IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ELIO AND LUCIA MULAS, CASE NO: 2:24-cv-00534-SPC-KCD

Plaintiff,

v.

WESTCHESTER SURPLUS LINES INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, Westchester Surplus Lines Insurance Company ("Westchester") moves pursuant to Federal Rule of Civil Procedure 56 for final summary judgment against Plaintiffs, Elio and Lucia Mulas ("Plaintiffs") and in support states as follows:

INTRODUCTION

This is an insurance coverage action. Plaintiffs insured their commercial rental property located in Port Charlotte, Florida, with Westchester and made a claim for damage to the property's roof and interior allegedly caused by Hurricane Ian. Westchester paid for the damage actually caused by the storm, but declined to pay for damage caused by pre-existing conditions, age related deterioration,

wear and tear, and construction defects, which are excluded causes of loss under the policy.

Plaintiffs sued Westchester alleging the roof and certain interior components of their commercial property were damaged by Hurricane Ian on or about September 28, 2022, and that Westchester improperly denied coverage and/or underpaid under the Westchester insurance policy.

Westchester moves for final summary judgment because Plaintiffs' evidence is insufficient to satisfy their burden of showing that the claimed damages are covered under the policy. In fact, Plaintiffs' expert opinion provided during the course of litigation wholly aligns with Westchester's determination that there was no storm or wind damage to the roof, which allowed the entry of rainwater, a prerequisite to coverage.

Plaintiffs also failed to produce competent evidence of their recoverable damages. The Westchester insurance policy initially pays on an "actual cash value" ("ACV") basis and will only pay replacement cost value ("RCV") once repairs or replacements are completed and competent documentation is submitted. Plaintiffs never produced evidence of repairs to support their claim for RCV, and they did not produce a competing opinion regarding the ACV of the loss. These omissions are fatal to Plaintiffs' case as Westchester properly paid for

the covered damages under the policy, and this constitutes a separate and independent basis entitling Westchester to summary judgment.

STATEMENT OF MATERIAL FACTS

1. Westchester issued Policy No. FSF16624421 001 to Plaintiffs, providing certain coverage for a commercial rental property located at 3811 Tamiami Trail, Port Charlotte, FL 33952, for the policy period of July 19, 2022, through July 19, 2023, ("Policy"). A copy of the Policy is attached as Exhibit 1 to the Affidavit of Michael Conley attached hereto as **Exhibit "A."**

2. On October 11, 2022, Plaintiffs submitted a claim to Westchester for damage to their property allegedly caused by Hurricane Ian on or around September 28, 2022. *See* Exhibit A, Affidavit of Corporate Rep. ¶ 7.

3. Westchester conducted a thorough investigation of Plaintiffs' loss, including an inspection of the property by an independent adjuster ("IA") on October 18, 2022, and an engineer on February 21, 2023. *See* Exhibit A, Affidavit of Corporate Rep. ¶¶ 8-9, 14.

4. Westchester's investigation determined that the storm had caused an electrical mast to fall on the roof, that three storefront windows had broken, and water had entered the property damaging the carpet near the broken windows. *Id.* ¶ 9; Ex. 2, IA estimate.

5. Westchester's independent adjuster estimated the cost of repairing the storm-caused damage as $21,314.49. After applying the Policy's $19,000.00 deductible, the net payment due came to $2,314.49. *Id.* ¶ 10; Ex. 2, IA estimate.

6. On December 22, 2022, Westchester provided the field adjuster's estimate to Plaintiffs and subsequently paid $2,314.49 for the storm related damage. *See* Exhibit A, Affidavit of Corporate Rep. ¶ 11.

7. On or about January 23, 2023, Plaintiffs' public adjuster ("PA") provided Westchester an estimate of alleged storm damage totaling $218,740.60. The estimate included replacement of the building's entire roof and over $100,000 to replace the ceilings, baseboards and flooring throughout the building along with repainting the entirety of the interior. *Id.* ¶12-13; Ex. 3, PA estimate.

8. The public adjuster's estimate calculated the loss on a replacement cost value (RCV) basis without reduction for depreciation. *Id.* ¶ 12; Ex. 3, PA estimate.

