IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

RESTORATION 1 OF PORT ST. LUCIE,
a/a/o John and Liz Squitieri,

Petitioner/Cross-Respondent,

v.

ARK ROYAL INSURANCE COMPANY,

Respondent-Cross-Petitioner.
_____/

Case No.: SC18-1624
L.T. Case No.: 4D17-1113

INITIAL BRIEF OF
PETITIONER/CROSS-RESPONDENT

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PRELIMINARY STATEMENT

As part of its regulatory responsibilities, Florida's Office of Insurance Regulation ("OIR") has repeatedly and consistently rejected insurers' attempts to place limitations on an insured's ability to assign post-loss benefits ("AOB"). OIR has specifically rejected attempts by Security First Insurance Company, Tower Hill Insurance Group, and Heritage Property & Casualty Insurance Company when those insurers attempted to condition AOBs on the written consent of all insureds, additional insureds, and mortgagees named in the policy. These are precisely the *same* limitations on AOBs advocated by Ark Royal in this case. Likewise, they are precisely the same limitations rejected by the Fifth District and, approved by the Fourth in this case.

Ark Royal sidestepped OIR's administrative review of its AOB limitation by simply "certifying" to OIR that various changes it was making in its policy form complied with Florida law. In other words, although other insurers submitted the same AOB limitations to OIR for review (limitations which OIR rejected), Ark Royal never has. Instead, Ark Royal avoided regulatory scrutiny of its AOB limitation by simply certifying to OIR that the various changes it was making to its policy in 2012 were consistent with Florida law. Contrary to its bald certification, Ark Royal's AOB changes were not consistent with Florida law and have been flatly and repeatedly rejected by OIR.

In addition to seeking administrative approval of limitations on post-loss AOBs, insurers have also repeatedly and consistently asked the Florida Legislature to impose these same limitations on AOBs. Each and every time, these attempts have also fallen flat. Likewise, insurers' repeated assaults on AOB's for over 100 years in the appellate courts have been to no avail—at least, until the Fourth District's decision in this case.

To be clear, Ark Royal's requirement that an AOB be signed by the mortgagee makes an insured's post-loss assignment of benefits a practical impossibility. Allowing it to stand not only eliminates an insured's right to freely assign post-loss claims, but also does an end-around the normal legislative and regulatory processes that are in place to protect the citizens of Florida from such an overreach.

STATEMENT OF THE CASE AND FACTS

I. The OIR Has Repeatedly Disapproved and Rejected Insurers' Requests to Limit Post-Loss Assignment Provisions that Require Written Consent of All Insureds, All Additional Insureds, and All Mortgagees Named in the Policy.

In 2003, the Florida Legislature created the OIR. The OIR is charged with overseeing the language insurers use in Florida's insurance policies:

> **The Office of Insurance Regulation … shall be responsible for all activities concerning insurers** and other risk bearing entities, including licensing, rates, **policy forms**, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements,

> premium financing, and administrative supervision, as provided under the insurance code or chapter 636.

Section 20.121(3)(a)1., Fla. Stat., emphasis added. The Florida Legislature also prohibits an insurer from utilizing policy language that has not been submitted to, and approved by, the OIR, with limited exceptions. Section 627.410, Fla. Stat.

A. The OIR Rejected Security First Insurance Company's Attempt to Condition Post-Loss Assignment on the Written Consent of All Insureds, All Additional Insureds, and All Mortgagees.

On July 1, 2014, Security First Insurance Company submitted form filing 14-12180 to the OIR [R. 85-102].[1] Security First's filings sought to add certain AOB language to its HO-3, HO-4, and HO-6 insurance policies [R. 87]. Specifically, Security First wanted to restrict its insureds' ability to enter into AOBs as follows:

> No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional "insureds", and all mortgagee(s) named in this policy.

[R. 88-90].

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[1] Petitioner/Cross-Respondent ("Restoration 1") cites to the original Record on Appeal (identified on this Court's docket as "1 VOLUME CERTIFIED COPIES OF APPEAL PAPERS – Filed Electronically") as "R."

Restoration 1 cites to the Fourth District's appellate record (identified on this Court's docket as "1 VOLUME RECORD ON APPEAL - Filed Electronically") as "4R."

On July 29, 2014, the OIR told Security First to delete this language in order to comply with Florida law [R. 95]. On August 15, 2014, the OIR disapproved the proposed forms altogether:

> We have completed our review of the forms contained in the above referenced filing. This letter is to advise you that the forms are hereby **disapproved**. The Office finds that the forms violate the intent and meaning of Sections 627.411(1)(a), 627.411(1)(b), and 627.411(1)(e), Florida Statutes.
>
> The forms contain language restricting the assignment of a post loss claim under the policy, which is contrary to Florida law. *See Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 n.7 (Fla. 2008); *Better Const., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 651 So. 2d 141, 142 (Fla. 3d DCA 1995); *Panopoulos v. Lexington Ins. Co.*, 8:13-CV-00-T-33TGW, 2013 WL 2708688, at *2 (M.D. Fla. June 12, 2013); *Erickson's Drying Sys., Inc. v. QBE Ins. Corp.*, 2:11-CV-581-FTM-99, 2012 WL 469746, at *2 (M.D. Fla. Feb. 13, 2012); *Belfor USA Group, Inc. v. Bray & Gillespie, LLC*, 605CV1624ORL19UAM, 2008 WL 276022, at *2 (M.D. Fla. Jan. 31, 2008).

[R. 96, emphasis added].

Security First requested an administrative review of OIR's decision, and the OIR administrative Hearing Officer issued a written report and recommendation [R. 474-94]. Security First argued that Florida's prohibitions on restricting post-loss AOB only applied to provisions requiring the insurer's consent, not the consent of others.

The administrative Hearing Officer upheld OIR's decision, and found a "restriction on the right of a policyholder to freely assign his or her post-loss benefits is prohibited under Florida law" [R. 482] and "the incorporation of such a

restriction on an assignment of post-loss rights in an insurance policy would be misleading for policyholders" [R. 486]. The Hearing Officer expressly determined: "the language of the Assignment Endorsements requiring the written consent of all " 'insureds,' all 'additional insureds,' and all mortgagee(s)" named in the policy is misleading pursuant to section 627.410(1)(b), Florida Statutes…." [R. 486, emphasis added].

The OIR noted there was no evidence the OIR had ever approved the AOB restrictions that Security First wanted to impose:

> There is no evidence in this record that the OFFICE has ever approved, pursuant to section 627.410, Florida Statutes, language such as is at issue in the Assignment Endorsements conditioning the validity of a post-loss assignment on the written consent of all " 'insureds,' all 'additional insureds,' and all mortgagee(s)" named in the policy.

[R. 479]. OIR later reiterated: "In short, there is no evidence presented in the record that the OFFICE has ever approved the inclusion of the language at issue in this case" [R. 490].

The OIR Commissioner thereafter entered a final order adopting the Hearing Officer's Report and Recommendations [R. 492-94]. (As will be discussed below, the Fifth DCA affirmed OIR's final order after Security First appealed.)

B. The OIR Rejected Tower Hill Insurance Group, LLC's Attempt to Attempt to Condition Post-Loss Assignment on the Written Consent of All Insureds, All Additional Insureds, and All Mortgagees.

In 2013, Tower Hill Insurance Group sought OIR's approval to add the following limitation on assignability to its policy as follows:

> No assignment of claims benefits shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s) named in this policy."

[R. 488-489]. OIR asked Tower Hill to "delete the Assignment of Benefits condition" [R. 489]. As a result of the OIR's review, "Tower Hill was required to remove its 'Assignment of Claims Benefits' language, which was identical in pertinent part to" Security First's AOB language [R. 489].

