

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

GEORGE BOTELHO and  
INNA BOTELHO,

Plaintiffs,

v.

INDIAN HARBOR INSURANCE  
COMPANY,

Defendant.

Case No. 9:24-cv-81400-WPD

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND STATEMENT OF UNDISPUTED MATERIAL FACTS**

**PLAINTIFFS**, GEORGE BOTELHO and INNA BOTELHO (collectively referred to herein as “Botelhos”), by and through the undersigned counsel, and pursuant to Rule 56, Fed. R. Civ. P., and Local Rule 56.1, hereby file this Response to **DEFENDANT’S**, INDIAN HARBOR INSURANCE COMPANY (“Indian Harbor”), Motion for Summary Judgment and Statement of Undisputed Material Facts, and, in support thereof, state:

1. Pursuant to Local Rule 56.1, simultaneous with the filing of this Response, the Botelhos are filing their Response to Indian Harbor’s Statement of Undisputed Material Facts (“Response to SOMF”). The Botelhos have included Additional Facts in the Response to SOMF, which run from Paragraph 46 to 69.

Separately, in connection with the previous filing of their own Motion for Summary Judgment, the Botelhos filed a Statement of Material Facts That the Plaintiffs Contend Are Not Genuinely Disputed in Support of Their Motion for Summary Judgment on Defendant's Seventh, Tenth, and Eleventh Affirmative Defenses ("SOMF") [Doc. 63]. In the below Analysis and Memorandum of Law sections, the Botelhos will cite to the Response to SOMF and SOMF in support.

### ANALYSIS

2. The Policies "insure against all risks of sudden and accidental direct physical loss or damage to your dwelling, contents and other structures unless an exclusion applies." [Doc. 63-1 and 2, at Section II(A) (pg. 23)].

3. The Botelhos' damages recoverable under the Policies arise primarily out of water intrusion to the interior of the Insured Dwelling including, without limitation, damage to other property and resulting and ensuing damage. SOMF, at ¶5. The water intrusion and wind related damage was primarily caused by storm and weather-related events, which resulted in excess rain. SOMF, at ¶9-13. Indian Harbor has actually acknowledged this in its Fifth Affirmative Defense, as follows:

Indian Harbor engaged Axiom Engineering ("Axiom") to assist in their investigation of the subject claim. Axiom inspected the Plaintiffs' home on October 28, 2021 and finalized their engineering report on November 11, 2021. At the inspection, Axiom found the roof to be in an unfinished state with many installation deficiencies throughout. **As detailed in Axiom's report, water entered the subject property through the unfinished roof leading to interior water damage.**

[Doc. 8, at pgs. 7-8] (**emphasis added**).

4. There is substantial evidence that Indian Harbor knew about the issues with the roof and voluntarily decided to issue the policies. PURE and/or Indian Harbor did an inspection of the Insured Dwelling in November 2019 and prepared a “Risk Management Report”.<sup>1</sup> SOMF, at ¶14; [Doc. 63-6] (Bates Number UW-000038 – UW-000062). The Risk Management Report outlines the condition of the residence and was prepared after an inspection of the Property by a representative of PURE and/or Indian Harbor named Janae Kanjian. SOMF, at ¶15; [Doc. 63-6]. In connection with the Risk Management Report, Indian Harbor and/or PURE provided the Botelhos with a “Home Health Scorecard”, meaning that it “evaluated the overall vulnerability of your home to loss and, if appropriate, identified steps you can take to better protect your home and family.” SOMF, at ¶16; [Doc. 63-6 at pg. 4] (UW-000041). Indian Harbor and/or PURE gave the Insured Dwelling a “Home Health Score” of 9 out of 10. SOMF, at ¶17; [Doc. 63-6 at pg. 4] (UW-000041). The Water Damage Score given by Indian Harbor and/or PURE was also a 9 out of 10. SOMF, at ¶18; [Doc. 63-6 at pg. 4] (UW-000041). The Risk Management Report also includes photographs of the Insured Dwelling in November 2019 in which it is

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<sup>1</sup> The Risk Management Report was first produced by Indian Harbor in this litigation on August 1, 2025.

visibly observable that the roof is in an incomplete condition with underlayment exposed. SOMF, at ¶19; [Doc. 63-6 at pg. 12] (UW-000049).

