UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ALLSTATE INSURANCE COMPANY, an Illinois corporation; ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, an Illinois corporation; ALLSTATE INDEMNITY COMPANY, an Illinois corporation; and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, an Illinois corporation,

Plaintiffs,

v. CASE NO: 6:18-CV-2184-ORL-KRS

AUTO GLASS AMERICA, LLC, a Florida limited liability company, and CHARLES ISALY, a citizen of Arizona,

Defendants.
_____/

NOTICE OF FILING AFFIDAVIT OF CHARLES ISALY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

PLEASE TAKE NOTICE that Defendants Auto Glass America, LLC and Charles Isaly hereby file the attached Affidavit of Charles Isaly in support of their Motion to Dismiss.

Respectfully submitted,

s/Mac S. Phillips
Fla. Bar No. 195413
PHILLIPS TADROS, P.A.
Trial Counsel for Defendants
212 SE 8th Street, Suite 103
Fort Lauderdale, Florida 33316
T. 954.642.8885
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E. service@phillipstadros.com
mphillips@phillipstadros.com

Respectfully submitted,

s/Chad A. Barr
Fla. Bar No.: 55365
LAW OFFICE OF CHAD A. BARR, P.A.
Trial Counsel for Defendants
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Altamonte Springs, Florida 32714
T. 407.599.9036
F. 407.960.6247
E. service@chadbarrlaw.com
chad@chadbarrlaw.com
paralegal@chadbarrlaw.com

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on February 4, 2019, we electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will provide notice to counsel for the Plaintiffs, Lori J. Caldwell, Esquire, Sally R. Culley, Esquire and Douglas B. Brown, Esquire, Rumberger, Kirk & Caldwell, P.A., Lincoln Plaza, Suite 1400, 300 South Orange Drive, Post Office Box 1873, Orlando, Florida 32802-1873.

s/Mac S. Phillips

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ALLSTATE INSURANCE COMPANY, an Illinois corporation; ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY, an Illinois corporation; ALLSTATE INDEMNITY COMPANY, an Illinois corporation; and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, an Illinois corporation,

Plaintiffs,

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AUTO GLASS AMERICA, LLC, a Florida limited liability company, and CHARLES ISALY, a citizen of Arizona,

Defendants.
_____/

AFFIDAVIT OF CHARLES ISALY

BEFORE ME, the undersigned notary public, personally appeared Charles Isaly who, after being duly sworn, deposes and says:

1. My name is Charles Isaly. I am over 18 years of age and am competent to testify about the matters described in this affidavit based on personal knowledge.

2. I am the sole owner and managing member of Auto Glass America, LLC ("AGA").

3. AGA is in the business of providing windshield replacements to our customers, most of whom are in Florida. Among the customers we service are those insured with Allstate.

4. In Florida, there is a law that says there is no deductible charged to customers for windshield replacement jobs. This means that our insured customers will not have to go out of pocket at all for our work, and we tell them so.

5. When an Allstate insured hires AGA to replace his or her windshield, AGA's

process begins with a phone call to Allstate with the customer on the line to determine whether the customer is currently insured and has comprehensive coverage. Once that is confirmed, we make arrangements with the customer to replace the windshield. In exchange for providing the windshield replacement services, the customer executes an assignment of benefits in favor of AGA, which assigns to us the customer's benefits under his or her automobile insurance policy. Pursuant to the assignments, AGA bills Allstate directly after the job is complete.

6. The vast majority of the time, Allstate sends us payment but in amounts less than the amounts we invoice.

7. Whenever Allstate pays less than the invoiced amount, we typically receive a letter telling us that Allstate invokes its right to appraisal to evaluate and estimate the cost to remedy the broken windshield. The letters are usually sent by a company called AGIS (Auto Glass Inspection Services). Allstate insists on using AGIS as its appraiser on all cases. A copy of a typical "appraisal letter" is attached as Exhibit 1.

8. AGA's position is that appraisal is not appropriate, and that Allstate's chosen appraiser is far from "disinterested." For example, AGIS's website as of April 28, 2015 specifically says that its "mission is to verify auto glass damage for the insurance industry" and AGIS "has no affiliation with any companies in the glass industry and only serves large insurance companies." A screenshot of the web page is attached as Exhibit 2. Attached as Exhibit 3 is a letter we received from AGIS's attorneys in 2013 threatening to sue us because they think the umpire we chose in the past is not disinterested. We do not think we will have a fair appraisal if AGIS is involved.

9. Rather than engage in what we think is a rigged appraisal process, we file lawsuits against Allstate to ultimately recover the difference between what we bill and/or for declarations

about the meaning of various provisions in the Allstate insurance policy, including the payment and appraisal provisions.

10. When Allstate receives the lawsuits we file, it typically files motions to dismiss and to compel appraisal. AGA has prevailed on these motions the overwhelming majority of the time.

11. In the past, after Allstate's dismissal/appraisal motions are denied, Allstate chose to settle whatever cases were then pending. On the vast majority of cases, Allstate made an additional payment to AGA. Sometimes, Allstate points out why they think payment is not due on a particular claim and if we agree, we dismiss.

12. Most recently, after the dismissal/appraisal motions were denied in 44 cases at the trial court level, Allstate petitioned the Broward County Circuit Court's Appellate Division for certiorari relief in late 2017 and early 2018 as reflected on the case numbers on the list attached as Exhibit 4. When AGA and Allstate entered into a full and final settlement of hundreds of cases in April and May 2018, Allstate dismissed the 44 appeals with prejudice and we dismissed our corresponding lawsuits.

13. An exemplar copy of AGA's state court complaint, Allstate's dismissal/appraisal motion, transcript of the hearing on the dismissal/appraisal motion, order denying the motion, Allstate's Petition for Writ of Certiorari and voluntary dismissal of same with prejudice are all attached as Composite Exhibit 5. Various other state court rulings on Allstate's dismissal/appraisal motions are attached as Composite Exhibit 6.

14. I read the Complaint Allstate filed in this federal case and see that Allstate says we sued them over 1,400 times. So far, AGA has identified over 1,000 lawsuits that it has filed against Allstate and is currently investigating to determine whether there are any more. The cases we identified so far are on the list attached as Exhibit 7 to this affidavit.

15. Of the 1,185 cases identified so far, approximately 600 have been settled on terms that are favorable to AGA and the rest remain pending. All of them were filed before Allstate this federal case.

16. Prior to the 2018 global settlement, Allstate and AGA negotiated and globally settled scores of additional cases in April 2016. All in, AGA is unaware of any case in which Allstate answered a complaint or countersued us. Instead, Allstate simply settled once defeated on its dismissal/appraisal motions Likewise, Allstate has not filed answers, defenses or counterclaims in the cases that remain pending, more than 150 of which involve the same short-pay scenario described above and the rest involve Allstate's failure to pay anything or failure to pay interest on appraisal awards on older claims on which AGA voluntarily submitted to the appraisal process

FURTHER AFFIANT SAYETH NAUGHT.

CHARLES ISALY

SWORN TO AND SUBSCRIBED before me on this 4th day of February, 2019 by Charles Isaly, who is X personally known to me or ___ produced a photo ID establishing that the affiant is Charles Isaly, and who did take an oath.

NOTARY PUBLIC,
State of Arizona

OFFICIAL SEAL
JESSICA R RICH
Notary Public - Arizona
MARICOPA COUNTY
My Commission Expires
JULY 4, 2021

EXHIBIT 1

AUTO GLASS INSPECTION SERVICES

1/8/19

AUTOGLASS AMERICA
INS: [redacted]
REF: [redacted]
Veh: 2011 CHEVROLET CRUZE

Re: Rights to appraisal

ALLSTATE has invoked their rights to appraisal in regards to the above captioned glass claim. ALLSTATE has hired our company as their appraiser. To facilitate this process, each party will appoint and compensate a qualified appraiser to evaluate and estimate the cost to repair said damages. All other appraisal expenses will be shared equally. Each appraiser will be required to provide written documentation to support their actual cash value and the amount of loss. If the appraisers cannot reach agreement, they'll submit their differences to the umpire. The two appraisers, or a judge of a court of record, will choose an umpire. A written decision that is agreed upon by any two of these three persons will determine the amount you and your assigned shop will be compensated in settlement of the loss.

Let me know if you have any further questions.

Regards,

[redacted]
Auto Glass Inspection Services
877-286-1942[redacted]
[redacted]

EXHIBIT 2

AGIS

AUTO GLASS INSPECTION SERVICES

Call Us Today 877-266-1942

5510 W. Chandler Blvd. Ste. 4
Chandler, AZ 85226

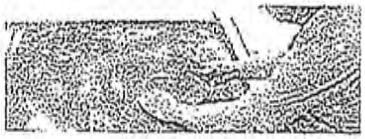
Map It

Service Areas

See what states AGIS covers and new areas to come

View Areas

Auto Glass Inspection



Learn more about the services that AGIS provides and FAQ's

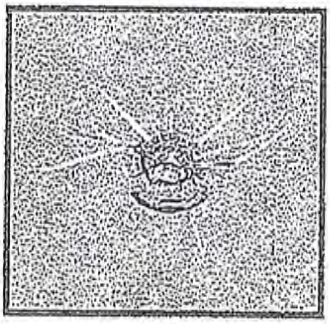
Click Here

About AGIS

Learn more about Leadership and Our Mission at AGIS.

Read More

CUSTOMER SERVICE SURVEY



Auto Glass Inspection Services, Inc. (AGIS) mission is to verify auto glass damage for the insurance industry. In recent years the auto glass industry has seen fraudulent claims increase dramatically. There is a serious lack of over sight in the auto glass industry which lends itself to improper installation and suspect claims being reported.

There are many untrained installation technicians in the auto glass industry. They are responsible for installing windshields, which serve as a vehicle's integral structural component. If these windshields are not properly installed, they may cause serious injury, death or improper air bag deployment during an accident.

AGIS sole purpose is to report back to the insurance industry what type of damage exists or lack thereof. Our inspection data shows many claims that are reported for replacement have no damage or can simply be repaired. The same data shows that many repair claims that are reported have no repairable damage.

During the inspection process, we explain to policyholders the benefits of repairing a chip or small crack versus replacing the entire windshield. We then educate them on proper repair or replacement techniques depending on their claims.

AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies.

CONSUMER FACTS

Can a pit be repaired?

No this is normal wear and tear, and can be as large as 1/8" in diameter. Only chips which have a black or silvery grey appearance like stars, bullseyes and cracks need to be repaired.

INDUSTRY NEWS

Auto Glass Week 2013
08/27/2013 Read More »

Your opinion is important to us!
08/22/2013 Read More »

EXHIBIT 3

LAW OFFICES

ALVAREZ & GILBERT, PLLC

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14500 N. NORTHSIGHT BLVD. SUITE 216
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Steven G. Ford
Thomas V. Rawles

EMAIL: SFORD@ALVAREZ-GILBERT.COM

VIA EMAIL, FACSIMILE, AND U.S. MAIL (AS INDICATED)

June 21, 2013

Barrett R. Smith
Auto Damage Experts, Inc.
P.O. Box 460
Dover, FL 33527
[redacted]

Dan Angelillo
[redacted]

Don Munro
[redacted]

Charles Islay
[redacted]

Jason Fry
[redacted]

Mark Lusnia
Facsimile: [redacted]

Re: Demand for Recusal and/or Removal of Umpire

Gentlemen:

This firm represents Auto Glass Inspection Services, Inc. ("AGIS") in its capacity as an appraiser for Esurance Insurance Company, Allstate Insurance Company, and Progressive Casualty Insurance Company and/or their respective affiliates (collectively, the "Insurers"). This correspondence addresses the status of umpire Barrett R. Smith in relation to approximately 117 auto glass claims (the "Claims") made by or otherwise on behalf of certain of the Insurers' respective policyholders (the "Insureds"). As you are aware, presently the Claims are in the appraisal process.

As most of you also are aware, AGIS recently requested that Mr. Smith recuse himself as umpire in the Claims. Mr. Smith did not comply with AGIS's request. Additionally, it is AGIS's understanding that neither the other appointed appraisers nor the subject automobile glass shops (the "Providers") presently are willing to join AGIS in relieving Mr. Smith of his duties. Nonetheless, in a final, pre-litigation effort to resolve this matter, AGIS once again reiterates its demand that Mr. Smith either recuse himself, or that the Appraisers and Providers endorse the AGIS's demand that Mr. Smith no longer serve as the umpire.

The need to immediately end Mr. Smith's tenure as umpire is based on information recently discovered by AGIS regarding Mr. Smith's activities in the field of automobile insurance "short pay" disputes and litigation, as well as on applicable law and guidelines. As explained by AGIS earlier, and previously unbeknownst to AGIS and undisclosed by Mr. Smith, Mr. Smith has taken an active role in promoting litigation by repair shops against insurers based on alleged underpayment by various insurers.

Indeed, Mr. Smith is part of what appears to be a pro-provider, anti-carrier, automobile repair industry "team" that provides industry consulting and legal advice to various providers around the country in relation to disputes with insurers over reimbursement rates. Specifically, the group appears to include Mr. Smith, Florida attorney A. Brent Geohagan, and shop owner/serial litigator Raymond Gunder, among others. The coordinated activities of these individuals are described in Mr. Smith's "Collision Digest" Facebook page, wherein he gleefully chronicles dispute results adverse to insurers and even goes so far as to characterize at least one insurer as engaging in "less than ethical and often egregious activities" in the area of alleged short pays by insurers. Copies of certain of the materials posted on the Collision Digest page are attached collectively hereto as Exhibit 1.

Mr. Smith did not specifically disclose any the foregoing activities in his curriculum vitae ("CV"), a copy of which is attached hereto as Exhibit 2. Instead, in his CV, Mr. Smith generically describes his activities as including consulting services in various areas of automotive damage. Nowhere in the CV (or anything else provided by Mr. Smith to AGIS or the Insurers) is any mention of Mr. Smith being a champion of provider "rights" and causes and a vocal critic of automobile insurers. Had AGIS and/or the Insurers been aware of Mr. Smith's activist endeavors, his candidacy for the role of umpire would have been scrutinized far more intensely and likely would have failed.

Against the factual backdrop set forth above, and for several reasons, Mr. Smith can no longer serve as umpire with regards to the Claims.

First, Mr. Smith's service as umpire runs afoul of The Code of Ethics for Umpires in Insurance Appraisals (the "Code"), a copy of which is attached hereto as Exhibit 3. As an initial violation, before accepting appointment as umpire, Mr. Smith failed to disclose the above-described activities, which should have been disclosed as falling within "professional . . . relationships which might reasonably affect impartiality or lack of independence *in the eyes of any of the parties*." Code, Cannon II(A)(2) (emphasis added).[1] Here, in the eyes of AGIS and

[1] The Code directs that "[a]ny doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure." Code, Cannon II(D).

the Insurers, Mr. Smith's industry relationships undermine his impartiality. Thus, with regards to the omitted disclosures, it is immaterial that Mr. Smith now self-servingly claims that his professional contacts with pro-provider groups will not impact his ability to fairly administer the Claims.

Also, in light of at least one party's request that Mr. Smith withdraw, he cannot properly continue as umpire under the circumstances. *See* Code, Cannon II(G)(2). No reasonable analysis of these facts could lead to the conclusion that the challenge to Mr. Smith's service as umpire is "not substantial," or that he could "nevertheless act and decide the [Claims] impartially and fairly." *See id.*

Second, and consistent with the Code, applicable law required Mr. Smith to disclose his pro-provider activities prior to accepting the umpireship. In a setting such as this, an umpire "has an *affirmative duty* to disclose any dealings that *might* create an impression of possible bias." *Weinger v. State Farm Fire & Cas. Co.*, 620 So.2d 1298, 1299 (Fla. App. 1993) (emphasis added).[2] The underlying public policy concerns were summarized by the court as follows: "'[T]he appearance of neutrality can be as important as neutrality itself because of the former's impact upon confidence in the proceedings by the parties and the public.'" *Id.* at 1300 (quoting *International Ins. Co. v. Schrager*, 593 So.2d 1196, 1197 (Fla. App. 1992)). Thus, the proper inquiry is whether the present facts create an appearance of impropriety, not whether Mr. Smith believes and/or says that he can perform impartially.

Moreover, the present circumstances and disclosure failures, if not properly remedied by removing Mr. Smith, will result in any decision likely being vacated. *See Weinger*, 620 So.2d at 1299 (failure to disclose "undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of [an] award") (citing *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149-50 (1968)); *see also* §682.13(1)(b), Fla. Stat. (grounds for vacating award).

Third, permitting Mr. Smith to continue to serve as umpire deprives the Insurers of their ability to receive the benefits of the underlying insurance policies, which contemplate an umpire who is "impartial." *See, e.g.*, Esurance Policy, p. 28.

Fourth, Mr. Smith's activities are contrary to the promises he made in the Umpire Appointment Agreement, which include his avowals that he will serve as "an unbiased umpire in all areas of loss pertaining to this subject claim," that he is "impartial," and that he "can render an accurate and fair decision." Plainly, given Mr. Smith's actions, comments, and overall attitudes, as evidenced by his own words, Mr. Smith cannot possibly fulfill these commitments.

---

[2] The notion that Mr. Smith's bias is no longer an issue and/or was somehow waived because AGIS and/or the Insurers did not discover the underlying facts before Mr. Smith was selected is meritless. Indeed, as noted, Mr. Smith had an affirmative duty to make the disclosures to AGIS and the Insurers.

In light of the foregoing, it is hereby demanded that Mr. Smith immediately recuse himself from the Claims and withdraw as umpire. Alternatively, if that is not done, it is hereby demanded that all parties request and direct that Mr. Smith withdraw as umpire.

Finally, in the event that Mr. Smith's removal as umpire is not timely completed, please be advised that the AGIS reserves all rights to compel that result through legal processes. Among other things, such rights include seeking judicial declaration that Mr. Smith cannot properly serve as umpire with regards to the claims. We are confident that a judge would agree that Mr. Smith's actions and omissions herein are contrary to the underlying policies, the Code, and Florida law.

Please govern yourselves accordingly.

Sincerely,

ALVAREZ & GILBERT, PLLC.

Steven G. Ford

SGF:
Enclosures

cc: Auto Glass Inspection Services, Inc.

EXHIBIT 4

CUSTOMER	LT CASE NO	APP CASE NO
[redacted]	coce17-005712(51)	CACE 18-5153
	coce17-005472(51)	CACE18-5155
	cowe17-018799(82)	CACE17-18799
	cowe17-016347(82)	CACE17-22796
	cowe17-016345(82)	CACE17-22798
	cowe17-014321(82)	CACE17-22781
	cowe17-014324(82)	CACE17-22831
	cowe17-014320(82)	CACE17-22797
	cowe17-014319(82)	CACE 17-22841
	cowe17-014315(82)	CACE17-22795
	cowe17-010641(82)	CACE17-22758
	cowe17-010645(82)	CACE17-22498
	cowe17-010644(82)	CACE17-22757
	cowe17-010648(82)	CACE17-22762
	cowe17-010649(82)	CACE17-22770
	cowe17-010652(82)	CACE17-22582
	cowe17-012814(82)	CACE17-22779
	cowe17-012813(82)	CACE17-22780
	cowe17-003260(82)	CACE17-22545
	cowe17-003261(82)	CACE17-22484
	cowe17-003267(82)	CACE17-22396
	cowe17-003253(82)	CACE17-22754
	cowe17-003255(82)	CACE17-22371
	cowe17-003259(82)	CACE17-22799
	cowe17-003262(82)	CACE17-22432
	cowe17-003265(82)	CACE17-22529
	cowe17-003263(82)	CACE17-22628
	cowe17-003286(82)	CACE17-22637
	cowe17-003288(82)	CACE17-22510
	cowe17-003264(82)	CACE17-22390
	cowe17-003241(82)	CACE 17-22546
	cowe17-003242(82)	CACE17-22463
	cowe17-003243(82)	CAE17-22641
	cowe17-003244(82)	CACE17-22491
	cowe17-003245(82)	CACE17-22394
	cowe17-003248(82)	CACE17-22659
	cowe17-003282(82)	CACE17-22373
	cowe17-003285(82)	CACE17-22581
	cono17-003394(73)	CACE17-21782
	cono17-001981(72)	CACE17-21947
	cono17-002097(73)	CACE17-21872
	cono17-003385(73)	CACE17-21833

EXHIBIT 5

IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

AUTO GLASS AMERICA, LLC,
as assignee of [redacted]

Plaintiff,

CASE NO.: 17-05712 COCE 51

vs.

ALLSTATE INSURANCE COMPANY,

Defendant,
_____/

PLAINTIFF'S AMENDED COMPLAINT

COMES NOW, the Plaintiff AUTO GLASS AMERICA, LLC ("Plaintiff") as post-loss assignee of [redacted] by and through its Undersigned attorney, and complaining of Defendant(s) ALLSTATE INSURANCE COMPANY ("Defendant"), states as follows:

INTRODUCTION

1. Plaintiff brings this action for declaratory relief against Defendant as a result of Defendant's application of ambiguous and unclear policy terms relative to the handling of the claim at issue.

PARTIES, JURISDICTION AND VENUE

2. At all times material hereto, Plaintiff was and is a Florida corporation with its principal place of business in the State of Florida.

3. At all times material hereto, the insured [redacted] was insured by Defendant under Policy Number [redacted] (the "Policy").

4. At all times material hereto, Defendant was a foreign corporation authorized to conduct and was conducting business in Broward County, Florida.

5. At all times material hereto, Defendant maintained an agent or other representative in

Broward County, Florida. Venue is proper in Broward County, Florida.

GENERAL ALLEGATIONS

6. On or about January 1, 2017 the insured's vehicle sustained windshield glass damage covered pursuant to the Policy of insurance issued by Defendant.

7. On or about March 20, 2017 the insured executed an assignment of benefits to AUTO GLASS AMERICA, LLC which assigned all of insured's rights, benefits and interests to AUTO GLASS AMERICA, LLC for the loss contemplated herein.

8. As a result of the windshield glass damage, AUTO GLASS AMERICA, LLC performed the necessary repair and replacements and provided Defendant with an invoice for payment.

9. Demand was made upon Defendant to pay said benefits pursuant to the Policy and Florida law, and Plaintiff and the assignor have otherwise complied with all contractual and statutory conditions precedent to recover, or same has been waived by Defendant.

10. Upon information and belief, after partial payment of the loss, Allstate demanded appraisal.

DECLARATORY JUDGMENT

11. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "10" above with the same force and effect as if set forth more fully herein.

12. Plaintiff is in doubt as to its rights under the policy of insurance.

13. Plaintiff has an interest averse to Defendant and the declaration requested deals with a present ascertainable state of facts as presented in the allegations set forth herein.

14. Florida Statute § 86.021 creates a right to declaratory judgment when a question of construction or validity arises under a contract.

15. The purpose of a declaratory judgment is to afford relief form a person's insecurity and uncertainty with respect to their rights, status, or other equitable or legal relations.

16. There is a bona fide, actual, present need for a declaratory judgment since to determine whether there is a disagreement as to the amount of loss it is necessary to determine whether the defendant's policy clearly and unambiguously informs insureds and its assignees how the amount is actually determined or whether the language used by the defendant to limit its liability is capable of more than one reasonable interpretation.

17. At all times material hereto, the policy of insurance contained the following language regarding *Auto Comprehensive Insurance Coverage*:

> ***Allstate will pay for direct and accidental loss to the insured auto or a non-owned auto not caused by collision.***
>
> ***Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.***

18. At all times material hereto, the applicable policy states as follows with respect to the limitation of Defendant's liability to pay for the loss of a covered windshield claim:

> *Our limit of liability is the least of:*
>
> 1. *The actual cash value of the property at the time of loss, which may include, which may include a deduction for depreciation; or*

2. ***the cost to repair or replace, as determine by us, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to applicable state laws and regulations.***

3. *$500, if the loss is to a covered trailer not described on the Policy Declarations.*

[Emphasis added].

COUNT 1 – PETITION FOR DECLARATORY RELIEF
THE INTERPRETATION OF THE TERM "COST TO REPAIR OR REPLACE"

19. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "18" above with the same force and effect as if set forth more fully herein.

20. That the Limit of Liability provision limits Defendant's exposure to the "*cost to repair or replace.*"

21. That the methodology utilized to determine the "*cost to repair or replace*" is neither identified nor is the term defined in the policy.

22. That the plain meaning of Defendant's "*cost to repair or replace the property or part*" policy language obligates Defendant to pay Plaintiff the cost to repair or replace the windshield at issue.

