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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

CASE NO. 3D2024-1196

TREASURE CAY CONDOMINIUM ASSOCIATION, INC. A/K/A TREASURE CAY CONDO ASSOC INC.,

***Appellant*,**

vs.

FRONTLINE INSURANCE UNLIMITED COMPANY,

***Appellee*.**

On Appeal from the Circuit Court, Eleventh Judicial Circuit of Florida
Case No. 19-CA-000269-M

INITIAL BRIEF OF APPELLANT

December 11, 2024

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INTRODUCTION

Treasure Cay appeals from a final order (R. 3563-3570) granting summary judgment in favor of its property insurer, Frontline Insurance Unlimited Company. The trial court, without the benefit of an evidentiary hearing, found as a matter of law that Treasure Cay's non-compliance with Frontline's onerous requests for information - issued after Treasure Cay invoked appraisal based on a genuine dispute over the amount of loss – resulted in a forfeiture of coverage.

Appellant will be referred to as "Treasure Cay" and Appellee will be referred to as "Frontline." Treasure Cay cites to the record as "R. [page numbers]."

STATEMENT OF THE CASE AND OF THE FACTS

I. FRONTLINE INVESTIGATES TREASURE CAY'S HURRICANE IRMA LOSS AND ADJUSTS THE CLAIM BELOW DEDUCTIBLE.

On September 10, 2017, Hurricane Irma struck Florida and caused significant damage to the Treasure Cay condominiums, a two-story, twelve-unit building that is home to a senior community in the Florida Keys. R. 700-703, 1028, 1087-1090. As the storm approached, Treasure Cay was in the process of completing a two-year, multimillion-dollar renovation to the condominiums; work crews were finishing the punch list. R. 1630-1635; R. 1142-1143, 1148, 1179-81, 1190; R. 700-703.

For nearly a week following the storm, Treasure Cay and all of the Florida Keys were virtually inaccessible because the Overseas Highway – the only bridge in and out – was obstructed by trees, boats, and debris. R. 700-703, 1028, 1080-81, 1082-83. New challenges arose after the bridge was cleared, as it took a great deal of time for tradesmen to get back to work. *Id.* Treasure Cay's renovation contractor managed to find eight workers to begin the massive task of clean-up, but many crews lost their homes and never returned. *Id.* Workers everywhere were in demand. *Id.*

Treasure Cay promptly notified Frontline of the loss, eager to assess the covered damages and begin repairs. R. 1148, 1627-28. Frontline inspected Treasure Cay on October 4, 2017. R. 1637; R. 1411-13. Six days later, Frontline sent Treasure Cay a letter stating that its investigation was complete and the loss was covered, but Frontline's repair cost estimate of $120,511.25 did not exceed Treasure Cay's $150,832 deductible. R. 1675; R. 1415-16. Frontline advised that it would make no payment and take no further action on the claim. *Id.*

II. FRONTLINE DECLINES THE OPPORTUNITY FOR FURTHER INVESTIGATION, THEN REJECTS TREASURE CAY'S COMPETING ESTIMATE AND APPRAISAL DEMAND.

Treasure Cay disagreed with Frontline's valuation of the covered damages, R. 1036-38, and the condominiums were in need of immediate

and extensive repair for the safety of the residents, R. 1591-94. So, in December 2017, Treasure Cay retained a public adjuster to accurately quantify its loss, locate vendors qualified to submit bids, and prepare a rebuttal package to Frontline with expected repair costs. R. 1687-88. Treasure Cay's public adjuster invited Frontline to participate in evaluating damages (thereby notifying Frontline that the amount of loss was disputed), but Frontline remained silent and declined to participate. R. 1687-88. Over the next two years, Frontline made no additional post-loss requests for documents, inspections, or examinations under oath (EUO). R. 1105-09; R. 1781.

In early 2018, while Treasure Cay's public adjuster was evaluating and documenting the loss, Treasure Cay applied for disaster assistance from the U.S. Small Business Administration (the "SBA") for help with the urgent, safety hazard repairs. R. 702-703; R. 1072. Frontline received an insurance verification request from the SBA on February 22, 2018 advising that Treasure Cay had applied for assistance and seeking confirmation of insurance recoveries Treasure Cay received from Frontline for its Hurricane Irma losses. R. 1783-84; R. 1164-66. Again, Frontline knew Treasure Cay was seeking financial assistance for its repairs, but Frontline did not contact

Treasure Cay or its public adjuster about the SBA loan, and Frontline does not know whether it responded to the SBA's request. R. 1165.

