

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION**

JANEY DUPONT-BUTLER, et al.,

Plaintiffs,

v.

Case No. 1:20-cv-35-AW-GRJ

**AMERICAN STATES INSURANCE
COMPANY,**

Defendant.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Mount Moriah First Missionary Baptist Church trustees sued American States Insurance Company after a hurricane damaged church property. ECF No. 1-3 at 4-8 (SAC). ASIC initially determined the Church had a covered loss, but it ultimately decided the recoverable loss was less than the deductible, meaning there was nothing owed. ECF No. 22-1. The Church obtained an estimate saying the loss was greater. ECF No. 1-7. It made a claim, and it later sued.

Both parties have moved for summary judgment. The Church moves for partial summary judgment, arguing that there is no dispute that there is a covered loss because all agree that hurricane winds caused at least some roof damage. ECF No. 22 at ¶ 46 (“The only issue with respect to the roof that needs to be decided by a jury is the amount . . . ”). ASIC, on the other hand, argues the Church is not entitled to recovery regardless of the loss amount. It argues there can be no

Replacement Cost Value (RCV) recovery because the Church never made repairs (a contractual prerequisite). And it argues there can be no Actual Cash Value (ACV) recovery because the Church never made an ACV claim. ECF No. 24. Because granting ASIC's motion would end the case, I will start with it.

I.

First, the parties agree that the Church cannot recover RCV. That is available only after an insured makes repairs, and the Church has not done that. So the only possible recovery is of ACV.

Although not precisely delineated, ASIC has four arguments as to why the Church cannot recover ACV. Its primary argument is clear: it contends the Church never made a presuit demand for ACV, so ASIC's failure to pay ACV was not a breach. Its remaining three arguments are a bit blended. ASIC contends that even if there were a breach, the complaint limited the relief sought to RCV. It also contends that—separate from the pleading issue—the Church litigated this case as if it were an RCV case and cannot change course now. And finally, it contends that the Church never had a valid ACV estimate even at the summary judgment stage, so the claim cannot survive. *See* ECF No. 34 at 5-6.¹

¹ This argument is in the reply to ASIC's summary judgment motion, but at the hearing, ASIC argued this point as to both motions.

A.

The Church made a presuit insurance claim when it submitted an estimate calculating the loss at approximately \$157,000. The estimate included the cost to repair the damage to the church (the RCV), but it calculated depreciation at zero percent. ECF No. 1-7. So although the estimate had a separate ACV column, the RCV and the ACV were the same. *See* ECF No. 1-7.

In ASIC's view, this initial estimate was solely an RCV estimate, despite the ACV column. ECF No. 24 at 2. Thus, it contends, the Church never specifically claimed ACV, so it waived its right to an ACV recovery.

It is true that "depreciation is necessarily part of actual cash value damages."

Buckley Towers Condo., Inc. v. QBE Ins. Corp., 395 F. App'x 659, 666 (11th Cir. 2010) (citing *Goff v. State Farm Fla. Ins. Co.*, 999 So. 2d 684, 689 (Fla. 2d DCA 2008)). But the Church insists its estimate was sufficient to claim ACV because ACV derives from the RCV. So, the argument goes, "by definition the initial estimate submitted necessarily includes ACV." ECF No. 28 ¶ 27; *cf. also Trinidad v. Fla. Peninsula Ins. Co.*, 121 So. 3d 433, 443 (Fla. 2013) ("[A]ctual cash value is defined as replacement cost minus depreciation."). From this, the Church argues that "a jury could easily find that [it] made a valid ACV claim." ECF No. 28 ¶ 76.²

² The Church also argues that it has now (in the summary-judgment phase) submitted a new estimate, complete with depreciation. That new estimate, of course,

The Eleventh Circuit considered a similar situation in *Buckley Towers Condominium, Inc. v. QBE Ins. Corp.*, 395 F. App'x at 666. The insurer in that case maintained that because the plaintiff had not accounted for depreciation in its estimate, it had submitted an RCV claim, not an ACV claim. *Id.* The court affirmed the denial of the insurer's motion for judgment as a matter of law:

[E]ven though depreciation is necessarily part of actual cash value damages, the insurance contract does not affirmatively obligate the insured to include depreciation in its initial proof of loss. . . . Imposing on [Plaintiff] the affirmative obligation to set forth depreciation . . . would add a new term to the insurance contract, which we are not free to do.

