IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOR THE THIRD DISTRICT

CASE NO.: 3D24-1196

L.T. CASE NO.: 2019-CA-269-M

TREASURE CAY CONDOMINIUM ASSOCIATION, INC. a/k/a TREASURE CAY CONDO. ASSOC., INC.,

Appellant,

vs.

FRONTLINE INSURANCE UNLIMITED COMPANY,

Appellee. /

ANSWER BRIEF

OF

FRONTLINE INSURANCE UNLIMITED COMPANY

Patrick E. Betar, Esq.
Melissa M. Sims, Esq.
BERK, MERCHANT & SIMS, PLC
2 Alhambra Plaza, Suite 700
Coral Gables, Florida 33134
Telephone: (786) 338-2900
Email: pbetar@berklawfirm.com
Msims@berklawfirm.com
kmendez@berklawfirm.com
Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CITATION TO RECORD AND ABBREVIATIONS

This brief will employ the same method of abbreviations and citations used in the Initial Brief.

Appellant will be referred to as "Treasure Cay."

Appellee will be referred to as "Frontline."

Citations to the Record on Appeal will be made as "R.___".

STATEMENT OF THE CASE AND FACTS

Treasure Cay's Statement of the Facts omits pertinent facts. As such, Frontline presents its statement of facts with record citations below.

The Insurance Policy

Treasure Cay owns and operates a four-story condominium building in Marathon, Florida. (R. 888, 1081). Frontline insured the building and its swimming pool against certain losses for a total limit of $3,126,456.00 for a one-year period commencing June 30, 2017. (R. 896, 968). On September 20, 2017, ten days after Hurricane Irma, Treasure Cay notified Frontline it was making a claim for damage. (R. 969, 1148).

Frontline's Inspection

Frontline sent an independent adjuster to inspect the property on October 4, 2017, with the insured and its contractor. (R. 1151-1152; 1286). Treasure Cay's treasurer and corporate representative (Dee Wright) testified in litigation that after the storm she saw felled trees, fence damage, felled street signs, some doors that would not

BERK, MERCHANT & SIMS PLC

2 Alhambra Plaza, Suite 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

close, and a tree on top of the insured's spa and in its swimming pool. (R. 1028). Treasure Cay gave no notice of any interior damage at the time of the inspection. (R. 1287).

Not surprisingly, while Frontline's adjuster observed some hurricane related damage to stucco, exterior signs and lights, and fences, he did not observe any hurricane related damage to the roof systems or interiors. (R. 1287). Indeed, Ms. Wright testified in deposition that she neither gave notice of any damage to her unit, nor saw any damage to her unit at that time. (R. 1030-1031).

Frontline's Coverage Determination

On October 10, 2017, Frontline issued its coverage position letter. In it, Frontline advised Treasure Cay that the estimated cost to repair covered damage did not exceed the policy's $150,832.00 hurricane deductible. (R. 969; 975). Frontline further advised the insured that it was closing its file at that time, but also invited Treasure Cay to contact it if there were any questions or concerns. (R. 975). Three days later, it also advised Treasure Cay of its right to mediate the loss through Florida's Department of Financial Services if it felt it was owed benefits under the policy. (R. 969; 982-983).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

Around that time, Treasure Cay also advised it would be presenting an engineering report. (R. 969; 1175). No reports or other documentation were produced by Treasure Cay until two years later when it reopened its claim. (R. 965-967; 970; 984-985).

Treasure Cay's Pre-storm Renovation Project

During his adjustment of the initial claim, Frontline's adjuster noticed that the insured buildings were undergoing what appeared to be an ongoing concrete restoration project. (R. 1287). He further observed that some of the windows had protective film on the glass, indicating they were recently installed prior to the Hurricane. (R. 1287). According to Treasure Cay's permit records with Monroe County, it spent $900,000 in concrete restoration and $142,402 in upgrading its windows and doors to be impact resistant – all just before Hurricane Irma. (R. 2282).

In suit, Frontline confimed that Treasure Cay was completing an extensive renovation when Hurricane Irma struck. (R. 1032-1033). As testified to by Ms. Wright during the lawsuit, the contractor was finishing the "punch list" and the project was nearly completed at the time of the storm. (R. 1032-1033).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

Ms. Wright further confirmed in deposition that, at the time of Hurricane Irma, Treasure Cay had newly installed hurricane impact windows and doors. (R. 1051). Although Treasure Cay represented to the County when it applied for construction permits that it spent $142,402 in replacing its existing windows and doors with impact resistant models, Ms. Wright testified that Treasure Cay actually spent "at least" double that amount. (R. 1051-1052; 2745). She also testified that the company that installed the new windows, Keys Glass, replaced some of the windows after the hurricane under warranty. (R. 1057).

Treasure Cay Reopens its Claim

Treasure Cay had a public adjuster to assist it in presenting its claim, Keys Claims Consultants ("Keys Claims"). (R. 1042-1043). In its December 20, 2017, letter of representation, Keys Claims invited Frontline "to join us in the inspection and damage calculations to ensure all information submitted on behalf of the insured is as accurate as possible." (R. 1106). That invitation to cooperate with Frontline was short-lived.

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

Another two years passed before Frontline received any substantive update on Treasure Cay's supplemental claim[1]. On September 18, 2019, Frontline received a sworn statement in proof of loss wherein Treasure Cay, for the first time, presented a $3,020,285.27 claim under oath. (R. 965-967; 970; 984-985). Notably, Treasure Cay's residential buildings were insured for $3,126,456.00 – making Treasure Cay's claim supplement nearly a policy limit demand first presented two years after the storm. (R. 896).

As part of its claim supplement, Treasure Cay sought replacement of nearly every one of its newly installed impact windows and doors (some of which still had the manufacturer's protective film in place after the storm). (R. 1287; 2788-89; 2282; 2695). The

---

[1] Florida Statute 627.70132 states, in part, "…the term 'supplemental claim' or 'reopened claim' means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim." Fla. Stat. § 627.70132. Based on that language, the multimillion-dollar claim presented after the initial adjustment is a "supplemental claim."

