IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

LATONYA FRANCIS,

Appellant,

v.

TOWER HILL PRIME INS. CO.,

Appellee.
_____/

CASE NO: 3D16-2114
LT CASE NO: 2015-CA-23315

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR MIAMI-DADE COUNTY

Nathan Teplitsky
THE MINEO SALCEDO LAW FIRM, P.A.
Florida Bar No. 108718
5400 S. University Drive, Suite 502
Davie, Florida 33328
Ph: (954) 463-8100
Email: service@mineolaw.com

Gray Proctor, of counsel
FOX & LOQUASTO, P.A
Florida Bar No. 48192
122 East Colonial Drive, Suite 100
Orlando, FL 32801
Ph: (407) 802-2858
Email: gray@appealsandhabeas.com

Attorneys for Appellant

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INTRODUCTION AND QUESTIONS PRESENTED

Latonya Francis appeals the order granting the motion for summary judgment by Tower Hill Prime Insurance Company ("Tower Hill").

Ms. Francis, who owns a replacement cost policy issued by Tower Hill, suffered rainwater losses to the interior of her house after her roof leaked on two separate occasions. Tower Hill denied coverage for the roof damage, citing its adjuster's report indicating that sealing deterioration "may" have caused the leak. It paid its adjuster's estimate of the actual cash value of the losses to the interior, which deducted depreciation from replacement cost estimates that were around $100,000 less than the replacement costs estimated by Ms. Francis's public adjuster. Ms. Francis sued for breach of contract.

The lower court held that no breach of contract could occur because Ms. Francis spent her benefits to repair her roof, rather than her interior. The judge found that Florida law permitted Tower Hill to pay only the amount spent to repair covered losses, even though the policy obligates Tower Hill to initially pay the actual cash value and subsequently issue supplemental payment for additional repair costs. The questions raised in this appeal are:

1) Do material issues of fact exist as to whether Tower Hill paid the full amount owed for the losses undisputedly covered by the policy?

2) If Ms. Francis adequately raised the issue of coverage for her roof damage, has Tower Hill shown that no disputed facts exist as to whether the damage is within the exclusion for wear and tear?

STATEMENT OF THE CASE AND FACTS

In this case, Latonya Francis ("Ms. Francis") alleged breach of contract for underpayment of her two water loss claims. Tower Hill Prime Insurance Co. ("Tower Hill") wrongfully excluded from coverage damage to her roof, citing the exclusion for wear and tear. Tower Hill also underpaid for covered damages to her interior, failing to tender the full actual cash value.

Ms. Francis owned a replacement-value policy from Tower Hill. The valuation clause provided that Tower Hill would pay the actual cash value of any loss, and pay any additional repair costs as they became due. As the summary explained, "We will pay no more than the actual cash value of an insured loss, less any applicable deductible, until the repairs are made and expenses are incurred." (R. 59). Subsection b of the loss settlement clause provided that losses to the dwelling would settled according to "the cost to repair or replace, after application of deductible and without deduction for depreciation." (R. 70). Tower Hill limited its liability to the least of three amounts: the policy limits; the "replacement cost of that part of the building damaged for like construction and use on the same premises;" or, the "necessary amount actually spend to repair or replace the damaged building." (R. 70 (subsection (b)(1)(a-c)).

An endorsement provided further detail on how losses would be settled. Tower Hill agreed to "initially pay at least the actual cash value of the insured loss,

less any applicable deductible." (R. 113). Additional amount necessary to effect replacement or repair would be paid "as work is performed and expenses are incurred." (R. 113). However, Tower Hill promised not to "require you to advance payment for such repairs or expenses." (R. 113).

The loss settlement clause provided the insured a third option as well:

> You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability according to the provisions of this [] loss settlement.

(R. 71).

On April 22, 2015, Latonya Francis suffered a water loss to bedroom and bathroom areas when water leaked through her roof. (R. 7, 40). On April 29, 2015, she suffered a second water loss to her kitchen, also due to roof leakage. (R. 9, 40).[1] The entire roof had been replaced in 2007. (R. 142-43).