5. Janae Kanjian has been a risk manager for Cincinnati Insurance for the past three years. SOMF, at ¶30; [Doc. 63-7, J. Kanjian Dep. Tr., 7:11-15, Aug. 29, 2025]. As a risk manager, she does home inspections for the insurance company for the purpose of documenting the features of the home and to assess the risk. SOMF, at ¶31; [Doc. 63-7, at 7:16-20]. Prior to her work for Cincinnati, she served as a risk manager for PURE for just under five years, from about 2017 to 2022. SOMF, at ¶32; [Doc. 63-7, at 8:8-17]. From 2002 to 2017, Ms. Kanjian served as a risk manager for Chubb Insurance. SOMF, at ¶33; [Doc. 63-7, at 9:9-11]. Then she went to PURE and then Cincinnati. SOMF, at ¶34; [Doc. 63-7, at 9:12-14]. Ms. Kanjian has performed a similar role for Chubb and PURE. SOMF, at ¶35.

6. The purpose of Ms. Kanjian's role as a risk manager in going to a high-value property to inspect it and to document the condition of it and to then provide that information to the underwriter is "[S]o that they have the information that they need to properly insure the risk." SOMF, at ¶36; [Doc. 63-7, at 10:8-17]. In Ms. Kanjian's experience, she thinks the underwriter utilizes her findings from her inspections to determine whether to insure the subject property. SOMF, at ¶37; [Doc. 63-7, at 11:4-11]. Ms. Kanjian testified that she would think an underwriter would consider the incomplete state of the roof at the Insured Dwelling because it "would

be more of an exposure that something could be wrong with it, or go wrong.” SOMF, at ¶39.

7. As to the Risk Management Report, Ms. Kanjian explained that it was “a risk consultation that we do when we have new members to document the features of the home and to assess the risk.” SOMF, at ¶38; [Doc. 63-7, at 14:4-11]. Ms. Kanjian testified the purpose of performing a risk management report after the insurance is in force is “[S]o that we know what we’re underwriting and what the risk exposure and the risk is.” SOMF, at ¶40; [Doc. 63-7, at 25:18-23].

8. In November 2019, Ms. Kanjian was an employee of PURE, and her role in inspecting the Insured Dwelling was to inspect the residence or premises for underwriting purposes. SOMF, at ¶20; [Doc. 63-4, at 18:9 – 19:4]. Underwriting purposes means “going out to inspect the property to determine condition of the – of the property that – that – that PURE had underwritten.” SOMF, at ¶21; [Doc. 63-4, at 19:5-12]. The purpose of Ms. Kanjian’s inspection of the Insured Dwelling on November 15, 2019 was “to report on the condition of the home or condition of the risk that – that – that PURE had underwritten” and/or to “document the condition or state of the property that was being insured.” SOMF, at ¶22.

9. An underwriter is on the front side that places the insurance or underwrites the risk. SOMF, at ¶23; [Doc. 63-4, at 20:22-25]. Underwriting the risk

means the person evaluates the risk of providing insurance to the homeowner and the property. SOMF, at ¶24; [Doc. 63-4, at 21:1-4].

10. The Risk Management Report prepared by Janae Kanjian was provided to the underwriting department for PURE Programs, LLC. SOMF, at ¶25; [Doc. 63-4, at 77:19-21]. This was to show the state or condition of the Insured Dwelling that PURE and/or Indian Harbor was assuming the risk of through issuing insurance for that Insured Dwelling. SOMF, at ¶26; [Doc. 63-4, at 77:22 – 78:4].

11. In November of 2019, PURE and/or Indian Harbor made the decision to continue insuring the Insured Dwelling with knowledge that the roof at the property was incomplete. SOMF, at ¶27; [Doc. 63-4, at 80:3-25]. This was a voluntary decision, and nobody forced PURE and/or Indian Harbor to continue insuring the Insured Dwelling. SOMF, at ¶28; [Doc. 63-4, at 80:3-25]. According to Indian Harbor's corporate representative, the decision to continue insuring the Insured Dwelling while having knowledge that the roof was in an incomplete state was a voluntary assumption of risk. SOMF, at ¶29; [Doc. 63-4, at 80:3-25].

