IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
APPELLATE DIVISION
STATE OF FLORIDA

TOQUON SERVICES d/b/a WET OUT RESTORATION, a/a/o Donna Crosby,

Appellant,

NO: 2018-AP-000019
L.T. No.: 2018-SC-1070

v.

UNIVERSAL INSURANCE COMPANY OF NORTH AMERICA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE COUNTY COURT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

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ARGUMENT

Wet Out is content to rest on its initial brief in most respects, because Universal's arguments clearly lack legal merit. For example, its argument that the appeal should be dismissed even though the record has been supplemented to its satisfaction is just wrong, plain and simple. Certain aspects of the answer brief, however, warrant a short individual treatment.

First, Wet Out observes that Universal repeats the same "magic language" block quote five times in its answer brief. (Answer Br., at 11, 15, 21, 27, 28). It is a settled feature of Florida law that an offer of accord and satisfaction needs to be sufficiently objectively clear to express offeror's subjective intent. Thus,

> [I]t's not a matter of magic language. Any way you can express – that the person you have given the check to somehow understands your motive that this does not mean that we can come back to the well. You can use any language that clearly expresses that. And the statute gives an example. . . .

Wet Out has consistently argued that no clear offer of accord and satisfaction occurred, and it is quite comfortable taking ownership of the correct statement of the law that Universal has block quoted so often.

Second, Universal stresses that there were no disputed issues of material fact. But that does not mean Universal wins. Here, there was a check and a letter, and the case turns on how the Court applies Section 673.3111 to those documents. What fact, exactly, was Wet Out supposed to dispute?

Similarly, there appears to be no dispute that Wet Out negotiated the $3,000 check from Universal, and did not return it. Wet Out has not, and could not, argue that it falls within Section 673.3111's 90-day return provision, any more than Universal could argue that it did not owe that $3,000. Universal's half-page, single spaced footnote on this issue is not relevant to this appeal. (Answer Br., at 9 n.4).[1]

Third, there are statements of law with which Wet Out must disagree. Universal's treatment of Section 673.3111(4) requires correction. Universal argues that Subsection 4 is an independent method of establishing accord and satisfaction. (Answer Br., at 7-8). According to Universal, it wins if "[t]he claimant cashes the check being tendered in full satisfaction of the claim with the actual knowledge that the check was being tendered in full satisfaction of the claim." But in context, it is clear that Subection 4 describes the limits of the exception for offers of accord and satisfaction sent to the wrong department in an organization:

[1] A brief aside regarding footnotes and the general tenor of Universal's brief. Wet Out has serious doubts that Universal's brief would fit within the 50-page limit without its constant resort to single-spaced footnotes and page-long block quotes. But the resultant lack of clarity can only disadvantage Universal. Therefore, Wet Out makes no objection to the length of the answer brief. Appellant does, however, ask the Court to take into consideration that the answer brief's mode of organization makes it difficult to discern Universal's arguments or address them in a logical, orderly manner. For example, Universal's concern with preservation of argument is scattered amongst footnotes throughout the brief, and not even raised as an independent ground for affirmance. Although appellees enjoy many deserved advantages on appeal, it would be unfair for Universal to reap any tactical advantage by obfuscating its points instead of stating them simply and clearly.

> **(3)** Subject to subsection (4), a claim is not discharged under subsection (2) if either paragraph (a) or paragraph (b) applies:
>
> **(a)** The claimant, if an organization, proves that:
>
> **1.** Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and
>
> **2.** The instrument or accompanying communication was not received by that designated person, office, or place.
>
> **(b)** The claimant, whether or not an organization, proves that, within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (a)1.
>
> **(4)** A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Fla. Stat. § 673.3111. Thus, if a responsible person in an organization actually knew that a negotiable instrument was given to settle a disputed claim, it is no defense that the offeror sent it to the wrong department.