23. That Plaintiff's bill charged the "cost to repair or replace," in accordance with the insurance policy.

24. Instead, Defendant refuses to pay the *cost to repair or replace* the windshield and seeks

to limit reimbursement in accordance with an artificial and unilaterally created methodology, unknown to the insured or Plaintiff.

25. That Defendant's failure to define the term, "*cost to repair or replace*" in the definition section of the policy, renders the policy language susceptible to more than one reasonable interpretation.

26. That there is no impediment which would have prevented Allstate from providing the clear definition of the "*cost to repair or replace*" within the policy.

27. That Plaintiff has an interest adverse to Defendant and the declaration requested deals with a present ascertainable state of facts as presented in the allegations set forth above.

28. That the policy fails to provide any standard or measure against which an insured or its assignee can conjure the amount it may expect to be reimbursed.

29. At all times material hereto, the term "*cost to repair or replace*" is undefined, unclear, ambiguous and susceptible of more than one reasonable interpretation

30. At all times material hereto, the language: *using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers*" is vague, ambiguous and capable of more than one reasonable interpretation.

31. At all times material hereto, Florida law requires that ambiguous policy terms capable of more than one reasonable interpretation be resolved in favor of the insured or its assignee and provide the greatest coverage affordable consistent with the interpretation favored by the insured.

32. As a result of the uncertainty created by the language used in Defendant's policy of insurance, it has become necessary for Plaintiff to retain the services of the undersigned

attorneys pursuant to F.S. § 627.428.

33. The relief sought is not merely giving of legal advice by the Courts as Plaintiff has an equitable interest in resolving the issues raised.

34. Plaintiff is entitled to recover attorneys' fees and costs under F.S. § 627.428.

35. The Plaintiff is in doubt as to its rights under the policy of insurance.

WHEREFORE, Plaintiff AUTO GLASS AMERICA, LLC ("Plaintiff") as post-loss assignee of TONYA WOMACK respectfully requests that this Court grant Declaratory Judgment for the Plaintiff, declaring:

A) That the Policy term "*cost to repair or replace*" is vague, ambiguous and capable of more than one reasonable interpretation.

B) That the Policy language "*using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers*" is vague, ambiguous and capable of more than one reasonable interpretation.

C) That the Court reserves as to supplemental monetary relief.

COUNT 2 – PETITION FOR DECLARATORY RELIEF
APPRAISAL IS NOT APPLICABLE

36. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "18" above with the same force and effect as if set forth more fully herein.

37. That the policy provisions regarding the right to appraisal and the limit of liability are inherently inconsistent and ambiguous and require judicial determination prior to the Plaintiff being required to engage in the appraisal process.

38. At all times material hereto, the applicable policy states as follows with respect to the limitation of Defendant's liability to pay for the loss of a covered windshield claim:

Our limit of liability is the least of:

1. *The **actual cash value of the property** at the time of loss, which may include, which may include a deduction for depreciation; or*
2. ***the cost to repair or replace**, as determine by us, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to applicable state laws and regulations.*
3. *$500, if the loss is to a covered trailer not described on the Policy Declarations.*

[Emphasis added].

39. At all times material hereto the appraisal provision in the policy states:

Both you and Allstate have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. ***Each appraiser will state separately the actual cash value and the amount of the loss.*** *An award in writing by any two appraisers will determine the loss payable.*

[Emphasis added]

40. That the actual cash value pertains only to the property, which includes the vehicle itself

and other types of property which may be covered under the policy, such as Sound System and Tape Coverage.

41. That the Limit of Liability provision requires a determination as to the **LEAST OF** the ***actual cash value*** and the ***cost to repair or replace***.

42. In a windshield repair or replacement claim, the cost to repair or replace the part will always be LESS THAN the ***actual cash value***.

43. Pursuant to the appraisal provision, appraisers are required to state separately both the ***actual cash value*** AND the ***amount of the loss***, therefore; an appraisal to determine the cost to repair or replace a minor part, such as a windshield, was never contemplated by the policy.

44. In a windshield claim, when it is determined that a part can be repaired or replaced, there is never a need to determine the *actual cash value* of the property.

45. Because there is never a need to determine the *actual cash value* of the property, there is no basis for appraisal.

46. That Plaintiff has an interest adverse to Defendant and the declaration requested deals with a present ascertainable state of facts as presented in the allegations set forth above.

47. As a result of the uncertainty created by the language used in Defendant's policy of insurance, it has become necessary for Plaintiff to retain the services of the undersigned attorneys pursuant to F.S. § 627.428.

48. The relief sought is not merely giving of legal advice by the Courts as Plaintiff has an equitable interest in resolving the issues raised.

49. Plaintiff is entitled to recover attorneys' fees and costs under F.S. § 627.428.

50. The Plaintiff is in doubt as to its rights under the policy of insurance.

WHEREFORE, Plaintiff AUTO GLASS AMERICA, LLC ("Plaintiff") as post-loss assignee of TONYA WOMACK respectfully requests that this Court grant Declaratory Judgment for the Plaintiff, declaring:

(A) That the Defendant's policy provision regarding the right to appraisal is vague, ambiguous, and in conflict with the limit of liability provision.

(B) That the Defendant's policy provision regarding the right to appraisal does not apply to repair or replacement of which windshield of the vehicle, but to situations which require an actual cash value determination.

(C) That since the appraisers are required to state separately both the *actual cash value* and *the amount of the loss*, an appraisal to determine the *cost to repair or replace* a windshield was never contemplated by the policy.

(D) That, in the alternative, when it is determined that a windshield can be repaired or replaced, there is never a need to determine the *actual cash value* of the property, and thus; because there is never a need to determine the *actual cash value* of the property, there is no basis for appraisal.

(E) That the Court reserves as to supplemental monetary relief.

COUNT 3 – PETITION FOR DECLARATORY RELIEF
APPRAISAL VIOLATES THE PROHIBITIVE COST DOCTRINE
IN THE ALTERNATIVE

51. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "18" above with the same force and effect as if set forth more fully herein.

52. That the appraisal provision is unenforceable based on theories of unconscionability and the Prohibitive Cost Doctrine.

53. That the cost of enforcing the Policy's appraisal provision will approach or exceed the amount of

the claim, consequently prohibiting any benefits of bringing such claims in these types of windshield repair and/or replacement cases.

54. At all times material hereto the appraisal provision in the policy states:

> *Both you and Allstate have a right to demand an appraisal of the loss.* ***Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses.*** *The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of the loss. An award in writing by any two appraisers will determine the loss payable.*
>
> [Emphasis added]

55. For an insured to claim windshield repair or replacement benefits once appraisal is demanded under the policy's appraisal provision, the insured must (1) pay to hire an appraiser; (2) pay half to hire an umpire; and (3) pay half of any other appraisal expenses.

56. Appraisal costs are substantially higher than litigation costs in that they are non-recoverable.

57. Enforcement of the appraisal provision in a windshield claim precludes the insured from effectively claiming comprehensive benefits as the appraisal participation costs exceed or approach the amount that is due and owing.

58. An appraisal to determine the cost to repair or replace a windshield would place the Plaintiff in a situation where it would be prohibitively costly and in violation of the Prohibitive Cost Doctrine.

59. That Plaintiff has an interest adverse to Defendant and the declaration requested deals with a present ascertainable state of facts as presented in the allegations set forth above.

60. Plaintiff is entitled to a declaratory judgment on the issues raised herein prior to requiring the plaintiff to decide whether there is an actual disagreement as to the amount of the payment.

61. As a result of the uncertainty created by the language used in Defendant's policy of insurance, it

has become necessary for Plaintiff to retain the services of the undersigned attorneys pursuant to F.S. § 627.428.

62. The relief sought is not merely giving of legal advice by the Courts as Plaintiff has an equitable interest in resolving the issues raised.

63. Plaintiff is entitled to recover attorneys' fees and costs under F.S. § 627.428 (2013).

64. The Plaintiff is in doubt as to its rights under the policy of insurance.

WHEREFORE, Plaintiff AUTO GLASS AMERICA, LLC ("Plaintiff") as post-loss assignee of TONYA WOMACK respectfully requests that this Court grant Declaratory Judgment for the Plaintiff, declaring:

(A) That the high cost of participating in appraisal in this type of claim, as provided by the policy, approaches or exceeds the amount of the claim, therefore rending it unenforceable.

(B) That the Court reserves as to supplemental monetary relief.

COUNT 4 – PETITION FOR DECLARATORY RELIEF
FAILURE TO SELECT DISINTERESTED APPRAISER
IN THE ALTERNATIVE

65. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "18" above with the same force and effect as if set forth more fully herein.

66. That the policy expressed the parties' clear intention to restrict appraisers to individuals who are, in fact, "disinterested."

67. At all times material hereto the appraisal provision in the policy states:

> *Both you and Allstate have a right to demand an appraisal of the loss.* ***Each will appoint and pay a competent and disinterested appraiser*** *and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to*

decide any differences. Each appraiser will state separately the actual cash value and the amount of the loss. An award in writing by any two appraisers will determine the loss payable.

[Emphasis added]

68. Upon information and belief, Allstate has appointed an appraiser that is not disinterested as a result of a pre-existing financial relationship with Allstate.

69. That Defendant's chosen appraiser has no affiliation with any companies in the glass industry and only serves large insurance companies.

70. Defendant's chosen appraiser is a habitual appraiser for Defendant and large insurance companies.

71. Defendant's chosen appraiser has previously threatened legal action against windshield repair and replacement facilities.

72. Defendant has not complied with the policy's appraisal provision as the Defendant's chosen appraiser is not "disinterested."

73. Defendant contumaciously continues to select the chosen appraiser despite Plaintiff's many efforts to remove the appraiser for its failure to be disinterested.

74. The right to appraisal provision is further vague and ambiguous since it requires each party to appoint a "competent" and "disinterested" appraiser without defining those terms and creating no procedural mechanism to determine or challenge whether said appraiser is "competent" and/or "disinterested."

75. That Plaintiff has an interest adverse to Defendant and the declaration requested deals with a present ascertainable state of facts as presented in the allegations set forth above.

76. Plaintiff is entitled to a declaratory judgment on the issues raised herein prior to requiring the

plaintiff to decide whether there is an actual disagreement as to the amount of the payment.

77. As a result of the uncertainty created by the language used in Defendant's policy of insurance, it has become necessary for Plaintiff to retain the services of the undersigned attorneys pursuant to F.S. § 627.428.

78. The relief sought is not merely giving of legal advice by the Courts as Plaintiff has an equitable interest in resolving the issues raised.

79. Plaintiff is entitled to recover attorneys' fees and costs under F.S. § 627.428 (2013).

80. The Plaintiff is in doubt as to its rights under the policy of insurance.

WHEREFORE, Plaintiff AUTO GLASS AMERICA, LLC ("Plaintiff") as post-loss assignee of TONYA WOMACK respectfully requests that this Court grant Declaratory Judgment for the Plaintiff, declaring:

(A) That the appraisal provision is further vague and ambiguous by failing to define "competent" and "disinterested" appraisers and providing no mechanism for determining and challenging appointed appraisers.

(B) That the Defendant's chosen appraiser does not meet the policy requirements of a "disinterested" appraiser.

(C) That the Court reserves as to supplemental monetary relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent via eservice this 14 day of June 2017 to Counsel of Record.

EMILIO STILLO, PA
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Total Pages: 24

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CIVIL DIVISION

AUTO GLASS AMERICA, LLC A/A/O [redacted] [redacted] PLAINTIFF(S), VS. ALLSTATE INSURANCE COMPANY, DEFENDANT(S).	CASE NO. COCE-17-005712 DIV 51

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEY'S FEES

Defendant, ALLSTATE PROPERTY AND CASUALTY COMPANY, by and through the undersigned counsel, pursuant to Florida Rule of Civil Procedure 1.140 and 1.280, hereby file this Motion to Dismiss the Plaintiff's Complaint, Demand into Appraisal, Motion for Protective Order as to Plaintiff's Demand for Discovery, and Motion to Dismiss any Claim for Attorney's Fees in support thereof state as follows:

FACTS AND ALLEGATIONS

1. The above captioned matter is a first party claim for comprehensive windshield insurance benefits sought by Plaintiff's as an alleged assignee.[1]

2. There is a dispute as to the ***total amount of loss only*** for the windshield of the subject vehicle.[2]

[1] Allstate does not stipulated to standing or to the validity of any purported assigned to file and maintain the subject action and reserves its right to challenge the same.
[2] Allstate further reserves its right to challenge coverage should future discovery/investigation reveal coverage does not exit.

3. ALLSTATE received an invoice from Plaintiff seeking payment for alleged windshield repair work done to the subject vehicle on March 20, 2017.

4. The receipt of Plaintiff's invoice, after the alleged repair/replacement was already completed, was the first notice to ALLSTATE of the purported windshield damage.

5. ALLSTATE agreed to pay its determined amount of loss for the alleged repairs and a check for the same was issued by ALLSTATE and received/deposited by the Plaintiff on April 3, 2017, merely (8) business days after the invoice.

6. The ALLSTATE policy issued to the alleged assignor, like most automobile policies, provides a method for the insured and insurance company to resolve disputes as to damages and values without the need for a lawsuit or litigation. The method is called Appraisal. The Appraisal clause is set forth in the subject Policy.

7. Prior to this lawsuit being filed, ALLSTATE sent Plaintiff and its insured a letter which stated that Allstate was invoking their right to appraisal, immediately putting them on notice of the same. The letter listed Allstate's chosen appraiser.

8. Plaintiff accepted ALLSTATE's aforementioned payment, and never contacted ALLSTATE or in any way noticed ALLSTATE that it disputed the amount of loss payment amount. Likewise, Plaintiff failed to respond to ALLSTATE's letter invoking appraisal in the event of a dispute, and made no attempts to participate in the appraisal process or comply with the conditions of the subject Policy's appraisal provision. Instead, without notice or warning, Plaintiff filed the subject action.

9. The filing of the subject lawsuit was ALLSTATE's first notice that there was a **dispute** as to the amount of loss paid to Plaintiff for the subject claim.

10. The applicable insurance policy Insured does not provide a timeframe for payment of comprehensive coverage insurance benefits. But even if there were a timeframe, Plaintiff fails to allege in its Complaint how long it took for Allstate to issue payment. Plaintiff likely omitted when Allstate issued payment from its Complaint because it only took Allstate (8) business days from the date of the invoice to issue said payment. This is a clear indication of a race to the courthouse lawsuit.

11. ALLSTATE asserts that the Plaintiff's claim should be dismissed for failure to comply with the Policy's appraisal provision and all obligations under the contract, which is a condition precedent to filing/maintaining a lawsuit.

12. ALLSTATE asserts that Plaintiff's Complaint should also be dismissed for lack of standing, failure to state a cause of action/failure to comply with Florida Civil Rules of Procedure 1.130 or Small Claims Rules 7.050(a)(1).

A) MOTION TO DISMISS COMPLAINT DUE TO LACK OF STANDING AND MEMORANDUM OF LAW IN ITS SUPPORT

13. Initially, the instant case should be dismissed as the Plaintiff does not have standing to maintain this cause of action. Specifically, Plaintiff has not demonstrated that it has received and /or attached a copy of the alleged assignment of the benefits from the insured in violation of Rule 1.130(a).

14. An assignment is defined as: "a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is effected". Black's Law Dictionary (7th ed. 1999).

15. Florida Rule of Civil Procedure 1.130(a) provides:

> Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments.

16. In Florida, the black letter rule of assignment creation is: "Any instruction document or act that vests in one party the right to receive funds arguably due to another party operates as an equitable assignment." See McClure v. Century Estates, Inc., 96 Fla. 568, 120 So. 4 (Fla. 1928).

17. It is well settled Florida law that under Progessive Express Insurance Company v. McGrath Community Chiropractic: "The assignment of personal injury protection (PIP) benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit; rather, it is the basis of the claimant's standing to invoke the processes of the court in the first place." 913 So. 2d 1281. The Progressive case makes it clear that once it has been proven that an assignment is invalid the case must be dismissed for lack of standing.

18. In essence, Plaintiff's failure to attach a valid assignment cannot vest in the Plaintiff the right to assert this action. Plaintiff doesn't not have standing to bring the instant matter and Plaintiff failed to secure a valid assignment as a condition precedent to filing this action.

19. Further, Plaintiff has failed to comply with Florida Rules of Procedure 1.130 and Small Claims Rules 7/050(a)(1), which both require that the written instrument a complaint is based on be attached thereto. See also Samuels v. King Motor Co. of Ft. Lauderdale, 782 So. 2d 489 (Fla. 4th DCA 2001); Safeco Insurance Co. of America v. Ware, 401 So. 2d. 1129 (Fla. 4th

DCA 1981). A pleading is subject to dismissal if the instrument that forms the basis for a cause of action therein is not attached to the same. See, e.g., Samuels, 782 So. 2d at 500; Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885 (Fla. 4th DCA 1990).

20. The object of these rules is simply—to fully apprise one's opponent of the nature and extent of the claims made against him so that he has a fair opportunity to respond in an intelligent manner and prepare his evidence. See, e.g., Sachse v. Tampa Music Co., 262 So 2d. 17 (Fla. 2d DCA 1980), U.S. Rubber Products v. Clark, 200 So. 385 (Fla. 1941)(same goal of previous version of rule). Accordingly, a pleading does not state a cause of action if it is based upon an illegible instrument. See e.g., Contractors Unlimited, Inc. v. Nortrax Equipment Co. Southeast, 833 So.2d 286 (Fla. 5th DCA 2002)(default judgment against guarantor set aside where copy of guaranty attached to complaint was substantially illegible)

21. Plaintiff has failed to attach to its Complaint the alleged assignment of benefits or a copy of the invoice for the purported repair work. Likewise, Plaintiff has also failed to attach to its Complaint a copy of the subject insurance policy. Plaintiff even names the wrong Defendant in its complaint. Accordingly, Plaintiff's complaint should be dismissed as a matter of law.

22. Even if a proper Assignment of Benefits was executed and attached it would not be sufficient to confer standing on the Plaintiff. An assignment is defined as a voluntary act of transferring a right or an interest. *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 641 (Fla. 2d DCA 2016). It is the transfer of a complete and present right from one person to another. *See Continental Cas. Co. v. Ryan Inc.*, 974 So. 2d 368, 376 (Fla. 2008); *Bioscience W.*, 185 So. 3d at 642 (contractor was permitted to step into the insured's shoes where there was a vested insurable interest). Further in this case, the Insured signed a clear screened

tablet that did not contain an assignment or any language to that effect. Therefore the assignment, is unenforceable as a whole. Defendant has affidavit from the insured and would provide a copy to the court upon request. This affidavit has been previously sent to Plaintiff in attempts to have the case dismissed.

23. "All contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment." *Kohl v. Blue Cross & Blue Shield of Fla., Inc.*, 988 So. 2d 654, 658 (Fla. 4th DCA 2008). Pursuant to Florida Statute Section 627.422, "A policy may be assignable, or not assignable, as provided by its terms." The statute, therefore, "expressly states that the terms of an insurance policy determine its assignability." *Lexington Ins. Co. v. Simkins Indus.*, 704 So. 2d 1384 (Fla. 1998).

24. The policy here contains an express non-assignment clause:

> **You** may not transfer this policy or assign any interest in this policy, other than benefits payable under **Part III, Personal Injury Protection**, to another person without **our** written consent. However, if **you** die this policy will provide coverage until the end of the premium period for **your** legal representative while acting as such and persons covered on the date of **your** death.

See applicable insurance policy.

25. Post-loss assignments are nevertheless upheld even if an insurance policy contains a specific provision precluding an insured's post-loss assignments of benefits without the insurer's consent. *See, e.g., One Call Prop. Servs. Inc.*, 165 So. 3d 749, 755 (Fla. 4th DCA 2015). Importantly, however, in order for a post loss assignment to be valid, the right to payment must have accrued under the policy and vested in the insured. *See, id*. (stating "as long as an insured complies with all policy conditions, a third-party assignee may recover benefits on a covered loss").

26. The Plaintiff's assignment is ineffective first because of the way it was obtained and second, because the right to additional payment[3] has not accrued and vested in the insured. There has been no determination that any additional payments are due and owing because the insured has not complied with the appraisal condition of the policy – the only way in which the amount of loss is to be decided. Unless and until any additional amounts are due and owing through the appraisal, there is no current and vested right to any payment. In short, until the appraisal is complete and the amount of further payment, if any, is determined, there is no vested right for the insured to assign.

27. Further, "[a]ssignment of a right to payment under a contract does not eliminate the duty of compliance with contract conditions." ***Shaw v. State Farm Fire & Cas. Co.***, 37 So. 3d 329, 332 (Fla. 5th DCA 2010), *disapproved on other grounds*, ***Nunez v. Geico Gen. Ins. Co.***, 117 So. 3d 388 (Fla. 2013). The Plaintiff, as a third-party assignee, however, is not liable for performance of any duty under a contract. *Id*. However, the duties and obligations under the contract is still owed and required by the assignor.

B) MOTION TO DISMISS FOR FAILURE TO SATISFY A CONDITION PRECEDENT AND DEMAND FOR APPRAISAL

28. Without waiving the Defendant's aforementioned Motion to Dismiss, the Defendant demands appraisal pursuant to the language of the applicable policy.

29. During the applicable policy period with ALLSTATE, the windshield of the Insured's vehicle was allegedly damaged such that it had to be replaced.

[3] Payment was already made for the amount of loss. Pursuant to the policy, any additional payment requires appraisal of the loss.

30. The Insured purportedly retained the services of AUTO GLASS AMERICA, LLC, to effectuate the windshield repairs.

31. Plaintiff submitted an invoice to ALLSTATE, and such invoice was in an amount in excess that which ALLSTATE is obligated to pay pursuant to the terms and conditions of the applicable policy of insurance.

32. On or about April 3, 2017, the Defendant submitted payment to Plaintiff pre-suit, for the *amount of loss*, in compliance with the terms of the policy with ALLSTATE.

33. On or about March 29, 2017, ALLSTATE demanded appraisal for the remaining billed amount pursuant to the terms and conditions of the applicable policy of insurance.

34. Defendant and/or ALLSTATE are hereby invoking appraisal again in this case pursuant to the applicable policy provisions.

35. Plaintiff prematurely filed this lawsuit on April 12, 2017, merely (16) business days after the invoice, seeking inflated payment of glass repairs. Previous to the filing, Plaintiff failed to make any efforts to resolve the dispute by contacting ALLSTATE and advising of any issues that prohibited them from complying with the obligations under the policy.

36. In pertinent part, the applicable policy of insurance provides as follows:

> **Right to Appraisal**
>
> Both **you** and **we** have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.
>
> See applicable insurance policy and declaration page.

37. Compliance with the terms and conditions of the policy, namely participating in appraisal once demanded, is a *condition precedent* to filing suit:

> **Action Against Allstate**
> No one may sue **us** under this coverage unless.
> 1. there is full compliance with all terms of this policy; and
> 2. at least 30 days have passed since the required notice of accident and reasonable proof of claim were filed with **us**.

See applicable insurance policy and declaration page.

38. ALLSTATE has not waived its right to appraisal, and has reached out to Plaintiff and the Insured on multiple occasions, in good faith, to have the issue resolved ***pre litigation***. All attempts pre-suit were ignored by the Plaintiff.

39. Per the policy, all conditions precedent must be complied with before suit can be filed. Under Florida law, a "no action" clause in an insurance contract may operate as a condition precedent barring suit against the insurer until the insured complies with relevant policy provisions. Langhorne v. Fireman's Fund Ins. Co., 432 F. Supp. 2d 1274 (N.D. Fla. 2006).

40. Plaintiff failed to participate in appraisal and, instead, filed this lawsuit in non-compliance with the terms and conditions of the policy. This lawsuit should therefore be dismissed until Plaintiff has complied with the terms and conditions of the policy – namely the appraisal process.

41. Florida courts have voiced a judicial preference for the resolution of conflicts through any extra-judicial means, such as appraisal, for which the parties have themselves contracted. See State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200, 1201-1202 (Fla. 3rd Dist. Ct. App. 1995).

42. It is also well settled that once the appraisal provision of an insurance policy has been properly invoked, further proceedings should be conducted in accordance with the appraisal provision, rather than by wholly different proceedings contemplated by the appraisal agreement. See Allstate Ins. Co. v. Suarez, 833 So. 2d 762, 766 (Fla. 2002).

MEMORANDUM OF LAW APPRAISAL CLAUSE

43. There are three elements for the courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and, (3) whether the right to arbitration is waived. Heller v. Blue Aerospace, LLC., 112 So. 3d 635 (Fla. 4th DCA 2013).

