IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER, COUNTY FLORIDA

KP ENTERPRISES, INC. D/B/A,
FIRST RESPONSE DISASTER TEAM,
a/a/o Maria Radojkovic

Appellant,

v.

FIDELITY FIRE & CASUALTY COMPANY
D/B/A FRONTLINE HOMEOWNERS
INSURANCE

Appellee.
_____/

Case No.: 2015-AP-6
L.T. Case No.: 2011-CC-560

REPLY BRIEF

ON APPEAL FROM
THE HON. MELISSA MOORE STENS
SEVENTH JUDICIAL CIRCUIT, FLAGLER COUNTY, FLORIDA

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ARGUMENT

After the answer brief was filed, the Second District Court of Appeal decided Bioscience W., Inc. a/a/o Gattus v. Gulfstream Prop. & Cas. Ins. Co., 41 Fla. L. Weekly D349 (Fla. 2d DCA February 5, 2016) ("Gattus") (App. A). The Gattus court joined the other districts recognizing the "unbroken string of Florida cases over the past century holding that policyholders have the right to assign such [post-loss] claims without insurer consent." Slip op. at 10. Here, Frontline's arguments that a post-loss assignment of benefits ("AOB") does not require payment to the AOB-holder directly would contravene this holding.

Additionally, the Second DCA considered and rejected arguments that post-loss assignments of benefits ("AOB"s) are "partial assignments." The answer brief shows that, as here, the appellee insurer raised the partial assignment argument as a tipsy coachman defense. (App. B). Nevertheless, the appellant prevailed.

Although the Gattus court did not use the term "partial assignment" in the opinion, it also did not indicate that the argument had not been considered or addressed in the opinion. Compare One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 749, 755-56 (Fla. 4th DCA 2015) (offering guidance to the lower court by explaining that "we decline to reach any of

Security First's other challenges to the assignment . . . [t]he trial court should address these issues in the first instance"). When the reasoning behind the opinion so clearly applies to partial assignments, this Court should not presume that the Gattus panel left the issue open. Assuming *arguendo* that Gattus is not mandatory authority holding that AOB's are not partial assignments, the reasoning of Gattus nevertheless precludes a finding that the instant assignment was partial.

I. An insurance policy cannot defeat the rule against restrictions on AOBs by permitting payment to anyone other than the assignee.

Even before Gattus, every District Court of Appeal in Florida to consider the issue has determined that well-settled law prohibits limitations on the post-loss assignment of insurance benefits. See, e.g., Accident Cleaners, Inc. a/a/o Gerena v. Universal Ins. Co., Case No. 5D15-352, 40 Fla. L. Weekly D 862 (Fla. 5th DCA April 10, 2015); One Call Prop. Servs. v. Sec. First Ins. Co., 165 So. 3d 749 (Fla. 4th DCA May 20, 2015); United Water Restoration Group, Inc. v. State Farm Fla. Ins. Co., No. 1D14-3797, 2015 Fla. App. LEXIS 10403, 40 Fla. L. Weekly D 1569 (Fla. 1st DCA July 8, 2015).

In an attempt to thwart these holdings, Frontline now argues that its policy creates a new species of assignment. This kind of assignment allows Frontline to discharge its policy obligations by paying parties with no right

to the proceeds. It contends that its actions were legal because "[n]othing in the policy's Loss Payment clause, or any other part of the policy, requires Frontline to issue KP its own check." (Answer Br., at 11).

Frontline tries to create exceptions to a rule that admits of none. The law could not be clearer: "Even if an insurance policy contained a specific, articulate provision precluding an insured's post-loss assignments of benefits without the insurer's consent, Florida case law yields deep-rooted support for the conclusion that post-loss assignments do not require an insurer's consent." Gattus, slip op. at 8. An assignment that does not legally require the obligor to pay the assignee is antithetical to the concept of assignments.

Frontline attempts to buttress its argument with an appeal to the perceived interests of insureds and public adjusters. It claims it "had to" pay the claim to Ms. Radojkovic directly because "she was responsible for any such sums not covered by insurance." (Answer Br. 16). It argues that "the insured in this case is a party to the policy who is responsible for any amounts Frontline does not pay. . . . Neither KP nor the insured could subvert the public adjuster's interest by having a check made solely payable to KP. This is because a public adjuster is a person who acts on behalf of or aids an insured in negotiating . . . ." (Answer Br., at 12). But a public adjustor has no role in Frontline's relationship with KP, and neither did Ms.

Radojkovic. After the AOB, Ms. Radojkovic had no interest in the benefits payable for KP's work; KP stood "in the shoes of the assignor" as the only "real party in interest." United Water, No. 1D14-3797,40 Fla. L. Weekly D1569, slip op. at 4. There was nothing for the adjuster to do for her.