Id. (marks and citations omitted).

Similarly, ASIC argues here that that the Church never submitted an ACV claim that accounted for depreciation. But it doesn't point to a policy provision saying that the Church had to present a depreciation calculation presuit to avoid forfeiting its ACV claim.³

does not bear on whether the Church made a presuit ACV claim or whether it was obligated to. The new estimate is discussed further below.

³ The “loss payment” provision of the policy suggests that the insured need not submit an ACV estimate. That provision states ASIC “will determine the value of lost or damaged property, or the cost of its repair or replacement, in accordance with the applicable terms of the Valuation Condition in this Coverage Form.” ECF No. 1-10 at 28. Plus, as ASIC acknowledged at the hearing, it never required a Proof of Loss; this was a more informal claims process.

In addition, as noted above, the Church's estimate did include the term "ACV" (albeit without depreciation), ECF No. 28-2, arguably putting ASIC on notice that it sought an ACV recovery. *Cf. id.* ("Moreover, and most significantly, Buckley Towers' second Sworn Proof of Loss included a typewritten entry for cash value loss in the amount of \$5,174,885.50 next to the category 'Actual Cash Value Loss,' arguably putting the insurance company on notice that the insured was seeking actual cash value from QBE."). ASIC has not shown it is entitled to summary judgment based on the Church's failure to provide a presuit estimate with depreciation.

B.

At the hearing, ASIC also argued that regardless of what the Church claimed presuit, its pleading limited the demand to RCV. Because this argument was not presented in the summary-judgment papers, I directed additional briefing, which the parties have provided. *See* ECF Nos. 41, 42.

ASIC relies primarily on the complaint's *ad damnum* clause, which demands judgment "for all unpaid bills of the [Church], with any interest on any overdue payments." SAC at 7. This does seemingly refer to replacement costs, although it is quite imprecise. (Replacement costs, if available, would not be limited to the Church's *unpaid* bills; it would include reimbursement.) At any rate, ASIC was invited to brief the extent to which the language in this *ad damnum* clause restricted

the Church’s avenues of recovery, and it did not cite any authority suggesting that the inclusion of “unpaid bills” meant the Church was waiving any ACV claim.

Moreover, the Church points out that the complaint alleges more broadly that ASIC has not paid “all necessary insurance benefits due and owing” SAC ¶ 20, and that the Church was damaged “in the form of unpaid insurance proceeds, interest, costs, and attorney’s fees.” SAC ¶ 22; *see also* SAC at 7 (asking for “such other and further relief as this court deems just and proper” in the *ad damnum* clause).

ASIC has not shown that the Church’s request for “unpaid bills” restricted it to pursuing RCV damages only. The overall demand was broad enough to encompass ACV too.

C.

Next, ASIC argues that the parties litigated the case to this point as an RCV case only. This relates to the pleading issues discussed above, but to the extent it is a separate and independent argument (ASIC’s papers do not make this clear), I find it does not provide a basis to grant ASIC summary judgment.

The argument is essentially an equitable one; ASIC claims that the Church has conducted itself as though it had no ACV claim. And to be sure, the Church has, from time to time, seemed focused on RCV—the very recovery it now says it cannot claim. For example, in response to a motion to compel relating to claimed damages, the Church said it had “explicitly stated that [it was] claiming the exact amount of

damages contained within the IPQ estimate,” which, again, did not include depreciation. ECF No. 17 at 5.⁴

But ASIC has not cited authority showing that summary judgment is appropriate under these circumstances. Nor has it argued any prejudice. Although it says it had no notice of any ACV issue throughout the case, it deposed the Church’s expert asking in detail about how and whether he had estimated the ACV. ECF No. 28-1 at 24-26.

Moreover, if ASIC viewed this as exclusively an RCV case, it could have moved for summary judgment months ago. (ASIC acknowledges in its motion “that Mount Moriah’s written discovery responses admit that it has not made repairs to the property.” ECF No. 24 at 10.) ASIC makes no claim that it only recently found out that the Church did not do any rebuilding.

D.

Finally, to the extent ASIC argues that it is entitled to summary judgment because the Church’s summary-judgment filing did not include an ACV estimate, I conclude that argument fails too.

