane Irma. (D.E. 1, Complaint and Notice of Removal, Attachment 2).

62. Count II and Count III alleged breach of contract as to the claims for Hurricane Matthew and Hurricane Irma. (D.E. 1, Complaint and Notice of Removal, Attachment 2).

63. After the lawsuit was filed, Defendant produced documents including reports and photographs obtained shortly before Hurricane Matthew, and photographs and videos taken shortly after Hurricane Matthew.

64. Plaintiff hired James Purcell who reviewed the documents produced by Defendant. (Ex. G, Purcell Aff. ¶ 8). James Purcell also performed an inspection and walked the property with the maintenance person, Bufus Jefferson. (Ex. G, Purcell Aff. ¶ 6).

65. James Purcell opined that the estimated cost of reasonable and necessary repairs total \$364,304.96 for Hurricane Matthew and \$1,904,664.84 for Hurricane Irma. (Ex. G, Purcell Aff. ¶¶ 9-10).

66. Plaintiff also retained engineer Freddy Andrade, who reviewed the documents produced by Defendant, weather information and performed an inspection. (Ex. H, Andrade Aff. ¶ 6).

67. Freddy Andrade opined that the roofing system sustained wind damage caused by Hurricane Matthew which was exacerbated by Hurricane Irma and that the significant and widespread roof damage requires that the roofing system be replaced. (Ex. H, Andrade Aff. ¶ 7).

68. Freddy M. Andrade also opined that the interior water damage was caused by roof penetrations which were storm induced openings in the building envelope. (Ex. H, Andrade Aff. ¶ 8).

## MEMORANDUM OF LAW

### **I. OVERVIEW**

First, whether the policies provide coverage for damage caused by wind and rain during Hurricane Matthew and Hurricane Irma is an issue of law to be resolved by summary judgment. Plaintiff is entitled to summary judgment as to coverage because the policy provides coverage and the policy controls over anything purportedly to the contrary. Further, Defendant's attempts to rely on documents outside the policy creates an ambiguity that further requires a finding of coverage.

Second, in this particular case, Plaintiff is also entitled to summary judgment as to damages. Defendant misrepresented that there was a Named Windstorm exclusion in the policy and then denied the claims with essentially no investigation. In doing so, Defendant overlooked insurmountable evidence, such as Defendant's own inspection prior to Hurricane Matthew which confirmed there was no preexisting damage and Defendant overlooked eyewitness testimony from Plaintiff's maintenance person establishing covered damage to the roof and interior water damage from rain through the wind created opening. Defendant cannot satisfy its burden for the affirmative defenses raised and Plaintiff is also entitled to summary judgment as to damages.

### **II. ARGUMENT AND CITATION OF AUTHORITY**

#### **A. STANDARD ON MOTION FOR SUMMARY JUDGMENT**

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “Summary judgment is particularly suited to cases of insurance coverage because the interpretation of a written contract is a matter of law to be decided by the court.” *Int’l Ship Repair & Marine Servs., Inc. v. N. Assur. Co. of Am.*, 2011 WL 5877505, at 4 (M.D. Fla. 2011). Federal Rule of Civil Procedure 56 (a) states:

Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

**B. SUMMARY JUDGMENT AS TO COVERAGE FOR INTERIOR DAMAGE**

Plaintiff is entitled to partial summary judgment, or the requested declaration, as to the availability of coverage for interior water damage caused by rain. When Plaintiff reported the claim after Hurricane Matthew it was reported as interior water damage from the roof. The policy undeniably provides coverage for interior damage caused by rain, if the roof is first damaged by wind and the rain then enters through the roof. The fact that this damage occurred is undisputed, including through the testimony of Plaintiff’s maintenance person. Defendant’s denial letter conceded that this coverage for the interior exists, but wrongfully denied the claim anyway. Summary Judgment should be granted finding the availability of coverage for interior damage.



**C. SUMMARY JUDGMENT AS TO COVERAGE FOR ALL DAMAGES**

Plaintiff is also entitled to partial summary judgment, or the requested declaration, finding that both the Hurricane Matthew and Hurricane Irma policies cover damage caused by wind and also water damage caused by rain. It is undisputed that the insurance policies do not include an exclusion for damage caused by a Named Windstorm. Instead, the policies actually cover a direct physical loss, which includes damage caused by wind and interior water damage caused by rain. Pursuant to the terms of the insurance policy, damages proven to be caused by wind and rain during Hurricane Matthew and Hurricane Irma are covered.