9. On February 21, 2023, Westchester's engineering consultant, Stephens Engineering Consultants, Inc., ("Stephens"), inspected the property to determine the cause and origin of the purported damage, if any, and determine whether the damage was the result of Hurricane Ian. Affidavit of Corporate Rep ¶ 14; Ex. 4, Def's engineer report.

10. Stephens Engineering found there was no windstorm-related damage on the roof and also determined that moisture intrusion into the property was not the

result of storm-created openings in the roofing or exterior cladding. Moreover, the engineer opined the de-bonded floor tiles were not the result of water intrusion. *See* Def's engineer report, Ex. 4 pg. 4-5, 11.

11. Westchester issued a partial denial of Plaintiffs claim on April 26, 2023. Specifically, the coverage letter stated as follows:

> It is our position that there were no damages to the exterior of the building envelope related to wind from Hurricane Ian, outside of what we previously agreed to. We regret to inform you that the policy specifically excludes flood, faulty workmanship, wear and tear, rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself. *As shown above, the cause of any interior water damages, outside of what we previously agreed to, is not from storm created openings, rather from historical and ongoing moisture penetrations. The policy stipulates that interior water damage from rain, snow, sleet, or ice is covered only if the building first sustains damage by a Covered Cause of Loss to the roof or walls through which the elements enter, which did not happen*.

See Affidavit of Corporate Rep. ¶ 15; Exhibit 5, Partial Denial Letter (emphasis added).

12. On April 19, 2024, Plaintiffs sued Westchester in the Circuit Court of the Twentieth Judicial Circuit in Charlotte County, Florida. Westchester removed to this Court. *See* Affidavit of Corporate Rep. ¶ 16; Exhibit 6, Complaint.

13. At no time prior to filing this suit, did the Plaintiffs ever provide Westchester with a competing ACV estimate for the covered damage or notify Westchester that they were disputing Westchester's coverage determination. *See* Affidavit of Corporate Rep. ¶ 17.

14. Additionally, at no time prior to filing this suit did Plaintiffs provide Westchester with documents showing that repairs had been made or expenses incurred in making repairs to the damaged covered property in excess of Westchester's payment (after deductible) as is required under the Policy. *See* Affidavit of Corporate Rep. ¶ 18. The relevant section of the Policy states:

> **3. Replacement Cost**
> ***
> **d.** We will not pay on a replacement cost basis for any loss or damage:
> **(1)** Until the lost or damaged property is actually repaired or replaced; and
> **(2)** Unless the repair or replacement is made as soon as reasonably Possible after the loss or damage.

See Policy, Exhibit 1 to Affidavit of Corporate Representative, pg. 15 of 16.

15. During the course of this litigation, Plaintiffs retained expert engineer Tierra, Inc. to inspect the property and provide an analysis as to the cause and origin of the aforementioned claimed damages. The Plaintiffs' expert engineer report was provided to Defendant on May 1, 2025, pursuant to this Court's Order. *See* Plaintiffs' engineer report attached as **Exhibit "B."**

16. Plaintiffs' retained expert engineer, Tierra, Inc., inspected the property on April 23, 2025, and made the following conclusions:

a. As to the roof of the property, "no wind damage was apparent to the roofing surface from Hurricane Ian[1]."

[1] In addition to the inspection conducted, Mr. Crawson reviewed historical images of the property, and photographs taken by Defendant's expert on February 21, 2023, neither of which revealed wind damage according to Tierra.

b. As to the exterior of the property, Tierra concluded that no exterior damage was observed during their investigation. However, based on photographs reviewed, the only wind-related damage found to the exterior consisted of a fallen electrical mast head and an indentation to the adjacent gutter along the rear elevation. No other storm-related damage was observed on the exterior during Tierra's inspection.

c. As to the interior, "no moisture damage was observed along the interior of the subject property at the time of Tierra's site visit." However, based on a review of photographs taken by Stephens (Defendant's expert) on February 21, 2023, and an image provided by the Plaintiff's son-in-law, Tierra concluded that the moisture stains on the ceiling of the property depicted in the photographs were caused by wind-driven rain associated with Hurricane Ian that entered through the roofing surface.

