IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

TOTAL CARE RESTORATION, LLC, a/a/o Julio Muniz,

Plaintiff/Appellant,

vs.

PEOPLE'S TRUST INSURANCE COMPANY,

Defendant/Appellee.
_____/

Appellate Div. Case 2019-093-AP
County Court Case 2018-1925-CC-5

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION AND QUESTIONS PRESENTED

Total Care Restoration, LLC ("Total Care") appeals the order granting summary judgment to People's Trust Insurance Company ("PTIC").

Julio Muniz suffered a covered water loss. In return for an assignment of homeowners insurance benefits ("AOB"), Total Care provided emergency mitigation services. His insurance policy contained a clause limiting PTIC's obligation to "The amount 'we' would have paid to Rapid Response Team LLC for necessary repairs made solely to protect the covered property from further damage." On summary judgment, PTIC introduced an agreement with Rapid Response Team, LLC ("RRT") to provide water mitigation services "for a flat fee of Two Thousand Dollars ($2000) per assignment." Total Care introduced invoices from RRT billing in excess of $2000 for water mitigation, along with deposition testimony indicating that some of the overages were caused by a higher flat rate for hurricane losses. The relevant invoices contained no line item detail, but representatives for RRT and PTIC speculated that RRT must have performed services not covered by the flat rate schedule.

The question in this appeal is: for summary judgment purposes, whether RRT's flat-fee agreement with PTIC conclusively demonstrates that PTIC would have paid RRT only $2,000 for the work represented by Total Care's $14,109.89 invoice?

STATEMENT OF THE CASE AND FACTS

On August 26, 2017, Julio Muniz suffered a roof leak at his home. (R. 59). He called Total Care to perform water mitigation services, and in return gave a post-loss assignment of benefits ("AOB"). (R. 60).

Total Care submitted an invoice for $14,109.89 to PTIC. (R. 62). In a December 11, 2017 letter, PTIC invoked the coverage limitation described in the option to repair clause:

> If "you" do not notify "us" and allow "us", at our option, to select Rapid Response Team, LLC™ for the covered Reasonable Repairs, "our" obligation for repairs made to protect the covered property from further damage is limited to the lesser of the following:
> (1) The reasonable cost "you" incur for necessary repairs made solely to protect the property from further damage;
> or
> (2) The amount "we" would have paid to Rapid Response Team, LLC™ for necessary repairs made solely to protect the covered property from further damage.

(R. 61). RRT explained that it had a standing flat-fee Service Agreement with RRT, which performed all water mitigation services for $2,000 per assignment. (R. 62-63). Accordingly, it issued a check for $2,000. (R. 63).

Total Care filed suit to recover the balance of its invoice on January 24, 2018. (R. 5).

I. PTIC's Motion for Summary Judgment: Option to Repair Clause and $2,000 Flat-Fee Service Agreement with Rapid Response Team.

On September 9, 2018, PTIC filed a motion for summary judgment. PTIC argued that its liability was limited to "The amount 'we' would have paid to Rapid Response Team, LLC for necessary repairs made solely to protect the covered property from further damage." (R. 61). PTIC argued that, "Had the insureds notified PTI of the need for mitigation services, and allowed PTI to select RRT to perform the mitigation services, PTI would have paid RRT $2,000.00 to perform the same services performed by Plaintiff." (R. 63).

In support of its argument, PTIC produced a "services agreement" between PTIC and RRT. (R. 151). The Services Agreement purports to "set forth the terms upon which [PTIC] from time to time may request the inspection, remediation or repair services of Rapid Response." (R. 151). The services agreement explicitly provides that "Nothing shall guaranty any minimum number of assignments or compensation to Rapid Response, nor that either party will conduct business exclusively with the other." (R. 151). An integration clause provided the "Agreement sets forth the entire contract between the parties concerning the subject thereof, and supersedes all prior and contemporaneous written or oral negotiations and agreements between them concerning the subject thereof." (R. 154). The agreement notes that the parties signed it "intending to be legally bound." (R. 154).

"In consideration for assignments made to Rapid Response, the Company agrees to pay to Rapid Response amounts determined in accordance with exhibit B." (R. 151). The attached exhibit, "Schedule B" of the services agreement provides for a flat rate to perform certain water mitigation services:

> Rapid response will perform the following services, to the extent required under the particular circumstances, in connection with each water mitigation assignment.
>
> 1. Water Extraction
> 2. Drying
> 3. Carpet Cleaning
> 4. Upholstery Cleaning
> 5. Dehumidification
> 6. Contents removal and restoration
> 7. Moisture-damaged material and restoration
> 8. Complete IIRC documentation of drying process
> 9. Emergency leak detection
> 10. Emergency plumbing services

(R. 158). For water mitigation assignments, "Rapid response will perform the above services for a flat fee of Two Thousand Dollars ($2,000) per assignment." For other repair services, RRT agreed to use Xactimate estimating software, with a 5% discount to the portion of the estimate that corresponded to RRT's overhead and profit. The Xactimate figure could be "adjusted for inflation, demand, and supply." (R. 158).