Federal inspectors from the SBA's Texas office visited Treasure Cay three times over the ensuing eighteen months, inspecting the damages and reviewing Treasure Cay's records, quotes, and invoices for repairs and replacements. R. 700-03; R. 1583, 1585-86, 1590-95. During this process, the SBA loss verifiers increased the amount of the loan three times to accurately reflect Treasure Cay's urgent repair needs. *Id.* The SBA ultimately loaned Treasure Cay nearly one million dollars to restore the property to a safe, livable condition. *Id.*

In September 2019, Treasure Cay delivered its detailed damage estimate to Frontline and invoked the Policy's mandatory appraisal clause. R. 253-55; 427-599. Frontline rejected appraisal and instead demanded that Treasure Cay comply with onerous requests to produce 32 categories of documents and a witness to testify under oath on 21 topics, claiming this information was now "necessary" to adjust the loss – though it had already inspected the property, adjusted the claim below deductible, and thereafter declined to further evaluate the loss with Treasure Cay's public adjuster. R. 730-39. Frontline imposed these belated requests as post-loss obligations under the Policy, threatening to deny coverage for non-compliance. *Id.*; R.

2074-77. When Treasure Cay invoked the Policy's mandatory appraisal clause, however, there were no post-loss obligations to be satisfied. Frontline had already completed its investigation, accepted coverage, and adjusted the claim adjusted the claim below deductible; Treasure Cay had submitted its competing estimate, and the parties genuinely disputed the amount of loss. R. 1637-38; R. 1151-54, 1156-57.

III. TREASURE CAY'S ACTION TO COMPEL APPRAISAL IS LITIGATED IN FEDERAL COURT THROUGH SUMMARY JUDGMENT, THEN REMANDED FOR LACK OF SUBJECT MATTER JURISDICTION.

Treasure Cay filed this action in November 2019 seeking to compel appraisal under the policy, only after Frontline rejected the Policy's mandatory appraisal process and issued unreasonable requests. After Treasure Cay filed suit, Frontline retaliated by denying this claim and argued that Treasure Cay's non-compliance with Frontline's attempt at a second investigation – *first requested after Treasure Cay's appraisal demand* – resulted in a material breach of the policy and a forfeiture of coverage. R. 1993-96; R. 2074-88.

Frontline removed this case to federal court, where it was styled *Treasure Cay Condominium Association, Inc. v. Frontline Insurance Unlimited Company*, Case No. 4:19-10211-CV-KING (S.D. Fla) ("Federal Action"). The parties exchanged discovery and conducted depositions. R.

411-12 (describing discovery in the Federal Action with reference to accompanying exhibits). Frontline voluntarily narrowed the 32 categories of documents sought in its pre-suit request, *see id.*, and the district court found that Frontline's 21 topics for EUO testimony were significantly overbroad, R. 2104-05 (limiting Frontline's attempt to notice Treasure Cay's deposition consistent with its EUO request).[1] Treasure Cay produced at least 1,318 pages, including an affidavit describing prior restoration work and Hurricane Irma damage with supporting documentation and invoices. R 412. Treasure Cay was also deposed for over three hours, its public adjuster was deposed for over three and a half hours, and its expert was deposed for over three hours. *Id.* And Frontline's representative testified at deposition that Frontline had never reviewed the materials produced by Treasure Cay during discovery, and she was unable to identify any missing information that could have prejudiced Frontline's second investigation of the claim. R. 1201-1211.

Following discovery, the parties filed cross-motions for summary judgment, Treasure Cay seeking to compel appraisal and Frontline seeking a forfeiture of coverage for non-compliance with post-loss obligations. In a

[1] *See also Treasure Cay Condominium Association, Inc. v. Frontline Insurance Unlimited Company*, No. 4:19-10211-CV-KING, ECF No. 45 (granting Treasure Cay's objections to Frontline's deposition notice). This Court may take judicial notice of the federal court's order. *See* §§ 90.202(6) *and* 90.202(12), Florida Statutes.

brief four-page Order, the district court refused to compel appraisal and granted summary judgment for Frontline, finding as a matter of law that Treasure Cay materially breached the policy and concluding in a footnote that Frontline was prejudiced as a result. R. 3537-40.

Treasure Cay then appealed to the Eleventh Circuit Court of Appeals, which found that the district court lacked subject matter jurisdiction over the Federal Action. On remand, the district court vacated its summary judgment order and remanded this case to the trial court below. *Treasure Cay Condominium Association, Inc. v. Frontline Insurance Unlimited Company*, No. 4:19-10211-CV-KING, ECF No. 85.