Defendant's reliance on the insurance application or binder to argue there is a Named Windstorm exclusion is erroneous. "It is '[h]ornbook insurance law that a binder merges into the subsequently issued policy so that the terms and conditions of the policy, in case of conflict or ambiguity, are controlling.'" *King v. Allstate Ins. Co.*, 906 F.2d 1537 (1990). When there is a conflict between an insurance application and the insurance policy, the terms of the insurance policy control. *Padgett v. Horace-Mann Ins. Co.*, 704 So. 2d 627 (Fla. 1st DCA 1997); *State Farm Mut. Auto. Ins. Co. v. Mallard*, 548 So. 2d 733 (Fla. 3d DCA 1989); *Quick v. National Indem. Co.*, 231 So. 2d 22 (Fla. 4th DCA 1970); *Mathews v. Ranger Ins. Co.*, 281 So. 2d 345 (Fla. 1973). The policy provides coverage for a direct loss and there is not a Named Windstorm exclusion in the policy. The policy controls over anything to the contrary and Plaintiff is entitled to summary judgment as to coverage.

Defendant's reliance on a statement in the declaration page for the deductible is also futile. As to the Hurricane Irma policy, Defendant cannot even rely on the deductible provision in the declaration page because Defendant removed the reference to Named Windstorm from the deductible section in the declarations page when it issued the policy. Thus, the Hurricane Irma declaration page only confirms that there is coverage for wind, subject to an increased deductible of \$25,000.

Defendant's reliance on the deductible referenced in the declaration page in the Hurricane Matthew policy is also erroneous. The terms of an endorsement control over anything purportedly to the contrary in any other insuring agreement, and to the extent that an insurance policy endorsement is inconsistent with the body of the policy, the endorsement controls. *Fireman's Fund Ins. Co. v. Levine & Partners, P.A.*, 848 So. 2d 1186 (Fla. 3d DCA 2003); *GEICO Marine Insurance Company v. Shackelford*, 316 F. Supp. 3d 1365 (M.D. Fla. 2018); *Keenan Hopkins Schmidt and Stowell Contractors, Inc. v. Continental Cas. Co.*, 653 F. Supp. 2d 1255 (M.D. Fla. 2009). Here, the body of the policy contains the Causes of Loss Special Form CP 10 30 (04 02) and this endorsement controls over the purportedly inconsistent statement in the declarations page referencing the deductible.

Defendant's reliance on the declaration page in the Hurricane Matthew policy is also improper because it is ambiguous. If considered, this statement in the declarations page states: DEDUCTIBLE: \$5,000 Per Occurrence, except; \$25,000 Per Occurrence as respects Wind and/or Hail (excluding Named Windstorm). This statement actually confirms that the policy covers damage caused by wind subject to

an increased deductible of \$25,000. According to Defendant, the statement then goes on to contrarily exclude damage caused by wind during a Named Windstorm. This contradiction creates an ambiguity. An ambiguity is also created because Defendant does not define what constitutes a Named Windstorm. Nor does Defendant state that water damage is excluded or state that rain resulting in damage during a Named Windstorm is somehow excluded. Where the terms of a binder are ambiguous, it is to be construed against the insurer and in favor of the insured. *Medley Warehouses, LC v. Scottsdale Ins. Co.*, 39 So. 3d 440 (Fla. 3d DCA 2010). Where an insurance contract consists of a master policy and certificate of insurance, ambiguities between the two are to be construed as including coverage, and, if the coverage language in a master policy is not recited in a certificate of insurance, an ambiguity is created which must be resolved in the manner that provides the broadest coverage. *Davis v. Crown Life Ins. Co.*, 696 F.2d 1343 (11th Cir. 1983); *Rucks v. Old Republic Life Ins. Co.*, 345 So. 2d 795 (Fla. 4th DCA 1977). Here, the broadest coverage includes damage caused by wind and rain and summary judgment should be granted.

