IN THE FIRST JUDICIAL CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

BAGELHEADS INC,

Plaintiff,

v. Case No.: 3:24-cv-00258-TKW-ZCB

INDIAN HARBOR INSURANCE COMPANY,

Defendant,
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED ON NOVEMBER 5, 2024

The Plaintiff, BAGELHEADS INC ("Plaintiff"), by and through the undersigned counsel, hereby responds to Defendant's, INDIAN HARBOR INSURANCE COMPANY (hereinafter "Defendant"), Motion for Summary Judgment filed on November 5, 2024, and in support, states the following:

BACKGROUND

1. On September 11, 2020, Plaintiff's property was damaged by Hurricane Sally.
2. On or about December 12, 2022, Defendant's Desk Adjuster acknowledged receipt of Plaintiff's estimate totaling $309,780.18.
3. On December 14, 2022, after several months of Pre-Suit Negotiations, Defendant filed a Notice of Intent to Litigate against Defendant with the Florida Department of Financial Services.
4. On April 19, 2024, Plaintiff filed a one-count Complaint against Defendant alleging breach of contract due to Defendant's underpayment of the Plaintiff's

Hurricane Sally claim.

5. On May 10, 2024, Defendant was served with the Complaint.
6. On June 7, 2024, Defendant moved this case to Federal Court.
7. On June 14, 2024, Defendant filed its Answer and Affirmative Defenses with an included Motion to Strike Plaintiff's Entitlement to Attorney Fees and Costs.
8. On June 17, 2024, the Court struck down the Defendant's Answer and Affirmative Defenses with an included Motion to Strike Plaintiff's Entitlement to Attorney Fees and Costs.
9. On June 17, 2024, Defendant filed its Answer and Affirmative Defenses.
10. On June 17, 2024, Defendant filed its Motion to Strike Plaintiff's Entitlement to Attorney Fees and Costs.
11. On July 3, 2024, the Court denied Defendant's Motion to Strike Plaintiff's Entitlement to Attorney Fees and Costs.
12. On August 12, 2024, Plaintiff served its Rule 26(a)(1) Disclosures.
13. On October 29, 2024, A Mediator was selected.
14. On November 5, 2024, Defendant filed its Motion for Final Summary Judgment.

UNDISPUTED FACTS

15. Defendant insured Plaintiff through insurance policy number UBP0005636-

03 (hereinafter the "Policy").

16. The Policy's effective dates were from August 28, 2020, to August 28, 2021.
17. The Policy insured Plaintiff's property (hereinafter the "Property"), located at 916 East Gregory Street, Pensacola, FL 32502.
18. The Property suffered a direct physical loss to the Property while the Policy was in effect.
19. Plaintiff reported the loss and the Defendant opened a claim and accepted coverage under claim number CLM0014305.
20. Defendant, pursuant to the Policy, paid $171,010.62 before suit was filed.
21. On September 30, 2024, Defendant designated Mr. Lynn Edwards as their expert and provided his estimate of damages and his curriculum vitae.

SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment as a matter of law "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." In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So. 3d 192 (Fla. 2020); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Furthermore, "A dispute of fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Hunter v. United States*, 825 Fed. Appx. 699, 701 (11th Cir. 2020). Summary Judgment for the moving party should be granted when the

evidence favoring the nonmoving party is "merely colorable, or is not significantly probative." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (internal citations omitted).

ARGUMENT

I. This Court Should Deny Defendant's Motion for Summary Judgment Because the Burden of Proof is on the Defendant to Prove a Lack of Coverage and Because Damages are Something only a Jury can Decide.

a. This Court should deny Defendant's Motion for Summary Judgment because the burden of proof is on the Defendant, not the Plaintiff, to prove that the loss the Property has suffered was not a covered cause of loss under the Policy and Defendant has not yet met that burden of proof.

An "all-risks" policy provides coverage for all losses not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. Meija v. Citizens Property Ins. Corp., 161 So. 3d 576, 577 (Fla. Dist. Ct. App. 2014); Hudson Prudential Prop & Cas. Ins. Co., 450 So. 2d 565, 568 (Fla. 2d DCA 1984); *See also* Sun Insurance Office Limited v. Clay, 133 So. 2d 735, 739 (Fla. 1961). The plaintiff in Meija had brought a breach of contract suit against her property insurance company. Meija, 161 So. 3d at 576. The Court in Meija found that the contract/policy underlying the dispute was an "all-risk" policy because the policy provided coverage for all losses not resulting from

misconduct or fraud unless the policy contained a specific provision expressly excluding the loss from coverage. Id. at 576.

