IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
APPELLATE DIVISION

RESTORATION 1 OF MIAMI, INC., a/a/o Marilyn Sidney,

Appellant,

v.

TOWER HILL SIGNATURE INS. CO,

Appellee.
_____/

CASE NO: 14-302 AP
L.T. NO: 13-9279-CC-05

INITIAL BRIEF

ON APPEAL FROM THE HON. SHELLEY J. KRAVITS
COUNTY COURT JUDGE

GRAY R. PROCTOR
Florida Bar No. 48192
LAW OFFICE OF GRAY PROCTOR
122 East Colonial Drive, Suite 100
Orlando, FL 32801
Ph: (321) 445-1951
Em: gray@appealsandhabeas.com

NATISHA QUIJANO
Florida Bar No. 96485
COHEN BATTISTI
1211 N. Orange Ave., Suite 200
Winter Park, FL 32789
Ph: (407) 478-4878
Em:nquijano@cohenbattitsti.com

ATTORNEYS FOR APPELLANT

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INTRODUCTION AND QUESTION PRESENTED

This is an appeal from an order granting summary judgment in an action for breach of an insurance contract, filed by an assignee of the benefits. The assignee provided water remediation services caused by a leak in the insured's roof. The insurance company denied the claim because the policy did not cover water damage unless the leak was caused by physical damage due to weather or wind. The questions presented in this case are:

1) Did the county court err by granting summary judgment where the affidavit in support featured opinion testimony from a non-expert who conducted an incomplete investigation and the assignee submitted an affidavit from an expert averring that the inspection was not sufficient to determine that the loss was not caused by weather-driven physical damage to the roof?

2) In the event the appellee raises any "tipsy coachmen" argument relating to defenses not ruled upon by the trial court, does appellant have standing to bring suit as an assignee of benefits?

STATEMENT OF THE CASE AND THE FACTS

Appellant Restoration of Miami, Inc. ("Restoration") sued appellee Tower Hill Signature Insurance Company ("Tower Hill") for breach of contract. In the complaint, Restoration alleged that it had obtained an assignment or equitable assignment from Marilyn Sidney, the insured. (R. 4). On or about March 20, 2013, Ms. Sidney's home was damaged by a water event, in remediation of which Restoration provided emergency water removal and construction services. (R. 5). Tower Hill did not pay Restoration's reasonably priced bills. (R. 5). Tower filed an answer and affirmative defenses alleging, *inter alia*, that Restoration lacked standing to sue because Florida law prohibited the post-loss assignment of benefits. (R. 112).

On October 31, 2013, Tower Hill filed a motion for summary judgment. (R. 208-329). According to Tower Hill, the leak was not caused by physical damage to the roof due to wind or weather, and therefore excluded from coverage under the policy. Tower Hill attached an affidavit from Cesar Guerrero, "an independent adjuster for Mathias & Company, Inc.," who had been "working in claims [sic] adjusting field for 11 years." (R. 298). He had "inspected countless properties for roof leaks and associated water damage." (Id.). Mr. Guerrero averred that:

> On April 4, 2013, I inspected the property and found the following:
> - The roof system was found to be leaking causing water damage to the interior of the risk.

- The Insured placed a tarp on the roof in order to stop the leak.
- After removing the tarp, there was no direct physical damage to the roof system.
- The roof system appears to be approximately 10+ years old.

(R. 299). In the affidavit, Mr. Guerrero claimed that he reported to Tower Hill that he had "concluded that the roof started leaking due to a combination of age, deterioration, and wear/tear, and not a one-time event such as a hurricane." (Id.).

Mr. Guerrero's deposition testimony was at odds with his summary judgment affidavit, however. Mr. Guerrero explained that the report he submitted to Tower Hill provided that the roof system "may have started leaking through a combination of age, deterioration and wear and tear." (CGD 22 (emphasis added))[1]. Mr. Guerrero admitted he was not sure whether the loss was caused by wear and tear because he was "not a roofer. I just give them my opinion." (CGD 23). "I don't consider myself an expert on roofing and what causes a roof leak. I just give my opinion based on my professional experience." (CGD 24). He had not lifted any of the shingles to look for physical damage, nor had he inspected the underside of the roof from the attic. (CGD 25-26). Accordingly, he had not indicated whether the loss was caused by wind driven damage: "I just noticed no physical damage to the roof and I don't know if it was wind driven. I don't know

[1] Mr. Guerrero's deposition transcript is not currently part of the record on appeal,

if it was just due to an old brittle roof." (CGD 28).