PTIC also attached Exhibit A, the "Rapid Response Team, LLC Description of Services" to be routinely provided. (R. 159). The Description of Services is a blueprint for long-term cooperation, providing that RRT will "coordinate with

[PTIC] regarding [PTIC]'s then-current and anticipated future needs for Rapid Response services." (R. 159). Rapid Response was to be "operated as a general contracting firm" delivering a full range of services:

> Rapid Response and the Company anticipate that RRT will render, directly or through subcontractors or vendors, those services customarily associated with a general contractor providing services in the personal residential market, including without limitation temporary repairs and loss mitigation, plumbing, electrical, HVAC, roofing, flooring, leak detection, carpentry, drywall repair/replacement, cabinet repair/replacement, painting, tile and grout repair, in installation of roof tarps, window and door board-up, demolition and debris removal.

(R. 159). But RRT was also expected to directly provide water mitigation services. In order to "facilitate its ability to accept assignments of the types typically associated with personal residences," Rapid Response agreed to "maintain an inventory of water mitigation equipment" and repair materials. (R. 159).

According to PTIC's motion for summary judgment, "every line item in Plaintiff's invoice, is encompassed within the Services Agreement between PTI and RRT." (R. 63).[1] Therefore, PTIC argued, it had conclusively proven that its liability under the policy was limited to $2,000. (R. 66).

[1] Total Care's invoice does not appear to have been submitted to the lower court.

II. Total Care's Opposition and Motion for Partial Summary Judgment: Depositions and Invoices Exceeding $2,000 for Water Mitigation.

Total Care filed its own motion for partial summary judgment (R. 559) as well as a response in opposition to PTIC's motion for summary judgment. (R. 567).

In its opposition to the motion for summary judgment, Total Care explained that depositions and business records "establish that there have been multiple prior instances where Defendant has paid Rapid Response in excess of $2,000 for water remediation services performed by Rapid Response." (R. 569). Total Care submitted depositions of Arielle Peters,[2] corporate counsel for PTIC, and for Steve Berman, Managing Director of RRT, along with selected invoices for water mitigation requesting payment of more than $2,000. (R. 380-476).

A. Deposition of Arielle Peters, corporate counsel for People's Trust.

Arielle Peters, corporate counsel for PTIC, was deposed as its representative on August 21, 2018. Ms. Peters was asked if there had "been any instances between February 28, 2017 through the present where Peoples Trust paid Rapid Response in excess of $2,000 for water mitigation services?" Ms. Peters explained that she believed the cap had only been exceeded in hurricane catastrophe claims.

[2] The depositions of Ms. Peters and Mr. Berman were taken in *Krystal Care, et al. v. People's Trust Insurance Company*, COWE 17-024288 (17th Cir., Broward County, Aug. 21, 2018).

She further explained that catastrophe claims were distinct from non-catastrophe or "daily" claims. (R. 202).

She conceded that the contract did not provide for any differential payment; however, she did not believe the contract was intended to cover hurricane claims. (R. 202-04). She stated that "the contract is silent as to catastrophe circumstances where Rapid Response Team provides water mitigation services. So that's why we do not apply it to mitigation in the event of a hurricane." (R. 203-04).

Total Care then confronted Ms. Peters with a list of payments from PTIC to RRT, including several instances where RRT was paid more than $2,000 for mitigation. (R. 206-07). Ms. Peters believed that they were all catastrophe claims, and explained she had it on "good authority" that RRT did not charge more than $2,000 for water mitigation in connection with any non-catastrophe loss. (R. 207-08). "Believe me, we would like to enforce the $2,000 limit on catastrophe claims as well." (R. 209).

B. Deposition of Steve Berman, Managing Director of Rapid Response Team.

On November 20, 2018, Steve Berman was deposed as RRT's managing director. He also served as a "Managing Director & Real Estate Development Executive Committee" member for PTIC. (R. 483).

Mr. Berman explained that the Service Agreement was a continuation of a verbal agreement between RRT and PTIC to try out the arrangement. (R. 324).

Other flat rate fee schedules existed for mold, fire, board-up, and tarping services. (R. 314-17). And, there was a "whole separate agreement between Rapid Response and People's Trust that pertains to hurricane losses." (R. 316). RRT's counsel explained that she was unsure whether the hurricane loss agreement and other flat rate schedules had been reduced to final writing and "executed and/or approved." (R. 317).