**D. SUMMARY JUDGMENT AS TO DAMAGES**

The Hurricane Matthew policy went into effect on February 21, 2016, and on March 8, 2016, Defendant inspected the property and confirmed the roof was serviceable and had no roof leaks. On October 6, 2016, Hurricane Matthew impacted the property with high winds and heavy rain. Like Defendant, Plaintiff's maintenance person also established that the claimed damage did not exist prior to Hurricane Matthew. Plaintiff's maintenance person was at the storm during Hurricane Matthew

and observed substantial water intrusion during the storm. After the storm an inspection of the roof revealed a four feet wide and fifty feet long piece of the roof that was peeled back by the wind which allowed the water intrusion during the storm. Defendant inspected the property on October 14, 2016 and photographed the extensive interior water damage. According to James Purcell's estimate, the Hurricane Matthew damages total \$364,304.96, which includes roof repairs for \$27,444.67 and interior repairs for \$248,142.71.

A comparison of Defendant's photographs after Hurricane Matthew with photographs after Hurricane Irma establish that additional damage that occurred. After Hurricane Irma the maintenance person, Bufus Jefferson, inspected the roof and identified seams and holes in the roof that resulted in water intrusion from rain. Hurricane Irma exacerbated the damages and caused additional damages which total \$1,907,664.84. This includes \$669,540.97 for replacement of the roof which needs to be replaced. It also includes \$881,996.18 for interior water damages that need to be repaired.

The property did not have roof leaks or interior water damage prior to Hurricane Matthew. The only potential factual issue as to damages would be whether the repairs are necessary solely because of Hurricane Matthew or also because of Hurricane Irma. However, this is of no consequence because Defendant insured the property during both hurricanes. Further, the majority of the damages, such as replacement of the roof, are claimed under Hurricane Irma which subsequently caused further damage. Wind and rain from Hurricane Irma that combines with other causes

to create a loss is covered. *Sebo v. American Home Assurance Co., Inc.*, 208 So. 3d 694 (2016)(rainwater and hurricane winds that combine with an excluded cause such as defective construction to cause the damage is covered). Thus, the damage from Hurricane Irma, including damage to areas of the roof that were repaired after Hurricane Matthew is covered.

**E. SUMMARY JUDGMENT ON DEFENDANT’S AFFIRMATIVE DEFENSES**

Defendant has the burden to prove its affirmative defenses. (D.E. 7). As set forth below, Defendant cannot do so. This is because the purported defenses are either deficient as a matter of law or because of Defendant’s erroneous denial and overlooking undisputed facts prevent Defendant from creating genuine issues of material fact.

**Affirmative Defense One – Notice of the Claim**

Defendant does not assert late notice as to the Hurricane Matthew claim. Thus, this defense cannot preclude Plaintiff’s recovery of \$364,304.96 for Hurricane Matthew damages. As to Hurricane Irma, Plaintiff is entitled to summary judgment because the reason for the notice was based on Defendant’s prior misrepresentation and the explanation for the late notice is objectively reasonable. Defendant’s defense is further deficient because it was not prejudiced by the purported late notice. Defendant’s denial of the claim also defeats this purported defense. “Where an insurer unconditionally denies liability, it waives all policy provisions governing notification of loss, proof of loss, and payment of premiums.” *Nu-Air Mfg. Co. v. Frank B. Hall & Co. of New York*, 822 F.2d 987, 993 (11th Cir. 1987). On February 28, 2019, Defendant

denied the claim stating there was “lack of coverage for damage due to named windstorm on this policy.” Defendant knew that there was no such Named Windstorm exclusion and also knew that it removed reference to a Named Windstorm in the deductible provision and Defendant’s denial precludes this purported defense.

Defendant references not receiving documents but does not identify any documents not produced. Thus, this purported defense is factually and legally insufficient because it is not stated with the requisite specificity. Defendant’s defense is further deficient because it was not prejudiced by not receiving the purported documents. Further, Defendant’s denial of the claim also precludes this defense. *Id.*

#### **Affirmative Defense Two – Named Windstorm**

As set forth above, Plaintiff is entitled to summary judgment as to coverage and this purported affirmative defense cannot preclude summary judgment. There is no Named Windstorm exclusion in the policy. Instead, the policy specifically covers all direct physical loss, which includes damage caused by wind and interior water damage caused by rain.

#### **Affirmative Defense Three – Exclusions**

Defendant vaguely asserts policy exclusions related to the damage allegedly being long term damage and damage that predates the policies. This defense is meritless, since the policy was effective on February 21, 2016, and on March 8, 2016, Defendant inspected the property and confirmed the roof was serviceable and had no roof leaks. Defendant also cannot controvert the eyewitness testimony of Plaintiff’s

maintenance man who established that the roof and interior damage occurred after Hurricane Matthew and then additional damage occurred after Hurricane Irma.