On July 11, 2014, Restoration filed a response in opposition to summary judgment. (R. 339-359). Restoration requested the Court deny the motion for summary judgment. (R. 347). Restoration explained that the loss would be covered if the water penetration occurred as a result of damage caused by wind or hail; the cause of the penetration was a question of fact. (R. 341-42). Mr. Guerrero, who was not a certified roofer, based his conclusion on a visual inspection only, did not affirmatively state the reason that the penetration occurred, and did not know whether the loss occurred as a result of wind driven damage. (R. 342-43). Therefore, Mr. Guerrero's affidavit failed to demonstrate that the water damage was not covered. (R. 343). Accordingly, Restoration had not acquired the burden to respond with evidence disputing any material fact.

Additionally, Restoration submitted an affidavit from Certified Professional Engineer Scott Brennan. (R. 352). Engineer Brennan identified deficiencies in Mr. Guerrero's report: the documents only indicated that water entered through the roof, there was no explanation or analysis describing the cause of the roof leak, and there was no finding that the roof leak was due to long term wear and tear. (R. 352). Based on Mr. Guerrero's review and the supporting documents, Engineer Brennan could not "rule[] out that the water penetration was not a direct result of

damage caused by wind or hail" based on the documents submitted. (Id.). Therefore, a disputed issue of fact existed as to whether the loss was covered.

On July 15, 2014, the court held a hearing on the motion for summary judgment. Tower Hill's counsel testified that "If it had been hit by hail, there would be pockmarks, there would be a hole, there would be something. If the wind had lifted up tiles, asphalt shingles, flat roof, it had lifted up, there would be physical damage." (HT 7).[2] Restoration pointed out that Mr. Guerrero had contradicted his statement that there was no physical damage to the roof when he admitted in the deposition that "he is not a certified roofer and that he could not state whether there was wind damage to the roof." (HT 8) The record did not conclusively show that no material issues of fact existed; indeed, Tower Hill's submissions "create genuine issues of material fact that are yet to be determined." (HT 9). Reminding the court that "it's Defendant's burden to prove the non-existence of a genuine material fact," (HT 14), Restoration also relied on the affidavit of Engineer Brennan who swore that the investigation was not sufficient to "exclude the fact that there was wind or hail damage," although she candidly admitted that Engineer Brennan had not inspected the property and did not determine the cause of the leak. (HT 14-15).

[2] The hearing transcript is not currently part of the record, and is cited as "HT."

Nevertheless, the county court granted Tower Hill's motion for summary judgment. The court relied on the statements by Mr. Guerrero, holding that Mr. Guerrero had "determined there was no direct physical damage," that his conclusion "was confirmed in [] his deposition," and that "[t]here is no evidence to contradict this finding by Mr. Guerrero." (R. 361). Under the water damage exclusion to the policy, there was no coverage for a leak "unless water penetration is a *direct result* of damage caused by wind or hail." (Id.). The court therefore concluded that "there are no material issues of fact regarding the instant suit and the denial of Ms. Sidney/Restoration 1's claim." (R. 362).

Restoration appeals.

SUMMARY OF ARGUMENT

Mr. Guerrero's inspection did not demonstrate that no material issues of fact existed. Mr. Guerrero was not an expert, and his opinion was not admissible as lay testimony. In any event he contradicted himself at the deposition, clarifying that in his opinion normal wear and tear may have been the cause of the leak; he refused to affirmatively testify that the leak had not been caused by weather-driven physical damage. He could only testify that he observed no damage to the shingles, not to the roof. Although Restoration had no legal duty to produce evidence in response to Mr. Guerrero's statements, the affidavit of engineer Scott Brennan further demonstrated that Tower Hill could not rely on Mr. Guerrero's inspection to satisfy its burden of proof. This Court should vacate the county court's order and remand for further proceedings because Tower Hill failed to show that no material issue of fact remained to be determined.

In order to preserve Restoration's rights, counsel addresses in advance some of the arguments that other insurers have recently raised regarding the legal validity of assignments of benefits. Section II of this brief will not be relevant unless Tower Hill chooses to address these issues in its answer brief.

