Insurance Coverage

Accord and satisfaction

Certified Priority Restoration v. Universal Company of North America, 326 So. 3d 1135 (Fla. 4th DCA 2021)

Coakley's property was damaged by water. She hired Certified Property Restoration (CPR) to repair the property and assigned her rights to recover insurance benefits under the insurance policy issued by Universal. After repairing the property, CPR emailed Universal a copy of the assignment of benefits and an invoice for $8,710. Universal responded that it did not receive a request "for prior authorizations to exceed $3,000 or 1% of the policy based upon an endorsement to the policy. As a result, Universal issued a $3,000 check to CPR and the front of the check contained the following remarks: "Dwelling, LO, MH COV A EMS Limit." CPR then deposited the check. After CPR did not receive full payment of its invoice, it filed a Complaint against Universal alleging breach of contract. Universal alleged a valid accord and satisfaction and that CPR failed to make a proper request to exceed the policy limits. The trial court granted summary judgment on both Affirmative Defenses.

The Fourth District found that it was error to enter Summary Judgment in favor of Universal based upon the conclusion that the check issued by it in the amount of coverage limits constituted a valid accord and satisfaction or the check did not include a conspicuous statement that it was tendered in full satisfaction of the claim. This despite the fact that Universal also sent additional correspondence with the check and the correspondence stated that Universal did not receive or approve a request to exceed limits as required by the policy and did not include a statement that no further benefit would be payable or that the amount of the check was the maximum amount payable. The Fourth District also found that there was no error in granting summary judgment in favor of Universal based upon the Affirmative Defense that it had paid its maximum due under the policy. In this case, CPR failed to request that Universal allow it to exceed the policy limits before submitting the invoice with the completed work as the policy required.

Actual cash value of loss

People's Trust Insurance Company v. Santos, 320 So. 3d 910 (Fla. 3d DCA 2021)

The Third District held that the statutory requirement that the insurance company initially pay at least the actual cash value of the insured loss, less any deductible when the dwelling is insured for replacement cost was inapplicable where the insurance company exercised its right to repair clause. It further held that a judgment awarding the insured's money damages was inconsistent with the record where People's Trust exercised its right to repair.

Appraisal

State Farm Florida Insurance Company v. Parrish, 312 So. 3d 145 (Fla. 2d DCA 2021)

Parrish submitted a claim for hurricane damage. He retained a public adjusting company, Keys Claims Consultants, Inc. to represent his interests regarding the claim. The adjuster was to prepare a detailed accounting of damages and negotiate with State Farm. It was also authorized to invoke the appraisal provision of his policy. The appraisal clause was invoked, and the adjuster selected the president of Keys Claims Consultants as its "disinterested appraiser." State Farm objected. State Farm filed a Petition to Compel Appraisal with Disinterested Appraiser which the trial court dismissed.

The Second District reversed and held that a public adjuster that has a contingency interest in an insured's appraisal award or who represents an insured in an appraisal process is not a "disinterested appraiser". The Second District certified conflict with the Third District's decision in *Brickell Harbour Condominium Association v. Hamilton Specialty Insurance Company*, 256 So. 3d 245 (Fla. 3d DCA 2018) which held that "an appraiser's director in direct financial interest and the outcome of the arbitration, including an arrangement for a contingent fee, requires disclosure rather than disqualification in the case of an appraiser."

State Farm Insurance Company v. Nordin, 312 So. 3d 200 (Fla. 1st DCA 2021)

Nordin was insured under a homeowner's policy issued by State Farm. During the coverage period, his home suffered water damage from a pipe failure. A State Farm representative inspected the damage, assigned a date of loss, and prepared an

estimate for the covered water damage. State Farm advised Nordin that it would provide coverage for the resulting loss and tear out the area necessary to access where the water escaped but that it would not provide coverage to replace the damaged pipes. The coverage payment was then made based upon the estimate provided by the representative.

Nordin then filed suit for breach of contract which failed to state with specificity the nature of the claim. State Farm responded by filing a Motion for a More Definite Statement and to stay discovery. In its motion, State Farm explained that it could not determine whether the Plaintiff was disputing the valuation of the damage, the coverage denial for replacement of the plumbing line, the valuation of the tear out, or some combination of valuation in coverage denial. It also stated that it could not determine whether the dispute was appropriate for appraisal. The motion also sought to stay discovery pending resolution of the motion.

The trial court agreed the pleading was insufficient and dismissed the Complaint with leave to file an Amended Complaint. It also denied State Farm's Motion to Stay Discovery. The result was an order to respond to discovery in a case where the dismissed the Complaint and before the filing of the Amended Complaint. State Farm's request to respond to discovery after the Amended Complaint was filed was denied and the trial court affirmatively ordered State Farm to respond. State Farm complied with the Order and served its responses and objections. State Farm sought no discovery of its own.

A month later, the Plaintiff filed an Amended Complaint which clarified the information about the nature of his claim. State Farm responded by filing a Motion to Abate, a Motion to Stay Discovery and a Motion to Compel Appraisal. The trial court denied State Farm's appraisal motion because State Farm had filed motions and pleadings, thereby concluding that it waived its appraisal right. The First District reversed, noting that there was nothing in the record which established that State Farm knowingly waived or engaged in conduct that implied it had waived its right to appraisal. Rather, the record reflected its deliberate action to evaluate the nature of the claim and to invoke appraisal at the first reasonable opportunity.

Castle Key Insurance Company v. Fischer, 312 So. 3d 1066 (Fla. 1st DCA 2021)

Fischer filed a claim with Castle Key following property damage from a hurricane. Castle Key tendered a check admitting coverage for some damage, while declining to cover damage to fences, trees, and landscape attached to the property.

Fischer then tendered a proof of loss much higher than Castle Key's estimate and Castle Key demanded appraisal pursuant to the insurance policy. Fischer sued Castle Key and Castle Key moved to abate the litigation and compel appraisal and the trial court denied same.

The First District reversed the trial court's order and held that by Castle Key paying a portion of the claim by tendering a check, but denying coverage for other damage to the property, Castle Key did not wholly deny coverage and thus appraisal was appropriate.

People's Trust Insurance Company v. Pellicer, 313 So. 3d 634 (Fla. 4th DCA 2021)

The trial court granted Plaintiff's Motion to Compel Appraisal despite the party's agreement that an evidentiary hearing was needed to address the insurance company's position that the Plaintiff did not comply with his post-loss obligations under the governing insurance policy. The Fourth District reversed finding that the trial court must first conduct that hearing to determine the necessity or sufficiency of the Plaintiff's compliance with their policy obligations before it can consider compelling appraisal.

Heritage Property & Casualty Insurance Company v. Superior Contracting & Environmental Specialties LLC, 314 So. 3d 743 (Fla. 2d DCA 2021)

The Second District held that the insured's assignee voluntarily and intentionally waived its right to an appraisal where the assignee filed suit two years after the insurance company had accepted coverage, sought extensive discovery relevant to the amount of the loss and only sought appraisal after the insurance company moved to dismiss the Complaint.

Zaleski v. State Farm Florida Insurance Company, 315 So. 3d 7 (Fla. 4th DCA 2021)

The Zaleskis owned a home insured by State Farm. While the subject policy was in effect, a water supply line burst in the home causing significant damage. The homeowners filed a claim under the policy. State Farm acknowledged coverage, investigated the claim, determined the amount of the loss and, after subtracting the applicable deductible, tendered payment to the homeowners. On June 21, 2017, the homeowners filed a Civil Remedy Notice of insurer violation ("CRN") with the Florida Department of Financial Services ("DFS") alleging various statutory violations.

One of the allegations was that State Farm failed to comply with the policy's loss settlement provision because it performed a cursory inspection of the property, failed to retain necessary experts to identify the repairs necessary to restore the property, and gave a low-ball estimate that failed to encompass all covered damages. The homeowners asserted that State Farm could cure the violations alleged in the CRN by issuing a payment for all contractual damages owed. It is undisputed that DFS accepted the CRN. Two weeks after filing the CRN, the Zaleskis, through their public adjuster, submitted a detailed estimate to State Farm valuing the total amount of the loss at almost four times the prior payment by State Farm.

On July 20, 2017, State Farm acknowledged receipt of the estimate, maintained that its initial evaluation was reasonable and invoked appraisal pursuant to the policy. On July 25, 2017, State Farm filed its response to the CRN with DFS. In neither its letter to the homeowners, nor its official response to the CRN did State Farm object to the sufficiency of the CRN and aside from its initial payment, State Farm did not issue any further payments within 60 days of the CRNs filing and did not settle the claim.

The matter proceeded to appraisal and on October 31, 2017, the appraisal panel determined that the total amount of the loss was almost four times the amount of the original payment by State Farm. Six days later, State Farm paid the homeowners the amount of the appraisal award, minus the prior payment made.

Shortly thereafter, the Zaleskis filed the First Party Bad Faith suit. State Farm responded to the Complaint by filing a Motion to Dismiss and alternative Motion for Summary Judgment in which they argued that, by invoking appraisal and timely paying the appraisal award, it cured the allegations in the CRN, thus precluding a bad faith action. They also argued that the CRN lacked the requisite specificity to provide State Farm with an opportunity to cure, including providing a specific cure amount. The trial court granted summary judgment in favor of State Farm and the Fourth District reversed. In doing so, they noted that the statute did not toll the cure period until the appraisal was complete. Further, State Farm's invocation of the appraisal process and payment of the appraisal award after the cure period expired did not cure the alleged bad faith claim.

Merrick Preserve Condominium Association v. Cypress Property & Casualty Insurance Company, 315 So. 3d 45 (Fla. 4th DCA 2021)

The Fourth District held that the trial court erred in denying the Condominium Association's petition to compel appraisal of roof damage. Here, the insurance company did not wholly deny coverage, but rather acknowledged coverage for part of the Association's claims related to non-roof related damage. Where an insurance company has not wholly denied coverage and the parties dispute whether the claim damage resulted from a covered or uncovered loss, appraisal was appropriate to determine causation.

People's Trust Insurance Company v. Farinato, 315 So. 3d 724 (Fla. 4th DCA 2021)

Farinato's home sustained damage as the result of a hurricane. The home was insured under a homeowner's policy issued by People's Trust. Almost a year after the hurricane, the insureds, through their public adjuster reported the claim. Five days later, the insurance company requested a sworn proof of loss and advised that a claims adjuster would be inspecting the property. Before receiving the sworn proof of loss, People's Trust sent the Farinatos a letter advising them that the policy provided coverage for damages to the interior of the home, but that the damage to the roof, "stemmed from age-related wear and tear" and was "excluded from coverage under your policy." Further, because the company's estimate of damages was well below the policy's deductible, People's Trust told the insureds that repairs would not commence nor would payment be made at that time. The letter advised that if the insureds disagreed with their assessment of the scope of repairs, that the insureds should provide a sworn proof of loss within 60 days. The letter also noted that the policy provided an appraisal mechanism for resolving any disagreement over the cost and scope of repairs and that if the appraisal process determined that the insureds' damages exceeded the deductible amount, People's Trust would exercise its option to proceed with repairs using its preferred contractor.