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

estimate upon which the $3 million claim was presented demanded $651,720 to replace the newly installed windows and doors. (R. 1813-1814). Those are the same windows and doors Treasure Cay told the County cost $142,402 just before the storm and which Ms. Wright testified actually cost double the amount represented to the County. (R. 1051-1052; 2745). Frontline learned in suit that the supplemental claim also included some of the same windows that Keys Glass replaced after the storm under their warranty. (R. 1057).

The new claim package demanded $665,731.53 for *repairs* to the stucco that had been *completely restored* for $900,000 (per the insured's permits) just before the storm. (R. 2282; 2788). It also included $258,960 for scaffolding to do the repairs – which appeared not to have been incurred in the pre-storm restoration project. (R. 2789). Treasure Cay's $3 million estimate and Proof of Loss raised several questions that needed further investigation.

Appraisal is demanded

In the same letter that presented the $3,020,285.27 claim supplement, Keys Claims requested an appraisal of the claim "if you

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

do not agree to the amount stated in the enclosed proof of loss." (R. 966).

The policy contains the following appraisal provision:

> Mediation Or Appraisal
>
> If we and you:
> ***
> B. Disagree on the value of the property or the amount of loss, either may request an appraisal of the loss, in writing. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree they will submit their differences to the umpire. A decision agreed to by any two will be binding.
>
> Each party will:
>
> 1. Pay its chosen appraiser; and
>
> 2. Bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we will still retain our right to deny the claim.

(R. 934).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

As seen from the above, when the parties disagree on the amount of loss, the dispute over the amount of loss can be resolved through an appraisal panel. At the time appraisal was demanded, however, Frontline had not had an opportunity to investigate and adjust the claim supplement. Because of that, it did not know if and to what extent it disagreed with the claim supplement being presented. (R. 1194).

Frontline Attempts to Adjust the Newly Presented Claim

Treasure Cay's buildings were insured for a total replacement cost value of $3,126,456.00. (R. 896). Yet, two years after the storm, Treasure Cay suddenly claimed it suffered $3,020,285.27 in damage to its buildings. (R. 965-967). Neither had the insured claimed a total loss to its property in 2017, nor did Frontline observe hurricane damage equal to the insured value of the property at that time. Understandably, Frontline had some concerns about the new claim supplement and wanted an opportunity to investigate and adjust the new loss. (R. 1174, 1194-1196).

The policy contains certain Duties in the Event of Loss or Damage, which are conditions precedent to coverage after a loss if

invoked by Frontline. (R. 943-944). The policy provision, which is written in the first-person perspective, refers to Frontline as "us" and Treasure Cay as "you." Among the Duties listed in the policy, Treasure Cay is required "*as often as may reasonably be required* [to] permit us to inspect the property proving the loss or damage and… permit us to make copies from your books or records." (R. 944) (emphasis added). It also requires Treasure Cay's representative to sit for an Examination Under Oath ("EUO") "as may be reasonably required" to discuss "any matter relating to this insurance or the claim, including an insured's books and records." (R. 944). The policy further contains a Legal Action Against Us clause that prohibits legal action unless there has been full compliance with all of the terms of the policy. (R. 902).

On October 11, 2019, Frontline told its insured that it was in the process of investigating and adjusting the newly presented claim supplement. (R. 986-995). To better understand the three-million dollars in damage now presented, Frontline invoked the insured's contractual post-loss obligations to present a representative for an EUO and to present its books and records for examination. (R. 986-

995). As noted in the letter, Frontline was trying to gather all the information needed to adjust the three million dollars in newly claimed damage. (R. 993).

There was a dramatic increase in the scope and the amount of damage now claimed. Notably, in suit, even Treasure Cay's representative testified that she did not think Frontline's request to inspect and investigate the supplemental claim was unreasonable. (R. 1057).

Treasure Cay's public adjuster responded to the EUO and document request that same day. By email, the public adjuster advised Frontline that he recommended Treasure Cay retain counsel to assist with the post-loss obligations (the EUO and document production). Once counsel was retained, the public adjuster stated that Frontline "will be notified and the EUO date can be verified or changed, depending on schedules." He then noted that he "look[ed] forward to working with you to help resolve the insured's claim." (R. 996-997).

A month later, however, Frontline had not received any further response to its requests. On November 13, 2019, Frontline's counsel

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

sent another letter to remind the insured of its upcoming EUO and that the November 9, 2019, production deadline had passed without any response. (R. 998-1002). The letter also clarified that the timeframe for the documents being produced was from 2010 through 2018 and again requested their production. (R. 998).

That same day, Treasure Cay's public adjuster repeated that the insured is in the process of hiring counsel and counsel would provide the requested documents. But, the public adjuster also offered to allow Frontline's counsel to go to the Association to inspect and copy them herself. (R. 1003).

On November 15, 2019, Frontline's adjuster and Treasure Cay's public adjuster began discussing Frontline's inspection of the property. When Frontline advised it wanted to send its adjuster and engineer to look at the three-million dollars in supplemental damage, the public adjuster responded that he was going to help coordinate dates when they could get access to the individual units. (R. 1006).

There was some additional back and forth about document production, but then Treasure Cay retained its counsel and changed course.

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

Treasure Cay Refuses to Comply with Post-Loss Obligations

On November 24, 2019, Frontline's counsel emailed Treasure Cay's counsel noting that the public adjuster had been coordinating inspections with Frontline's adjuster. In that email, Frontline advised it would like to have the inspections scheduled to commence "soon after the EUO on December 4." (R. 1010). Frontline also inquired as to when it could expect the documents requested on September 25, 2019 and October 11, 2019. (R. 1010).

Without warning, Treasure Cay filed suit against Frontline on November 14, 2019. (R. 3-6). That was done in violation of the policy's Legal Action Against Us provision since the requests for an EUO and inspections of the building and records were still pending. (R. 902).

Further, Treasure Cay completely changed course and advised Frontline that it had no intention to comply with its post-loss obligations to sit for an EUO or provide its books and records for examination and copying. (R. 1008-1009). Treasure Cay also advised that it only partially would comply with the other post-loss obligations if Frontline agreed it "can be done at this time without prejudice to [Treasure Cay's] legal position." (R. 1009). In other

words, Treasure Cay advised it would never sit for an EUO and would only partly comply with certain post-loss obligations *if* Frontline agreed to waive its coverage defenses and prejudice its legal position in the pending lawsuit filed by Treasure Cay. (R. 1008-1009).