IV. THE TRIAL COURT REFUSED TO COMPEL APPRAISAL AND FOUND, AS A MATTER OF LAW AND WITHOUT AN EVIDENTIARY HEARING, THAT TREASURE CAY FORFEITED COVERAGE DUE TO NON-COMPLIANCE WITH FRONTLINE'S BELATED AND EXCESSIVE REQUESTS FOR A SECOND CLAIM INVESTIGATION.

In the trial court below, Treasure Cay filed a comprehensive Motion to Refer Amount of Loss to the Appraisal Panel, seeking to compel appraisal. R. 397-711. The trial court denied this motion, finding that "resolution of the appraisal claim must be based on evidence either by way of trial or summary judgment." R. 834-35. Frontline served additional written discovery, and Treasure Cay responded to Frontline's request for production and interrogatories. R. 850-55.

The parties then filed cross-motions for summary judgment: Treasure Cay sought to compel appraisal, and Frontline sought a forfeiture of coverage. R. 856-1287; R. 1288-3429; R.3430-3453; R.3454-3550. Following a March 25, 2024 summary judgment hearing, and without the benefit of an evidentiary hearing, the court issued a June 7, 2024 Order refusing to compel appraisal and granting summary judgment for Frontline, finding as a matter of law that Treasure Cay forfeited coverage due to non-compliance with post-loss obligations. R. 3551-59. The trial court's Order made no determination as to whether Treasure Cay's September 2019 appraisal demand was ripe. Rather, the trial court improperly applied a strict compliance standard and found "no dispute that Plaintiff failed to comply with the policy's post-loss conditions," though it was disputed – Treasure Cay requested an evidentiary hearing to determine whether it had sufficiently complied with its post-loss obligations in discovery. R. 3557. The trial court also found as a matter of law that Treasure Cay could not overcome the presumed prejudice to Frontline, but identified no specific prejudice - consistent with Frontline's inability to identify any specific prejudice to its investigation at deposition. R. 3557-58; *see* R. 1201-1211. This timely appeal followed.

SUMMARY OF THE ARGUMENT

The trial court erred by failing to compel appraisal of this typical property insurance dispute. Frontline adjusted the claim with Treasure Cay's cooperation and determined that the loss was below deductible. Treasure Cay retained a public adjuster, who notified Frontline that Treasure Cay was preparing its own estimate and invited Frontline to participate in evaluating the covered damages. Frontline ignored this invitation, so Treasure Cay prepared and submitted its 172-page sworn proof of loss with supporting estimates and invoices, invoking the Policy's mandatory appraisal clause. Frontline rejected appraisal, issuing belated demands for a second investigation and then denying the claim in retaliation when Treasure Cay filed suit to compel appraisal.

Appraisal was ripe and should have been compelled. Frontline's belated attempt to conduct a second investigation, through improper and excessive requests, cannot delay the mandatory appraisal process where the parties already reached a genuine dispute over the amount of loss. The trial court's ruling impermissibly authorizes Frontline to delay appraisal indefinitely and impose unreasonable burdens on its policyholder by manufacturing new requests for documents and witnesses under the guise of post-loss obligations. Writ large, this decision would significantly expand

Florida law to favor property insurers, permitting them to choose when they will submit to mandatory appraisal, which will inevitably result in more routine property insurance disputes being managed by Florida courts. Mandatory appraisal is the preferred forum for these disputes because it conserves resources, and property insurers cannot serve in a gatekeeper function.

This case should be reversed and remanded with instructions to compel appraisal. At minimum, however, this case must be reversed and remanded for further proceedings to avoid an inadvertent and unjust forfeiture of coverage. Binding precedent requires the trial court to conduct an evidentiary hearing – as Treasure Cay requested – to determine whether Treasure Cay sufficiently complied with its post-loss obligations to permit appraisal. And the trial court could not determine as a matter of law that Frontline was prejudiced by Treasure Cay's non-compliance, since the record evidence reflects that Treasure Cay produced documents and witnesses in discovery that were responsive to Frontline's pre-suit requests.

ARGUMENT

I. STANDARD OF REVIEW.

The trial court's summary judgment ruling regarding construction of an insurance policy is subject to de novo review. *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005). This Court is "free to reassess the

parties' contract and arrive at a different conclusion than the trial court." *Advent Oil & Operating, Inc. v. S & E Enterprises, LLC*, 48 So. 3d 70, 72 (Fla. 1st DCA 2010) (citing *Emerald Pointe Prop. Owners Ass'n, Inc. v. Commercial Constr. Indus., Inc.*, 978 So.2d 873, 877 (Fla. 4th DCA 2008)).