44. Florida law is clear that a Court **must compel arbitration** when an arbitration agreement and arbitrable issues exist and the right to arbitrate has not been waived. Ballen Isles Country Club, Inc., v. Dexter Realty, 24 So. 3d 649, 652 (Fla. 4th DCA 2009). Any action or proceedings involving an issue subject to arbitration should be stayed if an application thereof has been made. Miller & Solomon General Contractors, Inc., v. Brennan's Glass Co., Inc., 824 So. 2d (Fla. 4th DCA 2002).

45. Appraisal clauses are similar to arbitration clauses, and as such they are considered a condition precedent to any recovery under an insurance policy. See Preferred Mut. Ins. Co. v. Martinez, 643 So. 2d 1101, 1102 (Fla. 3d DCA 1994)(citing Transamerica Ins. Co. v. Weed, 420 So. 2d 370 (Fla. 1st DCA 1982); see also Opar v. Allstate Ins. Co., 751 So. 2d 758, 759 (Fla. 1st DCA 2000); U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983); Fla. Farm Bureau Ca. Ins. Co. v. Sheaffer, 687 So.2d 1331, 1332 (Fla. 1st DCA 1997)(Appraisal provisions in insurance policies are construed in the same manner as arbitration provisions).

46. Once arbitration clause is properly invoked, **arbitration becomes a condition precedent to right of insured to maintain an action on the policy.** U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170, 172 (Fla. 1st DCA 1983). Courts should grant motions to compel arbitration (or appraisal) for **"permitting parties to litigate a dispute in court instead of proceed to arbitration, if there is a right of arbitration, constitutes a departure from essential requirements of law which cannot be remedied by appeal."** Id. Certiorari is appropriate remedy to review non-final order denying right to arbitration where such right exists. Id.

47. An appraisal clause contained in an insurance contract acts as a condition precedent to bringing a claim under the contract. United Community Insurance Company v. Lewis, 642 So. 2d 59 (Fla. 3d DCA 1994). **If one party to the insurance contract demands appraisal under the contract the proper action is dismissal of the action until the condition precedent has been met**. Id. Like the subject policy's appraisal provision, the governing appraisal provision in United Community Insurance Company v. Lewis provides that demand for appraisal "may" be made by either party. However, the Court rejected the insured's argument that the appraisal provision is permissive finding that **once demand for appraisal was made by either party…neither party had the right to deny that demand.** Id.

48. Arbitration is a remedial mechanism that is binding on an assignee of a contract containing an arbitration clause, and thus, even an assignment only of contract rights not entailing any duty of performance must be deemed to include the bargained-for remedial procedure. Kong v Allied Professional Inc. Co., 750 F. 3d 1295 (2014). A party cannot attempt to hold another party to the terms of an agreement while simultaneously trying to avoid the

agreement's arbitration clause…allowing such would "fly in the face of fairness." Marcus v. Florida Bagels, LLC, 112 So. 3d 631 (Fla. 4th DCA 2013)(citing Grigson v. Creative Artists Agency, LLC., 210 F.3d 524 (5th Cir. 2000).

49. The appraisal clause can also be invoked after a lawsuit if filed. Gonzalez v. State Farm Fire & Cas. Co., 805 So. 2d 814 (Fla. 3d DCA 2000); see also U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983)(Motion to Dismiss proper and appraisal request timely even when appraisal was not demanded prior to filing suit).

50. Pursuant to the aforementioned policy provisions and applicable Florida law, ALLSTATE demands appraisal regarding Plaintiff's claimed amount of loss. The appraisal provision of the policy at issue does not require that the appraisal provision of the policy be invoked prior to suit or, for that matter, at any particular time. See Bullard Bldg. Condo Ass'n., Inc. v. Travelers Property Casualty Co. of America, 2006 U.S. Dist. LEXIS 70674 *2-*3 (M.D. Fla. Sept. 25, 2006) (holding that Defendant made a prompt invocation of its appraisal rights under the terms of the policy when it demanded appraisal in its Motion to Dismiss or, Alternatively, to Abate and to Compel Appraisal). The appraisal demand was proper and timely pursuant to U.S. Fire Ins. Co. v. Franko, 443 So 2d 170 (Fla. 1st DCA 1983)(Defendant's motion to dismiss was held to be a proper and timely demand for appraisal even though appraisal was not demanded *prior* to suit).

51. A formal notice/formal demand for appraisal is not necessary to invoke the appraisal clause in an insurance policy. See Hirschfeld v Crescent Heights, X, Inc., 707 So. 2d 995 (Fla. 3d DCA 1998); U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170 (Fla. 1st DCA 1983)(although trial court found that it was not clear whether an affirmative and formal demand

for arbitration was ever made by the insurer, insurer's motion to dismiss insured's action seeking recovery on the policy constituted such demand).

52. A waiver of right to arbitrate occurs only when a party engages in conduct inconsistent with that right. Travelers of Florida v Stormont, 43 So.2d 3d 941 (Fla. 2010). Questions as to waiver of the right to arbitrate should be construed in favor of arbitration (or appraisal) rather than against it. King v Thompson & McKinnon, Auchincloss Kohlmeyer, Inc., 824 So.2d 1235 (Fla. 4th DCA 2002); Hill v. Ray Carter Auto Sales, Inc., 745 So.2d 1136, 1138 (Fla. 1st DCA 1999).

53. The question of waiver of appraisal is not solely about the length of time the case is pending or the number of filings the appraisal rights. Florida Ins. Guar v Sill, 154 So. 3d 422 (Fla. 5th DCA 2014); Am. Capital Assur. Corp. v. Courtney Meadows Apartment, L.L.P., 36 So. 3d 704, 707 (Fla. 1st DCA 2010)(finding party did not waive right to appraisal as party had not acted with right from time of demand).

54. Active participation is present in cases where the party seeking arbitration has defended by attacking the merits of the case as opposed to initially challenging to Plaintiff's right to judicial remedy in the first place. Miller & Solomon Gen. Contractors, Inc. v Brennan's Glass Co., 824 So. 2d 288, 290 (Fla. 4th DCA 2002).

55. The filing of a motion to dismiss directed at technical deficiencies in the complaint, such as defendants' first motion, is not "active participation" amounting to a waiver. See Hirschfeld v Crescent Heights, X, Inc., 707 So. 2d 955 (Fla. 3d DCA 1998); Prudential-Bache Sec. v. Pauler, 448 So.2d 894 (Fla. 2d DCA 1986); Graham Contracting, Inc., v. Flagler County, 444 So. 2d 971 (Fla. 5th DCA 1983); Houchins v. King Motor Co. of Fort Lauderdale

Inc., 906 So. 2d (Fla. 4th DCA 2005)(filing of motion to dismiss for failure to state cause of action does not constitute "active participation" in lawsuit as would result in waiver of right to insist on right to arbitration).

56. Asserting that the insured meet all other conditions precedent to claiming a loss is not inconsistent with demanding an appraisal; claiming that the loss is not covered is also not inconsistent with a demand for an appraisal. Florida Ins. Guaranty Association, Inc., v. Castilla, 18 So. 3d 703 (Fla. 4th DCA 2009)(insurance guaranty association, which took over liquidated property insurer, did not waive its right to an appraisal of insured homeowners' claim for hurricane damage to their residence by initially denying the claim and participating in homeowner's resulting lawsuit; association asserted the right to an appraisal in its original motion to dismiss the lawsuit and in all subsequent pleadings and hearings, and association never acted inconsistently with its rights to an appraisal).

57. The right to appraisal cannot be waived by the appointment of a contested appraiser. Travelers of Florida v. Stormont, 43 So. 3d 941 (Fla. 2010). Even if insured is correct that the insurer appointed an appraiser who was not competent; appraiser's alleged lack of competence was not conduct which is inconsistent with the right to appraisal, and correct procedure that insured should have followed was to make a written demand that insurer replace the appraiser, and if the insurer declined to do so, then promptly file a complaint in circuit court seeking removal of the appraiser. Once the insurer demanded appraisal, the insured was required to comply with the appraisal clause. Proceeding to court was not justified. Id.

58. The issue of waiver may, at times, require a hearing. Florida Ins. Guar v Sill, 154 So. 3d 422 (Fla. 5th DCA 2014); see also Doctor Assocs. v Thomas, 898 So. 2d 159, 162 (Fla.

4th DCA 2005)(holding question of waiver reviewable for competent, substantial evidence). However, when the underlying facts are undisputed, all that remains is to apply the law to the facts, and no evidentiary hearing is required. Florida Ins. Guar v Sill, 154 So. 3d 1015, 1017 (Fla. 3d DCA 2014); see also Truly Nolen of Am., Inc. v. King Cole Condo. Ass'n., 143 So. 3d 1015, 1017 (Fla. 3d DCA 2014)(reviewing issue of waiver de novo where facts undisputed); see also Bruce v. Reese, 431 Fed. Appx. 805, 806 (11th Cir. 2011)(holding, in context of preliminary injunction, "[a]n evidentiary hearing does not need to be held where the facts necessary to rule on the motions are undisputed").

59. **State courts should resolve all doubts about scope of arbitration agreement, as well as any questions about waivers thereof, in favor of arbitration.** Ronbeck Const. Co., Inc. v Savanna Club Corp, 592 So.2d 344 (Fla. 4th DCA 1992). The appraisal provision is intended to act as a quicker, less expensive method of resolving factual disputes relating to property insurance.

60. Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits. First Floridian Auto & Home Ins. Co., v Myrick, 969 So. 2d 1121, 1125 (Fla. 2d DCA 2007). "When the insurer admits that there **is** a covered loss, but there is a disagreement on the ***amount of loss***, it is for the appraisers to arrive at the amount to be paid." Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021, 1025 (Fla. 2002)(quoting Gonzalez v. State Farm Fire & Cas. Co., 805 So. 2d 814, 816-817 (Fla. 3d DCA 2000).

61. Because the subject policy contains an appraisal clause, once demanded, this is the way in which a determination is made for the loss amount payable. Compliance with the

appraisal clause is a duty under the policy and a condition precedent to loss payment. *See* applicable insurance policy. Therefore the Plaintiff's assignment is illusory unless and until the amount of loss is determined through appraisal.

62. Plaintiff and its counsel are familiar with the appraisal clause, the appraisal process and the outcome of this Motion as Allstate and other companies such as Progressive with almost identical appraisal clauses, have argued this Motion successfully against the Plaintiff and other repairs shops. A copy of various court orders in favor the Insurer here will be provided upon request or at the hearing on this Motion.

63. In some of these cases, appraisal was requested for the first time after the lawsuit was filed. Plaintiff unsuccessfully made arguments that appraisal was not appropriate because the car was repaired. The Court rejected the Plaintiff's arguments and ordered the parties comply with the appraisal clause. Plaintiff did not comply with appraisal, ignoring the Court's order, and eventually dismissed the case.

64. Plaintiff is aware of two cases where a final order granting Writ of Certiorari was entered on May 25, 2017 and May 26, 2017, where the appellate court found that it was ***improper to deny Defendant's Motion to Dismiss on this same fact pattern***. The court held that Respondent ***improperly proceeded to bring a lawsuit against the Petitioner after the proper invocation of a valid appraisal provision and that proceeding to court was not justified***. citing Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n. Inc., 117 So. 3d 1226 1229 (Fla. 3d DCA 2013). The court further noted that the dispute in these cases ***is purely a question of "the amount of loss" which falls within the scope of the appraisal provision***. An appraisal results in a binding determination as to the amount of the loss which is in dispute, and could avoid a

parties' need to resort to litigation. The court also distinguished that "issues relating to coverage challenges are questions exclusively for the judiciary." Florida Ins. Guar. Ass'n, Inc. v Olympus Ass'n Inc., 34 So. 3d 791, 794 (Fla. 4th DCA 2010). However, "***where the insurer admits that there is a covered loss, but there is a disagreement on the amount of the loss, it is for the appraiser to arrive at the amount to be paid***." Id. The plaintiff tried to have this matter reheard, and the court denied that request on July 11, 2017. These order are binding on all county court filings for glass claims. Defense provided this order to Plaintiff on July 24, 2017 via email and requested a dismissal—the case has yet to be dismissed. A copy of these orders will be provided upon request or at the hearing on this Motion. See Progressive American Insurance Company v. Broward Insurance Recovery Center a/a/o Isabella Cardona and Progressive Select Insurance Company v. Cornerstone Network, Inc., a/a/o Dakota Sowell, (a copy of this order has been filed with the court under a different cover)

65. Plaintiff and multiple repair shops have started mass filing lawsuits over nominal sums of money. Appraisal is required because the real relief sought is monetary. See Polk County v. Highlands in the Woods, LLC., 2017 WL 2199067 (Fla. 2d DCA 2017), which discusses the proper ruling when the "real issue at hand" is either damages or equitable relief.

66. Further, the legislative intent behind the statute, specifically in regards to comprehensive coverage, is safety (a copy of the Senate Bill Action Report *with incorporated intent* has been filed with the court under a separate cover). The purpose of the statute is so that an ***insured*** is not required to come out of pocket in order to get a new windshield repaired. However, in our cases, the windshield is already repaired, without an out-of-pocket cost to the insured, therefore the legislative intent is not contravened.

67. As the Court said in Nationwide Property & Casualty Insurance v. Bobinski, "[w]e also find that it maintains the better policy of this state to encourage insurance companies to resolve conflicts and claims quickly and efficiently without judicial intervention. Arbitration and appraisal are alternative methods of dispute resolution that provide quick and less expensive resolution of conflicts. Hopefully both will serve to suppress the ever increasing costs of insurance protection." 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001).

68. Permitting the parties to litigate this dispute in court instead of proceeding to appraisal constitutes a departure from the essential requirements of law which cannot be adequately remedied by appeal. See U.S. Fire Ins. Co. v. Franko, 443 So.2d 170, 172 (Fla. 1st Dis. Ct. App. 1983), reh'g denied (1984).

69. In the case at hand, it is undisputed that a valid appraisal agreement exists and that demand for appraisal has been made: that appraisal is the appropriate forum for the disputed issues; and that Defendant has not waived its right to appraisal. Accordingly, Plaintiff must be compelled to comply with the appraisal provision of the subject policy, and same is a condition precedent to the filing and maintaining of the subject lawsuit

C) PLAINTIFF'S COMPLAINT VIOLATES FLORIDA STATUTE § 626.854

70. The assignment of benefits to PLAINTIFF also violates Florida Statute § 626.854, also known as the public adjusting statute. The assignment to PLAINTIFF impermissibly adjusted the insurance claim, which is contrary to the statute's mandate. Pursuant to that statute:

> A "public adjuster" is any person, except a duly licensed attorney at law as exempted under s. 626.860, who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims

> for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims. The term also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of a public adjuster.

Fla. Stat. § 626.854(1).

71. While the statute specifically carves out from that definition "licensed health care provider[s] or employee[s] thereof who prepares or files a health insurance claim form on behalf of a claimant," i.e., for purposes of PIP benefits, the statute ***does not*** carve out an exception for glass companies such as Plaintiff who are enticing insured policyholders to submit claims by offering monetary or other valuable inducement such as a $100 restaurant.com gift card or cash in blatant violation of the statute. *See, e.g.,* Fla. Stat. § 626.854(8)(a)(2.)(statements or representations that invite an insured policyholder to submit a claim by *offering monetary or other valuable inducement are considered deceptive or misleading*). In the instant case, the insured received a voucher from the Plaintiff and was told to go online to redeem a free dinner or free cruise, whichever they chose. (Insured's affidavit can be provided to the court upon request. This affidavit was previously provided to the Plaintiff in attempts to have this case dismissed.)

D) PLAINTIFF'S COMPLAINT IS ALSO DEFICIENT BECAUSE IT FAILS TO SUE THE CORRECT DEFENDANT

72. Additionally, the named Defendant, ALLSTATE INSURANCE COMPANY, did not issue a personal automobile insurance policy to the purported Assignor; they are an improper party and the lawsuit should therefore be dismissed with prejudice.

73. ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY (hereinafter referred to as, "ALLSTATE") issued a personal automobile insurance policy to the

purported Assignor, which provided comprehensive coverage subject to the terms and conditions of the applicable policy of insurance not ALLSTATE INSURANCE COMPANY.

E) PLAINTIFF'S COMPLAINT BREACHES THE NO ACTION CLAUSE OF THE SUBJECT POLICY

74. The lawsuit filed by the Plaintiff is a breach of the terms and obligations under the Assignor's policy. The policy contains a No Action Clause titled "Action Against Allstate" in the general provisions. It states all conditions precedent must be complied with before suit can be filed.

75. "A no action clause in an insurance contract operates as a condition precedent that bars suit against the insurer until the insured complies with the relevant policy provisions." Wright v. Life Ins. Co., 762 So. 2d 992, 993 (Fla. 5th DCA 2000). Accord Harris v. N. British & Mercantile Ins. Co., 30 F.2d 94, 95 (5th Cir. 1929) ("If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.").

76. Under Florida law, a "no action" clause in an insurance contract may operate as a condition precedent barring suit against the insurer until the insured complies with relevant policy provisions. Langhorne v. Fireman's Fund Ins. Co., 432 F. Supp. 2d 1274 (N.D. Fla. 2006).

77. Such provisions "preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition." Southern Home Ins. Co. v. Putnal, 49 So. 922 (Fla. 1909). Cf. Swaebe v. Fed. Ins. Co., 374 F. App'x 855, 857-58 (11th Cir. 2010) ("The undisputed record shows that Swaebe filed this lawsuit prior to complying with the provisions of her policy and before any proof of loss had been filed. Swaebe thus breached the policy's 'no action' provision -- and because it is a condition precedent to recovery, under Florida law, Swaebe committed a material breach barring recovery."); McDonald

Indus., Inc. v. Ins. Co. of N. Am., 1995 U.S. App. LEXIS 4848 (8th Cir. Mar. 14 1995) (no action provision barred suit by insured due to failure to comply with notice provisions)

F) MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY

78. Since the appraisal process will lead to a resolution of this lawsuit, ALLSTATE asserts that judicial resources will be wasted if this case is not dismissed.

79. Discovery is not appropriate as this matter must process under the subject policy's appraisal clause which does not contemplate discovery. Agricultural Excess and Surplus Lines Insurance Company v. Kendall Lakes Townhomes Developers, 884 So. 2d 975 (Fla. 3d DCA 2004)(There is no need or justification for a deposition regarding disagreement of appraiser or umpire. The subject appraisal provision only provides that the parties may approach the court for selection of an umpire and does not contemplate discovery regarding same).

80. Moreover, it is well established that a trial court possesses broad discretion in overseeing discovery and protecting parties that are subject to the same. See, e.g., Rojas v. Ryder Truck Rental, Inc., 641 So. 2d 855, 857 (Fla. 1994); Gross v. Security Trust Company, 453 So. 2d 944, 945 (Fla. 4th DCA 1984)(whether depositions, or any other discovery, should be limited is within broad discretion of the trial court); South Florida Blood Service, Inc., v. Rasmussen, 467 So. 2d 798, 801 (Fla. 3d DCA 1985)(courts have authority to control discovery in all respects in order to prevent harassment and undue invasion of privacy).

81. In particular, a trial court may postpone discovery pending the resolution of a motion to dismiss. If the claims against the Defendant are dismissed, Plaintiff's discovery will, for all intents and purposes, be rendered moot. In such a scenario, Defendant would no longer be obligated to respond to Plaintiff's discovery Requests. As such, it clearly is a misuse of time,

money and effort to engage in discovery until the Motion to Dismiss is resolved. See, e.g., Deltona Corporation v. Bailey, 336 So. 2d 1163, 1169 (Fla. 1976)(trial court has discretion to postpone discovery by plaintiff pending determination of defendant's motion to dismiss complaint); Hollywood, Inc. v. Broward County, 90 So. 2d 47 (Fla. 1956)(trial court had discretion to prevent depositions pending resolution of potentially dispositive motion); Feigin v. Hospital Staffing Services, Inc., 569 So. 2d 941 (Fla. 4th DCA 1990)(trial court may stay depositions spending hearing on a motion to dismiss); Travelers Protective Association America v. Hackett, 438 So. 2d 1074, 1075 (Fla. 2d DCA 1983)(trial court improperly entered an order compelling a party to respond to discovery while motion to dismiss complaint was pending).

82. If the case is not dismissed, Defendant, ALLSTATE moves for a protective order, staying discovery in this matter so that the appraisal process may be completed. See Agricultural Excess & Surplus Lines Ins. Co. v. Kendall Lakes Townhomes Developers, Inc., 884 So. 2d 975, 976 (Fla. 3rd DCA 2004) (per curium) ("The contract between the parties only provides that the parties may approach the court for a selection of an umpire. No discovery is contemplated in the provision of the contract under which the parties are now proceeding."). Since appraisal will likely settle these matters, there is no need for either party to propound or conduct discovery at this time, especially since there was no need for a lawsuit.

83. Further, Plaintiff counsel has previously agreed to stay all discovery until this hearing is had.

D) MOTION TO DISMISS ANY CLAIM FOR ATTORNEY'S FEES

84. Plaintiff failed to plead any such applicable statutory or contractual basis and as such should be prohibited from claiming attorney's fees under this cause of action as they are not

entitled to attorney's fees. Plaintiff filed this lawsuit to collect attorney's fees when the policy has a specific, out of court means of resolution, the appraisal process, to resolve this fact pattern. Granting these fees would reward all the actions noted above and this race to the courthouse being brought by the Plaintiff.

WHEREFORE, Defendant ALLSTATE respectfully request that this Court: 1) dismiss Plaintiff's Complaint with prejudice as to the Defendant in favor of appraisal and appoint an umpire, if necessary; 2) enter a protective order, staying Plaintiff's discovery as to ALLSTATE in this matter and 3) prohibit the reward of attorney's fees under this cause of action. Defendant further moves this Court for reasonable attorneys' fees and costs and any other relief this Court deems just and proper.

I HEREBY CERTIFY that on the 24 day of July , 2017,

pursuant to Administrative Order No. AOSC13-49, a copy of the foregoing DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEY'S FEES has been electronically filed and served using the Florida Courts E-Filing Portal to:

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IN THE COUNTY COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

AUTO GLASS AMERICA, LLC
a/a/o [redacted]

CASE NO.: COCE-17-005472

Plaintiff,

-vs-

ALLSTATE INSURANCE COMPANY,

Defendant.
_____/

AUTO GLASS AMERICA, LLC
a/a/o [redacted]

CASE NO.: COCE-17-005712

Plaintiff,

-vs-

ALLSTATE INSURANCE COMPANY,

Defendant.
_____/

HEARING BEFORE THE HONORABLE
KATHLEEN MCCARTHY

Thursday, January 25, 2018
1:56 p.m. - 3:01 p.m.
Broward County Courthouse
201 Southeast 6th Street
Room 11172
Fort Lauderdale, Florida

Stenographically Reported By:
LOIS L. MCINNIS-KELLEHER, FPR
Florida Professional Reporter

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(Thereupon, the following proceedings were had:)

THE CLERK: Case number COCE17005712, Auto Glass America, LLC versus Allstate Insurance Company.

Please state your name for the record.

MS. BRUCK: Thank you.

Alison Haney Bruck, along with Kansas Gooden, on behalf of the defendant.

THE COURT: Welcome.

MS. BRUCK: Thank you.

MR. STILLO: Good afternoon, Your Honor. Emilio Stillo on behalf of the plaintiff.

MR. KOPELMAN: Larry Kopelman on behalf of the plaintiff.

MR. PHILLIPS: Mac Phillips for the plaintiff.

THE COURT: Good afternoon, everybody.

MS. BRUCK: Thank you, Your Honor.

We have a few motions before Your Honor today. The first one that we'd like to address is the motion to transfer, on both of these cases.

These cases are involving windshield repair or replacement, and the windshield was

damaged or allegedly damaged in counties outside of Broward County. The repairs happened outside of Broward County. All of the relevant witnesses would be outside of Broward County.

As for the case of Auto Glass America, the assignor being [redacted], that occurred -- excuse me -- that occurred in Pinellas County, and for the case of Auto Glass America, the assignor being [redacted], that case was in Hernando County.

So we have received -- just my firm alone has received 430 glass cases for this calendar year. I imagine the Broward docket is even more congested with these types of cases.

We don't think it is, number one, convenient for us, if we have to litigate these cases, since the depositions and the discovery would be regarding people in other counties.

We also don't think it's just to the citizens of Broward County to have to adjudicate facts that occurred outside of their own county. They have enough things to adjudicate and spend their time on here in Broward County alone.

So that's our first motion.

MR. PHILLIPS: Hi, Judge.