12. Craig Kobza, a hybrid fact/expert witness, was designated to “testify to rain and associated weather events impacting the property” causing resulting and ensuing damage, the condition of the subject property, including the rook and associated roofing work, and all related details, resulting and ensuing damage to the interior components of the residence as a result of rain and associated weather

events, and the damages suffered as a result of the rain and associated weather events resulting in damages to the interior of the residence. Response to SOMF, at ¶59; **Ex. E.**

13. Mr. Kobza opined that the amount to remediate and/or repair the damage to the interior of the Property as a result of the rain and/or associated weather event during the two policy periods i.e. the damages owed by Indian Harbor is \$975,279.00. Response to SOMF, at ¶60; [Doc. 59-8, at 60:4 – 61:3]. Mr. Kobza arrived at the \$975,279.00 by “taking the most relevant Custodio estimate and modifying it to eliminate those things which [I] didn’t think [Indian Harbor] should pay for.” Response to SOMF, at ¶61; [Doc. 59-8, at 61:4-10].

14. Mr. Kobza is personally familiar with various rain events at the Property from 2021 forward through personal visits to the home when it was raining, observation of general water leaks into the inside of the home, and FaceTimes with the Botelhos in which they would show him “a bucket of water” or “a bucket in the living room” and “you could see the drips going in the bucket in the living room coming from a skylight above the ridge line of the home, for instance.” Response to SOMF, at ¶62; [Doc. 59-8, at 17:3 – 20:23]. Mr. Kobza testified there are more than 15 areas of the subject residence where water has migrated to the inside of the home and damaged the as-constructed elements within the home in part. Response to SOMF, at ¶63; [Doc. 59-8, at 47:20 – 48:10].

15. Mr. Kobza worked with Nathan Custodio of Maracore over time on different iterations of estimates from Maracore as they worked through various issues, including whether the home, as it existed and as it would exist, with the cost to repair, would net the 50 percent rule. Response to SOMF, at ¶66; [Doc. 59-8, at 62:10 – 64:12].

### **MEMORANDUM OF LAW**

#### **A. Summary Judgment Standard:**

16. Rule 56(a), Fed. R. Civ. P., explains that a party may move for summary judgment on a claim or defense. Summary judgment is proper when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. *Williams v. Unified Gov't of Athens-Clarke Cnty. Ga.*, No. 24-13609, 2025 U.S. App. LEXIS 22445, at 7 (11th Cir. Sept. 2, 2025) (citing *Signor v. Safeco Ins. Co. of Ill.*, 72 F.4th 1223, 1227 (11th Cir. 2023); Fed. R. Civ. P. 56(a)). This Court must view all of the evidence and draw all reasonable inferences in favor of the Botelhos, as the non-moving party. *FCOA LLC v. Foremost Title*, 57 F.4th 939, 947 (11th Cir. 2023). All reasonable doubts regarding the facts should be resolved in favor of the non-moving party. *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818F.2d 1530, 1532 (11th Cir. 1987). Moreover, a court must deny summary judgment if reasonable minds could differ as to the factual inferences to be drawn from the undisputed facts. *Id.*



**B. This Court Should Enter Summary Judgment in Favor of the Botelhos on Indian Harbor's Seventh Affirmative Defense:**

17. Through its seventh affirmative defense, Indian Harbor claims that insurance coverage cannot be afforded for the Botelhos' claims due to alleged material misrepresentations made by the Botelhos on their application for insurance submitted to Indian Harbor [Doc. 8, at pgs. 9-10]. Not only should the Court not enter summary judgment on the Botelhos' claim based on the concealment or fraud provision of the Policies, the Court should enter summary judgment in favor of the Botelhos on Indian Harbor's affirmative defense asserting this argument.

