

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

CASE NO. 3D16-915

SERVANDO VAZQUEZ and SILVIA VAZQUEZ,

Appellants,

vs.

SOUTHERN FIDELITY PROPERTY & CASUALTY, INC.,

Appellees.

On Appeal from the Circuit Court, Eleventh Judicial Circuit of Florida
Case No. 15-12314 CA 01 (25)

**AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN
SUPPORT OF APPELLANTS**

December 1, 2016

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IDENTITY AND INTEREST OF AMICUS CURIAE

United Policyholders (“UP”) is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers’ duties and policyholders’ rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claims. UP’s activities in the State of Florida have included long-term hurricane recovery assistance, consumer advocacy related to homeowners’ insurance rates and availability, and coordination with the Office of Insurance Regulation on various policy matters.

In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide to advance the policyholder’s perspective on insurance cases likely to have widespread impact. UP has filed over 400 amicus briefs in state and federal courts since it was founded. UP’s amicus brief was cited in the U.S. Supreme Court’s opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). UP was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

UP has been actively involved as *amicus curiae* in Florida courts and submitted briefs in recent cases, including: *Altman Contractors, Inc. v. Crum and Forster Specialty Ins. Co.* Case No. SC16-1420 (Fla. 2016); *Lemy v. Direct General Finance Co.*, Case No. 12-14794 (11th Cir. 2014); *Amelia Island Company v. Amerisure Ins. Co.*, Case No. 10-10960G (11th Cir. 2010); *Sebo v. American Home Assurance Co.*, Case No. SC14-897 (Fla. 2014); *Washington National Ins. Corp. v. Ruderman*, Case No. SC12-323 (Fla. 2012); and *Amado Trinidad v. Florida Peninsula Ins. Co.*, Case No. SC11-1643 (Fla. 2012).

UP seeks to fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that may have escaped consideration. *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an amicus is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

UP has a substantial interest in this appeal because it presents a significant legal issue concerning a policyholder's right and ability to challenge a property insurer's actual cash value payment, as mandated by Fla. Stat. § 627.7011. The disposition has broad public policy implications for Florida's homeowners.

Undersigned counsel, representing UP's interests *pro bono* in this matter, have significant experience litigating a wide variety of insurance disputes, and submit that UP's brief will assist the Court in resolving this important state law issue.

SUMMARY OF THE ARGUMENT

The Florida Legislature has mandated that a property insurer must pay the actual cash value ("ACV") of a homeowner's property loss without first requiring repairs to the property. Fla. Stat. § 627.7011(3)(a) ("For a dwelling, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible."). The ACV of a covered loss is a question of fact, and disputes concerning the amount of this statutory payment must be resolved by a jury. The insurer, Southern Fidelity Property & Casualty, Inc. ("Southern Fidelity"), made a payment based upon its adjuster's estimate of the ACV. Servando and Silvia Vasquez alleged that the ACV of the loss was greater than the amount Southern Fidelity paid, and that the payment did not satisfy the statutory requirement. The trial court improperly resolved this factual dispute by granting summary judgment for the insurer, accepting that the insurer's ACV payment was correct despite the policyholders' allegations and evidence to the contrary.

Writ large, this decision precludes policyholders from disputing the amount of an insurer's statutory ACV payment, rendering Section 627.7011 meaningless. Florida's courts do not serve as a rubber stamp for property insurers' decisions

concerning the adjustment of a loss. The trial court's decision must be reversed and this case remanded for trial to determine the correct amount of Southern Fidelity's statutory ACV payment.

ARGUMENT

I. *SLAYTON* DOES NOT CREATE A LEGAL PRESUMPTION THAT THE INSURER'S ESTIMATE IS CORRECT AND DOES NOT OVERRULE CASES HOLDING THAT DISPUTES CONCERNING ACTUAL CASH VALUE PRESENT A GENUINE ISSUE OF MATERIAL FACT

The trial court's decision to grant summary judgment on the amount of Southern Fidelity's ACV payment was based on *Slayton v. Universal Prop. & Cas. Ins. Co.*, 103 So. 3d 934 (Fla. 5th DCA 2012). *Slayton*, however, did not address an insurer's statutory requirement to initially pay at least the ACV less the policy's deductible. And, as Appellants correctly contend, *Slayton* does not establish a conclusive legal presumption that an ACV estimate prepared by an insurance company's adjuster will be deemed to satisfy the insurer's statutory obligation when challenged by a policyholder's competent evidence. *See* Appellants' Initial Brief, pg. 9.

Where competing facts concerning the amount of a loss are presented on summary judgment, trial courts are not free to rule as a matter of law that one party's evidence is correct. Such factual disputes must be resolved by trial, and nothing in Section 627.7011, *Slayton*, or any other Florida decision supports the

legal presumption that Southern Fidelity requested and the trial court applied. To the contrary, the Florida Supreme Court has expressly rejected the insurance industry's efforts to obtain legal presumptions that would defeat legislative mandates. *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 58 (Fla. 2012) (“The application of a presumption as alleged and argued by Universal at trial, that an insured could not overcome this presumption, would render any portion of section 627.7073 unconstitutional and inconsistent with all other provisions of the sinkhole statutes.”).