Ms. Francis obtained an estimate for repairs for each loss from Stellar Public Adjusting Services, which totaled $72,788.10 and $44,998 for interior damages only. (R. 42; R. 347, 359). The estimate did not address coverage for roof damages or repair amounts. Tower Hill obtained a competing assessment from

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[1] Ms. Francis's deposition clearly describes water damage caused by rain leaking through the roof after a hailstorm. (R. 146, 149-50, 157).

independent adjuster Pacesetter Claims Service, Inc. (R. 163-71). It denied coverage for any roof damage, which Pacesetter claimed "may have been due to deteriorating sealant around vents." (R. 162). For the interior damage, Tower Hill paid $7,581.61 and $5,866.53, but withheld payments for depreciation in the amounts of $467.30 and $1,331.76. (R. 41; R. 172-77).

Tower Hill's checks were accompanied by letters explaining that, because the claim had been "paid at actual cash value," Ms. Francis could make a claim for "the amount of recoverable depreciation within 180 days by providing us with receipts, photos, estimates, and/or any other documentation supporting that repairs have been completed and costs incurred." (R. 217, 220). The letter also indicated that the payments were not final because Ms. Francis was permitted to "submit supplemental claims," but only for "damage discovered in the covered reconstruction and repair." (R. 217, 220). She was invited to contact Tower Hill if she "believe[d she] may have any supplemental damage." (R. 218, 221).

Ms. Francis used the proceeds to repair her roof, rather than the interior of her home. (R. 42). On October 16, 2015, Ms. Francis filed suit raising two breach of contract claims against Tower Hill.[2] (R. 7-15).

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[2] On December 29, 2015, two counts for declaratory relief were dismissed voluntarily. (R. 28).

On November 23, 2015, Tower Hill filed an answer to the complaint. (R. 18-22). On March 8, 2016, Tower Hill filed a motion for summary Judgment. (R. 37). Tower Hill argued that Ms. Francis could not contest whether her policy covered damage to her roof because she "mentioned only the leaks in the interior of the Property" during her deposition. (R. 42). Additionally, the estimate submitted by her public adjuster did not include roof repairs. (R. 43). According to Tower Hill, Ms. Francis forfeited her right to contest its coverage decision because she had referred to those documents in response to a discovery request. (See R. 214). In the alternative, Tower Hill argued that its own adjuster's inspection conclusively demonstrated that the roof damage was caused by excluded wear and tear. (R. 44).

As for the dispute regarding the actual value of the covered losses, Tower Hill argued that no breach had occurred because it had paid the amount due under the contract. According to Tower Hill, it was obligated only to pay "the necessary amount actually spent to repair or replace the damaged building." (R. 44-46). Because Ms. Francis had not undertaken to repair the interior, no further amount could be due. Additionally, Tower Hill argued that it had not denied her claims because the letters explained that she could submit supplemental claims if additional damage was discovered, and no supplemental claims had been raised. (R. 48).

Tower Hill offered the following justification for its position: "to protect the insurer from abuse of its services by precluding opportunistic claimants from relying on inflated estimates, prepared by their public adjusters, in an attempt to profit from, rather than be made whole by, insurance services." (R. 49).

In response, Ms. Francis explained that a dispute over actual cash value was "the issue at the heart of this litigation." (R. 225). She pointed out that the competing estimates varied significantly and raised an issue of fact regarding the actual cash value of the losses. (R. 224). Under Florida law, although "additional benefits could become due after repairs are made, that issue is completely irrelevant to this action which seeks a determination as to whether Defendant paid the full minimum amount due without regard to any repairs – i.e. the actual cash value." (R. 228-29).

After a hearing on April 8, 2016, the court granted Tower Hill's motion for summary judgment in an unreasoned order providing only that "Summary Final Judgment is hereby entered against the plaintiff and in favor of the defendant." (R. 771). No court reporter was present at the hearing, which was unrecorded.

On April 22, 2016, Ms. Francis filed a motion for rehearing. (R. 395). She contended it was error to require her to show that repairs were performed before allowing suit "over a bona fide dispute regarding the amount of the actual cash value." (R. 398). She explained that Tower Hill's payment could not have been

made pursuant to the "necessary amount actually spent" clause, because partial payment was made before any repairs were undertaken. (R. 401). In response, Tower Hill argued that the motion for reconsideration was improper because Ms. Francis only repeated arguments already made, which had been fully litigated on summary judgment. (R. 408-09).