THE COURT: Hello.

MR. PHILLIPS: On the transfer motion, I think we are putting the cart before the horse, because the other matters scheduled for today are whether or not these cases should get kicked out of the court system, in favor of appraisal. For a variety of reasons, obviously, we've got very good reason why these cases should remain in the court system.

But to talk about venue and transferring first, I think we should actually focus on whether or not court is appropriate, regardless of what county it is.

But since they did bring it up, this is not a fact-intensive case. There aren't issues, in this case, that -- or these cases that are before the Court, involving a car accident, or was the light red, or was the light green, where, you know, things happened. These cases are entirely matters of contract interpretation. Matters of contract interpretation are matters of law, period.

And in terms of counsel's concern for the

Broward County jury pools, we obviously share that concern; but, guess what, as a matter of law, there are no juries that are going to be burdened here.

As a matter of fact, the plaintiffs did not demand a jury trial, nor have the defendants. In fact -- well, the defendants haven't answered yet. They've -- we're here on a motion to dismiss and to transfer. So nobody's demanded a jury trial.

And in terms of judicial resources, and that being a precious thing to protect, also, we are well aware that there are 67 counties in Florida, but Dade, Broward, and Palm Beach have, by far, the biggest and craziest dockets. In fact, it's so disproportionate that that's, you know, incredible, you know, to me.

But at the same time, the case law does say that if the only issue on a venue transfer motion is conservation of judicial resources, even in the face of jammed up dockets, that is not the right ground to transfer venue.

I honestly didn't know that venue was going to be an issue, so I don't have the cases, but I can tell you off the top of my

head, because I did argue them recently. The first one that says that is a case called R.J. Reynolds versus Mooney, M-O-O-N-E-Y. It's a Third District case from 2014. And that cites to a case called Ashland, A-S-H-L-A-N-D, from the Second District, from 1977.

And the specific quote is -- I'm going to paraphrase it, is that from Ashland, in '77, nobody has ever presented to us any authority for the proposition that judicial inconvenience and clogged dockets is a basis to transfer venue. That was in 1977.

And so to 2014, I guess that's 37 years later, the Third District cited that case, and said nobody's brought to our attention anything that says that's the proper grounds to transfer venue.

So I'm more than happy to get copies of those cases to the Court. I just didn't have them with me this afternoon.

THE COURT: Okay.

MR. PHILLIPS: I had them with me this morning.

In any event, because there are no juries to burden, because of the location of

witnesses, which is the most important consideration on a convenience motion to transfer, because we don't have that, then we think, should the case -- cases stay within the court system, they should stay within the Broward court system because, one, the plaintiff's choice of forum is something that is given serious consideration.

Number two, the cause of action for breach of contract against Allstate is well laid in Broward, because Allstate has employees, offices, agents, representatives all in Broward. In fact, the law offices of whoever in-house counsel for Allstate is, I believe, is right across the street, at 110 Tower.

So we sued in the residence -- in the county where the defendant maintains their residence. And the fact is, also, that these are declaratory judgment claims, which further goes to we're dealing with matters of law as opposed to fact.

THE COURT: Okay.

MS. BRUCK: Thank you.

The polices, the matters of law which we're dealing with, were entered in the other

counties that I mentioned, not here.

THE COURT: Okay.

MS. BRUCK: And the two things that we considered are the convenience of the witnesses and interest of justice. Here, all the witnesses are in other county -- counties that I mentioned.

And in the interest of justice, it is not equitable that Broward County needs to foot the bill or the resources for events that occurred outside of Broward County.

There's also a case that I actually found this afternoon on Florida Law Weekly. It's one page. It is out of -- it's 13 Fla. L. Weekly -- excuse me. 13 Fla. L. Weekly Supp. 1021A. And that is 800 A1 Glass LLC, as assignor of -- assignee of Melissa Henderson versus Progressive Auto.

And the court found plaintiff's forum choice is suspect when the only nexus to Seminole County is the fact that the defendant does business there, and substantially all other aspects of the case, i.e., location where glass damage occurred, residence of insured's glass assignor, location of the windshield

repair, plaintiff's offices, and witnesses are elsewhere. Forum shopping is a viable concern, since there's only one county court judge in this particular county.

Additionally, Seminole County is devoting substantial resources to address and resolve a very large number of cases, whose only connection is that the defendant's insurance companies do business there, just like this case.

I have a copy, if Your Honor would like to see it.

THE COURT: Yes.

MS. BRUCK: May I approach, Your Honor?

THE COURT: Yes.

MS. BRUCK: Thank you.

MR. STILLO: We have a few other additional points, Your Honor, if I may.

THE COURT: Sure.

MR. STILLO: Paragraph six of their motion -- they're talking about witnesses, and things of that nature. Paragraph six of their motion says Allstate moves for protective order staying discovery, because they want the court to rule on the appraisal.

So they're talking out of both sides of their mouth, because here we are asking the Court to rule on the appraisals, pursuant to your request -- their request. No discovery has been answered. And now they're saying, well, we want to do discovery.

Well, which is it?

I'd assert that their argument is disingenuous to the extent that they are talking about doing discovery and convenience of witnesses, when their representations to the Court -- their representation to the Court is we don't want to do any discovery. We want the Court to rule on the appraisal.

Now they're not happy with the way the courts have been ruling on the appraisal, because Judge Halal, Judge DeLuca, Judge Fishman, Judge Skolnik, the judges have ruled against them on the appraisal issue, so now they're manufacturing this idea that they want to do discovery, contrary to their representations.

So I would ask the Court to just reserve as to that issue, proceed with what we prepared for, what we're here for, the appraisal issue,

and we cross the witness issue at a later point in time, because it's not ripe for right now, based on what Allstate has told the Court.

THE COURT: Okay.

Ma'am, I want to make sure I'm not missing anything.

MS. BRUCK: Sure.

THE COURT: Did you have an affidavit with what motion?

MS. BRUCK: Yes. We do.

THE COURT: I'm looking -- I'm looking at the --

MR. PHILLIPS: I'm looking at the docket, and I don't see it.

THE COURT: I have the electronic one, and I don't see that. So I --

MS. BRUCK: For one of them there is an affidavit attached to it.

THE COURT: I'm referring to Auto Glass America. The assignment of benefits is [redacted]

MS. BRUCK: Okay.

MR. PHILLIPS: Yeah. 5712. I'm literally looking at the same --

MS. BRUCK: Yeah. I think [redacted]

is the one with the affidavit. Let me just pull that up. There's an affidavit from the adjuster attached as Exhibit A to that motion.

I have it, Your Honor, just there's a lot of paperwork here. Okay. I have it.

The motion to transfer venue on Auto Glass America as assignee of [redacted] versus Allstate, there's an affidavit attached as Exhibit A.

If Your Honor would like to see it, I can approach and --

THE COURT: Okay.

MS. BRUCK: -- provide it to you.

THE COURT: But we're in agreement, you don't have one with the other case, correct?

MS. BRUCK: We do not have one with the other case. No.

THE COURT: Okay. All right.

MS. BRUCK: And just to comment on what was said about us manufacturing something, the only thing that's being manufactured here is the nexus to Broward.

Our motion to transfer was filed at the same time as our motion to dismiss and compel appraisal, and motion for protective order,

because, as case law is well decided, we must do all of those things at the same time to preserve our defenses, and to preserve our right to appraisal, and to preserve the motion to transfer argument.

THE COURT: Okay.

So with regard to the motion to transfer, the Court is going to take that under advisement.

So let's move on to --

MS. BRUCK: Okay.

MR. PHILLIPS: The one without the affidavit, Judge, the [redacted] case, it should be denied. There's no affidavit.

And if I may respond to the other one with the affidavit, I'm reading this for the first time. And an affidavit in support of a motion to transfer venue can't just list a bunch of people and say they are outside of the county.

There has to be testimony, in this affidavit, as to which witnesses are key, why they are important, and that they live out of the county.

We don't have that here. We just basically have [redacted] saying that she

lived -- [redacted] is the person, but the adjuster, [redacted] looking at the claim file, saying that [redacted] lives in Spring Hill, Florida, that's Hernando County. She retained the services of plaintiff to effectuate repairs on her vehicle, and she assigned her rights to us, and the repair work was done over there. There's nothing -- and that's the end of it. The last paragraph is Auto Glass America has its business in Seminole County.

So the affidavit doesn't give any real testimony as to why these people requested are important for trial, number one. Number two, the affidavit mentions two different counties; Hernando and Seminole.

Number three, they seem to make a big deal about the fact that Auto Glass America's office is somewhere else, but Auto Glass America has to appear for deposition in Broward County. Plaintiffs have to appear in the forum that they chose.

And there's nothing, no key evidence in this affidavit, that would suggest anything important happened anywhere else.

THE COURT: Okay. Thanks, Mr. Phillips.

Anything else before we proceed?

MS. BRUCK: Yeah.

There's no requirement, that I'm aware of, that I need to file an affidavit. Their assignment of benefits, which they have attached, shows where this repair happened, and shows the people and the addresses. So they're well aware of that.

And to pretend that that's a fact that's an issue is really disingenuous, and it flies in the face of everything that they say with regard to their assignment of benefits.

So if their assignment of benefits is questionable, then that's an additional concern that we basically have before this Court.

THE COURT: Okay. Thank you.

MS. BRUCK: The next thing that we would like to discuss, Your Honor, is the appraisal. So we think that this entire suit is premature, because this suit is about amount of loss.

Now, the policy states that if there's a dispute as to the amount of loss, then appraisal is the appropriate process to go through, not clog the court or Broward court

with these issues, but adjudicate it elsewhere, without the need of the court intervention.

We have sent, in both cases, appraisal letters, on two different occasions, to the plaintiff, with no response whatsoever.

Their argument is that our appraiser is not disinterested and, therefore, the appraisal clause is not valid, or at least that's one of their bases.

Travelers versus Stormont, which is 43 So.3d 941, out of the Third DCA, in 2010, says that there is a process that you have to follow. Travelers versus Stormont, just as a quick background, involves a car, some type of specialty Mustang car, that had work done to it to make it, I'm not sure, fast or -- or antique, or special in some way.

The appraiser that the insurance company wanted to use readily said and admitted that he had no knowledge about these types of cars, and he's never done work with it, so he was not qualified, as per the insured. And so instead of offering another appraiser or saying, hey, I don't agree with your appraiser, they filed suit in court.

And the Third DCA says that that's not the appropriate way to handle such a situation. That even if the appraiser is incompetent or interested in the case somehow, what needs to happen is, as soon as they find out about this appraiser, and as soon as they find out the issues surrounding it, that create concern for them, they need to request an additional appraiser from the insurance company.

Then, and only then, can the plaintiff -- well, let me back up. If the insurance company ignores that, or refuses to provide an additional appraiser, then, and only then, can the plaintiff file suit.

And, at that point, the plaintiff must file suit in circuit court for the issue of the appraiser only. And so that the circuit court can then adjudicate whether this appraiser is competent or interested in the case, and move along from there.

So we have jumped many steps ahead. Not only is this what we believe is not a proper venue, but we have now not a compliance with the policy. And if there's not a compliance with the policy, under the no action clause,

which is action against Allstate and our policy, which has been provided and is attached, we are entitled to 30 days before suit is filed, and all the conditions of the policy must be complied with before you can follow -- file suit.

So, in this particular instance, the appraisal has not been complied with. They did not follow the proper procedure in trying to obtain an appraiser that they think would be the -- a fair and competent appraiser. They raced to the courthouse.

And a waiver -- I know that they will say, later on, that they believe our appraiser is not -- is biased for us, and that there's historically some other cases they dealt with. None of them have been from my office.

We've had 430 cases from this attorney's firm in the past calendar year, and not one time have they ever followed the Third DCA's procedure of telling us or our client that we believe your appraiser is interested, or biased, or not competent. So they never give us the opportunity to resolve that issue, which they are required to do by the Third DCA.

And then there's also two cases out of Broward County, out of this circuit court, Progressive versus Cornerstone Network as assignor of Dakota Sohol, and Progressive Broward Insurance Recovery as assignor of Isabella Cardona.

And those cases, which have been provided to Your Honor, as well, they state when an insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraiser to arrive at the amount to be paid, which is the situation we have here.

There is a covered loss. We're admitting there's a covered loss. We paid the -- they submitted an invoice for one amount. We paid a different amount. So that's the entire dispute.

Which amount is correct?

Maybe none of them. And that's what -- that's where the appraisal clause comes into play.

So this is a premature suit, since the conditions precedent have not been met. And for that reason, as well, they're not entitled

to attorney's fees, because this is not ripe for suit yet. And there's case law on point. Travelers versus Stormont actually speaks about that in their holding, as well.

So, for those reasons, we move to dismiss.

THE COURT: Okay.

MR. KOPELMAN: Thank you, Your Honor. May it please the Court. Larry Kopelman on behalf of the plaintiff.

May I stay seated, Judge?

THE COURT: Yes.

MR. KOPELMAN: Thank you. I appreciate it.

Just to bring a little context to what is happening here, our client is a repair company -- windshield repair and replacement company. What happened was, there a -- one of Allstate's insureds was involved in an incident and accident that occurred in a loss, which resulted in the replacement of a windshield.

They came to our client under an assignment of benefits that our client took. They -- our client fixed the -- fixed the windshield -- they actually replaced the windshield, and then a bill was submitted to

Allstate for payment.

Pursuant to the policy, Judge, Allstate is obligated to pay pretty much any loss. It's -- this policy is akin to an all-risk type of policy. As long as you have a loss that's covered under the policy, which it is -- I don't think anybody disputes that it is a covered loss here -- it has to be paid under the terms and conditions of the policy.

The only thing governing the reimbursement of this claim is the limit of liability provision in the policy, which states, Judge, that the limit of liability is -- do you have the policy, by any chance?

THE COURT: I have this stack here, so I'm not sure where it is.

MR. KOPELMAN: Yeah.

Actually, it's -- Your Honor, if you could look at defendant's supplemental --

THE COURT: I have it. Just you can direct me to the page.

MR. KOPELMAN: Okay.

I believe it's page -- the pages aren't numbered, but it's the page that starts -- on the very top it says auto comprehensive

insurance coverage. I think it's the third page in.

THE COURT: Okay.

MR. KOPELMAN: Okay.

If we go to the bottom there, where it says limits of liability, the limit of liability is the least of the actual cash value of the property at the time of the loss, which may include a deduction for depreciation.

We don't have that scenario here because we don't have a determination that needs to be made with respect to the actual cash value of the property.

What we have, Judge, is what falls into number two here, category two, which is the cost to repair or replace, as determined by us, the property or part to its physical condition at the time of loss, using parts produced by or for the vehicles manufactured, and then it goes on and on, and states some other things.

So really the only -- the only issue is whether or not they have sufficiently limited their exposure by use of the term "the cost to repair or replace." There's no definition in the policy as to what constitutes the cost to

repair or replace. Absolutely none.

We submitted our bill. They paid less. I'm not sure of the exact amount that they reduced the reimbursement by, but they didn't pay the full amount of the cost to repair.

Once that happened, we filed suit in the case. We said, you know what, if there's another definition of the cost to repair, you have to tell us what that is.

So we filed petitions, Judge, for declaratory relief, claiming that their policy -- we believe it's clear in that the cost of repair means the cost of repair, the actual invoice submitted by our provider.

If they have another definition, it's got to be set forth clearly and unambiguously in the policy. That's why we filed this -- the dec action the way we did.

There's a case, Judge, called Atencio versus U.S. Security, and it's cited at 676 So.2d 489.

THE COURT: Okay.

MR. PHILLIPS: It's real short, two pages.

(Indicating.)

MR. KOPELMAN: Your Honor, this goes right

to the heart of our argument. Actually, it goes right to the heart of part of our argument. And in that it says -- the court in Atencio, the Third DCA, said that appraisal could not be compelled as to whether -- as to the question of whether the automobile insurer was required, under the policy's collision coverage, to pay for up to $200 for loss of use of the vehicle only or for only for rental reimbursement for $10 a day.

Since the question was not one of amount of loss -- it goes on, Judge, to say -- the court went on to say, questions of insurance policy interpretation and coverage -- and it's important to note, they use the terms interpretation and coverage -- are ordinarily for the court, rather than for arbitrators or appraisers to decide.

And that's what we're asking Your Honor to decide, is whether or not this policy is clear, whether it's ambiguous or unambiguous.

In addition to that, Judge, I want to -- I'd like to bring your attention to the appraisal provision, and show you why it's not applicable in this situation. If we go back to

their motion --

THE COURT: All right.

MR. KOPELMAN: -- and go back to that same case --

(Brief interruption.)

THE COURT: All right, sir.

MR. KOPELMAN: Thank you, Your Honor.

If we go to the portion of that memo that says right to appraisal, it says both you and we have a right to demand an appraisal of loss. Each will appoint and pay a competent and disinterested appraiser, and will equally share other appraisal expenses, okay, which is -- I'll talk about that part of it in a minute.

But going on it says, the appraisers or a judge of a court of record will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of the loss.

The case, Judge, of Heller versus Blue Aerospace, LLC, cited at 112 So.3d 635, points out that in either arbitration or appraisal there are three requirements in order to enforce an appraisal or arbitration provision. One is whether there's a valid written

agreement to arbitrate. Okay.

We don't dispute that there's a valid written agreement here, but the important thing is whether there is an appraisable issue. This issue isn't even right for appraisal because, as we just noted, the right to appraisal provision says that each appraiser will state separately the cash value and the amount of loss.

The actual cash value is completely irrelevant here. It's meaningless. The only issue that we have for consideration is the cost to repair. That's not addressed at all in the appraisal provision. So this is not an issue.

What this was set up to do, Judge, is, in reality, if you had a loss that was a big loss, and you had to make a determination as to how much the -- you know, how much the damages were, and how much the cost to repair the vehicle was, in order to assess whether or not there's been a total loss, to make a determination, that's why that appraisal provision is there, not to determine cost of repairs.

And really what -- what Allstate is trying to do is take a scenario where you've got a relatively minimal amount that's at dispute, okay, and we believe needs to be clarified pursuant to the policy, and force and push claimants into an appraisal process that will end up resulting in them receiving nowhere close to what their actual reimbursement should be.

Number one, it's -- like I said, it's not an appraisable issue. It's clearly not an appraisal issue. And number two, it's an issue -- this issue, with respect to what constitutes a cost of repair, the cost to repair is one for the Court to determine.

We believe it -- we believe, like I said, it's clear, cost to repair means the invoice itself. If they believe it's something else, they're going to have to explain that to the Court's satisfaction. And that's where the issue of policy comes into play.

For that reason, we don't believe that this is an appraisable issue, and we believe that their motion to invoke appraisal should be denied.

THE COURT: Okay. Thank you.

Defense, anything else?

MS. BRUCK: Yes, Your Honor.

MS. GOODEN: If I may stay seated.

THE COURT: Yes, I know. Your toe.

MS. GOODEN: Thank you.

THE COURT: I have no problem.

MS. GOODEN: We do not believe that there is a genuine issue of policy interpretation here. And just to kind of backtrack a little. Just the basic premise is an insurance contract policy is a contract between the insured and the insurance company.

And as the assignee, they kind of step into the shoes of that insured, and have to abide by it. So we are not forcing anybody to do anything. This is something that was expressly agreed to.

And we do not believe that the policy is ambiguous in any manner. So the plaintiff is focusing on very isolated statements. And if you actually read the appraisal clause, it does not mention the limit of liability section at all, and it doesn't amend it, it doesn't alter it, it doesn't do anything. It's essentially

dealing with something else.

And so there's a case that interprets this.

MS. BRUCK: Can we approach, Your Honor?

THE COURT: Yes.

MS. GOODEN: And, for the record, it's State Farm Fire & Casualty versus Middleton. That's a Third DCA case. 648 So.2d 1200. And the Third DCA interpreted a similar appraisal clause in respect to the limits of liability clause.

And if you go to page three -- essentially, three and four is the pertinent portions, but it starts on the right-hand column. We are influenced, too, by the fact that the language of the appraisal clause itself does not, as do others, limit itself to determining the amount of loss under this policy.

This was the decisive factor in LaCourse versus Firemen's Insurance, in which an automobile policy provided for arbitration when the parties do not agree as to the amount of damages, just as the present policy refers to a failure to agree on the amount of loss. And

that's the same here.

And the court went on to say, and holding that this language did not restrict the damages recoverable when the policy was stacked with others, the court said the amount of damages is not measured by or restricted in any way by the policy limits. It is a factual matter, completely independent of the actual amount of insurance provided by the policy.

For example, a jury verdict on the amount of damages is generally determined without any knowledge or reference to whether the defendant is insured. Here, the arbitration clause does not restrict the words amount of damages to policy limits or by any other fixed amount.

The disputed term is not modified by any language, such as payable or for which it is liable under the policy. And exactly the same here, our appraisal clause does not contain that language.

And if you go to page four, the left-hand column, it says, indeed, it has been specifically held that binding appraisal provisions are enforceable, even if the amount involved may exceed the value of the policy.

And then just skipping down towards the middle, the requirement of the submission to arbitration does not, moreover, result in any injustice to the insureds, whose recovery would essentially dependent -- sorry, would be essentially dependent upon the results of an arbitration process in the -- in any case.

This is true, because any claim for negligence or fraud depends on the showing that conduct proximately resulted in damage to the insured, that is, the amount of the loss as determined by the appraisal process.

And so we believe that this reasoning is equally applicable here. Our appraisal clause does not even reference this other provision. It doesn't say limits of liability. It doesn't say cost to repair. It just doesn't mention it.

And so just basic contract interpretation, this clause does not apply here. It doesn't -- again, it doesn't alter, amend, or control the appraisal clause. And so we believe that there's no bona fide need for this Court to essentially issue an advisory opinion as to the interpretation of this policy.

We believe this absolutely is an appraisable issue. And again, they've already conceded this is not about a coverage dispute. We've never denied coverage. We have readily admitted coverage, and we paid the amount it believes is reasonable.

And we see this dec action as just as essentially a unilateral escape valve to skirt their responsibilities under the policy, to get out from under appraisal, and to rack up attorney's fees.

And again, this is solely about the amount of loss. How much does this windshield cost?

Is it the amount they think or is it the amount that Allstate thinks?

And for that reason, Your Honor, we believe that this is an appraisable issue.

THE COURT: Okay. Thank you.

MR. KOPELMAN: May I respond, Your Honor?

THE COURT: Yes.

MR. KOPELMAN: Thank you.

First of all, the Atencio case out of the Third DCA doesn't talk solely about coverage. It talks about policy interpretation, in addition to coverage.

Secondly, this case that they just cited to Your Honor, the State Farm case, and represented to the Court that the appraisal provision in this policy was the same as the appraisal provision in this case here, is completely untrue.

The appraisal provision in this particular policy, in the -- in the State Farm policy that they gave you, this case, says if you and we fail to agree on the amount of loss, either one can demand that the amount of loss be set by appraisal.

If either makes a written demand for appraisal, each shall select a competent independent appraiser. Each shall notify the other of the appraiser's identity within 20 days. Two appraisers shall then select a competent and impartial appraisers.

If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of record or state where the resident's premises is located to select an umpire. The appraisers shall then set the amount of loss.

That's the only issue in that appraisal

provision for them to consider. That's why it's an appraisable issue, under that particular policy. And in our policy, the appraisers have to consider, separately, the actual cash value and the amount of loss. There's no way that this was ever contemplated for appraisal.

And I would bring to the Court's attention, when we -- we were lucky enough to get an order from Judge Fishman. It's the case of Broward Insurance Recovery, LLC versus Allstate, where the court said, since the plaintiff is in doubt as to its rights under the policy, which seeks to limit the defendant's liability to the cost to repair or replace the windshield, this creates a policy interpretation, which falls within the sole jurisdiction of the trial court rather than the employment of the nonjudicial remedy of the appraisal process.

It goes on, and then the court, in citing Judge Lee, Your Honor, says in the instant case, the operative issue is how the value of the loss should be determined, and making this determination is not within the purview of the

appraisal process.

Further, the policy language makes it clear that appraisal was not intended to apply where the cost to repair or replace is at issue as opposed to the actual cash value of the property or part, since the appraisers are required by the policy to make a determination as to the actual cash value.

It's very simple. It's not an issue for appraisal, period. It just isn't. We -- we have a dispute, we have a doubt, with respect to what that phrase "cost to repair" means. When you submit your invoice, you're expected -- if you read the policy, you expect them to pay. That is the cost to repair. There's nothing else in the policy that addresses that.

If they want to make a claim that there's some other methodology that they can use, Judge, that was not included in the policy, well, that is a policy interpretation issue, which must be decided by the Court.

