

**SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA**

**CASE NO.: 2D24-664**

RICHARD BRITO and PAMELA GARCIA f/k/a PAMELA TEJEDA

Appellants/Petitioner

v.

CITIZENS PROPERTY INSURANCE CORPORATION

Appellee

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INITIAL BRIEF  
OF

RICHARD BRITO and PAMELA GARCIA f/k/a PAMELA TEJEDA

---

APPEAL OF A FINAL JUDGMENT,  
AND DENIAL OF MOTION FOR NEW TRIAL  
FROM THE THIRTEENTH JUDICIAL CIRCUIT HILLSBOROUGH  
COUNTY, FLORIDA  
*THE HONORABLE PAUL HUEY, PRESIDING*  
Case No: 22-CA-000960

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## **PREFACE**

This is an appeal from a final judgment in favor of Citizens Property Insurance Corporation in a lawsuit involving a first-party breach of an insurance contract. RICHARD BRITO and PAMELA GARCIA f/k/a JUANA TEJEDA, will be referred to as the Appellants. CITIZENS PROPERTY INSURANCE CORPORATION, will be referred to as the Appellee.

For ease of reference herein, the following symbols will be used:

(R. )- followed by the page number in the Record on Appeal

(Supp. R.) – followed by the page number in the Supplemental Record on Appeal

## **STATEMENT OF THE CASE AND FACTS**

### **A. Introduction and Nature of the Case**

Appellants appeal a final judgment entered on a directed verdict for Defendant in this first-party property insurance case.

The Appellants' argument focuses on the trial judge's failure to apply the applicable law concerning recoverable damages in this one-count breach of contract action. The trial court improperly limited Appellants' damages and consequently entered a directed verdict in favor Appellee on the grounds that Appellants failed to prove their damages.

Appellants reported a claim to appellee for roof damage which was denied on the basis that the damage was caused by excluded perils. The Subject Policy is a homeowner's policy that provides coverage at replacement cost value and also contains ordinance and law coverage at twenty-five percent (25%).

Following the denial of the subject claim, Appellants filed a one count breach of contract action alleging: a) the existence of a valid insurance contract, b) that the policy had been breached when their claim was denied, and c) that they are entitled to recover damages

pursuant to the insurance contract including the full replacement cost value of their damaged property, and any other benefit available under the policy. Despite the requirement under the law and policy to adjust claims on a replacement cost basis, the trial court incorrectly agreed with Appellee that Appellants' recoverable damages under the policy and Florida law are limited to the actual cash value of the loss. The trial court also incorrectly agreed with Appellee as to how actual cash value should be determined.

Appellant's expert engineer testified that the roof was required to be replaced because: 1) the shingles were not repairable and, independently, 2) the amount of damage to the roof exceeded twenty-five percent (25%) of the roofing surface. Under these facts, the roof must be replaced.

At trial, the Appellants' expert general contractor, Dennis James, testified as to the actual cash value of the damages, broken down by specific location at the property, *i.e.* the roof, and individual rooms within the interior. He prepared an estimate which memorializes his opinions and contains a line-item analysis of each component necessary for the repairs. The estimate was not admitted into evidence because it contains both replacement cost value and

actual cash value amounts.

Appellee moved for directed verdict on the basis that Appellants failed to establish their damages. Appellee argued that the testimony was insufficient to establish the actual cash value of the loss. Mr. James relied upon Appellant's engineer's testimony that the roof could not be repaired, but rather must be replaced, in arriving at his opinions. He testified that he calculated the actual cash value of the loss by depreciating the replacement cost value. The Appellee maintained that the full scope of repairs could not be contemplated in determining the actual cash value of the damages pursuant to Florida law. Appellee argued that because Appellants' expert arrived at the actual cash value of damages by depreciating the full scope of repairs, Appellants did not meet their burden of establishing their damages.

The trial court agreed with Appellee's analysis and granted directed verdict on the roof portion of the claim. Following the directed verdict, Appellants filed a timely motion for new trial which was summarily denied.

## **B. The Policy**

Appellants renewed or procured a policy of homeowner's insurance from Appellee with effective dates of December 23, 2020, to December 23, 2021. (R. 991-1059). The policy insured the residential property owned by the Appellants located at 6010 Larmon St., Tampa, Hillsborough County, Florida. (R. 996). The policy is an HO-3 policy form that provides coverage on a replacement cost basis. (R. 996; R. 1034-35). The policy provides ordinance and law coverage up to forty-eight thousand two hundred dollars (\$48,200), which is twenty-five percent (25%) of the coverage A, or dwelling, limit. (R. 996).

The policy states that losses will be adjusted on a replacement cost basis and also incorporates the language contained in section 627.7011(3)(a), Florida Statutes, which mandates that an insurer must initially pay **at least** the actual cash value of the loss.

### **C. Loss Settlement**

Covered property losses are settled as follows:

\*\*\*

2. Buildings under Coverage **A** or **B** at replacement cost without deduction for depreciation, subject to the following:

a. If, at the time of loss, the amount of insurance in this Policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, **we will** pay the cost to

repair or replace, **after** application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

(1) The limit of liability under this Policy that applies to the building;

(2) The replacement cost of that part of the building damaged for like construction and use on the same premises; or

(3) The necessary amount to repair or replace the damaged building.

b. If, at the time of loss, the amount of insurance in this Policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this Policy that applies to the building:

(1) The actual cash value of that part of the building damaged; or

(2) That proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this Policy on the damaged building bears to 80% of the replacement cost of the building.

c. To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

(1) Excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;

(2) Those supports in (1) above which are below the surface of the ground inside the foundation walls, if there is no basement;

(3) Underground flues, pipes, wiring and drains; and

(4) Structures and other property excluded or not covered elsewhere in your Policy.

**d. We will initially pay at least the actual cash value of the insured loss, less any applicable deductible.** We will then pay any remaining amounts necessary to perform, such repairs as work is performed and expenses are incurred, subject to **2.a.** and **2.b.** above. If a total loss of the dwelling occurs, the provisions of **2.d.** above do not apply and we will pay the replacement cost coverage without reservation or holdback of any depreciation in value, pursuant to Section 627.702, Florida Statutes. This does not prohibit us from exercising our right to repair damaged property in compliance with this Policy and pursuant to Section 627.702(7), Florida Statutes.

(R. 1034-35) (emphasis added).

### **C. The Claim**

Appellants submitted a claim with an alleged date of loss of January 15, 2021. (R. 41 ¶ 10). Appellee dispatched a field adjuster to inspect the property. (R. 180 ¶ 3). Based on its investigation, Appellee denied the claim on or about July 8, 2021. (R. 1229-30). Appellee concluded that after a “thorough investigation” the damage was attributable to wear, tear, and deterioration. (R. 1229). Appellants filed the lawsuit on February 2, 2022. (R. 14-17).