Because Wet Out does not rely on Subsection 3, Subsection 4 is irrelevant. Applying Subsection 4 would not aid Wet Out in any event, however, because Universal has failed to show that anyone at Wet Out understood its professed intent

"within a reasonable time before collection of the instrument was initiated." Additionally, it appears inconsistent for Universal to argue both that Subsection 4 applies and that Wet Out could have availed itself of the 90-day repayment period described in Section 673.3111(3)(b), because Subsection 4 renders subsection 3 ineffective where it applies.

Another statement of law that needs correction is Universal's treatment of *St. Mary's Hospital v. Schocoff,* 725 So. 2d 454 (Fla. 4th DCA 1999). To read the answer brief, one would think *St. Mary's Hospital* clearly permits Universal to add a "take it or leave it" condition to every payment it makes to a homeowner, even for money it admits it owes. But Universal omits an important point: its side lost in *St Mary's Hospital*.

In fact, the part of *St. Mary's Hospital* on which Universal relies is merely a self-evident truism: "the phrase in the letter - - 'no further benefits will be payable' - - together with the explanation of benefits attached to the check which stated 'the maximum for this type of service has been reached,' makes explicit, without question, the insurer's position there are no further benefits due under the policy and it does not intend to make any further payments." *Id.* at 456. But that was not enough for a win because "there is nothing in that language standing alone, as it was here, which reasonably implies, much less expresses, that St. Mary's, by

its acceptance of the check, would be deemed to have *agreed* with the insurer's position." *Id* .at 456.

St Mary's Hospital is not a Section 673.3111 case, and it did not change the law. "Florida case law acknowledges that accord and satisfaction results 'when an offeree accepts a payment which is tendered *only on the express condition* that its receipt is to be deemed a complete satisfaction of a disputed claim.'" *Madison at SoHo II Condo. Ass'n v. Devo Acquisition Enters., LLC*, 198 So. 3d 1111, 1118, (Fla. 2d DCA 2016). It is not enough for Universal to state that it has paid all it will voluntarily pay. Without some language expressing that, as a condition of payment, the other party "can't come back to the well" (Tr. 42), there is no objectively clear expression of intent to enter an accord and satisfaction, and Section 673.3111 does not apply.

Fourth, Universal takes issue with characterizing the official comments to the U.C.C. as something Florida's legislature has "adopted." (Answer Br., at 18). Frankly, Universal's cases do not seem to support its position. However, resolving the dispute is not worth the effort. Wet Out merely asks that this Court join all of the other Florida courts which have been "guided by the official comments of the Uniform Commercial Code," *Allen v. Coates*, 661 So. 2d 879, 882 (Fla. 1st DCA 1995), rather than the "two trial courts in the State of Pennsylvania" that disagreed

with the comments on an unrelated issue. *De La Rosa v. Tropical Sandwiches, Inc.*, 298 So. 2d 471, 473 (Fla. 3d DCA 1974).

Fifth, preservation. Wet Out believes that Universal has failed to adequately raise any cognizable argument on preservation. However, in an abundance of caution, Wet Out notes that Universal is wrong to insinuate that no new authority can be raised on appeal. (Initial Br., at 19 ("Consideration of the applicability of a statute [or outside case or official comment] that was never presented to the trial court is improper when raised for the first time in the appeal." *Morroni v. Peeples*, 872 So. 2d 366, 367 (Fla. 2d DCA 2004))). The question is whether a new ground for relief is raised. In *Morroni*, the appellee "sought dismissal only on the issue of pleading defects," and never raised any argument that Section 475.42(1)(d) warranted dismissal. Here, the issue has always been Section 673.3111, and it is entirely proper to bring additional authority to the Court's attention where no new claim is thereby raised.

Similarly, to focus overmuch on whether specific phrases are in the record is not useful, where the underlying issues are clearly addressed.