"A trial court's findings of fact are reviewed for competent, substantial evidence." *Am. Residential Equities LLC v. Saint Catherine Holdings Corp.*, 306 So. 3d 1057, 1060 (Fla. 3d DCA 2020). As the party opposing summary judgment, this Court must review Treasure Cay's evidence and all reasonable inferences arising therefrom under the light most favorable to Treasure Cay. *See Garden St. Iron & Metal, Inc. v. Tanner*, 789 So. 2d 1148, 1149 (Fla. 2d DCA 2001); *see also Welch v. CHLN, Inc.*, 357 So. 3d 1277, 1278 (Fla. 5th DCA 2023). And while the lower court's findings are accepted if they are supported by substantial and competent evidence, this Court may not "disregard record evidence that disproves the lower court's findings or that reveals its rulings to be an abuse of discretion." *In re Doe*, 932 So. 2d 278, 284 (Fla. 2d DCA 2005).

II. AFTER ADJUSTING THE CLAIM BELOW DEDUCTIBLE AND REJECTING THE OPPORTUNITY FOR FURTHER INVESTIGATION, FRONTLINE CANNOT AVOID TREASURE CAY'S ELECTION OF MANDATORY APPRAISAL.

A. Appraisal Is Mandatory and the Preferred Forum To Resolve Disputes over the Amount of a Covered Property Loss.

Frontline's standard form property insurance Policy contains the following mandatory appraisal clause that can be invoked by either policyholder or insurer:

> If we and you … disagree on . . . 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 … 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.[2]

This District, interpreting virtually identical policy language, has held that no party can reject a valid demand for appraisal. *United Cmty. Ins. Co. v. Lewis*, 642 So. 2d 59 (Fla. 3d DCA 1994) (despite the presence of the word 'may' in the clause, "a full reading of the clause makes clear that neither party has the right to deny that demand once it is made") (citing *Ziegler v. Knuck*, 419 SO. 2d 818 (Fla. 3d DCA 1982)). Courts across Florida have agreed. *Breakwater Commons Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 2:20-CV-31-JLB-NPM, 2021 WL 1214888, at *2 (M.D. Fla. Mar. 31, 2021) ("When an

[2] R. 307 (emphasis added).

insurance policy contains an appraisal provision, the right to appraisal is not permissive but is instead mandatory, so once a demand for appraisal is made, neither party has the right to deny that demand.").

Appraisal is not merely mandatory when invoked; it is also the preferred forum for resolving disputes about the amount of a property insurance loss. *State Farm Fire & Cas. Co. v. Middleton*, 648 So. 2d 1200, 1201-02 (Fla. 3d DCA 1995) (recognizing the "general, even overwhelming, preference in Florida for the resolution of conflicts through any extra-judicial means, especially arbitration, for which the parties have themselves contracted").

B. Treasure Cay's September 2019 Appraisal Demand was Ripe and the Trial Court Erred by Refusing to Compel Appraisal.

When a party seeks to compel appraisal, the court "must make a preliminary determination as to whether the demand for appraisal is ripe." *Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342 (Fla. 2d DCA 2011) (emphasis added); *see also Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc.*, 54 So. 3d 578, 581 (Fla. 3d DCA 2011).

This Court has repeatedly held: "An appraisal demand is ripe where post-loss conditions are met, and the insurer has had a reasonable opportunity to investigate and adjust the claim and ***there is a disagreement***

regarding the value of the property or the amount of loss." *Certain Underwriters at Lloyd's v. Lago Grande 5-D Condo. Ass'n, Inc.*, 337 So. 3d 1277, 1280 (Fla. 3d DCA 2022) (quoting *People's Tr. Ins. Co. v. Fernandez*, 317 So. 3d 207, 210 (Fla. 3d DCA 2021)) (emphasis in original). In contrast, "appraisal is premature when one party has not provided a meaningful exchange of information sufficient to substantiate the existence of a genuine disagreement." *Id.* at 1280–81 (citations omitted).