C. The OIR Rejected Heritage Property & Casualty Insurance Company's Attempt to Condition Post-Loss Assignment on the Written Consent of All Insureds, All Additional Insureds, and All Mortgagees.

On April 29, 2016, Heritage Property & Casualty Insurance Company submitted form filing 16-09214 to the OIR [R. 338-384]. Heritage had initially used the "informational filing" self-certification to include the AOB restriction that no AOB would be valid without "the prior written consent of all 'insureds', all additional insureds and all mortgagee(s) named in the policy" [R. 340; R. 353; R. 368; R. 388]. As will be discussed below in more detail, such "informational filings" are where an insurer can side-step OIR's full review of its new forms on the honor system by self-certifying that their policies comply with Florida law. (Security First and Tower Hill's AOB limitations discussed in subsections I.A. and

B. above underwent OIR's full review process resulting in the immediate rejection of their AOB limitations.)

When Heritage sought retroactive certification with a full review of those forms in 2016 [R. 339-41], including filing #13-11070 where "new condition 18. Assignment of Claims Benefits has been added" [R. 340; R. 353; R. 368], the OIR rejected Heritage's new policy form with this limitation. The OIR explained because the form: "Includes Assignment of Benefits language similar to that disapproved in Security First filings" that "the forms cannot be approved as submitted…" [R. 377]. The OIR told Heritage:

> [I]f the company is unwilling to make revisions involving the compliance issues already identified, it appears we will need to move forward with the disapproval of the filing. Of course, the company may choose to withdraw the filings without prejudice, if they like.

[R. 377]. Heritage withdrew the filing [R. 379].

D. The Fifth District Determined an Insurer's Attempt to Condition Post-Loss Assignment on the Written Consent of All Insureds, All Additional Insureds, and All Mortgagees Violates Florida Law.

1. Security First Appealed the OIR's Determination.

Security First appealed OIR's ruling to the Fifth District. *Security First Ins. Co. v. Fla. Office of Ins. Regulation*, 232 So. 3d 1157 (Fla. 5th DCA 2017). In *Security First v. OIR*, the Fifth District recognized the OIR had rejected Security First's efforts to place restrictions on an insured's assignment that required the written consent of all insureds, all additional insureds, and all mortgagees.

Security First v. OIR, at 1157-58. Security First argued the longstanding restrictions under Florida law only applied to provisions which required an insurer's consent to AOBs, not the consent of other insureds or mortgagees. *Id*. at 1158. That is the same argument Ark Royal makes in this case.

In rejecting this assertion, the Fifth District directly quoted from this Court's opinion in *Continental Cas. Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 377 at n.7 (Fla. 2008):

> The insurers argue that the "anti-assignment" clause in the GIA precludes an assignment, even subsequent to the loss. **However, "it is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss."** *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 77 So. 209, 210–11 (Fla. 1917); *accord Better Constr., Inc. v. Nat'l Union Fire Ins. Co.*, 651 So. 2d 141, 142 (Fla. 3d DCA 1995).

Security First v. OIR at 1158-59 emphasis (bold face) added, *quoting Continental Cas. v. Ryan* at 377 at n.7, alteration (bracketed insert) in original.

The Fifth District then recognized: "Many Florida cases involve requiring **insurer** consent, **but not all**." *Security First v. OIR* at 1159, emphasis added. After once again recognizing "the right to recover under an insurance policy is freely assignable after loss" the Fifth District held the OIR did not erroneously interpret the case law concerning the free assignment of post-loss claims, and affirmed the OIR's final order. *Id*.

The Fifth District did not address any public policy concerns, feeling they were appropriate for the Legislature, not the Courts. *Id.* at 1160-61.

2. The Fifth District Again Held the Restriction on Assignment Was Contrary to Florida Law.

ASI Preferred Insurance Corporation utilized the same AOB restrictions Security First, Tower Hill and Heritage tried to incorporate, and the same one Ark Royal advocates in this case:

> No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional insureds and all mortgagee(s) named in this policy.

Restoration 1 CFL*, LLC v. ASI Preferred Ins. Corp.*, 239 So. 3d 747, 747 (Fla. 5th DCA 2018). In *Restoration 1 CFL v. ASI*, a water restoration company (an affiliate of Petitioner/Cross Respondent) provided emergency water cleanup services. The insurer, ASI Preferred, underpaid and/or did not pay invoices for the emergency remediation services, and the water restoration company filed suit pursuant to an AOB. *Id.* at 747. The Restoration 1 CFL AOB did not contain the mortgagee's consent. *Id*. The trial court dismissed the complaint, finding: " '[I]t is not unlawful to require the mortgagee's consent to an assignment of benefits.' " *Restoration 1 CFL v. ASI* at 747.

However, the Fifth District determined it was indeed unlawful to require the mortgagee's consent, that such restriction on assignment violated Florida law:

> Because here, as in [*Security First v. OIR*], the clause improperly restricts the assignment of post-loss claim benefits, contrary to Florida law, we reverse the dismissal of Appellant's action and remand for further proceedings. *See id*.

Restoration 1 CFL v. ASI at 747-48.

E. Ark Royal Insurance Company Did Not Get OIR Approval When It Conditioned Post-Loss Assignment on the Written Consent of All Insureds, All Additional Insureds, and All Mortgagees.

1. The OIR Permitted "Informational Filings" Which Were Not Reviewed Before Use.

Pursuant to § 627.410(4), Fla. Stat., the OIR may exempt form filings when the statute "may not practicably be applied." On June 25, 2012, the OIR issued an "Order Exempting Specified Forms from the Requirements of Section 627.410, Florida Statutes."[2] The Exemption Order was issued out of necessity because OIR was simply overwhelmed by insurers' submissions:

> In recent years, insurers have filed a historically high number of property and casualty forms for the OFFICE'S review and approval. Additionally, several laws were passed that broadly affect property and casualty insurance in this state. This necessitated numerous changes to the industry's current policy forms, which in turn resulted in a high number of form filings with the Office. This current volume of form filings has taxed the OFFICE'S review resources, and resulted in a lengthier review period for many filings.

[R. 487]. The OIR's order exempted certain property and casualty forms from the review and approval process. The exemption order allowed insurers to bypass OIR review and approval, and instead file "informational filings" that contained a

[2] The OIR also issued exemption orders on December 3, 2012, and June 23, 2014, effectively extending the informational filing time period [R. 487-88].

notarized certificate stating the form complied with Florida law [R. 487]. Informational filing forms were taken at face value, and *not* reviewed or approved by the OIR prior to use [R. 487].[3] In other words, insurers could only use these informational filings on the honor system.

Although insurers were able to submit an informational filing during the exemption period, the exemption orders also "permitted companies to still file for the full review and approval under section 627.410, Florida Statutes, even while the Exemption Orders permitting informational filings were in effect" [R. 489]. For example, when Tower Hill sought to change its policy, and restrict AOBs on the written consent of all insureds, all additional insureds, and all mortgagees, it requested a full review [R. 488-489]. Security First did not try to restrict AOBs through an information filing, either [R. 86; R. 339]. Hertitage tried to at first, but later asked OIR for a retroactive full review. Based on that review, OIR rejected the restriction and Heritage withdrew the filing. Because the OIR actually reviewed these proposed restrictions on post-loss assignment, the OIR required the insurers to delete these restrictions on AOBs. Ark Royal has never sought OIR's full review.

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[3] The OIR noted in its June 24, 2013, exemption order that it was "undertaking an audit of selected form filings under the previous Orders to ascertain if any such forms contain violations of the Florida law…" [R. 488].

