

IN THE CIRCUIT COURT OF THE 20TH  
JUDICIAL CIRCUIT IN AND FOR LEE  
COUNTY, FLORIDA

Case No.: 21-CA-000870

RONALD H. AJEMIAN AND DOROTHY  
D. AJEMIAN,

Plaintiffs,

v.

FIRST PROTECTIVE INSURANCE  
COMPANY D/B/A FRONTLINE  
INSURANCE COMPANY,

Defendant.

**ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF DEFENDANT'S  
MOTION FOR SUMMARY FINAL JUDGMENT**

THIS CAUSE having come before the Court on July 14, 2022, upon the Defendant's Motion for Reconsideration of Defendant's Motion for Summary Final Judgment, and the Court having considered the record, pleadings, motions, summary judgment evidence, as well as the argument of counsel, and being otherwise advised in the premises it is hereby.

**ORDERED AND ADJUDGED** that Defendant's Motion for Reconsideration of Defendant's Motion for Summary Final Judgment is GRANTED. The Court previously found that Plaintiffs failed to provide prompt notice of the loss as a matter of loss, and thus, there is a presumption of prejudice to Frontline. The Court finds there is no factual dispute as to whether Plaintiffs have rebutted the presumption of prejudice to Frontline. Defendant's Motion for Reconsideration of Final Summary Judgment is therefore Granted.

## UNDISPUTED FACTS

1. First Protective Insurance Company D/B/A Frontline Insurance Company (“Frontline”) issued Policy No. FPH3-10012, to Ronald Ajemian and Dorothy Ajemian (the “insureds”), for the property located at 7964 Glenfinnan Cir., Fort Myers, FL 33912 (the “Property”), with effective dates of March 30, 2017 through March 30, 2018 (the “Policy”).

2. On September 9, 2020, Plaintiffs reported a claim for alleged damages as a result of Hurricane Irma, occurring on September 10, 2017.

3. Frontline sent the insureds a claim acknowledgement letter with a Homeowners Claim Bill of Rights letter, notice of right to mediate, and a request for completion of a Sworn Proof of Loss and Claim for Damaged Property form within sixty (60) days from the date of the letter.

4. On November 2, 2020, Frontline’s independent adjuster inspected the Property.

5. On December 10, 2020, Frontline sent the insureds a Reservation of Rights letter, which requested that the insureds submit: any and all invoices and receipts for work completed to date documenting repairs completed for the damages being claimed, all invoices and estimates for any work to be completed, and copies of any correspondence related to the loss such as contracts, work authorizations, and assignment of benefits.

6. Following its claim investigation, in correspondence dated February 4, 2021, Frontline advised the insureds the claim was being denied, in part based on the prejudice to its investigation due to the Plaintiffs failure to provide prompt notice of the loss and failure to submit a completed sworn proof of loss.

7. The Court previously found that Plaintiffs breached the notice provision of the Policy by not promptly reporting their claim as a matter of law, thus prejudice to the Defendant is

presumed.

8. Pursuant to Florida case law, Plaintiffs have the burden to rebut the presumption of prejudice to Frontline in determining both causation and extent of the claimed damages. *De La Rosa v. Florida Peninsula Ins. Co.*, 246 So. 3d 438 (4th DCA 2018).

9. At Plaintiffs' depositions on May 18, 2022 and May 20, 2022, Plaintiffs confirmed that they returned to Florida in October/November 2017 after Hurricane Irma, and completed some repairs to the property around that time. No receipts or any documentation has been submitted to Frontline relating to any repairs as a result of Hurricane Irma.

10. Furthermore, Plaintiffs' expert engineer, David Money retained to opine to the cause and extent of damages, testified at deposition that he was unable to determine the extent of damages due to the passage of time. Specifically, Mr. Money testified as follows:

Q: So the insureds noticed the damages in 2017?

A: Yes.

Q: And then in 2018, did the damages get worse?

A: I don't have—I'm not—I don't have that information.

Q: Do you know if the damages got worse in 2019?

A: I don't have that information. I'm not sure when the tarp was put on and when they mitigated the water intrusion in the home. I'm not sure.

Q: Do you know if the damages got worse in 2020?

A: Don't know.

Q: 2021?

A: I don't know.

Q: Okay. So from 2017 to 2022 when the first inspection occurred in January, do you know if the damages got worse?

A: No.

Q: Do you know anything about the condition of the damages from 2017 to 2022, but prior to your inspection?

A: No.

Q: So you never saw any photographs or were able to inspect the property or have any knowledge of the damages prior to 2022?

A: No.

Q: Sorry. Had to plug up my computer. Are you able to provide an opinion on the extent of damages on how they changes from 2017 to 2022

A: I am not, no.