When reviewing the entry of summary judgment, an appellate court must examine the record and any supporting affidavits in the light most favorable to the non-moving party.¹ If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.² In this case, the trial court was presented with evidence from the Appellants that clearly disputed the ACV amount paid by Southern Fidelity. This evidence raised an issue of material fact, conflicted with the evidence presented by Southern

¹ *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256, 259 (Fla. 2002); *see also Fieldhouse v. Tam Inv. Co.*, 959 So. 2d 1214, 1216 (Fla. 4th DCA 2007).

² *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985) (“A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.”).

Fidelity, permitted different reasonable inferences, and tends to prove the issues before the trial court.

In determining damages following a property loss, ACV is a different value than replacement cost value (“RCV”). As explained by the Florida Supreme Court:

In contrast to a replacement cost policy, **actual cash value is generally defined as “fair market value” or “[r]eplacement cost minus normal depreciation,”** where depreciation is defined as a “decline in an asset’s value because of use, wear, obsolescence, or age.” *Black’s Law Dictionary* 506, 1690 (9th ed. 2009); *see also Goff*, 999 So. 2d at 689. In other words, replacement cost policies provide greater coverage than actual cash value policies because depreciation is not excluded from replacement cost coverage, whereas it generally is excluded from actual cash value. *See Goff*, 999 So. 2d at 689.

Trinidad v. Florida Peninsula Ins. Co., 121 So. 3d 433, 438 (Fla. 2013) (emphasis added); *see also Am. Reliance Ins. Co. v. Perez*, 689 So. 2d 290, 291-92 (Fla. 3d DCA 1997) (“We observe then, that the purpose of the [ACV/RCV] policy is either to compensate those insureds who elect not to repair or replace the damaged portion of their property by paying them fair market value (which inherently includes a deduction for depreciation) for the loss or damage they suffered, or, if repair or replacement is made, to compensate the insureds at cost without depreciation (as repair or replacement is to be made with new materials) . . . The dollar amount of value, cost, and depreciation are all factors to be considered through accepted appraisal practices.”).

Determining actual cash value necessarily involves issues of fact and cannot be resolved on summary judgment where the parties have submitted competing ACV estimates of a covered loss. *See Perez*, 689 So. 2d at 291-92 (reversing and remanding case to trial court for determination of depreciation); *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684 (Fla. 2d DCA 2008) (where insurer made pre-suit claim payment to the policyholders, trial court granted insurer's motion to compel appraisal, and resulting appraisal award determined the insurer had vastly underpaid the policyholders' claim). This Court has expressly held that disputes concerning the ACV of a property loss must be submitted to the factfinder. *See D.R. Mead & Co. v. Cheshire of Florida, Inc.*, 489 So. 2d 830, 832 (Fla. 3d DCA 1986) ("Without detailing the evidence submitted on both sides of the damages issue, we find that the actual cash value of the contents destroyed by fire was entirely for the jury to determine."). This is further demonstrated by the holding in *Slayton*, which merely affirmed a directed verdict based upon the evidence presented at trial in that case and did not even involve summary judgment. *Slayton*, 103 So. 3d at 936.

If this Court accepts the argument that, as a matter of law, it is not possible for an insurance company, such as Southern Fidelity, to be in breach of its policy as long as its ACV payment is based upon its own adjuster's estimate, no matter how inaccurate that estimate may be, this creates an irrefutable presumption in

favor of the insurance company's estimate. In effect, this would completely remove a policyholder's ability to challenge the insurance company's ACV payment and would make courts powerless to address underpayments by insurance companies that choose to hire adjusters who routinely undervalue the ACV of losses. An insurance company could simply file an affidavit of its own adjuster along with its estimate, and the court would be bound by the insurance adjuster's estimate, even if the policyholder submits competent and compelling evidence that the insurance adjuster's estimate is woefully deficient. The result is a rejection of existing Florida law, a denial of the policyholders' right to due process, and a windfall for property insurers.

II. FLORIDA'S HOMEOWNERS MUST BE PERMITTED TO CHALLENGE AN INSURER'S ACV ESTIMATE

The trial court held that Southern Fidelity does not violate Section 627.7011 or breach the policy, as a matter of law, so long as it pays ACV as determined by its own adjuster's estimate. This decision has obvious and devastating consequences for Florida's homeowners. Free from scrutiny, property adjusters will reduce ACV estimates to generate windfall profits for the industry, and policyholders will have no remedy to challenge whether the ACV payment was proper. This is certainly not the result the Florida Legislature intended in adopting Section 627.7011.

Florida Statutes define the term “independent adjuster” as the adjuster who is licensed to work for an insurance company; an independent adjuster cannot work for a policyholder. *See* Fla. Stat. § 626.855 (“An ‘independent adjuster’ means a person licensed as an all-lines adjuster who is self-appointed or appointed and employed by an independent adjusting firm or other independent adjuster, and who undertakes **on behalf of an insurer** to ascertain and determine the amount of any claim, loss, or damage payable under an insurance contract or undertakes to effect settlement of such claim, loss, or damage.”) (emphasis added).