ARGUMENT

I. The County Court Erred in Granting Summary Judgment.

This appeal presents an issue of law reviewed de novo because it involves an order granting final summary judgment; the de novo standard of review is applied to determine whether there are genuine issues of material fact and whether the trial court properly applied the correct rule of law in granting summary judgment. Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Rule 1.510 of the Florida Rules of Civil Procedure provides that summary judgment is appropriate when "there is no genuine issue as to any material fact," and the movant is "entitled to a judgment as a matter of law." It is well settled that a party moving for summary judgment has the burden of conclusively showing that there are no genuine issues of material fact. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985); see also Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999) (explaining that "summary judgment should not be granted unless the facts are so clear and undisputed that only questions of law remain."). The movant may rely on "affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence." Fla. R. Civ. P. 1.510(c). Any affidavit must "affirmatively show that the affiant is competent to testify to the matters in the affidavit." In re 1998 Ford Pickup v. Williams, 779 So. 2d 450, 451 (Fla. 2d DCA 2000) "Until it is determined that the movant has

successfully met this burden, the opposing party is under no obligation to show that issues do remain to be tried." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966).

In considering a motion for summary judgment, the trial court must draw every possible inference in favor of the party against whom summary judgment is sought. Romero v. All Claims Ins. Repairs, Inc., 698 So. 2d 605 (Fla. 3d DCA 1997). Further, where even the slightest doubt exists on the facts, the trial court should not grant summary judgment. Klein v. Robbins, 947 So. 2d 623 (Fla. 3d DCA 2007); see generally Janssen v. Alicea, 30 So. 3d 680, 681 (Fla. 3d DCA 2010).

A. Mr. Guerrero was not qualified to give an expert opinion that the leak was caused by normal wear and tear rather than weather-driven physical damage.

This Court must decide whether Mr. Guerrero's affidavit and deposition testimony shows beyond all doubt that no wind-driven or hail-driven physical damage caused the leak that damaged Ms. Sidney's home. Opinions are generally offered by experts; other witnesses generally must testify only as to their observations. Fid. Warranty Servs. v. Firstate Ins. Holdings, Inc., 74 So. 3d 506, 512 (Fla. 4th DCA 2011) (holding that lay testimony impermissibly strayed into territory reserved for experts when witness gave opinion as to market value of company based on specialized knowledge acquired "through thirty years' experience as an agent in the insurance industry").

With respect to whether an expert is competent to offer an opinion, "the Florida Legislature recently adopted the standard announced in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 587 (1993)." Zakrzewski v. State, No. SC13-1825, 2014 Fla. LEXIS 2032, 2014 WL 2810560 (Fla. June 20, 2014). Florida law now provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> **(1)** The testimony is based upon sufficient facts or data;
>
> **(2)** The testimony is the product of reliable principles and methods; and
>
> **(3)** The witness has applied the principles and methods reliably to the facts of the case.

Fla. Stat. § 90.702. "[W]here such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999) (quoting Daubert, 509 U.S. at 592).

In his affidavit, Mr. Guerrero offered his opinion that "the roof started leaking due to a combination of age, deterioration, and wear/tear and not a one-time event such as a hurricane." (R. 299). Mr. Guerrero readily admitted that he lacked the skills necessary to determine why a roof leaked based on visual

inspection of the shingles. Indeed, during his deposition he clarified that he not actually ruled out weather-driven physical damage as the cause; he had merely opined that the roof "may have started leaking through a combination of age, deterioration and wear and tear." (CGD 22 (emphasis added)). Additionally, his deposition testimony revealed that he had not looked under the shingles or observed the roof from underneath in the attic. Therefore, according to Mr. Guerrero himself, he lacked the specialized knowledge of an expert, and his testimony was not based on sufficient facts or data to determine whether wind or hail had caused physical damage to the roof. Natural Answers, Inc. v. Carlton Fields, P.A., 20 So. 3d 884, 889 (Fla. 3d DCA 2009) (explaining that expert affidavit "without any factual support" did not create a genuine issue of fact); M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A., 932 So. 2d 459, 464 (Fla. 4th DCA 2006) (**"**When the expert's opinion is based on speculation and conjecture, not supported by the facts, or not arrived at by recognized methodology, the testimony will be stricken.").