Mr. Berman was asked whether all the services outlined in the Service Agreement were included within the $2,000 cap. He replied that was true, "within reason." (R. 302). There were "rare exceptions" that depended on "the scope of the services that will have to be provided." (R. 304). These exceptions were not necessarily dependent on the cause of loss, although "the cause of loss dictates the amount of damage and mitigation." (R. 305). For example:

> Q:If you show up to a property and the roof is ripped off by Hurricane Irma and the entire property's wet, that's a situation where someone from Rapid Response will call People's Trust and say, "Look, we can't do this job for 2,000. We're going to have to exceed that cap."
> A: We probably wouldn't do the job.
> Q: Okay.
> A: It would be above our – you know, what we would want to do.
> Q: Okay. Well, let me – I'll give you a different hypothetical. You show up to a property and it's a Category 3, dirty water backup, and it's flooded several rooms in the property. Is that a set of circumstances where hypothetically Rapid Response will call People's Trust and say, "Hey, we have to go above the $2,000 cap to complete this work."

> A: In very rare instance, we would – when that would occur, we would call People's Trust if we had to do additional services.

(R. 305-06).

As a practical matter RRT obtained permission from PTIC to exceed the cap in specific cases, although no written procedures governed exceptions to the flat fee schedule. (R. 314). Mr. Berman thought that RRT had only billed more than $2,000 for water mitigation work "a handful less than three" times. (R. 307).

Mr. Berman further testified that wherever the $2,000 cap had been exceeded for a non-catastrophic loss, there must be "additional items" that did not correspond to water mitigation services. (R. 340-41). He agreed that an invoice for $5,000 was "an example of a water mitigation job that was, I guess, cumbersome in scope and one of your supervisors got approval to exceed the $2,000 cap." (R. 342). He could not explain, however, the reason the cap was exceeded in a series of invoices. (R. 329 ("Flat-rate water mitigation, $2160"); R. 331-32 (Invoice 392, $6,500 for "Water Mitigaiton" [sic]; *see* R. 421); R. 332 (Invoice 408, $3,300 for "Water Mitigation," *see* R. 421); R. 335 (Invoice 456, $3,000 "Flat Fee for Water Mitigation Services," *see* R. 426); R. 336 (invoice 464, *see* R 428 ($3,431.80 for "Flat Fee Water Mit Billing"), and invoice 466, *see* R. 429 ($2,495 for "Flat Fee Billing Water Mit")).

C. RRT's water mitigation invoices.

Total Care also submitted a series of RRT's invoices. (R. 380-476). RRT had submitted bills for up to $9,772.31 for "water extraction and remediation" (R. 450, June 8, 2017 invoice) without any line-item detail. On the only two occasions line-item detail is provided, RRT bypassed the flat rate structure entirely, billing a total of $8,892.73 on March 29, 2017 (R. 415-17) and $8,684.50 on May 1, 2017. (R. 432-36). On several other occasions RRT billed the $2,000 flat rate along with a charge that appeared to be at least arguably encompassed within mitigation services specified in Schedule B, such as leak detection (R. 403, 410, 414, 418, 439-40), plumbing services (R. 386, 402, 430), or additional subcontracted remediation services. (R. 437 (additional $395 charge for "water extraction & remediation (bid item)")).

The majority of the invoices, however, do not specify the reason that RRT was able to exceed the $2000 cap. There are a series of invoices charging $4,000 or $3,000 that are consistent with the testimony that RRT and PTIC negotiated flat rates for individual catastrophes (i.e., Hurricane Irma). These begin with a $4,000 for "water mitigation" on September 18, 2017 (R. 578) and continue throughout hurricane season.[3]

[3] (R. 460, 461, 462, 465, 469, 470 (late September and early October invoices charging $4,000 because equipment was left onsite); R. 473 (Charging $3,000 where "No Equipment On Site")).