On August 15, 2016, the court held a hearing. (App. A, at 1).[3] Ms. Francis explained that Tower Hill had not made payment under the "necessary amount actually spent" clause, but rather under the endorsement, and had impermissibly attempted to require her to advance costs of repair and complete repairs within 180 days. (Tr. 7-8, 11). Counsel explained that he had not been present at the first hearing, but thought that the court had not ruled on the wear and tear issue. (Tr. 12-13). The court declined to explain its earlier ruling, noting that "There's something called Tipsy Coachman in the appellate court." (Tr. 13). Counsel argued that all record evidence of wear and tear was inadmissible, and the cause of the roof damage was "a factual issue, at best." (Tr. 13).

Tower Hill argued that to receive any further payment, an insured would have to "at least commence repairs and come back to Tower Hill and say 'Look, we got an estimate . . . and it exceeds the initial amount that you paid us.'" (Tr.

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[3] Citations to the transcript are hereafter in the form "Tr. X," where X is the number in the upper-right corner of the transcript.

15). Tower Hill argued that it had not breached the contract because Ms. Francis had not provided an estimate for repairs in excess of the initial payment. (Tr. 15). The court interpreted Florida law to choose to issue payment under the "necessary amount actually spent clause" regardless of whether repairs had commenced, "sanctions an insurer not spending if payment is made pursuant to" the necessary amount actually spent clause before repairs are made. (tr. 16). Ms. Francis responded that Tower Hill's letters clearly showed that payment had not been issued under that clause. (Tr. 18).

The court's order provided only that the motion for rehearing was "denied." (R. 772). The pronouncement at hearing did not clarify. (Tr. 19-20).

Ms. Francis appeals.

SUMMARY OF ARGUMENT

The standard actual cash value (ACV) policy gives the holder the value of the property at the date of loss. For a little extra, Ms. Francis purchased the right to reimbursement for the full value to return the property to its original condition. Her replacement cost value (RCV) policy is supposed to offer more protection than an ACV policy. What she got is less than the actual cost, and if Tower Hill gets its way, that's all she will ever get.

Florida law permits Tower Hill to limit its initial payment to the ACV. It does not, however, give Tower Hill the right to unilaterally set that amount. Tower Hill also cannot invoke the "necessary amount actually spent to repair or replace" prong of the loss settlement clause to erase its obligation to pay true ACV. The lower court erred by holding that Ms. Francis forfeited her right to ACV benefits when she repaired her leaking roof instead of the damage caused by the leak.

The lower court also erred in finding that coverage for the roof damage was not at issue. In denying coverage, Tower Hill clearly understood her to make a claim for roof damages. Ms. Francis's deposition, to which she referred Tower Hill for a description of damages, clearly indicates that the cause of the interior damages was rainwater let in by a leak in the roof. Pacesetter's assessment was inadmissible, and too equivocal to demonstrate that no dispute exists as to whether Ms. Francis's policy covered the roof damage.

STANDARD OF REVIEW

An order granting final summary judgment is reviewed de novo 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). Summary disposition is appropriate only when there is not the slightest doubt as to any issue of material fact. Aloff v. Neff-Harmon, Inc., 463 So. 2d 291, 294 (Fla. 1st DCA 1984). The evidence must be "so clear and undisputed that only questions of law remain. Dade Cty. Sch. Bd. v. Radio Station Wqba, 731 So. 2d 638, 643 (Fla. 1999). The facts must be viewed in the light most favorable to appellant. Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). The moving party has the burden to conclusively demonstrate that the nonmoving party cannot prevail; the record before the court must dispel "the slightest doubt that an issue might exist." Gomes v. Stevens, 548 So. 2d 1163, 1164 (Fla. 2d DCA 1989) (citing Snyder v. Cheezem Dev. Corp., 373 So 2d 719 (Fla. 2d DCA 1979). If the slightest doubt exists as to whether the movant is entitled to judgment as a matter of law, the summary judgment must be reversed. Andrews v. Dep't of Nat. Res., 557 So. 2d 85, 89 (Fla. 2d DCA 1990).