18. The undisputed evidence demonstrates that, despite PURE and/or Indian Harbor having full knowledge of the incomplete condition of the roof in November 2019, PURE and/or Indian Harbor voluntarily assumed the risk and agreed to continue insuring the Insured Dwelling. SOMF, at ¶14-29; [Doc. 63-6], [Doc. 63-4, at 18:9 – 19:4; 19:5-12; 19:13 – 20:20; 20:22-25; 21:1-4; 77:19-21; 77:22 – 78:4; 80:3-25; 81:1-4]; [Doc. 63-7, at 7:11-20; 8:8-17; 9:9-22; 10:8-17; 11:4-11; 14:4-11; 22:2 – 23:23; 25:18-23]. Indian Harbor cannot be heard to complain now. *See Besett v. Basnett*, 389 So. 2d 995, 997 (Fla. 1980) (“[T]he recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”) In *Basnett*, the Florida Supreme Court quoted from Comment (a) of Section 541 of the Restatement (Second) of Torts (1976), as follows:

Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, **he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect.** On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

*Basnett*, 389 So. 2d 997 (quoting Comment (a) of Section 541 of the Restatement (Second) of Torts (1976)) (**emphasis added**).

19. Cases subsequent to *Basnett* simply confirm its holding. *Specialty Marine & Indust. Supplies v. Venus*, 66 So. 3d 306, 310 (Fla. 1st DCA 2011); *Off the Wall & Gameroom LLC v. Gabbai*, 301 So. 3d 281, 284 (Fla. 4th DCA 2020); *Gonzalez v. Indep. Ord. of Foresters*, No. 24-10758, 2025 U.S. App. LEXIS 2124, at 13-14 (11th Cir. Jan. 30, 2025). Indian Harbor's own corporate representative admitted that the decision to continue insuring the Insured Dwelling while having knowledge that the roof was in an incomplete state was a voluntary assumption of risk. SOMF, at ¶27-29; [Doc. 63-4. at 81:1-4]. He further testified that it is possible for the insurance carrier to cancel the insurance policy after it is bound or issued [Doc. 63-4, at 24:16 – 25:13], and that one of the reasons it could be cancelled after it is bound or issued is if the insurance company learns something about the property

after it binds the policy that makes it concerned about the risk of insuring the property. *Id.* at 24:16 – 27:4.

**C. At The Least, There is a Genuine Dispute of Material Fact as to Whether The Plaintiffs Have Identified a Sudden, Accidental, and Fortuitous Loss Within Indian Harbor’s Coverage Periods That Exceeds the Applicable Policy Deductible:**

20. Indian Harbor first argues the Botelhos’ loss cannot be classified as fortuitous. First, this argument is directly inconsistent with the testimony of the corporate representative of Indian Harbor:

Q. Do – do you think that a rainstorm is a fortuitous event?

Mr. Ramey: Object to form.

The Witness: In – in what way?

Q. Just in the general way – in the general sense. Taking – you know, let’s take this out of the context of the failed ceiling on the windows. So I’m just in the general natural sense of asking questions. Is a rainstorm a fortuitous event?

Mr. Ramey: Object to form.

The Witness: **I – I – I – I really don’t know how to answer that. I – I guess, I would say it could be.**

Q. Okay. And under what circumstances would it not be?

A. **Yeah. I – I don’t know. I guess, I can’t answer that.**

Q. Why not?

A. **Just – I – I just don’t have the knowledge, I guess, to answer that question.**

Q. Okay. What knowledge are you missing?

A. I – I – I – I don’t know. I – I – I guess, I can’t answer that. I don’t have the – the capacity to answer whether or not, you know, a rain event is a fortuitous event. I don’t know.

Q. Okay. And you’re not able to tell me which knowledge or what knowledge you’re missing?

A. I mean, if I knew, then I wouldn’t be missing the knowledge, I guess.

Q. **What – is a – is a high wind event a fortuitous event?**

A. **I – I mean, in the context of just – it – yeah. I mean, it’s something that we have no control over, right?**

Q. Right. Like rain and wind. I mean, you – you’d have to ask the man upstairs. **We – nobody knows, like, when those things are going to happen, right?**

A. True.

Q. Okay. Maybe there’s like, some meteorologist –

A. Maybe we could forecast it, yeah.

Q. Right. We could forecast them, **but nobody really knows, like, when – exactly when it would happen, how forceful they would happen, and things like that, right?**

A. True. Fair.

Q. **So in that sense, at least they are somewhat fortuitous, right?**

A. That’s fair.

[Doc. 63-4, at 122:4 – 124:5] (emphasis added).