Subsequently, the insureds' counsel sent People's Trust a letter of representation and a sworn proof of loss along with an estimate that included damages to the roof. The appraisal far exceeded the policy deductible. Following receipt of this, People's Trust emailed an appraisal letter to the insureds' counsel advising that the insurance company disputed the scope of loss and/or the amount of damages identified in the sworn proof of loss and was predicated upon a repair estimate which includes repairs that fall outside the scope of the loss. They therefore demanded an appraisal.

The insureds then filed a Complaint for breach of the insurance contract. Shortly after the insureds filed suit, People's Trust moved to compel appraisal asserting that it had acknowledged insurance coverage for the claim and that the only dispute between the parties concerned the amount of loss and the scope of repairs. People's Trust then requested that the trial court compel its right to repair the insureds' property in accordance with the eventual appraisal award and compel the insureds to pay the applicable hurricane deductible. The trial court granted the motion.

Subsequently, an appraisal award was entered for almost the exact amount requested in the sworn proof of loss and it included the cost of repairing the roof. The insureds moved to confirm the appraisal award but the trial court never ruled on the motion. People's Trust preferred contractor ultimately repaired the insureds' property in accordance with the appraisal award. The insureds then moved for an award for attorney's fees alleging that the lawsuit was necessitated by People's Trust's failure to satisfy its obligations under the policy and that the post-suit payment of the claim operated as a confession of judgment.

The trial court granted the award of attorney's fees. The Fourth District reversed and found that the filing of lawsuit was not a necessary catalyst to resolving the dispute because the dispute over the cause of loss to the roof was an amount of loss issue for the appraisers and not a coverage issue for the court.

People's Trust Insurance Company v. Fernandez, 317 So. 3d 207 (Fla. 3d DCA 2021)

Fernandez had a homeowner's insurance policy from People's Trust with a Preferred Contractor Endorsement that allowed it to use its own preferred contractor to evaluate and repair damages once it accepted a claim as covered and exercised its contractual option to repair the covered losses. Fernandez filed a claim for hurricane damage and People's Trust accepted the claim and invoked its option to repair under the endorsement. People's Trust notified Fernandez that he could submit his own estimate of repairs if he disputed their proposed scope of repair. The insurance company's adjuster emailed Fernandez's counsel and requested that Fernandez provide a Sworn Proof of Loss and repair estimate and his counsel timely responded to this request. The adjuster, however, failed to record the email and the proof of loss attachments. As a result, People's Trust sent repeated requests to Fernandez to supply a Sworn Proof of Loss to which Fernandez did not respond because he had already timely submitted the requested documents.

When People's Trust did nothing to commence repairs, Fernandez filed his two count Complaint against the insurance company for breach of his insurance contract and declaratory judgment. After suit was filed, People's Trust filed an Omnibus Motion seeking an order compelling appraisal, dismissing the Complaint and authorizing their right to repair the property and to pay the deductible, followed by a Motion to Stay Discovery. Fernandez unilaterally set the hearing on People's Trust Motion to Dismiss and to Compel Appraisal. Its counsel did not receive notice of the hearing and did not attend the hearing and the trial court heard the motion anyway and entered an order denying its Motion to Dismiss and Compelling Appraisal. The trial court granted a Motion for Reconsideration and reset the hearing.

At the hearing, the trial court asked Fernandez if it should stay the litigation and compel appraisal. Fernandez argued that it was too late to compel appraisal because the parties were already engaged in litigation. After hearing argument, the trial court denied the Motion to Dismiss, required it to file an answer to the Complaint and stated that People's Trust could again file a Motion to Compel Appraisal. People's Trust then appealed the portion of the Order denying its motion to stay and to compel appraisal. The Third District reversed and noted that post-loss requirements had been met by both parties and the issue was ripe for appraisal. Therefore, they reversed the part of the Order which required People's Trust to answer the Complaint and remanded with directions to stay the litigation and to compel appraisal.

Certain Underwriters at Lloyds v. Jimenez, 319 So. 3d 93 (Fla. 3d DCA 2021)

The Third District reversed the trial court's decision granting Jimenez's Motion to Compel Appraisal in a first-party property insurance action, where, although the policy contained general appraisal provisions permitting either party to demand appraisal, the policy contained an unambiguous endorsement deleting and replacing that general appraisal provision with a provision explicitly reserving to the insurance company the sole right to require appraisal. As the Third District pointed out, the law in Florida is clear that to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls.

Express Damage Restoration, LLC v. Citizens Property Insurance Corp., 320 So. 3d 305 (Fla. 3d DCA 2021)

Express Damage filed a declaratory action arguing that Citizens wrongfully invoked the appraisal provision of its homeowners policy to resolve the disagreement between the parties as to both the necessity of the water mitigation services provided by Express Damage and the reasonableness of its charges for those services. The trial court ruled that the policy's appraisal provision clearly and unambiguously applied to this claim and the Third District agreed because the policy provided that either party could demand appraisal to resolve "disagreement regarding the amount of the covered loss" and it was undisputed that the water mitigation services performed were part of the amount of the covered loss.

Webb Roofing & Construction, LLC v. Fednat Insurance Company, 320 So. 3d 803 (Fla. 2d DCA 2021)

The trial court granted Fednat's Motion to Compel Appraisal and abate the action pending appraisal. Webb Roofing asserted that the homeowner's insurance policy provision requiring appraisal did not apply to it because its claim for damages flows from an assignment and not from being a party to the insurance policy. The Second District disagreed and affirmed the trial court's finding that the appraisal portion of the insured's homeowner policy applied to the insured's assignee. The Court explained that the assignee received an assignment that entitled it to receipt of payment from the insurance company and concomitant with that right was its duty to comply with the conditions of the contract that afforded it payment.

People's Trust Insurance Company v. Espana, 320 So. 3d 940 (Fla. 3d DCA 2021)

Following a claim for damage from a hurricane, People's Trust exercised its option to repair the damaged property under the Preferred Contractor endorsement. As such, the Third District ruled that it was error for the trial court to enforce payment of an appraisal award finding that there was no merit to Espana's claim that People's Trust breached the conditions precedent by failing to provide Espana with documentation of its contractors current licensure, worker's compensation insurance and commercial general liability insurance. As the court noted, People's Trust's duty to provide such documentation was not a condition precedent to formation of the repair contract and therefore there was no basis for the breach of contract action.

Castle Key Insurance Company v. Wooden Family Trust, 321 So. 3d 346 (Fla. 1st DCA 2021)

Castle Key insured a property owned by the Wooden Family Trust. The trust filed a claim for property damage caused by a hurricane. Castle Key accepted coverage for the claim and advanced payments to the owners. A few months later, the trust hired a public adjuster who submitted an estimate but it was significantly higher than Castle Key's initial estimate. Castle Key returned to the property and, following further inspection, issued a supplemental payment. Notwithstanding the payments, the trust sued Castle Key for breach of contract and declaratory relief. In response to the Complaint, Castle Key filed a Motion for More Definite Statement and asserted that it could not determine from the Complaint which coverage or what damages were at issue or whether the trust was alleging additional damages. As a result, Castle Key maintained it was "unable to intelligibly evaluate the claims at issue or formulate its response to the Complaint whether in the form of an answer and affirmative defenses, or demand for appraisal." The trial court denied Castle Key's motion whereupon it filed a Motion to Abate, stay discovery and compel appraisal. It simultaneously filed an answer denying any breach and raising the appraisal provision as an affirmative defense. The trial court concluded that Castle Key had actively litigated the case and denied the Motion to Stay and to compel appraisal. The First District reversed and found that Castle Key was entirely justified in filing the Motion for More Definite Statement before filing an answer where the Complaint was so ambiguous that it could not have reasonably been required to prepare a responsive pleading. Further, the District Court found that the record below reflected deliberate action by Castle Key to evaluate the nature of the claims and then invoked appraisal at its first reasonable opportunity.

SafePoint Insurance Company v. Hallet, 322 So. 3d 204 (Fla. 5th DCA 2021)

Hallet had a policy with SafePoint. Following a burst kitchen pipe, he made a claim and Safepoint inspected and helped repair the property. SafePoint acknowledged coverage and later issued a series of payments. Hallet and SafePoint then exchanged correspondence and information first directly and then through their public adjuster and attorney. During this process, Hallet produced almost 500 documents that they claim supported their loss. Following issuance of a civil remedy notice, Hallet demanded payment of approximately $100,000 at which point SafePoint reaffirmed coverage and initiated a contractual appraisal process.

Hallet agreed to appraisal and the appraisal process began. Months after the appraisal commenced, SafePoint retained counsel who sought to gather information

from Hallet and, via letter, demanded 24 categories of documents, sworn proofs of loss and examinations under oath of Hallet, his children, their public adjuster and their plumber.

The policy obligated Hallet to provide post-loss information "as often as [SafePoint] reasonably required. Thereafter, Hallet provided a sworn proof of loss. The Hallets and their public adjuster appeared at the examinations. SafePoint sent Mrs. Hallet and their public adjuster home and examined Mr. Hallet for eight hours. Only a small fraction of the examination concerned the increase in the Hallets' claim from their civil remedy notice to their sworn proof of loss. Unable or unwilling to conclude, SafePoint's lawyer unilaterally reset both Hallets and their public adjuster for examination. He then examined Mr. Hallet for another four hours and Mrs. Hallet for 2 ½ hours. The public adjuster did not appear due to a conflict, so SafePoint's lawyer unilaterally noticed him again for the next day. When the public adjuster again did not appear, SafePoint's lawyer denied the Hallets' entire claim citing their failure to comply with their policy's obligations to produce post-loss information. Hallet then filed a declaratory judgment action seeking completion of the appraisal process and also seeking a declaration that they suffered a covered loss, that they had complied with their post-loss policy obligations and that SafePoint had waived its right to collect post-loss information by initiating the appraisal process. SafePoint declined to answer the Complaint instead moving for summary judgment based solely upon the Plaintiffs failure to comply with their post-loss obligations. The trial court entered judgment in favor of the Hallets based upon a Third District decision; *SafePoint Insurance Company v. Gomez*, 263 So. 3d 222 (Fla. 3d DCA 2019). The Fifth District noted that the plain language of the policy did not condition SafePoint's ability to garner post-loss information on the state or existence of the appraisal process but rather directed that the insureds may not sue SafePoint unless they have complied with "all of" the policy's terms. They also noted that the policy permitted SafePoint to ask for post-loss information "as often as it reasonably requires."