See Plaintiffs' Engineer Report attached hereto as **Exhibit B**. pg. 5

17. The Policy excludes coverage for damage to the interior of the property caused by rain unless the building or structure first sustains damage by a Covered Cause of Loss to its roof or walls. The relevant sections of the Policy read as follows:

Causes of Loss – Special Form

C. Limitations

The following limitations apply to all policy forms and endorsements, unless otherwise stated:

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

. . .

c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:

> **(1)** The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters;

See Policy, Exhibit 1 to Exhibit "A", pg. 6 of 10.

18. Tierra also concluded that the broken windowpanes along the front elevation of the storage area of the property were the result of wind and wind-borne debris associated with Hurricane Ian. *See* "Exhibit B."

19. Plaintiffs replaced the entire roof of the property between February 21, 2024, and April 2, 2024, for a total cost of $29,500.00. Plaintiffs also had the entire ceiling of the property replaced for $14,000. Repair receipts were not provided in this case until June of 2025—more than one year after the initiation of the present lawsuit. See Plaintiffs' Supplemental Disclosures, **Exhibit "C."**

SUMMARY OF ARGUMENT

1. Plaintiffs cannot establish a genuine issue of material fact because their expert's opinions align with Defendant's expert in that Hurricane Ian did not cause damage to the roof, nor any storm-created openings leading to interior damage. Further, the parties are in agreement on the scope of covered damages and Westchester issued payment accordingly.

2. Plaintiffs cannot meet their burden of proving they are entitled to additional damages as their evidence is limited to the property's Replacement Cost Value ("RCV"). This is inapplicable herein because Plaintiffs did not meet the

requirements to recover RCV, i.e., submission of repair or replacement costs before filing suit; instead, under the evidence presented Plaintiffs are entitled only to the Actual Cash Value (ACV) but have also failed to provide evidence of the Property's ACV before filing this lawsuit.

MEMORANDUM OF LAW

I. STANDARD OF REVIEW

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." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986). Once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A district court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Essex Ins. Co. v. Barrett Moving & Storage, Inc.*, 885 F.3d 1292, 1299 (11th Cir. 2018).

A. PLAINTIFFS LACK COMPETENT EVIDENCE TO PROVE THE DAMAGES CLAIMED ARE COVERED UNDER THE POLICY

The Court, when sitting in diversity, applies Florida substantive law and federal procedural law. *Glob. Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1027 (11th Cir. 2017). Under Florida law, the insured bears the burden of proving that the claimed loss is covered under the policy. *See Citizens Prop. Ins. Corp. v. Kings Creek S. Condo, Inc.*, 300 So. 3d 763, 766 (Fla. 3d DCA 2020). Plaintiffs failed to meet their burden of proof because they have not produced evidence establishing that their claimed loss was caused by Hurricane Ian.

ROOF DAMAGE

Plaintiffs allege that Hurricane Ian caused damage to the roof of the Property, requiring a full replacement estimated at $73,718.09.[2] Plaintiffs have not presented evidence demonstrating that the damage to the roof was caused by Hurricane Ian. To the contrary, Plaintiffs' evidence supports Defendants' position that the damages were not the result of the Hurricane

Plaintiffs retained Bradley Crowson, P.E of Tierra, Inc. ("Tierra"),a licensed engineer, to inspect the property and determine the presence and cause of any storm related damage. Mr. Crowson opined that "no wind damage was apparent to the roofing surface from Hurricane Ian" at the time of their inspection nor in

[2] See Plaintiff's Complaint, Exhibit 6; PA's Repair Estimate, Exhibit 3

their review of historical photographs taken post-Ian.[3] The report further noted that while historical aerial images show that the roofing surface was re-reroofed between January 2, 2024 and November 27, 2024, historical aerial images from EagleView and Nearmap dated December 3, 2022, as week as the February 21, 2023 photographs taken by Stephens Engineering who inspected the property on behalf of Defendant, "show no apparent wind damage to the roofing surface.[4]"