Finally, Wet Out thanks Universal for pointing out errors in the initial brief. (Answer Br., 24, at n. 10). On page 15, the undersigned used "a U.C.C. case" to describe authority that was quite clearly "a non-U.C.C. case." (Initial Br., at 15 (citing *Weston Builders & Developers, Inc. v. McBerry, LLC*, 891 A.2d 430, 457

(Md. 2006)). The undersigned apologizes for the error. However, as Universal agrees that non-U.C.C. authority is relevant with respect to *St. Mary's Hospital*, the undersigned is optimistic that the error did not trouble the Court or Universal.

CONCLUSION

"How was Wet Out supposed to know that Universal wanted to settle a disputed claim, when Universal stated that it owed every cent it paid?" That is the issue in this case. It should be answered with reference to the $3,000 check and accompanying correspondence, which are reproduced below the signature block.

The undersigned has read the answer brief many times, but cannot discern Universal's answer, if it has one. Because the offer is not clear, because the payment was for an amount Universal conceded it owed, and because there is no indication of good faith, Wet Out asks the Court to reverse the order granting summary judgment and remand for futher proceedings.

Respectfully Submitted,

s/Gray Proctor

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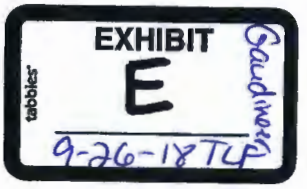
May 4, 2018



Wet Out Restoration
1623 SW Crossing Cir
Palm City. FL 34990

Insured	:	DONNA CROSBY
Claim Number	:	1802FL24000304
Date of Loss	:	2/24/2018
Policy Number	:	UICH0000180626

Dear Wet Out Restoration

We are in receipt of the invoice in the amount of $5,788.31 you have submitted for water mitigation services performed at the subject insured property owned by DONNA CROSBY. We have also received a copy of your Assignment of Benefits, Direction to Pay and 2018 signed W-9.

We have reviewed your invoice and in accordance with the applicable policy provision(s) are issuing payment in the amount of $3,000. Payment has been limited to the amount of $3,000 as we were not notified by you of the estimated mitigation costs nor did we receive your request to exceed the $3,000 policy limit or 1 % of coverage A, limit of $ 1,740.00 until the mitigation work was completed.
The $3,000 payment is greater than the 1% of the policy Coverage A limit of $1,740.00.

Please refer to the following as excerpted from the Florida Special Provisions UI-100 8-16 endorsement, which states in part:

E. Additional Coverages
****
2. Reasonable Emergency Measures
Paragraph 2. Reasonable Repairs in HO 00 03 (D.2. in form HO 00 06) is deleted and re-placed by the following:

a. We will pay up to the greater of $3,000 or 1% of your Coverage A limit of liability for the reasonable costs incurred by you for necessary

measures taken solely to protect covered property from further damage, when the damage or loss is caused by a Peril Insured Against.

b. We will not pay more than the amount of a. above, unless we provide you approval within 48 hours of your request to us to exceed the limit in a. above. In such circumstance, we will pay only up to the additional amount for the measures we authorize.

If you have any questions concerning this water mitigation claim or the Florida Special Provisions UI-100 8-16 endorsement, please feel free to call me at 888-877-0770 You may reach me between the hours of 8:30 AM and 5:30 PM.

Sincerely,

Kevin Gaudineer
Inside Claims Representative
(888) 877-0770; Ext. 6663
claims@uihna.com

312018SC001070

Document type : Disbursement Check 08/29/2018 9:10 AM

THIS CHECK IS VOID WITHOUT A COLORED BORDER AND BACKGROUND PLUS A KNIGHT & FINGERPRINT WATERMARK ON THE BACK - HOLD AT ANGLE TO VIEW

Universal Insurance Co. of North America
P.O. Box 50907
Sarasota, FL 34232

32-2/1110

CHECK NO. 340118626
DATE 05 /10 /2018

Bank of America
Tampa, FL

POLICY NO. UICH0000180626 **CLAIM NO.** 1802FL24000304
REMARKS Dwelling,LO,NO INV#: RJJ

Checks over $20,000 require two signatures.