As promised, Treasure Cay did not appear for the duly noticed EUO on December 6, 2017. (R. 1008; 1014). As noted by Treasure Cay's counsel, "[w]e are in suit and therefore will not be attending an EUO." (R. 1008). Further, Treasure Cay did not permit the property inspection. (R. 1014). It also did not provide any of the requested documents prior to filing suit. (R. 1013-1014).

Frontline denied coverage for the loss December 16, 2019, because Treasure Cay refused to comply with its post-loss obligations and filed suit prior to fully complying with the policy's terms or allowing Frontline to investigate its claim supplement. (R. 1013-1016).

Still, Frontline's denial letter gave Treasure Cay the opportunity to dismiss its lawsuit, comply with its post-loss obligations, allow Frontline to adjust the $3 million claim supplement, and right its

wrong. (R. 1016). Treasure Cay refused that opportunity, and the parties moved forward in the lawsuit Treasure Cay filed.

The Litigation, Summary Judgment, and Final Judgment

The matter was removed to Federal Court. (R. 75). Judge James Lawrence King ultimately entered final judgment for Frontline, finding no merit in the same arguments raised by Treasure Cay on appeal here. (R. 1018-1021).

In doing so, Judge King granted Frontline's motion for final summary judgment, finding that Treasure Cay's invocation of appraisal did not vitiate its post-loss obligations to allow inspection of its records and property or sit for an Examination Under Oath. By refusing to comply, Judge King found that Treasure Cay materially breached the insurance policy and was not entitled to an appraisal. (R. 1020-1021). When Treasure Cay appealed to the Eleventh Circuit Court of Appeals, that Court never addressed the merits of the appeal. The Court of Appeal, *sua sponte*, raised jurisdictional concerns. The case was then remanded back to state court. (R. 167).

Back in state court, the parties again moved for cross summary judgments. Treasure Cay again argued that when it

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

contemporaneously demanded appraisal with its presentation of a three-million dollar claim supplement, it eviscerated Frontline's right to invoke post loss obligations. (R. 1288-1323).

Frontline again disagreed with Treasure Cay's position on summary judgment. Frontline argued that Treasure Cay materially breached the policy (precluding any right to recovery or an appraisal under the policy) when it completely and intentionally refused to comply with it post-loss obligations or allow Frontline to adjust its $3M claim supplement. (R. 856-886).

The trial court again ruled in Frontline's favor after hearing argument for over an hour. (R. 3551 - 3559). On June 7, 2024, the Court rendered its order granting Frontline's motion for summary judgment and entering final judgment in its favor. (R. 3552-3559).

In doing so, the trial court found that simply demanding appraisal did not relieve Treasure Cay from complying with its post-loss obligations under Frontline's policy. (R. 3556). It also found that "there is no dispute that [Treasure Cay] refused to comply with its post-loss obligations after it submitted its $3 million supplemental claim" prejudicing Frontline. (R. 3555, 3557-3558). Ultimately, the

trial court agreed with Judge King in the federal court; Treasure Cay's refusal to comply materially breached the policy relieving Frontline from any further obligation under the policy for the Hurricane Irma claim – including appraisal. (R. 3557-3558).

This appeal followed.

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

SUMMARY OF THE ARGUMENT

The issue on appeal is whether the trial court correctly determined that Treasure Cay refused to comply with its contractual post-loss obligations, thereby preventing an appraisal and materially breaching the insurance policy. Treasure Cay contends that it no longer had to comply with its post-loss obligations after it invoked an appraisal of the amount of loss. However, this Court — sitting *en banc* — rejected a similar argument over two decades ago. Moreover, this Court consistently has held that an insured's refusal to comply with post-loss obligations can provide grounds to deny coverage for an insurance claim.

After presenting a $3 million claim for supplemental damage, Treasure Cay completely refused to comply with its post-loss obligation to sit for an Examination Under Oath. Additionally, it declined to allow an inspection of its property or its books and records related to the claim supplement unless Frontline "cut a deal" and agreed to prejudice its defenses in a pending lawsuit. Each of these refusals constituted a separate material breach of the insurance policy. The trial court properly found that these breaches

prejudiced Frontline, thereby relieving it of any further obligation to provide coverage.

Treasure Cay now asks this Court to rewrite the insurance contract, abrogate a prior *en banc* decision from this Court, and establish new precedent in Florida. Specifically, it urges this Court to hold, for the first time, that an insured can absolve itself of all post-loss obligations under an insurance policy simply by requesting an appraisal of the amount of loss. As the trial court and the federal district court before it both concluded, Treasure Cay's position lacks any basis in Florida law.

Finally, Treasure Cay's request for an evidentiary hearing is without merit. In Florida, evidentiary hearings are warranted only when there is a genuine issue regarding substantial compliance with an insured's post-loss obligations. Here, Treasure Cay openly admits it refused to sit for an Examination Under Oath or allow inspection of its property and records after it presented its $3 million claim supplement, asserting that it was not required to do so.

Accordingly, the final judgment should be affirmed.

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

STANDARD OF REVIEW

This case comes before the Court on a grant of summary judgment, which is reviewed de novo. *Kocik v. Fernandez*, 354 So. 3d 1134, 1137 (Fla. 3d DCA 2023) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)). Under Florida Rule of Civil Procedure 1.510(a), summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Additionally, the construction and interpretation of an insurance policy is a question of law, also subject to de novo review. *Arguelles v. Citizens Prop. Ins. Corp.*, 278 So. 3d 108, 111 (Fla. 3d DCA 2019).

ARGUMENT

The trial court correctly found that Treasure Cay did not fully comply with its post-loss obligations, thereby relieving Frontline of any further obligations under the policy and rendering the request for appraisal moot.

The trial court's order denying appraisal should be affirmed.

I. An insured must comply with *all* of its duties after loss before an appraisal can be compelled.

The argument raised by Treasure Cay is, essentially, that it can comply with *some* post-loss obligations, then present a supplemental claim and *refuse* to comply with *any* post-loss obligations simply by demanding an appraisal of the loss. That position was previously rejected by this Court, sitting *en banc*, in *United States Fid. & Guar. Co. v. Romay*, 744 So. 2d 467 (Fla. 3d DCA 1999).

