No. 19-12716

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROCKHILL INSURANCE COMPANY,
Defendant/Appellant/Cross-Appellee,

v.

ST. LOUIS CONDOMINIUM ASSOCIATION, INC.,
Plaintiff/Appellee/Cross-Appellant.

—

On Appeal from the United States District Court
Southern District of Florida, Case No. 1:18-cv-21365-WILLIAMS/Torres

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CROSS-APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Rockhill Ins. Co. v. St. Louis Condo. Assoc., Inc., Appeal No. 19-12716

I. Corporate Disclosure Statement:

St. Louis Condominium Association, Inc., is a non-government corporation. There is no parent corporation or publicly traded corporation that owns more than 10% of St. Louis' stock.

II. Certificate of Interested Persons:

1. GlobalPro Recovery, Inc.
2. Craig M. Greene, Esq.
3. Shawn R. Horwick, Esq.
4. Kramer, Green, Zuckerman, Greene & Buchsbaum, P.A.
5. Lauren Levy, Esq.
6. Levy Law Group, P.A.
7. Michael Metta, Esq.
8. Mark J. Mintz, Esq.
9. Mintz Truppman, P.A.
10. Susan C. Odess, Esq.

11. Gray R. Proctor, Esq.

12. Rockhill Holding Company

13. Rockhill Insurance Company

14. Siegfried Rivera

15. Stuart Sobel, Esq.

16. State Auto Insurance Group

17. State Automobile Mutual Insurance Company

18. St. Louis Condominium Association, Inc.

19. Hon. Kathleen M. Williams

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CROSS-APPELLANT'S ARGUMENT IN REPLY

I. Rockhill failed to present sufficient evidence to support the jury's pre-existing damages finding.

The Association agrees that determining "the building's pre-existing damages was a function for the jury and not the court." (Cross-Appellee's Br., at 1). Thus, no objection was made when the Court properly instructed the jury on Rockhill's burden to prove, by "the greater weight of the evidence . . . the dollar amount" of any pre-existing damage. (Tr. 482). The issue on appeal is not the identity of the factfinder, but the sufficiency of the evidence supporting the finding of $359,578 in pre-existing damages. As discussed in the Association's Reply in support of its post-trial motions (D.E. 275, at 2-3), and on pages 33-35 of Cross-Appellant's Brief, Rockhill did not present evidence sufficient to link the $359,578 line item for waterproofing in the Association's expert repair estimate (Ex. 59; Cross-Appellant's Br., at 15-16) to pre-existing damage.

Now Rockhill argues (for the first time) that the jury might have reached the award without reference to the repair estimate of the Association's expert general contractor ("the Torres estimate"). (Cross-Appellee's Br., at 6 (equivocating whether the jury acted "intentionally or by coincidence")). Rockhill suggests that the jury might have started with the $1.2 million beautification project, which Rockhill argued was actually a project to repair pre-existing damages. (*See* summary of

Rockhill's argument at trial at Cross-Appellant's Br., at 19-22). Although Rockhill offers the illusion of proportionality by characterizing both the damage award and the pre-existing damages figure as "less than 30%" of the relevant amounts, (*see* Cross-Appellee's Br., at 5), the relevant percentages are not close. The relationship between the total damages the Association sought ($16,036,942), (Tr. 507), and the total award ($3,673,303.67) is 22.90%. The relationship between the $1.2 million beautification project and the jury's $359,578 finding for pre-existing damages, however, is 29.96%.

To observe that both amounts are under 30% is to imply a relationship where none can be shown. There is no indication that the jury accepted Rockhill's argument that the Association's claim overlapped with preexisting damages memorialized in the beautification project, especially where Rockhill's expert was not permitted to testify about any such link. (Tr. 363-64). There is even less reason to believe much less that the jury applied some proportional reduction to the $1.2 million beautification estimate to reach a final figure of $359,578.00.

Moreover, it was Rockhill itself who first relied on the Torres estimate, pointing out the match in response to the Association's argument that the pre-existing damages figure was not supported by the evidence. (D.E. 273, at 2 (arguing that there was "a factual predicate for the jury's determination that $359,578 of Plaintiff's claimed damages were preexisting" because of evidence purportedly

showing that "this item [i.e., the waterproofing line item in the Torres estimate] was categorically excluded from coverage."); D.E. 274, at 6 (same)). Rockhill should not be heard to "chang[e] positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted).

Also, the damage award included sixty-seven cents, which shows that this particular jury was willing to calculate amounts down to the penny. If the deliberation involved a fractional calculation, we would not expect this jury to return a figure ending in .00. To attribute the jury's precise result to anything other than the line item for waterproofing strains the imagination, and there is no other evidence to support that figure.