2. Ark Royal Submitted an Informational Filing, Verified the Form Complied with Florida Law, and Put the Form into Use Without OIR Review or Approval.

Within 2 months of OIR's first exemption order allowing informational filings, on August 20, 2012, Ark Royal submitted an informational filing [R. 28-83] containing many items, including the AOB limitation with a self-certification that its changes complied with Florida law. The AOB contained within Ark Royal's informational filing, which is the subject of this appeal stated:

> Assignment of Claim Benefits. No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional insureds and all mortgagee(s) named in this policy.

[R. 47].

II. This Case.

A. The Squitieris Insurance Policy Contained the Disapproved Restriction on Assignment.

Ark Royal insured Jon and Liza Squitieri under a renewal insurance policy during the period of June 1, 2016, to June 1, 2017 [R. 232-99]. The Policy's "Special Provisions for Florida" endorsement contained the same language from Ark Royal's informational filing which had been expressly rejected by the OIR in other filings made pursuant to § 627.410, Fla. Stat.:

> The following Condition is added:
>
> * * *

> 18. Assignment of Claim Benefits. No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional insureds and all mortgagee(s) named in this policy.

[R. 272]. The main Policy (a standardized Insurance Services Office, Inc. form HO-3 policy) did not contain this restriction [R. 255-58], it was only contained in the "Special Provisions for Florida" endorsement.

The Policy's declaration page listed the Squitieris as the named insureds and listed "PNC BANK NA, 13AOA,ATIMA PO BOX 743 SPRINGFIELD, OH 45501" as the mortgagee [R. 232].

The Policy also contained a "Loss Payment" provision and a "Mortgage Clause" which provided, in pertinent part:

> Loss Payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment.
>
> * * *
>
> Mortgage Clause. The word "mortgagee" includes trustee. If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear.

[R. 272].

B. The Squitieris Suffered a Loss and Liza Squitieri Executed an AOB in Favor of Restoration 1.

On August 24, 2016, the Squitieri residence suffered water damage [R. 16-21]. The Policy imposed specific duties on the Squitieris to protect their home

from further damage, and make reasonable and necessary repairs to protect the home:

> 2. Your Duties After Loss. In case of a loss to covered property, you must see that the following are done:
>
> * * *
>
> d. Protect the property from further damage. If repairs to the property are required, you must:
>
> (1) Make reasonable and necessary repairs to protect the property; and
>
> (2) Keep an accurate record of repair expenses;

[R. 255].

In order to comply with these contractual duties after the loss, Ms. Squitieri contracted with Restoration 1 to provide services to extract the water and mitigate the loss [R. 330]. Ms. Squitieri executed a direct pay authorization in favor of Restoration 1 [R. 331]. Ms. Squitieri also signed an "Assignment of Insurance Benefits" in consideration for the services Restoration 1 rendered [R. 332].

In exchange for the assignment of benefits, and in further consideration for "not requiring full payment at the time of service" [R. 332], Restoration 1 provided its services to mitigate the Squitieris' water damage. Restoration 1 completed its services on August 29, 2016 [R. 336], and its billing totaled $20,305.74 [R. 16-21].

On September 11, 2016, Ark Royal issued a letter to the Squitieris that rejected Ms. Squitieri's AOB because: "The document is missing signatures from

PNC BANK NA, ISAOA,ATIMA whose signatures are necessary for the assignment to be valid" [R. 25-26].

After rejecting the AOB, on November 2, 2016, Ark Royal issued a $2,612.12 check for the Squitieris' $20,305.74 loss. The check complied with the Policy's "Loss Payment" and Mortgage Clause" and protected the interest of all insureds and all mortgagees named in the Policy. Although Restoration 1 was a payee on the check, in order the receive any proceeds from the check Restoration 1 had to have consent of all insureds and the mortgagee, because the check was made payable to all insureds (Jon Squitieri and Liza Squitieri), the mortgagee (PNC BANK NA, ISAOA,ATIMA), Restoration 1, and "Coastal Claims Consultants, LLC" [R. 23]. All insureds and the mortgagee consented to Restoration 1's deposit of the check by endorsing the check [R. 334].

C. Restoration 1 Filed a Complaint Against Ark Royal, and Ark Royal Moved to Dismiss.

On December 16, 2016, Restoration 1 filed a lawsuit against Ark Royal [R. 4-102]. Restoration 1 claimed standing under the AOB and under an equitable assignment for the work it performed [R. 5]. The Complaint contained one count for a declaration that Ark Royal's AOB language was invalid and unenforceable under Florida law, and one count for breach of contract for underpaying the bill [R. 7-12]. The Complaint included OIR file materials showing that Ark Royal never sought OIR's review and approval for its AOB conditions [R. 28-83]. The

Complaint also included OIR file materials showing the OIR disapproved and rejected the same AOB language from Security First [R. 85-102].

Ark Royal moved to dismiss both counts of Restoration 1's Complaint, asserting a myriad of reasons why Restoration 1 allegedly did not have standing, and why Ark Royal's AOB condition allegedly did not violate Florida law [R. 108-324].

Restoration 1 responded and moved for summary declaratory judgment [R. 385-471]. Restoration 1 explained that Ark Royal's arguments were invalid. Although Ark Royal had self-certified its AOB clause complied with Florida law, Restoration 1 argued the restriction on AOBs did not comply with Florida law [R. 387]. Restoration 1 pointed out that OIR disapproved Security First's same restriction, and Heritage's nearly identical restriction as being contrary to Florida law [R. 388; R. 338-384].

In support of its arguments, Restoration 1 filed the OIR's Written Report and Recommendation In the Matter of: Security First Insurance Company, Case No.: 182865-15, and the Final Order in the Security First case [R. 473-494].[4] In the Report and Recommendation, the OIR explained in detail how Security First's *exact same* language did not comply with Florida law, was not approved by the OIR, and how the OIR outright rejected policy language conditioning AOBs on the

[4] *Security First v. OIR* had not been decided yet.

written consent of all insureds, all additional insureds, and all mortgagees [R. 473-494].

Ark Royal filed a Reply and Response [R. 495-505]. Ark Royal stated: "The OIR has never disapproved this policy language nor has it otherwise taken action against Ark as a result of the language" [R. 498]. While (maybe) technically true, the OIR had indeed repeatedly disapproved the policy language—it was word-for-word the same language Security First attempted to utilize:

> No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional "insureds" and all mortgagee(s) named in this Policy.

[R. 47; R. 88-90].

Despite the OIR's specific finding that requiring the written consent of all insureds, all additional insureds, and all mortgagee(s) rendered the restriction on post-loss AOBs invalid [R. 473-494], Ark Royal argued Security First was materially different and therefore inapplicable [R. 500]. Finally, Ark Royal speculated that the OIR's rejection of the exact same restriction on AOBs "is currently on appeal before the Fifth District Court of Appeal and will likely be overturned" [R. 500]. Ark Royal's prophecy proved false, and OIR's rejection was upheld. *Security First v. OIR*, *supra*.

Ark Royal's Motion to Dismiss was heard on March 13, 2017 [R. 582]. The Trial Court reserved ruling to review the case law [R. 582].