To the extent Mr. Guerrero relied only on his experience without explaining the reasons underlying his conclusion, his "pure opinion testimony" is no longer competent evidence. Perez v. Bell S. Telecomms., Inc., 138 So. 3d 492, 497 (Fla. 3d DCA 2014). Not only did Tower Hill fail to make any showing that his testimony was based on reliable methods applied to sufficient facts, Restoration 1

provided evidence that Mr. Guerrero's investigation was not sufficient to support the conclusion in his affidavit. (R. 352 (affidavit of Certified Professional Engineer Scott Brennan that the investigation could not "rule[] out that the water penetration was not a direct result of damage caused by wind or hail"); see Hoover v. United Servs. Auto. Ass'n, 125 So. 3d 636, 644-45 (Miss. 2013) (holding that opinion of expert that wind caused damage was admissible under Daubert and Kumho even though he had not personally examined structure). Mr. Guerrero's expert opinion was not competent summary judgment evidence.

B. Mr. Guerrero's opinion was not an admissible lay opinion.

Thus, any opinion testimony from Mr. Guerrero had to be evaluated as a lay witness. Under Section 90.701, Fla. Stat., his opinion was not admissible unless he could not otherwise convey his perceptions to the trier of fact, his opinion was not prejudicially misleading, and the opinion did not require any special knowledge, skill, experience, or training. See Bolin v. State, 41 So. 3d 151, 157 (Fla. 2010) (finding no error in allowing young boy to testify that substance "appeared" to be blood because it was unlikely that he could have "conveyed what he saw without using the word blood" and jury would not think substance had been scientifically tested).

Mr. Guerrero admitted that determining the cause of the roof leak required specialized skill and training he did not have. Moreover, under examination at the

deposition, Mr. Guerrero's testimony established that his perceptions could have been summarized in the following statement: "I observed no physical damage to the shingles, but I did not inspect the roof structure underneath for openings." There was no reason to allow him to give opinion testimony that normal wear and tear caused the leak, especially when he later testified that his actual conclusion was that the roof system "may have started leaking through a combination of age, deterioration and wear and tear." (CGD 22 (emphasis added)).

C. Mr. Guerrero's observations did not conclusively demonstrate that weather-driven physical damage was not the cause of the leak.

Mr. Guerrero observed no physical damage to shingles, but did not inspect the roof structure underneath for openings. At the summary judgment hearing, counsel attempted to supply a key proposition that Tower Hill had failed to support: that "If [the roof] had been hit by hail, there would be pockmarks, there would be a hole, there would be something. If the wind had lifted up tiles, asphalt shingles, flat roof, it had lifted up, there would be physical damage." (HT 7). Even if counsel were permitted to testify on behalf of a client, there was no showing that counsel was qualified to express such an opinion.

The proposition stated by counsel is not so self-evident that the county court could use it to evaluate Mr. Guerrero's observation. Shingles are sufficiently resilient that they are nailed to roofs without damage. Can a hail storm damage a roof without damaging the shingles? Can wind damage a roof without visible

damage to the shingles? These possibilities cannot be ruled out by a layman. Mr. Guerrero's cursory investigation of the shingles does not entitle Tower Hill to summary judgment because it does not show that no physical damage occurred.

II. Restoration 1 has standing to sue because Florida law does not permit Tower Hill to place any restrictions on a post-loss assignment of benefits.

For nearly 100 years, Florida has applied the majority rule prohibiting contractual restraints on post-loss assignments of insurance benefits ("AOBs"). W. Fla. Grocery v. Teutonia Fire Ins. Co., 77 So. 209, 211 (Fla. 1917) ("It is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does not apply to an assignment after loss."). Section 627.422, Florida Statutes, which provides that "A policy may be assignable, or not assignable, according to its terms," does not alter the analysis, as it precludes only assignment of the entire policy, not assignment of post-loss benefits. Citizens Prop. Ins. Co. v. Ifergane, 114 So. 3d 190, 195 (Fla. 3d DCA 2012); Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384, 1386 n.3 (Fla.1988)).

1. Florida is a majority rule jurisdiction that does not allow restrictions against assignments of a policy to apply to assignments of the benefits after a loss occurs.