Heritage Property & Casualty Insurance Company v. Virginia Gardens Condominium Association, Inc., 322 So. 3d 1230 (Fla. 3d DCA 2021)

The insured requested appraisal. The insurance company objected claiming that the insured's repair estimate did not constitute a disagreement on the scope of a covered loss, but rather, constituted a supplemental claim. The trial court concluded that the condominium association did not make a supplemental claim and therefore the disagreement between the parties was ripe for appraisal. The Third District affirmed and further found that the trial court did not abuse its discretion in allowing

the appraisal to go forward while preserving Heritage's right to subsequently raise coverage defenses.

Silversmith v. State Farm Insurance Company, 324 So. 3d 517 (Fla. 4th DCA 2021)

The Fourth District ruled that the trial court erred in applying Florida Statute §934.03 to preclude Silversmith from making an audio/video recording of the inspection of her home by State Farm's appraiser absent consent of all participants. The District Court noted that for an oral conversation to be protected under the statute, the speaker must have an actual subjective expectation of privacy along with a societal recognition that the expectation was reasonable. The court further found that there was nothing in the State Farm policy which precluded a recording of the appraisal inspection and further noted that the appraiser had no legitimate expectation of privacy while in the insured's home for an inspection.

Progressive American Insurance Company v. Dr. Car Glass, LLC, 327 So. 3d 447(Fla. 3d DCA 2021)

The Third District denied certiorari and found that the trial court did not depart from the essential requirements of the law by staying a breach of contract count and deferring a ruling on the Motion to Compel Appraisal until after a resolution of a declaratory judgment count challenging the enforceability of an appraisal clause.

American Coastal Insurance Company v. Ironwood, Inc. 330 So. 3d 570 (Fla. 2d DCA 2021)

Ironwood filed a claim for property damage caused by a hurricane. Two years later, they filed an additional claim for damage caused by the same hurricane. American Coastal began investigating the new claim and requested a variety of documents from Ironwood whereupon it invoked its right to an appraisal before American Coastal made a coverage determination on the second claim. American Coastal argued that an appraisal was premature because the insured had not yet provided all of the documentation requested. Ironwood disagreed and filed suit claiming breach of contract when seeking an appraisal and compensatory damages. Ironwood moved for a stay of the litigation and for an order compelling appraisal which the trial court granted. The Second District reversed and found that this order was premature because the trial court failed to resolve the dispute over Ironwood's compliance with its post-loss obligations to furnish American Coastal with requested

documents, and because the trial court also erroneously concluded that Ironwood's subsequent claim was an aspect of its original claim rather than a supplemental claim. The Second District held that the claim was not yet ripe for appraisal until the coverage determination was made.

First Call 24/7, Inc. v. Citizens Property Insurance Corp., 330 So. 3d 934 (Fla. 4th DCA 2021)

Citizens' insured sustained water damage to their home. The insured contracted with First Call to provide water mitigation services and assigned their benefits under their policy to First Call. First Call invoiced Citizens more than $6,000 and Citizens responded with a letter stating that it found the costs for reasonable and necessary water mitigation services to be under $1,000. Citizens enclosed a check for the amount and demanded an appraisal of the remaining amount in accordance with the policy's appraisal clause. After Citizen's invoked the appraisal clause, First Call filed a Petition for Declaratory Relief asserting that the appraisal provision did not apply to emergency mitigation services but only to existing property damages not repaired. Citizens eventually moved for Summary Judgment on the appraisal provision. The trial court granted Summary Judgment in favor of Citizens and the Fourth District affirmed and determined that the trial court did not err in concluding that the appraisal clause applied to water mitigation repairs which had already been completed pointing out that the plain language of the policy stated that the appraisal clause applied to all property damage and not just to existing property damage that had yet to be repaired.

People's Trust Insurance Company v. Nowroozpour, 331 So. 2d 193 (4th DCA 2021)

Nowroozpour owned a property insured by People's Trust. The policy included a Preferred Contractor Endorsement. The Endorsement included a mitigation provision providing that in order for a peril causing a loss to be covered if repairs were necessary to prevent the property from further damage, the insureds were to notify People's Trust before authorizing or commencing repairs so that the insurance company could select Rapid Response Team (RRT) to make the covered reasonable repairs. The endorsement also contained an appraisal provision stating that in the event the insurance company elected to repair the property and the insureds and People's Trust failed to agree on the amount of loss, either party could demand an appraisal as to the amount of loss and the scope of repairs.

The day after water damage caused by a hurricane damaged the home, insured's daughter reported the daughter to People's Trust. People's Trust stated it would send RRT to the property within 72 hours. It was undisputed that it failed to send RRT to the property and that RRT never provided any water mitigation services. Because of that failure, the property further deteriorated and sustained significant additional damage.

A week after the loss, a field adjuster inspected the property and prepared an estimate of repairs in the amount of $781. Thereafter, People's Trust sent a letter to the insureds accepting coverage for the loss but stating that the damage did not exceed the policy's deductible. Several months later, the insured sent a sworn proof of loss totaling almost $106,000. Six weeks later the insureds filed a Complaint alleging breach of contract and People's Trust then acknowledged receipt of the sworn proof of loss, acknowledged the dispute over the scope of repairs and demanded appraisal of the amount of loss and scope of repairs.

Eventually the trial court denied the Motion to Compel appraisal and also found that People's Trust's failure to provide water mitigation services was a material breach of the policy which caused prejudice to the insureds and discharged them from any further contractual duties under the endorsement, including appraisal, repair by the preferred contractor or payment of the policy's hurricane deductible. The Fourth District reversed and found that the insurer's failure to provide water mitigation services was not a breach that voided or discharged the insureds from the appraisal provision in the policy. Rather, mitigation was included within the duty to repair and the insurer's failure to mitigate was relevant only to the cost to repair the property.

American Coastal Insurance Company v. Hanson's Landing Association, Inc., 331 So. 3d 199 (Fla. 4th DCA 2021)

The Fourth District reversed the trial court and found that appraisal was prematurely granted where there was a factual dispute as to whether there was any coverage under the policy because the notice of the claim was untimely and because the condominium association failed to comply with the policy requirements to produce the requested information about the extent of the losses. There was also a factual dispute as to whether coverage under the policy was void because the association allegedly engaged in concealment, misrepresentation, or fraud in submitting its claim. As such, the Fourth District directed the trial court to first resolve the extent of coverage under the policy prior to ordering appraisal.

Villagio at Estero Condominium Association, Inc. v. American Capital Assurance Corporation, 46 FLWD 879 (Fla. 2d DCA 4/16/21)

Villagio appealed a non-final order that denied its Motion to Stay and Compel Appraisal in its action against American Capital for breach of an insurance contract and declaratory judgment. The Second District reversed to the extent that the trial court ruled that the issue of coverage must be determined before appraisal and remanded for an order compelling appraisal. The court certified conflict with decisions from the Fourth District.

State Farm Florida Insurance Company v. Shotwell, 46 FLWD 2188 (Fla. 3d DCA 10/6/21)

The Third District held that the trial court erred in entering an order compelling State Farm to pay its insurable amount of an appraisal award where the award encompassed the cost of tearing out and replacing kitchen cabinets and a slab which were not covered under the policy's "tear out" provision. This provision only covered the cost to tear out and replace a particular part of the building necessary to gain access to the specific point of the system or appliance from which water, steam or sewage escaped.

Synergy Contracting Group, Inc. v. Fednat Insurance Company, 46 FLWD 2625 (Fla. 2d DCA 12/10/21)

The Second District held that Fednat was not entitled to judgment in its favor after paying a post-lawsuit appraisal award within the time limit required by the policy where the appraisal process confirmed that Fednat had wrongfully denied paying the assignee a specified amount of benefits under the policy. The court noted that quantifying the amount owed served to expedite resolution of the substantive litigation in the trial court but did not wipe away Fednat's prior denial and that while Fednat may yet have a defense liability to the assignee's claim of attorney's fees, a judgment in its favor is not one of the bases for them.

People's Trust Insurance Company v. Tosar, 46 FLWD 2651 (Fla. 3d DCA 12/15/21)

People's Trust issued a homeowner's insurance policy which contained a Preferred Contractor Endorsement which gave the insurance company a right to repair option after inspecting the covered loss. Specifically, People's Trust had the

option to select its own contractor to repair the damage to the insured's property in lieu of issuing a lost payment that would otherwise be due under the policy. The policy endorsement required the insurance company to notify its insureds of its election of its right to repair within 30 days of its inspection of the reported loss. Should People's Trust exercise its right to repair, the policy also required the insureds to pay the policy deductible and to execute the necessary work authorizations and permit applications which allowed the preferred contractor to perform the repairs.

The policy endorsement also contained an appraisal clause that applied only when the insurance company exercised its right to repair and when the parties disagreed as to the amount of the covered loss and the scope of repairs to be performed. The appraisal clause expressly reiterated that the repairs to be performed by the preferred contactor were in lieu of any loss payment under the policy. Here the court order appraisal panel set the amount of loss and scope of repairs to be performed by the preferred contractor.

As such, the homeowners were contractually obligated to authorize the contractor to perform the repairs and to pay the hurricane deductible absent pleading and proof that People's Trust improperly exercised the right to repair or that the endorsement was otherwise invalid, or it had breached the insurance contract. As such, the trial court erred in granting Final Summary Judgment in favor of the insureds and in ordering People's Trust to issue payment when the amount of the appraisal award where People's Trust timely exercised its rights under the policy endorsement to repair the damaged property.

Redlhammer v. ASI Preferred Insurance Corp., 47 FLWD 52 (Fla. 3d DCA 12/29/21)

The Third District reversed the trial court's order compelling appraisal commenting that an appraisal is premature when one party has not proved a meaningful exchange of information sufficient to substantiate the existence of a genuine disagreement. Here the insured provided the insurance company with his public adjuster's estimate to repair a broken main drain line and the insurance company rejected the public adjuster's proposed method of repair without the benefit of the competing repair estimate from its field adjuster or any other estimator. As such, there was insufficient record evidence that the insured and the insurance company had an informed disagreement on the amount of loss related to the repair of the main drain line.