21. The Botelhos’ damages recoverable under the Policies arise primarily out of water intrusion and wind related damage to the interior of the Insured Dwelling including, without limitation, damage to other property and resulting and ensuing damage. SOMF, at ¶5. The water intrusion and wind related damage was primarily caused by storm and weather-related events, which resulted in excess rain. SOMF, at ¶9-13.

22. It has been separately acknowledged by Indian Harbor’s own expert witness, Zachary Errington. SOMF, at ¶11-13. The report submitted by Mr. Errington finds observed water damage by Mr. Errington during his inspection on or about October 28, 2021 in the sitting room and laundry room, kitchen, and guest suite, which, according to Mr. Errington, were “consistent with leakage through the roof above due to deficiencies in the installation.” SOMF, at ¶11. For the living room and theater room, the Botelhos reported signs of water damage to Mr. Errington,

who then concluded that these areas of reported damages were “also consistent with leakage through the roof above due to deficiencies in the installation.” SOMF, at ¶12. Mr. Errington confirmed the leakage he is referring to in his report is rain coming into the interior of the residence during a storm or rain event. Response to SOMF, at ¶53. The water damage Mr. Errington either reported or observed in the home during his inspection was spread across the home. *Id.*, at ¶54. It was not an isolated event of water intrusion. *Id.* at ¶54. Surprisingly, Indian Harbor’s own expert, Mr. Errington, testified the damage to the interior of the house could have happened on December 7, 2020, the same day the Botelhos reported a claim to Indian Harbor and/or PURE. *Id.* at ¶55. Mr. Kobza, the Botelhos’ hybrid fact/expert witness, testified he is personally familiar with various rain events at the subject property from 2021 forward through personal visits to the home when it was raining, observation of general water leaks into the inside of the home, and FaceTimes with the Botelhos in which they would show him “a bucket of water” or “a bucket in the living room” and “you could see the drips going in the bucket in the living room coming from a skylight above the ridge line of the home, for instance.” *Id.* at ¶62. Mr. Kobza testified there are more than 15 areas of the subject residence where water has migrated to the inside of the home and damaged the as-constructed elements

within the home in part. *Id.* at ¶63.<sup>2</sup> Mr. Kobza opined that the amount to remediate and/or repair the damage to the interior of the subject property as a result of the rain and/or associated weather event during the two policy periods i.e. the damages owed by Indian Harbor is \$975,279.00. *Id.* at ¶60.

23. There is a mountain of evidence that the damages to the Property were caused by rain water intruding to the interior of the residence as a result of rain and weather type events. Even Indian Harbor's own expert has acknowledged it. There is also evidence from a licensed and experienced general contractor in the State of Florida that the cost to remediate the damages associated with the water intrusion is \$975,279.00. Rain and weather events are clearly chance events and unknown, and fortuitous, as even Indian Harbor's corporate representative acknowledged. Indian Harbor's real complaint is the Botelhos should not be able to recover because the roof was in an unfinished state. But the evidence is clear and undisputed that Indian Harbor knew about the condition of the roof and, despite that knowledge, actively decided to insure the Property. Indeed, according to Indian Harbor's own corporate representative, the decision to continue insuring the Property while having knowledge that the roof was in an incomplete state was a voluntary assumption of

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<sup>2</sup> The Botelhos have personal knowledge of water intruding to the interior of the house between October 19, 2019 and October 19, 2021. Response to SOMF, at ¶64. They are suing Indian Harbor because they have material damages based on legitimate issues of rain and water intrusion. *Id.* at ¶65.

risk. Response to SOMF, at ¶58. Indian Harbor has waived the right to complain. *See Domino v. Nielsen*, 322 So. 3d 691 (Fla. 4th DCA 2021); *see also W.B.D. v. Howard Johnson Co.*, 382 So. 2d 1323, 1327 (Fla. 1st DCA 1980) (explaining that, the Florida Supreme Court, in *Bellaire Securities Corporation, et. al. v. Brown*, 124 Fla. 47 (1963) held that a party may waive any right to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by the constitution).