These findings fully align with the conclusions made by Defendant's engineer, Victor J. Neese, P.E., with Stephens Engineering Consultants, Inc. ("Stephens"). Stephens performed a site study at the property to determine the cause and origin of purported damage and determine whether the damage was the result of the Hurricane. Mr. Neese found no wind-damage to the roof.[5]

There is no genuine issue of material fact with regard to the roof because Plaintiffs' and Defendant's experts both agree that no wind-related damage occurred to the roof as a result of Hurricane Ian. Plaintiffs' own expert, Mr. Crowson, inspected the property, examined historical aerial imagery, reviewed the photographs taken during Stephens' inspection and agreed with Stephen's findings that there were no observable signs of wind-related damage on the roof of the property and no damage allowing the entry of rainwater.

[3] See Def. Facts ¶ 16; Exhibit 7, Plaintiff's Engineer Report, pg. 3, 5.
[4] Id.
[5] See Def. Facts ¶¶9-10; Exhibit 4, Defendant's Engineer Report, pg. 4-5,11.

Because there is no evidence that the property's roof was damaged by Hurricane Ian and no evidence that any damage caused by Hurricane Ian caused an opening in the roof to allow rain to penetrate the interior, Plaintiffs have failed to meet their burden and Defendant is entitled to judgment as a matter of law.

BUILDING EXTERIOR DAMAGE

Plaintiffs' expert's evaluation found no wind damage to the exterior elevations of the property with the exception of minor damage caused when the wind blew over an electrical mast mounted on the side of the building.[6] [7] Tierra also concluded that some windowpanes along the left-half front elevation of the property had been broken as a result of wind and wind-borne debris associated with Hurricane Ian.[8] Westchester covered and paid for the damage caused by the falling electrical mast, the broken glass window panes, and water damaged carpet that occurred when the window panes blew out.

Defendant's expert also found a lack of storm-related damage to the exterior of the building.[9] Westchester, thus, properly, afforded coverage for the only damaged areas that are supported by the findings of the experts in this case. As such, there can be no dispute.

[6] See Def. Facts ¶ 16; Exhibit 7, Plaintiff's Engineer Report, pg. 3, 5.
[7] Id. at 3, 5.
[8] Id. at 5.
[9] See Exhibit 4.

There is no genuine issue of fact as to exterior damages. Defendant provided coverage for the electrical mast, for the broken windows, and the related ensuing interior damage. Both Defendant's engineer and Plaintiffs' engineer findings support this. Therefore, summary judgment should be granted in favor of Defendant regarding all exterior damage.

INTERIOR DAMAGE

Plaintiffs claimed damage to the ceiling allegedly caused by wind-driven rain during Hurricane Ian. However, their expert report states that no moisture damage was observed at the time of the engineer's inspection.[10] Based solely on the review of photographs taken by Stephens on February 21, 2023, and other images provided by the insured's son-in-law, Tierra concluded that the moisture stains observed along the ceiling were "the result of wind-driven rain associated with Hurricane Ian through the roofing surface[11]."

The Policy, however, explicitly excludes coverage for damage caused by rain to the interior of the property unless the building or structure first sustains damage by a Covered Cause of Loss, allowing the entry of the rainwater.[12] Hurricane Ian is the only potentially covered cause of loss that the Plaintiffs have put forth as the source of the damage allegedly sustained by the property.[13] Here,

[10] See Exhibit B, Plaintiff's Engineer Report, pg. 3.
[11] Id. at 3, 5; Def. facts. ¶ 16C
[12] See Def. facts. ¶ 17.
[13] See Plaintiff's Complaint ¶¶ 8, 11; Def. Corp. Rep. ¶ 7.

the engineers retained by the parties agree that the roof of the property was not damaged by Hurricane Ian.[14] In other words, because Hurricane Ian did not damage the roof of the property, any water damage alleged to have occurred to the ceiling as result of the storm's wind-drive rain through the roofing surface is explicitly excluded by the terms of the Policy.

Additionally, Tierra's report does not point to any other exterior damage caused by Hurricane Ian through which rain could have entered the property. Furthermore, Plaintiffs' expert report is devoid of any alternative theory of causation to support coverage for the interior water damage claimed by Plaintiffs.