Thus, the public adjuster and Ms. Radojkovic had no interest in the relevant benefits that KP could "subvert." In fact, if the public adjuster or the insured retained any interest in the assigned benefits, Frontline itself would have subverted them with the final check for $1,887.18, because "they didn't put the [public adjustor] on that check. They didn't put the homeowner on that check." (R. 1310).

In fact, Frontline's position is contrary to Ms. Radojkovic's interests. It would allow insurers to use strategic policy language to impair AOBs. This will ultimately "place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs," a result the Second DCA has found unacceptable. Gattus, Slip. Op. at 9. Ms. Radojkovic got the benefit of timely repairs, which surely further the public interests. If the benefits did not cover KP's services, or coverage were denied, Ms. Radojkovic would still be better off than if she'd had to prepay or borrow funds for repair. Ms. Radojkovic's interests do not align with Frontline's arguments in this case.

If, as Frontline argues, the out-of-state cases cited in the initial brief were not "instructive to the instant case," presumably Frontline could have distinguished them. Instead, it merely proclaims an absence of any "binding case law . . . that requires a non-party remediation company in a first-party insurance lawsuit to be issued its own check." (Answer Br., at 11-12). Frontline is wrong; it cannot restrict AOBs through any policy provision. See Gattus, slip op. at 8 & n.1 (observing that Florida "stands apart from a minority of jurisdictions that permit an insurer to contractually restrict its insured's post-loss assignment"). And of course, Frontline fails to cite to any mandatory or persuasive authority that would allow an insurance company with notice of an AOB to pay anyone other than the AOB-holder. This absence of authority should itself be instructive to the instant case.

Finally, Frontline argues without citation to authority that the terms of Ms. Radojkovic's assignment to KP render the assignment unenforceable. In addition to observing that Ms. Radojkovic is responsible for costs not covered by insurance, it also argues that the assignment cannot be enforced because it imposes on Ms. Radojkovic an obligation to sign over any payment made directly to her. (Answer Br. at 17). Even if Frontline had standing as a nonparty to the contract, it should not be interpreted to permit payment to anyone except KP. If the terms of the assignment permitted

payment to the assignor, the contract would provide. No inference – much less explicit provision – can be constructed from a routine attempt to define responsibilities in the event a non-party acts unpredictably. After all, by its own admission Frontline made a mistake when it issued the final check directly to KP. The policy at issue does not and cannot limit the AOB that occurred in this case, and KP is entitled to direct payment.

II. The AOB in this case is full, complete, and enforceable.

Frontline argues that the assignment here is an unenforceable partial assignment because "KP did not obtain 'all rights to the thing assigned,' *i.e.*, the insured's complete claim." (Answer Br. at 16). Whether an assignment is partial depends on how a right and a "part of a right" are distinguished. Florida law does not support Frontline's reasoning that an AOB is part of a whole claim and therefore impermissibly partial. In fact, Gattus shows that an AOB gives a "whole" right, not one that is a part of anything.

In Gattus, Bioscience West, Inc. appealed the lower court's order granting summary judgment, which held that "a provision limiting the assignment 'of this policy' without Gulfstream's written consent" rendered an unconsented-to assignment of benefits a legal nullity. Id., slip op. at 2. On appeal, Gulfstream Insurance raised the tipsy coachman argument that the assignment in the case was impermissibly partial. (App. B). As does

Frontline here, Gulfstream argued that Bioscience obtained a partial assignment because the AOB "applie[d] only to services performed by Bioscience" and not to the entire claim. (App. B, at 20). Just as the Second DCA rejected Gulfstream's argument, this Court should reject Frontline's argument.

Gattus explains that an AOB gives "the right to recover a benefit." Slip. Op., at 2-3. Florida law prohibits restrictions on the insured's "unilateral assignment of a benefit," or "financial proceeds derived from a benefit of the policy." Id. at 4. When an assignment is limited to "proceeds pertaining to services," the AOB-holder acquires "a right to seek payment for the mitigation services it rendered." Id. at 5. These descriptions indicate that an AOB for services rendered is a distinct, separate legal right, not to be considered merely part of the entire claim.

Here, KP's AOB grants the right to seek benefits "in consideration of [KP]'s agreement to perform services and supply materials." (R. 532). The Gattus assignment is materially indistinguishable; it assigned "any and all insurance rights, benefits, and proceeds pertaining to services provided by BIOSCIENCE WEST, INC . . . to [Bioscience]. I hereby authorize direct payment of any benefits or proceeds to my property . . . , as consideration for

any repairs made by [Bioscience]." Slip op. at 2. Thus, as in KP's interest is definite and whole, not a part of anything.

