<<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 RESPONSE IN OPPOSITION**

**TO DEFENDANT’S FINAL MOTION FOR SUMMARY JUGMENT**

COMES NOW the Plaintiff, <<PROVIDER\_SUITNAME>>, by an through its undersigned counsel, and pursuant to Rule 1.120, Fla. R. Civ. P., states that based on the pleadings and summary judgment evidence on file, the Defendant is not entitled to a summary judgment as a matter of law under Rule 1.510, as there are material issues of fact in dispute, and in support thereof states the following :

1. **DEFENDANT’S MOTION FOR SUMMARY JUDGMENT MUST FAIL BECAUSE THE QUESTION OF WHETHER THE PLAINTIFF’S SERVICES IS A COST OF REPAIR OR REPLACEMENT IS A QUESTION OF FACT FOR A JURY**

Plaintiff contends that there are genuine issues of material fact; and as such, Defendant is not entitled to summary judgment as a matter of law in this matter. It is well settled in Florida that the granting of summary judgment is only appropriate where, as a matter of law, it is apparent from the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. See The Florida Bar v. Greene, 926 So.2d 1195, 1200 (Fla. 2006). 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. Id. A defense is not a sufficient basis for granting a motion for summary judgment unless the evidence supporting that defense is so compelling as to establish that no issue of material fact actually exists. Harvey Building, Inc. v. Haley*,* 175 So.2d 780 (Fla.1965). The burden is upon the Defendant to show that there is no genuine issue of material fact. See Harvey Bldg., Inc. v. Haley, 175 So.2d 780, 782 (Fla. 1965).

Florida law places a higher burden on a party moving for summary judgment in state court, requiring the movant to:”[S]how conclusively that no material issues remain for trial.” Visingardi v Tirone, 193 So. 2d 601 (Fla. 1966).

All doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict in the evidence, then summary judgment is not available. Gonzalez v. B&B Cash Grocery Stores, Inc., 692 So. 2d 297 (Fla. 4th DCA 1997). Similarly, a trial court may not weigh the evidence or judge the credibility of witnesses in arriving at summary judgment; instead, the moving party must conclusively show the absence of any genuine issues of material fact. Craven v. TRG-Boyton Beach, Ltd., 925 So. 2d 476 (Fla. 4th DCA 2006).

When determining whether or not a service constitutes “a cost of repair or replacement”, the legal definition of the contractual term is a question of pure law. *See* Bissell v. State, 605 So.2d 878, (Fla. 5th DCA 1992); *see also* Sproles v. American States Ins. Co., 578 So.2d 482, 484 (Fla. Fla. 5th DCA 1991). The question of whether the service provided by the Plaintiff, constituted a “cost of repair or replacement” is a question of pure fact. *See* Id. Whether or not the facts support that the services provided by the Plaintiff constitute the legal definition “a cost of repair or replacement” is exclusively for a jury to decide.

In the instant matter there are two questions of fact that are in dispute: 1. whether the services provided by the Plaintiff constitute a cost of repair or replacement; and 2. whether the services provided were reasonable and necessary. While there is no case law in the state of Florida that specifically defines what costs of repair or replacement are compensable under a policy of insurance, there is the case of Trinidad v. Fla. Peninsula Ins. Co., 121 So. 3d 433, 440 (Fla. 2013) in which 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. The Court found that “any other costs of a repair that the insured is reasonably likely to incur . . . are considered replacement costs.”

In the matter of Prepared Insurance Company v. Gal, 209 So.3d 14, (Fla. 4th DCA 2016), the Fourth District Court of Appeals analyzed the decision in Trinidad, noting that the Florida Supreme Court stated that overhead and profit must be paid under a replacement cost policy when overhead and profit " are going to be 'reasonable and necessary' to the repair." Trinidad at 441. However, if overhead and profit are not "reasonable and necessary" to the repair, then the insurer may withhold payment. *See* id. (citing § 627.7011(6), Fla. Stat. (2008)). The issue of whether overhead and profit are "reasonably necessary" is **"no different than any other costs of a repair,"** see Trinidad at 441. The amount owed under an insurance policy is “**generally be a question of fact for the jury.**” Prepared Ins. Co. at 17 *citing* Citizens Prop. Ins. Corp. v. Mallett, 7 So.3d 552, 556 (Fla. 1st DCA 2009); and Mee v. Safeco Ins. Co. of Am., 2006 PA Super 257, 908 A.2d 344, 348 (Penn. Super. Ct. 2006) ("Whether use of a general contractor was reasonably likely is a question of fact for the jury." ).

Here, like in Trinidad and Prepared Ins. Co., the Plaintiff provided services which it maintains was a cost of repair or replacement. Specifically, Plaintiff provided forensic engineering services directly relating to the damages sustained at the subject property from a severe weather event that occurred on April 6, 2019.

Generally, there are three (3) basic steps to any repair. First, you must identify the damage. Second, you must formulate a plan for the repair or replacement of the damage. Lastly, you must execute the plan to repair or replace the damaged property. Here, the services provided the Plaintiff satisfy the first two steps. As part of the inspection and report, Plaintiff identified damage to the subject roof, discussed the repairability of the asphalt shingle roof and the applicable Florida Building Code and suggested a full roof replacement of the entire roof based upon the extent of the roof damage. Like the engineering services provided by the Plaintiff in this matter, the services of a contractor do not directly repair or replace damaged property, rather they directly relate to those functions. The compensability of the Plaintiff’s services under the subject policy of insurance and whether those services were reasonable and necessary are a question of fact for a jury under the Florida Supreme Court’s decision in Trinidad and the Fourth District Court of Appeals decision in Prepared Ins. Co.

1. **ENGINEERING SERVICES ARE NOT SPECIFICALLY EXCLUDED UNDER THE SUBJECT POLICY OF INSURANCE.**

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; 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**

It is clear that the Defendant has failed to meet its burden of demonstrating that there are no disputes as to material facts and that it is entitled to summary judgment as a matter of law. Whether or not the Plaintiff’s services constitute a cost of repair or replacement is a question of fact for a jury, as is the queston of whether it is reasonable and necessary to…... For the Court to determine, that the services were not a cost of repair or replacement under the subject policy of insurance would be reversible error.

WHEREFORE, Plaintiff, <<PROVIDER\_SUITNAME>>, requests the Court to enter an Order to Deny Defendant’s Motion for Summary Judgment, and grant such other further relief that is just and appropriate under the circumstances.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on ­­­­­­­­­­­­­February 19, 2022, a true and correct copy of the foregoing was filed and served on the Defendat through the Florida E-File Portal.

**Florida Insurance Law Group, LLC**

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Logo, company name

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