### **D. The Proceedings**

Following the denial of their claim, Appellants filed a one count

breach of contract action against Appellees. (R. 14-17). Therein Appellants allege that at all times their property located at 6010 Larmon St., Tampa, Florida 33634 was covered under a policy of insurance issued by Appellee. (R. 14). The Appellants allege that on or about January 15, 2021, they suffered damage to their property and that the damage was due to a covered peril under the policy. (R. 15). Appellants' complaint alleges, in pertinent part, that:

“All conditions precedent to obtaining payment of said benefits under the policy from Defendant have been complied with, met or waived.

...

Plaintiffs are entitled to damages, including the full cost of repairs of the damage to their Property.

Plaintiffs are entitled to compensation for the loss to their Property. Plaintiffs seek the following damages: (a) **the full replacement cost for the property**; (b) damages including court costs, attorneys' fees under § 627.428, Florida Statutes, expert fees and costs and pre-judgment interest; and (c) additional policy benefits for loss rental value, debris removal, and any other benefit available under the policy.”

(R. 15 ¶¶ 11, 18-19) (emphasis added).

In response to the lawsuit Appellee raised five (5) affirmative defenses:

1. As its First Affirmative Defense, Defendant asserts that the policy of insurance controls the rights and obligations of the parties and coverage, if any, is

limited to all the terms, conditions, limitations, exclusions, exceptions, deductible and other applicable provisions under the contract.

2. As and for its Second Affirmative Defense, Defendant asserts that Plaintiffs have no right of recovery as a result of their neglect of the property and their failure to use all reasonable means at and after the time of loss to protect the property.

3. As and for its Third Affirmative Defense, Defendant asserts that Plaintiffs are not entitled to recover for any damages that were repaired or altered prior to putting Defendant on notice and permitting an inspection of the damage.

4. As and for its Fourth Affirmative Defense, Defendant asserts that the alleged loss and reported damages described in the Plaintiff's Complaint are not covered, in whole or in part, by the Policy, including, but not limited to, the following provisions:

**Covered Peril**

**SECTION I - PERILS INSURED AGAINST**

A. Coverage A - Dwelling And Coverage B - Other Structures

2. We do not insure, however, for loss:

b. Caused by:

(9) Any of the following:

(a) Wear and tear, marring, chipping, scratches, dents, or deterioration;

(b) Inherent vice, latent defect, defect or mechanical breakdown;

Upon inspection of the property, Defendant observed rotten fascia wood. Furthermore, the roof was replaced in 2006, but showed evidence of prior repairs on the right slope of the flat roof.

Defendant's inspection further identified water damage to the plank decking with gaps. Defendant did not observe any peril created openings.

5. As and for its Fifth Affirmative Defense Defendant asserts that the alleged loss and reported damages described in the Plaintiff's Complaint are not covered, in whole or in part, by the Policy, including, but not limited to, the following provisions:

**SECTION I – PERILS INSURED AGAINST**

**A. Coverage A – Dwelling and Coverage B – Other Structures**

...

2. We do not insure, however, for loss:

...

8. Rain, snow, sleet, sand or dust to the interior of a building unless a covered peril first damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening

Upon inspection of the home, Citizens observed no peril created openings on the roof, and any interior damage in the residence premises is not the result of a covered peril.

(R. 20-24). The failure to comply with a condition precedent to recovery was not pleaded as a defense or denied with specificity. (R. 22-23). Similarly, an exclusion referring to matching costs is also not a defense in the case. (R. 22-23).

Appellants disclosed their experts Richard L. Cannyn, P.E., and Dennis James on January 31, 2023:

Richard L. Cannyn, P.E.

Beryl Project Engineering, LLC  
5806 S 3rd St., Tampa, Florida 33611

Mr. Cannyn is expected to testify regarding the conditions at the subject property pursuant to his inspection of the property and review of various reports and that data contained therein; the opinions and conclusions as set forth in his report consistent with his deposition testimony, and his experience and expertise. Mr. Cannyn is expected to testify that the damage to the subject property was caused by a covered peril. Mr. Cannyn will testify regarding his educational background and his expertise regarding structural engineering. Mr. Cannyn will testify as to any and all data collected at the subject property, and all professional opinions within his area of expertise rendered throughout the course of the claim investigation and litigation. He may testify as to his review of deposition testimony provided by Plaintiffs and various other engineers and experts involved in this lawsuit. He may also testify in rebuttal to the testimony of the experts that Defendant ultimately presents expert testimony from.

\*\*\*

Dennis James  
Triad Construction & Management Services  
("Triad")  
2708 Alt 19 N, Suite #602  
Palm Harbor, FL 34683

Mr. James is expected to testify regarding the conditions at the subject property pursuant to the inspection performed by Triad, the amounts necessary for repairs to the subject property, and his experience and expertise. Mr. James will testify regarding the replacement cost value and actual cash value of the repairs, including but not limited to all costs associated with emergency and/or temporary

repairs performed to mitigate the damages. Mr. James will testify regarding his educational background and his expertise regarding construction. Mr. James will testify as to any and all data collected at the subject property, and all professional opinions within his area of expertise rendered throughout the course of the claim investigation and litigation. He may testify as to his review of deposition testimony provided by Plaintiffs and various other engineers and experts involved in this lawsuit. He may also testify in rebuttal to the testimony of the experts that Defendant ultimately presents expert testimony from.

(R. 169-74).

On May 15, 2023, Appellee filed its motion for summary judgment alleging that Appellant could not meet its burden of proof.

(R. 179-193). In support of its motion, Appellee submitted the affidavit of its corporate representative (R. 195-327) and field adjuster (R. 328-331).

Appellants served their response to the motion on September 15, 2023. (R. 446-457). In support of their response, the Appellants submitted the affidavit of their engineer, Mr. Cannyn. (R. 458-503).

The trial court heard argument from the parties on October 2, 2023, and denied the motion for summary judgment after concluding that a material issue of fact remained as to whether Appellee was liable for the claim. (R. 553). The parties proceeded towards a jury trial.

**E. The Appellee's Motion in Limine to Limit the Evidence of Damages**

In anticipation of the trial, the Appellee filed a motion in limine to limit evidence of damages to direct physical loss and preclude evidence of matching costs. (R. 595-99). Therein, Appellee requested the trial court determine that the proper measure of damages is actual cash value; that damages must be measured as they existed at the time the lawsuit was filed; that the policy covers only direct losses which are only physically damaged items; and that matching damages do not fall within the policy's definition of a direct loss. (R. 598). The motion was heard on January 18, 2024. (Supp. R. 1441-1513).