MR. STILLO: We have a few other issues, Your Honor. Can I briefly address them? And Mr. Phillips is going to address them, as well.

THE COURT: Let me check with the defense.
Anything else before we move on?
MS. GOODEN: Just briefly.
I never represented to the Court that it was verbatim of the appraisal clause, and I said that this reasoning equally applies here.
And then there has been some mention about other judges, and how they rule. Just for Your Honor's benefit, right now there's currently, I think, 47 petitions for writ of cert up before the circuit court, here in Broward, on this very issue between these parties.
THE COURT: Okay. Thank you.
Okay. Mr. Stillo.
MR. STILLO: Another issue we have -- permission to approach, Your Honor?
THE COURT: Yes.
MR. STILLO: This is a case that sets out one of the other issues.
MS. BRUCK: Do I have it?
MR. STILLO: It was provided in the copies.
MS. BRUCK: Okay.
MR. STILLO: One of the -- there's

multiple declaratory counts at issue. One of the declaratory counts at issue concerns whether defendants chose an appraiser, a company known as AGIS, is a disinterested appraiser. The policy has a specific requirement that each side select a disinterested appraiser.

Now, the courts that have ruled on this issue -- and this is on page three of the order I just cited. Plaintiff contends -- and this is the case of Clear Vision Windshield Repair as assignee of [redacted] versus Progressive American Insurance Company, cited as 23 Fla. L. Weekly Supp. 486A.

In that case, coincidentally enough, the insurance company was also using this company called AGIS as an appraiser. And that was a Progressive case. And that policy had a requirement that the appraiser be impartial. Disinterested is an even higher standard than impartial.

And what Judge Skolnik found, he said the plaintiff contends that the defendant has violated the policy of insurance by selecting an appraiser who is not impartial. In our

case, disinterested

In the Fifth District's opinion in the case of Florida Insurance Guaranty versus Branco, cited as 148 So.3d 488, the Fifth District addressed whether an entity who was clearly, quote unquote, interested in the outcome, could serve as the parties' appraiser.

In Branco, the attorney for the policyholder was selected by the policyholder to serve as the parties' appraiser. The court held that it was impermissible to select one's own lawyer to act in that capacity when the contract of insurance called for a, quote unquote, disinterested appraiser.

The policy called for each party to choose a competent and disinterested appraiser. And Judge Orfinger, who authored the opinion, stated that the court's research had revealed no Florida case on point. But they looked to the Pennsylvania law, and ultimately determined that that was not going to be allowed.

The court in Branco found the policy provision, which requires a disinterested appraiser, expressed the parties' clear intention to restrict appraisers to individuals

who are, in fact, disinterested.

So now, what facts do we have in our case that AGIS is disinterested, and why do we need a declaration?

MS. BRUCK: And, Judge, I would object. I'm sorry.

MR. STILLO: Judge, she can respond after I'm done. I don't know why she has to interrupt.

THE COURT: Okay. Well, just let's see what her objection, is Mr. Stillo.

MR. STILLO: Okay.

THE COURT: Go ahead.

MS. BRUCK: Thank you.

I certainly don't mean to interrupt. I just want to object to any facts that it sounds like Mr. Stillo is about to cite. It's outside the four corners of the motion to dismiss and their complaint. So we object to any extraneous facts, hearsay, and things of that nature.

THE COURT: Okay.

Mr. Stillo, your response?

MR. STILLO: Okay.

My response is, well, there's an

affidavit, so let's start with the affidavit. The affidavit that was filed September 5th, 2017 -- and one of the purposes of the declaratory action, one of the requirements of the declaratory action, is it capable of repetition?

And Allstate has never wavered from this decision to use AGIS. This goes back years and years.

So is AGIS disinterested?

So this is where it gets interesting. So I have the affidavit that was filed with the Court September 5th, 2017, of my client, Charles Isaly. Charles Isaly is the owner of Auto Glass America.

Charles Isaly's affidavit goes on and establishes the business of Auto Glass America, that he has personal knowledge, that authenticates all the records attached to the affidavit.

And it says, and this is what happened, there was a dispute back in 2013, with AGIS, five years ago, with an issue in the appraisal process.

And guess what happened?

AGIS -- there's letters attached. AGIS hired their own lawyers, and threatened to sue Mr. Isaly. So their supposedly disinterested appraisers threatened to sue him, and they still won't stop using him.

So the letter is attached there. And the letter says specifically, I'm in receipt of correspondence -- this is paragraph seven of Mr. Isaly's affidavit dated June 21st, 2013, from attorneys retained by AGIS, which threatened Auto Glass America with litigation.

He attaches the correspondence. The correspondence states the firm of Alvarez & Gilbert, PLLC represents AGIS in its capacity of appraiser -- as appraiser for Allstate.

AGIS, through the counsel, threatened Allstate with litigation, which would include seeking a judicial decree. So AGIS is trying to bring a declaratory action against any client. And it goes on to say, AGIS reserves all rights. Govern yourself accordingly. So that's step one.

Mr. Isaly also has visited AGIS's internet homepage website, and attaches a copy of the website from April 28th, 2015. Again,

Allstate's relationship with AGIS, this goes back four, five, six years, at least.

What's interesting about this is, on its internet homepage, back in 2015, AGIS states, in its first sentence, Auto Glass Inspection Services' mission is to verify auto glass damage for the insurance industry.

In the third paragraph AGIS states, AGIS's sole purpose is to report back to the insurance industry what type of damage exists or lack thereof.

In the fifth paragraph of the website, AGIS has no affiliation with any companies in the glass industry, and only serves large insurance companies.

Then he goes on to say Allstate has previously selected AGIS, and we -- and Mr. Isaly, we have -- correspondence has been sent to Allstate, in hundreds of cases, saying withdraw AGIS. They refused to do so. Courts will not require a party to do a futile act.

Now, what's interesting is, there was a case that came out recently, in July of 2017, which I previously provided counsel, which is a Third DCA case, cited as Heritage Property &

Casualty Insurance versus Romamach, cited as 224 So.3d 262. That was an opinion from July 12th of this year -- of last year.

What that case was about was, the insurance company brought a declaratory action against a policyholder regarding whether their umpire was, in fact, competent and impartial. And the Third District held that the homeowners -- the home insurer stated a cause of action for declaratory relief, to the extent that the insurer was seeking to determine whether the appointed umpire was, in fact, competent and impartial.

So there is DCA case law directly supporting the plaintiff's declaratory action, in this case, against AGIS. This is not only capable of repetition. It has been rep -- and I have a litany of orders here where I've gotten discovery allowed by numerous judges, including Judge Marks and other judges, against AGIS.

And the second I filed a motion to appoint a commissioner, they end up confessing judgment, because there's even more to this story than meets the eye, because AGIS is out

in Arizona.

But what happens is, if the client has -- let's say they have the exact same damage, and you have three different insurance carriers using AGIS, AGIS has a representative for each carrier in the office, and they all come up with their own price, based on what insurance company it is.

So what they don't want me to uncover is that there is a prearranged deal where AGIS will come in with a specific amount, no matter what, based on the carrier.

So AGIS is -- this is -- they're -- this is not at all what the policies contemplated. They're not remotely disinterested. There's a prearranged deal, I believe, here. And one of our motions is to compel discovery, and I'd like to go out to Arizona to take their deposition.

But this is an issue that won't stop. And we have a motion to compel discovery. We'll get into that later. But we believe we cite a completely valid cause of action for declaratory relief, as it relates to AGIS.

And we have other issues to address, too,

but I think if we just do them one at a time it's a little easier.

THE COURT: Okay.

MS. BRUCK: Thank you, Your Honor.

Well, I move to strike almost the entire argument. It's something of an evidentiary hearing, without any real evidence or admissibility being established.

The filing of an affidavit doesn't necessarily make it admissible or relevant. So we move to strike that in it's entirety. That's -- all of it's outside of anything that's happened within my firm.

And regardless of all of that, we're not saying these facts can't be adjudicated in court. We're saying there's a procedure. So back to the procedure of the Third DCA, as soon as the grounds are known, then the plaintiff must make a demand that the insurer replace the appraiser.

If the insurer declines, the insured must properly file a complaint, in circuit court, seeking removal of the appraiser. And that's page seven of eight of Travelers versus Stormont.

The cases that the plaintiff's attorney cited are not on point at all because Florida Insurance versus Bronco, that case is a case that was already in litigation over coverage. Once coverage was determined, the insured invoked the appraisal. And they went to -- the insurer refuted the appraiser the insured selected, because the insured's selected appraiser was the insured's attorney in the instant case.

So they properly brought that particular issue before the court, who they were already in front of. They didn't circumvent the procedure that is put in place to avoid litigation. They were already in litigation.

And as to Heritage Property & Casualty, that case is also not on point because those two parties actually went to appraisal. There was an appraisal award, and then the umpire came in, because they -- to determine which appraiser was correct, because they couldn't come to an agreement.

And they -- one of the parties thought that the umpire was biased. So the party properly brought it before the court saying,

hey, we believe this umpire is biased, we can't come to an agreement on that, and asked for the court's intervention. They properly filed the dec relief, whether the appraiser was competent and impartial, and they did that circuit court, as well.

So we're not saying these issues can't be adjudicated or they're not entitled to it. We're just saying you're not going about it in the correct way, as carved out by the law.

THE COURT: Okay. All right.

Ma'am, I'm going to overrule your ore tenus motion to strike.

All right. What's next?

MR. PHILLIPS: Hi, Judge.

One of the other issues is what is called the prohibitive cost doctrine. And to -- as a prelude to that, let me just back up a little bit to make sure that we're all staying within the context here.

What we have here is a four-count complaint for declaratory relief. And these are not claims for breach of contract disguised as declaratory relief. Appraisers aren't the folks that are authorized to award equitable

relief to a party. That is solely within the province of the court.

The four claims for declaratory relief are, one, an interpretation of the cost to repair or replace. That's already been discussed. Atencio, in our view, establishes that.

Number two is the interpretation that the appraisal provision is not applicable. Again, already been discussed. Cost to repair or replace actual cash value. I won't beat a dead horse.

Number three is, the appraisal violates the prohibitive cost doctrine. And what the prohibitive cost doctrine is, it's a judicially created doctrine. It first showed up, as far as I'm able to tell, at the United States Supreme Court, in a decision called Green Tree Financial Corp. Alabama versus Randolph, 531 U.S. 79.

There the issue was arbitration, but I think everybody here will agree that the case law on appraisal and arbitration is the same conceptually.

And what it basically means is, the law is

not going to require a party to spend a substantial amount of money seeking relief that they are looking for. You don't spend $10 to get back $5, in other words.

And the declaration that we're seeking that the appraisal provision is unenforceable and actually illusory, because the expense to enter into appraisal is prohibitive on the insured and the plaintiff.

The appraisal provision requires both sides to bear the costs of their own appraiser, and split the costs of an umpire, if the appraisers are in conflict.

Those are not taxable costs that could be recovered in an action in law or equity. Those are just costs that the insured or the assignee can never get back, if the case goes to appraisal.

Here, these are windshield replacement cases where the average amount of dispute is 4, 5, $600, maybe a little less on some, maybe a little more on some. The appraisal process, to pay for the appraiser, to split the umpire, is -- I don't think anybody would disagree -- at least a couple of hundred dollars.

So we're spending money, and we're not getting it back, in order to get what we're entitled to, under the contract. The best that we're going to do is get only a percentage of what we're ultimately entitled to, because we've had to pay for the actual appraiser.

In insurance cases, Florida Statute 627.428 provides a one-way attorney fee statute. Costs are, you know, recovered by the victor.

Well, if the case is brought in court, the insured will get its costs back, if they prevail. That can't happen in appraisal. The most the insured or assignee can hope to get is a percentage.

And there have been several cases that have talked about this around the state. One that jumps out at me is actually the same case that Mr. Kopelman referenced, the Broward Insurance Recovery Center a/a/o Charlie Gari, G-A-R-I, versus Allstate.

There Judge Fishman said that, well, we ultimately don't need to even reach the prevailing prohibitive cost doctrine, or whether or not AGIS is disinterested or not,

because she ruled for the plaintiff on the policy interpretation.

But she did go out of her way to point out, although the court's finding renders moot the issue of whether the invocation of appraisal would violate the prohibitive cost doctrine, which renders appraisal or arbitration prohibitively costly, where the cost of participating in that process effectively prohibits a party from participating, since any recovery would create a loss, it should be noted that plaintiff likely would have been required to spend more on the appraisal process than it claims in the dispute. Judge Hilal said the same thing two months ago. What she said there was, we don't need to reach the prevailing -- the cost prohibitive doctrine.

But there is a citation to a variety of cases that say that, well, the out-of-pocket can't be recovered. Every dime spent on appraisal is a dime less than the plaintiff would ultimately recover, so...

MR. STILLO: Here, Your Honor.

MS. BRUCK: What is that?

MR. STILLO: Judge --
MR. PHILLIPS: That is -- that's --
THE COURT: I'm sorry, Mr. Phillips. I just want to make sure.
Did you need anything?
MS. BRUCK: I was just wondering what the document was.
THE COURT: Oh, okay.
MR. STILLO: That was the Judge Hilal case I just --
MS. BRUCK: Thank you.
MR. STILLO: -- I just --
THE COURT: Do you have a copy?
MS. BRUCK: I do. Thank you very much.
THE COURT: Okay. All right.
I'm sorry, Mr. Phillips.
MR. PHILLIPS: Oh, no. That's okay.
That is -- this prohibitive cost doctrine is the point of count three for declaratory relief. And then count four is the AGIS issue, and them not being disinterested.
So all in, we're asking the Court for a determination here. We're asking the Court to interpret the contract. And I don't think the Court should have to even reach the prohibitive

cost doctrine. Why spend $300 to recover 400? The net effect to the plaintiff is $100.

We don't think the Court needs to reach the issue of AGIS, and their litigation tactics, and the fact that they are aligned only with the insurance industry, because we think that the motion to dismiss and to compel appraisal should be denied, based on the policy language.

The fact that we're asking this Court to help us interpret this policy language, that's something an appraiser just cannot do.

MS. GOODEN: Yes, Your Honor.

You know, they cited the U.S. Supreme Court. This case has been interpreted by Florida district courts.

Can you give a copy to them, and then the Court?

MS. BRUCK: Sure.

MS. GOODEN: One in particular, it's a Second District Court of Appeal case called Zephyr Haven Health & Rehab Center versus Hardin, at 122 So.3d 916.

And the Court explained that in order to fall within this prohibitive cost doctrine,

which even the U.S. Supreme Court, in the Green Tree case, found it didn't apply, that the plaintiff has to prove both procedural and substantive unconscionability. And so the procedural unconscionability is essentially the manner in which the contract was entered.

And if you look at the complaint, there is no allegation as to how this contract was entered. And so, as a matter of law, this count fails. It doesn't state a cause of action.

Now, the substantive unconscionability, it requires an assessment of the contract's terms to determine whether they are so outrageously fair as to shock the judicial conscience.

And so this Zephyr Haven case basically says that where a party alleging this only establishes one or two prongs, that claim fails. And that's what's going on here.

And I will note, I think the substantive unconscionability claim fails, as well. They are, you know, focusing a lot on the amount in dispute; you know, we're not going to get money, we're not going to make money. And that's not truly what you're supposed to focus

on in this issue.

You're supposed to look at essentially the amount that's likely to incur, and an inability to pay that amount. So if, in looking at the appraisal, it's $100, $200, you know, it's fairly minimal. It's the ability to pay that. And that has not been alleged here, either.

And so, and again, we've got to look at, appraisal is meant to be quick, efficient, cheap, to move the parties through these claims, and not bog down in litigation for years. And so we don't think, as a matter of law, they have even stated a claim here.

Thank you.

THE COURT: Thank you.

MR. PHILLIPS: Thank you, Judge.

I'm just reading this case for the first time, but I don't even have to get all the way through to distinguish it.

We are here on a windshield replacement. We are certainly not here on a nursing home case. And I certainly don't want to misspeak about the case, without having a chance to fully digest it, but the -- what the court does seem to say here is, on page six of the

opinion, that to the extent Hardin -- and I think Hardin is the -- yeah, Edna Hardin, that's the actual nursing home patient.

To the extent that Hardin has maintained that the costs were prohibitively expensive, she had to prove the likelihood of incurring such costs. And then they cite to Green Tree.

They -- the court doesn't say if something is prohibitively -- it doesn't say that the prohibitive cost doctrine doesn't apply here. What it says is, it's up to the patient or, in this case, it would be the provider, to prove that -- what those costs are in relation to the damages being sought.

Here, again, we're not seeking damages. These are all claims for declaratory relief. And we raise the issue because it requires the plaintiff to go out-of-pocket a substantial percentage of the amount they seek to recover. We're not there yet.

We would ask that if the Court even reaches that issue, that let's have an evidentiary hearing on it to determine what those actual costs are. That should alleviate any concerns raised in opposition to our

argument there.

But again, and respectfully, we don't think we even need to get there. We think the counts for declaratory relief asking the Court to interpret the policy ought to end the inquiry, end of story.

I will literally drop my mike and sit down.

THE COURT: Okay.

MR. STILLO: Just one other thing, briefly, Your Honor.

They had cited a 17th Circuit opinion, and that was a straight breach of contract. This is a different policy of insurance, and these are different causes of action.

And that's the same thing that was argued to Judge Hilal, Judge Hurley, Judge DeLuca, and they all -- they all still denied the appraisal requests. So I would distinguish that, and --

THE COURT: Okay. All right. Thank you.

I don't know how it happened, but this was only calendered for 15 minutes.

MS. BRUCK: Wow.

MR. STILLO: I apologize, Judge.

THE COURT: So I don't want to keep the

party back there waiting.

MR. STILLO: Is it permissible for both sides to submit proposed orders, Your Honor?

THE COURT: Absolutely.

I have my division 51 e-mail address in that metal bin right next to you, if you want to take a copy. Okay. And then my JA is going to be out on maternity for another two months. So if you need anything, the best way to reach me is through that e-mail address, because I can't accept calls in here.

Okay?

MS. BRUCK: Okay.

MR. STILLO: Should we do that by close of business next Friday, Your Honor?

Is that agreeable?

THE COURT: Is that enough time for everyone?

That would be the 10th.

MR. STILLO: Kansas, is that agreeable?

MS. GOODEN: Can I have ten days?

I have an 11th Circuit argument.

THE COURT: Of course.

MR. STILLO: That's fine. That's fine.

THE COURT: Yes.

MS. GOODEN: Thank you.

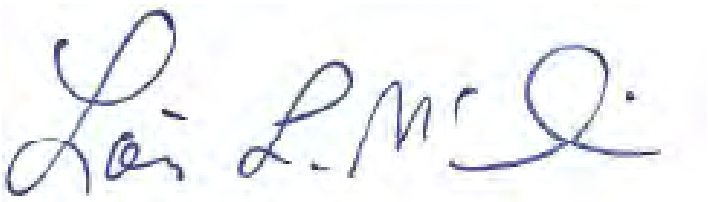
THE COURT: Of course. Okay.

(Thereupon, the hearing was concluded at 3:01 p.m.)

CERTIFICATE OF REPORTER

I, Lois L. McInnis-Kelleher, FPR, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript is a true and correct record of my stenographic notes.

Dated this 5th day of February 2018 at Fort Lauderdale, Broward County, Florida.



Lois L. McInnis, FPR

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IN THE COUNTY COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 17-005712 COCE 51

AUTO GLASS AMERICA, LLC (a/a/o [redacted]

vs.

ALLSTATE INSURANCE COMPANY

_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEYS' FEES

THIS CAUSE came before the Court on January 25, 2018 for hearing on Defendant's Motion to Dismiss Plaintiff's Complaint, Demand into Appraisal, Motion for Protective Order Regarding Discovery, and Motion to Dismiss any Claim for Attorneys' Fees (the "Motion"), and the Court, having reviewed the Motion and entire court file; having reviewed the relevant legal authorities; having heard argument of counsel; and having been sufficiently advised in the premises,

ORDERS AND ADJUDGES that the Motion is **DENIED** in all respects for the reasons set forth below.

Background

In this case regarding the replacement of Allstate's insured's windshield performed by Auto Glass America, LLC, the Amended Complaint asserts four counts for declaratory relief:

1. Count 1 seeks a judicial declaration interpreting the term "cost to repair or replace" contained in the Limit of Liability provision under the comprehensive portion the Allstate policy;

2. Count 2 seeks a judicial declaration that the appraisal provision in the property damage portion of the Allstate policy is not applicable to the instant claim;

3. Count 3 seeks a judicial declaration that appraisal in the context of the subject claim violates the prohibitive cost doctrine; and

4. Count 4 seeks a judicial declaration that Allstate failed to select a disinterested appraiser (this count was pled in the alternative).

In response, Allstate filed the Motion in an effort to dismiss the case and compel appraisal with its chosen appraiser, Auto Glass Inspection Services ("AGIS"). In its response Allstate also challenged whether the Plaintiff has standing. The Defendant contends that the assignment of benefits violates Florida Statute § 626.854 in that the assignment violated the "public adjusting statute".

The Allstate insurance policy provides for appraisal when there is only a dispute as to the specific dollar amount of the loss, and states:

> [W]e will pay for direct and accidental loss to the insured auto or a non-owned auto not caused by collision.
>
> Glass breakage, whether or not caused by collision, and collision with a bird or animal.
>
> * * *
>
> Our limit of liability is the least of:
>
> 1. The **actual cash value** of the **property** at the time of the loss, which may include a deduction for depreciation;
>
> 2. The **cost to repair or replace** as determined by us, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to applicable state laws and regulations.
>
> * * *
>
> Right to Appraisal
>
> Both you and we have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.

The Plaintiff opposes the Motion on several grounds, including: (1) appraisal is an inappropriate process to resolve such equitable claims as declaratory relief regarding the interpretation of the insurance policy; (2) Allstate's appraisal provision does not apply to repair and replacement of windshields; (3) Allstate's chosen appraiser, AGIS, is not "disinterested" as required by the policy in the event appraisal was appropriate; and (4) the cost of the appraisal likely exceeds the amount of damages and that expense is not a taxable cost at the conclusion of the process, such that Plaintiff could recoup the cost of the appraisal even if it were the prevailing party.

Plaintiff contends that the primary issue in this case is one of insurance policy interpretation, for which appraisal is not an appropriate method of dispute resolution because appraisal is only proper when the sole issue is the amount of the loss or the actual cash value of the entire vehicle (as opposed to a part thereof, like the windshield). When the insurer determines that the part can be repaired or replaced, the actual cash value of the property (i.e., the entire vehicle) is no longer at issue and the only determination required is the cost to repair or replace the part which is not the subject of appraisal. The only valuation to be made is the cost to repair or replace the part or property. Therefore, the court must determine whether the term "cost to repair or replace" is either ambiguous or can reasonably be interpreted in more than one manner as alleged by the plaintiff in the complaint. The Court believes that not only does this policy term require judicial interpretation, but that the "cost to repair or replace" windshield glass is not an issue for which appraisal exists as evidenced by the terms of the appraisal provision itself.

Additionally, Plaintiff seeks a declaration that Defendant's appointed appraiser, AGIS, is not "disinterested" as is required by the policy of insurance. See *Heritage Prop. and Cas. Ins. Co. v. Romanach,* 224 So.3d 262 (Fla. 3d DCA 2017); *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla.5th DCA 2014). The Plaintiff presented the Court with correspondence dated June 21, 2013 from attorneys retained by AGIS which threatened various repair shops with litigation.[1] The correspondence states the Alvarez & Gilbert, PLLC law firm represents AGIS in its capacity as appraiser for Allstate's various entities. Further, the letter contains threats of litigation against these shops by AGIS relating to disputes at issue in the appraisal process. The firm, on behalf of AGIS further warns repair shops to "govern [themselves] accordingly."

The Plaintiff also presented the Court with a print-out of the AGIS website on which AGIS states its mission is "to verify glass damage for the insurance industry." The website also represents that "AGIS sole purpose is to report back to the insurance industry what type of damage exists or lack thereof." It further indicates that "AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies."

The Plaintiff also presented correspondence sent between Plaintiff and Allstate in numerous claims requesting AGIS be removed as appraiser because AGIS is not disinterested

[1] Plaintiff contends it is of vital import that AGIS has retained their own attorneys in the past to threaten repair facilities – including Auto Glass America, LLC – with litigation about the appraisal process.

and that Allstate appoint a disinterested appraiser. In response, Allstate issued numerous letters retaining the position that AGIS is disinterested. Allstate continues to retain this position as stated in Defendant's motion. Plaintiff argues that despite making a good faith effort to remove AGIS and to obtain a disinterested appraiser Allstate's position remains, thus; creating a basis to believe that sending additional letters requesting the removal of AGIS would be futile. See *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2007).