The defense is also meritless because it is incorrectly cited by Defendant. The first provision under Exclusions does include anti-concurrent language by excluding damage “caused directly or indirectly” regardless of “any other cause or event that contributes concurrently or in any sequence to the loss.” Causes of Loss Special Form CP 10 30 (04 02) page 1 of 9. However, none of Defendant’s raised exclusions have this anti-concurrent language because it is removed prior to all of the exclusions. Causes of Loss Special Form CP 10 30 (04 02) page 2 of 9. Therefore, even if there was wear and tear or deterioration on the roof, wind combing with these excluded causes, or wind contributing to cause damage, or the openings in the roof, such as the large piece of the roof peeled back by wind is covered pursuant to the applicable concurrent cause doctrine. *Sebo*, 208 So. 3d 694.

#### **Affirmative Defense Four – Misrepresentation**

This defense solely asserts that a misrepresentation occurred by Plaintiff representing that Hurricane Matthew damage was caused by Hurricane Irma. This defense is meritless, as Plaintiff reported the claim immediately after Hurricane Matthew and showed Defendant the damage caused by Hurricane Matthew. When Defendant investigated the Hurricane Irma claim it was already aware of the prior Hurricane Matthew claim and there could not possibly have been a misrepresentation.

Additionally, Plaintiff and Plaintiff’s Public Adjuster never asserted that Hurricane Matthew did not contribute to require the repairs in the estimate prepared

after Hurricane Irma. The Public Adjuster's estimate represented repairs needed as of his inspection which was performed after Hurricane Irma. The Public Adjuster was not in possession of Defendant's photographs taken after Hurricane Matthew and, before the lawsuit was filed, was not in the same position as Defendant and not in possession of documents to decipher damages caused by Hurricane Matthew. Defendant was in possession of these documents. Once Defendant's documents were obtained in litigation, Plaintiff obtained estimates that deciphered repairs required because of Hurricane Matthew.

#### **Affirmative Defense Five – Coinsurance**

An insurer is required to plead a co-insurance clause as a defense. *Home Ins. Co., N. Y. v. Eisenson*, 181 F.2d 416, 418 (5th Cir. 1950). "The burden is upon the insurer to prove that the insured breached the co-insurance clause by failing to maintain insurance on the property to the extent required by the contract." § 220:13. Evidence; Burden of Proof, 15 Couch on Ins. § 220:13. Thus, Defendant has the burden to establish that Plaintiff breached the co-insurance clause and failed to maintain sufficient insurance and does not have sufficient evidence to do so. Defendant apparently did not perform a valuation when it inspected the property before insuring it or when adjusting the claims. The co-insurance clause involves a penalty or partial forfeiture. *English & Am. Ins. Co. v. Swain Groves, Inc.*, 218 So. 2d 453, 456 (Fla. 4th DCA 1969). Thus, the doctrines of implied waiver and estoppel may be asserted as a defense when an insurer seeks to impose a forfeiture." *Id.* at 457. Defendant has a long history of insuring the subject property and performing underwriting inspections.



Defendant never took issue with the insured amount and should also be deemed to have waived the ability to do so.

**Affirmative Defense Six – Mitigation**

Defendant has no evidence that a failure to mitigate resulted in additional damages that could have been avoided. To the contrary, it is established that there were no leaks prior to Hurricane Matthew and that the roof damage caused by Hurricane Matthew was promptly repaired.

**Affirmative Defense Seven – Deductibles**

Defendant's deductible provisions are ambiguous as set forth above. If applied, these provisions would only operate to reduce the recovery of each claim by \$25,000.

**Affirmative Defense Eight – Limitations**

There are no policy provisions cited or defenses raised, and this purported defense is deficient as a matter of law.

**III. CONCLUSION**

WHEREFORE, Plaintiff, SHILOH CHRISTIAN CENTER, respectfully requests that the Court enter an order granting summary judgment in its favor and a ruling that the policy provides coverage for damage caused by wind and rain during a windstorm and also find that Plaintiff is entitled to the damages as set forth herein.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via email to: Charles R. Rumbley, Esq., LOBMAN, CARNAHAN, BATT, ANGELLE & NADER, 400 Poydrass Street, Suite 2300, New Orleans, LA 70130 (crr@lcba-law.com; flservice@lcba-law.com) on October 28, 2021.

By: s/Matthew G. Struble

Matthew G. Struble, Esquire

Florida Bar No.: 77092

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