On March 17, 2017, the Trial Court granted Ark Royal's motion to dismiss, ordering as follows:

> 1. The insurance policy that forms the basis for the Breach of Contract Action contains an "Assignment of Claim Benefits" provision requiring all insureds, additional insureds and mortgagees to consent to any assignment of their rights in an insurance claim. The Assignment of Benefits upon which Plaintiff relies to establish standing in the above styled action is not executed by Jon Squitieri, a co-insured under the policy, and PNC Bank, N.A., the mortgagee named in the policy. Therefore, the Assignment of Benefits fails to comply with the subject policy's unambiguous condition that claims assignments be executed by all insureds and mortgagees. Accordingly, based upon the specific facts of this case, Plaintiff lacks standing to prosecute Count II of its Complaint (Breach of Contract) and, thus, Count is hereby dismissed.
>
> 2. The Office of Insurance Regulation is the legislative body empowered by Fla. Stat. §627.410 and §627.411 to approve and disapprove insurance forms. Plaintiff requests that this Court act against Ark Royal Insurance Company when the Office of Insurance Regulation has not. Accordingly, Count I of Plaintiff's Complaint (Declaratory Action) is hereby dismissed.

[R. 606-07]. Restoration 1 timely appealed the order dismissing its case to the Fourth District [R. 610-12].

D. The Fourth District Court of Appeal.

The Fourth District issued its opinion in *Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co*., 255 So. 3d 344 (Fla. 4th DCA 1018) on September 5, 2018. The Fourth District affirmed the Trial Court's dismissal of Restoration 1's Complaint and found the AOB limitation was valid: "we affirm the trial court's dismissal of the complaint and declaratory judgment action and hold that the

language of the assignment of benefits provision in the instant insurance contract is enforceable." *Restoration 1 v. Ark Royal* at 348.

In reaching its conclusion, the Fourth District distinguished this Court's opinion in *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209 (Fla. 1917) and its progeny on the grounds that they involved the *insurer's* consent to assignment. *Restoration 1 v. Ark Royal* at 347. The Fourth District distinguished the other cases relied on by the Fifth District because although they may not have involved insurers, "none of the cases cited in *Security First* discuss a condition on assignment that requires the consent of the insureds and mortgagees." *Id*. Therefore, the Fourth District concluded: "The central reasoning and holding of *West Florida Grocery Co.* does not extend to the facts of this case" *Restoration 1 v. Ark Royal* at 348.

The Fourth District attempted to distinguish *Security First v. OIR* by saying the OIR had not indicated any disapproval of Ark Royal restriction on assignment:

> We initially note that, in contrast to *Security First*, OIR disapproval is not at issue in the instant case. Ark Royal submitted the required certified, informational filing detailing this particular insurance contract to OIR, and **OIR has not indicated any disapproval of the specific language in question**—even though it is statutorily required to retroactively disapprove of any policy forms that do not meet the requirements of the insurance code. §§ 627.410(3), 411(1), Fla. Stat. (2018).

Restoration 1 v. Ark Royal at 347, emphasis added. The record evidence was replete with OIR's repeated "disapproval of the specific language in question" that

required "the written consent of all 'insureds', all additional insureds and all mortgagee(s) named in this policy." The OIR had expressly disapproved Security First, Tower Hill, and Heritage's use of the same "specific language" [R. 85-102; R. 474-94; [R. 338-384]. The fact that Ark Royal was able to slide this same language past OIR using an informational filing is certainly not a valid basis for distinguishing Ark Royal's restriction from those of Security First, Tower Hill or Heritage's. And, more importantly, it certainly provides no support for the misplaced conclusion that OIR has somehow approved Ark Royal's change. Neither does Ark Royal apparent avoidance of the OIR's random audit.

The Fourth District was also critical of the Fifth District's rationale, saying the Fifth District misquoted and overstated this Court's holding concerning assignment after loss:

> Further, in relying upon *West Florida Grocery*, the Security First opinion **misquotes (and thereby overstates)** the holding in that case. The Fifth District's opinion represents that the supreme court's holding is that "it is a well-settled rule that **[anti-assignment provisions do]** not apply to an assignment after loss." *Sec. First*, 232 So. 3d at 1158-59. However, the actual quote, without alterations, merely states that "it is a well-settled rule that the provision in a policy relative to the *consent of the insurer* to the transfer of an interest therein does not apply to an assignment after loss." *W. Fla. Grocery*, 209 So. at 210-11 (emphasis added).

Restoration 1 v. Ark Royal at 347, alteration (italics) in original, emphasis (boldface) added. The Fifth District did not misquote or overstate the holding by inserting the bracketed language. The Fifth District's quotation was an exact,

original quote—including the bracketed insertion—from *Continental Casualty Co. v. Ryan Inc. Eastern*, 974 So. 2d 368, 377 n. 7 (Fla. 2008), where this Court inserted the bracketed language. *Security First v. OIR* at 1158-59.

The Fourth District ultimately determined Ark Royal's restriction on AOB was valid and enforceable. *Restoration 1 v. Ark Royal* at 348. In doing so, the Fourth District certified conflict with *Security First v. OIR*. The Fourth District's opinion also expressly and directly conflicts with *Restoration 1 CFL v. ASI*. This Court has granted review on conflict jurisdiction.

SUMMARY

Ark Royal's unauthorized restriction on AOBs impermissibly restricts the named insured, Ms. Squitieri's, ability to freely assign her post-loss insurance claim. As a result, the Trial Court erred in finding Restoration 1 did not have standing to bring the claim, and the Fourth DCA committed error in finding Ark Royal's AOB restrictions enforceable.

STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss based on a question of law is subject to *de novo* review. *The Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

ARGUMENT

It is common knowledge that legislators have repeatedly debated AOB issues over the years with no legislative consensus. *See*, *e.g.*: HB 1421 (2017); SB 1038 (2017); HB 743 (2014); SB 708 (2014); and many more.

Insurers have also turned to the administrative process to limit AOBs. But, OIR has steadfastly rejected their attempts to restrict AOBs. Insurers have also unsuccessfully attacked AOBs in the courts. The limitation imposed by Ark Royal is just the latest salvo.

Ark Royal's AOB limitation renders the insured's ability to assign post-loss claims a practical impossibility. Emergency losses occur at all hours of the day, night, weekends, and on holidays when contacting the mortgagee would be impossible. But, even if the insured could contact "all mortgagee(s) named in this policy," those mortgagee(s) may no longer have an interest in the home (after repeated sales of the mortgage) when the loss occurs. But, even if the insured were able to contact the mortgagee(s), the insured would have to find a person at the mortgagee who 1) had the legal authority to bind the mortgagee, 2) was willing to review the AOB on an expedited basis, and 3) was willing to sign the AOB. All this before a vendor would agree to start the emergency services.

Additionally, this all presupposes that the insured could find their policy in the midst of an emergency. Many insureds don't have, or can't locate their

policies, especially in the aftermath of an emergency. If they could find the entire policy, then the vendor and the insureds would have to read through the policy and its endorsements to determine if this policy is one of the ones that requires the mortgagee(s) to sign the AOB. Given all these uncertainties, allowing Ark Royal's anti-assignment clause to stand will not only prevent Ark Royal's insureds' from assigning their benefits, but it will also impair the rights of insureds with other policies—whether the policy at issue requires the consent of mortgagees or not—because vendors would be leery of rendering their services without proof that the particular policy at issue didn't require mortgagee approval.

This would achieve the insurance industry's ultimate objective of eliminating AOBs without having to go through the legislative.

Noted above, the OIR has repeatedly disapproved and rejected insurers' requests to include restrictions on AOBs that require the written consent of all insureds, all additional insureds, and all mortgagees named in the policy. In this case, the *only* evidence showed that the OIR rejected the restriction on AOBs as being in violation of § 627.411(1)(a), (1)(b), and (1)(e) Fla. Stat.[5] [R. 96; R. 225;

[5] Section 627.411, Fla. Stat. Grounds for disapproval.—

(1) The office shall disapprove any form filed under s. 627.410, or withdraw any previous approval thereof, only if the form:

(a) Is in any respect in violation of, or does not comply with, this code.