ARGUMENT

I. Tower Hill is obligated to pay the actual cash value of the loss regardless of whether any repairs are made.

Tower Hill argues that, despite its unconditional obligation to pay the actual costs of any damage after a loss, it can pay nothing at all if it chooses to invoke a certain provision in the loss payment clause. Its arguments have been addressed and rejected in the powerfully reasoned order in Javellana v. Tower Hill Signature Insurance Co., No. 14-CA-31467, 23 Fla. L. Weekly Supp. 1031a (11th Cir. March 31, 2016) (App. B). Faced with identical circumstances, that court "conclude[d] – without difficulty:"

> that an insurer does not -- *ipso facto* -- comply with an obligation to pay "at least" the "actual cash value" of damaged property merely by paying *any* amount "estimated" by its adjuster . . . . If the adjuster's "estimate" equals the "actual cash value" of the loss, then paying that amount necessarily satisfies the insurer's contractual obligation. But if the "estimate" is for an amount that is materially less than the true "actual cash value" of the damaged property, the payment of that "estimated" amount obviously does not satisfy the insurer's obligation to initially pay "actual cash value. . . ." Contrary to Tower Hill's wishful thinking the policy does not obligate it to initially pay *only* the amount of its adjuster "estimate." It obligates the company to pay "at least" the "actual cash value" of the damaged property. The precise obligation imposed by statute. That obligation is clear and unequivocal, and exists *regardless* of whether the insured decides to use those funds to repair the home or bet them on a hand of blackjack. And if the carrier pays an amount materially less than the true "actual cash value" of the

> property damaged by a covered peril it is in breach of its contract. It is just that simple.

(App. B, at 3).

The two pillars of Tower Hill's arguments to the contrary cannot support a contrary result here. Slayton v. Universal Property and Casualty Insurance Company is not binding on this Court. 103 So. 3d 934 (Fla. 5th DCA 2012). In Slayton, the insurer's estimate of replacement cost coverage due was more than $30,000 less than the estimate of the homeowner's public adjuster. Id. at 936. The insured negotiated the check, which was accompanied by a letter stating that the amount "does not necessarily constitute a full and final settlement of your claim for damages," and that the insured could "submit supplemental claims for any damages discovered in the covered reconstruction and repair." Id. The Fifth DCA affirmed the order granting a directed verdict, concluding that no breach occurred because the policy "unambiguously limited Universal's liability . . . to the necessary amounts actually spent to repair or replace." Id.

Two important factors render Slayton inapposite even if it were mandatory. First, the appellant had failed to raise the then-current version of Section 627.7011(3), which required payment of full replacement cost regardless of whether the insured undertook repairs. Without that law, there was no statutory requirement that any payment occur. Second, although obscured by the Fifth DCA's opinion, the insured in Slayton actually undertook repairs, and by the time

of the appeal had paid her roofing contractor "less than she was paid by Universal for the roof repair. (App. C, at 14 n.2). Here, Tower Hill is unquestionably required to make an initial payment, and does not seek to recover replacement costs in excess of those actually incurred.

The only mandatory authority that applies simply does not support Tower Hill. In Trinidad v. Florida Peninsula Insurance Company, the Supreme Court addressed the loss payment clause at issue here. 121 So. 3d 433 (Fla. 2013). Below, this Court had held that overhead and profit were not payable unless the insured actually made such payments. Id. at 442. It reasoned that the insurer could limit its liability to "the necessary amount actually spent to repair or replace the damaged building." Id. Because the insured had not made any repairs, benefits for overhead and profit were not due.

The Supreme Court explained that payments could not have been made under the "necessary amount actually spent" clause, because the insured had not actually spent any money to repair the property. Id. "Indeed, if subsection (1)(c) of the policy, which requires payment only for the 'necessary amount actually spent' on the repairs, was the applicable provision, Florida Peninsula would not have been required to pay Trinidad anything because Trinidad did not actually spend anything on repairs." Id. This result would be unenforceable because the then-applicable law required payment in full of replacement costs regardless of

whether repairs occurred. Id. Subsection (1)(c) was merely "an alternative method of calculating the payment amount when the insured has actually undertaken repairs." Id.

