<<COURT\_NAME>>

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| <<PROVIDER\_SUITNAME>>,  a/a/o <<INJUREDPARTY\_NAME>>    Plaintiff,  vs.  <<INSURANCECOMPANY\_SUITNAME>>  Defendant. | Case No. <<INDEXORAAA\_NUMBER>> |

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PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

FOR COVERAGE OF ENGINEERING SERVICES

Plaintiff, <<PROVIDER\_SUITNAME>> a/a/o <<INJUREDPARTY\_NAME>>, pursuant to Florida Rule of Civil Procedure 1.510, respectfully moves this court for summary judgment for payment of its engineering services provided in connection with the subject loss herein. Plaintiffs are entitled to summary judgment for the reasons set forth in the attached Memorandum of Law filed herewith.

STATEMENT OF UNDISPUTED FACTS

1. This lawsuit arises from a claim for damages to real property located at <<INJUREDPARTY\_FULL\_ADDRESS>> (hereinafter the “Property”) in connection with a covered loss that occurred on <<ACCIDENT\_DATE>> (hereinafter the “Loss”).
2. Defendant issued an HO-3 Form “all-risk” homeowners insurance policy (hereinafter the “Policy”) Policy No. <<POLICY\_NUMBER>> to <<INJUREDPARTY\_NAME>> (hereinafter the “Insured”), which was in full force and effect at the time of the loss.
3. During the subject policy period and prior to the filing of the instant lawsuit the Insured reported to the Defendant the loss to the insured property.
4. Following the loss, the Insured executed an assignment of benefits to the Plaintiff in exchange for engineering services meant to assist in the repair or replacement of damaged physical property. See Exhibit A.
5. Subsequent to the assignment of benefits, the Defendant refused to pay the insurance benefits due to the Plaintiff for services rendered.
6. As a result of Defendant’s actions, Plaintiff filed the instant lawsuit for breach of contract for Defendant’s failure to issue policy benefits under the subject policy of insurance.
7. In response to Plaintiff’s Complaint, Defendant filed an Answer and Affirmative Defenses, and stated without any justification, that the services provided by Plaintiff are not covered by the Policy.
8. Plaintiff, with the support of the facts and Florida law, asserts that the Defendant is liable to the Plaintiff for all damages sought in this lawsuit.

**MEMORANDUM OF LAW**

INTRODUCTION

Plaintiff provided forensic engineering services in connection with a covered loss. Defendant refused to pay for the services claiming that the same are not compensable under its “HO-3 all-risks policy”, because engineering services are not specifically referenced or listed as covered services in its policy. However, the existing Florida case law provides without exception that insurance policies should be construed broadly to provide the insured with the greatest possible policy benefit.

Essentially, for the Plaintiff to prevail on a Motion for Summary Judgment on this issue, all it must show is that a covered cause of loss occurred during the policy period, while the policy was in full force and effect. The burden then shifts to the insurer to show that the specific service is excluded under the policy.

Defendant’s HO-3 policy covers the type of peril suffered by the insured property, and the policy was in full force at the time of the loss. Plaintiff’s engineering services were performed in response to said covered loss, and Defendant’s “all-risk” policy contains no exclusion for engineering services.

Accordingly, Plaintiff has met its burden and entering summary judgment in its favor is proper.

ARGUMENT

“Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law.” Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). “Summary judgment is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings.” The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006). A court considering summary judgment must avoid putting a party through “the expense of going through a trial, where the only possible result will be a directed verdict.” Gonzalez v. Citizens Prop. Ins. Corp., 273 So. 3d 1031, 1035 (Fla. Dist. Ct. App. 2019) (quoting Martin Petroleum Corp. v. Amerada Hess Corp., 769 So.2d 1105, 1108 (Fla. 4th DCA 2000)).

To answer the questions at issue, Plaintiff must show that a loss occurred apparently within the terms of the policy Jones v. Federated Nat'l Ins. Co., 235 So. 3d 936 (Fla. 4th DCA 2018) citing Phoenix Insurance Company v. Branch, 234 So. 2d 396, 398 (Fla. Dist. Ct. App. 1970). Once Plaintiff establishes this, the burden shifts to Defendant to prove that the loss or in this instance the service in question was excluded. Id. Defendant fails to meet this burden.