R. 409; R. 474-94]. The OIR litigated this issue, involving an identical restriction on assignment, to conclusion in the Fifth District. *Security First v. OIR*, *supra*.

Restoration 1 anticipates Ark Royal will argue, as it did below, that its restriction on assignment is substantially different from Security First because the Security First restriction on AOBs contains "additional restrictions" [R. 499-500] and is "not identical to Ark Royal's provision" [4R. 223]. Such an argument completely ignores the language at issue that restricts the assignability of an AOB:

> No assignment of claim benefits, regardless of whether made before loss or after loss, shall be valid without the written consent of all "insureds", all additional "insureds", and all mortgagee(s) named in this policy.

[R. 88-90; R. 272]. This same restriction on assignment was the issue in both *Security First v. FLOIR* and *Restoration 1 v. Ark Royal*. This is the finite policy language that the OIR has consistently rejected as being in violation of § 627.411, Fla. Stat., the statute it is charged with enforcing.

Although the Trial Court acknowledged "The Office of Insurance Regulation is the legislative body empowered by Fla. Stat §627.410 and §627.411

(b) Contains or incorporates by reference, where such incorporation is otherwise permissible, any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

* * *

(e) Is for residential property insurance and contains provisions that are unfair or inequitable or encourage misrepresentation.

to approve and disapprove insurance forms," it committed error when it ignored the OIR's rejection of the same limitations on AOBs [R. 606-07]. Similarly, the Fourth District erred when it ignored the record evidence and claimed:

> **OIR has not indicated any disapproval of the specific language in question**—even though it is statutorily required to retroactively disapprove of any policy forms that do not meet the requirements of the insurance code. §§ 627.410(3), .411(1), Fla. Stat. (2018).

Restoration 1 v. Ark Royal at 347, emphasis added. To the contrary, OIR repeatedly rejected the exact same language. Indeed, in the very words of the OIR's administrative hearing officer:

> There is no evidence in this record that the OFFICE has ever approved, pursuant to section 627.410, Florida Statutes, language such as is at issue in the Assignment Endorsements conditioning the validity of a post-loss assignment on the written consent of all " 'insureds,' all 'additional insureds,' and all mortgagee(s)" named in the policy.

[R. 479]. And again: "In short, there is no evidence presented in the record that the OFFICE has ever approved the inclusion of the language at issue in this case" [R. 490].

I. As Assignee, Restoration 1 Stood in the Shoes of the Assignor, Ms. Squitieri.

Ms. Squitieri assigned "all insurance rights, benefits, proceeds and any causes of action" arising out of the August 24, 2016, water loss to Restoration 1. As a result of the assignment, Restoration 1 was for all practical legal purposes the

named insured. In *Dove v. McCormick*, 698 So. 2d 585 (Fla. 5th DCA 1997), the court stated:

> Generally, an assignor conveys to the assignee his or her rights and interests in the property or interest assigned. In other words, the "assignee stands in the shoes of his assignor." Furthermore, where a statute is silent, the courts "fill in the inevitable statutory gaps" by relying on the common law. On the subject of assignments, the common law "speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.*"

Dove at 589, alteration (italics) in original, citations omitted. *See also*, *All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So. 2d 131, 132 (Fla. 1972) ("[A]n assignee of an insurance claim stands to all intents and purposes in the shoes of the insured….").

In *Lauren Kyle Holdings, Inc. v. Heath-Peterson Const. Corp*., 864 So. 2d 55, 58 (Fla. 5th DCA 2003), the court stated:

> An assignment is a transfer of all the interests and rights to the thing assigned. The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name. Because an assignment vests in the assignee the right to enforce the contract, an assignor retains no rights to enforce the contract after it has been assigned.

Lauren Kyle at 58, citations omitted. The Fourth District understands this as well:

> An assignor of a note conveys to the assignee his or her rights and interest in the note assigned. As a matter of substantive law, the assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in his own name.

Nolan v. MIA Real Holdings, LLC, 185 So. 3d 1275, 1276 (Fla. 4th DCA 2016).

No one disputes that Ms. Squitieri alone can retain Restoration 1 to protect the property. No one disputes that Ms. Squitieri can sue Ark Royal for failing to pay the Restoration 1 bill. There is absolutely no valid reason why Ms. Squitieri cannot assign those very same rights to Restoration 1 in exchange for Restoration 1's agreement to fix her house. Restoration 1 would simply be standing in Ms. Squitieri's shoes. Nothing more, and nothing less. Ark Royal's restriction on this long accepted right to freely make such an assignment is contrary to Florida law.

II. A Post-Loss Insurance Claim Is a Chose in Action, Freely Assignable Under Florida Law.

Black's Law Dictionary defines a "Chose in Action" in pertinent part as "The right to bring an action to recover a debt, money, or thing." CHOSE, Black's Law Dictionary (10th ed. 2014). In *One Call Prop. Services, Inc. v. Security First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015), the Fourth District itself noted:

> A chose in action arising out of contract is assignable and "may be sued upon and recovered by the assignee in his own name and right." *Spears v. W. Coast Builders' Supply Co.,* 101 Fla. 980, 983, 133 So. 97, 98 (1931). "A claim on an insurance policy is a chose in action and is assignable as such." *United Cos. Life Ins. Co. v. State Farm and Fire Cas. Co.,* 477 So. 2d 645, 646 (Fla. 1st DCA 1985).

One Call v. Security First at 752-53, footnote omitted.

The parties agree that insurance policy provisions which require the *insurer*'s consent for an AOB are unenforceable. *Restoration 1 v. Ark Royal* at 345-46, referencing and citing to *West Florida Grocery*, *supra*. However:

> Ark Royal explains that the exception set forth in *West Florida Grocery* is simply that an insurance company cannot condition an assignment of rights upon the insurer's consent. A significant difference exists between requiring the insurer's consent and requiring the consent of the insureds and mortgagees. Ark Royal argues against extending this "narrow common law exception" to create a new public policy rule that prohibits any burden on any assignment whatsoever.

Restoration 1 v. Ark Royal at 345. Ark Royal makes a distinction without a difference—a restriction on assignment of a post-loss insurance claim is a restriction on assignment of a post-loss insurance claim, no matter whose consent is required.

An insurer's ability to restrict assignment of the policy itself is logical, since "the purpose of such nonassignability clauses is 'to prevent an increase of risk and hazard of loss by a change of ownership without the knowledge of the insurer.' " *Lexington Ins. Co. v. Simkins Indus., Inc*., 704 So. 2d 1384, 1385 (Fla. 1988). However, no such interest exists after a loss, *Lexington* at 1386, n.3, since the damages and exposure are fixed at the time of loss, regardless of the individual or entity bringing the claim for policy proceeds. *See*, *e.g*., *Williams v. Auto Owners Ins. Co*., 779 So. 2d 563, 565 (Fla. 2d DCA 2001) (Rights under a fire insurance policy "are fixed both as to amount and standing to recover at the time of the fire loss." quoting *Counihan v. Allstate Ins. Co*., 25 F.3d 109, 113 (2d Cir. 1994)); *cf. Bioscience West, Inc. v. Gulfstream Prop. & Cas. Ins. Co*., 185 So. 3d 638, 642 (Fla. 2nd DCA 2016) ("Ms. Gattus, however, did have an insurable interest at the

time of the loss. Ms. Gattus, the insured/assignor, then assigned her vested insurable interest by the post-loss execution of the assignment of benefits to Bioscience, permitting Bioscience to step into Ms. Gattus's shoes.")