24. Indian Harbor complains that the Botelhos' damages sought have changed. Indian Harbor primarily relies on correspondence from 2022 exchanged between counsel for the parties, and a Proof of Loss form completed in April 2022. There was a substantial amount of activity occurring to the Botelhos during that time period. Dr. Botelho explained:

Q. Okay. So, certainly, there was a fair amount going on, you know, globally in terms of your claim with Indian Harbor, you know, a separate dispute with your contractors, the existence of a lien on your house at that time, right?

Mr. Ramey: Object to form.

The Witness; Well, that amongst other things. There was, obviously, my business, that is as a physician, my responsibilities to the hospital which cannot be ignored, otherwise I can be suspended, family issues.

Q. Certainty, it's a very stressful time for a homeowner, right, to be dealing with an insurance company, a separate lawsuit with contractors, an incomplete roof, consultants, attorneys, a lot of fees and costs. Those are the kinds of things that you and your wife were dealing with at the time. Is that accurate?

Mr. Ramey: Object to form.

The Witness: That is right. But in addition to that, only yesterday my wife brought pictures. We haven't celebrated a major holiday in our house with family in over four years. The last time I had a Christmas tree we had the Christmas tree outside, not in the living room, because things have been moved away from the living room because of water damage, water intrusion.

My wife and I have had countless arguments, just – how do you put it? I don't know. This has been – it started years ago. This has gone on for years.

[Doc. 59-10, at 129:12 – 130:21]; *see also* Response to SOMF, at ¶67.

25. The Botelhos, because they are not experienced in construction, relied on contractors like Mr. Kobza and Nathan Custodio of Maracore to prepare estimates on their behalf. Response to SOMF, at ¶68. The “continuous and ongoing” language in the Proof of Loss Form and related correspondence was “a reflection of what was actually happening at the time in terms of a lot of uncertainty related to the roof, the lien, the separate litigation with the contractors, the damages estimates, coordinating with consultants, attorneys, things like that”. Response to SOMF, at ¶69. As a part of this litigation, the Botelhos requested Mr. Kobza, using the Maracore estimates as a base, opine as to the amount to remediate and/or repair the damage to the interior of the subject property as a result of the rain and/or associated weather event during the two policy periods i.e. the damages owed by Indian Harbor. Mr. Kobza has offered an opinion that the cost of that is \$975,279.00. Response to SOMF, at ¶60.

**D. Indian Harbor's Actual Cash Value Argument Has Been Waived; Even if Considered on the Merits, Indian Harbor's Argument Must be Rejected:**

26. Indian Harbor did not assert the actual cash value argument as an affirmative defense [Doc. 8, at pgs. 4-12]. An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability. *State Farm Mut.*



*Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014); *see also R.J. Reynolds Tobacco Co. v. Schlefstein*, 284 So. 3d 584, 590 (Fla. 4th DCA 2019) (explaining that an affirmative defense “is an assertion of facts or law by the defendant that, if true, would avoid the action....”) (quoting *Custer Med. Ctr. v. United Auto. Ins.*, 62 So. 3d 1086, 1096 (Fla. 2010)). The Florida Supreme Court explained the concept of an affirmative defense this way:

An “affirmative defense” is any defense that **assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them.** In effect, an affirmative defense says, “Yes, I did it, but I had a good reason.”

*State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990) (**emphasis added**).

27. Notably, in an acknowledgment that policy arguments and/or exclusions are affirmative defenses, Indian Harbor did assert other policy provisions and/or exclusions as affirmative defenses [Doc. 8, at second, third, fourth, fifth, sixth, seventh, eighth, and ninth affirmative defenses]. By not asserting the actual cash value argument as an affirmative defense, Indian Harbor waived it. *See* Rule 12(b), Fed. R. Civ. P.