Plaintiffs, therefore, have put forth no proof whatsoever to overcome the policy's exclusion for interior water damage as a result of the alleged wind-driven rain.[15] Defendant, therefore, respectfully requests this Court grant Summary Judgment in its favor and against Plaintiffs as Plaintiffs have not and cannot meet their initial burden to establish storm damage to the roof, exterior or interior above and beyond what Westchester properly paid.

[14] See Def. Facts ¶¶ 10, 16
[15] See, Def. Facts ¶17, See also, Policy, Exhibit 1 to Exhibit "A", pg. 6 of 10.

B. PLAINTIFFS CANNOT ESTABLISH A BREACH OF CONTRACT AS (1) PLAINTIFFS ARE NOT ENTITLED TO REPLACEMENT COST VALUE AS THEY DID NOT PROVIDE PROOF OF WORK PERFORMED PRIOR TO FILING SUIT AND/OR (2) PLAINTIFFS CANNOT CONTEST THE ACV PAYMENT MADE BY WESTCHESTER BECAUSE THEY DID NOT SUBMIT A COMPETING ACV ESTIMATE.

Westchester has not breached the contract as Plaintiffs have failed to satisfy the Policy's condition precedent by (1) not submitting any evidence of repairing or replacing the damaged property prior to filing suit and/or (2) not providing an Actual Cash Value estimate to dispute Westchester's payment. The elements of a breach of contract action which the Plaintiffs must prove are (1) a valid contract; (2) a material breach; and (3) damages. See *Abbott Laboratories v. G.E. Capital*, 765 So. 2d 737 (Fla. 5th DCA 2000) (citing *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994); *Abruzzo v. Haller*, 603 So. 2d 1338 (Fla. 1st DCA 1992).

While Plaintiffs can establish the first element, they indisputably cannot prove the second and third elements because the contract requires repair or replacement of the property as a condition precedent to further payment, which they failed to provide before filing the instant lawsuit.[16]

Additionally, prior to filing this lawsuit, Plaintiffs did not contest the Actual Cash Value of the loss by submitting a competing estimate, nor that their repair costs incurred, if any, surpassed the $21,314.49 coverage Westchester had already

[16] *See* Defendant's Facts ¶¶ 14, 19.

afforded as required by Florida Law.[17] Therefore, Plaintiffs cannot prove that Westchester breached the contract. Thus, no genuine issue of material fact exists to bar granting summary judgment in favor of Westchester on Plaintiffs' breach of contract claim.

Under the policy, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs **once the damaged property is actually repaired or replaced**. *See* Exhibit 1 to Exhibit A, the Policy (Pg. 15 of 16), which states in pertinent part that:

> **3. Replacement Cost**
>
> **d.** We will not pay on a replacement cost basis for any loss or damage:
>
> **(1)** Until the lost or––– damaged property is actually repaired or replaced; and
>
> **(2)** Unless the repair or replacement is made as soon as reasonably possible after the loss or damage.

The Policy and Florida law indisputably "require payment of Actual Cash Value" *Vazquez v. Southern Fidelity Property & Casualty, Inc.*, 230 So. 3d 1242, 1243 (Fla. 3d DCA 2017). When interpreting an insurance contract, courts are "bound by the plain meaning of the contract's text." *Geico Gen. Ins. Co. v. Virtual Imaging*

[17] See Def. Facts ¶¶ 13-14.

Servs., Inc., 141 So. 3d 147, 157 (Fla. 2013). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *Id*. An insurer's "unilateral determination of the cash value of a loss does not entitle it to summary judgment in the face of a competing estimate of damages." *Goldberg v. Universal Prop. & Cas. Ins. Co.*, 302 So. 3d 919, 925 (Fla. 4th DCA 2020). However, "the insurer should not be deemed to have breached the contract where it accepted coverage and paid the only estimate it received of the Actual Cash Value of the loss." *Id*.