*Deposition Transcript of Money, Pages 78-80.*

### CONCLUSIONS OF LAW

1. Defendant's Motion for Reconsideration of Defendant's Motion for Summary Final Judgment is **Granted**.

2. When an insured materially breaches a condition precedent, the insurer is not obligated to pay any damages. See *Amica Mut. Ins. Co. v. Drummond*, 970 So. 2d 456, 459-460 (Fla. 2d DCA 2007). Florida law holds that where an insured has breached the conditions of an insurance policy, prejudice to the insurer is presumed. *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216, 1218 (Fla. 1985). The presumption can only be avoided by the insured presenting evidence that the insurer was not in fact prejudiced by noncompliance with the condition. *Id.*; see *Hunt v. State Farm Fla. Ins. Co.*, 145 So. 3d 210, 211 (Fla. 4th DCA 2014) (where insureds did not come forward with any evidence rebutting the presumed prejudice State Farm suffered as a result of their tardily submitted proof of loss, trial court properly entered summary favor in State Farm's favor).

3. "The question of whether an insured's untimely reporting of loss is sufficient to result in the denial of recovery under the policy implicates a two-step analysis." *LoBello v. State Farm Florida Ins. Co.*, 152 So.3d 595, 599 (Fla. 2d DCA 2014). If late notice is established, prejudice to the insurance company is presumed. *Macias*, 475 So. 2d at 1218. A plaintiff can only avoid the legal presumption of prejudice (and thus summary judgment) by presenting evidence of no prejudice. *Id.*

4. The Court finds that the factual record in this case supports final summary judgment

in Frontline's favor, as the Court has found as a matter of law that Plaintiffs failed to provide prompt notice to Frontline. The Court found that because the Plaintiffs breached the notice provision of the policy, prejudice to Defendant is presumed.

5. Pursuant to Florida law, Plaintiffs have the burden to rebut the presumption of prejudice to Frontline's investigation. The Court finds that there is no factual dispute as to whether Plaintiffs are able to rebut the presumption of prejudice. Plaintiffs rely on their expert engineer, David Money, in order to create a factual dispute as to whether Frontline was prejudiced in its investigation. While Mr. Money was able to opine on *causation*, he affirmatively testified that he was unable to determine the *extent of damage* due to the passage of time between the date of loss and investigation of the loss.

6. Additionally, Plaintiffs testified that there were no photographs, videos, or repair receipts provided to Frontline during the claim investigation. Likewise, Plaintiffs testified that repairs were performed to the Property shortly after Hurricane Irma before the loss was reported to Frontline. Moreover, Plaintiffs testified that the damages continued to get worse over time.

7. Due to Plaintiffs delay in reporting their loss three years after Hurricane Irma, and only after they had conducted some repairs and failed to present any records of repair receipts during Frontline's claim investigation, rendered it impossible for Frontline to determine the full extent of the claimed damages. Coupled with the testimony provided by Plaintiffs' own engineer, there are no issues of disputed facts that Plaintiffs cannot rebut the presumption of prejudice to Frontline, and Plaintiffs shall go hence without day.

8. The Court also notes that the Third District Court of Appeals recently issued their opinion in *Perez v. Citizens Property Ins. Co.*, 3D20-1709 (Fla 3d DCA July 6<sup>th</sup> 2022). The *Perez* case had almost identical facts and the Court granted summary judgment on behalf of Citizens.

Although the time for rehearing is not past and the opinion is not final or binding on this Court the analysis is sound. This Court adopts the reasoning of the Perez opinion and finds it persuasive in determining the outcome of the present case.

**DONE AND ORDERED** in Chambers at Fort Myers, Lee County, Florida



eSigned by Michael McHugh 07/15/2022 11:00:39 iVj5GPmu

Electronic Service List

Alan Seth Feldman <afeldman@alanfeldmanlaw.com>

ARDALAN MONTAZER <AMontazer@kpattorney.com>

ARDALAN MONTAZER <jgutowski@kpattorney.com>

ARDALAN MONTAZER <FirstPartyEService@kpattorney.com>

Erica A. Showell <EShowell@kelleykronenberg.com>

Erica A. Showell <dkasimier@kelleykronenberg.com>

Jeffrey Wank <jwank@kelleykronenberg.com>

Derek Oliver Goldsmith <dgoldsmith@kelleykronenberg.com>

Jeffrey D Groover <jgroover@kpattorney.com>

Jeffrey D Groover <lhalloran@kpattorney.com>

Jeffrey D Groover <TampaFirstPartyEService@kpattorney.com>

John W. Salmon <MARTHA@SD-ADR.COM>