Assignments

Union Restoration, Inc. v. Heritage Property & Casualty Insurance Company, 326 So. 3d 226 (Fla. 3d DCA 2021)

The trial court properly dismissed the assignee's complaint against Heritage after determining that the assignment attached to the Amended Complaint was invalid because it was not signed by one of the insureds and the mortgagee as required by the policy.

The Kidwell Group, LLC v. GeoVera Specialty Insurance Company, 328 So. 3d 994 (Fla. 4th DCA 2021)

The Fourth District held that the trial court did not err in dismissing the assignee's breach of contract action against GeoVera where the assignment of claim benefits was not signed by all insureds as required by the policy.

General Contractors of Central Florida v. Heritage Property & Casualty Insurance Company, 331 So. 3d 262 (Fla. 3d DCA 2021)

The Third District affirmed the trial court and found that it properly dismissed a breach of contract Complaint filed by an assignee seeking payment for water removal services rendered under an assignment of benefits under a policy issued to a homeowner where the policy contained a provision requiring that all mortgagees must consent in writing to any post-loss assignment of benefits, and one of the mortgagees named in this insurance policy did not consent in writing to the assignment.

Attorney's fees

People's Trust Insurance Company v. Farinato, 315 So. 3d 724 (Fla. 4th DCA 2021)

Farinato's home sustained damage as the result of a hurricane. The home was insured under a homeowner's policy issued by People's Trust. Almost a year after the hurricane, the insureds, through their public adjuster reported the claim. Five days later, the insurance company requested a sworn proof of loss and advised that a claims adjuster would be inspecting the property. Before receiving the sworn proof of loss, People's Trust sent the Farinatos a letter advising them that the policy

provided coverage for damages to the interior of the home, but that the damage to the roof, "stemmed from age-related wear and tear" and was "excluded from coverage under your policy." Further, because the company's estimate of damages was well below the policy's deductible, People's Trust told the insureds that repairs would not commence nor would payment be made at that time. The letter advised that if the insureds disagreed with their assessment of the scope of repairs, that the insureds should provide a sworn proof of loss within 60 days. The letter also noted that the policy provided an appraisal mechanism for resolving any disagreement over the cost and scope of repairs and that if the appraisal process determined that the insureds' damages exceeded the deductible amount, People's Trust would exercise its option to proceed with repairs using its preferred contractor.

Subsequently, the insureds' counsel sent People's Trust a letter of representation and a sworn proof of loss along with an estimate that included damages to the roof. The appraisal far exceeded the policy deductible. Following receipt of this, People's Trust emailed an appraisal letter to the insureds' counsel advising that the insurance company disputed the scope of loss and/or the amount of damages identified in the sworn proof of loss and was predicated upon a repair estimate which includes repairs that fall outside the scope of the loss. They therefore demanded an appraisal.

The insureds then filed a Complaint for breach of the insurance contract. Shortly after the insureds filed suit, People's Trust moved to compel appraisal asserting that it had acknowledged insurance coverage for the claim and that the only dispute between the parties concerned the amount of loss and the scope of repairs. People's Trust then requested that the trial court compel its right to repair the insureds' property in accordance with the eventual appraisal award and compel the insureds to pay the applicable hurricane deductible. The trial court granted the motion.

Subsequently, an appraisal award was entered for almost the exact amount requested in the sworn proof of loss and it included the cost of repairing the roof. The insureds moved to confirm the appraisal award but the trial court never ruled on the motion. People's Trust preferred contractor ultimately repaired the insureds' property in accordance with the appraisal award. The insureds then moved for an award for attorney's fees alleging that the lawsuit was necessitated by People's Trust's failure to satisfy its obligations under the policy and that the post-suit payment of the claim operated as a confession of judgment.

The trial court granted the award of attorney's fees. The Fourth District reversed and found that the filing of lawsuit was not a necessary catalyst to resolving

the dispute because the dispute over the cause of loss to the roof was an amount of loss issue for the appraisers and not a coverage issue for the court.

Universal Property & Casualty Insurance Company v. Celestrin, 316 So. 3d 752 (Fla. 3d DCA 2021)

The trial court acted in an arbitrary manner by failing to reduce an award for attorney's fees where the experts for both parties provided testimony that a reduction was necessary, and the trial court ignored that recommendation without explanation. It is hornbook law that counsel cannot be compensated for work towards determining the amount of fees it seeks to recover.

United Automobile Insurance Company v. Professional Medical Group, Inc., 318 So. 3d 1261 (Fla. 3d DCA 2021)

Where the insurance company requested that the trial court hold an evidentiary hearing on the issue of attorney's fees, it was error for the trial court to award attorney's fees without conducting the evidentiary hearing.

Lizardi v. Federated National Insurance Company, 322 So. 3d 184 (Fla. 2d DCA 2021)

Even though there was no transcript of an evidentiary hearing which resulted in an award of attorney's fees, the Second District reversed because the trial court's order was fundamentally erroneous on its face where the trial court reduced the Plaintiff's hourly rate and the amount of hours for which payment was requested without making specific findings to support its determination and also failed to award pre-judgment interest.

Heritage Property & Casualty Insurance Company v. Virginia Gardens Condominium Association, Inc., 322 So. 3d 1230 (Fla. 3d DCA 2021)

The insured requested appraisal. The insurance company objected claiming that the insured's repair estimate did not constitute a disagreement on the scope of a covered loss, but rather, constituted a supplemental claim. The trial court concluded that the condominium association did not make a supplemental claim and therefore the disagreement between the parties was ripe for appraisal. The Third District

affirmed and further found that the trial court did not abuse its discretion in allowing the appraisal to go forward while preserving Heritage's right to subsequently raise coverage defenses.

Silversmith v. State Farm Insurance Company, 324 So. 3d 517 (Fla. 4th DCA 2021)

The Fourth District ruled that the trial court erred in applying Florida Statute §934.03 to preclude Silversmith from making an audio/video recording of the inspection of her home by State Farm's appraiser absent consent of all participants. The District Court noted that for an oral conversation to be protected under the statute, the speaker must have an actual subjective expectation of privacy along with a societal recognition that the expectation was reasonable. The court further found that there was nothing in the State Farm policy which precluded a recording of the appraisal inspection and further noted that the appraiser had no legitimate expectation of privacy while in the insured's home for an inspection.

Progressive American Insurance Company v. Dr. Car Glass, LLC, 327 So. 3d 447(Fla. 3d DCA 2021)

The Third District denied certiorari and found that the trial court did not depart from the essential requirements of the law by staying a breach of contract count and deferring a ruling on the Motion to Compel Appraisal until after a resolution of a declaratory judgment count challenging the enforceability of an appraisal clause.

American Coastal Insurance Company v. Ironwood, Inc. 330 So. 3d 570 (Fla. 2d DCA 2021)

Ironwood filed a claim for property damage caused by a hurricane. Two years later, they filed an additional claim for damage caused by the same hurricane. American Coastal began investigating the new claim and requested a variety of documents from Ironwood whereupon it invoked its right to an appraisal before American Coastal made a coverage determination on the second claim. American Coastal argued that an appraisal was premature because the insured had not yet provided all of the documentation requested. Ironwood disagreed and filed suit claiming breach of contract when seeking an appraisal and compensatory damages. Ironwood moved for a stay of the litigation and for an order compelling appraisal which the trial court granted. The Second District reversed and found that this order was premature because the trial court failed to resolve the dispute over Ironwood's compliance with its post-loss obligations to furnish American Coastal with requested

documents, and because the trial court also erroneously concluded that Ironwood's subsequent claim was an aspect of its original claim rather than a supplemental claim. The Second District held that the claim was not yet ripe for appraisal until the coverage determination was made.

First Call 24/7, Inc. v. Citizens Property Insurance Corp., 330 So. 3d 934 (Fla. 4th DCA 2021)

Citizens' insured sustained water damage to their home. The insured contracted with First Call to provide water mitigation services and assigned their benefits under their policy to First Call. First Call invoiced Citizens more than $6,000 and Citizens responded with a letter stating that it found the costs for reasonable and necessary water mitigation services to be under $1,000. Citizens enclosed a check for the amount and demanded an appraisal of the remaining amount in accordance with the policy's appraisal clause. After Citizen's invoked the appraisal clause, First Call filed a Petition for Declaratory Relief asserting that the appraisal provision did not apply to emergency mitigation services but only to existing property damages not repaired. Citizens eventually moved for Summary Judgment on the appraisal provision. The trial court granted Summary Judgment in favor of Citizens and the Fourth District affirmed and determined that the trial court did not err in concluding that the appraisal clause applied to water mitigation repairs which had already been completed pointing out that the plain language of the policy stated that the appraisal clause applied to all property damage and not just to existing property damage that had yet to be repaired.

People's Trust Insurance Company v. Nowroozpour, 331 So. 2d 193 (4th DCA 2021)

Nowroozpour owned a property insured by People's Trust. The policy included a Preferred Contractor Endorsement. The Endorsement included a mitigation provision providing that in order for a peril causing a loss to be covered if repairs were necessary to prevent the property from further damage, the insureds were to notify People's Trust before authorizing or commencing repairs so that the insurance company could select Rapid Response Team (RRT) to make the covered reasonable repairs. The endorsement also contained an appraisal provision stating that in the event the insurance company elected to repair the property and the insureds and People's Trust failed to agree on the amount of loss, either party could demand an appraisal as to the amount of loss and the scope of repairs.

The day after water damage caused by a hurricane damaged the home, insured's daughter reported the daughter to People's Trust. People's Trust stated it would send RRT to the property within 72 hours. It was undisputed that it failed to send RRT to the property and that RRT never provided any water mitigation services. Because of that failure, the property further deteriorated and sustained significant additional damage.

A week after the loss, a field adjuster inspected the property and prepared an estimate of repairs in the amount of $781. Thereafter, People's Trust sent a letter to the insureds accepting coverage for the loss but stating that the damage did not exceed the policy's deductible. Several months later, the insured sent a sworn proof of loss totaling almost $106,000. Six weeks later the insureds filed a Complaint alleging breach of contract and People's Trust then acknowledged receipt of the sworn proof of loss, acknowledged the dispute over the scope of repairs and demanded appraisal of the amount of loss and scope of repairs.

Eventually the trial court denied the Motion to Compel appraisal and also found that People's Trust's failure to provide water mitigation services was a material breach of the policy which caused prejudice to the insureds and discharged them from any further contractual duties under the endorsement, including appraisal, repair by the preferred contractor or payment of the policy's hurricane deductible. The Fourth District reversed and found that the insurer's failure to provide water mitigation services was not a breach that voided or discharged the insureds from the appraisal provision in the policy. Rather, mitigation was included within the duty to repair and the insurer's failure to mitigate was relevant only to the cost to repair the property.