Other Florida courts, at both the state and federal levels, have come to similar conclusions. *See, e.g., Metal Products Co., LLC v. Ohio Sec. Ins. Co.*, 2022 WL 104618 (11th Cir. 2022) (affirming summary judgment for insurer and stating that "Ohio Security did not breach its contract with Metal Products … [Prior to suit,] Metal Products [only] submitted an estimate that calculated the replacement cost damages to its buildings … [However,] [t]he insurance policy states that no payment is made on a claim for replacement cost value '[u]ntil the lost or damaged property is actually repaired or replaced' … Because Metal Products made no repairs, Ohio Security was not obligated to pay the replacement cost value of the buildings." (citing *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So.2d 811, 815 (Fla. 2007) ("[C]ourts have almost uniformly held that an insurance company's liability for

replacement cost does not arise until the repair or replacement has been completed.")); *CMR Constr. & Roofing, LLC v. Empire Indemnity Ins. Co.*, 843 Fed. Appx. 189, 192 (11th Cir. 2021) (affirming summary judgment for insurer and stating "[t]he insurance policy provides that a claim for replacement cost value will not be paid '[u]ntil the lost or damaged property is actually repaired or replaced' … [Here,] Empire could not have breached the insurance policy based on the replacement cost value because the 'until and unless' provision has not been satisfied…Nor could Empire have breached the insurance policy based on actual cash value because CMR did not and does not seek actual cash value.").

The Sixth DCA recently issued a *per curiam* opinion in *Levy v. United Prop. & Casualty Ins. Co.*, Case No.: 2020-CA-001938 (Lee Cty. Ct., Sept. 27, 2021), affirming the Hon. Alane Laboda's grant of an insurance carrier's motion for summary judgment, finding that the insureds had "not performed the actual repairs and incurred expenses related to the claimed loss" and that the insureds "failed to present any evidence demonstrative a disputed issue of facts exist" concerning the ACV of the loss, despite the insureds' submission of two estimates setting forth only the RCV of the claimed loss. *See Levy*, Case No.: 2020-CA-001938, ¶¶7, 10-11 (Lee Cty. Ct., Sept. 27, 2021); *Levy v. United Prop. & Casualty Ins. Co.*, 6D23-111 (Fla. 6th DCA Feb. 21, 2023).

Recently, the First DCA issued a lengthy opinion in *Homeowners Choice Property & Casualty Insurance Company, Inc., v. Clark*, 2025 WL 850677 (Fla. 1st DCA Mar. 19, 2025), confirming that a plaintiff cannot obtain an award of RCV damages when repairs have not been made and ACV damages have not been claimed. The First DCA explained:

> But when—as here—no evidence can support a disagreement as to ACV, a factfinder cannot conclude which of the two amounts is correct. Just as the courts found in *Salazar* and *Universal Prop. & Cas. Ins. Co. v. Qureshi*, 396 So. 3d 564, 566–67 (Fla. 4th DCA 2024), we too conclude that when (1) an insured's estimate and evidence provides only for RCV costs and (2) no evidence is presented to challenge the insurer's ACV payout, no breach of contract occurs when the insurer fails to pay monies under the insured's estimate.

Id. at 111-112. Plaintiffs' evidence consists only of an RCV estimate. It did not provide an ACV estimate. Westchester paid for the covered damages identified in their investigation and the Plaintiffs failed to dispute the payments with evidence of other or additional ACV damages, or actual repair documents. Although the Plaintiffs are pursuing RCV damages in this litigation, they are not entitled to RCV damages unless and until repairs are made, per the Policy and Florida law.

Earlier this month, in *Bailetti v. Universal Prop. And Cas. Ins. Co.*, 2025 Fla. App. LEXIS 7547 (Fla, 1st DCA Oct. 8, 2025), the Court made clear that once the insurer provides an ACV estimate and pays that estimate sum, the burden shifts to the insured to demonstrate the payment was not reflective of the entire loss.

Further, where the estimate presented at trial by the Insured reflected an ACV valuation, "Appellants failed to show that as of June 2021, when they filed their breach of contract action, Universal had breached the insurance policy." This is directly on-point herein as the Plaintiffs have not provided any evidence of a breach of the policy at the time of filing suit, as no competing ACV estimate was provided suggesting a dispute.