Plaintiff also seeks a declaration that the appraisal provision is unenforceable and illusory because the expense to enter appraisal is prohibitive upon both the insured and Plaintiff. The appraisal provision at issue requires that each party bears the costs of its own appraiser and split the costs for the umpire if the appraisers do not agree on the amount of the loss. Plaintiff relies on various county court decisions that have considered whether appraisal provisions may be illusory in the context of the small monetary amounts of windshield damage cases. See *Broward Ins. Recovery Cntr., LLC (a/a/o Charlie Gari) v. Allstate Fire and Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County Ct. May 8, 2017)(Fishman, J.); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Lee, J.); *Clear Vision Windshield Repair LLC (a/a/o Frances Soto) v. Progressive Amer. Ins. Co.*, 23 Fla. L. Weekly Supp. 862a (Fla. Broward County Ct. December 14, 2015)(Skolnik, J.).

Conclusions of Law

To be entitled to declaratory relief, a party must demonstrate that "there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertain or ascertainable state of facts or present controversy as to a state of facts; that some impurity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *Bartsch v. Costell,* 170 So.3d 83, 88 (Fla. 4th DCA 2015)(quoting *Olive v. Mass*, 811 So.2d 644, 657-58 (Fla. 2002). Declaratory relief in the insurance context is rendered by the trial court after determining the state of facts giving rise to the application of the policy provisions. *See Northwest Center for Integrative Medicine & Rehabilitation, Inc. v. State Farm Mutual Automobile Ins. Co.,* 214 So.3d 679 (Fla. 4th DCA 2017). Plaintiff has sufficiently stated causes of action for declaratory relief in each of the counts asserted in the Amended Complaint.

There are three elements for the courts to consider in ruling on a motion to compel arbitration or appraisal of a given dispute: (1) whether a valid written agreement to appraisal exists; (2) whether an issue for appraisal exists; and, (3) whether the right to appraisal is waived. *Heller v. Blue Aerospace LLC*, 112 So. 3d 635(Fla. 4th DCA 2013). In this case, Plaintiff seeks the Court's interpretation and construction of insurance policy language, including the appraisal provision itself. As a threshold matter, it has yet to be determined whether there exists a valid

written agreement that calls for appraisal. In fact, the very declarations the Plaintiff seeks in this case involve the validity of the appraisal and limit-of-liability provisions in the policy[2].

If the Court interprets and construes the agreement to appraise as valid, the next step is to determine whether an issue for appraisal exists. While appraisal is a preferred non-judicial method of dispute resolution, it is only appropriate when the sole issue to be decided is a determination of the amount of damages sustained by the insured. *See Citizens Prop. Ins. Corp. v. Demetrescu,* 137 So.3d 500 (Fla. 4th DCA 2014); *Citizens Prop. Ins. Corp. v. Michigan Condominium Ass'n*, 46 So.3d 177 (Fla. 4th DCA 2010). In other words, an appraisable issue only exists when there is a dispute over money. In this case the Defendant does not even agree that the Plaintiff has standing. Appraisal is not appropriate when a case presents only issues of contract interpretation or coverage. *Antencio v. U.S. Sec. Ins. Co.*, 676 So.2d 489 (Fla. 3d DCA 1996)("Questions of policy interpretation and coverage are ordinarily for the court, rather than arbitrators or appraisers to decide."); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Hon. Robert W. Lee)("In the instant case, the operative issue is how the value of the loss should be determined, and making this determination is not within the purview of the appraisal process."). This case presents issues of contract interpretation or coverage to be determined by the Court as a matter of law. Specifically, the Court must determine whether the term "cost to repair or replace" is ambiguous or capable of more than one reasonable interpretation. It is not an action for damages.

Further, appraisal for windshield glass repair or replacement is not contemplated by the appraisal provision in the policy. The provision requires the appraisers to determine the actual cash value and the amount of the loss. Neither of those determinations are necessary or even relevant when the issue is the meaning of the term "cost to repair" windshield glass. If appraisal was intended to determine the cost to repair or replace a windshield, the appraisal provision would say so. It does not. This Court is not at liberty to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So.3d 494, 497 (Fla. 2014), quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986).

Defendant relies upon *Progressive Select Ins. Co. v. Cornerstone Network, Inc. (a/a/o Dakota Sowell),* Case No.: CACE 16-021830 (AW), FLWSUPP 2503SOWE, (Broward County, Circuit Court)(Appellate Capacity)(May 25, 2017) and *Progressive American Ins. Co. v. Broward Insurance Recovery Center, LLC (Isabella Cardona),* Case No.: CACE 16-021757 (AW) (Broward County, Circuit Court)(Appellate Capacity)(May 26, 2017)(unpublished) for the proposition that appraisal is proper for windshield repairs, and should be employed instead of the judicial process. Those cases are distinguishable from the instant matter as they were

[2] Curiously, Allstate maintains Plaintiff lacks standing for two reasons. First, Allstate argues Plaintiff lacks standing because the insured did not comply with the appraisal provision; therefore, according to Allstate, the right to additional payment did not vest in the insured so the insured had no rights or benefits to assign. Second, Allstate argues that the assignment of benefits constitutes a violation of Fla. Stat. § 626.854, which provides a definition of "public adjuster." The Court makes no finding as to standing at this time.

lawsuits for breach of contract seeking only damages. They were not claims for declaratory relief like those raised by the Plaintiff in this case. Further, the *Progressive* damages cases involve different policies and provisions than the Allstate policy at issue here. In contrast to the Progressive cases the issues set forth in the Plaintiff's complaint require judicial interpretation and declaratory relief involving terms in both the limit of liability and appraisal provisions in the policy.

The simple fact is that without a judicial interpretation as to the meaning and/or possible ambiguity of the term "cost to repair or replace" the Plaintiff faces the potential of being forced into an appraisal process without knowing whether the Defendant has complied with the limit of liability provision in its policy. While alternative dispute resolutions are favored by the courts they cannot be used as vehicles by either party to avoid the terms, conditions and construction of the contract which is subject of the suit.

Although not binding, this Court is also persuaded by the other county court decisions in favor of Plaintiff's position. *See e.g., Auto Glass America, LLC (a/a/o Joe Johnson) v. Allstate Ins. Co., 25 Fla. L. Weekly Supp. 833a* (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Auto Glass America LLC (a/a/o Marian Donovan) v. Allstate Ins. Co.*, Case No. 17-3260 COWE (82) (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Harry Drangsland) v. Allstate Ins. Co.,* 25 Fla. L. Weekly Supp. 294 (Fla. Broward County Ct. May 8, 2017)(Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Charlie Gari) v. Allstate Fire and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County CT. May 8, 2017) (Fishman, J.); *Broward Insurance Recovery Center, LLC (a/a/o Jason Kemps) v. Allstate Ins. Co.,* Case No.: 16-012906 COWE (81) (Fla. Broward County Ct. May 8, 2017) (Fishman, J.); *Auto Glass Wizards, Inc. (a/a/o Noel Ramos) v. Allstate Ins. Co.*, Case No.: 16-11775 COCE (54) (Fla. Broward County Ct. January 12, 2018) (Barner, J.); *Auto Glass Wizards, Inc. (a/a/o William Diaz) v. Allstate Ins. Co.*, Case No.: 16-11461 COCE (54) (Barner, J.); *Auto Glass America, LLC (a/a/o Erica Gantley) v. Allstate Fire and Casualty Ins. Co.*, Case No.: 17-1041 CONO (72) (Fla. Broward County Ct. December 8, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Angelina Davinport) v. Allstate Fire and Casualty Ins. Co.,* Case No.: 17-1981 CONO (72) (Fla. Broward County Ct. November 16, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Diane Bloom) v. Allstate Ins. Co.,* Case No.: 17-3385 CONO (73) (Fla. Broward County Ct. November 3, 2017) (Deluca, J.); *Auto Glass America, LLC (a/a/o Amy Trucano) v. Allstate Ins. Co.,* Case No.: 17-3394 CONO (73) (November 3, 2017) (Deluca, J.); *Broward Insurance Recovery Center, LLC (a/a/o Ken Baker) v. Allstate Ins. Co.,* Case No.: 16-22873 COCE (56) (Fla. Broward County Ct. April 25, 2017); *Clear Vision Windshield Repair, LLC (Harold Becker) v. Allstate Prop. and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 291b (Fla. Broward County Ct. April 21, 2016) (Marks, J.); *Broward Insurance Recovery Center, LLC (Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Fla. Broward County Ct. November 2, 2016) (Lee, J.); *Clear Vision Windshield Repair, LLC (a/a/o Jennifer Beckles) v. Progressive Amer. Ins. Co.,* 23 Fla. L. Weekly Supp. 486a (Fla. Broward County Ct. September 2, 2015)(Skolnik, J.).

For these reasons, Defendant's Motion is hereby **DENIED**.

Since the Court finds appraisal to be inappropriate in this case, it does not need to reach the issues of Allstate's compliance (or lack thereof) with the appraisal provision by selecting AGIS, an appraiser whose disinterest is questioned by the Plaintiff, or whether appraisal should be precluded under the prohibitive cost doctrine. Those issues are moot.

DONE and **ORDERED** at Plantation, Broward County, Florida on this 6th day of February, 2018.

HONORABLE KATHLEEN MCCARTHY
COUNTY COURT JUDGE

Copies furnished to:

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IN THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA
APPELLATE DIVISION

CASE NO. _____
L.T. NO.: COCE-17-005712 Div. 51

ALLSTATE INSURANCE COMPANY,

Petitioner,
vs.

FROM THE COUNTY COURT
OF BROWARD COUNTY

AUTO GLASS AMERICA LLC
A/A/O [redacted]
Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI FILED PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.100(F)

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INTRODUCTION

Petitioner ALLSTATE INSURANCE COMPANY[1] respectfully requests this Court to issue a writ of certiorari quashing the County Court's February 6, 2018 order denying its Motion to Dismiss, Demand for Appraisal and Motion for Protective Order. The Respondents' compliance with the policy's appraisal provision is a condition precedent to filing and maintaining a lawsuit against Allstate.

All references to the Appendix will be by the symbol "App." followed by the corresponding volume and page number.

BASIS FOR INVOKING JURISDICTION OF THE COURT

Jurisdiction of this Court is appropriate pursuant to Florida Rules of Appellate Procedure 9.030(c)(2), (3) and 9.100, and Article V, Section 5(b) of the Florida Constitution.

FACTS UPON WHICH PETITIONER RELIES

This case concerns the cost to repair of an automobile windshield. (App. 004-013). Allstate Property and Casualty Insurance Company issued a personal automobile insurance policy to [redacted]. (App. 187). The policy contains

[1] The parties have agreed to amend the caption to reflect the correct insurance company – Allstate Property and Casualty Insurance Company. (App. 033-041). An order has not been entered at this time.

comprehensive coverage. (App. 188). The following are the pertinent terms and conditions of the policy:

> **GENERAL PROVISIONS**
> The coverages of this policy apply only when a specific premium is indicated for them ton on the Policy Declarations. If more than one **auto** is insured, a coverage premium will be shown for each **auto**. **Allstate**, relying upon the declarations, subject to all the terms of the policy and subject to **your** payment of the premiums, makes the following agreements with **you**.
>
> * * *
>
> **Definitions Used Throughout the Policy**
> The following definitions apply throughout the policy unless otherwise indicated. Defined terms are printed in bold face type.
>
> 1. **Allstate, we, us** or **ours** means the company shown on the Policy Declarations.
> 2. **Auto** means a land motor vehicle designed for use principally upon public roads.
>
> * * *
>
> 5. **You** or **your** means the policyholder named on the Policy Declarations and that [policyholder's **resident** spouse.
>
> The following provisions apply throughout the policy unless a different provision regarding the same subject matter is provided under a particular coverage or it is otherwise indicated.
>
> * * *
>
> **Transfer**
> You may not transfer this policy or assign any interest in this policy, other than benefits payable under **Part III, Personal Injury**

Protection, to another person without our written consent. However, if **you** die this policy will provide coverage until the end of the policy period for **your** legal representative while acting as such and persons covered on the date of **your** death.

* * *

Action Against Allstate
No insured person or injured person, as those terms are defined in Parts I, II, III, and IV of the policy, may sue use for any matter related to this policy unless there is full compliance with all the terms of the policy. No one other than such as insured may bring suit against us prior to first obtaining a judgement against an insured for damages covered under the policy.

If liability has been determined by judgement after trial, or by written agreement among the insured, the other person, and us, then a person other than an insured who obtains this judgement or agreement against an insured person may sue **us** up to the limits of this policy.

The bankruptcy or insolvency of a person inured will not relieve **us** of any obligation.

* * * * * * *

Part V – Protection Against Loss To The Auto
The following coverages apply when indicated on the Policy Declarations.

* * *

Auto Comprehensive Insurance Coverage
HH
If a premium is shown on the Policy Declarations for **Auto Comprehensive Insurance, we** will pay for direct and accidental loss to the **insured auto** or a non-owned **auto** not caused by collision. Loss caused by missiles, falling objects, fire, theft, or larceny,

explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, and riot or civil commotion is covered. Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.

* * *

Payment of Loss By Us
Allstate may pay for the loss in money, or may repair or replace the damaged or stolen property. **We** may, at any time before the loss is paid or the property is replaced, return at our own expense any stolen property, either to **you** or at **our** option to the address shown on the Policy Declarations, with payment for any resulting damage. **We** may take all or part of the property at the agreed or appraised value. **We** may settle any claim or loss with **you** or the owner of the property.

Right to Appraisal
Both **you** and **Allstate** have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.

Limits of Liability
Allstate's limit of liability is the least of:

1. the actual cash value of the property at the time of the loss, which may include a deduction for depreciation; or

2. the cost to repair or replace, as determined by **us**, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to application state laws and regulations; or

3. $500, if the loss is to a covered trailer not described on the Policy Declarations.

* * *

Assistance and Cooperation
We will require any person making a claim to cooperate with **us** in the investigation, settlement or defense of any claim or suit. This includes, but is not limited to, giving **us** a recorded statement, a written statement, and/or a video-recorded statement, when requested by **us**, as often as we reasonably require.

(App. 196, 198, 200, 215, 219, 220). The policy also has an amendatory endorsement which provides:

I. In the **General Provisions** section of the policy the following changes are made:

* * *

Transfer
You may not transfer this policy or assign any interest in this policy, other than benefits payable after a loss, to another person without **our** written consent. However, if **you** die this policy will provide coverage until the end of the premium period for your legal representative while acting as such and persons covered on the date of your death.

* * *

Action Against Allstate
No one may sue **us** for any matter related to this policy unless there is full compliance with all terms of the policy.

If liability has been determined by judgment after trial, or by written

agreement among the insured, a person other than the insured, and **us**, and then the person other than an insured who obtains this judgment or agreement against an insured person may sue **us** up to the limits of this policy.

The bankruptcy or insolvency of a person insured will not relieve **us** of any obligation.

Assistance and Cooperation
We will require any person making a claim to cooperate with **us** in the investigation, settlement or defense of any claim or suit.

* * *

VI. **Part V – Protection Against Loss To The Auto** is amended as follows:

* * *

B. The **Right to Appraisal** provision is replaced by the following:

Right to Appraisal
Both **you** and **we** have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. Each appraiser will state separately the actual case value and the amount of loss. If they disagree, they will submit their differences to the umpire. The umpire will be selected by the appraisers or a judge of a court of record. A written decision by any two of these three persons will determine the amount of the loss. The amount of loss determined under this provision will be binding on **you** and **us.**

C. The **Limits Of Liability** provision is replaced by the following:

Limits of Liability
Allstate's limit of liability is the least of:
1. the actual cash value of the property at the time of the loss,

which may include a deduction for depreciation;

2. the cost to repair or replace, as determined by **us**, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to application state laws and regulations;
3. the limit shown on the Policy Declarations applicable to the damaged property; or
4. $500, if the loss is to a covered trailer not described on the Policy Declarations.

(App. 224, 227, 240, 241).

On or about March 20, 2017, Auto Glass repaired the windshield of [redacted] in St. Petersburg, Pinellas County. (App. 078; 281-283). Auto Glass sent Allstate an invoice for the repair; this was Allstate's first notice of the claim. (App. 078; 281).

On or about April 3, 2017, Allstate agreed to pay an amount it believed to be reasonable for the work performed, which was below the inflated amount Auto Glass had requested, and issued a check for that amount. (App. 078). Auto Glass cashed this check. (App. 078).

Several days later, Allstate sent letters to Respondent and its insured stating that Allstate was invoking its right to appraisal for the remaining billed amount pursuant to the terms and conditions of its policy. (App. 284-285). The selected

appraiser also sent several letters to the Respondents requesting the name of their appraiser. (R. 286-288).

Instead of submitting to appraisal, Respondent Auto Glass America filed suit against Allstate on April 12, 2017 – less than one month from the date the windshield was repaired. (App. 004-013). The complaint purportedly asserted a one-count declaratory judgment action claiming that Allstate's insurance policy was ambiguous. (App. 004-013). Auto Glass sought attorney's fees and costs. (App. 011). Auto Glass served extensive discovery. (App. 062-065; 066-069; 070-076).

Allstate demanded appraisal and moved to dismiss the action arguing: 1) Auto Glass does not have standing to maintain the cause of action because the assignment of benefits was not provided, was not attached to the complaint, and was not otherwise proper; 2) Auto Glass failed to satisfy a condition precedent to filing suit as it refused to submit to appraisal; 3) the assignment of benefits violates Florida Statute § 626.854; 4) Auto Glass breached the no action clause by filing suit and not complying with all conditions precedent; 5) Auto Glass named the wrong Allstate entity in the complaint; 6) Auto Glass is not entitled attorney's fees because it raced to the courthouse to file suit instead of complying with the terms of the policy. (App. 014-020; 025-032). Allstate also moved to transfer venue to Pinellas County. (App. 021-024).

Without leave of Court, Auto Glass filed an Amended Complaint requesting declaratory judgment. (App. 048-061). Auto Glass alleged that the term "cost to repair or replace" in the Limit of Liability provision was ambiguous and rendered the appraisal clause unenforceable. (App. 048-061). In the alternative, Auto Glass further claimed that appraisal violated the Prohibitive Cost Doctrine and the selected appraiser AGIS was not disinterested. (App. 048-061). Again, Auto Glass requested attorney's fees and costs. (App. 048-061).

Allstate filed a supplemental memorandum of law in support of its motion to dismiss and demand for appraisal addressing the issues raised in the Amended Complaint. (App. 158-178).

The trial court conducted a hearing and heard argument from the parties. (App. 0321-406). First, Allstate argued that the matters should be transferred because all events occurred, and all witnesses reside outside of Broward County. (App. 323-325). Auto Glass countered the case involves a matter of contract interpretation, which is a matter of law, and Allstate has offices in Broward County. (App. 325-328). The Court took the motion to transfer under advisement. (App. 334).

Next, Allstate argued that the lawsuit is premature, and appraisal should be compelled as this case is about the amount of loss. (App. 336; 340). Allstate

admitted that this is a covered loss. (App. 340). Allstate requested and invoked appraisal. (App. 337). Allstate also explained that Auto Glass failed to follow the proper procedure for challenging their appraiser as set forth by the Court in Travelers of Fla. v. Stormont, 43 So. 3d 941 (Fla. 3d DCA 2010). (App. 337-339).

Auto Glass noted that no one disputes that this is a covered loss. (App. 342). Instead, it asserted that reimbursement is governed by the Limit of Liability provision of the policy and it is unclear what the term "cost to repair or replace" means. (App. 342-345). It also argued that appraisal does not apply to this situation. (App. 345-348).

Allstate explained that the appraisal clause does not reference or mention the Limit of Liability provision; as a result, it does not amend or alter it in any manner. (App. 349). Relying on State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200 (Fla. 3d DCA 1995), Allstate noted that the appraisal clause does not limit itself to determining the amount of loss under the Limit of Liability provision and therefore, the parties would be bound by an award in excess of the provision. (App. 350-353). As a result, there is no bona fide need for this Court to issue an advisory opinion as to the interpretation of the policy. (App. 352). This is an appraisable issue. (App. 353).

Next, Auto Glass, citing an affidavit it filed, argued that Allstate's appraiser is not a disinterested appraiser. (App., 358-364). It noted it wants to discover whether Allstate has a prearranged deal with the appraisal company. (App. 365). Allstate objected to any use of the affidavit and moved to strike. (App. 360-366-368). It, again, responded that the Auto Glass did not following the proper procedure under Stormont. (App. 360; 366-368). The trial court overruled Allstate's *ore tenus* motion to strike. (App. 368).

Auto Glass then asserted that the prohibitive cost doctrine applies. (App. 368-371). It compared the cost of appraisal to the amount at issue. (App. 370-371). It further noted that the trial court does not need to reach the last two issues, if it rules on the policy interpretation. (App. 373-374).

In response, Allstate explained that in order to fall within the prohibitive cost doctrine, the plaintiff must allege both substantive and procedurally unconscionability. (App. 374-376). The amended complaint does not sufficiently set forth either and improperly focuses on the amount at issue. (App. 375-376).

On February 6, 2018, the trial court entered an order denying the motion. (App. 311-318). The Court found that this case presents "issues of contract interpretation or coverage to be determined by the Court as a matter of law" and that appraisal is not contemplated by the policy. (App. 315). The Court found the issues

concerning the disinterested appraiser and the prohibitive cost doctrine moot. (App. 317). This petition timely followed.

NATURE OF THE RELIEF SOUGHT

Petitioner ALLSTATE INSURANCE COMPANY respectfully requests this Court to issue a writ of certiorari quashing the February 6, 2018 order denying Allstate's Motion to Dismiss, Demand for Appraisal and Motion for Protective Order.

ARGUMENT IN SUPPORT OF RELIEF REQUESTED

THIS COURT SHOULD ACCEPT JURISDICTION AND ISSUE A WRIT QUASHING THE ORDER BELOW BECAUSE THE TRIAL COURT'S ORDER DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF THE LAW, THEREBY CAUSING IRREPARABLE INJURY WHICH CANNOT BE ADEQUATELY REMEDIED ON APPEAL.

"To grant a writ of certiorari to quash a non-final order, the petitioner must show (1) the order will cause material and irreparable injury that cannot be corrected on final appeal and (2) the order departed from the essential requirements of law." Favalora v. Sidaway, 996 So. 2d 895, 897 (Fla. 4th DCA 2008). See also Bared & Co. v. McGuire, 670 So. 2d 153, 156 (Fla. 4th DCA 1996).

A departure occurs where "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Combs v. State, 436 So. 2d 93,

96 (Fla. 1983). "A 'clearly established principle of law' can derive from a number of legal sources, including the constitution, statutes, rules of court, and controlling case law." Progressive Express Ins. Co. v. Physician's Injury Care Ctr., Inc., 906 So. 2d 1125, 1126-27 (Fla. 5th DCA 2005). Accord Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003). "A failure to observe the essential requirements of the law has been held synonymous with a failure to apply 'the correct law.'" Fassy v. Crowley, 884 So. 2d 359, 364 (Fla. 2d DCA 2004) (citing Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995)).

> Permitting parties to litigate a dispute in court instead of proceeding to [appraisal], if there is a right of [appraisal], constitutes a departure from the essential requirements of the law which cannot be adequately remedied by appeal. Certiorari is the appropriate remedy to review a nonfinal order denying the right to [appraisal] where such right exists.

U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170, 172-73 (Fla. 1st DCA 1983) (citing Lapidus v. Arlen Beach Condo. Ass'n, Inc., 394 So. 2d 1102 (Fla. 3d DCA 1981)). Accord Progressive Am. Ins. Co. v. Collision Concepts of Delray, 23 Fla. L. Weekly Supp. 400a, *2-3 (Fla. 15th Cir. Ct., Sept. 18, 2015). See also Palms W. Hosp. Ltd. P'ship v. Burns, 83 So. 3d 785, 788 (Fla. 4th DCA 2011) (holding that "irreparable harm can be shown where a court incorrectly denies a motion to dismiss for failure to follow pre-suit requirements, as doing so would eliminate the cost-saving features the Act was intended to create.").