American Coastal Insurance Company v. Hanson's Landing Association, Inc., 331 So. 3d 199 (Fla. 4th DCA 2021)

The Fourth District reversed the trial court and found that appraisal was prematurely granted where there was a factual dispute as to whether there was any coverage under the policy because the notice of the claim was untimely and because the condominium association failed to comply with the policy requirements to produce the requested information about the extent of the losses. There was also a factual dispute as to whether coverage under the policy was void because the association allegedly engaged in concealment, misrepresentation, or fraud in submitting its claim. As such, the Fourth District directed the trial court to first resolve the extent of coverage under the policy prior to ordering appraisal.

State Farm Florida Insurance Company v. Shotwell, 46 FLWD 2188 (Fla. 3d DCA 10/6/21)

The Third District held that the trial court erred in entering an order compelling State Farm to pay its insurable amount of an appraisal award where the award encompassed the cost of tearing out and replacing kitchen cabinets and a slab which were not covered under the policy's "tear out" provision. This provision only covered the cost to tear out and replace a particular part of the building necessary to gain access to the specific point of the system or appliance from which water, steam or sewage escaped.

Citizen's Property Insurance Corp. v. Casanas, 46 FLWD 2324 (Fla. 3d DCA 10/27/21)

Casanas filed suit for underpayment of a hurricane damage claim. "The case was minimally litigated – - there were no depositions taken, no dispositive motions filed, few hearings and no trial." The case settled at mediation for $35,000 and the trial court subsequently concluded that that the lodestar was $70,800 and added a 1.8 multiplier for a fee of $127,440. The total fee award was for $150,600, including $9,360 in litigation costs and $13,800 for Plaintiff's fee expert. As the Third District pointed out the final award of costs and fees was nearly five times the amount of the settlement.

The Third District concluded that the hourly rates billed for each attorney were reasonable based on the evidence in the record. They found that the lodestar amount was unsupported by competent, substantial evidence that the number of hours billed were reasonable, nor did the trial court make any specific findings as to disputed time entries. Rather, without explanation, the trial court adopted the Plaintiff's fee expert's 10% blanket reduction in the number of hours expended which the Third District found was "arbitrary and unsupported." The Appellate Court reversed the lodestar amount with instructions to reduce the number of hours billed to 81.1 hours because this was the only number for which there was competent, substantial evidence adduced by the Defendant's fee expert following a line-by-line accounting of compensable hours.

It also reversed the trial court's application of a multiplier because there was no evidence that Plaintiffs could not have obtained other competent counsel in the market absent the availably of a contingency fee multiplier, nor did Plaintiff's counsel establish that there was a risk of non-payment because the parties' retainer

agreement expressly provided for counsel's recovery of fees. Lastly, it reversed the litigation costs assessed. The Plaintiff submitted two expert invoices but did not present any evidence regarding the reasonableness of the litigation costs or whether they intended to call the expert witness for trial. The Third District stated that the trial court erred because it "awarded costs without making any factual findings regarding which expenses would have been reasonably necessary for an actual trial."

People's Trust Insurance Company v. Tosar, 46 FLWD 2651 (Fla. 3d DCA 12/15/21)

People's Trust issued a homeowner's insurance policy which contained a Preferred Contractor Endorsement which gave the insurance company a right to repair option after inspecting the covered loss. Specifically, People's Trust had the option to select its own contractor to repair the damage to the insured's property in lieu of issuing a lost payment that would otherwise be due under the policy. The policy endorsement required the insurance company to notify its insureds of its election of its right to repair within 30 days of its inspection of the reported loss. Should People's Trust exercise its right to repair, the policy also required the insureds to pay the policy deductible and to execute the necessary work authorizations and permit applications which allowed the preferred contractor to perform the repairs.

The policy endorsement also contained an appraisal clause that applied only when the insurance company exercised its right to repair and when the parties disagreed as to the amount of the covered loss and the scope of repairs to be performed. The appraisal clause expressly reiterated that the repairs to be performed by the preferred contactor were in lieu of any loss payment under the policy. Here the court order appraisal panel set the amount of loss and scope of repairs to be performed by the preferred contractor.

As such, the homeowners were contractually obligated to authorize the contractor to perform the repairs and to pay the hurricane deductible absent pleading and proof that People's Trust improperly exercised the right to repair or that the endorsement was otherwise invalid, or it had breached the insurance contract. As such, the trial court erred in granting Final Summary Judgment in favor of the insureds and in ordering People's Trust to issue payment when the amount of the appraisal award where People's Trust timely exercised its rights under the policy endorsement to repair the damaged property.

Redlhammer v. ASI Preferred Insurance Corp., 47 FLWD 52 (Fla. 3d DCA 12/29/21)

The Third District reversed the trial court's order compelling appraisal commenting that an appraisal is premature when one party has not proved a meaningful exchange of information sufficient to substantiate the existence of a genuine disagreement. Here the insured provided the insurance company with his public adjuster's estimate to repair a broken main drain line and the insurance company rejected the public adjuster's proposed method of repair without the benefit of the competing repair estimate from its field adjuster or any other estimator. As such, there was insufficient record evidence that the insured and the insurance company had an informed disagreement on the amount of loss related to the repair of the main drain line.

Bad faith

Butler v. Florida Peninsula Insurance Company, 312 So. 3d 496 (Fla. 4th DCA 2021)

Butler filed suit against the insurance company after it entered into a *Coblentz* agreement stipulating to have been sent judgment in assigning Butler the right to collect a judgement of $100,000 against the insurance company. Butler alleged one count of bad faith against the insurance company for denying coverage in its failure to defend the insured under its personal injury insurance policy in a separate suit. The insurance company moved for summary judgment arguing that the action was barred by the statute of limitations because the insured, whose claim appellate had asserted, was required to file an action against the insurance company within five years of its denial of coverage and its request to defend the underlying suit. The trial court agreed and granted summary judgment. The Fourth District reversed and held that the statute of limitations began to run, not at the time that the insurance company refused to cover and to defend, but at the time that the bad faith claim became cognizable which is when the damages were fixed by entry of the agreed judgment based upon the *Coblentz* agreement.

Citizens Property Insurance Corp. v. Manor House, LLC, 313 So. 3d 579 (Fla. 2021)

The Supreme Court held that, in a first-party breach of contract action brought by an insured against its insurer, Florida law does not allow the insured to recover extra-contractual, consequential damages, such as damages for lost rental income. Rather, the contractual amount due to the insured is the amount owed pursuant to

the express terms and conditions of the policy. The Supreme Court also held that extra-contractual damages are recoverable in a separate bad faith action but are not recoverable in an action against Citizens Property Insurance Corporation because Citizens is statutorily immune from first-party bad faith claims.

National Fire & Marine Insurance Company v. Infinity Biscayne Myrtle Members, LLC, 316 So. 3d 766 (Fla. 3d DCA 2021)

The tenants of Infinity Biscayne were forced to limit their operations as a result of pandemic-related shut downs. Infinity then filed suit against National Fire seeking to recover lost revenue under an all-risk insurance policy. The Complaint consisted of five counts including: anticipatory breach of contract; breach of contract; breach of contract-civil authority coverage; breach of covenant of good faith and fair dealings; and bad faith. National Fire moved to dismiss the anticipatory breach count contending it did not constitute a claim under Florida law and also sought to dismiss the counts for breach of covenant of good faith and fair dealing and bad faith because they were premature as coverage issues had not yet been resolved. The Third District ruled that the anticipatory breach claim constituted a viable cause of action. They further noted that Florida does not recognize first-party common law bad faith claims. The court reviewed the Complaint and found that the claim for breach of covenant of good faith and fair dealing was essentially a claim for bad faith and thus, in the absence of coverage, this was premature. Despite the apparent prematurity, it also noted that there was a vast body of binding precedent which precluded a finding of irreparable harm in the current procedural posture. As such, the Petition for Certiorari was denied.

Ellison v. Willoughby, 326 So. 3d 214 (Fla. 2d DCA 2021)

The Second District granted rehearing and reaffirmed its prior rulings that (1) the bad faith settlement the Plaintiff reached with his uninsured motorist carrier for almost $4,000,000 more than its policy limits could not constitute a “set-off” under §768.041(2) against the Plaintiff’s excess verdict against a Co-Defendant. This statute presupposes the existence of multiple Defendants being jointly and severally liable for the same damages and the Plaintiff’s settlement funds from the UM carrier applied only to the claims he asserted for breach of contract for failure to pay uninsured motorist benefits not asserted against the Co-Defendant. Secondly, there was no set-off under §768.76(1) because the bad faith settlement proceeds did not fall within the statutory definition of “collateral source,” as set forth in the statute,

because the subrogation or reimbursement rights still existed, and UM payments are not collateral sources to be deducted from jury verdicts. Third, the Settlement Agreement recited that $1,735,000 was payable to the Plaintiff for his damages of personal injury or sickness within the meaning of §104(a)(2) of the Internal Revenue Code. To the extent that those payments were viewed as compensation for past medical expenses and future medical expenses, they also could not be collateral sources as defined by §768.76(2)(a). Likewise, the $2,265,000 payment to the trust account of Plaintiff's counsel did not fall within that definition either. Where there may have been some portion of the proceeds in an amount less than the amount attributed to past medical expenses, that amount fell within the definitional scope of §409.910(6) (involving Medicaid liens) and had no bearing on whether the proceeds met the definitional criteria of §768.76(2)(a) which provides a narrower and more specific definition of benefits and sources than does §409.910(6). Because this was a case of first impression, the District Court certified a question of great public importance asking the Florida Supreme Court to answer the questions about whether the settlement payment made by an uninsured motorist carrier to settle a first party bad-faith claim can be subject to a set-off under §768.041(2) or is a collateral source within the meaning of §768.76.