Because questions of coverage are legal questions, not questions of fact, Plaintiff’s find a Motion for Summary Judgment is most appropriate. Id. (“Coverage determinations are legal questions decided by the court, not a jury.”). Fayad v. Clarendon Nat. Ins. Co., 899 So. 2d 1082, 1085 (Fla. 2005)

1. THE PERIL AT ISSUE WAS COVERED UNDER PLAINTIFF’S HO3 POLICY INSURED BY DEFENDANT.

Plaintiff’s insured property located at <<INJUREDPARTY\_FULL\_ADDRESS>>, suffered damages a result of a covered loss which occurred on about <<ACCIDENT\_DATE>>. At the time of the loss, the Insured had a HO-3 form Homeowner’s Insurance Policy issued by Defendant in full force and effect.. An HO-3 policy is an all-risk policy, meaning that “[u]nless the policy expressly excludes the loss from coverage . . . [Defendant must] provide[] coverage for all fortuitous loss or damage other than that resulting from willful misconduct or fraudulent acts.” Fayad v. Clarendon Nat. Ins. Co., 899 So.2d 1082, 1085 (Fla.2005). An all-risk policy protects all direct losses except those explicitly excluded from the policy. Jones v. Federated Nation Insurance Company, 235 So. 3d 936, 940-41 (Fla. 4th DCA 2018). In Jones, the 4th DCA held,

“Under an all-risk insurance policy, ‘the rule is that once the insured establishes a loss apparently within the terms of the policy, the burden is upon to the insurer to prove the loss arose from a cause that was excepted.” Our allocation of this preliminary burden of proof is consistent with the general notion that an all-risk insurance policy guards against all risk except those explicitly excluded by the policy.

The court explained: “an insured claiming under an all risks policy has the burden of proving that the insured property suffered a loss while the policy was in effect. The burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy’s terms.

235 So. 3d 936, 940-41 (Fla. 4th DCA 2018).

Because the insured’s property was covered on <<ACCIDENT\_DATE>> and the damage was not explicitly excluded from coverage under Plaintiff’s policy, the terms of a HO-3 policy require that Plaintiff’s damage be covered. Thus, Plaintiff’s burden to show that the damage was covered under the policy has been met.

1. COSTS OF ENGINEERING SERVICES ARE REASONABLE AND COMPENSABLE.

Under an all-risk policy, costs of engineering services are compensable because (1)  payment for services of a professional, to identify the cause and origin of the loss and/or to determine necessary steps needed to repair a property is reasonable; and (2) Defendant’s policy did not exclude engineering services.

Under Florida section 627.7011(6), an “insurer may limit its liability to the ‘reasonable and necessary cost’ to repair or replace the damaged property.” Trinidad v. Fla. Peninsula Ins. Co., 121 So. 3d 433, 440 (Fla. 2013). In Trinidad v. Florida Peninsula Insurance Company, the Florida Supreme Court held as a matter of law that overhead and profit were included in the replacement cost of a covered loss, where the insured is reasonably likely to need a general contractor for the repairs. 121 So. 3d 433, 436 (Fla. 2013). Specifically, the Court held that “insurers are not statutorily permitted to hold back any portion of the replacement cost payment, including costs for overhead and profit, contingent on the insured's actually repairing or replacing the property.” Id. Lastly, the Court found that “any other costs of a repair that the insured is reasonably likely to incur . . . are considered replacement costs.”

Just as the general contractor’s services in Trinidad, here, the engineering services were reasonable services rendered to survey the property damage, make a determination as to whether a repair or replacement of the damaged property was warranted, and proscribe the method for restoring the property to its pre-loss condition. Remarkably, insurers, including the Defendant, routinely engage engineers to conduct engineering testing for the exact same reasons that the Plaintiff conducted its services for here. Thus, the engineering inspection at issue here was a “cost of a repair that the insured [was] reasonably likely to incur . . .” and should be considered as a matter of law a reasonable replacement cost covered under the policy. Id. Because insurers who make “a payment to the insured, but refuse to pay the entire claim . . .”  are “not entitled to withhold replacement cost payments,” here, Defendant should not be allowed to allege the inspection costs were unreasonable and withhold payment. Haynes v. Universal Prop. & Cas. Ins. Co., 120 So. 3d 651, 654 (Fla. Dist. Ct. App. 2013).