This Court held in *Romay* that an insured must comply with *all* its post loss obligations before an appraisal is ripe. That proposition has been upheld consistently by Florida's courts. *See*, *Am. Capital Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020) (a demand for appraisal not ripe until post-loss conditions are met); *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344 (Fla. 3d DCA 2011) (until all post-loss conditions are met and the insurer has a reasonable opportunity to investigate the loss, there is no disagreement to appraise).

The appraisal provision examined in *Romay* was substantially similar to the one contained in Frontline's policy, and stated "If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss." *Id.* In each of the consolidated cases in *Romay*, the insured ultimately disputed its carrier's initial evaluation of the loss, demanded additional payment, and invoked appraisal. Like Frontline, the carrier responded by advising appraisal was premature because it was invoking the insureds' "Duties After Loss" and demanded a sworn proof of loss, documentation that supported the claim, examinations under oath, and reinspection of the property. Two of the insureds only provided repair estimates and one only provided a sworn statement in proof of loss, but each filed petitions to compel appraisal. *Id* at 409. No further compliance was made with the remaining requests for information and reinspection.

Based on the insureds' partial compliance with the insurers' requests, the trial court compelled appraisal apparently on the same argument raised by Treasure Cay: once an insured disputes the amount of loss and presents a proof of loss and/or an estimate,

appraisal is ripe and must be compelled. *Id*. at 469-470. This Court reversed.

Although appraisal can be invoked to resolve disputes over the amount of loss, "the disagreement [over the amount of loss] necessary to trigger appraisal cannot be unilateral." *Id*. As this Court noted, "by the terms of the contract, it was contemplated that the parties would engage in some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist." *Id*. 470.

The *Romay* Court receded from prior cases to the opposite and required "compliance with the policy's preconditions to appraisal before granting motions to compel appraisal." *Id* at 472. Thus, this Court found the insured's request for appraisal premature because, "[n]o reasonable and thoughtful interpretation of the policy could support compelling appraisal without first complying with the post-loss obligations." *Id*. at 471.

This Court has never receded from *Romay*, as confirmed by *Redlhammer v. ASI Pref. Ins. Corp.*, 337 So. 3d 421 (Fla. 3d DCA 2021).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

In *Redlhammer*, this Court noted, "[i]n an unbroken line of cases, this Court has held that appraisal is premature when one party has not provided a meaningful exchange of information sufficient to substantiate the existence of a genuine disagreement." *Id* 423. Again, this Court noted, "an insured must comply with *all of the policy's post-loss obligations* before the appraisal clause is triggered." *Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12, Inc.*, 54 So. 3d 578, 581 (Fla. 3d DCA 2011), (citing, *Romay*, 774 So. 2d at 471 (emphasis added)); see also, *First Home Ins. Co. v. Fleurimond*¸36 So. 3d 172, 174 (Fla. 3d DCA 2010) (same).

Contrary to Treasure Cay's position, an insured cannot pick and choose which post-loss obligations it will honor, if any – it must comply with *all* post-loss obligations. *Certain Underwriters at Lloyd's v. Gables Court Condo. Ass'n*, 357 So. 3d 759, 761 (Fla. 3d DCA 2023) ("It is well-settled in Florida that *all* post-loss obligations must be satisfied before a trial court can exercise its discretion to compel appraisal.") (citing, *State Farm Fla. Ins. Co. v. Fernandez*, 211 So. 3d 1094, 1095 (Fla. 3d DCA 2017) (emphasis added)). This is so, even if

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

appraisal is demanded before post-loss compliance is invoked. *Romay*, 744 So. 2d at 469.

"The law in this district is clear and has been for nearly twenty years: the party seeking appraisal must comply with all post-loss obligations before the right to appraisal can be invoked under the contract." *State Farm Fla. Ins. Co. v. Hernandez*, 172 So. 3d 473, 476-77 (Fla. 3d DCA 2015).

The trial court was correct in finding Treasure Cay was required to comply with all its post-loss obligations and those post-loss obligations were not struck from the policy the moment appraisal was demanded.

II. Treasure Cay fails to cite any authority that holds a presuit request for post-loss compliance is "waived" or "disallowed" when appraisal is demanded.

Without citing any binding authority to support its position, Treasure Cay argues its invocation of appraisal stops the adjustment process and deprives Frontline of its ability to invoke post loss obligations. The three unpublished district court decisions relied upon by Treasure Cay are distinguishable and do not supplant *Romay*, or its progeny.

First, Treasure Cay cites unpublished decisions that are distinguishable since there was no coverage denial for non-compliance. *Palm Bay Yacht Club v. Lexington Ins. Co.*, No. 18-23888-CV, 2019 U.S. Dist. LEXIS 20093 (S.D. Fla. Feb. 6, 2019). Instead, the question presented was whether the insured waived its right to appraisal or if appraisal was premature. The insurer in *Palm Bay Yacht Club* had not denied coverage for the claim. Further, there were no requests to comply with post-loss obligations pending when suit was filed. Here, however, Frontline does not argue prematurity. Frontline argues that Treasure Cay's refusal to comply with its presuit requests for an EUO and inspections and its filing suit without complying is a material breach of the insurance contract that relieved Frontline from any further obligations under the insurance contract. This case is postured much differently than *Palm Bay Yacht Club*.

Next, Treasure Cay cites to another unpublished decision where there was a question as to whether the insured substantially complied with its post-loss obligations prior to suit. *Diamond Lake Condo. Ass'n v. Empire Indem. Ins. Co.*, No. 2:19-cv-547-FtM-38NPM,

2020 U.S. Dist. LEXIS 181392 (M.D. Fla. Sep. 30, 2020). The district court found that there were no pending requests for compliance with any post-loss obligations enumerated in the policy. Further, although timing was a potential issue, the insured had complied with all requests for compliance with post-loss obligations found in the policy. *Id.* at *8. Here, Frontline requested an EUO, to inspect the property, and to inspect Treasure Cay's books and records before Treasure Cay filed suit. Unlike the in *Diamond Lake*, the policy contained the specific post-loss obligations requested and they were requested *prior* to suit being filed. What is also distinguishable from *Diamond Lake*, Treasure Cay did not comply or even partially comply with any of those requests prior to filing suit.