Wright Insurance Agency, Inc. v. Nationwide Mutual Fire and Insurance Company, 328 So. 3d 331 (Fla. 2d DCA 2021)

Twenty years earlier, Anthony Wright crashed his car into a car driven by Michelle Wesbey. Wesbey sued Wright and Wright Insurance Agency and his employer for the injuries sustained in the crash. At the time of the accident, Wright and his agency were insured for $100,000 under an automobile liability policy issued by Nationwide. Nationwide failed to tender its policy limits to Wesbey when it had the opportunity to do so, failure that Wright and the agency contended constituted bad faith. Because of the dispute, Nationwide, Wesbey and Wright ultimately agreed to resolve Wesbey's tort action by entering into an agreement entitled "Stipulation and Joint Motion to Stay." At that point, Wesbey's suit had been pending for six years. The agreement was a variant of the procedure approved in *Cunningham v. Standard Guarantee Insurance Company*, 630 So. 2d 179 (Fla. 1994). Under this modified *Cunningham* agreement, the parties also agreed on the amount of damages the insurer would pay Wesbey if there was a verdict finding Nationwide guilty of bad faith. The trial court ultimately dismissed the bad faith action based upon the conclusion that it was barred by the statute of limitations. The Second District reversed noting that the trial court had not approved the modified *Cunningham* agreement for one year after both parties had signed it. The trial court concluded that the agreement did not require its approval, but the Second District

found that that was not supported by the plain language of the agreement and was inconsistent with the parties' stated purpose for entering the agreement. Because the bad faith action was filed within four years from the date that the trial court approved the parties' agreement, the Second District found that the action was not barred by the statute of limitations.

<u>Claims file</u>

Avatar Property & Casualty Insurance Company v. Flores, 320 So. 3d 840 (Fla. 2d DCA 2021)

The Plaintiff's home was damaged in a hurricane and they submitted a claim to Avatar. The insurance company agreed there was coverage but the parties disagreed as to how much the claim was worth. The Magistrate found that coverage was not at issue in the case. Instead, it found that there was simply a dispute over the scope and pricing of the damages. As such, it compelled the insurance company to produce investigative and claims handling documents from its claims files. The Second District noted that there is no privilege in Florida that automatically attaches to claims file materials but the work product privilege is broadly defined to include documents that can be fairly said to have been prepared or obtained because of the prospect of litigation. The Second District ruled that the trial court departed from the essential requirements of the law by overruling Avatar's work product objection and compelling it to produce its investigation and claims handling documents because although Avatar had admitted that some coverage exists under the policy, the amount and nature of that coverage remains in dispute. Additionally, the Second District held that documents related to a prior claim made by the insureds did not lose their protected status merely because no litigation arose directly from that claim.

<u>Co-insured</u>

Pro-Medics Therapy & Rehab Center, LLC v. United Automobile Insurance Company, 47 FLWD 18 (Fla. 3d DCA 12/22/21)

The Third District held that the Claimant was entitled to coverage under a policy where the undisputed evidence showed that the Claimant's name was included as a co-insured on the policy's declaration page and because "co-insured" was not defined by the policy, the term would be given its plain and ordinary meaning.

***Cunningham* agreement**

Wright Insurance Agency, Inc. v. Nationwide Mutual Fire and Insurance Company, 328 So. 3d 331 (Fla. 2d DCA 2021)

Twenty years earlier, Anthony Wright crashed his car into a car driven by Michelle Wesbey. Wesbey sued Wright and Wright Insurance Agency and his employer for the injuries sustained in the crash. At the time of the accident, Wright and his agency were insured for $100,000 under an automobile liability policy issued by Nationwide. Nationwide failed to tender its policy limits to Wesbey when it had the opportunity to do so, failure that Wright and the agency contended constituted bad faith. Because of the dispute, Nationwide, Wesbey and Wright ultimately agreed to resolve Wesbey's tort action by entering into an agreement entitled "Stipulation and Joint Motion to Stay." At that point, Wesbey's suit had been pending for six years. The agreement was a variant of the procedure approved in *Cunningham v. Standard Guarantee Insurance Company*, 630 So. 2d 179 (Fla. 1994). Under this modified *Cunningham* agreement, the parties also agreed on the amount of damages the insurer would pay Wesbey if there was a verdict finding Nationwide guilty of bad faith. The trial court ultimately dismissed the bad faith action based upon the conclusion that it was barred by the statute of limitations. The Second District reversed noting that the trial court had not approved the modified *Cunningham* agreement for one year after both parties had signed it. The trial court concluded that the agreement did not require its approval, but the Second District found that that was not supported by the plain language of the agreement and was inconsistent with the parties' stated purpose for entering the agreement. Because the bad faith action was filed within four years from the date that the trial court approved the parties' agreement, the Second District found that the action was not barred by the statute of limitations.

Extra-Contractual Consequential Damages

Citizens Property Insurance Corp. v. Manor House, LLC, 313 So. 3d 579 (Fla. 2021)

The Supreme Court held that, in a first-party breach of contract action brought by an insured against its insurer, Florida law does not allow the insured to recover extra-contractual, consequential damages, such as damages for lost rental income. Rather, the contractual amount due to the insured is the amount owed pursuant to the express terms and conditions of the policy. The Supreme Court also held that extra-contractual damages are recoverable in a separate bad faith action but are not

recoverable in an action against Citizens Property Insurance Corporation because Citizens is statutorily immune from first-party bad faith claims.

Covington v. State Farm Fire & Casualty Company, 330 So. 3d 943 (Fla. 4th DCA 2021)

Mrs. Covington and her husband obtained insurance for their vehicle from State Farm and were both named insureds under the policy. Although the husband was the title holder of the vehicle, Mrs. Covington made loan and interest payments for the vehicle and drove it daily. The Plaintiff's daughter was in an accident while driving the vehicle and filed a claim with State Farm who advised the Plaintiff to file a claim with the other driver's insurer, GEICO. GEICO prepared a repair estimate, and the vehicle was taken to a repair shop, however, GEICO's estimate did not include all the needed repairs and some of the completed repairs were unsatisfactory. Covington then contacted State Farm to report that the vehicle was improperly repaired prompting State Farm to send an adjuster to evaluate the vehicle. State Farm recommended another repair shop to perform the work but before those repairs were completed, the Covingtons sold the vehicle.

The Covingtons sued State Farm for breach of contract alleging that they failed to properly repair or replace the vehicle. The Plaintiff later joined her husband as a Co-Plaintiff and State Farm raised an affirmative defense that Mrs. Covington did not have an insurable interest in the vehicle and lacked standing to bring the action. The trial court granted Summary Judgment in favor of State Farm and the Fourth District reversed finding that because Mrs. Covington drove the car daily and made insurance and loan payments on the vehicle that there was an issue of fact which precluded Summary Judgment. The Fourth District also held that the Plaintiffs could not recover extra-contractual consequential damages in a breach of contract action because it was a first-party insurance claim and such damages were not contemplated by the insurance contract. Furthermore, State Farm could not be liable for the loss of use of the vehicle because it did not undertake an obligation to make the repairs by simply advising the insureds to make a claim with the other motorist's insurance company.

Insurer can sue for legal malpractice

Arch Insurance Company v. Kubicki Draper, LLP, 316 So. 3d 1249 (Fla. 2021)

In a case of first impression, the Florida Supreme Court determined that Arch Insurance Company had the standing to maintain a legal malpractice action against counsel it hired to represent its insured where the insurance company had a duty to defend and was contractually subrogated to the insured's rights under the insurance policy.

Material misrepresentation

Nembhard v. Universal Property and Casualty Insurance Company, 326 So. 3d 760 (Fla. 3d DCA 2021)

The Nembhards applied for insurance with Universal in August 2016. The application for insurance required the homeowners to indicate if they had filed any loss claims within the past five years. The homeowners did not disclose that they had had two earlier water loss claims with their prior insurer and had collected payments on those two claims. In October 2016, the Nembhards filed a claim for water and roof damage allegedly caused by a hurricane. Universal accepted coverage and issued payment. The homeowners then disputed the amount of payment. In November 2016, Universal canceled the policy stating that the damage claimed by the Nembhards was not a covered hazard, was not a result of any roof opening caused by the windstorm and also cited the deteriorated condition of their roof. The Nembhards then sued Universal for breach of contract. During Universal's investigation of the claim, it discovered that when the insureds applied for coverage, they had two prior water damage claims within the past five years. The underwriting guidelines for Universal did not allow this type of homeowners policy to be issued for property with prior water losses.

As a result, Universal moved for summary judgment alleging that there was no policy in effect and no future financial recovery was possible for the homeowners. The Nembhards responded that issues of material fact remained, and that summary judgment was inappropriate because the insurance company waived the defense of material misrepresentation because it had not raised it as an Affirmative Defense in its responsive pleadings. Further, the insured pointed out that Universal had paid the claim and accepted further premiums despite its knowledge of their failure to disclose the two prior water loss claims. As a result, they argued that Universals post-loss behavior amounted to a waiver of its right to rescind and actually ratified the alleged misrepresentation of the insurance application. The trial court granted

summary judgment and the Third District affirmed finding that although Universal did not plead misrepresentation as an Affirmative Defense and only raising it for the first time in its motion, the issue was tried by consent. Further, the omission on the application was found to be material or Universal would not have issued the policy had it known of the prior claims and lastly finding that Universal did not waive its right to rescind the policy by its post-loss actions.

No duty to defend

Sierra Auto Center, Inc. v. Granada Insurance Company, 317 So. 3d 1220 (Fla. 3d DCA 2021)

The Third District affirmed the summary judgment entered in favor of Granada Insurance finding that it had no duty to defend the insured in an action alleging injuries arising out of assault and battery on the insured's premises where the policy contained an express endorsement excluding coverage for injuries arising out of or resulting from an assault or battery.

Obligation after paying policy limits

Damage Services, Inc. v. Citizens Property Insurance Company, 328 So. 3d 996 (Fla. 4th DCA 2021)

The trial court properly entered Summary Judgment in favor of Citizens where the clear wording of its policy established a reimbursement cap on expenses for emergency measures which could not be exceeded without request to, and prior approval from, Citizens. The Fourth District also held that the trial court properly rejected the assignee's alternative argument that it could recover under the policy provision insuring against direct loss to property because the invoice was for water extraction and "remediation" and thus was not within the emergency measure policy provisions. The Fourth District pointed out that the Complaint clearly described the Plaintiff's work as water extraction and not as any type of repair.

All Insurance Restoration, Inc. v. Citizens Property Insurance Corporation, 328 So. 3d 1057 (Fla. 3d DCA 2021)

All Insurance as an assignee of Citizens' insured, sought to recover the full amount charged for mitigation services. The trial court entered Summary Judgment in favor

of Citizens based upon a determination that it had satisfied its contractual obligations by paying assignee the policy limit for reasonable emergency measures. The Third District further held that the assignee's email and submission of an invoice was not a request to exceed policy limits to which Citizens was required to respond, but rather, was a demand for payment of services which had already been rendered. As such, Summary Judgment in favor of Citizens was affirmed.