The “independent” adjuster’s actions bind the insurance company that employs him or her. *See Old Republic Ins. Co. v. Von Onweller Constr. Co.*, 239 So. 2d 503, 504 (Fla. 2d DCA 1970). Therefore, the “independent adjusters” used by insurance companies are inherently biased toward the insurance company that employs them. The estimate of an insurer’s “independent adjuster” does not set the definitive measure of damages for ACV under the applicable policy. It is merely an estimate prepared by the insurer’s adjuster and based on the insurer’s internal claim procedures. Thus, a trial court cannot grant summary judgment to an insurer solely because it used an “independent adjuster,” as that adjuster is anything but independent. This is even more significant when, as in this case, the policyholder has presented evidence that disputes the insurer’s adjuster and the ACV amount paid by the insurer.

Furthermore, the position advocated by Southern Fidelity will lead to absurd results. Assume, for the sake of argument, that a homeowner has submitted a covered claim for severe damage arising out of a fire and any unbiased adjuster or general contractor would conclude that the damages amount to \$100,000. On the other hand, the insurance company hires an adjuster that estimates that the ACV value is somehow only \$20,000. Under this scenario, Southern Fidelity takes the position that it could simply pay \$20,000 as ACV, regardless of whether its adjuster's estimate is grossly inadequate, and the policyholder would then be unable to challenge the amount of the ACV. As a result, the policyholder would have no avenue of relief and would be bound by the insurance company's inadequate ACV payment.

Southern Fidelity will likely argue that the homeowner does indeed have an avenue of relief: the homeowner could engage in repairs to the damaged property and any repairs that exceed the ACV payment will be paid for by Southern Fidelity. This argument is a fallacy. The insurer is required by statute, **at a minimum**, to initially pay ACV for a covered loss, and the policyholder is not obligated to use these funds for any specific purpose, even including making repairs or improvements to the damaged property. *See* Fla. Stat. § 627.7011. It is the policyholder's choice regarding how to spend the funds received as ACV. Significantly, the policyholder is not obligated to engage in any repairs in order to

receive the proper amount of ACV and should not be forced to make repairs by an insurer's unreasonable ACV payment.

There are many instances where a policyholder may not want to repair all or any of the damages, or cannot afford to move out of their home to perform the work (as Florida law and every Florida homeowner policy requires that the policyholder first "incur" the costs of additional living expenses before reimbursement by the insurer). For example, a homeowner that is attempting to sell or move from their home may choose to forego making any repairs and sell their home "as is" because (1) they have limited time to sell or move from their home; (2) they do not want to engage in extensive repair and renovations right before selling their home; (3) they do not want to live through major repair and renovations because of the disturbance, noise, dust, etc.; (4) they need cash quickly from the sale of their home and cannot afford to delay the sale by making repairs or renovations; or (5) they are facing foreclosure and do not want to further improve their home right before losing it to a bank. Under Southern Fidelity's position, a homeowner would be forced to make repairs in order to challenge or receive any amount higher than the initial ACV paid by an insurer. Thus, if the homeowner decides not to perform repairs, the insurance company's ACV can never be challenged. This is even more absurd when the ACV amount paid by the insurer is woefully deficient and the policyholder does not have personal funds to

begin major repairs. Under the fire loss example from above, the policyholder would only have \$20,000 to initiate \$100,000 worth of repairs. There is no guarantee that the insurer will eventually pay for the full \$100,000 worth of repairs, and the insurer could delay and prolong the claims process for a significant period of time. In the interim, the policyholder is left carrying the financial burden of making \$100,000 worth of repairs, plus the cost of additional living expenses, while hoping that the insurer does the right thing after that same insurer just paid the policyholder a fraction of ACV. This financial quandary will have a chilling effect on some policyholders causing them to not initiate repairs; consequently, the insurer will be insulated from any liability for its failure to pay the proper amount of ACV. This simply cannot be the state of affairs when dealing with these issues.

CONCLUSION

The Florida Legislature has mandated that a property insurer must initially pay the ACV of the loss without requiring repairs to the property. The ACV of a covered loss is a question of fact, and disputes concerning the amount of this statutory payment must be resolved by a jury. Southern Fidelity made its ACV payment based upon its own adjuster's estimate. Appellants alleged that the ACV of the loss was greater than the amount Southern Fidelity paid, and that the payment did not satisfy the statutory requirement. The trial court improperly resolved this factual dispute by granting summary judgment for the insurer,

accepting that the insurer's ACV payment was correct despite the policyholders' allegations and evidence to the contrary.

As a result, this decision precludes policyholders from disputing the amount of an insurer's statutory ACV payment, rendering Section 627.7011 meaningless. Thus, the trial court's decision allows an insurer to unilaterally establish the amount of ACV payment. The trial court's decision should be reversed and this case remanded for trial to determine the correct amount of Southern Fidelity's statutory ACV payment and to protect Florida homeowners' right to challenge the actions of their insurers.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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