Today in Florida "'it is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss.'" Cont'l Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368, 377 n.7 (Fla. 2008) (quoting W. Fla. Grocery Co., 77 So. at 210-11). Assignment of contractual rights to payment is an important commercial

mechanism to facilitate transactions and ensure the payment of obligations. See Shaw v. State Farm Fire & Cas. Co., 37 So. 3d 329, 332 (Fla. 5th DCA 2010) (en banc). Section 317 of the Second Restatement of Contracts illustrates the general rules on assignments of contractual rights. Subsection 1 defines an assignment as "a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." The Restatement also provides that contractual rights (as opposed to obligations) are assignable by default:

> (2) A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

Restatement (Second) of Contracts § 317(2). Similarly, the Uniform Commercial Code provides that by default, rights are assignable "except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance." U.C.C. § 2-210(2).

Courts recognize that insurers may object to the assignment of an entire insurance policy because the insurer may be disadvantaged when the policy is transferred to an insured with a higher risk profile. See E. Allen Farnsworth, Contracts, § 11.4, at 717 (3d ed. 1999) (citing Central Union Bank v. N.Y. Underwriters' Ins. Co., 52 F.2d 823 (4th Cir. 1931)). However, post-loss assignments of the right to receive insurance benefits from a covered loss ("AOB's") represent a special case. SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC, 394 F. Supp. 2d 585, 593 (S.D.N.Y. 2005) ("Before loss, the insurer is subjected to a risk . . . which the insurer may exempt from assignability except upon its own consent. Upon loss, however, the risk disappears and nothing remains except the assured' s right to payment -- a mere chose in action which may be assigned within the limitations of any other chose in action.") (quoting Beck-Brown Realty Co. v. Liberty Bell Ins. Co., 241 N.Y.S. 727, 728 (Sup Ct. Kings Cty. 1930)).

Accordingly, courts and commentators agree that an AOB categorically does not materially increase the burden or risk to the insurer. Peck v. Pub. Serv. Mut. Ins. Co., 114 F. Supp. 2d 51, 56 (D. Conn. 2000) (citing 3 Couch on Insurance §35:7 (3d ed. 1999) and holding that a post-loss assignment "in no way increased the insurer's risks or obligations."). This reasoning applies even when it is unclear whether the insured has suffered a covered loss. Egger v. Gulf Ins. Co., 903 A.2d

1219, 1224-25 & 1229 (Pa. 2006) (post-death, pre-verdict assignment of excess insurance policy proceeds valid despite anti-assignment clause; relevant loss occurred at moment of death because subsequent assignment did not change risks insurer undertook to insure despite excess insurance not definitely being needed until after jury verdict established excess damages).

Florida courts have adopted this position as well. The only legitimate purpose of an anti-assignment clause is to protect the insurer against "an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer." Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384,1386 (Fla. 1988) (citation omitted). After loss has occurred, assignment of the right to receive payment does not alter the insurer's risk calculus. International Schools Services, Inc. v. AAUG Ins. Co., Ltd., No. 10-62115-CIV, 2012 WL 5192265, *9 (S.D. Fla. July 25, 2012) (explaining that "allowing an insured to assign its right to the proceeds of an insurance policy after a loss has occurred hurts the insurer not at all. Its obligations are fixed when the loss occurs. The assignment does not increase or decrease the financial exposure of the company in any way." (quotation omitted)). The rights of the insured to insurance proceeds become fixed as of the date of loss. In re Surfside Resorts and Suites, Inc., 344 B.R. 179, 189 (Bankr. M.D. Fla. 2006) ("[O]nce the Hotel had sustained property damage, Plaintiff was already

responsible for payment of whatever claim Debtor asserted. Hence, once the damage affected the property, Plaintiff's obligation to pay originated.").

Because assignability promotes consumer welfare and respects consumer property rights to the coverage they purchased, without causing any cognizable injury to the insurer, almost every jurisdiction agrees that an AOB cannot be validly precluded by contract. E.g., Sable Cove Condo. Ass'n v. Owners Ins. Co., No. 14-cv-00912-MJW, 2014 U.S. Dist. LEXIS 124050, *9-11 (D. Colo. Sept. 5 2014) (concluding Colorado law bars restrictions on post-loss AOBs); In re Ambassador Ins. Co., 965 A.2d 486, 490-92 (Vt. 2008) (explaining that insurer's "legitimate interest" in restricting assignability ended when loss occurred; rejecting claim that identity of payee was relevant because "[t]he claims are worth what they are worth regardless of whether [the insured or the assignee] submits the request for payment to [the insurer]"); Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121, 129 (Ohio 2006) ("[T]he chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred."); Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 237-38 (Iowa 2001) (holding that non-assignment clauses only applied to pre-loss assignments, and that the prohibition of post-loss assignments would be "in contravention of public policy and the general purpose of indemnity contracts"); Smith v. Buege, 387 S.E.2d 109, 116 (W. Va. 1989) (holding that insurers may not