However, there are also many invoices for which catastrophe pricing would not seem to apply:

1) $2150.00 for "RRT invoices (water mitigation) 5-25-17" (R. 436)
2) $2154.00 for "water mitigation services" on May 19, 2017 (R. 442)
3) $2,185.00 for "water mitigation" on June 15, 2017 (R. 452)
4) $2,225 for "rrt invoice (water mitigation) 5-25-17" (R. 444)
5) $2,264.00 for "water mitigation services" on June 2, 2017 (R. 448)
6) $2,347.22 for "water mitigation services" on May 19, 2017(R. 441)
7) $2,375 for "RRT invoices (water mitigation) 5-25-17 (R. 445)
8) $2495.00 for "Flat Fee Billing Water Mit" on April 25, 2017 (R. 429)
9) $2,692 for "water mitigation services" on May 9, 2017 (R. 438)
10) $2,750 for "RRT Invoices (water mitigation) 5-24-7" (R. 443)
11) $3,000 for "flat fee for water mitigation services" on March 23 and April 24, 2017 (R. 412, 427);
12) $3,300 for "water mitigation" on April 14, 2017 (R. 423)
13) $3,431.80 for "Flat Fee Water Mit Billing" on April 25, 2017 (R. 428)
14) $3,500 for "water extraction and remediation" dated March 13, March 15, March 27, and April 19, 2017 (R. 401, 408, 413, 426)
15) $4000 for "water extraction & remediation" on March 20, 2017 (R. 407).
16) $5,000 for "flat rate billing – water mitigation" on June 14, 2017 (R. 451 (noting expenditure was "Approved by Josh Wilson")).
17) $5,250.00 for "water mitigation" on march 21 (R. 409)
18) $6,500 for "water mitigation" on April 12, 2017 (R. 421)
19) $8,034.76 for "water mitigation" on March 21, 2017 (R. 408)

None of these invoices provide line-item detail explaining why RRT charged PTIC more than $2,000.

D. Cost Allocation Agreement.

Total Care also submitted a "Cost Allocation Agreement" dated July 28, 2011 between, *inter alia*, PTIC, RRT, and People's Trust Holdings, LLC. (R. 477).[4] The cost allocation agreement refers to a preceding "Service Agreement between People's Trust Insurance Company and Rapid Response Team, LLC dated September 14, 2009," which is not in this record. (R. 477).

The Cost Allocation Agreement defines "allocable expenses" to "mean those expenses incurred by one or more Companies conferring a direct benefit on another Company, a portion of which expense is properly allocable . . . to the Company receiving the benefit." (R. 477). "A Company initially bearing a disproportionate share of such an expense will be reimbursed by the Company receiving the benefit . . . ." (R. 477). It provides for direct allocation unless "the Companies are not able to readily and practically determine the proportional benefit to each of them," in which case allocation would be "according to revenues unless accounting principles dictate that another method of allocation is required or preferable." (R. 478). The agreement specifically allocated RRT a 1% share of payroll and 3% share of rent for corporate headquarters. (R. 478-79).

[4] The Agreement is signed by a representative for People's Trust Holdings, LLC; PTIC; People's Trust MGA, LLC; GS TWO, LLC; DPF Store, LLC; and, Rapid Response Team, LLC. (R. 480). It appears as though the CFO of People's Trust Holdings, LLC signed on behalf of every entity, and that his signature was witnessed by the same individual each time.

III. Hearing on motions for summary judgment.

Three days before the hearing, PTIC also submitted an affidavit from Ms. Peters as Corporate counsel, averring that "every line item in Plaintiff's invoice" was covered by the flat rate payment schedule and that "PTI would have paid RRT $2,000.00 to perform the same services performed by Plaintiff." (R. 577). Total Care filed a motion to strike the affidavit the affidavit as untimely. (R. 670) PTIC agreed to make its arguments without the benefit of the affidavit. (App. 18-19).[5]

The motions for summary judgment were heard on March 7, 2019. PTIC argued that its letter limiting coverage stated specifically "we would have paid in this case $2,000. It's consistent with the Service Agreement. The fact that in some random other cases, People's Trust paid Rapid Response Team additional amounts. I don't see any relevance to the interpretation of the policy in this case." (App. 9). PTIC asked the Court to "find that the undisputed record evidence shows that People's Trust would have paid [RRT] $2,000 if Total Care gave the required notice under the policy." (App. 9).

Total Care explained that the summary judgment evidence it submitted showed "multiple payments over $2,000 made for water mitigation services, the same scope of services which were performed by the Plaintiff in this case." (App.

[5] The hearing transcript was not in the record at the time this brief was filed. Appellant has filed it as an appendix, along with a motion to supplement the record.

13). The invoices gave "no indication that the services were any different than those performed in this case." (App. 15-16). Payments in excess of $2,000 for water mitigation "happen[] very often. So this is not a one-time isolated instance. It's not something that happens rarely. It is a common occurrence." (App. 16).