In support of its arguments, the Appellee relied on *Vazquez v. Citizens Prop. Ins. Corp.*, 304 So.3d 1280 (Fla. 3d DCA 2020), for the proposition that because Appellee filed suit prior to commencing repairs the measure of damages is limited to actual cash value of the physically damaged property which cannot include matching costs. (R. 598-99). In further support thereof, Appellee cited *Voges v. Ward*, 123 So. 785 (Fla. 1929) for the proposition that "the general rule in actions at law is that the right of a plaintiff to recover must be

measured by the facts as they existed when the suit was instituted”. (R. 597). Relying on this principle of law, Appellee argued that unless the insured had performed all necessary repairs or replacement prior to the lawsuit, evidence of their damages are limited to the actual cash value of the loss. (Supp. R. 1476-87).

MR. LABBE: So what would happen, Your Honor, 6 is they would get -- so all they can be entitled 7 to -- because this is a breach of contract action. 8 Right? So the only thing they can be entitled to 9 is what would be due and payable under the policy 10 at the time suit was filed. That's how breach of 11 contract works. So because the only thing payable 12 under the policy at the time they filed suit is 13 ACV, that's the only thing the jury can award.

(Supp. R. 1480).

In response, the Appellants cited *Citizens Prop. Ins. Corp. v. Tio*, 304 So. 3d 1278 (Fla. 3d DCA 2020), *reh'g denied* (June 5, 2020), *review denied*, SC20-959, 2020 WL 7230480 (Fla. Dec. 8, 2020). (Supp. R. 1453-56). The Appellants maintained that the trial court should follow *Tio* because, like the subject claim, the claim in *Tio* was denied whereas the claim in *Vazquez* was a covered claim. (Supp. R. 1455-56). The Appellants argued that *Tio* makes clear that the statutory mandate that an insurer initially pay at least the actual cash value of a loss under a replacement cost value policy does not

operate as a limitation on a policyholder's remedies for an insurer's breach of an insurance contract. (R. 1455-56).

Over Appellants' objection, the trial court granted the motion in limine. (Supp. R. 1487-88).

**F. The Appellants' Expert, Richard "Leo" Cannyn's Testimony:**

Appellants' expert, Mr. Cannyn is a licensed professional engineer in the state of Florida, and principal project manager for Beryl Engineering and Inspections ("Beryl"). (Supp. R. 1520-22). He has performed thousands of forensic investigations, including but not limited to forensic roofing investigations where the focus is to determine whether a roof has suffered damage, what caused the damage and when. (Supp. R. 1526-28). Mr. Cannyn testified that as a professional engineer he can determine whether a roof that has been damaged is able to be repaired or must be replaced pursuant to the applicable Florida Building Code provisions. (Supp. R. 1529). His company was retained to perform a forensic roofing investigation with respect to the subject claim. (Supp. 1536).

Mr. Cannyn testified that pursuant to his investigation he confirmed exterior and interior damage to the subject property. (Supp. R. 1549-50). He further concluded, within a reasonable

degree of engineering certainty, that wind had caused the damage to the roof and allowed water to enter the home through openings caused by wind. (Supp. R. 1576-77). Mr. Cannyn identified the locations of those openings on the roof through demonstrative aids that were admitted into evidence. (Supp. R. 1566-68); (R. 1227).

Mr. Cannyn was questioned and testified to the timing of the damage. (Supp. R. 1569-75). Relying on publicly available weather data, and information provided by the insureds, Mr. Cannyn determined that the damage was the result of a storm event that occurred on December 24, 2020, to the exclusion of other storm events. (Supp. R. 1572-74). He explained that a roof leak would typically take time to manifest into a ceiling stain, thus explaining the gap in time from the storm event and the alleged date of loss. (Supp. R. 1587).

Mr. Cannyn further concluded that based on the brittleness test that was performed at the property, and the amount of damage that was observed, the roof is required to be replaced under the Florida Building Code. (Supp. R. 1575-77). The brittleness test being referred to, which is published by the National Academy of Forensic Engineers, is a test to determine whether the shingles are repairable

to the exclusion of damage to other shingles. (Supp. R. 1534).

11 So the test is taking a shingle, lifting it 45  
12 degrees three times, which is supposed to replicate or  
13 repair to neighboring shingles and to see if that  
14 shingle gets damaged, i.e., do tabs break off, does the  
15 shingle tear, does it permanently then stick up, or is  
16 it lifted? And that's supposed to help you determine  
17 can this roof be repaired versus replaced.

18 Q. Is that brittleness test something that you  
19 regularly utilize when doing forensic engineering?  
20 A. It is.

(Supp. R. 1534).

He also testified that based on the amount of damage Beryl found, the Florida Building code requires that the roof be replaced.

(Supp. R. 1575). The Florida Building Code provision Mr. Cannyn refers to is the requirement that if more than twenty-five percent (25%) of the roof is damaged, the whole roof must be replaced. (Supp. R. 1529).

Importantly, Mr. Cannyn did not opine or conclude that any repairs were necessitated because of “matching”.

**G. The Appellants’ Expert, Dennis James’ Testimony:**

Dennis James, a state certified general contractor and state certified roofing contractor, testified as to the cost of repairs to the property. (R. 1637-39). Consistent with the Court’s ruling on the

Defendant's Motion in Limine, the testimony was limited to the actual cash value of the repairs.

Mr. James, and his company Triad Restoration Services, were retained to conduct a site inspection and prepare an estimate of damages based upon the findings of Beryl Project Engineering. (Supp. R. 1636-38). Mr. James explained that the actual cash value was calculated by entering the measurements of the various rooms and areas of the home that were damaged into a software program commonly utilized in the insurance industry known as Xactimate. (Supp. R. 1639-40). The age of the materials is then estimated and manually inputted into the program to determine depreciation, which is how one arrives at actual cash value. (Supp. R. 1640).

Mr. James provided testimony as to the actual cash value of repairs for those various areas of the home that were damaged, beginning with the living room. (Supp. R. 1643-44). He confirmed that the amount was determined by applying depreciation to the replacement cost value of the repairs. (Supp. R. 1643).

Mr. James proceeded to provide testimony as to the actual cash value of the repairs to the damaged portions of the living room and two (2) affected bedrooms. (Supp. R. 1643-46). He explained that

the scope of repairs in the living room and two (2) bedrooms was substantially similar and would entail cutting out a minimal amount of drywall where the water staining existed, replacing that drywall and affected insulation, and then applying texture and paint to the area. (Supp. R. 1646-47).

The actual cash value of the repairs to the damaged property in the living room was estimated to total three thousand eight hundred-forty dollars and two cents (\$3,840.02) in the year 2023 when the estimate was created, and two thousand nine hundred twenty-four dollars and twenty-nine cents (\$2,924.29) in the year 2021 when the loss occurred. The actual cash value of the repairs to the damaged property in the first bedroom was estimated to total one thousand five hundred thirty-four dollars and eighty cents (\$1,534.80) in the year 2023, and one thousand one hundred forty dollars and twenty-eight cents (\$1,140.28) in the year 2021. The actual cash value of the repairs to the damaged property in the second bedroom was estimated to total one thousand four hundred and eighty-six dollars and fifty-two cents (\$1,486.52) in the year 2023, and one thousand one hundred and three dollars and fifty-four cents (\$1,103.54) in the year 2021.