restrict post-loss assignments; explaining that reason for restrictions – "to protect the insurer against an increased risk resulting from the assignment" – did not apply because liability was fixed on date of loss); see also Williston on Contracts § 49:126 (4th ed.) ("As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy — consisting of the right to receive the proceeds of the policy — after a loss has occurred. The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property."); 3 Couch on Insurance § 35:8-9; 44 Am. Jur. 2d Insurance § 778; Annotation, *Claim under Contract of Property Insurance as Assignable after Loss,* 56 A.L.R. 1391 (2014 cum. supp.).

Like other jurisdictions, Florida also recognizes that after a loss, the right to recover insurance payments becomes a chose in action, "a right to personal things of which the owner has not the possession, but merely a right of action for their possession." Spears v. W. Coast Builder's Supply, 133 So. 97 (Fla. 1931); see Castellano v. Citizens Prop. Ins. Corp., 98 So. 3d 1180, 1183 n. 3 (Fla. 3d DCA 2012) (insurance claim is an assignable chose in action); W.S. Badcock Corp. v.

Webb, 699 So. 2d 859, 861 (Fla. 5th DCA 1997) (recognizing free assignability of choses in action); Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969) (chose in action arising out of contract is assignable); see also Ondimar Transportes Maritimos v. Beatty St. Props., 555 F.3d 184, 187 n.2 (5th Cir. 2009) (reviewing common-law rule that, as choses in action, unliquidated tort claims are assignable). Florida is also among the majority of states which have made a policy decision in favor of assignability. See Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 104 n. 86-87 (Del. 2009) (concluding that Florida, like New York, has adopted "fundamental policy judgments" against restrictions on post-loss AOBs; concluding that facts did not demonstrate any increase in insured-against risks sufficient to warrant enforcing anti-assignability clause).

In Florida, as a general rule an anti-assignment clause in a contract cannot bar a transfer of the right to receive payments unless some important policy justifies restricting the insured's property rights. E.g., Kohl v. Blue Cross & Blue Shield of Fla, Inc., 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) (allowing restrictions of AOBs to in-network medical providers); Rapid Settlements, Ltd. v. Dickerson, 941 So. 2d 1275, 1277 (Fla. 4th DCA 2006) (observing that general rule is that "a prohibition against assignment of a contract will prevent assignment of the contractual duties, but does not prevent assignment of the right to receive payments due;" holding that Florida's Structured Settlement Protection Act

permitted contact clause which prohibits assignment of payments). Other exceptions might exist where the insurer's interest is sufficiently compelling, for example, when a loss is not discovered or discoverable until well after the loss and assignment occurs. Compare Travelers Cas. & Sur. Co. v. United States Filter Corp., 895 N.E.2d 1172, 1179-81 (Ind. 2008) (despite rule against restricting AOB, policy for "indemnity coverage and a defense for the bodily injury or property damage claims of third parties resulting from the use of the insured's products" could contain anti-assignability clause; although injury caused by exposure to silica may have occurred before transfer, right to recovery was inchoate before detection, and "[a] right not currently held is not a chose in action assignable at law") with Egger, 903 A.2d at 1224-25, 1229 (allowing assignment of right to excess coverage insurance after loss but before jury verdict created liability).

Otherwise, "Post—loss insurance claims are freely assignable without the consent of the insurer," notwithstanding language purporting to limit assignability. Citizens Prop. Ins. Co. v. Ifergane, 114 So. 3d 190, 195 (Fla. 3d DCA 2012) (citing Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384 (Fla. 1988)). "[A]n insured may assign insurance proceeds to a third party after a loss, even without the consent of the insurer." Lexington Ins. Co., 704 So. 2d at 1386 n.3. In the specific context of insurance benefits assigned after discovery of a loss, "'it is a well-settled rule that [anti-assignment provisions do] not apply.'" Cont'l Cas. Co.

v. Ryan Inc. Eastern, 974 So. 2d 368, 377 n.7 (Fla. 2008) (quoting W. Fla. Grocery Co. v. Teutonia Fire Ins. Co., 77 So. 209, 210-11 (Fla. 1917)).