Also distinguishable is *Waterford Condo. Ass'n v. Empire Indem. Ins. Co.*, No. 2:19-cv-81-FtM-38NPM, 2019 U.S. Dist. LEXIS 138930 (M.D. Fla. Aug. 16, 2019). There, the insured revised its estimate of cost to repair from $2 million to $5 million. But, the district court found that it was not a new claim. Instead, the district court found the increase the cost of repair was due to "a strong economy, busy construction industry, and back-to-back hurricanes in 2017 and

2018." *Id.* at *5-6 Prior to suit the insurer had prepared multiple estimates on the same items being claimed and district court found parties had adjusted the same scope and just come to different estimates on the cost to repair. *Id.* Here, we have a drastic change in both pricing and a newly enlarged scope of items damaged that Frontline did not get to adjust and investigate. *Waterford* is not instructive.

Further hurting Treasure Cay's reliance on those three unpublished federal trial court decisions is a published decision from the Eleventh Circuit Court of Appeals, *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771 (11th Cir. 2000), which followed this Court's decision in *Romay*.

Galindo was a consolidated appeal where three sets of insureds had a similar set of facts. In 1992 the insureds made a claim following Hurricane Andrew. The insurance companies adjusted the claims, paid what was owed, and closed their files. Five years later, each of the insureds claimed the prior payments were insufficient "and demanded payment of a supplemental, sizable claims based on unsworn and unsigned estimates" prepared by a public adjuster. *Id.*

at 773. The insureds presented the insurance companies an "ultimatum:" either pay the requested amount or submit to appraisal." *Id.* The letter enclosing Treasure Cay's $3 million unsworn and unsigned estimate gave the same "ultimatum." (Doc. 20-6).

As Frontline did, the insurers in *Galindo* responded that appraisal was premature, that they needed to inspect the newly claimed damage, and invoked the insureds' post-loss obligations. *Id.* As Frontline did, the insurers requested an inspection of documentation and the newly claimed damage, though they requested a sworn proof of loss rather than an EUO. *Id.* As Treasure Cay did, each of the insureds filed suit and moved to compel appraisal rather than comply with the post-loss obligations.

Then the district courts each granted summary judgment finding that "the insureds had prevented the insurance companies' investigation of the supplemental claims, which was a condition precedent to the party's demands for appraisal." *Id.* at 774. On appeal, the insureds argued that they are entitled to compel appraisal of their supplemental claims based on the newly provided loss

estimates alone, as does Treasure Cay here. *Id.* Unlike here, however, none of the claims were denied based on material breaches of the post-loss obligations coupled with a violation of a legal action clause.

The Eleventh Circuit affirmed the district courts. In doing so, the Court stated:

> Therefore, we hold that these insureds must comply with the post-loss terms of their respective homeowner's policies, which enables the insurance companies to investigate the insureds' claims and to disagree with the loss amount before the appraisal term becomes effective.

Id. at 777.

In doing so, the Eleventh Circuit relied heavily on this Court's decision in *Romay*.

Appellate courts in Florida, both state and federal, have ruled against the position Treasure Cay now takes. It is well-settled that an insurer can still invoke an insured's post-loss obligations – even after appraisal is demanded and even after a prior claim determination was made. *Romay*, 744 So. 2d at 468; *Galindo*, 203 F.3d at 777; *see also*, *Galeria Villas*, 48 So. 3d at 191-192 (concluding that until a

policy's post-loss conditions are met, there is no disagreement as to the amount of loss to be appraised).

III. Treasure Cay's complete refusal to comply with post-loss obligations relieved Frontline from any further obligation under the policy.

When an insurer defends against coverage on the grounds that its insured failed to comply with post-loss obligations, a coverage question arises that must be resolved by the court – not an amount of loss question that could be resolved by an appraisal pane. As conceded by Treasure Cay, it refused to sit for an Examination Under Oath or allow inspections of its books and property after it presented its $3 million supplemental claim because it felt it had no obligation to do so. This Court in *Romay* disagreed with that position. That issue needed to be resolved prior to compelling an appraisal, and the trial court properly did so.

A. A complete refusal to comply with a post-loss obligation is a valid ground for denying coverage for a loss.

Frontline's policy contains certain Duties in the Event of Loss or Damage, which are conditions precedent to coverage. (R. 943-944). Similar "duties" placed on an insured after a loss have been in

property insurance contracts for more than a century. *See, e.g., Southern Home Ins. Co. v. Putnal,* 49 So. 922 (Fla. 1909). Florida recognizes these duties as reasonable post-loss measures included in the parties' contract to enable and facilitate claims investigation and processing. "The nature of the post-loss obligations is merely to provide the insurer with an independent means by which to determine the amount of loss, as opposed to relying solely on the representations of the insured." *Romay*, 744 So. 2d at 471 n.4.

"Conditions in policies of insurance are part of the consideration for assuming the risk, and the insured, by accepting the policy, becomes bound by these conditions." *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300, 304 (Fla. 4th DCA 1995). An insured's compliance with all post-loss obligations allows for an orderly claims handling process without burdening either the parties or the court system with unnecessary litigation.

In *State Farm Florida Ins. Co. v. Hernandez*, 172 So. 3d 473, 478 (Fla. 3d DCA 2015), *rev. denied* 2016 LEXIS 1366 (Fla. 2016), the Court explained the rationale for requiring compliance with all post-loss obligations in the context of an appraisal:

> Until these [post-loss obligation] conditions are met and the insurer has a reasonable opportunity to investigate and adjust the claim, there is no "disagreement" (for purposes of the appraisal provision in the policy) regarding the value of the property or the amount of loss. Only when there is a "real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer," is an appraisal warranted.

Hernandez, 172 So. 3d at 477-78.

That rationale applies equally in the context of requiring an insured to comply with all post-loss obligations prior to filing suit.

The purpose of Frontline's "Legal Action Against Us" clause is to enable the contractual claims resolution processes to avoid litigation. Compliance with conditions precedent is made a prerequisite to filing suit under the policy's no action clause, which states, in pertinent portion, that "No one may bring a legal action against us under this Coverage Part unless there has been full compliance with all of the terms of this Coverage Part." (R. 902). "No action" clauses are clear and enforceable in setting forfeiture as the consequence for an insured's breach of policy post-loss conditions.