This Court's 2022 decision in *Lago Grande* illustrates when an insured's appraisal demand is premature. There, the insurer received notice a year after the loss, adjusted the claim, and issued payment of $137,619.38. *Id.* at 1279. The insured "did not respond to the coverage determination letter or the amount of payment," raising no dispute until it filed suit against the insurer ten months later. *Id.* The insured then moved to compel appraisal and the insurer resisted, arguing the insured had not complied with its post-loss obligations. *Id.* When the motion was heard, the insured still had not produced any damage or repair estimate, and claimed only that it was a "multi, multi, multi-million dollar loss." *Id.* at 1280. The trial court nonetheless granted the insured's motion and compelled appraisal. *Id.*

This Court reversed on appeal, finding appraisal was premature because the insured "filed its lawsuit without ever providing its own estimate

of loss, expressing disagreement with the [i]nsurer's determinations, or demanding additional payment." This Court held that "[the insured's] silence could not establish the existence of a genuine disagreement over the amount of loss" and remanded for further proceedings. *Id.* at 1281.

In similar decisions, this Court has made clear that an insured's appraisal demand is premature when it has failed to produce its own damages estimate: "For there to be a disagreement, the insurance company must be put on notice that the insured's damages estimate is different from the insurer's estimate and scope of repairs." *People's Tr. Ins. Co. v. Ortega*, 306 So. 3d 280, 285 (Fla. 3d DCA 2020). In *Ortega*, for example, the insured never submitted a sworn proof of loss with the claimed amount (as the insurer requested), but instead filed suit and only submitted its repair estimate with a motion to compel appraisal. *Id.* at 283-84. This Court remanded for an evidentiary hearing to determine if the amount was genuinely disputed such that appraisal was ripe. *Id.* at 285.

In cases where the insured submitted its own claim estimate, but the insurer complained that it did not have ***a reasonable opportunity*** to investigate before appraisal, this Court has remanded for the parties' to comply with post-loss obligations or an evidentiary hearing to determine whether the insured's compliance was sufficient to permit appraisal. *Citizens*

Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc., 54 So. 3d 578, 582 (Fla. 3d DCA 2011) (remanding "for an evidentiary hearing on whether [the insured] sufficiently complied with the policy's post-loss requirements"); *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So. 3d 188, 191 (Fla. 3d DCA 2010) (remanding for the insured's "complete and immediate cooperation" and "a prompt response to the claim by Citizens after its prompt investigation").

The undisputed facts show that this case is materially different from this Court's line of decisions finding the insured's appraisal demand premature. After Frontline inspected the property and adjusted the claim below deductible, R.1637-73, Treasure Cay notified Frontline that it was preparing its own estimate and invited Frontline to participate, R. 1799. Frontline declined this invitation, and also failed to inquire when it learned Treasure Cay was seeking financial assistance from the SBA for urgent repairs. R. 1783. Treasure Cay only invoked appraisal when it submitted 172 pages with a sworn proof of loss for the specific amount of $2,863,962.47 accompanied by detailed estimates and invoices. R. 1801. Even then, Treasure Cay agreed to permit further investigation, offering to participate in field testing of the glass and roof systems. R. 1800. Treasure Cay did not seek to compel appraisal until Frontline rejected the appraisal demand and

issued facially excessive requests for documents and testimony, making clear that Frontline planned to delay the claim in favor of an abusive second investigation it had previously declined.

When Treasure Cay invoked appraisal on September 18, 2019, it had complied with all post-loss obligations under the policy and provided Frontline with multiple opportunities to fully investigate and adjust the claim. Treasure Cay had fully cooperated with Frontline's initial investigation, and Frontline had adjusted the claim below deductible without requesting any additional information. After Frontline's adjustment was complete, Treasure Cay gave notice that it was preparing its own estimate in response and invited Frontline to participate in evaluating the loss, but Frontline declined. There is no credible argument that Frontline was denied a reasonable opportunity to fully investigate Treasure Cay's claim. Nor could anyone legitimately refute that the parties had reached a genuine disagreement about the amount of loss in September 2019. Appraisal was therefore ripe and should have been compelled.

The trial court did not consider whether Treasure Cay's appraisal demand was ripe, as it was obligated to do. *People's Tr. Ins. Co. v. Fernandez*, 317 So. 3d 207, 211 (Fla. 3d DCA 2021) ("PTI conceded coverage, and Fernandez timely submitted his scope of loss estimate which