Although the law has changed, the result of accepting Tower Hill's interpretation would still violate Section 627.7011(3)(a), which requires the insurer to "initially pay at least the actual cash value of the insured loss." Thus, the lower court erred when it concluded that Trinidad permits the insurer to pay nothing under the "necessary amount actually spent" as long as it specifies that part of the loss payment clause. (Tr. 16). Stevens v. Allstate Ins. Co., 19 F. Supp. 3d 690, 696 (E.D. La. 2014) ("Whatever Allstate called that payment, it must have been made under subsection (d) and been a payment for actual cash value . . . . For Allstate to prevail in a motion for summary judgment, it must demonstrate that there is no genuine issue that the actual cash value is less than the amount it paid").

Regardless, Tower Hill did not specify the "necessary amount actually spent" clause. In giving Ms. Francis only 180 days to provide evidence of repairs and claim full replacement cost, (R. 173), it clearly attempted to usurp her authority to invoke the alternative loss settlement provision, which permits the insured to "disregard the replacement cost . . . and make claim under this . . . on an actual cash value basis," and then "make claim within 180 days after loss for any

additional liability." (R. 71). Even if this were permissible, Tower Hill would still be required to at least "initially pay at least the actual cash value." (R. 113).

Tower Hill has obligated itself to pay the actual cash value, and to prevail it must show there is no dispute that it did so. Stevens v. Allstate Ins. Co., 19 F. Supp. 3d 690, 696 (E.D. La. 2014) ("Whatever Allstate called that payment . . . . to prevail in a motion for summary judgment, it must demonstrate that there is no genuine issue that the actual cash value is less than the amount it paid"). Clearly "actual cash value is ordinarily determined soon after damage occurs . . .via an estimate," which Ms. Francis has provided. Id. Here, where ACV is determined by subtracting depreciation from replacement cost, the $100,000 difference between the RCV estimates demonstrates a dispute as to the ACV due under the policy.

There also exist two reasons to believe that Tower Hill may owe Ms. Francis full replacement cost right now. First, equitable considerations should prevent Tower Hill from refusing to pay replacement costs if its underpayment of ACV benefits prevented initiation of repairs. Zaitchick v. Am. Motorists Ins. Co., 554 F. Supp. 209, 216-17 (S.D.N.Y. 1982) (holding that insurance company was required to pay full replacement value because failure to tender an initial payment made replacement of their home and possessions impossible). This is doubly true here because Tower Hill illegally attempted to impose a 180-day period to effect repairs.

Vantage View, Inc. v. QBE Ins. Corp., No. 07-61038-CIV-MARRA, 2009 U.S. Dist. LEXIS 20938, at *4 (S.D. Fla. Mar. 3, 2009) (applying doctrine where ACV underpayment impaired insured's ability to make repairs "as soon as reasonably possible," as required for RCV coverage); see also Vision I Homeowners Ass'n v. Aspen Specialty Ins. Co., 674 F. Supp. 2d 1333, 1342-43 (S.D. Fla. 2009)

Another issue regarding Ms. Francis's immediate entitlement to full RCV arises due to the ambiguity of Tower Hill's loss settlement clause, which calls into question whether it can hold back replacement costs at all. The policy provides that repair costs will be paid "as work is performed and expenses are incurred," but also that Tower Hill "will not require you to advance payment for such repairs or expenses." (R. 113). To incur an expense, an insured "must have actually paid or must have become liable for the payment of such expense." Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222, 224 (Fla. 2d DCA 1964). Thus, repair costs will only be paid as repairs occur and the insured becomes liable. This cannot easily be squared with a promise not to require advance payment. The only possible reading is that the insured must find a repairman willing to work on credit, without any assurance that additional payments will be made. This puts the insured in a difficult position that renders illusory the promise not to require advance payment. See Bailey v. Farmers Union Coop. Ins. Co., 498 N.W.2d 591,

598 (Neb. 1992) (noting difficulty of securing a loan "without the assurance . . . that additional replacement costs would be covered up to the policy limit).