Therefore, this unusual case should not be approached as though the jury merely selected a figure for pre-existing damages from a legally permissible range. *See*, *e.g.*, *United States v. Sullivan,* 1 F.3d 1191, 1196 (11th Cir.1993) (affirming damage award where United States had not "introduced evidence itemizing the cost" of replanting but final award was "well within the range of damages that the evidence would support"). The only rational explanation is that the jury adopted the figure from the waterproofing line item in the Torres estimate. That discrete component of the damage award is reviewable for sufficient evidence just as any other fact would be. *E.g., Schimpf v. Reger*, 691 So. 2d 579, 580 (Fla. 2d DCA 1997) (reversing where

"the portion of the [special] verdict awarding the Regers $32,760 for 'Return on principal due and unpaid' was not supported by the evidence presented to the jury").

Rockhill also asks the Court to apply a favorable evidentiary standard that only operates for the benefit of plaintiffs. Specifically, Rockhill accuses the Association of "confusing the measure of proof necessary to establish the fact that a claimant has sustained some damage, with the measure of proof necessary to enable the jury to fix the amount of the damage." (Cross-Appellee's Br., at 7). Rockhill, however, is a defendant seeking a reduction of a damages award. The reason for relaxing the rule against uncertainty of damages does not extend to it here.

The principle that "reasonable certainty as to the facts of injury and causation is more critical than reasonable certainty as to the computation of the resultant losses" exists to benefit the injured party, not a party that refuses to honor its contract. *Maggolc, Inc. v. Roberson*, 116 So. 3d 556, 558 (Fla. 3d DCA 2013). It is well-settled that "the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Florida law refuses to let uncertainty completely "defeat[] recovery" when "it is clear that substantial damages have been suffered." *Twyman v. Roell*, 166 So. 215, 218 (Fla. 1936); *see Story Parchment Co.*, 282 U.S. at 563 (citation omitted) (explaining that "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby

relieve the wrongdoer from making any amend for his acts" merely because the damages inflicted "cannot be measured with exactness").

This principle extends to actions that sound in contract as well. *Int'l Union of Operating Engineers, Local 653 v. Bay City Erection Co.*, 300 F.2d 270, 272 (5th Cir. 1962) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.") (quoting *Story Parchment Co.*, *id.*); *see also In re Florida Microsoft Antitrust Litig.*, 99-27340, 2002 WL 31423620, at *8 (Fla. 11th Jud. Cir. Ct. Aug. 26, 2002) (applying principle to antitrust class action proceedings). But Rockhill cites no law, and the Association can find none, that would make the principle available to limit damages owed by a wrongdoer like Rockhill. As the wrongdoer whose conduct made this litigation necessary, Rockhill should not receive the advantages afforded the plaintiff who could not recover unless the courts adopted a less strict measure of certainty.

Even the inapplicable standard Rockhill arrogates for itself contemplates the introduction of the "best evidence" of the amount of covered damages and pre-existing damages. *Perdue Farms Inc. v. Hook*, 777 So. 2d 1047, 1052 (Fla. 2d DCA 2001). Rockhill's expert Paul Millard conducted a 3-day inspection of the property to calculate the amount of damages "related to Hurricane Irma." (D.E. 116-2, at 6). He estimated above-deductible repair costs of $975,610.90, (D.E. 116-2, at 110), which outlined "each and every observable damages [sic] potentially attributable to

Hurricane Irma." (D.E. 233, at 4). Rockhill should have to account for its last-minute decision to keep its expert opinion from the jury and instead pursue an all-or-nothing approach to the policy exclusion for pre-existing conditions. The district court properly required Rockhill to prove the dollar amount of any pre-existing damages, which Rockhill simply failed to do.

In sum: Rockhill fails to identify any record support that connects the waterproofing line item to the pre-existing damages its experts described. Thus, regardless of the standard of certainty the Court applies, Rockhill has failed to carry its burden to show that a specific, discrete element of the damage award was subject to the exclusion for pre-existing damages. *Cf. Hi-Shear Tech. Corp. v. United Space All., LLC*, 1 So. 3d 195, 203 (Fla. 5th DCA 2008) (allowing award to stand despite unrebutted expert testimony where amount awarded matched amount identified in an interrogatory "to state the amount of damages it sustained"). Adapting the most favorable standard possible: "Although difficulty in proving [the dollar value of damages excluded from coverage] will not prevent recovery . . . there must be a reasonable basis in the evidence for the amount [deducted]." *Schimpf v. Reger*, 691 So. 2d 579, 580 (Fla. 2d DCA 1997). The Court should remand for entry of an award that does not reflect the jury's unsupported determination of pre-existing damages.

II. The 3% deductible violates Section 627.701(2) because Florida's Office of Insurance Regulation never "determine[d] that the deductible provision is clear and unambiguous."