Mr. James then proceeded to testify that the actual cash value of the repairs, in 2023, to the roof is nine thousand two hundred fifty-five dollars and twenty-nine cents (\$9,255.29). (Supp. R. 1647). He explained that, pursuant to Mr. Cannyn's opinions, the scope of repairs to the roof contemplated a replacement, which would include replacement of the roofing metals, accessories, underlayment, new nails, and new shingles. (Supp. R. 1647; 1658). A satellite program was utilized to determine the measurements of the roof and then the Xactimate software program computes the unit costs. (Supp. R. 1647-48). The size of the roof was determined to be twelve squares with a square being the unit of measurement defined as a hundred square feet. (Supp. R. 1648). The actual cash value of the repairs to the roof was estimated to have totaled seven thousand three hundred ninety-eight dollars and twenty-one cents (\$7,398.21) in the year 2021. (Supp. R. 1648).

Mr. James testified that his estimate also included amounts for "general conditions" which include labor for content manipulation, general site cleanup, project management supervision, permitting fees, dumpsters, and final cleanup. (Supp. R. 1649). The amount for general conditions was estimated to total five thousand six hundred

fifty-three dollars and fifty-eight cents (\$5,653.58). (Supp. R. 1649). A “labor minimum supply” charge was also included which is a line item generated by the software program to address minor repairs contemplated in the scope of the estimate. (Supp. R. 1649.). The amount for “labor minimum supply” was estimated to total one thousand two hundred forty-eight dollars and seventy-three cents (\$1,248.73). (Supp. R. 1649-50).

Mr. James testified that in total, and within a reasonable degree of professional certainty, the actual cash value to repair the direct physical damage was estimated to total twenty-three thousand eighteen dollars and ninety-four cents (\$23,018.94) in the year 2023 and seventeen thousand seven hundred and eighty-one dollars and ten cents (\$17,781.10) in the year 2021.

The proffered estimate was not admitted into evidence because it contained an amount for both replacement cost value of the damages and actual cash value. (R. 817); (Supp. R. 1652).

#### **H. Appellee’s Directed Verdict**

Following the testimony of both Mr. Cannyn and Mr. James, the Appellee moved for directed verdict on the basis that the Appellants

failed to establish their damages in this case. (R. Supp.) Appellee maintains that “whether or not the entire roof might need to be replaced has no bearing on the actual cash value.” (Supp. R. 1672). The Appellee argued that Florida law prescribes how actual cash value is determined, and that it cannot contemplate all costs needed to complete repairs. (Supp R. 1672-74). Expanding on this, Appellee argued:

6 It's the same thing here. I would encourage  
7 them to point me to any provision of the policy  
8 that allows for the payment for property that is  
9 not damaged.  
10 And the answer to that question is, Your  
11 Honor, the only place that it could ever exist is  
12 the Ordinance and Law Provision, which has no  
13 bearing on any determination of actual cash value  
14 or full replacement cost value.

(Supp. R. 1694)

11 Mr. James' estimate includes replacement of  
12 every shingle on that roof, nailing the entire  
13 roof, replacing the entire underlayment on that  
14 roof, and replacing all the metal work on that  
15 roof. And he was very clear that there's been no  
16 testimony presented that all of that was damaged.  
17 He was very clear that based on his experience and  
18 how he generates estimates, it's what we need to  
19 do to do all the work, and then we plug in the age  
20 of the house, and it gets reduced a little bit.  
21 That's what he testified. He was very clear.  
22 I've been doing this for 30 years. This is how

23 it's done.  
24 That's all well and good. That's how  
25 Mr. James does it. But what Florida law requires  
1 is that the evidence be limited to the property  
2 that suffered a direct physical loss. That's all  
3 the policy covers.

(Supp. R. 1672-73).

10 MR. LABBE: And, Your Honor, I'm not trying  
11 to be facetious at all. But again -- and I think  
12 I mentioned this earlier. There are only two  
13 choices under the law. You can either sue for  
14 breach of contract for failure to pay the actual  
15 cash value of the directly, physically damaged  
16 property, or, you can perform the work and incur  
17 expenses, and then you can sue for the replacement  
18 cost value, which would include things like  
19 non-damaged property, and matching, and ordinance  
20 and law.

(Supp. R. 1705)

In other words, unless every shingle, every inch of underlayment, every nail, every roofing metal and accessory are damaged, those items cannot be contemplated in the actual cash value of the loss.

In response, Appellants again relied on *Tio, supra*, for the proposition that it was erroneous for the trial court to limit the recoverable damages and evidence to the actual cash value of the loss. (Supp. R. 1674). Appellants also pointed out that the policy

does not contain a definition of actual cash value. (Supp. R. 1675). Under the Broad Evidence Rule any evidence logically tending to establish a correct estimate of the value of damage may be considered by the trier of fact to determine the actual cash value. (Supp. R. 1702). Mr. James testified as to the actual cash value of the damages based on a generally accepted definition of actual cash value. (Supp. R. 1656; 1709). Appellants argued that under these facts, to say that they did not put on evidence of what the actual cash value of the damage is would be erroneous. (Supp. R. 1709).

After hearing argument of counsels, the trial court agreed with the Appellee and granted the directed verdict as to the roof and denied the motion as to the interior damages. (Supp. R. 1710-11).

### **I. Appellants' Motion for New Trial**

Appellants filed a timely motion for new trial on February 8, 2024. (R. 819-901). Therein, Appellants argue that the Court erred and/or abused its discretion when it granted the motion in limine limiting the evidence of Appellants' damages; that the trial court abused its discretion in precluding Mr. James' estimate from evidence; and that the trial court erred in granting the directed verdict. (R. 819-32).

Relying on *Tio, supra*, Appellants argued that by limiting the evidence of Appellant's damages to the actual cash value of the loss the trial court abused its discretion and deprived them of the full benefits of the replacement cost coverage afforded under the Subject Policy and law. (R. 819; 824-26). The Subject Policy and section 627.7011 require that all losses be adjusted on a replacement cost value basis, including the costs necessary to meet applicable laws and ordinances, and the costs of removing debris. (R. 820-21). Section 627.7011 in no way authorizes an insurer to adjust losses under a replacement cost value policy on an actual cash value basis. (R. 823). The fact that an initial payment may, at the discretion of the insurer, be limited to at least the actual cash value of the loss should not translate into less coverage than what is required under the law. (R. 823-24). Section 627.7011 unequivocally governs and sets forth the requirements for adjustment of claims under a replacement cost coverage policy. (R. 820-24). There is no provision in the Subject Policy or the law that limits Appellants' recovery to the actual cash value of the loss. *Tio, supra*.