III. An Insurance Company Cannot Condition an Individual's Right to Assign Post-Loss Claims on the Consent of Others.

Both the Fifth District and the OIR recognized what the Fourth District did not: Florida law prohibits an insurer from placing conditions on post-loss assignment. This maxim is not only limited to requiring the insurer's permission to assign. The Fifth District recognized: "Many Florida cases involve insurer consent, but not all." *Security First v. OIR* at 1159. The OIR addressed this argument head-on:

> SECURITY FIRST is not contesting the well-settled point of Florida law that policy language requiring the insurer's consent for a post-loss assignment of benefits is not enforceable. Rather, SECURITY FIRST argues that is all Florida law prohibits. **However, while some cases are couched in terms of the insurers' consent, other cases more broadly hold that any provisions restricting or barring a post-loss assignment are invalid**. *See*, *e.g.*, *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 n.7 (Fla. 2008) ("[I]t is a well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss." (quoting *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 12 Fla. 220, 77 So. 209, 210-11(1917))); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 753 (Fla. 4th DCA 2015) ("Even when an insurance policy contains a provision barring assignment of the policy, an insured may assign a post-loss claim."); *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So. 3d 1, 3 (Fla. 5th DCA 2015), *reh'g denied* (May 11, 2015) ("Dating back to 1917, the Florida Supreme Court recognized that provisions in insurance contracts requiring consent to assignment of the policy do not apply to assignment after loss."); *Better Const., Inc. v. Natl Union Fire Ins.*

> *Co*., 651 So. 2d 141, 142 (Fla. 3d DCA 1995) ("[A] provision against assignment of an insurance policy does not bar an insured's assignment of an after-loss claim."); *see also Erickson's Drying Sys., Inc. v. QBE Ins. Corp*., 2012 WL 469746, at *2 (M.D. Fla. Feb. 13, 2012) (unreported) ("Florida law is clear that an insured can assign rights to an insurance policy even in the presence of an anti-assignment clause if the assignment occurs after the loss."); *Belfor USA Group, Inc. v. Bray & Gillespie, LLC*, 2008 WL 276022, at*2 (M.D. Fla. Jan. 31, 2008) ("Under Florida law, an insured may assign its interest in insurance proceeds to a third party after a loss irrespective of the fact that the insurance policy contains a nonassignment clause.").

[R. 481-82, footnotes omitted, emphasis added].

This general rule—restrictions on assignment not limited to an insurer's consent—arises out of the fact post-loss claims have long been "*freely* assignable":

> [T]he right to recover is **freely assignable after loss** and that an assignee has a common-law right to sue on a breach of contract claim. Dating back to 1917, the Florida Supreme Court recognized that provisions in insurance contracts requiring **consent to assignment of the policy do not apply to assignment after loss**. *W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.,* 74 Fla. 220, 77 So. 209, 210–11 (1917); *see Cont'l Cas. Co. v. Ryan Inc. E.,* 974 So. 2d 368, 377 n. 7 (Fla. 2008) (reaffirming the principle from *W. Fla. Grocery Co.* that the law is well-settled that anti-assignment provisions do not apply after loss); *Lexington Ins. Co. v. Simkins Indus., Inc.,* 704 So. 2d 1384, 1386 n. 3 (Fla. 1998) ("[A]n insured may assign insurance proceeds to a third party after a loss, even without the consent of the insurer." (citing *Better Constr., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 651 So. 2d 141, 142 (Fla. 3d DCA 1995))). **Furthermore, the right to sue for a breach of contract to enforce assigned rights was recognized early in Florida history**. *See Nationwide Mut. Fire Ins. Co. v. Pinnacle Med., Inc.,* 753 So. 2d 55, 57 (Fla. 2000) ("**The right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution**." (citing *Robinson v. Nix,* 22 Fla. 321 (1886))).

> In section 627.405, the Legislature did not state that it was displacing **well-settled common law of (1) the free assignability of contractual rights to recover or (2) the inability for insurers to restrict post-loss assignments**.

Accident Cleaners, Inc. v. Universal Ins. Co., 186 So. 2d 1, 3 (Fla. 5th DCA 2015), emphasis added. Insurers cannot restrict post-loss assignments of claim, whether by requiring the insurer's consent or someone else's consent.

This longstanding rule against limiting assignment is not just for insurance companies. Contractual language requiring *any* consent for assignment does not apply to a chose in action for breach of the contract:

> Contractual language requiring consent for the assignment of contracts, contractual interests, rights, and obligations has no effect on the assignment of a chose in action for breach of the contract. *C.P. Motion, Inc. v. Goldblatt*, 193 So. 3d 39, 43 (Fla. 3d DCA 2016); *Aldana v. Colonial Palms Plaza, Ltd*., 591 So. 2d 953, 955 (Fla. 3d DCA 1991); *Paley v. Cocoa Masonry, Inc*., 433 So. 2d 70, 70–71 (Fla. 2d DCA 1983) ("[T]he prohibition of a contract against assignment is against an assignment of rights and privileges under the contract. That prohibition does not prohibit the assignment of a claim for damages on account of breach of contract."). "[C]hoses in action arising out of contract are assignable and may be sued upon and recovered by the assignee in his own name and right." *Spears v. W. Coast Builders' Supply Co*., 101 Fla. 980, 133 So. 97, 98 (1931) (citing *Robinson v. Springfield Co*., 21 Fla. 203 (Fla. 1885)).

Spa Creek Services, LLC v. SW Cole, Inc., 239 So. 3d 730 (Fla. 5th DCA 2017).

Similarly, Ark Royal's attempted restriction "has no effect on [Ms. Squitieri's] assignment of a chose in action for breach of the contract."

In *Cordis Corp v. Sonics Intern., Inc.*, 427 So. 2d 782 (Fla. 3rd DCA 1983), the Court held:

> It is clear that, while contractual provisions against assignability are generally enforceable in Florida, *Troup v. Meyer,* 116 So. 2d 467 (Fla. 3d DCA 1959), the clause relied on by Sonics is inapplicable to the present situation. One which, like this, forbids only the assignment of a party's "rights" under a contract simply does not preclude the assignment of an accrued claim for damages arising from its breach. *Rosecrans v. William S. Lozier, Inc.,* 142 F.2d 118, 124 (8th Cir. 1944) ("The prohibition of the contract against assignment is against an assignment of the rights and privileges under the contract. This prohibition of assignment does not, however, prohibit the assignment of a claim for damages on account of breach of the contract."); *Charles L. Bowman & Co. v. Erwin,* 468 F.2d 1293, 1297 (5th Cir.1972) ("The law draws a distinction ... between assignment of performance due under a contract and assignment of the right to receive contractual payments."); *Trubowitch v. Riverbank Canning Co.,* 30 Cal.2d 335, 182 P.2d 182 (1947); see also, *Portuguese-American Bank of San Francisco v. Welles,* 242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116 (1916).

Cordis at 783; *also CP Motion, Inc. v. Goldblatt*, 193 So. 3d 39 (Fla. 3rd DCA 2016) (holding that restriction on assignment did not prevent assignee from pursuing claim for damages arising from breach of contract); *Aldana v. Colonial Palms Plaza, Ltd*., 591 So. 2d 953 (Fla. 3d DCA 1991) (holding that anti-assignment clause did not prevent assignment of right to receive payments due).

IV. Ark Royal's Restriction on AOBs Serves No Valid Purpose, and Certainly Not Any that Outweighs Ms. Squitieris' Right to Assign the Post-Loss Benefits.