Rockhill's rebuttal to Ground II fares no better. First, Rockhill argues that the Association somehow failed to raise this argument below. (Response Br., at 2, 10-13). The statutory language the Association cited below makes clear that it is "the office" (i.e., the Office of Insurance Regulation, or "OIR") which must determine whether a deductible is "clear and unambiguous" – not the judiciary. (D.E 270, at 4 & n. 3; D.E. 272, at 4-5 & n. 6 (explaining that the Association was not "aware of any determination")). The Association raised the only claim available under the language of Section 627.701(2). Rockhill does not really dispute this; its voluminous statement of fact and legal standard conclude with *ipse dixit*, not analysis. (Cross-Appellee's Br., at 10-13).

Rockhill's other arguments lack merit as well. The first is "the Association never challenged the fact, as stated in Rockhill's Response, that Rockhill is a surplus lines insurance carrier." (Cross-Appellee's Br., at 11). In fact, the Association argued that Rockhill had never pleaded, much less proved, any surplus lines carrier status; instead, Rockhill identified itself as "engaged in the business of insurance." (D.E. 275, at 3-4). As the district court confirmed in rejecting Rockhill's challenge to prejudgment interest, Rockhill failed to raise surplus lines status in its affirmative defenses or anywhere else. (D.E. 291, at 5). Rockhill offered no evidence in support

of its status, and obtained no ruling on the issue from the trial court. This was necessary because this Court has held that the issue of surplus lines insurer status is "not an appropriate one for judicial notice." *Houston Specialty Ins. Co. v. Vaughn*, 763 Fed. Appx. 853, 854 (11th Cir. 2019). Thus, for the purposes of this case, Rockhill is not a surplus lines insurer.

Moreover, the exemption in Section 626.913(4) applies to "surplus lines insurance authorized under §§ 626.913-626.937," not all insurance issued by a surplus lines carrier. Regardless of Rockhill's status in the abstract, the policy here lacks the statutorily mandated language. (Id. at 4-5 (pointing out that the policy is never described as a "surplus lines" policy and lacks the disclaimers mandated by Fla. Stat. § 626.924(1) and (2))). This is not a situation where "the party substantially complied" or "the notice purpose of the statute has been fulfilled" in some other way. *Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 20-14013-CV, 2020 WL 6588379, at *6 (S.D. Fla. Nov. 10, 2020). Nothing in the policy here indicates that the Association is subject to the risks associated with a surplus lines product.

Finally, Rockhill accuses the Association of "asking this Court to ignore the *Chalfonte* line of cases." (Response Br., at 13 (citing *QBE Ins Co. v Chalfonte Condo Apt Ass'n*, 94 So. 3d 541, 543 (Fla. 2012))). In fact, the Association deals with *Chalfonte* at some length on pages 39-42 of Cross-Appellant's principal Brief, concluding that "Voiding a deductible that does not comply with Section 627.702(2)

is consistent with *Chalfonte*." The Association will not repeat those arguments here; suffice it to say that Rockhill's concession that "whether statutory cause [sic] of action should be judicially implied is a question of legislative intent" makes the question a straightforward one. (Cross-Appellee's Answer Br., at 15).

More fundamentally, this case presents a different problem than the *Chalfonte* court faced. *Chalfonte* dealt with *de minimis* violations of specific legislatively-required details of language ("hurricane" vs. "windstorm") and type-size (18 point type vs. 16.2 point type). *Id.* at 550; *see also Pin-Pon Corp*, 2020 WL 6588379, at *6 (observing that *Chalfonte* featured an insurer which "substantially complied with the technical notice requirements"). Evading OIR review, on the other hand, is not a *de minimis* violation. *See Richard v. GEICO Gen. Ins. Co.*, 4:16CV184-MW/CAS, 2017 WL 5953298, at *1 (N.D. Fla. Jan. 30, 2017) (denying presumption of knowing acceptance of insurance limits where form was not approved by office of insurance regulation). Rockhill's freewheeling approach to OIR review defeats Florida's regulatory scheme in a way that word choice and typeface do not.

Separation-of-powers issues also attend the approach taken by the district court. Florida's legislature delegated at least the initial determination of ambiguity to the executive branch, and that choice should be respected. Moreover, judicial review of OIR action, at the time Section 627.702(2) was passed, would have entailed deference to the administrative body, signifying an even stronger intent to

put the decision in the hands of the executive.[1] To preserve the regulatory scheme Florida's legislature intended, Rockhill should face consequences for bypassing the OIR's legislative mandate to approve a percentage deductible only if "clear and unambiguous."

CONCLUSION

Rockhill did not carry its burden to establish that the waterproofing component of the Torres estimate corresponded to pre-existing damages. Moreover, the deductible is unenforceable because the policy does not qualify for surplus lines status, and Florida's Office of Insurance Regulation did not certify the policy as unambiguous. The Court should remand for entry of an appropriate final award of damages.

Respectfully Submitted,

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[1] Although Florida's constitution was recently amended to eliminate this deference, Fla. Const. art. V, §21, the OIR would have received deference when the statute was passed.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 2311 words and 196 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/Gray R. Proctor

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/Gray R. Proctor