disagreed with PTI's scope of loss estimate. At that point, the trial court needed to evaluate whether all post-loss obligations had been met and whether appraisal was ripe before proceeding further."). The trial court instead concluded that Frontline's decision to reject Treasure Cay's appraisal demand in favor of new and excessive post-loss obligations was authorized under Florida law – and further held that Treasure Cay forfeited coverage by not strictly complying with Frontline's requests. This ruling departs from other Florida decisions holding that insurers cannot delay appraisal by imposing new post-loss obligations *after the policyholder's appraisal demand*. *See*, *e.g.*, *Palm Bay Yacht Club v. Lexington Ins. Co.*, No. 18-23888-CV, 2019 WL 1112278, at *1 (S.D. Fla. Feb. 6, 2019), *report and recommendation adopted*, No. 18-23888-CIV, 2019 WL 2255561 (S.D. Fla. Feb. 22, 2019) (compelling appraisal where insurer adjusted the claim and then "sat on its hands for more than eight (8) months"); *Waterford Condo. Ass'n of Collier Cty., Inc. v. Empire Indem. Ins. Co.*, No. 2:19-CV-81-FTM-38NPM, 2019 WL 3852731, at *2 (M.D. Fla. Aug. 16, 2019), *reconsideration denied*, No. 2:19-CV-81-FTM-38NPM, 2019 WL 4861196 (M.D. Fla. Oct. 2, 2019) (policyholder's appraisal demand was ripe even though insurer "ha[d] not investigated [policyholder]'s most recent estimate").

The *Palm Bay* court compelled appraisal on virtually identical facts. The insurer, like Frontline, initially adjusted the claim and determined that the loss was covered but below deductible. 2019 WL 1112278, at *1. Months later, the policyholder produced an estimate over $20 million and invoked appraisal. *Id.* The insurer argued that the policyholder could not demand appraisal because it had not complied with its post-loss obligations. *Id.* at *3-4. But the court found no pending post-loss obligations when appraisal was invoked, and expressly rejected the insurer's claim that it "had no meaningful opportunity to evaluate and investigate" the loss, since the insurer had initially adjusted the claim. *Id.* at *4. The court further held that the insurer could not demand compliance with new post-loss obligations after remaining idle for months on a disputed claim. *Id.* (insurer that "sat on its hands for more than eight (8) months" could not "state that it was somehow blindsided by the extent of the losses Plaintiff claims …; th[e] record shows that, instead of diligently pursuing a resolution of the matter, [the insurer] did nothing.").

The *Waterford* court reached the same result on similar facts. The insurer initially adjusted the claim, then the policyholder submitted its estimate and the insurer revised its adjustment. The policyholder then filed suit and moved to compel appraisal after submitting an updated estimate that more than doubled its claimed damages. 2019 WL 3852731, at *1. The

insurer argued that appraisal was not ripe until it had an opportunity to investigate the policyholder's updated estimate. *Id.* at *2. The court disagreed, finding that the insurer's prior adjustment of the claim was sufficient to establish a dispute over the amount of loss, and the insured "need not wait for [the insurer] to investigate the claim again before compelling appraisal." *Id.*

Palm Bay and *Waterford* are consistent with this Court's jurisprudence on the ripeness of an insured's appraisal demand, which mandates reversal. Frontline's standard form property insurance policy allows either party to unilaterally elect appraisal. This policy language is meaningless if the insurer can simply wait until the policyholder demands appraisal, then choose to delay appraisal by initiating a new and expanded claim investigation. Neither the policy nor Florida law permits an insurer to act as the gatekeeper to the mandatory and preferred appraisal process. The trial court's ruling, writ large, improperly grants insurers significant (if not complete) control over when they will submit to appraisal. This Court should reverse and remand with instructions for the trial court to compel appraisal of this claim.

C. At Minimum, the Trial Court erred by Denying Treasure Cay's Request for an Evidentiary Hearing to Determine Sufficient Compliance with Its Post-Loss Obligations.

"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." *First Protective Ins. Co. v. Ahern*, 278 So. 3d 87, 89 (Fla. Dist. Ct. App. 2019) (citing *Citizens Prop. Ins. Corp. v. Gutierrez*, 59 So. 3d 177, 178-79 (Fla. 3d DCA 2011)). Strict compliance with every insurer request is not required; the court must determine if the insured "sufficiently complied" to permit appraisal.[3] *Ortega*, 306 So. 3d at 284 (Fla. Dist. Ct. App. 2020) ("when an