Total Care argued that the endorsement was an "illusory provision" that PTIC applied "arbitrarily." (App. 17). "The carrier is deciding when and where it wants to use this provision to its advantage." (App. 17)

PTIC argued that examples of overpayments in other cases were not relevant "to what People's Trust would have paid [RRT] in this case." (App. 19). There was no "record evidence that People's Trust would have paid Rapid Response Team anything more than $2,000 in this case." (App. 19-20). It was enough that "People's trust said they would have paid Rapid Response Team $2,000 in this case. No record evidence says that they would have paid Rapid Response Team $2,000 in this case if they gave notice. So we think summary judgment should be granted." (App. 20). Based on "the clear language" of the Service Agreement and "People's Trust's undisputed position that it would have paid Rapid Response Team $2,000 in this case," summary judgment was appropriate. (App. 21).

Total Care responded that the way in which the Service Agreement was actually administered "creates a question of fact as to what would have been paid in this case. Would it have been the $2,000 cap as alleged by the carrier or would

it have been the reasonable costs which were incurred, which were $14,000 in this case?" (App. 25). Total Care reminded the court that "if you go 1 through 10 in Exhibit B, the Service Agreement, it's the same exact services that were performed by Plaintiff." (App. 26). The court observed that "if the corporate representative and if the managing director is saying that we've reviewed everything that was done in this case and in another case that exactly – performs the same services or the same needs and we made a payment which exceeded $2,000, then I agree with your argument." (App. 27). However, "the only thing I'm hearing from you is sort of a general argument that they've paid more in other cases, but not that the services were exactly the same and they were subject to exhibit B." (App. 27).

PTIC then pointed to the deposition testimony of Ms. Peters explaining that the cap had been exceeded in catastrophe cases, which the Service Agreement did not cover. (App. 28). PTIC contended that she had "actually explained why there were additional payments and said it was because for hurricane claims, we will pay more." (App. 28). Total Care clarified that "There is no catastrophe exclusion or catastrophe exception in the Service Agreement. This Service Agreement says we will pay $2,000 for water mitigation." (App. 29).

The court then concluded that "we do have the testimony of the corporate representative saying that that was the basis under which they exceeded the per assignment provision in Exhibit B." (App. 29). The Court asked whether Total

Care had any other testimony explaining the basis for exceeding the Exhibit B flat fee schedule. (App. 29). Total Care pointed to Mr. Berman's testimony and the invoices paying more than $2,000 for flat rate water mitigation. (App. 30).

The court then asked "how many times did they pay over $2,000 and did they indicate that it was a catastrophic payment or any details as to why they paid more than $2,000?" (App. 31-32). It asked:

> Based on that deposition, did the managing director or corporate rep acknowledge that they've paid more than $2,000, I don't know, more than five time, more than 20 times and did they indicate that those were catastrophic payments or did they give any explanation as to why it exceeded the flat fee of $2,000?

App. 32). Total Care explained that Mr. Berman "could not testify as to whether all of these circumstances where they went over the $2,000 were catastrophic or non-catastrophic." (App. 34). He had admitted that the Service Agreement did not distinguish between the two, though, and "he also said at the deposition that he was uncertain. He did not know whether it applied to catastrophic claims, but that he believed that it was being applied only to catastrophic claims." (App. 35).
The Court asked whether Total care could identify "more than 10 occasions, for example, that Rapid Response was paid more than $2,000 for the sam eservices that were rendered in this case and it was not a catastrophic claim?" (App.. 33-34). Total Care, noting that the agreement "makes no reference to catastrophic claims,"

explained to the court that Mr. Berman could not testify whether all of the circumstances were catastrophic or non-catastrophic." (App. 34).

The court then asked whether PTIC had any explanationfor the "numerous occasions that are maybe non-catastrophic and it exceeded $2,000?" (App. 36). PTIC was "not aware of any and there's no testimony that they did exceed on any of those." (App. 36). PTIC state that "in the deposition, Mr. Berman said I believe that of these ones that exceeded it would be because therey're – well, they're called cat claims, catastrophe claims." (App. 36).

Asked squarely why there was no "fact issue for the jury," PTIC raised two points. "One, I don't believe that it's relevant in the sense that even if People's Trust paid more amounts in other claims, it doesn't change the fact that People's Trust said we would have only paid you $2,000 in this claim." (App. 37).

Two, PTIC argued Total Care had failed to "create" a question of fact, because the record did not show that PTIC had paid more than $2,000 in any "apples to apples case." (App. 37). "The only stuff we have in front of the Court today is the testimony from Ms. Peters and Mr. Berman. And they all said we believe these were all cat payments and every mitigation payment for non-cat claims was $2,000 or less in the relevant time period." (App. 38). Claims that the agreement was applied arbitrarily were "speculation because he has no testimony

from Ms. Peters or Mr. Berman that it was applied in any arbitrary fashion." (App. 38).