Similarly to the policy found in Meija, which provided coverage for all losses not resulting from misconduct or fraud unless the policy contained an exclusion, the Policy in this case states in "SECTION I – PROPERTY," that:

> [Defendant] will pay for direct physical loss of or damage to Covered Property at the [Property] caused by or resulting from any Covered Cause of Loss.
>
> Policy Page 40, *See Policy attached hereto as Exhibit "A"*; Id. at 576.

The Policy later goes on to state in the "Covered Causes of Loss" Section:

> Risks of direct physical loss **unless** the loss is:
> a. **Excluded** in Paragraph B. Exclusions in Section I […]
> (emphasis added)
>
> Policy Page 41

Just like in Meija, where the policy provided coverage for all losses subject to the policy's exclusions, the Policy here provides coverage for any "direct physical loss," subject to the policy's exclusions. Policy, Page 40; Id. at 576. Therefore, this Court should consider the Policy to be an all-risks policy.

Initially, an insured claiming under an all-risks policy has the burden of proving that the insured property suffered a loss while the policy was in effect. Meija, 161 So. 3d at 576; Hudson. 450 So. 2d at 568. The burden then shifts to the insurer to prove that the cause of loss was excluded from coverage under the policy's terms. Id. at 578. Once the burden shifts to the insurer, the insured has no burden to

disprove other possible causes. Stonewall Ins. Co. v. Emerald Fisheries, Inc., 388 So. 2d 1089, 1090 (Fla. Dist. Ct. App. 1980). In Meija, the plaintiff was appealing a final judgment on a jury trial on the grounds that the burden of proof had been incorrectly allocated. Meija, 161 So. 3d at 578. The plaintiff claimed that they had been incorrectly saddled with the initial burden of proving that the loss their property had suffered was covered under the policy. Id. at 577-8. The Court in Meija agreed with the plaintiff, stating that they only needed to show that there was a direct physical loss to their property and that they did so. Id. at 578. Thus, the Court reasoned, that the burden had been successfully shifted in their case to the defendant, who was then required to prove that the cause of the loss was excluded from coverage under the policy's terms. Id. at 579. Since the trial court had not correctly applied this burden, Meija was reversed and remanded for a new trial. Id. at 579.

As stated above, the Policy is an all-risks policy. As it is an undisputed fact, as evidenced by the Defendant's Payment/Settlement Letter dated February 23, 2023, *attached hereto as Exhibit "B"*, that the Property suffered an actual physical loss during the effective dates of the Policy, this Court should find that Plaintiff has met their initial burden of proof—stated in Meija to be proving there was an actual physical loss to the Property. Id. at 579. Accordingly, this Court, similar to the court in Meija, should also find that the burden is now on Defendant to produce evidence to show that the damage to the Property falls under an exclusion. Id. at 579.

In Defendant's Motion for Final Summary Judgment, they claim that expert evidence is necessary to establish that the cause of the loss to the Property is covered under the Policy. Defendant also claims that the Plaintiff's initial burden is to prove that the cause of the loss to the Property is covered under the Policy—rather than what has been established in Meija (that the initial burden for a plaintiff claiming under an all-risk policy is just to prove that the insured property suffered a loss during the policy period). Id. at 576. Defendant, in attempting to show that Plaintiff cannot meet this fake burden, cites two cases which appear to require that a Plaintiff must supply expert testimony to meet this fake burden: Peek and Mama Jo's. Peek v. American Integrity Ins. Co. of Florida, 181 So. 3d 508 (Fla. Dist. Ct. App. 2015); Mama Jo's, Inc. v. Sparta Ins. Co., No. 17-CV-23362-KMM, 2018 WL 3412974 (S.D. Fla. June 11, 2018), aff'd, 823 F. App'x 868 (11th Cir. 2020).

Mama Jo's was a case wherein the plaintiff was suing their insurer for breach of an all-risks policy. Mama Jo's, Inc., No. 17-CV-23362-KMM, 2018 WL 3412974 at 1. The plaintiffs in Mama Jo's were claiming that their property was damaged by construction debris and dust from the road work. Id. at 1. The defendant had moved for summary judgment, along with motions challenging the efficacy of the plaintiff's experts. Id. at 1. After the court in Mama Jo's granted both of the motions to strike plaintiff's experts, they turned to Defendant's motion for summary judgment. Id. The court in Mama Jo's once again applied the Meija burden of proof to determine

if the plaintiff had successfully met their initial burden of proving actual, physical loss during the policy's effective dates. Id. at 8. The court opined: "While an expert is not necessary in all breach of contract cases, here the crucial question—whether construction dust and debris caused damage to the [p]laintiff's property is not one a lay witness can answer." Id. at 8. Thus, the court felt that, without an expert, the plaintiff could not meet their initial burden because whether dust caused actual physical loss to the property was a question only an expert could answer. Id. at 8. Accordingly, the court in Mama Jo's found that summary judgment was appropriate. Id. at 10.