The above sections demonstrate restrictions on the assignability of an insured's post-loss claims have long been deemed unenforceable. The reasoning

underlying the long held principal is sound, and retaining an insured's ability to assign post-loss claims is an important right that must be protected.

When the Squitieris' home suffered water damage, their Ark Royal insurance policy imposed specific duties on the Squitieris to protect their home from further damage and to make reasonable and necessary repairs to protect the home from further damage [R. 255]. In order to comply with these contractual duties after the loss, Ms. Squitieri contracted with Restoration 1 to provide emergency services to mitigate the loss [R. 330].

In consideration for emergency repairs to her property, and in consideration for "not requiring full payment at the time of service," Ms. Squitieri assigned her insurance benefits, proceeds, and causes of action to Restoration 1 [R. 15]. In exchange for this promise, Restoration 1 quickly completed such emergency repairs and services.

Ms. Squitieri's AOB was a transfer of her chose in action: a personal property right that cannot be unreasonably encumbered by restrictions on alienability. This Court has observed that "Personal property, as well as real property, at common law was subjected to the rule against restraints on alienation." *Reimer v. Smith*, 105 Fla. 671, 675 (1932). Nonetheless, by using the same language expressly condemned by the OIR as violating § 627.411, Fla. Stat., Ark

Royal argues it *can* place such limitations on Ms. Squitieri in order to restrict post-loss assignment of claims against it. It cannot.

In *Bioscience West*, *supra*, the Court wisely recognized the valid need for AOBs for emergency water mitigation companies, and being able to freely assign those benefits without the consent of others:

> [I]t is imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs. Repairing a home after an unexpected loss event is often a time-sensitive procedure. An insured simply cannot afford to wait for an insurance claim to be adjusted to address that loss, and insurance benefits represent the most ready means of paying for post-loss emergency repairs.

Bioscience West at 643. The same rationale applies here, regardless of whether the insurer is trying to require its own consent to the AOB, or trying to require the consent of other insureds, and/or the mortgagee. Even though *Bioscience West* was related to an insurer's consent, as Restoration 1 has stated above: Whether the insured has to obtain consent from the insurer, additional insureds, or mortgagee(s), it is a distinction without a difference. Emergency water remediation is a time-sensitive procedure, and an insured simply cannot afford to wait for a written consent of all insureds, all additional insureds, and all mortgagees to address that loss. The assigned insurance proceeds represent the most ready means of paying for post-loss emergency repairs.

This is certainly not a new concept. Over 160 years ago, the Supreme Court of New York declared:

> There is certainly not the same reason for prohibiting an assignment after a loss, as before. After the loss the confidential relation of insurer and insured no longer exists, but a new relation has arisen out of it, to wit, that of debtor and creditor; and it is difficult to see any reason connected either with public policy or the proper rights of the former, why the latter should not be permitted to deal with and concerning this right in action as he is permitted to do in respect to any other absolute right, and transfer the same in payment of debts or to meet the other necessities of business. Ordinarily, it is of the first importance that those who have sustained loss by fire should immediately realize the amount of their insurance, to replace the property destroyed, and it is not unfrequently indispensable, to prevent the utter ruin of the sufferer, that he should receive prompt aid by means of his insurance; and if the company cannot, or will not, pay promptly, he should be permitted to anticipate his claim by transferring it, either by sale or pledge. If he cannot do this, he may be in the power of the company and subjected to such terms as the managers may see fit to impose. They may say, in effect, to the man who has bargained with them for absolute indemnity, and to whose business prospects delay is utter ruin, or whose family are in pinching want for the relief which this indemnity would afford, "accept of the pittance we offer or we will contest your claim and avail ourselves of such delays as a litigation will afford; and as you cannot realize the amount by sale or pledge, without incurring a forfeiture of the claim, you must await our inclination, or the slow result of a lawsuit, before you can recover the money to which you are entitled and which you so much need."

Goit v. Nat'l Prot. Ins. Co., 1855 N.Y. App. Div., 25 Barb. 189, 193-194, 1855 WL 6047 (N.Y. Gen. Term. 1855)

Such time sensitive repairs are frustrated by Ark Royal's requirement that any AOB have the "written consent" of the mortgagee. The Squitieri's mortgagee identified in the Policy is at a Post Office Box in the State of Ohio.

The time sensitive repairs are even further frustrated by the requirement that any AOB have the written consent of all "insureds." The Policy defines "insured" as "you and residents of your household who are: a. Your relatives; or b. Other persons under the age of 21 and in the care of any person named above" [R. 247]. A resident relative may be traveling overseas or in college and incapable of giving written consent; "Under the age of 21" may be a child legally incapable of entering into an AOB. Lastly, the time sensitive repairs are even further frustrated by the requirement that any AOB have the written consent of all "additional insureds" which are not even defined in the Policy. How would the insureds and vendors even know whose consent was required?

In *West Florida Grocery*, this Court concluded consent by an insurer was "superfluous" because the insurer would still have to pay the covered loss. *West Florida Grocery* at 211. The Fourth District tried to distinguish Ark Royals' restriction on this ground, arguing it would be "impossible" to call Ark Royal's provision superfluous:

> In the instant case, as Ark Royal argued in its motion to dismiss below, it is impossible to brand the contested provision as superfluous—as both of the insureds, as well as the mortgagee, have a

> vested interest that a reputable, legitimate third-party contractor perform repairs on the home.

Restoration 1 v. Ark Royal at 347-48. The Fourth District is simply wrong. The Policy's Loss Payment provision and Mortgage Clause provide this same protection. Ark Royal availed itself of Loss Payment provision and Mortgage Clause and included the other insured, and mortgagee on the loss payment check. Therefore, the AOB restrictions were superfluous.

The Policy's "Loss Payment" clause states, in pertinent part: "We will adjust all losses with **you**. **We will pay you** unless some other person is named in the policy or is legally entitled to receive payment" [R. 272, emphasis added]. "You" is defined in the Policy as "the 'named insured' shown in the Declarations and the spouse if a resident of the same household" [R. 247].

The Policy's "Mortgage Clause" states, in part: "If a mortgagee is named in this policy, any loss payable under Coverage A or B **will be paid to the mortgagee** and you, as interests appear" [R. 272, emphasis added].

When Ark Royal paid toward the Squitieris' August 24, 2016, emergency water claim, Ark Royal protected the insureds' and mortgagee's interest by including them all on Restoration 1's check [R. 333]. If the mortgagee or any insured needed to exercise their "vested interest that a reputable, legitimate third-party contractor perform repairs on the home," or was unhappy in any way with the services Restoration 1 provided, they could have protected their interests by simply

not signing the check until the repairs were completed to their satisfaction. Of course, since they signed the check and indicated no dispute with the repair, Ark Royal has now received a windfall based on its impermissible and superfluous AOB restrictions.

No legitimate interest could justify restricting an insured's right to transfer her rights and claims to post-loss benefits due, especially when the AOB is traded for policy-mandated repairs to the insured residence.

V. This Case Was Not Suitable For Termination on a Motion to Dismiss.

This Court holds:

> The purpose of a motion to dismiss is to determine whether the plaintiff has alleged a good cause of action, and for purposes of passing on a motion to dismiss a complaint, the court must assume that all facts alleged in the complaint are true.