The court found that, to defeat PTIC's motion for summary judgment, Total Care would have to "argue that in this case, in fact, Rapid Response would have paid more than $2,000." (App. 40). Total Care responded that the flat rate mitigation schedule was supposed to apply to a certain scope of services, which Total Care had also completed, rendering the jobs comparable by definition. (App. 40-41). But the court stated that that "it sounds like if . . . it exceeds [the services described in lines] 1 through 10, they're giving you an explanation as to why they paid more than $2,000." (App. 42). Total Care contended that the "various reasons" given for exceeding the cap showed that a question of fact existed as to whether it was applied consistently. (App. 43).

The court granted summary judgment for PTIC. Total Care appeals.

SUMMARY OF ARGUMENT

PTIC argues that as a matter of law, its agreement with RRT conclusively demonstrates that it would pay no more than $2000 for water remediation at the Muniz residence. But the Service Agreement is not even a contract, because PTIC is not bound to use RRT, and RRT is not bound to take any jobs from PTIC. PTIC's main argument – that it had a legal right to demand RRT complete the job for $2,000 – is erroneous.

PTIC is no better off here, however, if the Court finds a binding contract exists. The Service Agreement as written obviously does not govern PTIC's relations with RRT, leaving PTIC to explain why it tendered so many above-cap payments for water mitigation jobs. PTIC argues that the contract was intended to recognize a distinction between catastrophic claims and non-catastrophic or daily claims. PTIC needs parol evidence of intent, and where there is parol evidence, there is a jury issue.

Finally, to the extent the lower court relied on general statements that RRT and PTIC abided by the agreement unless RRT provided additional services, it invaded the jury's province by making a credibility determination. The Court should reverse the order granting summary judgment and remand for trial.

STANDARD OF REVIEW

Review of an order granting summary judgment is *de novo*. *Volusia Cty. v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 130 (Fla. 2000). It is the moving party's burden to show, conclusively, the absence of any genuine issue of material fact. *Patel v. Aurora Loan Servs., LLC*, 162 So. 3d 23, 24 (Fla. 4th DCA 2014). Evidence and all inferences arising therefrom are construed in the light most favorable to the nonmovant. *Delotta v. J & J Auto., Inc.*, 895 So. 2d 1167, 1168 (Fla. 4th DCA 2005). "'If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.'" *Id.* (quoting *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)).

On summary judgment, courts must not determine credibility or weigh conflicting evidence. *Plantation Key Office Park v. Pass Int'l*, 110 So. 3d 505, 508 (Fla. 4th DCA 2013). Even "where the evidence as to a material fact is *undisputed*," summary judgment is not appropriate "if there are conflicting inferences of fact reasonably deducible from that undisputed evidence." *Ham v. Heintzelman's Ford, Inc.*, 256 So. 2d 264, 267 (Fla. 4th DCA 1971). Reversal is appropriate when a court uses parol evidence to decide how contracts should be interpreted. *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 716 (Fla. 4th DCA 2017). Summary judgment also should not occur where a "factual inconsistency

between unwritten policies and written forms" creates an issue of fact. *Schwartz v. Guardian Life Ins. Co. of Am.*, 73 So. 3d 798, 808-09 (Fla. 4th DCA 2011).

ARGUMENT: For summary judgment purposes, PTIC has not shown that the amount it would have paid RRT was only $2,000

PTIC's Service Agreement with RRT does not conclusively show that PTIC could have had Mr. Muniz's home repaired for only $2,000. The Service Agreement is not a legally binding contract that gives PTIC an unqualified right to demand that RRT perform any particular mediation project for the flat fee described in Schedule B. It is also incomplete, as PTIC implicitly concedes by introducing evidence of other fee agreements not described in Schedule B. Because PTIC would rely on parol evidence to construe the terms of the written agreement, the terms and effect of that agreement are questions of fact that cannot be resolved on summary judgment. Finally, there is no other direct evidence showing that RRT would have taken on the Alonso-Bolanos job for the $2,000 flat rate specified in the Service Agreement.

I. The Service Agreement is an illusory promise, not a binding contract.

PTIC argues that the Service Agreement proves it had a legal right to pay only $2,000 for the services described in Total Care's $14,109.89 invoice. But despite its promissory language, the Service Agreement is an illusory promise that does not bind the parties in any particular case.

"Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." *See Contractpoint Fla. Parks, LLC v. State of Florida*, 958 So. 2d 1035, 1036 (Fla. 1st DCA 2007); *see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir. 1998) (explaining that promisor "who says, in effect, 'I will if I want to'" has not entered an enforceable contract).