On numerous occasions, this Court has granted certiorari relief where the lower court has denied an insurance company's motion to dismiss and demand appraisal. See, e.g., Progressive Am. Ins. Co. v. Broward Ins. Recovery Center a/a/o Maria Puntiel, Case No. CACE 17-000838 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Select Ins. Co. v. Broward Ins. Recovery Center a/a/o Nicole Boursiquot, Case No. CACE 17-000882 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Ins. Co. v. Broward Ins. Recovery Center a/a/o Roberto Vilau, Case No. CACE 17-000884 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Ins. Co. v. Cornerstone Network LLC. a/a/o Lori Carter Moffatt, Case No. CACE 17-000883 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Select Insurance Company v. Broward Insurance Recovery, a/a/o Esteban Gomez, Case No. CACE 16-022581 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Insurance Company v. Cornerstone Network, Inc. a/a/o Isabella Cardona, Case No. CACE 16-021727 (Fla. 17th Jud. Cir. May 26, 2017); Progressive Select Insurance Company v. Cornerstone Network, Inc. a/a/o Dakota Sowell, Case No. CACE 16-021830 (Fla. 17th Jud. Cir. May 25, 2017). This Court should similarly grant that relief here.

I. THE TRIAL COURT'S ORDER CAUSES IRREPARABLE HARM TO THE PETITIONER WHICH CANNOT BE REMEDIED ON APPEAL.

The trial court's order causes irreparable harm to Allstate that cannot be remedied on plenary appeal. "Permitting parties to litigate a dispute in court instead of proceeding to [appraisal], if there is a right of [appraisal], constitutes a departure from the essential requirements of the law which cannot be adequately remedied by appeal." U.S. Fire Ins. Co., 443 So. 2d at 172-73.

The trial court's order deprives Allstate of a contractual right and process to which it is entitled. The order eliminates the quick, efficient, and cost-saving method Allstate and its insured contracted for and expressly agreed to. See Palms W. Hosp. Ltd. P'ship, 83 So. 3d at 788. Indeed, the entire purpose of appraisal is to avoid litigation. Allstate should not be forced to expend resources, which cannot be recouped after plenary appeal, litigating a dispute which it has a clear contractual right to resolve through the appraisal process.

While the cost of litigation usually is not considered irreparable harm, the Fifth District has explained:

> But, this general principle presupposes the existence of otherwise proper litigation. If the purpose of [appraisal] is to avoid litigation, permitting the parties to litigate at all where there is a right to [appraisal] completely frustrates that right. Where the right to [appraisal] exists, compelling a party whose application has been denied to wait until a final judgment is entered so that he can appeal

> the order denying [appraisal], may be a remedy in name, but it is not an adequate remedy in fact. Thus, we agree with the other district courts that an order denying the right to [appraisal] where such right exists is a departure from the essential requirements of law which cannot be adequately remedied by appeal. Certiorari is thus the appropriate remedy to review such order.[2]

Paine, Webber, Jackson & Curtis v. Lucas, 411 So. 2d 1369, 1370-71 (Fla. 5th DCA 1982). Accord Riverfront Props., Ltd. v. Max Factor III, 460 So. 2d 948, 951 (Fla. 2d DCA 1984). See also Graham Contracting, Inc. v. Flagler Cty., 444 So. 2d 971, 972 n.1 (Fla. 5th DCA 1983); U.S. Fire Ins. Co. v. Franko, 443 So. 2d 170, 172 (Fla. 1st DCA 1983); R.W. Roberts Constr. Co. v. St. Johns River Water Mgmt. Dist., 423 So. 2d 630, 631 (Fla. 5th DCA 1982); Lapidus v. Arlen Beach Condo. Ass'n, 394 So. 2d 1102, 1103 (Fla. 3d DCA 1981); Vic Potamkin Chevrolet v. Bloom, 386 So. 2d 286, 287 (Fla. 3d DCA 1980). To allow this case to move forward would completely undermine the express language of the insurance policy and render it meaningless.

II. THE TRIAL COURT'S ORDER DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

An insurance policy is a contract which governs the rights and obligations of the parties. Fabricant v. Kemper Indep. Ins. Co., 474 F. Supp. 2d 1328, 1330 (S.D.

[2] The Florida Rules of Appellate Procedure were subsequently amended to allow for immediate review of such non-final orders in appeals to District Courts. See Fla. R. App. Pro. 9.130(a)(3)(C)(iv). However, Rule 9.130 does not apply to appeals from County to Circuit Courts. As a result, certiorari is still the proper method to review these orders in this Court.

Fla. 2007). As an assignee of the insured, Respondent Auto Glass America is bound by all the terms and conditions of the policy – including the appraisal provision. See Ind. Lumbermens Mut. Ins. Co. v. Pa. Lumbermens Mut. Ins. Co., 125 So. 3d 263, 266 (Fla. 4th DCA 2013) ("An assignee of an insurance claim stands to all intents and purposes in the shoes of the insured[.]"); Allstate Ins. Co. v. Regar, 942 So. 2d 969, 973 (Fla. 2d DCA 2006).

Florida law is clear that appraisal provisions within an insurance policy are valid and enforceable upon the parties. Such clauses are conditions precedent for the insured, and its assignees, to file a lawsuit. See New Amsterdam Cas. Co. v. J. H. Blackshear, Inc., 156 So. 695, 696 (Fla. 1934) ("Appraisals, as provided for in such covenants, are conditions precedent to the right of the insured to maintain an action on the policy."); Preferred Mut. Ins. Co. v. Martinez, 643 So. 2d 1101, 1103 (Fla. 3d DCA 1994) ("As with arbitration clauses, appraisal provisions are deemed to be conditions precedent to recovery under the insurance policies); Transamerica Ins. Co. v. Weed, 420 So. 2d 370, 371 (Fla. 1st DCA 1982); J&E Invs., LLC v. Scottsdale Ins. Co., No. 16-61688-CIV, 2016 U.S. Dist. LEXIS 122370, at *4 (S.D. Fla. Aug. 18, 2016) ("[I]n Florida, as is the case with arbitration clauses, appraisal provisions contained within an insurance contract are treated as conditions precedent to recovery under the policy.").

"Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits. Fla. Ins. Guar. Ass'n v. Olympus Ass'n, 34 So. 3d 791, 794 (Fla. 4th DCA 2010). An appraisal is an "alternative method[] of dispute resolution that provide[s] quick and less expensive resolution of conflicts." Nationwide Prop. & Cas. Ins. v. Bobinski, 776 So. 2d 1047, 1049 (Fla. 5th DCA 2001). The entire purpose of appraisal is to avoid litigation. Accord Cammarata v. State Farm Fla. Ins. Co., 152 So. 3d 606, 614 (Fla. 4th DCA 2014) (Gerber, J., concurring); First Floridian Auto & Home Ins. Co. v. Myrick, 969 So. 2d 1121, 1125 (Fla. 2d DCA 2007).

Thus, "[m]otions to compel [appraisal] should be granted whenever the parties have agreed to [appraisal] and the court entertains no doubts that such an agreement was made." Preferred Mut. Ins. Co. v. Martinez, 643 So. 2d 1101, 1103 (Fla. 3d DCA 1994). Accord Fla. Ins. Guar. Ass'n v. Castilla, 18 So. 3d 703, 705 (Fla. 4th DCA 2009). Any doubts should be resolved in favor of appraisal. Bos. Bank of Com. v. Morejon, 786 So. 2d 1245, 1247 (Fla. 3d DCA 2001).

When confronted with a motion to compel, the trial court is limited to determining: "(1) whether a valid written agreement exists containing an [appraisal] clause, (2) whether an [appraisable] issue exists, and (3) whether the right to [appraisal] was waived." Phillips v. Gen. Accident Ins. Co. of Am., 685 So. 2d 27,

29 (Fla. 3d DCA 1996). See generally Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc., 162 So. 3d 140, 143 (Fla. 2d DCA 2014) ("While the trial court did not expound on the reasoning behind its decision, it could not have found the appraisal clause to be unenforceable unless the clause violated either statutory law or public policy."). Because there is no dispute that this was a valid insurance policy and that Allstate did not waive appraisal, the only issue the trial court could have decided was whether this is an issue for appraisal.

The record unequivocally shows this was an issue for appraisal and Allstate properly invoked its appraisal clause. "Where the right to [appraisal] is properly asserted, proceeding with the dispute in the courts instead of submitting the matter to [appraisal] constitutes a departure from the essential of law." Grillo v. Raymond James & Assocs., Inc., 524 So. 2d 1121, 1122 (Fla. 2d DCA 1988). Accord Lapidus, 394 So. 2d at 1103.

A. The trial court's refusal to enforce the appraisal clause constitutes a departure from the essential requirements of the law.

To skirt their obligations under the insurance policy, the Respondent filed a declaratory judgment action purportedly seeking an interpretation of the insurance policy. Respondent asserted that the appraisal provision does not apply to the repair and replacements of windshields. They claim that this is a coverage or policy

interpretation issue for the trial court to decide. The trial court accepted their arguments wholesale. (App. 311-317).

Nevertheless, there is no coverage issue or need to interpret the policy. It is undeniable that Allstate **never** denied coverage for this claim. Allstate readily, and repeatedly, admitted that the policy provided coverage and even paid a reasonable amount for the windshield claim. The only genuine dispute between the parties is the amount of that loss. In other words, what is the reasonable cost of that windshield.

"When the disagreement concerns the **amount of loss**, not coverage, it is for the appraisers to arrive at the amount to be paid." Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). See also Johnson v. Nationwide Mut. Ins. Co., 828 So. 2d 1021, 1025 (Fla. 2002) ("[W]hen the insurer admits that there is a covered loss, but there is a disagreement on the amount of loss, it is for the appraisers to arrive at the amount to be paid."); Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, 117 So. 3d 1226, 1229 (Fla. 3d DCA 2013) ("[A]n agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and 'amount of loss.'"); First Protective Ins. Co. v. Hess, 81 So. 3d 482, 485 (Fla. 1st DCA 2011) ("While issues concerning coverage challenges are exclusively for the courts, where an insurer admits there is a covered loss and there is a disagreement regarding the amount of the loss, the appraisers are charged with determining the

loss."); Fla. Ins. Guar. Ass'n v. Olympus Ass'n, 34 So. 3d 791, 794 (Fla. 4th DCA 2010).

Determining the method or extent of the necessary repairs falls wholly within the appraisal clause. Fla. Ins. Guar. Ass'n v. Branco, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). In Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc., 162 So. 3d 140, (Fla. 2d DCA 2014), the Second District explained that:

> [T]he question of what repairs are needed to restore a piece of covered property is a question relating to the amount of 'loss' and not coverage. Ipso facto, the scope of damage to a property would necessarily dictate the amount and type of repairs needed to return the property to its original state, and an estimate on the value to be paid for those repairs would depend on the repair methods to be utilized. The method of repair required to return the covered property to its original state is thus an integral part of the appraisal, separate and apart from any *coverage* question. Because there is no dispute between the parties that the cause of the damage to Cannon Ranch's property is covered under the insurance policy, the remaining dispute concerning the scope of the necessary repairs is not exclusively a judicial decision. Instead, this dispute falls squarely within the scope of the appraisal process-a function of the insurance policy and not of the judicial system.

Id. at 143.

This is exactly what is occurring here. There is no dispute between the parties that the cause of the damage to the automobile is covered under Allstate's policy. The parties simply disagree as to the **amount of loss**. There is no issue as to whether the windshield is covered under the policy. Again, Allstate has readily admitted that

this is a covered loss. Thus, the appraisal clause applies and was adequately invoked by Allstate.

Once it was invoked, appraisal was mandatory. United Cmty. Ins. Co. v. Lewis, 642 So. 2d 59, 59-60 (Fla. 3d DCA 1994). "Once the insurer demanded appraisal, the insured was required to comply with the appraisal clause. Proceeding to court was not justified." Travelers of Fla. v. Stormont, 43 So. 3d 941, 945 (Fla. 3d DCA 2010). "[F]urther proceedings should be conducted in accord with those provisions. . . ." Allstate Ins. Co. v. Suarez, 833 So. 2d 762, 765 (Fla. 2002)

Moreover, the Respondent's filing of a declaratory judgment action does not take this case out of the appraisal arena. Again, there is no genuine dispute as to the plain meaning of the policy language. The Respondent simply filed the action to avoid complying with the appraisal clause and to recover attorney's fees.

Indeed, the Respondent's argument as to "cost to repair or replace," and the trial court's wholesale acceptance thereof, is lacking.[3] The Allstate appraisal clause provides that the appraisers are to determine the amount of loss *in its entirety* - not to determine the amount of loss based on the separate limit of liability provision (i.e. "cost to replace or repair"). The appraisal provision provides:

[3] Notably, the Florida Supreme Court have found that the terms repair and replace "are utterly unambiguous." Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732, 735 (Fla. 2002).

> **Right to Appraisal**
> Both **you** and **we** have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. Each appraiser will state separately the actual case value and the amount of loss. If they disagree, they will submit their differences to the umpire. The umpire will be selected by the appraisers or a judge of a court of record. A written decision by any two of these three persons will determine the amount of the loss. The amount of loss determined under this provision will be binding on **you** and **us.**

(App. 240).

As demonstrated, there is no limitation in the appraisal clause. It does not even reference the Limit of Liability provision. It is an unrelated provision in the policy. The appraisal clause does not even contain the terms "cost to repair or replace." See LaCourse ex rel. LaCourse v. Firemen's Ins. Co., 756 F.2d 10, 14 (3d Cir. 1985).

The Third District has rejected a similar argument and explained:

> We are influenced, too, by the fact that the language of the appraisal clause itself does not, as do others, limit itself to determining the amount of the loss *under this policy*. This was the decisive factor in LaCourse v. Fireman's Ins. Co., 756 F.2d 10, 12 (3d Cir. 1985), in which an automobile policy provided for arbitration when the parties "do not agree as to the amount of the damages," just as the present policy refers to a failure "to agree on the amount of the loss." In holding that this language did not restrict the damages recoverable when the policy was "stacked" with others, the court said:
>
> > [the] amount [of damages] is not measured by or restricted in any way by the policy limits. It is a factual matter completely independent of the actual amount of insurance provided by the policy. For example, a jury

> verdict on the amount of damages is generally determined without any knowledge of or reference to whether the defendant is insured.
>
> [Here,] the arbitration clause does not restrict the words, "amount of damages" to policy limits, or by any other fixed amount. The disputed term is not modified by any language such as "payable" or "for which it is liable under the policy."
>
> Indeed, it has been specifically held that binding appraisal provisions are enforceable even if the amount involved may exceed the value of the policy.
>
> * * *
>
> The requirement of the submission to arbitration does not, moreover, result in any injustice to the insureds, whose recovery would be essentially dependent upon the results of an arbitration process in any case. This is true because any claim for negligence or fraud depends on a showing that that conduct had proximately resulted in damage to the insured, that is, that the amount of the loss *as determined by the appraisal process* was more than the limits of the HO-3 policy. Putting the same thing in another legal way, any reformation of the policy, as sought by the plaintiffs, would affect only the limits of the recoverable loss. The putatively reformed policy would still contain the appraisal clause. Thus, all of Middletons' roads lead directly to appraisal.

State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200, 1202-03 (Fla. 3d DCA 1995) (internal citations omitted).

This reasoning equally applies here. There is no limiting language contained within Allstate's appraisal clause. The unrelated Limit of Liability clause does not

restrict the appraisal clause in any way. It does not even refer to it. Under the clear terms of the policy, the appraiser's job is simply to assess the amount of loss. In other words, even if appraisal resulted in an amount that exceeds the policy limit, Allstate would be bound by that determination.

Common sense and a basic understanding of the English language must control here. This Court should reject the Respondent's strained and illogical argument that is made simply to circumvent the appraisal clause. The trial court departed from the essential requirements of the law by finding that appraisal is not contemplated by the policy.

While the trial court stated it cannot rewrite contracts, that is exactly what it did. It ignored the plain wording of the policy and inserted meaning that is simply not there. It relied on an unrelated provision in the policy and ignored basic contract principles.

Indeed, if this Court accepts Respondent's argument and the trial court's ruling, it would mean that an insurance company would be prohibited from enforcing its policy any time a windshield vendor files a declaratory judgment action or asserts that a wholly unrelated term in its policy is ambiguous. It amounts to a unilateral escape valve or a get-out-jail-free card. The effect would force an insurance company to always accept a repair shop's outrageous and inflated invoice or risk being held

liable for attorney's fees for the unwarranted litigation. This is against public policy, the terms of the insurance policy, and the quick and efficient intent of appraisal.

In any event, Respondent's declaratory judgment action cannot be used to absolve it of the policy's condition precedent of appraisal. "Thus, all of [Auto Glass'] roads lead directly to appraisal." Middleton, 648 So. 2d at 1203.

Requiring parties to litigate a case instead of proceeding to appraisal is a departure from the essential requirements of the law. U.S. Fire Ins. Co., 443 So. 2d at 172-73 (Fla. 1st DCA 1983). Accord Broward Ins. Recovery Center a/a/o Maria Puntiel, Case No. CACE 17-000838 (AW); Broward Ins. Recovery Center a/a/o Nicole Boursiquot, Case No. CACE 17-000882 (AW); Broward Ins. Recovery Center a/a/o Roberto Vilau, Case No. CACE 17-000884 (AW); Cornerstone Network LLC. a/a/o Lori Carter Moffatt, Case No. CACE 17-000883 (AW); Broward Insurance Recovery, a/a/o Esteban Gomez, Case No. CACE 16-022581 (AW); Cornerstone Network, Inc. a/a/o Isabella Cardona, Case No. CACE 16-021727; Cornerstone Network, Inc. a/a/o Dakota Sowell, Case No. CACE 16-021830; Collision Concepts of Delray, 23 Fla. L. Weekly Supp. 400a. Accordingly, certiorari should be issued.

B. Respondent violated the no action clause in the Allstate policy by refusing to submit to appraisal – a condition precedent.

Once Allstate invoked appraisal under the policy, it was a mandatory condition precedent to filing suit. United Cmty. Ins. Co. v. Lewis, 642 So. 2d 59, 60 (Fla. 3d DCA 1994) ("A full reading of the clause makes clear that neither party has the right to deny that demand once it is made."). Refusal to submit to appraisal violates the no action clause of the Allstate policy. See generally New Amsterdam Casualty Co. v. J. H. Blackshear, Inc., 116 Fla. 289, 291 (Fla. 1934).

"A no action clause in an insurance contract operates as a condition precedent that bars suit against the insurer until the insured complies with the relevant policy provisions." Wright v. Life Ins. Co., 762 So. 2d 992, 993 (Fla. 5th DCA 2000). Such provisions "preclude the insured from recovering upon the policy, where it provides that no suit can be maintained until after a compliance with such condition." Southern Home Ins. Co. v. Putnal, 49 So. 922, 932 (Fla. 1909).

By failing to comply with the mandatory condition precedent of appraisal, Auto Glass materially breached the policy's no action clause by filing suit against Allstate. Cf. Swaebe v. Fed. Ins. Co., 374 F. App'x 855, 857-58 (11th Cir. 2010) ("The undisputed record shows that Swaebe filed this lawsuit prior to complying with the provisions of her policy and before any proof of loss had been filed. Swaebe thus

breached the policy's 'no action' provision — and because it is a condition precedent to recovery, under Florida law, Swaebe committed a material breach barring recovery."). See also Edwards v. State Farm Fla. Ins. Co., 64 So. 3d 730, 732 (Fla. 3d DCA 2011) ("Failure to comply with a condition precedent to payment relieves the insurer of its duty to make payment."); Haiman v. Fed. Ins. Co., 798 So. 2d 811, 812 (Fla. 4th DCA 2001) ("A total failure to comply with policy provisions made a prerequisite to suit under the policy may constitute a breach precluding recovery from the insurer as a matter of law.").

The filing of the instant suit was improper and unjustifiable. See Travelers of Fla. v. Stormont, 43 So. 3d 941, 945 (Fla. 3d DCA 2010) ("Once the insurer demanded appraisal, the insured was required to comply with the appraisal clause. Proceeding to court was not justified."). The trial court departed from the essential requirements of the law by allowing it to go forward.

C. **The trial court ignored clear case law from this Court mandating appraisal in these circumstances**.

The trial court departed from the essential requirements of the law by failing to apply the correct law. Fassy, 884 So. 2d at 364. Specifically, the trial court ignored clear and binding case law from this Court mandating appraisal. See Progressive Am. Ins. Co. v. Broward Ins. Recovery Center a/a/o Maria Puntiel, Case No. CACE

17-000838 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Select Ins. Co. v. Broward Ins. Recovery Center a/a/o Nicole Boursiquot, Case No. CACE 17-000882 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Ins. Co. v. Broward Ins. Recovery Center a/a/o Roberto Vilau, Case No. CACE 17-000884 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Ins. Co. v. Cornerstone Network LLC. a/a/o Lori Carter Moffatt, Case No. CACE 17-000883 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Select Insurance Company v. Broward Insurance Recovery, a/a/o Esteban Gomez, Case No. CACE 16-022581 (AW) (Fla. 17th Jud. Cir. July 31, 2017); Progressive Am. Insurance Company v. Cornerstone Network, Inc. a/a/o Isabella Cardona, Case No. CACE 16-021727 (Fla. 17th Jud. Cir. May 26, 2017); Progressive Select Insurance Company v. Cornerstone Network, Inc. a/a/o Dakota Sowell, Case No. CACE 16-021830 (Fla. 17th Jud. Cir. May 25, 2017).

These cases involve many of the same assertions that the Respondent is making here. For instance, in Progressive Select Insurance Company v. Broward Insurance Recovery, a/a/o Esteban Gomez, Case No. CACE 16-022581 (AW) (Fla. 17th Jud. Cir. July 31, 2017), Auto Glass asserted that there was a coverage issue because of Defendant's ambiguous policy language concerning cost of repair and/or replacement. (App. 249). This Court rejected that argument then, and should similarly do so here.

In any event, these cases were provided to the trial court via a notice of supplemental authority. (App. 242-278; 289-308). The trial court ignored these opinions from this Court, failed to apply the correct law and departed from the essential requirements of the law.

D. The trial court improperly considered an affidavit filed by the Respondent and matters outside of the complaint in making its decision.

The Respondent filed an affidavit and argued matters set forth in the affidavit at the hearing. Allstate objected and moved to strike. The trial court overruled this request. In its order, the trial court references the matters set forth in the affidavit.

Florida law is clear that the trial court is confined to the four-corners of the complaint and any exhibits thereto. Posigian v. Am. Reliance Ins. Co., 549 So. 2d 751, 753 (Fla. 3d DCA 1989) ("In considering a motion to dismiss, 'the trial court and this court are confined exclusively to an examination of the complaint and any attached documents incorporated therein.'") (citing Hopke v. O'Byrne, 148 So. 2d 755 (Fla. 1st DCA 1963)). The trial court erred when it considered the affidavit at the hearing and referenced matters therein in its order.

CONCLUSION

This Court should issue a writ of certiorari quashing the order denying Allstate's Motion to Dismiss, Demand for Appraisal and Motion for Protective Order and order the parties to appraisal. As demonstrated above, the order causes irreparable harm to Allstate which cannot be remedied on plenary appeal. It deprives Allstate of a contractual right and process to which it is entitled. Allstate will expend numerous fees and costs litigating a claim which should not be filed in the judicial system. The trial court departed from the essential requirements of the law by failing to apply the correct law and requiring the parties to litigate a claim that is subject to mandatory appraisal. This Court should correct this miscarriage of justice.

WHEREFORE, Petitioner ALLSTATE INSURANCE COMPANY respectfully requests this Court to issue a writ of certiorari quashing the trial court's order denying Allstate's Motion to Dismiss, Demand for Appraisal and Motion for Protective Order.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was **uploaded and served via the eportal and U.S. Mail** to: **Andrew Davis-Henrichs, Esquire** Emilio Stillo, P.A., 7320 Griffin Road, Suite 203, Davie, FL 33314, efilingpleadings@gmail.com; eservices@emiliostillopa.com; **Lawrence M. Kopelman, P.A.,** One West Las Olas Blvd., Suite 500, Fort Lauderdale, FL 33301, LMKGlass@kopelblank.com; **Mac S. Phillips, Esquire,** Phillips Tadros, P.A., 212 SE 8th Street, Suite 103, Fort Lauderdale, FL 33316; **Alison Haney Bruck, Esquire,** Law Offices of Robert J. Smith, 150 West Flagler Street, Suite 1600, Miami, FL 33130, miamilegal@allstate.com; **Broward County Circuit Court Appellate Division**, (via email only) appeals@17th.flcourts.org; this 5th day of March, 2018.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail to: **Honorable Kathleen McCarthy**, 201 SE 6th St, Fort Lauderdale, FL 33301; this 5th day of March, 2018.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

CERTIFICATE OF COMPLIANCE

In accordance with Florida Rules of Appellate Procedure 9.100(l) and 9.210(a)(2), the undersigned counsel hereby certifies that this Petition for Writ of Certiorari complies with the font requirements of the Rules: Times New Roman 14-point font.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

IN THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA
APPELLATE DIVISION

CASE NO. CACE-18-005153
L.T. NO.: COCE-17-005712 Div. 51

ALLSTATE INSURANCE COMPANY,
Petitioner,

vs.