2. No legal distinction exists between an assignment of benefits for a sum certain and an assignment for a yet-to-be determined amount

Insurers have crafted several ingenious arguments against AOBs based on convoluted analyses of law and strained readings of insurance contracts. Additionally, they seek to mitigate the rule's impact by stripping away the right to sue from the bundle of property rights acquired by an assignee. Nevertheless, in Florida "the common law 'speaks in a loud and consistent voice: An assignee stands in the shoes of his assignor." Prescription Partners, LLC, v. Fla. Dep't Fin. Servs., 109 So. 2d 1218, 1222 (Fla. 1st DCA 2013) (citations omitted). This Court should not allow Tower Hill to change clearly settled law regardless of what new argument they may bring.

Like the majority of jurisdictions, Florida law does not distinguish between post-loss claims based on whether the amount due has been reduced to a sum certain because the assignment does not affect the insurer's liability. W. Fla. Grocery, 77 So. at 211 (citing Ga. Co-Operative Fire Assn v. Borchardt, 123 Ga. 181 (Ga. 1905)). The "mere change in the identity of the payee on a check" that occurs in an AOB is immaterial and "does not represent an increased risk to the insurer:"

> Before loss, the insured has only an inchoate or a contingent right to compensation, but after loss that right has "bec[o]me absolute" and transferable without consent, since the relationship of the insured and insurer is now one of "creditor and debtor" and the policy no longer significant except as evidence of the existence and amount of the debt.

Antal's Rest., Inc. v. Lumbermen's Mut. Cas. Co., 680 A.2d 1386 (D.C. 1996)).

Like all choses in action, an AOB would be worthless without a corresponding right to sue on an obligation; therefore, the very concept of a chose in action "includes the right both of the thing itself and of the right of action as annexed to it." Wehr Constructors, Inc. v, Assur. Co. of Am., 384 S.W. 3d 680, 688 (Ky. 2012) (citing 63C Am. Jur. 2d Property § 22). A cause of action accrues at the time of breach even when damages have not been liquidated or ascertained. See Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc., 941 So. 2d 576, 578 (Fla. 4th DCA 2006); Fradley v. Dade County, 187 So. 2d 48, 49 (Fla. 3d DCA 1966). Similarly, in an early Florida case, it was held that assignment of an open account was valid. Walters v. Whitlock, 9 Fla. 86 (1860). With an open account, the amount due fluctuates, but notice to a debtor of an assignment of such an account is all that is necessary to shift to the debtor the duty of payment of the account to the assignee.

Assignment of any chose in action carries with it the entire cause of action to recover, including the right to determine the amount due. Ondimar Transportes

Maritimos v. Beatty St. Props., 555 F.3d 184, 187 n.2 (5th Cir. 2009) (citing cases). In accordance with this rule, Florida law provides assignees a right to sue. Schuster v. Blue Cross & Blue Shield of Fla., Inc., 843 So. 2d 909, 911-12 (Fla. 4th DCA 2003) ("Under Florida law, an insured may assign his right to benefits under a contract of insurance. The effect of such an assignment is to place the insured's cause of action for such benefits in the [assignee].") (citations omitted); see also Blvd. Nat'l Bank of Miami v. Air Metal Indus., Inc.,176 So. 2d 94, 97-98 (Fla.1965) (holding that the owner of a chose in action arising out of contract "may assign it to another so that the assignee may sue on it in his own name and make recovery.").

Indeed, the rights of assignees to bring actions to enforce their rights have been deemed so fundamental that efforts to restrict that right were declared unconstitutional in Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, 753 So. 2d 55, 57 (Fla. 2000) (ruling that statute which prohibits "provider-assignees from pursuing a breach of contract claim in court" would be an unconstitutional violation of assignee's access to courts because the right of an assignee to sue preexisted the adoption of the Florida Constitution). Moreover, even if an assignor agreed to pursue the claim on the assignee's behalf, he could not because the assignee has obtained all "rights to the thing assigned." Price v. RLI Ins. Co., 914 So. 2d 1010, 1013-14 (Fla. 5th DCA 2005) (quoting Lauren Kyle Holdings, Inc. v.