In candor to the Court, the Gattus opinion does not use the term "partial assignment." Nevertheless, the Court's reasoning shows that AOBs like the one KP obtained from Ms. Radojkovic are enforceable. At the very least, Gattus stands for the proposition that the tipsy coachman partial assignment argument should not be addressed here.

Even if Frontline were correct that the Court should undertake a partial assignment analysis, it has failed to demonstrate that the AOB here is unenforceable. Frontline has represented to this Court that "If an assignment is partial only, it can be enforced against the debtor only with the debtor's consent, or with the joinder in an equitable proceeding of all persons entitled to the various parts of the debt." (Answer Br., at 15 (citing Space Coast Credit Union v. Walt Disney World Co., 483 So. 2d 35, 36 (Fla. 5th DCA 1986))). Frontline's authority does not control this case, and moreover the test for partiality as stated in the answer brief is incomplete. KP will address each issue in term.

First, Space Coast is not a useful guide in this case. The Space Coast court addressed assignment of future wages only, describing how the law applied to "the debtor, or [his or her] employer." 483 So. 3d at 36. The

reasoning behind Space Coast's analysis of the assignment that directed the employer "to deduct from his wages and pay to the Credit Union $20.00 per week, commencing February 25, 1982 through June 30, 1984," does not apply to AOBs. Id. at 35.

Assigning future wages is akin to assigning insurance rights before loss occurs, which is not an AOB. And the 100+ year history of AOBs in Florida – most of which are partial and unenforceable by Frontline's reasoning – creates an expectation in any reasonable party of dealing with more than one party on occasion. As the Gattus opinion points out, insurance policies generally contain a clause that "contemplate[s] the need to pay third parties who were 'legally entitled' to benefits." Slip op. at 5-6; see (R. 961 ("We will pay you unless some other person . . . is legally entitled to receive payment"). Employers, however, expect to pay only one person and be done with the issue. Contrariwise, insurance companies expect to have to value all repairs after a covered loss, and should realize that any valuation may be subject to dispute. There is no reason for the Court to break with recent authority affirming AOBs by extending Space Coast to cover post-loss AOBs.

Should this Court undertake the partial assignment analysis, Frontline still cannot prevail on this record. For the general rule on partial

assignments, which must be applied on a case-by-case basis, the Space Coast court drew on the Restatements, which provide a more complete description of the common law rule it adopted:

> (1) Except as stated in Subsection (2), an assignment of a part of a right, whether the part is specified as a fraction, as an amount, or otherwise, is operative as to that part to the same extent and in the same manner as if the part had been a separate right.
>
> (2) If the obligor has not contracted to perform separately the assigned part of a right, no legal proceeding can be maintained by the assignor or assignee against the obligor over his objection, unless all the persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder.

483 So. 2d at 36 (quoting Restatement (Second) of Contracts § 326) (emphases added)). Equitable considerations are weighed according to the sole reason for the rule: to prevent the obligor from "multiple suits or claims not contemplated by the assigned contract." Id. (citing Annot., 80 A.L.R. 413, 414 (1932); 6 Am. Jur. 2d Assignments § 76 (1963)).

Thus, partiality is only the first inquiry. Assuming *arguendo* that Frontline did not contract for separate performance as a matter of law by recognizing that "some other person" might be entitled to payment, the

policy still contains no explicit clause forbidding partial AOBs (if such a thing can exist). This renders the policy ambiguous at best. Parol evidence of extrinsic factors, such as "[c]ustom and usage," Farr v. Poe & Brown, Inc., 756 So. 2d 151, 152-53 (Fla. 4th DCA 2000), and the conduct and circumstances of the parties at the time the contract was made, will be relevant to interpreting the contract. Clark v. Clark, 79 So. 2d 426, 428 (Fla. 1955). The record cannot currently support any judgment on this point.

And still Frontline's legal labors would not be done. It would still have to demonstrate all of the following conditions: first, that all parties entitled to performance are not joined; second, that joinder is feasible; and finally, that it would be inequitable to allow the suit to continue. There is no indication that any other party is currently entitled to performance; there is no indication that they could be joined; and, the record demonstrates no hardship to Frontline if this case proceeds.

It is unclear what Frontline means by "creat[ing] an equitable assignment on appeal." Frontline merely argues that "it would be fundamentally unfair to Frontline to expand KP's contract to an assignment of the insured's entire claim, which KP acknowledges that it does not have." (Answer Br., at 18-19). An assignment in equity would no more transfer the entire claim than an AOB at law, and a lack of hardship to Frontline is

demonstrated by the same considerations that render this AOB, if partial, nevertheless enforceable.