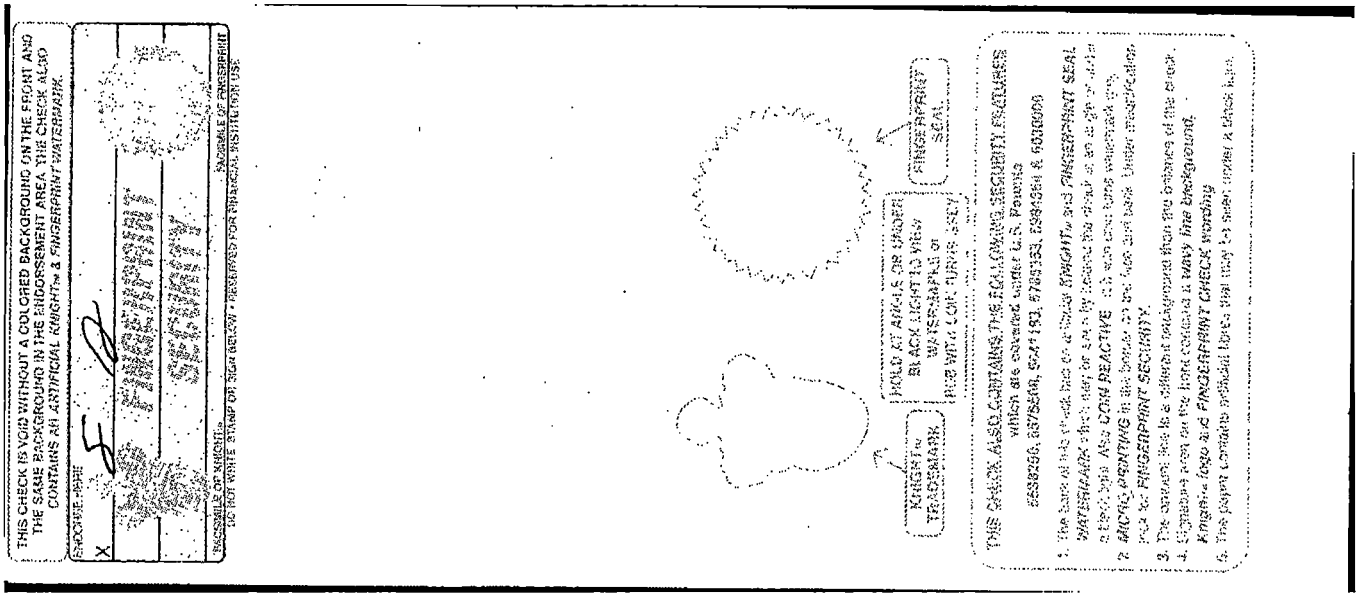
INSURED DONNA CROSBY

******$3,000.00

Three Thousand And NO/100 Dollars

PAY
TO THE
ORDER OF **Wet Out Restoration, Toquon Services, LLC**
1623 SW Crossing Circle
Palm City FL 34990

⑈ [redacted]



Tag	Amount	Note	Serial Number	Volume ID / Customer Data	Item Date	ImgVolNo	Account Number / Issue Date
No		No		18060540015301	05/22/2018		[redacted]
	3000.00		340118626	Wet Out Restoration, Toquon Services, LLC		1	

FILE IN OPEN COURT
Date 10-01-18
By EH EH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Initial Brief has been furnished via through the Florida courts eportal to:

George L. Fernandez, Esq. And Manuel A. Fernandez, Esq., of the law firm of Quintairos, Prieto, Wood & Boyer, P.A., 9300 South Dadeland Boulevard, 4th Floor Miami, Florida 33156 at gfernandez@OPWBLAW.com; manuel.fernandez@OPWBLAW.com; and bfetokakis-fernandez@OPWBLAW.com

on this 8th day of August, 2019.

/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ Gray Proctor