Heath-Peterson Constr. Corp., 864 So. 2d 55, 58 (Fla. 5th DCA 2003)). Thus, when an assignment of benefits occurs, the assignee and only the assignee has a right to sue to recover the thing assigned. This Court should reject any argument to the contrary by Appellee.

3. Failure of an insured to complete all conditions precedent to payment before an assignment of benefits occurs does not render the assignment invalid.

The common law recognizes that benefits may be assigned before the assignor has completed all of the contractual duties. See Restatement (Second) of Contracts § 320 ("The fact that a right is . . . conditional on the performance of a return promise or is otherwise conditional does not prevent its assignment before the condition occurs."). When an assignment occurs before all conditions are fulfilled, the assignor's subsequent performance creates an enforceable right to payment that runs to the assignee. See Restatement (Second) of Contracts § 337 ("Where the right of an assignor is limited or voidable or unenforceable or subject to discharge or modification, subsequent events which would eliminate the limitation or defense have the same effect on the right of the assignee."), 337 cmt. n. a. ("An assignment ordinarily transfers only what the assignor has, but limitations and defenses are not enlarged by the transfer. If a condition of the obligor's duty is met or excused, for example, the condition ceases to limit the assignee's right just as it would have ceased to limit the right of the assignor in the absence of assignment."). Performance of the assignee's duties is a condition

subsequent to actual recovery; the loss event is the condition precedent to the creation of a transferrable chose in action and the right to sue to recover it. Lay v. Myers, 181 Ill. App. 614, 618 (Ill. Ct. App. Chicago 1913); see also Assocs. Loan Co. v. Walker, 416 P.2d 529, 531 (N.M. 1966) (explaining that "if the contract in Partin's hands was subject to a condition precedent under which it was not to become effective until the happening of a contingency, upon assignment the assignee took the contract subject to the same condition").

Florida has adopted this rule as well. E.g., Better Constr. v. Nat'l Union Fire Ins. Co., 651 So. 2d 141, 142 (Fla. 3d DCA 1995) (holding that "no-action" clause did not impair "assignment of an after-loss claim"); Fred S. Conrad Constr. Co. v. Exchange Bank of St. Augustine, 178 So. 2d 217, 219-220 (Fla. 1st DCA 1965) (enforcing assignment of "monies due or to become due" under a subcontract). Subsequent performance is also inherent in the maxim that the assignee "to all intents and purposes stands in the shoes of the insured." All Ways Reliable Bldg. Maint., Inc. v. Moore, 261 So. 2d 131, 132 (Fla. 1972); see also Prof'l Consulting Servs., Inc. v. Hartford Life and Accident Ins. Co., 849 So. 2d 446, 447-48 (Fla. 2d DCA 2003). Requiring performance before an AOB would be to treat an assignee differently than the insured by imposing a stricter notice requirement due to the AOB because the insured would need to show only substantial compliance or lack of prejudice from noncompliance with the notice requirement before bringing suit.

State Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071 (Fla. 2014) (insurer must plead and prove affirmative defense of noncompliance with post-loss requirements and resulting prejudice); see Allstate Floridian Ins. Co. v. Farmer, 104 So. 3d 1242 (Fla. 5th DCA 2012) (holding that full compliance clause in policy did not alter substantial compliance rule). It should be enough that the insured or the assignee subsequently complies with all contractual duties actually imposed by the policy before the assignee brings suit.

CONCLUSION

After the loss event occurred, Restoration obtained a valid assignment of benefits from the insured. Therefore Restoration has standing to sue for breach of contract. Because no competent record evidence rules out the possibility that weather-driven physical damage caused the leak, Tower Hill failed to conclusively demonstrate that no issues of material fact existed as to whether the loss was covered. Accordingly, Restoration requests that this court vacate the county court's holding and remand for further proceedings.

Respectfully Submitted,

/s/ Gray Proctor

GRAY R. PROCTOR
Florida Bar No. 48192
LAW OFFICE OF GRAY PROCTOR
122 East Colonial Drive, Suite 100
Orlando, FL 32801
Ph: (321) 445-1951
Email: gray@appealsandhabeas.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by email through the Florida courts e-filing portal, to counsel of record this 5th day of November, 2014.

s/Gray R. Proctor
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

s/Gray R. Proctor
Attorney