Here, Plaintiffs submitted estimates that solely provide for the replacement cost value, failing to account for any depreciation. As such, it is clear on the face of the documents that these estimates are only replacement cost value estimates, and not actual cash value estimates. Plaintiffs, at a minimum, were required to submit a competing estimate that in good faith subtracted depreciation to determine the Actual Cash Value. Plaintiffs' pre-suit estimates did not. Having failed to do this, Plaintiffs have not met their burden to show a breach of contract.

Alternatively, Plaintiffs were required, under the policy, to submit to Westchester proof of the completion of work performed or costs incurred in excess of the prior payments issued by Westchester in order for any additional funds to be released. Under the terms of the Policy, as no repairs had been completed, and/or no repair documents had been submitted before initiating litigation, Plaintiffs' only entitlement to benefits under the Policy was ACV damages, which neither Plaintiffs nor their public adjuster apparently estimated. Plaintiffs failed to

provide proof of repairs prior to filing this lawsuit in April 2024 and based on documents recently received, failed to make repairs "as soon as reasonably possible after the loss or damage." Thus, Westchester's adjustment of the loss and payment to the Plaintiffs could not be in breach of the Policy, and this lawsuit is improper.

"A cause of action must exist and be complete before an action can be commenced or as sometimes stated, the existence or non-existence of a cause of action is commonly dependent upon the state of facts existing when the action was begun." *Orlando Sports v. Sentinel Star*, 316 So.2d 607, 610 (Fla. 4th DCA 1975). An insured does not have a cause of action for breach of contract if prior to the lawsuit, and with respect to the benefits *actually* due and owing to the insured, "[t]here [is] never a breakdown in the claims adjusting or communications process, nor [] a refusal to pay the claim." *Goldman v. United Services Automobile Association*, 244 So.3d 310, 311 (Fla. 4th DCA 2018).

As referenced previously, the United States Court of Appeal for the Eleventh Circuit affirmed the district court's grant of summary judgment under similar facts as before this Court. *See, CMR Constr. & Roofing, LLC v. Empire Indem. Ins. Co.*, 843 Fed. Appx. 189 (11th Cir. 2021). In *CMR*, after the insurance carrier issued payment to the roofer and without making any repairs, the roofer submitted an estimate to the insurance carrier for the replacement cost value only.

Id. at 191. CMR sued, and the insurance carrier filed a motion for summary judgment, alleging it could not have breached the contract when CMR sought only replacement cost value, despite having made no repairs. *Id*. The district court granted summary judgment in the insurance carrier's favor, and the appellate court affirmed. *Id*. at 192.

In the case at hand, it is undisputed the Plaintiffs either have made none of the alleged necessary repairs prior to litigation or failed to provide documentation of repairs prior to litigation, yet sought payment from Defendant based solely on an estimate submitted and created by their public adjuster for replacement cost value. Plaintiffs have not presented evidence that they or their representatives provided Defendant with any competing actual cash value estimate prior to suit or that Plaintiffs or their representatives appropriately disputed Defendant's coverage determination and made a supplemental actual cash value claim prior to initiating this litigation.

In conclusion, the Plaintiffs cannot establish there is a genuine issue of material fact for this case to proceed to the jury. First, the parties' experts are in agreement that Hurricane Ian did not cause damage to the roof of the property. The additional interior damages claimed are expressly excluded by the policy and the damage the parties agree were related to the storm has already been covered by Defendant. Second, Plaintiffs cannot show that Defendant breached the Policy

by failing to meet its payment obligations. Prior to filing this lawsuit, Plaintiffs did not submit proof of repairs or replacement of the damaged property. Nor did they submit a competing actual cash value estimate. Thus, Westchester properly paid the only actual cash value estimate in its possession, as required by the Policy and Florida law.

Wherefore, Defendant, Westchester Surplus Lines Insurance Company, respectfully requests this Court grant final summary judgement in its favor and against Plaintiffs, as well as any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

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Number	Title
A	Affidavit of Michael Conley
A-1	Policy
A-2	Field Adjuster Estimate
A-3	Plaintiff's Public Adjuster Estimate
A-4	Defendant's Engineer Report
A-5	Defendant's Coverage Letter
A-6	Plaintiff's Complaint
B	Plaintiff's Engineer Report
C	Plaintiff's Supplement Disclosure