An illusory promise is composed of "words in a promissory form that promise nothing. . . . They do not purport to put any limitation on the freedom of the alleged promisor. If A makes an illusory promise, A's words leave A's future action subject to A's own future whim, just as it would have been had A said nothing at all." *Harby v. Wachovia Bank, N.A.*, 915 A.2d 462, 469 (Md. 2007) (citing *Corbin on Contracts* § 5.28). Because one party "has not promised to do anything, there is no consideration and no contract." *Office Pavilion S. Fla., Inc. v. ASAL Prods., Inc.*, 849 So. 2d 367, 370-71 (Fla. 4th DCA 2003) (discussing Restatement, *supra* at § 77 cmt. a, illus. 1); *see also Petroleum Traders Corp. v. Hillsborough Cty.*, No. 8:06-cv-2289-T-TBM, 2008 U.S. Dist. LEXIS 109717, at *11-16 (M.D. Fla. Oct. 14, 2008) (applying Florida law).

Here, the agreement provides that PTIC "from time to time may issue assignments to Rapid Response." (R. 151). But "Nothing in this Agreement shall guaranty any minimum number of assignments or compensation to Rapid

Response, nor that either party will conduct business exclusively with the other." (R. 151). And, nothing in the contract requires PTIC to accept assignments.

Moreover, the price terms remain indefinite. In most circumstances RRT is to use Xactimate in its quote. (R. 158). However, the Xactimate estimate may be "adjusted for inflation, demand and supply," and the parties "may agree upon reduced charges based upon market conditions or competitive considerations." (R. 158). And although Exhibit B does purport to set a "flat fee of Two Thousand ($2,000) per assignment" for all water mitigation claims, PTIC clearly cannot enforce this provision unless RRT agrees. (R. 209 ("Believe me, [PTIC] would like to enforce the $2,000 limit on catastrophe claims as well;" R. 305 (RRT "probably wouldn't do the job" at the $2,000 flat rate if the work were more than "what we would want to do")). To the extent the lower court relied on any vested legal right to have Mr. Muniz's water mitigation completed for $2,000, it erred, because there is no contract here.

II. If the Service Agreement is a binding contract, the finder of fact must weigh parol evidence of the unwritten agreement to exclude catastrophic claims from the $2,000 cap.

Assuming *arguendo* that PTIC and RRT have a contract, summary judgment would still be inappropriate. PTIC is in the position of establishing that its relations with RRT are controlled by the contract. PTIC has to square the plain language of the Service Agreement with evidence that RRT has been paid more

than $2,000 on many occasions. RRT and PTIC have explained that the contact is silent as to catastrophic claims because it is not intended to apply to them. A different fee schedule applies during hurricanes. In effect, PTIC argues that a latent ambiguity exists, at least as to catastrophic claims, and seeks to introduce parole evidence of the flat rate fee schedule that applies during a catastrophe. PTIC's argument precludes summary judgment because where there is parole evidence, there is a question for trial.

A latent ambiguity occurs "when a contract is rendered ambiguous by some collateral matter." *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 336 (Fla. 5th DCA 2013) (quoting *Mac-Gray Servs., Inc. v. Savannah Assocs. of Sarasota, LLC*, 915 So. 2d 657, 659 (Fla. 2d DCA 2005)). The matter cannot be "apparent from the face of the document," but must instead arise when "some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Mac-Gray*, 915 So. 2d at 659 (citations omitted). Here, the distinction between catastrophic claims and daily claims is an extraneous fact that PTIC argues renders the Service Agreement ambiguous.

The law is clear that "[u]se of parol evidence to determine either the intent of the parties or the terms of a contract precludes summary judgment." *Montealegre v. Banco de Credito Centroamericano*, S.A., 895 So. 2d 1097, 1099

n.7 (Fla. 3d DCA 2004) (citing *Bayco Dev. Co. v. Bay Med. Ctr.*, 832 So. 2d 921, 922 (Fla. 1st DCA 2002)); *see also Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 716 (Fla. 4th DCA 2017) (extending principle where parol evidence was necessary to resolve patent ambiguity as to relationship between signatories). Although Schedule B contains no exceptions to the $2,000 flat rate schedule, including for catastrophes Ms. Peters testified that the parties had an implicit understanding that catastrophic claims would be treated differently, and that Schedule B's silence on the issue meant that the flat rate did not apply. (R. 202-03, 210 (agreeing that "Schedule B is silent on what to charge for water mitigation services in the event the peril is a catastrophe")). PTIC and RRT operated under a separate catastrophe pricing schedule that increased RRT's rates, presumably to reflect the increased demand for RRT's services and the general shortage of remediation equipment. (R. 321-23 (Deposition testimony of Arielle Peters, corporate counsel for PTIC describing)); (R. 317-19 (Deposition testimony of RRT Managing Director Steven Berman, describing practice of negotiating flat fees during Hurricanes Irma, Michael, and Matthew).