However, Defendant's reliance on Mama Jo's is misplaced. Both cases employed the reasoning found in Meija, but there is two key differences between the cases: First, unlike in Mama Jo's, where the plaintiff had yet to meet their initial burden of proving actual physical damage to their property during the policy period, here it is an undisputed fact that the Property suffered an actual physical loss during the policy period—meaning Plaintiff has automatically met their initial burden. Id. at 8. In this case, the Defendant open coverage, by their own admission, thereby admitting that there was a covered loss during the policy period. (*See Exhibit "B"*). Failing that, however, is the fact that this claim is for hurricane damage—not damage due to construction dust. The court in Mama Jo's only stated an expert was necessary because a lay witness could not tell whether dust caused actual, physical damage to

the property—the court even stated that experts are not always necessary. Id. at 8. Here, a lay witness could most certainly identify that actual, physical damage occurred to the Property. It was hit by a hurricane.

Peek was an appeal from the trial of a breach of contract case regarding an all-risk policy. Peek, 181 So. 3d at 508-12. At trial, the plaintiff had met their initial burden of proving the insured property suffered a loss while the underlying policy was in effect, but then the defendant in Peek countered by having an expert testify to show that the loss was not a covered cause of loss—the burden of proof in Peek transferred between plaintiff and defendant consistent with the logic found in Meija. Id. at 509-10; Meija, 161 So. 3d at 576-79. However, following defendant's expert testifying, the plaintiff in Peek did not call a rebuttal expert to show that the cause of loss fell under an exception to the policy's exclusion. Peek, 181 So. 3d at 510. Because the plaintiff put on no rebuttal evidence to rebut the findings of the defendant's expert, a directed verdict was entered in favor of the defendants. Id. at 510-11.

Defendant cites Peek to show that "plaintiffs could not establish cause of loss where they did not present expert testimony or other evidence as to the cause of loss." This quote, while indicative of the events of Peek, mischaracterizes the case's application to the case at hand. For one, the defendant in Peek had met their burden of proving the cause of loss was one that fell under a policy exclusion. Here,

Defendant has not.

Defendant cites Porben v. Attain Specialty Ins. Co., 546 F. Supp. 3d 1325, 1330 (S.D. Fla. 2021). The cite states that an "expert is generally necessary to establish the cause and scope of damage." The case law does not say that an expert is absolutely necessary for the Plaintiff to prove its case.

Porben goes on to say, "Summary judgment may be inappropriate even where the parties agree on the basic facts [ ] but disagree about the inferences that should be drawn from these facts." Whelan v. Royal Caribbean Cruises Ltd., No. 1:12-cv-22481, 2013 WL 5583970, at *2 (S.D. Fla. Aug. 14, 2013) (alteration added; citation omitted). Where "reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment" and proceed to trial. Id. (citations omitted)." Id.

Porben is distinguishable from this instant case because in Porben, the insurance company denied the plaintiff's claim in full. In this case, Defendant has paid a considerable sum to the Plaintiff but has not paid all the damages claimed.

In Defendant's Motion for Final Summary Judgment, Defendant admits: "Defendant's expert, Lynn Edwards, was unable to differentiate between loss-related damages [(covered damages)] and those caused by wear and tear [(an exclusion)]. [Document 21, Page 7, ¶ 1]. Taking this statement at face value, Defendant's expert's inability to distinguish whether the damage to the Property was

excluded or not means that the expert cannot determine what damages fall under an exclusion. Thus, no proof has been presented to this Court that Defendant can meet their Meija burden in order to shift it back to Plaintiff and force Plaintiff to contest their expert's findings with an expert of their own. Therefore, this Court should apply the reasoning of Meija, Peek, and Mama Jo's to find that Plaintiff does not need an expert because the burden of proof is still on the Defendant, not the Plaintiff, to prove that the loss the Property has suffered was not a covered cause of loss under the Policy and Defendant has not yet met that burden of proof.

b. This Court should deny Defendant's Motion for Summary Judgment because the Damage in this case is an issue of fact, not an issue of law.

Issues of fact are properly reserved for the jury. Gainey v. Washington County, 251 So. 3d 1032, 1034 (Fla. Dist. Ct. App. 2018; Combs v. Plantation Patterns, 106 F. 3d 1519, 1530 (11th Cir. 1997). The jury is the sole judge of such factual issues as damages and neither the trial judge nor an appellate court may substitute its judgment on such an issue for that of the jury. Jefferson Realty of Fort Lauderdale, Inc. v. U.S. Rubber Co., 222 So. 2d 738, 742 (Fla. 1969); Sunrise Point, Inc. v. Reliance Realty, Inc., 371 So. 2d 674, 675 (Fla. 3d DCA 1979).

