IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 3D16-1844

RYAN ESCOBAR,

Appellant,

vs.

TOWER HILL SIGNATURE INSURANCE COMPANY,

Appellee.

On Appeal from the Circuit Court, Eleventh Judicial Circuit of Florida
Case No. 15-28620 CA 01

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

March 17, 2017

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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 that

cannot be overemphasized. UP has filed a similar amicus brief in a pending Third District appeal involving related issues, *Vazquez v. Southern Fidelity Property & Casualty, Inc.*, Case No. 3D16-915.

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, Tower Hill Signature Insurance Company ("Tower Hill"), made a payment based upon its adjuster's estimate of the ACV. The insured, Ryan Escobar, alleged that Tower Hill did not satisfy its statutory obligation because the ACV of the loss was greater than the amount Tower Hill paid. The trial court improperly resolved this factual dispute by granting summary judgment for the

insurer, accepting that Tower Hill's ACV payment was correct despite the policyholder's 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 Tower Hill'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 Tower Hill'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 Appellant correctly contends, *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* Appellant's Initial Brief, pg. 7-8.

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 Tower Hill 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

[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).

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 Appellant that clearly disputed the ACV amount paid by Tower Hill. This evidence raised an issue of material fact, conflicted with the evidence presented by Tower Hill, permitted different reasonable inferences, and tends to prove the issues before the trial court. This conflicting evidence should have been submitted to the factfinder at trial.

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

[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.").

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."). That ACV disputes present a question of fact

is confirmed by the holding in *Slayton*, which merely affirmed a directed verdict based upon the evidence presented at trial. *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 Tower Hill, 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. This presumption would eviscerate a policyholder's ability to challenge the insurance company's ACV payment and would render the courts powerless to address underpayments by insurance companies that choose to hire adjusters who routinely undervalue the ACV of losses. An insurance company could rely on the affidavit of its own adjuster along with its estimate, and the court would be bound by the insurer's estimate, even if the policyholder submits competent and compelling evidence that the insurer's estimate is woefully deficient. The result is a rejection of existing Florida law, a denial of 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 Tower Hill 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 cannot be the result the Florida Legislature intended in adopting Section 627.7011.

The 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 not truly independent, and likely to demonstrate a bias toward the insurance company that employs them.

The estimate of an insurer's "independent adjuster" cannot set the definitive measure of damages for ACV under the applicable policy. It is a one-sided estimate prepared by the insurer's adjuster and based on the insurer's internal

claim procedures. A trial court cannot grant summary judgment to an insurer solely because it used an "independent adjuster," as that adjuster is anything but independent. Summary judgment is particularly inappropriate when, as in this case, the policyholder has presented evidence that disputes the insurer's adjuster and the ACV amount paid by the insurer.

The position advocated by Tower Hill 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's adjuster erroneously estimates that the ACV value is only $20,000. Under this scenario, Tower Hill 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 be bound by the insurance company's inadequate ACV payment and have no adequate legal remedy.

Tower Hill will likely argue that the homeowner can seek relief by first repairing the damaged property, and any repairs that exceed the ACV payment will be covered under the policy. 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.; or (4) they need cash quickly from the sale of their home and cannot afford to delay the sale by making repairs or renovations. Under Tower Hill's argument, 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 is unable 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, all in reliance upon an insurer that paid only 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 cannot be the intended effect of Section 627.7011.

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. Tower Hill made its ACV payment based upon its own adjuster's estimate. Appellant alleged that the ACV of the loss was greater than the amount Tower Hill 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 policyholder's 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 Tower Hill'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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