[3] It is firmly established that insurers cannot demand their policyholder's absolute compliance with all post loss-obligations, particularly where they are untimely or facially unreasonable. Such unlimited power would permit insurers to abuse the claims process, harass their policyholders, and delay claims indefinitely. *Whistler's Park, Inc. v. Fla. Ins. Guar. Ass'n*, 90 So. 3d 841, 845 (Fla. 5d DCA 2012) ("Most policies provide that an insurer can demand multiple EUO's and unlimited records and that insureds cannot even have counsel present. The breadth of this power, combined with the promise of forfeiture if the insured is not compliant, has had predictable results…."). Post-loss obligations only afford insurers an opportunity to investigate the claim, and policyholders do not breach the policy by refusing to comply with unreasonable requests. *Id.*; *see also Brickell Harbour Condo. Ass'n, Inc. v. Hamilton Specialty Ins. Co.*, 256 So. 3d 245, 248 (Fla. 3d DCA 2018); *State Farm Fla. Ins. Co. v. Cardelles*, 159 So. 3d 239, 241-42 (Fla. 3d DCA 2015); *Makryllos v. Citizens Prop. Ins. Corp.*, 103 So. 3d 1032, 1034 (Fla. 2d DCA 2012) ("[an insured's partial cooperation can raise a fact question concerning whether the insurer should be able to declare a breach of the insurance contract that precludes recovery").

insurer reasonably disputes whether an insured has sufficiently complied with a policy's post-loss conditions so as to trigger the policy's appraisal provision, a question of fact is created that must be resolved by the trial court before the trial court may compel appraisal"); *see also Mango Hill*, 54 So. 3d at 582; *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129, 131 (Fla. 4th DCA 2010), *disapproved of on other grounds by Am. Coastal Ins. Co. v. San Marco Villas Condo. Ass'n, Inc.*, 379 So. 3d 1099 (Fla. 2024) ("where the insured cooperates to some degree or provides an explanation for its noncompliance, a fact question is presented regarding the necessity or sufficiency of compliance").

This Court has consistently reversed trial court orders ruling on an insured's compliance with post-loss conditions without an evidentiary hearing. *Heritage Prop. & Cas. Ins. Co. v. Sunset Villas Phase III Condo. Ass'n, Inc.*, 390 So. 3d 215, 217 (Fla. 3d DCA 2024); *United Prop. & Cas. Ins. Co. v. Concepcion*, 83 So. 3d 908, 909 (Fla. 3d DCA 2012) (reversing for evidentiary hearing because the insured "claims that the trial court had ample, sworn documents in the court file, including answers to interrogatories, from which it could conclude that he complied with his post-loss obligations under the insurance contract").

It is undisputed that Treasure Cay had complied with all post-loss obligations when it demanded appraisal in September 2019. Treasure Cay should not have been required to show compliance with any post-loss obligations Frontline sought to impose after this appraisal demand, since appraisal was ripe and should have been compelled. To the extent Treasure Cay was required to show compliance with Frontline's belated effort to create new post-loss obligations, the district court could not determine Treasure Cay's non-compliance as a matter of law and without an evidentiary hearing. Treasure Cay specifically requested an evidentiary hearing for this purpose, R. 2090, and the record evidence established that the parties had engaged in substantial discovery – voluntarily narrowed by Frontline and limited by the federal court – that reasonably satisfied all of Frontline's pre-suit requests for documents and testimony. The lack of an evidentiary hearing and factual record as to the propriety of Frontline's belated requests and Treasure Cay's compliance was clear error and requires reversal.

At minimum, this case should be reversed and remanded with instructions for an evidentiary hearing to determine whether Treasure Cay sufficiently complied with its post-loss obligations to warrant appraisal.

III. DISPUTED FACTUAL ISSUES PRECLUDED THE TRIAL COURT'S FINDING THAT FRONTLINE SUSTAINED PREJUDICE AS A MATTER OF LAW, RESULTING IN A FORFEITURE OF COVERAGE.

The trial court ruled that Treasure Cay forfeited coverage for this loss by refusing to comply with Frontline's excessive requests to conduct a second investigation after Treasure Cay had demanded appraisal. No Florida court has ever granted a forfeiture of coverage on these facts, and no court should, since "[t]he law abhors forfeiture of insurance coverage." *Am. Integrity Ins. Co. v. Estrada*, 276 So. 3d 905, 914 (Fla. 3d DCA 2019); *Johnson v. Life Ins. Co. of Ga*., 52 So. 2d 813 (Fla. 1951) ("forfeiture of rights under an insurance policy is not favored by the law, especially where, as here, a forfeiture is sought [by the insurer] after … [an] event giving rise to the insurer's liability") (citations omitted).