The motion for new trial also alleges that the trial court erred in granting the directed verdict because Appellants' expert, Dennis

James, testified as to the actual cash value of the loss. (R. 827). His opinions were based on the engineer's conclusions that the roof was damaged by wind, and that the scope of repairs to that direct physical damage required a full replacement. (R. 826-29). Mr. James explained that actual cash value is defined as the 'replacement cost minus depreciation' consistent with the Florida Supreme Court's opinion in *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So.3d 433, 443 (Fla. 2013). (R. 827). No other definition was before the trial court. (R. 827).

Appellants maintained that the trial court failed to apply the "Broad Evidence Rule" pursuant to which the factfinder is permitted to take into account all pertinent evidence on the subject of valuing including, the replacement cost value of loss less depreciation. (R. 961-64). Appellants argued that the preclusion of the itemized estimate prepared by Appellants' expert, Dennis James, was an abuse of discretion as it would have assisted the trier of fact in determining Appellants' damages. (R. 829-30). The trial court denied the motion on February 12, 2024. (R. 902). This appeal follows.

## **SUMMARY OF THE ARGUMENT**

The testimony and evidence as to damages was not so uncertain, speculative, remote, contingent and inconclusive that it could support or justify a verdict for the Appellee. Relying on the Appellants' expert engineer's opinions that: a) the subject property suffered damage from wind and wind created openings to the roof, and b) that the roof was required to be replaced in order to restore the property to its pre-loss condition, Appellants' expert general contractor provided an actual cash value number for each area of the home that required repair as a result of the direct physical damage.

Both of Appellants' experts provided sufficient testimony as to the damages in this case. Mr. Cannyn, a licensed professional engineer, opined that the roof had suffered damage because of wind, that more than twenty-five percent (25%) of the roof covering was damaged, that the roof shingles were brittle and could not be repaired, and that under these facts, the roof must be replaced. Based on the scope of repairs set forth by Mr. Cannyn, Mr. James determined the actual cash value of the repairs to the roof would cost nine thousand two hundred fifty-five dollars and twenty-nine cents (\$9,255.29) in the year 2023 and seven thousand three hundred

ninety-eight dollars and twenty-one cents (\$7,398.21) in the year 2021. (Supp. R. 1647-48). This testimony was sufficient to allow the jury to determine the actual cash value of the damages. The trial court erred in granting a directed verdict for the Appellee.

The trial court erred when it limited the damages in this case. The trial court should have held, as in *Tio, supra*, that by denying liability, the Appellee waived its right to withhold payment pursuant to a contractual provision deferring payment.

The trial court erred in treating the Subject Policy as one that only provides coverage on an actual cash value basis. The Subject Policy covers losses on a replacement cost basis, not actual cash value. The law mandates that all losses under this policy be adjusted on a replacement cost basis. The replacement cost value must be determined and is pertinent to the valuation of actual cash value. Actual cash value is generally computed by applying depreciation to the replacement cost value of the repairs or replacement of damaged property. There was no basis for the trial court to deviate from this generally accepted computation.

Viewing the evidence and all inferences of fact in the light most favorable to Appellants, this Honorable Court should reverse the

directed verdict granted in favor of Appellee on the issue of damages to the roof portion of the Subject Claim. This Honorable Court should also find that the trial court abused its discretion in precluding the Triad estimate from evidence and denying Appellants' motion for new trial.

## **ARGUMENT**

### **A. Standard of Review**

The standard of review for directed verdict is de novo. *Jackson Hewitt, Inc. v. Kaman*, 100 So.3d 19, 27 (Fla. 2d DCA 2011). "An appellate court reviewing the grant of a directed verdict must view the evidence and all inferences of fact in the light most favorable to the nonmoving party and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315, 329 (Fla. 2001) (citing *Frenz Enters., Inc. v. Port Everglades*, 746 So.2d 498, 502 (Fla. 4th DCA 1999)).

The standard of review for the denial of a motion for new trial is an abuse of discretion. *Allstate Ins. Co. v. Wiley*, 954 So.2d 1273 (Fla. 2d DCA 2007). An abuse of discretion occurs "when the judicial action is arbitrary, fanciful, or unreasonable or where no reasonable

man would take the view the trial court adopted.” *Frances v. State*, 970 So. 2d 806 (Fla. 2007) (citations omitted). A new trial is the appropriate remedy where the trial court has determined that a party fails to meet their burden of establishing the correct measure of damages as a result of judicial error. Fla. R. Civ. P. 1.530; *Levy v. Ben-Shmuel*, 255 So.3d 493, 495 (Fla. 3d DCA 2018).

The standard of review for rulings on the admissibility of evidence is also an abuse of discretion standard. *Jent v. State*, 408 So. 2d 1024, 1029 (Fla. 1981). “However, a court's discretion is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to de novo review.” *Sottilaro v. Figueroa*, 86 So.3d 505, 507 (Fla. 2d DCA 2012) (citing *Pantoja v. State*, 59 So.3d 1092, 1095 (Fla. 2011)).

**B. The Trial Court Erred in Limiting the Recoverable Damages to the Actual Cash Value of the Loss and Granting the Directed Verdict**

The trial court erred in limiting the measure of recoverable damages to the actual cash value of the loss and granting the directed verdict on the roof. The trial court should have followed *Tio, supra*, which also involved a denied claim. In *Tio*, the trial court granted Citizens' motion in limine to limit the evidence of damages to actual

cash value. *Id.* at 1279. Citizens asserted that Tio was not entitled to any consideration of replacement cost value damages because Tio had not undertaken any repairs to the subject property. Tio sought rehearing and reconsideration of this latter order granting Citizen's motion in limine. *Id.* The trial court granted Tio's rehearing motion, thereby allowing the jury to hear the parties' competing valuations of Tio's loss. *Id.*

Both cases, *Vazquez* and *Tio*, were decided by the Third District Court of Appeals and *Tio* distinguishes *Vazquez*. The Third District Court of Appeals made clear that section 627.7011(3), which allows an insurer to initially pay only the actual cash value of the loss does not limit a policyholder's remedies for an insurer's breach of contract action. *Id.* Citing to *Independent Fire Ins. Co. v. Lugassy*, 593 So.2d 570 (Fla. 3d DCA 1992), the *Tio* court found unavailing the argument that Appellant made to the trial court, "that, after breaching the policy, it may enforce the terms of the policy at its convenience." *Id.* (citing *Maier Brewing Co. v. Pacific Nat'l Fire Ins. Co.*, 33 Cal.Rptr. 67, 73, 218 Cal.App.2d 869 (1963) (it is a well-recognized rule that an insurer may not deny all liability and, at the same time, be permitted to stand on a provision inserted in the policy for its benefit)); *John*

*Conlon Coal Co. v. Westchester Fire Ins. Co.*, 16 F.Supp. 93 (M.D.Pa.1936) (insurer which denies liability is not entitled to benefit from policy provision deferring payment; interest must be paid from date of loss). The underlying legal theory is that by denying liability, the insurer waives its right to withhold payment pursuant to a contractual provision deferring payment. *Samuels v. California Ins. Co.*, 192 Pa.Super. 484, 162 A.2d 48 (1960); *accord Home Ins. Co. v. Roll*, 187 Ky. 31, 218 S.W. 471 (1920).

