IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CASE NO. 3:24-cv-00258-TKW-ZCB

BAGELHEADS INC,

Plaintiff,

v.

INDIAN HARBOR INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Defendant, INDIAN HARBOR INSURANCE COMPANY, files its Reply in Further Support of its Motion for Summary Judgment, stating the following:

This is a property insurance breach of contract case in which scope and amount of damages/repairs after a hurricane are in dispute. Plaintiff did not disclose any experts and attempts to argue that Rule 26(a)(2) expert testimony is not necessary. Herein, Defendant continues its arguments that Plaintiff has no ability to provide the required expert testimony to establish the required elements of its claim. The only competent testimony on the issues of causation and damages are the opinions of Defendant's expert, which are not in dispute. Therefore, there

are no genuine issues of material fact to be determined at trial and Summary Judgment is proper.

Plaintiff argues that the property owner can establish all necessary elements of the claim without the need for any expert testimony. The argument that the owner of a bagel shop, through the experience gained by owning a bagel shop, is a viable substitute for qualified expert testimony is not supported by case law or federal statute.

Plaintiff cites to *Fed. R. Evid.* 701, which lays out the requirements for opinion testimony from a non-expert and the rule's notes describe when a layperson's personal knowledge can form the basis for opinion testimony. The rule's 2000 amendment references situations when an owner of a business may testify as to business profits which is permitted because:

> "Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Fed. R. Evid.* 701

Or when an amphetamine user may testify as to the identification of a familiar narcotic because:

> " Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge." *Id.*

A business owner has a special connection to the profits of a business, as profits can be presumed to be the driving factor behind owning a business. Similarly, the amphetamine user can be presumed to have an intimate knowledge of what amphetamines look like. These exceptions demonstrate on their face that there is a level of specific personal knowledge. However, Plaintiff produces no evidence and provides no arguments to bring the current property owner within the exceptions to layperson opinion testimony as provided by the rule. Plaintiff's citations to case law also fail to establish that the property owner is qualified or knowable on the issues of identifying hurricane damage and estimating repairs, and are easily distinguishable from the current case.

In *B & B Tree Service, Inc. v. Tampa Crane & Body, Inc*., 111 So. 3d 976, 978 (Fla. 2d DCA 2013), the president of the tree service company was found not to be qualified to testify as to the value of his property. The case does not help to establish when an owner would be qualified to provide opinion testimony into the scope and amount of repairs to a structure after a hurricane.

In *Indian River County v. Ocean Concrete, Inc*., 45 Fla. L. Weekly D2637a (Fla. 4th DCA 2020), the court allowed a property owner's opinion testimony in the context of testimony regarding property value to determine if it was burdened by the action of a government entity. However, *Indian River County* provides restrictions to this opinion testimony:

> "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. An owner must be shown to have knowledge regarding the property and its value sufficient to qualify him." *Id.*

Here, Plaintiff does not attempt to establish that the property owner has any knowledge familiar to the issues in this case. The case does not help to establish when an owner would be qualified to provide opinion testimony into the scope and amount of repairs to a structure after a hurricane.

This is not a breach of contract case in which Plaintiff's inability to provide mathematical precision is at issue. The issue is whether Plaintiff has a witness qualified to provide any testimony as to what parts of a building were damaged by a hurricane and how much it will cost to tear down and rebuild that part of the

building. In the cited *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), the court determined that the Plaintiff properly provided testimony to establish the *replacement* cost value of repairs. Although the *actual* cost value of repairs were the proper measure, the Court found that a jury would be able to establish damages at trial with reasonable certainty by using the replacement cost value. In the current matter, the only way to determine the cost of repairs at all would be through the testimony of Defendant's expert. The cases cited by Plaintiff do not support the positon that a lay witness property owner is qualified to provide opinion testimony as to causation or damages of hurricane repairs.

Plaintiff argues that an "all-risks" policy and the opening of coverage causes the burden of proof to shift to the extent that expert testimony is not required. However, without expert testimony, Plaintiff can not dispute the amount of damages. Because the undisputed amount of damages falls below the amount already paid by Defendant, there is no question of fact for the jury.

Plaintiff attempts to distinguish the requirement in *Mama Jo's* that expert testimony is required in cases similar to the current matter by arguing that *Mama Jo's* is a different kind of case, because the damages complained of were from dust and debris- not damages from a hurricane. Without citing to a case or providing

any relevant examples, Plaintiff argues that a lay witness could most identify damage from a hurricane. This positon is not supported by law.

The purpose of a jury is of course to decide issues of fact. That includes the issue of damages, including the scope of damages. Defendant agrees that issues of fact are not appropriate for a court to rule on during summary judgment. However, Defendant is not asking the court to rule on any issues of fact. Defendant is asking that the court find that Defendant has established a fact, while Plaintiff is unable to rebut that fact. Since the jury only has one answer, there is no question of fact.

Regardless of the burden of proof, it is a requirement to establish the amount of damages. As detailed above, Plaintiff can not use the property owner to establish causation or damages. Defendant's expert is the only competent witness on such issues. As discussed in Defendant's Motion for Summary Judgment, Defendant has already paid more than the amount estimated by Defendant's expert. With a singular witness to provide testimony on these issues, there is no question of fact for a jury to decide. Therefore, it is proper for summary judgment to be entered.

WHEREFORE, Defendant INDIAN HARBOR INSURANCE COMPANY respectfully asks this Honorable Court to grant its Motion for Final Summary Judgment against Plaintiff BAGELHEADS INC, to enter an order and final judgment

in favor of Defendant INDIAN HARBOR INSURANCE COMPANY and against Plaintiff BAGELHEADS INC.

Dated: 12/11/24

Respectfully submitted,
s/ Kreg M. Jones
Kreg M. Jones, Esquire.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court using the CM/ECF system on December 11, 2024, and the foregoing document is being served this day on all counsel or parties of record, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

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