Total Care observes that there is evidence of a flat-rate catastrophe pricing schedule that also compensates RRT for the business it loses when equipment is left at a PTIC job site. (R. 460-62, 465, 469-70 (late September and early October invoices charging $4,000 because equipment was left onsite); R. 473 (Charging

$3,000 where "No Equipment On Site")). However, Florida law is clear that when parol evidence is necessary to resolve latent ambiguities, summary judgment cannot lie.

III. General statements that RRT and PTIC abide by the agreement cannot be accepted without an impermissible credibility determination.

Finally, it would also be error on summary judgment to rely on general statements that, unless RRT exceeds the scope of services or mitigates a hurricane loss, the parties abide by the flate rate schedule.

Mr. Berman, as director of RRT rather than in his capacity with PTIC, testified that every invoice for more than $2,000 must have included an "additional item" not covered by the description of services in Schedule B. (R. 340-41). But the record indicates that RRT and PTIC are long-term strategic partners with overlapping personnel and expenses, not uninterested parties dealing at arm's length. Their interests are close enough that RRT is a party "whose interest in the litigation invests the affidavit with an issue of credibility." *Jenkins v. Graham*, 237 So. 2d 330, 333 (Fla. 4th DCA 1970). Therefore, Mr. Berman's general statements cannot be accepted as true on summary judgment.

Courts should be wary of preventing credibility from being assessed by the finder of fact. Where the record reasonably would support a different interpretation of the evidence, granting summary judgment based on an affidavit can

impermissibly involve the court in "weighing of conflicting inferences and an assessment of the credibility of interested witnesses." *Tucker v. Am. Emp'rs Ins. Co.*, 218 So. 2d 221, 223 (Fla. 4th DCA 1969).

In *Tucker*, Plaintiff/Appellant alleged that the defendant "conducted a surveillance . . . for the purpose of annoying, harassing and intimidating her into a settlement of her claim . . . for less than she otherwise would accept." *Id.* at 221. The defendants "flatly denied" following Ms. Tucker, and neither she nor her husband could identify "the trespassers or the driver of the white panel truck." *Id.* at 223. The trial court granted summary judgment. The Fourth DCA reversed, because other facts in the record precluded the affidavit from conclusively settling the issue of fact.[6] *Id.*

A similar case from the Third DCA is in accord. *Berlanti Constr. Co. v. Miami Beach Fed. Sav. & Loan Asso*., 183 So. 2d 746 (Fla. 3d DCA 1966). In *Berlanti Construction*, plaintiff/appellant's employee deposited company money into his personal account. It alleged that the defendant bank should have known that the employee was not authorized. On summary judgment, the bank submitted

[6] The court remarked that "the coincidence in time between the obnoxious surveillance and the innocuous surveillance admitted to by the defendants," along with "the admission of the defendants that the defendant . . . was employed to conduct a secret surveillance of the plaintiff . . . indicate the existence of a genuine issue of material fact as to the defendants' responsibility for the obnoxious surveillance." *Id.*at 223.

an affidavit from the employee, who averred that "he had endorsed the checks and deposited them in his savings account at the request of Louis Berlanti, [president of the plaintiff] and that he had withdrawn and disbursed the proceeds in accordance with the instructions from Louis Berlanti." *Id.* at 747. The plaintiff did not submit counter-affidavits, and summary judgment was entered for the bank.

The Third DCA reversed because the employee was "an interested witness because he would be liable to the savings and loan association if it prevailed." *Id.* The lower court had erred by conducting "an evaluation and credibility process which is not an aspect of the summary judgment procedure." *Id.* at 748; *see also GEICO Indem. Ins. Co. v. Reed*, 13 So. 3d 99, 100 (Fla. 4th DCA 2009) (reversing; summary judgment improper because finder of fact should determine credibility of affidavit that "she mistakenly titled the van in Barton Reed's name, but it actually was used solely as a business vehicle").

And so it is here. PTIC and RRT are operating together to limit liability and reduce costs on water mitigation claims. It is easy to make claims about what RRT would have done. It should be for the jury to decide whether those claims are credible.

CONCLUSION

This case cannot be decided on the Service Agreement alone. It is either a contract that needs parol evidence to interpret, or it is not a contract at all. Regardless, the case cannot be resolved on this record without making an improper credibility determination. It should be for the jury to determine whether PTIC could really have gotten the Muniz job done for only $2,000 if it were afforded an opportunity to invoke its option to repair.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via email through the efiling portal, to counsel of record this 1st day of August.

/s/ Gray R. Proctor

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).

/s/Gray R. Proctor