**C. The Subject Policy Provides Coverage on a Replacement Cost Basis, Accordingly the Adjustment and Settlement of the Subject Claim is Governed by Section 627.7011, Florida Statutes**

The Subject Policy provides coverage on a replacement cost value basis. (R. 1034-35) (Covered property losses are settled as follows: ... Buildings under Coverage A or B at replacement cost...). Section 627.7011, Florida Statutes, titled “Homeowners’ policies; offer of replacement cost coverage and law and ordinance coverage” governs the adjustment and settlement of claims under a replacement cost coverage policy. § 627.7011, Fla. Stat. (2020). Pursuant to section 627.7011(b), which is incorporated into the

policy pursuant to section 627.418,<sup>1</sup> any loss under the Subject Policy must be adjusted on the basis of replacement costs, including costs necessary to meet applicable laws and ordinances and the costs of removing debris.

[A]ny loss that is repaired or replaced at any location **will be adjusted on the basis of replacement costs to the dwelling not exceeding policy limits, rather than actual cash value**, and also including costs necessary to meet applicable laws and ordinances regulating the construction, use, or repair of any property or requiring the tearing down of any property, including the costs of removing debris.

§ 627.7011(b), Fla. Stat. (emphasis added). The statute very clearly states that losses under this type of policy **cannot** be adjusted on an actual cash value basis.

Section 627.7011(b) further states that the ordinance and law

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<sup>1</sup> Section 627.418, Florida Statutes, states, in pertinent part:

(1) Any insurance policy, rider, or endorsement otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be thereby rendered invalid, except as provided in s. 627.415, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code.

§ 627.418, Florida Statutes (2020).

coverage applies to the damaged portion of the structure:

However, additional costs necessary to meet applicable laws and ordinances may be limited to 25 percent or 50 percent of the dwelling limit, as selected by the policyholder, **and such coverage applies only to repairs of the damaged portion of the structure** unless the total damage to the structure exceeds 50 percent of the replacement cost of the structure.

§ 627.7011(b), Fla. Stat. (emphasis added).

The statute requires a determination as to the replacement cost and in the event the insurer elects to limit its initial payment to **at least** the actual cash value, that amount should be paid immediately.

(3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs:

(a) For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred.

§ 627.7011(3)(a) Fla. Stat. (2011)-(2022).

The Loss Settlement provision of the Subject Policy mirrors the statute reiterating that losses will be adjusted at a replacement cost basis and incorporates the permissive payment methodology that

allows it to limit the initial payment to at least the actual cash value, as follows:

**Section I – Conditions**

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**C. Loss Settlement**

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**2.** Buildings covered under Coverage **A** or **B** at replacement cost without deduction for depreciation, subject to the following:

\* \* \*

**d.** We will initially pay the actual cash value of the loss, less any applicable deductible. We will then pay any remaining amounts necessary to perform the actual repair or replacement as work is performed and expenses are incurred...

(R. 1034-35). Contained within this provision, and the statute upon which it is based, are two terms which are not defined by the Subject Policy: “replacement cost” and “actual cash value.”

Because the Subject Policy does not define these relevant terms, we must look elsewhere to determine the meanings. The replacement cost value, or RCV, is the amount “it would cost to replace the damaged structure on the same premises.” *Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 438 (Fla. 2013) quoting *Davis v. Allstate Ins. Co.*, 781 So. 2d 1143, 1144 (Fla. 3d DCA 2001) (quoting *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 627 N.Y.S.2d 185, 187 (1995)). “Replacement cost insurance is designed to cover the difference

between what property is actually worth and what it would cost to rebuild or repair that property.” *Trinidad*, 121 So. 3d at 438 (quoting *State Farm Fire & Cas. Co. v. Patrick*, 647 So. 2d 983, 983 (Fla. 3d DCA 1994)).

Actual cash value is the result of a simple arithmetic equation: “replacement cost, less depreciation.” *Glens Falls Ins. Co. v. Gulf Breeze Cottages*, 38 So. 2d 828, 829 (Fla. 1949). In *Trinidad v. Fla. Peninsula Inc. Co.*, the Florida Supreme Court solidified this sentiment holding that “actual cash value is generally defined as . . . [r]eplacement cost minus normal depreciation.” *Trinidad*, 121 So. 3d at 438 (Fla. 2013) (quoting *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684, 690 (Fla. 2d DCA 2008)). Additionally, the Florida Supreme Court defined depreciation in this context as the “decline in an asset’s value because of use, wear, obsolescence, or age.” *Trinidad*, 121 So. 3d at 438 (quoting *Black’s Law Dictionary* 506, 1690 (9th ed. 2009)).

The ability to withhold depreciation until repairs are performed and costs are incurred under an actual cash value theory does not provide insurers with carte blanche to refuse to acknowledge that such amounts are covered under the policy, such as Appellee did in this matter. Rather, “[a]s replacement cost policies are intended to

operate, following a loss, both actual cash value and the full replacement cost are determined. The difference between those figures is withheld as depreciation until the insured actually repairs or replaces the damaged structure.” *Fla. Ins. Guar. Ass’n v. Somerset Homeowners Ass’n, Inc.*, 83 So. 3d 850, 851 (Fla. 4th DCA 2011) (quoting *Goff*, 999 So. 2d at 690)). Said another way, “ACV equals RCV minus depreciation, and so an RCV calculation must be made to arrive at ACV.” *Breakwater Commons Assn., Inc. v. Empire Indem. Ins. Co.*, 2:20-CV-31-JLB-NPM, 2021 WL 1214888, at \*4 (M.D. Fla. Mar. 31, 2021). Logically, so too is an RCV calculation necessary to calculate depreciation.

In *Trinidad*, the Florida Supreme Court analyzed whether allotment for a contractor’s overhead and profit, an element that has nothing to do with direct physical loss, could be considered part of the actual cash value of the loss. *Trinidad*, 121 So. 3d at 438-39. The Florida Supreme Court held that any cost reasonably necessary to bring the insured property back to its pre-loss state was recoverable as actual cash value. *Trinidad*, 121 So. 3d at 439-43. Citing *Goff*, *supra*, the Florida Supreme Court held as follows:

In *Goff*, the Second District concluded that overhead and profit are included in the scope of an actual cash value policy “where the insured is reasonably likely to need a general contractor for repairs.” The Second District correctly determined, in essence, that overhead and profit are like all other costs of a repair, such as labor and materials, the insured is reasonably likely to incur. The Second District therefore held that a portion of overhead and profit, like a portion of all other costs, was included but could be depreciated in an actual cash value policy.