Occurrence

Certain Underwriters at Lloyd's v. Pierson, 322 So. 3d 106 (Fla. 4th DCA 2021)

From 1983-1984, Caravella, who was a 15-year old boy with a low I.Q. was convicted of murder and sentenced to life in prison. In 2010, DNA evidence was found proving his innocence and following his exoneration, he brought civil rights claims against the officers who arrested him alleging that they physically and verbally forced his confession years earlier. The jury found in favor of Caravella and awarded him $7,000,000 in damages. Thereafter, the officers filed a Complaint for indemnification against Lloyds and alleged that their former employer held an occurrence-based commercial general liability policy between 2004 – 2010 and that under the terms of the policy, the officers were entitled to indemnification for the judgment amount entered against them.

The Fourth District concluded that the plain language of the policy makes clear that the "occurrence" giving rise to liability must happen during the period of insurance. Because it was undisputed that the officer's misconduct occurred 20 years prior to the subject policies, there could be no duty to indemnify and the fact that the victim of the officer's civil rights violations suffered the consequences of the wrongful conduct throughout his incarceration including while the subject policies were in effect was irrelevant for purposes of determining whether the insurer had a duty to indemnify. Likewise, the fact that the victim was exonerated while the policy was in effect was also of no consequence.

Overvaluation

Anchor Property & Casualty Insurance Company v. Trif, 322 So. 3d 663 (Fla. 4th DCA 2021)

The Trif's home was insured by Anchor and was damaged in a hurricane. An adjuster inspected the house and the company later advised that it would not make payment because the damage was less than the policy's deductible. It further

indicated that it would not cover interior water damage because there was no peril-created opening and the inspector found no physical evidence of any wind damaged shingles. Subsequent thereto, the owner of a company called Exactimators created an estimate of all the damages to the home setting forth a significantly higher claim which included approximately 50% for roofing. Thereafter, the homeowner signed a sworn proof of loss for the amount of damage estimated by Exactimators. The Fourth District noted that the sworn proof of loss was typed with only the signature line and the notary information filled in by hand. Anchor presented no evidence at trial that it took any action in response to the estimate or the sworn proof of loss. Suit was filed and Anchor asserted an affirmative defense that it was relieved of its indemnity obligation under the "concealment or fraud" provision in the policy due to "intentional misrepresentation and/or fraudulent conduct and/or material false statements." Specifically, Anchor alleged that the insureds made willful misrepresentations and material false statements regarding the pre-loss condition of the property because they had denied that any pre-loss roof leaks had occurred when in fact they had made an insurance claim for roof leaks five years earlier. The Fourth District held that mere overvaluation is not, in the absence of fraud, a misrepresentation which will result in the policy being voided.

Pleading conditions precedent

Saavedra v. Universal Property & Casualty Insurance Company, 314 So. 3d 729 (Fla. 5th DCA 2021)

In its answer to Saavedra's Complaint, Universal alleged that he failed to satisfy all conditions precedent to recover pursuant to the terms of the policy. Ultimately, Universal filed a Motion for Summary Judgment arguing that Saavedra did not comply with the terms of the policy and argued that he failed to promptly report the loss, failed to show the damage sustained before making repairs and failed to provide any records or documents sought by Universal in order to investigate the claim. In response to the motion, Saavedra argued in part that the motion should have been denied because Universal failed to plead non-compliance with conditions precedent with specificity as required by FRCP 1.120(c).

The Fifth District held that by not alleging with specificity the manner in which Saavedra failed to satisfy the conditions precedent, Universal failed to comply with FRCP 1.120(c), thereby waiving its defense that Saavedra failed to comply with the conditions precedent. Because the failure to satisfy conditions precedent was the basis for its summary judgement, the District Court reversed and remanded.

Policy versus endorsement

Certain Underwriters at Lloyds v. Jimenez, 319 So. 3d 93 (Fla. 3d DCA 2021)

The Third District reversed the trial court's decision granting Jimenez's Motion to Compel Appraisal in a first-party property insurance action, where, although the policy contained general appraisal provisions permitting either party to demand appraisal, the policy contained an unambiguous endorsement deleting and replacing that general appraisal provision with a provision explicitly reserving to the insurance company the sole right to require appraisal. As the Third District pointed out, the law in Florida is clear that to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls.

Post-loss obligations

Lopez v. Avatar Property & Casualty Insurance Company, 313 So. 3d 230 (Fla 5th DCA 2021)

The Fifth District reversed summary judgment in favor of Avatar, finding that the trial court erred in entering summary judgment in its favor, based upon a determination that the insured's sworn statements and proofs of loss did not provide the information required under its policy. The Fifth District held that the insured was not required to utilize Avatar's proof of loss forms, and a review of the records showed that the forms utilized by the insured provided most, if not all of the information regarding the insured's claim that was requested in Avatar's own forms, especially when considering that each proof of loss was accompanied by an itemized repair estimate.

People's Trust Insurance Company v. Pellicer, 313 So. 3d 634 (Fla. 4th DCA 2021)

The trial court granted Plaintiff's Motion to Compel Appraisal despite the party's agreement that an evidentiary hearing was needed to address the insurance company's position that the Plaintiff did not comply with his post-loss obligations under the governing insurance policy. The Fourth District reversed finding that the trial court must first conduct that hearing to determine the necessity or sufficiency of the Plaintiff's compliance with their policy obligations before it can consider compelling appraisal.

Castro v. People's Trust Insurance Company, 315 So. 3d 761 (Fla. 4th DCA 2021)

The Fourth District held that the insured's failure to execute a work authorization and pay a deductible under the policy constituted a total breach of the policy's option to repair. Accordingly, it upheld the trial court's entry of Final Summary Judgment in favor of People's Trust.

Universal Property & Casualty Insurance Company v. Horne, 314 So. 3d 688 (Fla. 3d DCA 2021)

In reversing a summary judgment in favor of the insured, the Third District held that Universal did not waive its affirmative defenses of the insured's failure to comply with her post-loss obligations by issuing payment to her. In doing so, they held that, in order for there to be total forfeiture of coverage under the homeowner's insurance policy for failure to comply with post-loss obligations, the insured's breach must be material. If a material breach is established, the burden then shifts to the insured to show that any breach did not prejudice the insurance company.

Arguello v. People's Trust Insurance Company, 315 So. 3d 35 (Fla. 4th DCA 2021)

The trial court concluded that the insureds had forfeited their policy coverage because they failed to provide a sworn proof of loss. The Fourth District reversed and ruled that because the insureds complied to some extent with the policy requirements and the policy language required the insurance company to prove it was prejudiced by the insureds' failure to provide a sworn proof of loss, summary judgment was improper because material issues of fact remained.

Edwards v. SafePoint Insurance Company, 318 So. 3d 13 (Fla. 4th DCA 2021)

SafePoint issued a homeowner's insurance policy to the insured which required Edwards to give prompt notice of loss and to provide a sworn proof of loss within 60 days after the insurance company's request. On July 24, 2016, the insured suffered a property loss and the following day she hired a public adjuster. As part of the property loss, the insured's fence, sprinkler and septic tank were damaged.

On August 9, 2016, after repairs to the sprinkler and septic tank had already been made, the insured reported the loss to SafePoint through her adjuster. On August 15, 2016, SafePoint requested various documents including a sworn proof of loss. 15 days later, its field adjuster inspected the property. On September 16, 2016,

SafePoint issued a reservation of rights letter and requested Edwards to provide various documents including a sworn proof of loss within 20 days. On October 26, 2016, the public adjuster emailed SafePoint in response to their request for documentation. The adjuster attached a police report and advised SafePoint that an estimate and a sworn proof of loss were "currently being completed."

On November 3, 2016, SafePoint requested the receipt for the sprinkler and the septic tank adding that those items were repaired prior to inspection. On November 7, 2016, SafePoint advised that it was unable to pay or deny the claim because it had not received the information necessary to properly evaluate the loss. It requested paid receipts for the sprinkler and the septic tank and the insured's estimate of repairs to the fence. SafePoint did not specifically request a sworn proof of loss in this correspondence. On November 12, 2016, SafePoint sent a similar email. On December 17, 2017 the public adjuster emailed SafePoint stating that the estimate was still not ready and that the sprinkler and septic tank were repaired in accordance with the insured's "duty to remediate the damages before they get worse" and demanded payment of the undisputed amount of insurance proceeds.

On February 17, 2017, SafePoint sent Edwards a letter with a check which represented "SafePoint's payment for dwelling damage" after subtracting the deductible and depreciation. The payment was based upon the damage estimate prepared by its field adjuster for the cost to repair the fence, sprinkler and septic tank. The letter also advised that the payment did not necessarily constitute a full and final settlement and invited the insured to submit supplemental claims for additional damages. Finally, SafePoint reminded the insured that it previously asked Edwards to provide paid receipts for the sprinkler and septic tank. The letter did not mention the insured's failure to submit a sworn proof of loss nor did it state that the claim was being denied due to the insured's failure to comply with their post-loss obligations.

On March 15, 2017, the adjuster sent SafePoint a supplemental request for payment along with the public adjuster's statement of loss, public adjuster's estimate and a sprinkler repair invoice. SafePoint failed to respond to this supplemental request for payment within 90 days and thereafter Edwards filed suit.

The Fourth District held that the trial court properly entered summary judgment for SafePoint based upon Edwards' failure to provide a sworn proof of loss. Edwards' claimed that SafePoint waived its right to demand compliance with post-loss obligations by denying the insured's supplemental claim because it was not preserved for appellate review because that argument was not raised in the trial court. It also held that the insured did not cooperate "to some degree" with proof of loss

requirements and SafePoint was not required to demonstrate that it was prejudiced by Edwards' failure to comply with proof of loss requirements.

People's Trust Insurance Company v. Amaro, 319 So. 3d 747 (Fla. 3d DCA 2021)

Amaro entered into a homeowner's insurance contract issued by People's Trust which included a "Preferred Contractor endorsement." The endorsement provided Plaintiff with a lower premium and in exchange gave People's Trust the right to have its Florida Preferred Contractor repair any covered damage in lieu of issuing cash payment.

Following a hurricane loss, People's Trust elected to repair the hurricane damage under the endorsement. The insured failed to provide a compliance sworn proof of loss and completed his own repairs to the home thereby preventing People's Trust from completing the repairs under the endorsement. The Third District ruled that the trial court erred in entering judgment which required People's Trust to pay the appraisal amount finding that the insured breached the policy by failing to fulfill his post-loss obligations and by hiring his own contractor to perform repairs.

SafePoint Insurance Company v. Hallet, 322 So. 3d 204 (Fla. 5th DCA 2021)

Hallet had a policy with SafePoint. Following a burst kitchen pipe, he made a claim and Safepoint inspected and helped repair the property. SafePoint acknowledged coverage and later issued a series of payments. Hallet and SafePoint then exchanged correspondence and information first directly and then through their public adjuster and attorney. During this process, Hallet produced almost 500 documents that they claim supported their loss. Following issuance of a civil remedy notice, Hallet demanded payment of approximately $100,000 at which point SafePoint reaffirmed coverage and initiated a contractual appraisal process.