Second, Defendant’s policy does not explicitly exclude these services or limit liability to cover these services. Defendant has not identified any policy provision that excludes the engineering services from coverage. Where “the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as written.” See Lenhart v. Federated National Insurance Company, 950 So. 2d 454, 457 (Fla. 4th DCA 2007). “When an insurer fails to define a policy term having more than one meaning, the insurer cannot argue a narrow or restrictive interpretation of the coverage provided.” State Farm Mutual Automobile Insurance Company v. Menendez, 70 So. 3d 556, 569-70 (Fla. 2011). Under the plain language of Defendant’s policy, the policy provides for all reasonable costs of repairing or replacing damaged property, which could include the services of an engineer, and there is no restriction that excludes the forensic engineering service in question from payment under Defendant’s policy. There are endorsements attached to the policy that provide and exclude coverage, but at no point do these endorsements exclude engineering services. This Court should not allow Defendant to argue for a more restrictive interpretation of the coverage provided than the restrictions it already includes in its policy. Id. Here, the plain meaning of Plaintiff’s all-risks policy is that their services are covered, because they are reasonable costs associated with the repair or replacement of damaged property and not explicitly excluded.

While the question of whether engineering services are compensable under a property insurance policy may be an issue of first impression in the State of Florida; however, a review of case law throughout the country has yielded a potential answer regarding this issue. In the case of Zurich American Ins. Co. v. Keating Bldg. Corp., 513 F. Supp. 2d 55 (D.N.J. 2007), the United States District Court of New Jersey was tasked with determining whether certain type of services were compensable under a “Builder’s Risk” insurance policy. Like in the instant matter, the policy of insurance provided coverage “against all risk of direct physical loss or damage” and would pay the “[c]osts to repair or replace the property lost or damaged….” Id. at 59. The Insured sought payment for “engineering services” amongst other services relating to the demolition of a collapsed portion of the insured building. *See* Id. The Court found that “a reasonable person would conclude that costs of engineering [services]… was a cost associated with demolition…” which was compensable under the policy of insurance. Id. at 65. Here, like in Zurich American a reasonable person would conclude that the use of an engineer to determine the repairability and extent of damage to a major structural component of a building, such as a roof, would be a cost associated with the repair or replacement of the damaged physical property.

At best, Defendant’s policy is susceptible to more than one interpretation or may be considered ambiguous on whether engineering services are included in the all-risk policy. The Florida Supreme Court has found that “[i]nsurance policy language is considered to be ambiguous if the language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage.” Washington Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943 (Fla. 2013). However, even if this Court finds that Defendant’s policy is ambiguous on the issue of engineering services, or that both party’s positions are reasonable, the Court must find for the insured or its assignee. See Washington Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943 (Fla. 2013) (“Where one reasonable interpretation of the policy provisions of an ambiguous insurance policy would provide coverage, that is the construction which must be adopted.”) See also Auto Owners Insurance Company v. Anderson, 756 So. 2d 29, 34 (Fla. 2000) (“Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy.”) Only if “the insurer makes clear that it has excluded a particular coverage, however, [is] the court is obliged to enforce the contract as written.” State Farm Fire and Casualty Insurance Company v. Deni Associates of Florida, Inc., 678 So. 2d 397, 401 (Fla. 4th DCA 1996). Engineering services are reasonable costs in the inspection of damages and Defendant failed to exclude these services under their all-risk policy, therefore, the Court should find the services are included in the coverage.

CONCLUSION

Based upon the foregoing, it is evident that no genuine issue of material fact exists in the

present matter, as the facts are so crystallized as to leave only questions of law. Plaintiff is entitled to final summary judgment in this matter because Defendant cannot meet their burden of presenting evidence to reveal a genuine issue of material fact.

WHEREFORE, Plaintiff, <<PROVIDER\_SUITNAME>> respectfully requests that this Court enter an Order Granting Plaintiff’s Motion for Final Summary Judgment against Defendant, as well as awarding Plaintiff its reasonable attorneys’ fees and costs associated with bringing forth this Motion and enter final summary judgment in its favor for the reasons set forth and for any other relief this Court deems necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 19, 2022 a true and correct copy of the foregoing was served upon the Defendant via the Florida E-file Portal.

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