*Trinidad*, 121 So. 3d at 438. Based on this precedent, the Florida Supreme Court intended actual cash value to encompass all costs of repair, including those reasonably likely to be incurred, with the insurer reserving the right to depreciate such costs. *Juvonen v. United Prop. And Cas. Ins.*, 124 So. 3d 976 (Fla. 4th DCA 2013) (holding that the trial court erred in finding that the insurer could refuse to pay overhead and profit expenses until they actually incurred the expenses); *See also, Replacement Cost Coverage*, 34 Wake Forest L. Rev. 295, 296 (1999)(the purpose of actual cash value is to place the insured back in the position she enjoyed prior to the loss).

And the full acknowledgement of coverage is mandatory in order for an insurer to fulfill its adjustment obligations. *Goff*, 999 So.2d at 690 (“As replacement cost policies are intended to operate, following

a loss, both actual cash value and the full replacement cost are determined”).

The Subject Policy provides that losses will be settled on a replacement cost basis. (R. 1034-35). Accordingly, the replacement cost value of the loss is pertinent to the determination of actual cash value. (Supp. R. 961-63). The trial erred when it excluded all necessary costs of repairs as part of the computation to determine the actual cash value of the loss.

**D. The Subject Policy Language Which Provides Coverage for “Direct Loss to Property” Is the Trigger for Coverage, not a Limitation on Coverage**

There are two (2) distinguishable types of property insurance policies which may be issued by insurers in the State of Florida: “all-risk” policies and “named perils” policies. *See generally Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671 (Fla. 2d DCA 2014). An “all-risk” policy insures against all direct losses except those explicitly excluded and, alternatively, a “named perils” policy protects against perils explicitly identified as included in the policy. *See id.* at 673, n. 1; *see also Fisher v. Certain Interested Underwriters at Lloyds*, 930 So. 2d 756, 758 (Fla. 4th DCA 2006). As outlined in *Munoz* and *Fisher*, coverage under an “all-risk” policy will include language such

as “we provide coverage for all risks not otherwise excluded” whereas a “named perils” policy will contain language which states “we provide coverage caused by any of the following perils.” With regard to the “Perils Insured Against”, the Subject Policy contains the following provision:

**PERILS INSURED AGAINST**

COVERAGE A – DWELLING and COVERAGE B  
– OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property...

[R. 1024].

In *Jones v. Federated Nat'l Ins. Co.*, 235 So. 3d 936 (Fla. 4th DCA 2018), the Court analyzed the exact same language stating “[t]here is no dispute that the insurance policy at hand is . . . an allrisk policy.” *Id.* at 940 (“The policy here initially states that “[w]e insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.”). The Subject Policy is, accordingly, an all-risks policy.

For coverage to be triggered under the policy, the insured must suffer direct loss to the insured property. (R. 1024). While direct, physical loss is required to trigger coverage under the policy, all

damages not otherwise excluded are covered under the Subject Policy. (R. 1024-31).

The Appellee persuaded the trial court that under *Vazquez*, the Subject Policy does not indemnify the insured for the amount necessary to return their damaged property to its pre-loss condition if the scope of repairs includes non-damaged components. This extension of the *Vazquez* holding is not supported under the law. The *Vazquez* opinion was the result of a ruling on the insurance carrier's motion *in limine* related to the scope of damages to be presented to the jury. *Vazquez*, 304 So. 3d at 1282. In *Vazquez*, the insured sustained a loss to her kitchen cabinets and twelve ceramic floor tiles as a result of water intrusion. *Id.* Citizens paid \$33,759.52 for the damages based on the actual cash value of the loss. *Id.* at 1282-3. The insured presented an estimate totaling \$84,542.93 to Citizens which represented a full replacement of the matching floor tiles throughout the house and all the kitchen cabinets. *Id.* at 1283. The insured subsequently filed suit alleging in pertinent part, breach of contract for failing to pay the actual cash value of the loss. *Id.* During litigation, an affidavit was executed by the consultant who drafted the insured's estimate stating that \$70,000 of the estimate was

included for matching costs. *Id.* Emphasizing that the operative complaint sought recovery on only an actual cash value basis, the trial court in *Vazquez* noted that actual cash value did not include matching but specifically “clarified that its ruling did not preclude Ms. Vazquez from seeking to recover matching costs.” *Id.* at 1284. The *Vazquez* Court did not rule that matching was excluded under the terms of the “all-risk” policy in *Vazquez*, only that matching damages were not relevant under an actual cash value theory.

Unlike *Vazquez*, the complaint in this lawsuit seeks replacement cost value damages. Also, unlike *Vazquez*, neither of the Appellants’ experts testified as to matching costs. Instead, Appellee sought and persuaded the trial court to extend the ruling in *Vazquez* and find that unless every single shingle, every inch of underlayment and decking, every nail, roofing metal and accessory was damaged, the fact that the roof is required to be replaced pursuant to Appellants’ expert engineer’s opinion within a reasonable degree of engineering certainty, could not be contemplated in the determination as to the actual cash value of the damages. This extension of *Vazquez* is misplaced. There is nothing in *Vazquez* or the applicable case law that would limit the scope of repairs when

there is direct physical damage to a property to something less than what is necessary to restore the property to its pre-loss condition under a replacement cost value policy.

**E. Treating the Policy as an Actual Cash Value Policy Results in a Windfall to the Insurer and Violates s. 627.7011**

The purpose of property insurance contracts is to indemnify policyholders for the amount necessary to return damaged property to their pre-loss condition. *See generally Glens Falls Ins. Co.*, 38 So. 2d 828 at 829; *Sperling v. Liberty Mut. Ins. Co.*, 281 So. 2d 297, 298 (Fla. 1973). It is well settled that a replacement cost value policy provides more coverage than an actual cash value policy. “Replacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property.” *Five Solas, LLC v. Ram Realty Servs., LLC*, 322 So.3d 82 (Fla. 4th DCA 2021) (citing *Trinidad*, 121 So.3d at 438 (quoting *Patrick*, 647 So. 2d at 983)). Replacement cost covers the cost of replacing the damaged structure on the same premises. *Trinidad*, 121 So. 3d at 438. “In other words, replacement cost policies provide greater coverage than actual cash value policies

because depreciation is not excluded[.]” *Id.* (citing *Goff*, 999 So. 2d at 689)).