28. Further, Indian Harbor claims it made a request that the Botelhos submit a claim for actual cash value. As support, Indian Harbor cites to Paragraph 38 of its Statement of Material Facts. That cites to Composite Exhibit 20. But that Sworn Statement in Proof of Loss form does not request “actual cash value” or even

say “actual cash value” [Doc. 59-20, at pg. 1]. Rather, it uses the phrase “[B]uilding damages”. *Id.* Indian Harbor’s representations to this Court are false, and the fact that the Proof of Loss Form does not request actual cash value is consistent with Indian Harbor not asserting the argument as an affirmative defense. Further, the Policies simply provide that Indian Harbor will pay “no more than the actual cash value”. Indian Harbor also assume that Mr. Kobza’s damages analysis is at replacement cost value. That is a question of fact for the jury to determine.

**E. The Botelhos Are Not Seeking Damages For Defective Construction From Indian Harbor:**

29. Indian Harbor next argues the faulty, inadequate, or defective construction exclusion bars the Botelhos’ claims. Yet, it is undisputed the Botelhos are seeking damages arise primarily out of water intrusion to the interior of the Insured Dwelling including, without limitation, damage to other property and resulting and ensuing damage. SOMF, at ¶5. The water intrusion and wind related damage was primarily caused by storm and weather-related events, which resulted in excess rain. SOMF, at ¶¶9-13; [Doc. 8, at pgs. 7-8]; *see also supra*, at ¶29. The exclusion Indian Harbor relies on expressly states: “[H]owever, we do insure ensuing covered loss to your dwelling and other structures unless another exclusion applies.” That is exactly what this is. Rain and weather events are covered losses because they are “sudden” and “accidental” or, as Indian Harbor’s corporate representative acknowledged, “fortuitous”.

### **F. The Botelhos Are Entitled to Seek Loss of Use Damages:**

30. As explained *supra*, the Botelhos have clearly demonstrated a covered loss occurring within Indian Harbor's policy periods which would trigger coverage for loss of use damages. *See supra*, at ¶¶27-32. A homeowner that loses the use of a structure because of delay in its completion is entitled to damages for that lost use. *Gonzalez v. Barrenechea*, 170 So. 3d 13, 15 (Fla. 3d DCA 2015) (citing *Russo v. Heil Constr., Inc.*, 549 So. 2d 676, 677 (Fla. 5th DCA 1989)). The Botelhos have explained that Mr. Kobza will testify that he anticipates it would take between 5.5 and 6 months to perform the remediation and/or repair work to address the damages caused by rain and/or weather events [Doc. 52-1, at pg. 9]. The Botelhos have further explained the rental value of the Property would be in the range of \$12,000.00 to \$17,200.00 per month. *Id.* For the 5.5 to 6 month period, the total loss of use for the Property ranges from \$66,000.00 to \$111,800.00. *Id.*

31. The Botelhos can testify to the value of their own Property. *See Horn v. Corkland Corp.*, 518 So. 2d 418 (Fla. 2d DCA 1988) (owner of property can testify to value of his property); *Harbond, Inc. v. Anderson*, 134 So. 2d 816 (Fla. 2d DCA 1961) (same)). Dr. Botelho testified that he has been denied full access to his home [Doc. 59-10, at 81:20 – 82:9]. This is “because of water intrusion and having to move things away from rooms, we had limited use and, in some situations, loss of us, complete loss of use, of certain areas of the home” during Indian Harbor's policy

period. *Id.* The concept of loss of use means full and uninterrupted use of one's property. The Botelhos have essentially been living in a construction site for the recent history, including during Indian Harbor's policy periods [Doc. 59-6, at 74:2 – 75:13]. Under Florida law, this entitles them to loss of use. *See Gonzalez*, 170 So. 3d at 17 (finding that party was entitled to loss of use even though son was sleeping at the home during the relevant period, as house was “unsuitable for living throughout the process.”)

**WHEREFORE**, Plaintiffs, George Botelho and Inna Botelho, respectfully request this Court to: (i) deny Indian Harbor's Motion for Summary Judgment [Doc. 60], and Statement of Undisputed Material Facts [Doc. 59]; (ii) award the Botelhos their attorneys' fees and costs; and (iii) award the Botelhos any additional relief the Court deems just and appropriate:

Dated this 5th day of December, 2025.

Respectfully submitted,

/s/ *Matthew B. Devisse*

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Matthew B. Devisse  
Florida Bar No. 119125  
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**CERTIFICATE OF SERVICE**

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