⁴ ASIC points to other things, including the Church’s objection to an interrogatory about damages (an objection ASIC never asked this court to resolve). ECF No. 41 at 5-10; *see also* ECF No. 28 at 13-14. But ASIC never explicitly asked the Church to provide a depreciation estimate or otherwise to confirm it did not seek any ACV recovery. And while deposing the Church’s expert, ASIC asked whether the expert had calculated ACV and how it was calculated, ECF No. 28-1 at 24-26—points that would be irrelevant if this had always been just an RCV case.

The case law makes clear that Florida’s “broad evidence rule” controls the types of evidence the jury can consider in determining ACV. *See Barrett v. Prudential Prop. & Cas. Ins. Co.*, 790 F.2d 842, 844 (11th Cir. 1986). “Under this rule, any evidence logically tending to establish a correct estimate of the value of the damaged or destroyed property may be considered by the trier of facts to determine [ACV] at the time of loss.” *Id.* (quoting *Worcester Mut. Fire Ins. Co. v. Eisenberg*, 147 So. 2d 575, 576 (Fla. 3d DCA 1962)); *see also J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1369 (11th Cir. 1982).

Accordingly, at this stage, it is irrelevant whether the Church’s updated estimate with depreciation ultimately can be considered because other evidence (including the initial estimate without depreciation) could provide a sufficient basis from which a jury could determine ACV. In other words, putting aside all the other issues about the adequacy of the pleadings, how the case was litigated, whether there was a presuit demand, and so forth, the original expert estimate would have been enough to defeat summary judgment. *Cf. Barrett*, 790 F.2d at 845 (“The original purchase price of the house, its rental value, the proof of loss statement, and the contractor’s estimate all constituted relevant, probative evidence from which a jury could logically base a determination as to the actual cash value of the destroyed property.”).

Because ASIC has not shown that it is entitled to judgment as a matter of law, its summary judgment motion (ECF No. 24) will be denied. In reaching this conclusion, I therefore have not considered the new estimate.

II.

I now turn to the Church's motion, which seeks partial summary judgment "on the issue of coverage for wind damage to the roof of the[] property." ECF No. 22 at 1. It points ASIC's coverage letter saying ASIC determined that the roof was damaged by wind and that there was a covered loss. ECF No. 22-1; *see also* ECF No. 22-3.

ASIC argues that most of the roof damage was not hurricane damage, but it does not contest the Church's assertion that the hurricane caused at least some roof damage. *See* ECF No. 27 at 7-9. Indeed, the parties were in agreement at the hearing that there was a covered loss during the policy period. Rough Trans. at 2-4. They further agreed as to the burden-shifting framework for determining coverage under insurance policies. ECF No. 27 at 4. Under that framework, the insured bears the initial burden of establishing a loss the policy covered. *Cf. LaMadrid v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 567 F. App'x 695, 702 (11th Cir. 2014) (citing *Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 875 (11th Cir. 1985)). If the insured shows a covered loss, the burden shifts to the insurer to show that an exclusion applies. *Id.*

So with the parties essentially in agreement on all this, ASIC is left to argue that summary judgment on this issue would not advance the case in any meaningful way. And it may not end up making much practical difference. But at trial, it will keep the Church from having to meet its initial burden of showing a covered loss.

In arguing that such a finding would not meaningfully advance this case, ASIC argues that “[the Church] must prove that all of its claimed damages to both roofs are covered by the Policy.” ECF No. 27 at 6. But this misstates the burden-shifting framework. Once the insured satisfies its initial burden by showing a covered loss, “the burden shifts to the insurer to show that the loss resulted from an excluded cause. The insured does not need to disprove any excluded causes.” *Citizens Prop. Ins. Corp. v. Munoz*, 158 So. 3d 671, 674 (Fla. 2d DCA 2014) (cleaned up).

Again, ASIC “agrees that *some* roof shingles and *some* tabs of the roof shingles were damaged by winds from Hurricane Michael.” ECF No. 27 at 8-9. Based on this acknowledgement, it is established that a covered loss occurred, and I will grant the Church’s motion to that extent. But to be clear, I do not find (and have not been asked to find) that all roof damage was covered. ASIC can still present evidence that only part of the roof damage was caused by wind, but it bears the burden of showing that any damage was the result of an excluded cause.

It is now ORDERED:

1. ASIC's motion for summary judgment (ECF No. 24) is DENIED.
2. The Church's motion for partial summary judgment (ECF No. 22) is GRANTED.

SO ORDERED on February 25, 2021.

s/ *Allen Winsor*
United States District Judge