The issue of damage (specifically, the scope of damage) is an issue of fact. Jefferson, 222 So. 2d at 742; Sunrise, 371 So. 2d at 675. And issues of fact are not appropriate for a court to rule on during summary judgment. In their Motion for

Summary Judgment, Defendant claims that summary judgment should be granted because Plaintiff has no expert to opine as to damages. However, granting their motion would cause this Court to supplant the jury's ability to decide issues of fact. Therefore, this Court should deny Defendant's Motion for Summary Judgment because the damage in this case is an issue of fact, not an issue of law.

An expert is not necessary for a jury to find for the Plaintiff in this case. This is not a complex case needing experts. "Expert testimony is unnecessary in cases where jurors are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training. "*Wills v. Amerada Hess Corp.*, 379 F.3d 32 (2d Cir. 2004).

c. Defendant's Motion for Summary Judgment should be Denied because the Defendant has Underpaid the Claim.

Defendant's argument that Plaintiff cannot dispute the amount of damages without a designated damages expert misstates the applicable law and fails to recognize the sufficiency of Plaintiff's evidence. In the Northern District of Florida and under relevant Eleventh Circuit precedent, testimony from a property owner regarding incurred costs for repairs is admissible and sufficient to create a genuine issue of material fact regarding damages.

Florida law and federal case law recognize that a property owner is competent to testify about the condition of their property, the damages sustained, and the costs incurred to repair or replace damaged property. *See Fed. R. Evid. 701* (permitting

lay witness testimony based on personal knowledge); Florida courts recognize that property owners are competent to testify about the value of their property and the costs incurred for repairs. This principle is based on the owner's presumed familiarity with the property's characteristics and their experience in dealing with it. In B & B Tree Service, Inc. v. Tampa Crane & Body, Inc., 111 So. 3d 976, 978 (Fla. 2d DCA 2013), the court stated: "An owner is qualified to testify to the value of his property based on a presumed familiarity with the characteristics of the property, knowledge or acquaintance with its uses and purposes, and experience in dealing with it."

Similarly, in *Indian River County v. Ocean Concrete, Inc.*, 45 Fla. L. Weekly D2637a (Fla. 4th DCA 2020), the court upheld the admissibility of an owner's testimony regarding property valuation, emphasizing the owner's knowledge and intended use of the property. Therefore, Plaintiff, as the property owner, is competent to testify about the damages sustained and the actual costs incurred for repairs, such as the roof and air conditioning units.

Plaintiff has provided invoices and receipts showing that the roof/exterior replacement cost was $102,503.26 (See Exhibit C-Copy of Crest Exteriors Roof Invoice) and the air conditioning unit replacement cost $23,820 (See Exhibit D-Copy of All Seasons Service Network HVAC Invoice). These amounts differ from Defendant's expert's estimates of $76,130.16 for the roof and $20,987.50 for the HVAC units, respectively. (*Doc. 21-3-Defendant's Motion for Summary Judgment-*

Exhibit 3). This evidentiary disparity alone establishes a genuine issue of material fact regarding the amount of damages.

Defendant's argument that Plaintiff's lack of a damages expert is fatal to the claim ignores established case law and the admissibility of evidence provided by the property owner. Plaintiff has presented competent evidence of incurred costs, which directly contradict Defendant's expert's estimates. This evidentiary conflict constitutes a material dispute of fact, precluding summary judgment. Accordingly, Defendant's motion should be denied.

Further, "[a] plaintiff generally does not need to prove contractual damages with mathematical precision to survive summary judgment. It is enough for the plaintiff to establish that damages exist and can be proven with reasonable certainty." SFR Servs. LLC v. GeoVera Speciality Ins. Co., No. 2:19-cv-466-JLB-MRM, 2021 WL 1909669, at *5 (M.D. Fla. May 12, 2021) (citing Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1212 (11th Cir. 2006)); *see also* Buckley Towers Condo., Inc. v. QBE Ins. Corp., 395 F. App'x 659, 666 (11th Cir. 2010)." Marquez v. Nat'l Fire & Marine Ins. Co., 551 F. Supp. 3d 1313, 1324 (S.D. Fla. 2021).

CONCLUSION

This Court should deny Defendant's Motion for Summary Judgment because the burden of proof is on the Defendant to prove a lack of coverage and

because damages are something only a jury can decide. Additionally, this Court should deny Defendant's Motion for Summary Judgment because there is a disputed material fact concerning the amount of damages, and the Defendant has underpaid the claim.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court DENY Defendant's Motion for Final Summary Judgment and let the parties proceed to Trial and any other relief the Court feels is true and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2024, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I further certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service list in the manner specified, either via transmission of Notices of Electronic Filing or generated by CM/ECF or in some other authorized manner for those counsel of record or parties who are not authorized to receive electronically Notice of Electronic Filings.

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SERVICE LIST

Bagelheads Inc. v. Indian Harbor Insurance Company

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United States District Court, Northern District of Florida

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