In *Putnal*, the Florida Supreme Court held that an insured's failure to comply with a policy post-loss condition "will preclude the

insured from recovering upon the policy, where it provides that no suit can be maintained until after compliance with such condition." *Putnal*, 49 So. at 932. *See also, e.g.*, *Goldman, supra*; *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456 (Fla. 2d DCA 2007). The Florida Supreme Court has never receded from its decision in *Putnal* in any property insurance case.

"Florida courts have consistently interpreted proof of loss obligations coupled with similar no-action clauses to be conditions precedent." *Allstate Floridian Ins. Co. v. Farmer*, 104 So.3d 1242, 1246 (Fla. 5th DCA 2012).

Thus, it is universal that an insured's complete failure to comply with its post-loss obligations is a material breach of the policy that can void coverage for a loss. *State Farm Fla. Ins. Co. v. Xirinachs*, 251 So. 3d 221, 223 (Fla. 3d DCA 2018) ("…the insured's failure to comply with their post-loss obligations relieved State Farm of any duties under the policy as to the supplemental claims sought by the insured.").

B. Each of Treasure Cay's refusals to comply with post loss obligations is a valid ground for denying coverage.

Here, Frontline invoked Treasure Cay's post-loss obligation to sit for an EUO and allow inspection of its property, books, and records. There is no dispute between the parties that those duties are contained within the policy, along with a legal action clause. There is also no dispute that Treasure Cay refused to comply with its post-loss obligations after it submitted its $3 million claim supplement. The dispute is whether Treasure Cay was obligated to comply with them. Treasure Cay categorized its duties as "burdensome" and "vindictive" but, Florida law holds that "these obligations are not unduly burdensome or arbitrary and constitute assurance that the insurer will be provided with adequate information on which to base its conclusions." *Romay*, 744 So. 2d at 471.

The $3 million claim supplement presented many anomalies that were not explained simply by the Proof of Loss and estimate submitted by the public adjuster. The windows and doors at Treasure Cay were brand new at the time of loss. Many still had their protective film from the installation still in place. Indeed, some of the windows were replaced by the company that installed them and under their

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

warranty – a fact only learned in deposition during litigation. Yet, the $3 million estimate calls for complete replacement of all windows and doors at twice the cost paid by Treasure Cay prior to Hurricane Irma. Further, the new claim package also demanded $665,731.53 in repairs to the stucco that had been completely restored for $900,000 (per the insured's permits) just before the storm, plus an additional $1.6 million for scaffolding apparently not needed during the pre-storm work.

As seen from the above, if there was ever a claim presentation that demanded further investigation, Treasure Cay's certainly did. Even Treasure Cay's representative testified in deposition that she did not think Frontline's request to inspect and investigate the claim here was unreasonable.

While list of documents and areas of inquiry requested by Frontline seems long, many are overlapping and can be categorized into three categories: 1. the condition of the building before the storm; 2. the condition of the building after the storm; and, 3. the extent and amount of work done to the affected portions of the building before and after the storm.

Indeed, similar requests for information have been deemed relevant and useful in examining losses at commercial properties. In *Citizens. Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n*, 48 So. 3d 188, 191 (Fla. 3d DCA 2010), the court noted that "[t]he association board and membership meeting minutes may disclose, for example, (1) decisions to undertake capital improvements affecting the damaged property, (2) expenses incurred in maintaining or repairing a roof or other common elements, and (3) the nature and dates of prior damage or repairs." *Id*. at 191. As the *Galeria* court pointed out, the information sought by Frontline reveals the general health of the building and often indicates other causes for the damage claimed, a history of similar issues, and other relevant information.

Florida courts specifically have found that the failure to produce documentation is a material breach of a condition precedent that relieves the insurer of its duties under the policy. *Xirinachs*, 251 So. 3d at 222-223; *Edwards v. State Farm Fla. Ins. Co.*, 64 So. 3d 730, 732-733 (Fla. 3d DCA 2011). They have also found that the refusal to sit for an EUO is a similar breach that relieves the insurer of any further obligations under the policy. *Goldman*, 660 So. 2d at 304;

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ●PHONE: 786.338.2900 ● FAX: 786.338.2888

Edwards, 64 So. 3d at 732-733; *Stringer v. Fireman's Fund Ins. Co.*, 622 So.2d 145, 146 (Fla. 3d DCA 1995). Further, an insured's compliance with some post-loss obligations does not excuse a failure to comply with other post-loss obligations. *Castro v. People's Tr. Ins. Co.*, 315 So. 3d 761, 766 (Fla. 4th DCA 2021).

IV. There were no factual issues that precluded the entry of summary judgment.

The parties agree on the material facts. Once Treasure Cay presented its $3 million estimate concurrently with its appraisal demand, Frontline attempted to adjust and investigate the newly enhanced scope and amount of the claim. In so doing, they requested an EUO and to inspect both the property and the insured's books and records. The parties also agree that among the insured's duties in the policy are to provide an EUO and allow inspection of the property and the insured's books and records. The disagreement is not factual, but a question of law: Whether the insured's invocation of appraisal ended Frontline's ability to invoke the policy's post-loss obligations. The trial court correctly answered that legal question and the final judgment should be affirmed.

Treasure Cay cites state cases allowing an evidentiary hearing when an insured's post-loss compliance is in dispute and/or when an insurer argued the request for appraisal was premature. Frontline ultimately denied coverage entirely for the Hurricane Irma claim due to Treasure Cay's failure to comply with its post loss obligations. This puts Treasure Cay's request for appraisal in a different posture.

Generally, evidentiary hearings are only used in claims where an insurer claims a request for appraisal is premature and there is a question of whether the insured substantially complied with its post-loss obligations. *Am. Coastal Ins. Co. v. Quadomain Condo. II Ass'n*, 294 So. 3d 921, 922 (Fla. 4th DCA 2020) ("When a factual dispute exists as to whether a party requesting an appraisal complied with its post-loss obligations, the trial court must hold an evidentiary hearing to determine the issue of such compliance.") (citations omitted); *State Farm v. Hernandez*, 172 So. 3d 473, 476-7 (Fla. 3d DCA 2015) (same).