The Subject Policy does not limit an insured’s recovery to actual cash value. It mandates that an insurer must initially pay at least the actual cash value of the loss, but unequivocally provides coverage at replacement cost value. (R. 1034-35). This necessarily includes **“the costs necessary to meet applicable laws and ordinances regulating the construction, use, or repair of any property requiring the tearing down of any property, including the costs of removing debris.”** § 627.7011(1)(b), Fla. Stat. The policy cannot provide less coverage than that required by Florida law. § 627.418, Fla. Stat.; *See, Adams v. Aetna Cas. & Sur. Co.*, 574 So.2d 1142 (Fla. 1st DCA 1991); *See also Auto- Owners Ins. Co. v. DeJohn*, 640 So.2d 158, 161 (Fla. 5th DCA 1994) (“When an insurance policy does not conform to the requirements of statutory law, a court must write a provision into the policy to comply with the law, or construe the policy as providing the coverage required by law.”).

Appellee charged Appellants a premium for a replacement cost value policy which under Florida law requires that all losses be adjusted on a replacement cost basis. § 627.7011(1)(b), Fla. Stat.

Despite this, Appellee persuaded the Court to limit Appellants' recovery to actual cash value of the damages and to preclude in that calculation costs necessary to restore the property to its pre-loss condition.

Appellee maintained that despite having denied the claim, Appellants are required to perform the necessary repairs and submit a supplemental claim as a condition precedent to recovery of replacement cost value coverage. Appellee's arguments are illogical. If the full scope of repairs, *i.e.* the replacement of the roof, is not part of the equation in determining what is payable under the policy, what is to prevent Appellee from further denying the claim for a roof replacement if a jury verdict is rendered in favor of the insureds. In other words, if the jury is only permitted to award payment for x amount of shingles, and makes no determination that a roof replacement is required, where does that leave the insured? Appellee persuaded the trial court that the answer was to file another claim and lawsuit.

MR. LABBE: Right. I can tell you what I  
4 believe the proper process would be, would be to do  
5 the repairs and then submit the claim directly  
6 within Citizens or whatever insurance company it is  
7 for the -- for the difference between the cost of

8 repairs and the actual cash value of the damages.  
9 THE COURT: And if Citizens doesn't want to  
10 pay it, Mr. Mullinax can beat their head in again.  
11 MR. LABBE: Absolutely.

(Supp. R. 1491).

This argument that an insured needs to make a supplemental claim when coverage has been denied has already been rejected by the Second District Court of Appeals. *Castro v. Homeowners Choice Prop. & Cas. Ins. Co.*, 228 So. 3d 596 (Fla. 2d DCA 2017); *Goldberg v. Universal Prop. & Cas. Ins. Co.*, 302 So.3d 919, 925 (Fla. 4th DCA 2020) (holding that an insured is not required to file a supplemental claim on a denied claim). Further, Appellee's arguments are entirely inconsistent. In the one hand, Appellee argues that the roof is not damaged by a covered peril such that would trigger coverage. It then maintains that despite its denial of the claim for lack of coverage, that the insured must replace the damaged property prior to the lawsuit to recover the replacement cost value of the property. This flies in the face of well-settled principles of law. Once a party breaches a contract the non-breaching party is not obligated to further perform under the contract and then bring suit to recover its damages. *State Farm Mutual Auto. Ins. Co. v. Gueimunde*, 823 So.2d 141 (Fla. 3d DCA

2002) (rejecting the argument that the insured must first incur costs to trigger the insurer's obligation to pay despite the insurer's denial of coverage); *Peachtree Cas. Ins. Co. v. Walden*, 759 So.2d 7, 8 (Fla. 5th DCA 2000) (holding that when the insurer advised it would no longer pay for treatment the insured had an immediate right of action even though it took place long before the time prescribed for the promised performance and before conditions specified in the promise have occurred). An insurer may not deny all liability and be permitted to stand on a policy provision inserted into the policy for its own benefit. *Tio*, 304 So.2d at 1280 (citing *Lugassy*, 593 So. 2d at 571)).

The permissive payment provision set forth in section 627.7011(3)(a) was not intended to result in a windfall to the insurer and deprive an insured of the full benefit of their policy. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole."). An insurer cannot charge and receive a premium for replacement cost coverage and then circumvent the requirements of section 627.7011. The trial court's improper limitation on the damages precluded Appellants from the

full benefit of their policy and a determination as to the proper scope of repairs to their damaged property.

**F. The Trial Court Abused Its Discretion in Excluding the Triad Estimate from Evidence**

The trial court abused its discretion in precluding the proffered itemized estimate prepared by Mr. James from evidence. While Mr. James provided testimony as to the actual cash value of the repairs to the roof, his itemized estimate provides even more detail in that it provides the unit costs of each component of repair. A jury could have utilized the estimate and the arguments of counsel to arrive at an opinion as to both the replacement cost value and actual cash value of the loss. The Appellee moved for directed verdict on the basis that Mr. James' testimony was insufficient proof of actual cash value, in part, because of the lack of exactitude. However, under Florida law, absolute exactness is not a requirement. *See McCall v. Sherbill*, 68 So. 2d 362, 364 (Fla. 1953) ("[D]amages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient that there be a reasonable basis of computation although the result may be only approximate."); *W. Boca Med. Ctr., Inc. v. Marzigliano*, 965 So. 2d 240, 244 (Fla. 3d DCA 2007)

("The 'reasonable certainty' rule for the calculation of damages does not require mathematical precision[.]"). Even under Appellee's misplaced definition of actual cash value, a jury could have made a determination as to the actual cash value of the loss utilizing the estimate.

The only basis for excluding the estimate was that it contained an amount for the replacement cost value of the loss. It did not contain "matching" costs which was the issue in the *Vazquez* matter. Yet the Court precluded the estimate which could have assisted the trier of fact in determining the actual cash value of the loss. Had the trial court admitted the estimate it cannot be said that there was insufficient testimony and evidence upon which the jury could fix and determine the amount of damages.

### **CONCLUSION**

Based on the facts and arguments outlined above, the trial court erred when it improperly limited Appellants' damages to the actual cash value of the loss. The trial court abused its discretion when it precluded the Triad estimate from evidence solely because it included replacement cost value calculations. The law mandates a determination as to the replacement cost value and actual cash value

of a loss under the Subject Policy. The trial court also abused its discretion by denying Appellants' motion for new trial because its determination that Appellants failed to meet their burden of establishing the correct measure of damages was a result of judicial error. Accordingly, this Honorable Court should reverse the lower court's rulings, and grant this appeal.

WHEREFORE, Appellants, **RICHARD BRITO and PAMELA GARCIA f/k/a JUANA TEJEDA**, respectfully request that this Honorable Court reverse and remand this matter, granting Appellants' request for a new trial, and for any and all other relief this Court deems just and proper.

Respectfully submitted,

/s/Barbara M. Hernando  
Barbara M. Hernando, Esq.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email to: Evan A. Zuckerman, Esquire, ezuckerman@florida-law.com and eazservice@florida-law.com on this 19<sup>th</sup> day of July 2024.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Brief complies with the font requirements and word count requirements in Fla. R. App. P. 9.210 and Fla. R. App. P. 9.045.

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