Where an insurer seeks forfeiture of coverage based on non-compliance with post-loss obligations, the record evidence must establish both material breach of the policy and prejudice to the insurer:

> [F]or an insurer to successfully establish a coverage defense based upon an insured's failure to satisfy post-loss obligations such that an insured forfeits coverage under a policy, *the insurer must plead and prove that the insured has materially breached a post-loss policy provision.* If the insurer establishes such a material breach by the insured, *the burden then shifts to the insured to prove that any breach did not prejudice the insurer.*

Estrada, 276 So. 3d at 916 (emphasis added); *see also People's Tr. Ins. Co. v. Fernandez*, 317 So. 3d 207 (Fla. 3d DCA 2021); *Nunez v. Universal Prop. & Cas. Ins. Co.*, 325 So. 3d 267 (Fla. 3d DCA 2021). The *Nunez* panel reiterated *Estrada's* analysis for determining whether an insured's breach was material or—articulated differently—whether an insured failed to substantially comply with post-loss obligations:

> [F]or there to be a total forfeiture of coverage under a homeowner's insurance policy for failure to comply with post-loss obligations (i.e., conditions precedent to suit), *the insured's breach must be material.*
>
> Further, while the interpretation of the terms of an insurance contract normally presents an issue of law, *the question of whether certain actions constitute compliance with the contract often presents an issue of fact. See State Farm Fla. Ins. Co. v. Figueroa*, 218 So. 3d 886, 888 (Fla. 4th DCA 2017) ("Whether an insured substantially complied with policy obligations is a question of fact.") (emphasis added); *Solano v. State Farm Fla. Ins. Co.*, 155 So. 3d 367, 371 (Fla. 4th DCA 2014) ("A question of fact remains as to whether there was sufficient compliance with the cooperation provisions of the policy to provide State Farm with adequate information to settle the loss claims or go to an appraisal, thus precluding a forfeiture of benefits owed to the insureds.")

Id. at *4 (quoting *Estrada*, 276 So. 3d at 912) (internal citations partially omitted).

Trial courts cannot summarily resolve the question of prejudice relying on a presumption of prejudice – as the trial court did – without evidentiary support against a non-movant on a motion for summary judgment. Frontline

did not suffer prejudice unless the record evidence establishes that it was unable to obtain information necessary to the adjustment of the claim due to Treasure Cay's non-compliance with post-loss obligations. Here, Frontline was attempting a second investigation after Treasure Cay demanded appraisal. Frontline could not have suffered prejudice, as matter of law, ***because it had already adjusted the claim without the newly requested information***. Whatever information Frontline was seeking in a second investigation, by definition, could not have been necessary to its adjustment of the claim. Moreover, the record evidence shows that Treasure Cay could (and did) produce all the necessary information in discovery, eliminating any possibility of prejudice. *See Diamond Lake Condo. Ass'n, Inc. v. Empire Indemnity Ins. Co.*, No. 2:19-cv-547-FtM-38NPM, 2020 WL 9160865, at *4 (M.D. Fla. Sept. 30, 2020) ("if an insured provides whatever the insurer might have wanted 'post-loss and pre-suit' during the course of the suit, such as through discovery, then a trial court commits no error when it orders the insurer to 'submit to an appraisal."). At deposition, Frontline admitted it had not reviewed materials that Treasure Cay produced during discovery and thus could not identify any specific missing information that caused prejudice to its adjustment of the claim. R. 1201-1211.

The court could not have determined that Frontline was prejudiced, as a matter of law, because the factual record is silent on the question of (1) whether the information Frontline requested in its second investigation was necessary to the adjustment of the claim (it was not), and (2) whether Treasure Cay ultimately provided Frontline with any necessary information requested (it did). If appraisal is not compelled, this case must be reversed and remanded for trial on the issue of prejudice to prevent the unjust forfeiture of coverage.

CONCLUSION

The trial court erred by failing to compel appraisal of this typical property insurance dispute. Treasure Cay's appraisal demand was ripe because it had complied with all post-loss obligations and the parties disagreed on the amount of loss. Neither the policy nor Florida law permits Frontline to delay the mandatory appraisal process indefinitely by imposing new post-loss obligations after Treasure Cay properly invoked appraisal. This Court should reverse and remand with instructions for the trial court to compel appraisal of this claim. Alternatively, at minimum, this Court should reverse and remand for evidentiary hearing or trial on the issue of Treasure Cay's compliance with post-loss obligations, which is necessary to prevent

an inadvertent forfeiture of coverage based on the trial court's improper factual findings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by e-mail through the Florida Courts E-Filing Portal on December 11, 2024 to:

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Undersigned counsel certifies that this Brief complies with the type size and style-volume limitations (5,639 words) and is in Arial 14-point font, and therefore in compliance with Florida Rule of Appellate Procedure 9.045(e) and 9.210(a)(2).

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