An evidentiary hearing was not necessary here because Treasure Cay admits it did not comply with its post-loss obligations to present for an EUO or present its property, books, and records for

inspection. Indeed, it argues it did not even need to do so once it demanded appraisal. Therefore, there is no need for an evidentiary hearing to determine whether Treasure Cay complied – Treasure Cay concedes it did not.

This is not a question of whether an appraisal request was simply premature, which can be resolved via an evidentiary hearing. *See*, *Quadomain*, 294 So. 3d at 922. This is a question of coverage, for which Frontline asserted it had no duty to provide benefits based on Treasure Cay's material breach of the insurance contract. The issue presented in the parties' summary judgments was whether Treasure Cay refused to comply with a post-loss obligation and, if so, whether that relieved Frontline from any further obligations under the policy. The trial court correctly answered both questions in the affirmative.

C. Treasure Cay failed to present evidence to overcome the presumption of prejudice to Frontline.

Treasure Cay argues that the trial court erred in granting summary judgment because Frontline did not establish prejudice. That is not only incorrect factually, but a misstatement of the law.

In the jurisdictions in Florida that require prejudice from an insured's complete non-compliance with post-loss conditions, there is a presumption of prejudice that the *insured* must overcome. *See*, *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 916 (Fla. 3d DCA 2019).[2] Here, Treasure Cay failed to rebut the presumption of prejudice to Frontline. Because of that, summary judgment was warranted.

Traditionally, Florida courts did not consider the issue of prejudice when an insured failed to comply with a post-loss obligation. If an insured completely failed to comply with any post-loss obligation, coverage was voided. Further, if an insured complied to some degree with an obligation, an insurer would have rebuttable presumption of prejudice that the insured would have to overcome. If the insured failed to overcome the presumption of prejudice in the

---

[2] Notably, Justice Polston and Justice Canady, dissenting to a plurality opinion on an uninsured motorist claim, noted that fact prejudice is *not* required when an insured fails to comply with a post-loss obligation in a *property* insurance claim. *State Farm Mut. Auto. Ins. Co. v. Curran*, 153 So. 3d 1017, 1086 (Fla. 2014).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

context of partial compliance, coverage would be declared void as if there was no compliance.

In recent years, the Third and Fifth District Courts of Appeal have modified the traditional analysis. While those districts still hold that the failure to comply with a post loss obligation is a material breach of the contract, they now require prejudice to the insurer from any breach of a post-loss condition (rather than only in cases of partial compliance). The Third and Fifth Districts now infer a presumption of prejudice in instances where an insured *completely* fails to comply with post-loss obligations, as well as in situations where there is *partial* compliance. If the insured fails to rebut the presumption of prejudice, then coverage is voided. *Estrada*, 276 So. 3d 905, 916 (Fla. 3d DCA 2019); *Nunez v. Universal Prop. & Cas. Ins. Co.*, 325 So. 3d 267, 273-274 (Fla. 3d DCA 2021) (remanding on the issue of whether the insured met its burden to prove the insurer was not prejudiced since the trial court did not have the benefit of *Estrada*). Even under that standard, however, the trial court correctly entered summary judgment.

Treasure Cay failed to present any evidence to rebut the presumption of prejudice afforded Frontline when it refused to comply with post-loss obligations. And, it strains credulity for Treasure Cay to argue there is no prejudice to Frontline when it prohibited Frontline from inspecting the newly claimed damage, questioning the insured about the basis of its new $3 million dollar claim, or looking at any documents relating to damage, repairs, and the pre-storm condition of the items now claimed as damaged.

As discovery showed, within the $3 million claim supplement was replacement of all windows and doors that were replaced just before the storm for at least half the price now being claimed. (R. 1051-1052; 1287; 2282; 2745). Some of which were replaced after the storm by the contractor who installed them and under their warranty. The windows and doors at Treasure Cay were brand new at the time of loss. Many still had their protective film from the installation still in place. (R. 1287). Still, in litigation, Treasure Cay's expert stated that the windows and doors date to original construction. (R. 1059-1060). Further, the new claim package also demanded $665,731.53 in repairs to the stucco that had been

completely restored for $900,000 (per the insured's permits) just before the storm, plus an additional $258,960 for scaffolding apparently not needed during the pre-storm work. (R. 2788; R. 2789). This $3 million claim supplement commands the insurance company be allowed the independent investigation discussed in *Goldman* and *Romay*.

Regardless of whether prejudice is required, the trial court correctly found that Frontline was prejudiced by Treasure Cay's non-compliance and that Treasure Cay failed to present evidence to overcome that prejudice.

As the trial court found, Frontline was prejudiced by its inability to reinspect the property and hold an examination under oath. We are approximately five years after Treasure Cay's $3 million claim was first presented and payment demanded. During those two years Treasure Cay's building has been exposed to the elements, allowing conditions to worsen or change with age and time, all of which negatively affect any inspection of the building Frontline might now have. Further, memories will have faded, individuals will have moved or passed on, and Frontline's ability to conduct an EUO is affected.

There is no way Frontline's inspectors will be able to see the conditions at the property in 2025 (or later) as they were observed by Treasure Cay's inspectors and experts in 2019 (and earlier). Because of that, Frontline's independent means by which to determine the amount of loss, as opposed to relying solely on the "representations of the insured" is affected for the worst. *See*, *Romay*, 744 So. 2d at 471 n.4. Therein lies the prejudice.

Treasure Cay failed to present any evidence to rebut the prejudice presumed to Frontline. Instead, it focused on its incorrect legal theory that invocation of appraisal ended Frontline's right to invoke post-loss compliance in the first place.

Treasure Cay argues that because Frontline's corporate representative did not review its litigation document production, there is no prejudice from Treasure Cay's presuit non-compliance. The corporate representative for deposition, however, is not the person who would have reviewed the documents presuit. That would have been Frontline's field adjuster and experts. They would have compared the documents to the damage claimed and conditions seen to try and resolve the $3 million claim in whole or in part. Frontline's

opportunity to try and adjust the $3 million claim presuit was prevented by Treasure Cay's refusal to produce its books and records, as well as its building, for inspection.