Ms. Francis prays she will have an opportunity to explore the RCV issues more fully below, at trial. Although they illustrate why summary judgment is premature, the Court need not decide them now. The Court's task here is, as Judge Hanzman explained, "just that simple." Javellana, 23 Fla. L. Weekly Supp. 1031a, App. B, at 3. Ms. Francis is entitled to receive the actual cash value of the loss, and Tower Hill has not proven that it has paid the benefits due. Mills v. Foremost Ins. Co., 511 F.3d 1300, 1306 (11th Cir. 2008) (holding that overhead and profit, as component of actual cost, is due regardless of whether repairs are undertaken); Tritschler v. Allstate Ins. Co., 144 P.3d 519, 525-26 (Az. Ct. App. 2006) (concluding under materially identical policy that "absent satisfactory and completed direct repairs by Allstate . . . . an insured is entitled to receive the actual cash value of the damage pursuant to subsection (b) regardless of whether he or she chooses to repair or replace the damaged property").

The Court should reverse and remand for a determination of the actual cash value of the loss.

II. Roof damage coverage is properly at issue here, and Tower Hill has not carried its burden to show no disputed facts as to coverage.

Contrary to Tower Hill's argument below, Ms. Francis clearly indicated that leaks in her roof had caused the interior loss. In connection with the first loss, her brother reported that water was coming from "the ceiling" because "the roof had a leak." (R. 146, Tr. 75-76). In response to questioning, she asked why she would call a plumber to address a roof leak. (R. 149, Tr. 85). The water loss was caused by rain leaking through the roof, and stopped when the rain stopped. (R. 149, Tr. 87; R. 150, Tr. 89). There were hailstorms around the time of the water losses. (R. 157, Tr. 118). And regardless of her public adjuster's failure to submit an estimate for roof repair, Tower Hill clearly understood her to be making a claim on her roof because coverage was denied prior to suit. (R. 173, 176 ("the claim you have presented to Tower Hill Prime Insurance Company for roof damage does not qualify for payment)).

The question is therefore whether Tower Hill presented evidence sufficient to carry its burden to show that no coverage existed. To prevail on summary judgment 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).

Tower Hill submitted a report prepared by Pacesetter adjuster Kenny Tyler. The report is only relevant to prove the truth of its contents – i.e., Kenny Tyler's statements regarding the cause of the roof damage. The report is hearsay. § 90.801, Fla. Stat. It is not accompanied by the certification required for admission as a business record under Section 90.803(6), Florida Statutes. No other exception could apply.

Even if Pacesetter's report were treated as an affidavit or a business record, it would not be admissible. 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 v. Merrell Dow Pharms., 509 U.S. 579, 592 (1993)).

Nothing is known about the credentials of Pacesetter adjuster Kenny Tyler or the methods by which he concluded that there were no "storm damages found to dwelling roof shingles, flat roofs, or vents." (R. 162). He did not definitively conclude that no coverage existed; instead, he merely opined that the "leak from roof may have been due to deteriorating sealant around vents." (R. 162). It is not known what facts or observations, if any, underlay his opinions. 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). On this record, his opinion would not be admissible, and therefore is not competent summary judgment evidence.

CONCLUSION

Tower Hill has not carried its burden on summary judgment. The lower court erred in concluding that Tower Hill had no obligation to tender payment of the full ACV of the loss regardless of whether repairs were made. A disputed issue of material fact exists as to whether Tower Hill paid the true ACV. The issue of coverage for Ms. Francis's roof was adequately raised, and Tower Hill has failed to produce admissible evidence showing that coverage does not exist. Ms. Francis asks the Court to reverse and remand for a determination of ACV of the undisputed coverage and a coverage determination for damages to the roof.

Respectfully Submitted,

/s/ Gray Proctor

Nathan Teplitsky
THE MINEO SALCEDO LAW FIRM, P.A.
Florida Bar No. 108718
5400 S. University Drive, Suite 502
Davie, Florida 33328
Ph: (954) 463-8100
Email: service@mineolaw.com

Gray Proctor, of counsel
FOX & LOQUASTO, P.A
Florida Bar No. 48192
122 East Colonial Drive, Suite 100
Orlando, FL 32801
Ph: (407) 802-2858
Email: gray@appealsandhabeas.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to opposing counsel via email: Justin Guido, Esq.; Nicole Smith, Esq.; and, Allan Rotlewicz, Esq., Brickell City Tower, Suite 3000, 80 Southwest 8th Street Miami, Florida 33130-3037, at:

jguido@rumberger.com
nsmith@rumberger.com
arotlewicz@rumberger.com

This 3d day of January, 2017.

/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).

/sGray R. Proctor
Attorney