Frontline's arguments do not warrant affirming the trial court. If the Court considers this tipsy coachman argument – and KP maintains that it should not, see (Initial Br. at 26) – it must be rejected, as a matter of law or at the least as unsupported by the record.

III. The amount that Frontline owes KP has not been settled.

KP has never conceded that the amount Frontline paid out for KP's services, if paid to KP, would have been reasonable. Frontline omits relevant evidence and argument presented by KP. This unfortunate and inefficient tactic should not delay the Court long, because the record clearly demonstrates a dispute about the fair value of KP's services.

As noted in the initial brief, KP submitted invoices totaling $14,446.49 and attached them to the amended complaint.[1] Frontline issued KP a check for $1,878.18. (R. 1041-43). Frontline issued two more checks jointly: $7,240.88 (R. 977) and for $3,337.13 (R. 978). The $12,456.19 figure represents an undisputed amount due KP, measured by Frontline's willingness to pay. The dispute over this sum is whether Frontline

[1] $3,337.13 for materials removal and demolition (R. 541), $4,198.48 for mold remediation (R. 538); $7,026.12 for dwelling dryout (R. 534); and $214.76 for contents dryout. (R. 535).

discharged its obligations with respect to the $10,578.01 paid jointly. Even if Frontline had paid the $10,578.01 directly to KP, an additional $2320.30 separates the amount billed from this undisputed amount.

An affidavit attached to plaintiff's cross-motion for summary judgment also established that that KP believed the underpayment amounted to $12,683.45. (R. 1197). Using this figure, the amount disputed is $2105.44 – with $10,578.01 undisputed of a total of $14,561.63 owed.

Either way, the record makes plain that KP's dispute was not limited to the identity of the payee. Frontline mischaracterizes KP's position, claiming KP's motion for summary judgment "argued that the [reasonable] amount was determined to total $12,456.19, which is the exact amount Frontline argued it paid." (Answer Br., at 20). KP's motion provides that "There is no dispute as to the fact that the Defendant does not contest that it determined that it owed KP enterprises $12,456.19." (R. 1180).

KP's offer to "stipulate for the purposes of today's hearing that the amount that we're discussing for today is reflected in the three checks that were issued" (R. 1314) (emphasis added) reflects counsel's recognition that at the hearing, the important point was that summary judgment should be denied because Frontline paid the wrong parties. And, as Frontline omits from its brief, its counsel was "not going to stipulate to anything." (R.

1315). Frontline failed to carry its summary judgment burden, and the trial judge erred by finding no dispute as to the value of KP's services.

Frontline additionally argues that it has issued benefits up to the $10,000 limit on mold-related damage. Whether KP's services are covered by that policy limit, rather than as an additional coverage or a reasonable repair, (R. 935), is an issue of fact that was not litigated below and cannot be settled here. Additionally, the policy provides that when there is damage not caused by mold, the limitation applies only to "an increase in the loss" attributable to mold. (R. 950). An additional endorsement specifies that the policy exclusion does not apply "when 'fungi,' wet or dry rot, yeast or bacteria results from fire or lightning (R. 960). These policy provisions create issues of fact not suitable for resolution on appeal.

Moreover, the record indicates that Frontline initially determined that most of the benefits paid were not subject to the mold damage limitation. A letter from Frontline on April 12, 2011 indicates that the $7240.88 check was paid entirely under Coverage A emergency, while the $3,337.13 check was from proceeds subject to the mold limitation.. (R. 979-80). The checks themselves bear this out. (R. 977 ($7240.88 under dwelling A), R. 978 ($3,337.13 "under dwelling Mold Coverage"); compare R. 1004 ($35,333.19 "under dwelling coverage"), R. 1042 ($1,878 payment "under Coverage

A/Mold"). Subsequently a letter dated May 17, 2011 letter asserts, but fails to explain why, Frontline believes it issued $8,121.82 of the $10,000 coverage for mold. (R. 1029). On this record, Frontline cannot conclusively demonstrate that benefits for KP's services would exceed the mold coverage.

CONCLUSION

Because Ms. Radojkovic gave KP a valid, enforceable post-loss AOB in consideration for emergency remediation services, and because the parties dispute the reasonable value of those services, the order granting summary judgment should be reversed, and the case remanded for further proceedings.

Respectfully Submitted,
/s/ Gray R. Proctor

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I HEREBY CERTIFY that a copy of the foregoing has been furnished, through the e-filing portal, to: Daniel Lazaro and Elaine Walter, 420 S Dixie Hwy Coral Gables, FL, 33146-2227, at:

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this 16h day of March, 2016.

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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).

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