Further, the fact a representative from Treasure Cay appeared at a deposition during litigation is irrelevant. Florida holds a deposition is not a valid substitute for the requested EUO. It is well settled in Florida that discovery in litigation does not "fix" a lack of pre-suit compliance with post-loss obligations to provide information:

> We are unpersuaded that appellee's post-suit deposition of appellants obviated any prejudice to appellee. The policy does not provide that depositions may be substituted for examinations under oath as appellants suggest. Rather, depositions and examinations under oath serve vastly different purposes. First, the obligation to sit for an examination under oath is contractual rather than arising out of the rules of civil procedure. Second, an insured's counsel plays a different role during examinations under oath than during depositions. Third, examinations under oath are taken before litigation to augment the insurer's investigation of the claim while a deposition is not part of the claim investigation process. Fourth, an insured has a duty to volunteer information related to the claim during an examination under oath in accordance with the policy while he would have no such obligation in a deposition. Finally, the insurer has the right to examine insured independently in sworn examinations while it would have no parallel right to do so under the Florida Rules of Civil Procedure. *See Ferrigno v. Yoder, 495 So. 2d 886 (Fla. 2d DCA 1986), review denied sub nom. Suncoast Insurers, Inc.*

> *v. Ferrigno, 504 So. 2d 768 (Fla. 1987)* (trial court abused its discretion when precluding plaintiffs from attending each other's depositions).

Goldman, 660 So.2d at 305-306; *see also*, *Sweeny v. Citizens Prop. Ins. Corp.*, 43 So. 3d 842, 843 (Fla. 1st DCA 2010) ("Even if Ms. Sweeney complied with Citizens' discovery requests or cooperated with Citizens in other respects, Ms. Sweeney was still required to submit to the examination under oath as a condition precedent to filing suit.") (Rowe, J. concurring).

The prejudice cannot be cured now. As Florida courts have noted, a post-suit "do-over" several years after the loss and two years after the claim supplement was presented is neither permitted, nor does it "cure" the prejudice. *Goldman* went on to say,

> Since forfeitures are not favored, this court has considered the possibility of remanding the case with directions that appellants submit to an examination under oath. However, we decline to exercise this option since any belated compliance by appellants more than two (2) years subsequent to the loss and the commencement of suit would satisfy neither the spirit nor intent of the policy conditions at issue. *See Watson v. National Sur. Corp., 468 N.W.2d 448 (Iowa 1991)* (insured's belated offers to submit to examinations under oath were not substantial compliance with questioning-under-oath provision of fire policy since insurer needed evidence at time of investigation when facts were more easily recalled and

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

> before crucial evidence was destroyed or became otherwise unavailable); *Pervis, 901 F.2d at 948* (insured's offer came too late to be considered); *Azeem v. Colonial Assurance Co., 96 A.D.2d 123, 468 N.Y.S.2d 248, 250 (N.Y. App. Div. 1983)* (insured's willingness to submit to examination under oath almost one and a half years after the first scheduled examination and two years after the fire does not satisfy contractual obligation of cooperation).

Goldman, 660 So.2d at 305-306.

Frontline's denial letter gave the insured an opportunity to dismiss its lawsuit, comply with its post-loss obligations, and right its wrong. (R. 1016). Treasure Cay never took that opportunity and has now waived any opportunity to do so.

Based on the facts of this case, the trial correctly entered summary judgment on Frontline's post-loss obligation defense. *See e.g.*, *Hope v. Citizens Prop. Ins. Corp.*, 114 So. 3d 457, 460 (Fla. 3d DCA 2013) (no sufficient evidence to overcome the presumption of prejudice to an insurer, even with an insured's affidavit and repair estimates); *Yacht Club on the Intracoastal Condo. Ass'n v. Lexington Ins. Co.*, 599 F. App'x 875, 881 (11th Cir. 2015) (finding prejudice as a matter of law on the post-loss obligation of late notice, which the insured failed to sufficiently rebut).

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

Treasure Cay failed to rebut the prejudice presumed to Frontline after it materially breached the insurance contract by refusing to comply with its post-loss obligations and then filing suit. The final judgment should be affirmed.

V. Conclusion.

Treasure Cay made a tactical decision to try and advance a new and novel legal argument to avoid compliance with its contractual post-loss obligations. Maybe it did so because it truly believed in its position. Maybe it did so because it did not want Frontline to investigate its near policy limits claim to replace windows and doors and repair stucco on a building that – just before the storm – had brand new windows and doors installed and had just completed a concrete renovation project. Either way, the result of its choice is the same.

Treasure Cay consciously and willingly chose not to comply with its post-loss obligations and file suit. This prevented Frontline from adjusting its $3 million claim supplement. That was a material breach of the insurance contract and fatal to its insurance claim.

BERK, MERCHANT & SIMS PLC

2 ALHAMBRA PLAZA, SUITE 700 ● CORAL GABLES, FLORIDA 33134 ● PHONE: 786.338.2900 ● FAX: 786.338.2888

For the reasons stated above, the final judgment should be affirmed.

Respectfully submitted,

BERK, MERCHANT & SIMS, PLC

/s/ Patrick E. Betar
Patrick E. Betar / FBN: 11073
Melissa M. Sims / FBN: 85936
2 Alhambra Plaza, Suite 700
Coral Gables, Florida 33134
Telephone: (786) 338-2900
Email: pbetar@berklawfirm.com
msims@berklawfirm.com
kmendez@berklawfirm.com
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure as it has been prepared in Bookman Old Style 14-point font and does not exceed 13,000 words.

/s/ Patrick E. Betar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail on February 24, 2025, to:

Stephen A. Marino, Jr., Esq.
Benjamin C. Hassebrock, Esq.
Rochelle N. Wimbush, Esq.
Derrick S. Natal, Esq.
Jacob M. Schuster, Esq.
VER PLOEG & MARINO, P.A.
100 SE 2nd Street, Suite 3300
Miami, Florida 33131
Tel: (305) 577-3996
E-Mail: smarino@vpm-legal.com
Bhassebrock@vpm-legal.com
rwimbush@vpm-legal.com
dnatal@vpm-legal.com
jschuster@vpm-legal.com
lmulhall@vpm-legal.com
jpacheco@vpm-legal.com
Counsel for Appellant

/s/ Patrick E. Betar