Hallet agreed to appraisal and the appraisal process began. Months after the appraisal commenced, SafePoint retained counsel who sought to gather information from Hallet and, via letter, demanded 24 categories of documents, sworn proofs of loss and examinations under oath of Hallet, his children, their public adjuster and their plumber.

The policy obligated Hallet to provide post-loss information "as often as [SafePoint] reasonably required. Thereafter, Hallet provided a sworn proof of loss. The Hallets and their public adjuster appeared at the examinations. SafePoint sent Mrs. Hallet and their public adjuster home and examined Mr. Hallet for eight hours.

Only a small fraction of the examination concerned the increase in the Hallets' claim from their civil remedy notice to their sworn proof of loss. Unable or unwilling to conclude, SafePoint's lawyer unilaterally reset both Hallets and their public adjuster for examination. He then examined Mr. Hallet for another four hours and Mrs. Hallet for 2 ½ hours. The public adjuster did not appear due to a conflict, so SafePoint's lawyer unilaterally noticed him again for the next day. When the public adjuster again did not appear, SafePoint's lawyer denied the Hallets' entire claim citing their failure to comply with their policy's obligations to produce post-loss information. Hallet then filed a declaratory judgment action seeking completion of the appraisal process and also seeking a declaration that they suffered a covered loss, that they had complied with their post-loss policy obligations and that SafePoint had waived its right to collect post-loss information by initiating the appraisal process. SafePoint declined to answer the Complaint instead moving for summary judgment based solely upon the Plaintiffs failure to comply with their post-loss obligations. The trial court entered judgment in favor of the Hallets based upon a Third District decision; *SafePoint Insurance Company v. Gomez*, 263 So. 3d 222 (Fla. 3d DCA 2019). The Fifth District noted that the plain language of the policy did not condition SafePoint's ability to garner post-loss information on the state or existence of the appraisal process but rather directed that the insureds may not sue SafePoint unless they have complied with "all of" the policy's terms. They also noted that the policy permitted SafePoint to ask for post-loss information "as often as it reasonably requires."

Nunez v. Universal Property & Casualty Insurance Company, 325 So. 3d 267 (Fla. 3d DCA 2021)

The Third District affirmed the trial court directing a verdict in favor of the insurance company finding that Nunez materially breached her insurance contract with Universal where the undisputed facts showed that she wholly failed to comply with her post-loss obligations to attend an examination under oath and likewise failed to offer evidence of compliance or attempted compliance, or even a reasonable justification for her failure to attend the statement.

Dias v. Universal Property & Casualty Insurance Company, 330 So. 3d 38 (Fla. 4th DCA 2021)

Dias suffered water property damage at his home and immediately hired an emergency services contractor to stop the water loss and minimize the damages. He then contacted a public adjuster regarding the loss who notified Universal of the loss.

Universal acknowledged the claim with an email to the public adjuster and requested a date and time to inspect the property and a sworn proof of loss and repair estimate with other documents. Universal also sent a letter to Dias advising that they were evaluating the claim under a reservation of rights for late reporting. Universal's adjuster inspected the house about two weeks later. He inspected all the areas affected and took photos and measurements but did not prepare an estimate because he was not asked to do so. At his deposition, he testified he did not need further information to prepare the estimate.

Approximately three weeks later, Universal sent another letter to Dias requesting a sworn proof of loss and some documents. Two weeks later, another was sent again advising that Universal was proceeding under a reservation of rights and again requested the sworn proof of loss and other documents. Just over a month later, they sent a letter denying the claim for lack of cooperation for failure to submit the sworn proof of loss or the requested documents. About six weeks later, the public adjuster submitted the sworn proof of loss and an estimate of the cost to repair and more than a year later, Dias filed suit against Universal.

Universal answered alleging that the insureds had failed to satisfy all conditions precedent to recover pursuant to the policy and then they moved for summary judgment arguing that Dias failed to comply with his post-loss policy obligations. The trial court entered summary judgment and the Fourth District reversed finding that it was error to enter final summary judgment in favor of Universal based upon a conclusion that Dias did not timely comply with the post-loss obligations where disputed issues of fact remain as to whether Universal was prejudiced by the untimely submission of the sworn proof of loss and documentation.

Heslope v. Universal Property & Casualty Insurance Company, 46 FLWD 2474 (Fla. 4th DCA 11/17/21)

The homeowner submitted sworn proofs of loss for each of his claims. Universal argued that he failed to include certain information in the proofs of loss including his spouse's signature, further description of the loss, a delineation of his claimed damages or additional living expenses thus constituting a material breach of the policy. The trial court granted Summary Judgment; however, the Fourth District reversed finding that the failure to provide this information was an issue of fact for the jury to determine as to whether it constituted a material breach of the policy.

Right to repair

People's Trust Insurance Company v. Santos, 320 So. 3d 910 (Fla. 3d DCA 2021)

The Third District held that the statutory requirement that the insurance company initially pay at least the actual cash value of the insured loss, less any deductible when the dwelling is insured for replacement cost was inapplicable where the insurance company exercised its right to repair clause. It further held that a judgment awarding the insured's money damages was inconsistent with the record where People's Trust exercised its right to repair.

Standing

Brown v. Omega Insurance Company, 322 So. 3d 98 (Fla. 4th DCA 2021)

Brown's home was insured through Omega Insurance Company. After suffering water damage to the residence, Brown contracted with Oasis Builders to perform repairs on the home. The contract contained an assignment of benefit clause. Omega never approved any work to be done by Oasis and Oasis never performed any repairs on the Brown's property. Brown filed suit against Omega alleging breach of contract. Omega filed an answer in which it raised an Affirmative Defense but Brown lacked standing to bring the claim because they had assigned their rights to Oasis under the contract. The trial court granted Summary Judgment in favor of Omega and the Fourth District reversed finding that the contract did not divest the Brown's standing where it applied the work that Oasis performed or would perform and where Oasis had not yet performed any work under the contract.

Statute of limitations

Butler v. Florida Peninsula Insurance Company, 312 So. 3d 496 (Fla. 4th DCA 2021)

Butler filed suit against the insurance company after it entered into a *Coblentz* agreement stipulating to have been sent judgment in assigning Butler the right to collect a judgement of $100,000 against the insurance company. Butler alleged one count of bad faith against the insurance company for denying coverage in its failure to defend the insured under its personal injury insurance policy in a separate suit. The insurance company moved for summary judgment arguing that the action was barred by the statute of limitations because the insured, whose claim appellate had asserted, was required to file an action against the insurance company within five

years of its denial of coverage and its request to defend the underlying suit. The trial court agreed and granted summary judgment. The Fourth District reversed and held that the statute of limitations began to run, not at the time that the insurance company refused to cover and to defend, but at the time that the bad faith claim became cognizable which is when the damages were fixed by entry of the agreed judgment based upon the *Coblentz* agreement.

Summary judgment

Empire Pro Restoration, Inc. v. Citizens Property Insurance Corp., 322 So. 3d 96 (Fla. 4th DCA 2021)

Bowden's home was covered by a homeowner's policy issued by Citizens. The policy contained an exclusion for damage caused by "rain…to the interior of the building." Bowden sustained a roof leak causing water damage to the home's interior ceilings and walls. Empire provided remediation services in exchange for assignment of the insured's rights to recover for the cost of the work under the insurance policy. Citizens denied the claim for benefits maintaining that the policy at issue did not cover damage caused by wear and tear and that a "covered peril" did not cause the opening in which the rain entered.

Empire then filed a breach of contract lawsuit. Neither party offered any evidence to establish what caused the roof leak leading to the interior water damage. The trial court observed that Empire failed to present any sworn evidence to support a factual basis for finding that the damage was caused by rain entering through an opening caused by a covered peril and that they did not know what caused the roof to leak. As a result, the trial court entered summary judgment for Citizens. The Fourth District affirmed and ruled that the trial court did not err in entering summary judgment in favor of Citizens where it established that the exclusion of the policy applied and Empire failed to offer any evidence that the exception to the exclusion applied. It further held that the trial court properly applied the burden shifting framework applicable to all-risk policies.

Brown v. Omega Insurance Company, 322 So. 3d 98 (Fla. 4th DCA 2021)

Brown's home was insured through Omega Insurance Company. After suffering water damage to the residence, Brown contracted with Oasis Builders to perform repairs on the home. The contract contained an assignment of benefit clause. Omega never approved any work to be done by Oasis and Oasis never performed any repairs on the Brown's property. Brown filed suit against Omega

alleging breach of contract. Omega filed an answer in which it raised an Affirmative Defense but Brown lacked standing to bring the claim because they had assigned their rights to Oasis under the contract. The trial court granted Summary Judgment in favor of Omega and the Fourth District reversed finding that the contract did not divest the Brown's standing where it applied the work that Oasis performed or would perform and where Oasis had not yet performed any work under the contract.

Underwriting file

American Integrity Insurance Company v. Venable, 324 So. 3d 999 (Fla. 1st DCA 2021)

Venable filed a Complaint alleging that American Integrity breached their homeowner's insurance policy by denying coverage and failing to pay for losses arising from water damage to their home. Venable filed a Request to Produce, and the insurance company objected on grounds of overbreadth and privilege. The trial court eventually overruled the insurance company's objection to producing its underwriting file. The offered to provide the underwriting file to the court for an *in camera* review and the trial court denied this offer and overruled the objection without giving the insurance company a chance to file a privilege log.

The First District granted certiorari and held that the trial court departed from the essential requirements of law by compelling American Integrity to produce certain documents contained in its underwriting file without allowing it a reasonable time to file a privilege log addressing the subject documents and conducting an *in camera* inspection of the documents for which it asserted a claim of privilege or confidentiality.

Where is a policy issued?

Robles v. United Automobile Insurance Company, 46 FLWD 1009 (Fla. 1st DCA 5/4/21)

Robles lived in Escambia County and kept his car there. The car was totaled in a hit and run accident in Escambia County. After the accident, Robles filed a claim and United Auto cancelled the policy retroactive to its inception asserting that Robles had failed to disclose prior personal injury protection claims. Robles then sued in Escambia County for declaratory relief. The trial court transferred venue to Miami-Dade County based on the forum selection clause in the policy which stated that venue was based on where the policy was "issued." The First District found

that this was error because the term “issued” can mean different things in the insurance context: it can mean delivery to an insured where the insured risk is located; or it can be issued where the insurance company prepares and signs the policy.