Hammonds v. Buckeye Cellulose Corp., 285 So. 2d 7, 11 (Fla. 1973). The purpose of a motion to dismiss is not to determine issues of fact. *Fla. Farm Bureau Gen. Ins. Co. v. Ins. Co. of N. Am.*, 763 So. 2d 429, 432 (Fla. 5th DCA 2000) ("A motion to dismiss should not be used to determine issues of ultimate fact and may not act as a substitute for summary judgment." Citations and internal quotation marks omitted). The Court is required to resolve every reasonable conclusion or inference in favor of the non-moving party. *Meyers v. City of Jacksonville*, 754 So. 2d 198, 202 (Fla. 1st DCA 2000); *Weaver v. Leon County Classroom Teacher's Ass'n*, 680 So. 2d 478, 481 (Fla. 1st DCA 1996).

At the time the motion to dismiss was granted, factual issues remained which prevented dismissal of Restoration 1's lawsuit. For example, Restoration 1 sufficiently pled that it had complied with all conditions precedent to the Complaint and to recover under the Policy [R. 11]. That was sufficient pleading of factual allegations to survive a motion to dismiss. Fla. R. Civ. P. 1.120(c) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred."). To go further would require an evidentiary hearing and factual adjudication directed to the validity of the AOB (the condition precedent).

For example, the restriction on assignment merely says an AOB must have the "written consent" of all insureds, all additional insureds (whomever they may be), and the mortgagee [R. 272]. The AOB condition does not say when the written consent must be obtained, or that the written consent must be on the AOB form itself. It merely says "written consent." The mortgage agreement is not in the record. The mortgage agreement may (or may not) authorize the insured to act on the mortgagee's behalf, may (or may not) consent to assignment with regard to post-loss claims, or may (or may not) waive any such condition. The Trial Court did not know, yet made a factual determination that there was no written consent because it wasn't on the fact of the AOB, which is not even required.

Since no time frame is placed on the "written consent" requirement,[6] Restoration 1 could have obtained Mr. Squitieri's or the mortgagee's consent at a later date. Ms. Squitieri may even possess her husband's and the mortgagee's written consent, to be produced in non-party discovery. These facts about written consent are unknown, yet the Trial Court adjudicated them against Restoration 1 in a motion to dismiss. This was error.

Restoration 1's Complaint also alleged that all conditions precedent to the lawsuit and to entitle Restoration 1 to recover under the Policy had been waived [R. 11]. Whether Ark Royal waived this condition[7] was a question of fact. *Bolin v. State*, 793 So. 2d 894, 897 (Fla. 2001); *Hill v. Ray Carter Auto Sales*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999) ("Whether a waiver has occurred in any given situation is generally a question of fact.").

The Trial Court also had to make a factual determination that the Policy's Florida endorsement actually contained the restriction on AOBs. However, a certified copy of the Policy was never before the Trial Court or the Fourth District.

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[6] Heritage proposed language would have required "the **prior** written consent of all 'insureds', all additional insureds and all mortgagee(s) named in the policy" [R. 353, emphasis added].

[7] Indeed, Ark Royal could have waived this condition precedent by failing to properly plead it, had the case gone that far. *Ingersoll v. Hoffman*, 589 So. 2d 223, 225 (Fla. 1991); *Hodusa Corp. v. Abray Construction Co*., 546 So. 2d 1099 (Fla. 2d DCA 1989).

Further, Ms. Squitieri may have been acting as the actual or apparent agent of the mortgagee or of her husband, with permission to authorize an AOB on their behalf. "An agency relationship can arise by written consent, oral consent, or by implication from the conduct of the parties." *Stalley v. Transitional Hosps. Corp. of Tampa, Inc*., 44 So. 3d 627, 630 (Fla. 2d DCA 2010) (citing *Thompkin Corp. v. Miller*, 24 So. 2d 48, 49 (Fla. 1945)). Whether an agency relationship between two related parties exists is decided by "the trier of fact." *S. Fla. Coastal Elec., Inc. v. Treasures on the Bay II Condo Ass'n*, 89 So. 3d 264, 267 (Fla. 3d DCA 2012) (citing *Moore v. River Ranch, Inc*., 642 So. 2d 642, 643-44 (Fla. 2d DCA 1994). As an issue of fact, a jury could have concluded that Mr. Squitieri and the mortgagee's conduct of endorsing Restoration 1's payment constituted written consent or ratified the agency. Thus, dismissing the case was error.

Factual issues also remained whether Restoration 1 was entitled to an equitable assignment for the work it performed. In general, an act that vests in one party the right to receive funds arguably due another party (like Restoration 1's emergency restoration services) may operate as an equitable assignment. *McClure v. Century Estates, Inc*., 120 So. 4, 10 (Fla. 1928). Moreover:

> No particular words or form of instrument is necessary to effect an equitable assignment, and any language, however informal, which shows an intention on the other to receive, if there is valuable consideration, will operate as an effective equitable assignment.

Giles v. Sun Bank, N.A., 450 So. 2d 258, 260 (Fla. 5th DCA 1984). This Court recognizes that an assignment may be oral and proven by parol evidence:

> It is undoubted that the creditor of an account receivable or other similar chose in action arising out of contract may assign it to another so that the assignee may sue on it in his own name and make recovery. Formal requisites of such an assignment are not prescribed by statute and it may be accomplished by parol, by instrument in writing, or other mode, such as delivery of evidences of the debt, as may demonstrate an intent to transfer and an acceptance of it.

Blvd. Nat'l Bank of Miami v. Air Metal Indus. Inc., 176 So. 2d 94, 97-98 (Fla. 1965). The Trial Court and Fourth District erred by dismissing the complaint in the face of the equitable assignment. *WM Specialty Mortgage, LLC v. Salomon*, 874 So. 2d 680, 682-83 (Fla. 4th DCA 2004) (holding complaint stated a cause of action where a subsequently filed assignment executed after the date of the filing of the complaint indicated that mortgage was transferred to the plaintiff before the complaint was filed, raising the possibility of an equitable assignment).

CONCLUSION

The Trial Court erred when it determined Restoration 1 did not have standing to pursue its claims. The Fourth District erred when it deemed Ark Royal's unauthorized and unapproved restriction on AOBs was valid. For the foregoing reasons, the Fourth District's opinion and Trial Court's order should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to Thomas Keller, Esquire [tkeller@butler.legal, arusso@butler.legal, zhasbini@butler.legal], D. Grayson Kelly, Esquire [gkelly@butler.legal, eservice@butler.legal], Gray Proctor, Esquire [gray@appealsandhabeas.com], Kenneth Bell, Esquire and Lauren Purdy, Esquire [kbell@gunster.com; lpurdy@gunster.com, aarmstrong@gunster.com, eservice@gunster.com]; Scott Millard, Esquire and Jordan Mejeur, Esquire [smillard@itsaboutjustice.law, jmejeur@itsaboutjustice.law, rachael@itsaboutjustice.law.]; Mark K. Delegal, Esquire and George N. Meros, Esquire [mark.delegal@hklaw.com, kay.akridge@hklaw.com, george.meros@hklaw.com, charlene.roberts@hklaw.com, Becky.Hilliard@hklaw.com]; Ashleigh Kalifeh, Esquire [akalifeh@capcityconsult.com]William W. Large, Esquire [william@fljustice.org]; Philip M. Burlington, Esquire [pmb@FLAppellateLaw.com, kbt@FLAppellateLaw.com]; Kansas R. Gooden, Esquire [kgooden@boydjen.com, dperalta@boydjen.com, kbelton@boydjen.com]; Trenton H. Cotney, Esquire [tcotney@cotneycl.com; mbritt@cotneycl.com, lcox@cotneycl.com, courtfilings@cotneycl.com]; Thomas P. Crapps, Esquire [tom@meenanlawfirm.com; tim@meenanlawfirm.com;

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY in compliance with 9.210(a)(2), the font used in this Response is Times New Roman 14-point font.

Respectfully submitted,

Mark A. Nation, Esquire