FROM THE COUNTY COURT
OF BROWARD COUNTY

AUTO GLASS AMERICA LLC
A/A/O [redacted]
Respondent.

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Florida Rule of Appellate Procedure 9.350(a), Petitioner ALLSTATE INSURANCE COMPANY and Respondent AUTO GLASS AMERICA, LLC A/A/O [redacted] hereby jointly stipulate that the above-captioned action has been amicably resolved and is dismissed with prejudice with each party to bear its own costs and attorney's fees, except as otherwise agreed as part of the underlying settlement.

Dated this 26th day of June, 2018.

PHILLIPS TADROS, P.A. */s/ Mac S. Phillips* Mac S. Phillips Florida Bar No.: 195413 212 S.E. 8th Street Suite 103 Fort Lauderdale, FL 33316 (954) 642-8885 (954) 252-4621 – Fax mphillips@phillipstadros.com Attorney for Respondent	BOYD & JENERETTE, P.A. */s/ Kansas R. Gooden* Kansas R. Gooden Florida Bar No.: 58707 201 N. Hogan Street, Suite 400 Jacksonville, FL 33606 (904) 353-6241 (904) 493-5658 – Fax kgooden@boydjen.com Attorney for Petitioner

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IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

AUTO GLASS AMERICA, LLC.
a/a/o [redacted]

Plaintiff, CASE NO.: COCE 17-005712 (51)

Vs.

ALLSTATE INSURANCE COMPANY,

Defendant,
_____ /

VOLUNTARY DISMISSAL WITH PREJUDICE-CASE SETTLED

COMES NOW, the Plaintiff, AUTO GLASS AMERICA, LLC. a/a/o [redacted] and files this Voluntary Dismissal with Prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on the date filed in the E-filing Portal to Counsel of Record as listed on the E-Filing Portal.

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/s/ Andrew Davis-Henrichs
ANDREW DAVIS-HENRICHS, ESQ.
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EXHIBIT 6

IN THE COUNTY COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 17-005472 COCE 51

AUTO GLASS AMERICA, LLC (a/a/o [redacted]

vs.

ALLSTATE INSURANCE COMPANY

_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEYS' FEES

THIS CAUSE came before the Court on January 25, 2018 for hearing on Defendant's Motion to Dismiss Plaintiff's Complaint, Demand into Appraisal, Motion for Protective Order Regarding Discovery, and Motion to Dismiss any Claim for Attorneys' Fees (the "Motion"), and the Court, having reviewed the Motion and entire court file; having reviewed the relevant legal authorities; having heard argument of counsel; and having been sufficiently advised in the premises,

ORDERS AND ADJUDGES that the Motion is **DENIED** in all respects for the reasons set forth below.

Background

In this case regarding the replacement of Allstate's insured's windshield performed by Auto Glass America, LLC, the Amended Complaint asserts four counts for declaratory relief:

1. Count 1 seeks a judicial declaration interpreting the term "cost to repair or replace" contained in the Limit of Liability provision under the comprehensive portion the Allstate policy;

2. Count 2 seeks a judicial declaration that the appraisal provision in the property damage portion of the Allstate policy is not applicable to the instant claim;

3. Count 3 seeks a judicial declaration that appraisal in the context of the subject claim violates the prohibitive cost doctrine; and

4. Count 4 seeks a judicial declaration that Allstate failed to select a disinterested appraiser (this count was pled in the alternative).

In response, Allstate filed the Motion in an effort to dismiss the case and compel appraisal with its chosen appraiser, Auto Glass Inspection Services ("AGIS"). In its response Allstate also challenged whether the Plaintiff has standing. The Defendant contends that the assignment of benefits violates Florida Statute § 626.854 in that the assignment violated the "public adjusting statute".

The Allstate insurance policy provides for appraisal when there is only a dispute as to the specific dollar amount of the loss, and states:

> [W]e will pay for direct and accidental loss to the insured auto or a non-owned auto not caused by collision.
>
> Glass breakage, whether or not caused by collision, and collision with a bird or animal.
>
> * * *
>
> Our limit of liability is the least of:
>
> 1. The **actual cash value** of the **property** at the time of the loss, which may include a deduction for depreciation;
>
> 2. The **cost to repair or replace** as determined by us, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to applicable state laws and regulations.
>
> * * *
>
> Right to Appraisal
>
> Both you and we have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.

The Plaintiff opposes the Motion on several grounds, including: (1) appraisal is an inappropriate process to resolve such equitable claims as declaratory relief regarding the interpretation of the insurance policy; (2) Allstate's appraisal provision does not apply to repair and replacement of windshields; (3) Allstate's chosen appraiser, AGIS, is not "disinterested" as required by the policy in the event appraisal was appropriate; and (4) the cost of the appraisal likely exceeds the amount of damages and that expense is not a taxable cost at the conclusion of the process, such that Plaintiff could recoup the cost of the appraisal even if it were the prevailing party.

Plaintiff contends that the primary issue in this case is one of insurance policy interpretation, for which appraisal is not an appropriate method of dispute resolution because appraisal is only proper when the sole issue is the amount of the loss or the actual cash value of the entire vehicle (as opposed to a part thereof, like the windshield). When the insurer determines that the part can be repaired or replaced, the actual cash value of the property (i.e., the entire vehicle) is no longer at issue and the only determination required is the cost to repair or replace the part which is not the subject of appraisal. The only valuation to be made is the cost to repair or replace the part or property. Therefore, the court must determine whether the term "cost to repair or replace" is either ambiguous or can reasonably be interpreted in more than one manner as alleged by the plaintiff in the complaint. The Court believes that not only does this policy term require judicial interpretation, but that the "cost to repair or replace" windshield glass is not an issue for which appraisal exists as evidenced by the terms of the appraisal provision itself.

Additionally, Plaintiff seeks a declaration that Defendant's appointed appraiser, AGIS, is not "disinterested" as is required by the policy of insurance. See *Heritage Prop. and Cas. Ins. Co. v. Romanach,* 224 So.3d 262 (Fla. 3d DCA 2017); *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla.5th DCA 2014). The Plaintiff presented the Court with correspondence dated June 21, 2013 from attorneys retained by AGIS which threatened various repair shops with litigation.[1] The correspondence states the Alvarez & Gilbert, PLLC law firm represents AGIS in its capacity as appraiser for Allstate's various entities. Further, the letter contains threats of litigation against these shops by AGIS relating to disputes at issue in the appraisal process. The firm, on behalf of AGIS further warns repair shops to "govern [themselves] accordingly."

The Plaintiff also presented the Court with a print-out of the AGIS website on which AGIS states its mission is "to verify glass damage for the insurance industry." The website also represents that "AGIS sole purpose is to report back to the insurance industry what type of damage exists or lack thereof." It further indicates that "AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies."

The Plaintiff also presented correspondence sent between Plaintiff and Allstate in numerous claims requesting AGIS be removed as appraiser because AGIS is not disinterested

[1] Plaintiff contends it is of vital import that AGIS has retained their own attorneys in the past to threaten repair facilities – including Auto Glass America, LLC – with litigation about the appraisal process.

and that Allstate appoint a disinterested appraiser. In response, Allstate issued numerous letters retaining the position that AGIS is disinterested. Allstate continues to retain this position as stated in Defendant's motion. Plaintiff argues that despite making a good faith effort to remove AGIS and to obtain a disinterested appraiser Allstate's position remains, thus; creating a basis to believe that sending additional letters requesting the removal of AGIS would be futile. See *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2007).

Plaintiff also seeks a declaration that the appraisal provision is unenforceable and illusory because the expense to enter appraisal is prohibitive upon both the insured and Plaintiff. The appraisal provision at issue requires that each party bears the costs of its own appraiser and split the costs for the umpire if the appraisers do not agree on the amount of the loss. Plaintiff relies on various county court decisions that have considered whether appraisal provisions may be illusory in the context of the small monetary amounts of windshield damage cases. See *Broward Ins. Recovery Cntr., LLC (a/a/o Charlie Gari) v. Allstate Fire and Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County Ct. May 8, 2017)(Fishman, J.); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Lee, J.); *Clear Vision Windshield Repair LLC (a/a/o Frances Soto) v. Progressive Amer. Ins. Co.*, 23 Fla. L. Weekly Supp. 862a (Fla. Broward County Ct. December 14, 2015)(Skolnik, J.).

Conclusions of Law

To be entitled to declaratory relief, a party must demonstrate that "there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertain or ascertainable state of facts or present controversy as to a state of facts; that some impurity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *Bartsch v. Costell,* 170 So.3d 83, 88 (Fla. 4th DCA 2015)(quoting *Olive v. Mass*, 811 So.2d 644, 657-58 (Fla. 2002). Declaratory relief in the insurance context is rendered by the trial court after determining the state of facts giving rise to the application of the policy provisions. *See Northwest Center for Integrative Medicine & Rehabilitation, Inc. v. State Farm Mutual Automobile Ins. Co.,* 214 So.3d 679 (Fla. 4th DCA 2017). Plaintiff has sufficiently stated causes of action for declaratory relief in each of the counts asserted in the Amended Complaint.

There are three elements for the courts to consider in ruling on a motion to compel arbitration or appraisal of a given dispute: (1) whether a valid written agreement to appraisal exists; (2) whether an issue for appraisal exists; and, (3) whether the right to appraisal is waived. *Heller v. Blue Aerospace LLC*, 112 So. 3d 635(Fla. 4th DCA 2013). In this case, Plaintiff seeks the Court's interpretation and construction of insurance policy language, including the appraisal provision itself. As a threshold matter, it has yet to be determined whether there exists a valid

written agreement that calls for appraisal. In fact, the very declarations the Plaintiff seeks in this case involve the validity of the appraisal and limit-of-liability provisions in the policy[2].

If the Court interprets and construes the agreement to appraise as valid, the next step is to determine whether an issue for appraisal exists. While appraisal is a preferred non-judicial method of dispute resolution, it is only appropriate when the sole issue to be decided is a determination of the amount of damages sustained by the insured. *See Citizens Prop. Ins. Corp. v. Demetrescu,* 137 So.3d 500 (Fla. 4th DCA 2014); *Citizens Prop. Ins. Corp. v. Michigan Condominium Ass'n*, 46 So.3d 177 (Fla. 4th DCA 2010). In other words, an appraisable issue only exists when there is a dispute over money. In this case the Defendant does not even agree that the Plaintiff has standing. Appraisal is not appropriate when a case presents only issues of contract interpretation or coverage. *Antencio v. U.S. Sec. Ins. Co.*, 676 So.2d 489 (Fla. 3d DCA 1996)("Questions of policy interpretation and coverage are ordinarily for the court, rather than arbitrators or appraisers to decide."); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Hon. Robert W. Lee)("In the instant case, the operative issue is how the value of the loss should be determined, and making this determination is not within the purview of the appraisal process."). This case presents issues of contract interpretation or coverage to be determined by the Court as a matter of law. Specifically, the Court must determine whether the term "cost to repair or replace" is ambiguous or capable of more than one reasonable interpretation. It is not an action for damages.

Further, appraisal for windshield glass repair or replacement is not contemplated by the appraisal provision in the policy. The provision requires the appraisers to determine the actual cash value and the amount of the loss. Neither of those determinations are necessary or even relevant when the issue is the meaning of the term "cost to repair" windshield glass. If appraisal was intended to determine the cost to repair or replace a windshield, the appraisal provision would say so. It does not. This Court is not at liberty to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So.3d 494, 497 (Fla. 2014), quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986).

Defendant relies upon *Progressive Select Ins. Co. v. Cornerstone Network, Inc. (a/a/o Dakota Sowell),* Case No.: CACE 16-021830 (AW), FLWSUPP 2503SOWE, (Broward County, Circuit Court)(Appellate Capacity)(May 25, 2017) and *Progressive American Ins. Co. v. Broward Insurance Recovery Center, LLC (Isabella Cardona),* Case No.: CACE 16-021757 (AW) (Broward County, Circuit Court)(Appellate Capacity)(May 26, 2017)(unpublished) for the proposition that appraisal is proper for windshield repairs, and should be employed instead of the judicial process. Those cases are distinguishable from the instant matter as they were

[2] Curiously, Allstate maintains Plaintiff lacks standing for two reasons. First, Allstate argues Plaintiff lacks standing because the insured did not comply with the appraisal provision; therefore, according to Allstate, the right to additional payment did not vest in the insured so the insured had no rights or benefits to assign. Second, Allstate argues that the assignment of benefits constitutes a violation of Fla. Stat. § 626.854, which provides a definition of "public adjuster." The Court makes no finding as to standing at this time.

lawsuits for breach of contract seeking only damages. They were not claims for declaratory relief like those raised by the Plaintiff in this case. Further, the *Progressive* damages cases involve different policies and provisions than the Allstate policy at issue here. In contrast to the Progressive cases the issues set forth in the Plaintiff's complaint require judicial interpretation and declaratory relief involving terms in both the limit of liability and appraisal provisions in the policy.

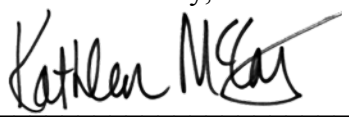
The simple fact is that without a judicial interpretation as to the meaning and/or possible ambiguity of the term "cost to repair or replace" the Plaintiff faces the potential of being forced into an appraisal process without knowing whether the Defendant has complied with the limit of liability provision in its policy. While alternative dispute resolutions are favored by the courts they cannot be used as vehicles by either party to avoid the terms, conditions and construction of the contract which is subject of the suit.

Although not binding, this Court is also persuaded by the other county court decisions in favor of Plaintiff's position. *See e.g., Auto Glass America, LLC (a/a/o Joe Johnson) v. Allstate Ins. Co., 25 Fla. L. Weekly Supp. 833a* (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Auto Glass America LLC (a/a/o Marian Donovan) v. Allstate Ins. Co.*, Case No. 17-3260 COWE (82) (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Harry Drangsland) v. Allstate Ins. Co.,* 25 Fla. L. Weekly Supp. 294 (Fla. Broward County Ct. May 8, 2017)(Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Charlie Gari) v. Allstate Fire and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County CT. May 8, 2017) (Fishman, J.); *Broward Insurance Recovery Center, LLC (a/a/o Jason Kemps) v. Allstate Ins. Co.,* Case No.: 16-012906 COWE (81) (Fla. Broward County Ct. May 8, 2017) (Fishman, J.); *Auto Glass Wizards, Inc. (a/a/o Noel Ramos) v. Allstate Ins. Co.*, Case No.: 16-11775 COCE (54) (Fla. Broward County Ct. January 12, 2018) (Barner, J.); *Auto Glass Wizards, Inc. (a/a/o William Diaz) v. Allstate Ins. Co.*, Case No.: 16-11461 COCE (54) (Barner, J.); *Auto Glass America, LLC (a/a/o Erica Gantley) v. Allstate Fire and Casualty Ins. Co.*, Case No.: 17-1041 CONO (72) (Fla. Broward County Ct. December 8, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Angelina Davinport) v. Allstate Fire and Casualty Ins. Co.,* Case No.: 17-1981 CONO (72) (Fla. Broward County Ct. November 16, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Diane Bloom) v. Allstate Ins. Co.,* Case No.: 17-3385 CONO (73) (Fla. Broward County Ct. November 3, 2017) (Deluca, J.); *Auto Glass America, LLC (a/a/o Amy Trucano) v. Allstate Ins. Co.,* Case No.: 17-3394 CONO (73) (November 3, 2017) (Deluca, J.); *Broward Insurance Recovery Center, LLC (a/a/o Ken Baker) v. Allstate Ins. Co.,* Case No.: 16-22873 COCE (56) (Fla. Broward County Ct. April 25, 2017); *Clear Vision Windshield Repair, LLC (Harold Becker) v. Allstate Prop. and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 291b (Fla. Broward County Ct. April 21, 2016) (Marks, J.); *Broward Insurance Recovery Center, LLC (Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Fla. Broward County Ct. November 2, 2016) (Lee, J.); *Clear Vision Windshield Repair, LLC (a/a/o Jennifer Beckles) v. Progressive Amer. Ins. Co.,* 23 Fla. L. Weekly Supp. 486a (Fla. Broward County Ct. September 2, 2015)(Skolnik, J.).

For these reasons, Defendant's Motion is hereby **DENIED**.

Since the Court finds appraisal to be inappropriate in this case, it does not need to reach the issues of Allstate's compliance (or lack thereof) with the appraisal provision by selecting AGIS, an appraiser whose disinterest is questioned by the Plaintiff, or whether appraisal should be precluded under the prohibitive cost doctrine. Those issues are moot.

DONE and **ORDERED** at Plantation, Broward County, Florida on this 6th day of February, 2018.



HONORABLE KATHLEEN MCCARTHY
COUNTY COURT JUDGE

Copies furnished to:

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Christie Quintero, Esq., and Kansas R. Gooden, Esq., for the Defendant.

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25 Fla. L. Weekly Supp. 833a

Online Reference: FLWSUPP 2509JJOH

Insurance -- Automobile -- Windshield repair -- Declaratory judgments -- Plaintiff has stated cause of action for declaratory relief in complaint seeking interpretation of term "cost to repair or replace" in policy and declarations that appraisal provision in policy is not applicable to claim for windshield repair, that appraisal in context of claim violates prohibitive cost doctrine, and that insurer failed to select disinterested appraiser -- Motion to dismiss and compel appraisal denied, as case presents issues of contract interpretation, coverage, and standing that are beyond determination of damages -- Windshield replacement and repair is not contemplated by appraisal provision of policy requiring appraiser to determine actual cash value and amount of loss, which are not relevant to cost to repair windshield

AUTO GLASS AMERICA, LLC (a/a/o Joe Johnson), Plaintiff, vs. ALLSTATE INSURANCE COMPANY, Defendant. County Court, 17th Judicial Circuit in and for Broward County. Case No. 17-003282 COWE (82). November 21, 2017. Jennifer W. Hilal, Judge. Counsel: Emilio R. Stillo and Andrew Davis-Henrichs, Emilo-Stillo P.A.; Lawrence Kopelman, Lawrence M. Kopelman, P.A.; and Mac Phillips, The Phillips Law Group, for Plaintiff. Alison Haney Bruck, Law Offices of Robert J. Smith, and Kansas R. Gooden, Boyd & Jenerette, P.A., for Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION

TO DISMISS PLAINTIFF'S AMENDED COMPLAINT,

DEMAND FOR APPRAISAL, AND MOTION FOR

PROTECTIVE ORDER REGARDING DISCOVERY

THIS CAUSE came before the Court on October 27, 2017 for hearing on Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Demand into Appraisal and Motion for Protective Order Regarding Discovery (the "Motion"), and the Court, having reviewed the Motion and entire court file; having reviewed the relevant legal authorities; having heard argument of counsel; and having been sufficiently advised in the premises,

ORDERS AND ADJUDGES that the Motion is **DENIED** in all respects for the reasons set forth below.

Background

In this case regarding the replacement of Allstate's insured's windshield performed by Auto Glass America, LLC, the Amended Complaint asserts four counts for declaratory relief:

1. Count 1 seeks a judicial declaration interpreting the term "cost to repair or replace" contained in the Limit of Liability provision under the comprehensive portion the Allstate policy;

2. Count 2 seeks a judicial declaration that the appraisal provision in the property damage portion of the Allstate policy is not applicable to the instant claim;

3. Count 3 seeks a judicial declaration that appraisal in the context of the subject claim violates the prohibitive cost doctrine; and

4. Count 4 seeks a judicial declaration that Allstate failed to select a disinterested appraiser (this count was pled in the alternative).

In response, Allstate filed the Motion in an effort to dismiss the case and compel appraisal with its chosen appraiser, Auto Glass Inspection Services ("AGIS"). In its response Allstate also challenged whether the Plaintiff has standing. The Defendant contends that the assignment of benefits violates Florida Statute § 626.854 in that the assignment violated the "public adjusting statute".

The Allstate insurance policy provides for appraisal when there is only a dispute as to the specific dollar amount of the loss, and states:

> [W]e will pay for direct and accidental loss to the insured auto or a non-owned auto not caused by collision.
>
> Glass breakage, whether or not caused by collision, and collision with a bird or animal.
>
> * * *
>
> Our limit of liability is the least of:
>
> 1. The **actual cash value** of the ***property*** at the time of the loss, which may include a deduction for depreciation;
>
> 2. The ***cost to repair or replace*** as determined by us, the property or part to its physical condition at the time of loss using parts produced by or for the vehicle's manufacturer, or parts from other sources, including, but not limited to, non-original equipment manufacturers, subject to applicable state laws and regulations.
>
> * * *
>
> Right to Appraisal
>
> Both you and we have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.

The Plaintiff opposes the Motion on several grounds, including: (1) appraisal is an inappropriate process to resolve such equitable claims as declaratory relief regarding the interpretation of the insurance policy; (2) Allstate's appraisal provision does not apply to repair and replacement of windshields; (3) Allstate's chosen appraiser, AGIS, is not "disinterested" as required by the policy in the event appraisal was appropriate; and (4) the cost of the appraisal likely exceeds the amount of damages and that expense is not a taxable cost at the conclusion of the process, such that Plaintiff could recoup the cost of the appraisal even if it were the prevailing party.

Plaintiff contends that the primary issue in this case is one of insurance policy interpretation, for which appraisal is not an appropriate method of dispute resolution because appraisal is only proper when the sole issue is the amount of the loss or the actual cash value of the entire vehicle (as opposed to a part thereof, like the windshield). When the insurer determines that the part can be repaired or replaced, the actual cash value of the property (i.e., the entire vehicle) is no longer at issue and the only determination required is the cost to repair or replace the part which is not the subject of appraisal. The only valuation to be made is the cost to repair or replace the part or property. Therefore, the court must determine whether the term "cost to repair or replace" is either ambiguous or can reasonably be interpreted in more than one manner as alleged by the Plaintiff in the complaint. The Court believes that not only does this policy term require judicial interpretation, but that the "cost to repair or replace" windshield glass is not an issue for which appraisal exists as evidenced by the terms of the appraisal provision itself.

Additionally, Plaintiff seeks a declaration that Defendant's appointed appraiser, AGIS, is not "disinterested" as is required by the policy of insurance. See *Heritage Prop. and Cas. Ins. Co. v. Romanach*, 224 So.3d 262 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D1563a]; *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla. 5th DCA 2014) [39 Fla. L. Weekly D2020a]. The Plaintiff presented the Court with correspondence dated June 21, 2013 from attorneys retained by AGIS which threatened various repair shops with litigation.[1] The correspondence states the Alvarez & Gilbert, PLLC law firm represents AGIS in its capacity as appraiser for Allstate's various entities. Further, the letter contains threats of litigation against these shops by AGIS relating to disputes at issue in the appraisal process. The firm, on behalf of AGIS further warns repair shops to "govern [themselves] accordingly."

The Plaintiff also presented the Court with a print-out of the AGIS website on which AGIS states its mission is "to verify glass damage for the insurance industry." The website also represents that "AG1S sole purpose is to report back to the insurance industry what type of damage exists or lack thereof." It further indicates that "AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies."

The Plaintiff also presented correspondence sent between Plaintiff and Allstate in numerous claims requesting AGIS be removed as appraiser because AGIS is not disinterested and that Allstate appoint a disinterested appraiser. In response, Allstate issued numerous letters retaining the position that AGIS is disinterested. Allstate continues to retain this position as stated in Defendant's motion. Plaintiff argues that despite making a good faith effort to remove AGIS and to obtain a disinterested appraiser Allstate's position remains, thus: creating a basis to believe that sending additional letters requesting the removal of AGIS would be futile. See *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2007) [28 Fla. L. Weekly D2229d].

Plaintiff also seeks a declaration that the appraisal provision is unenforceable and illusory because the expense to enter appraisal is prohibitive upon both the insured and Plaintiff. The appraisal provision at issue requires that each party bears the costs of its own appraiser and split the costs for the umpire if the appraisers do not agree on the amount of the loss. Plaintiff relies on various county court decisions that have considered whether appraisal provisions may be illusory in the context of the small monetary amounts of windshield damage cases. See *Broward Ins. Recovery Cntr., LLC (a/a/o Charlie Gari) v. Allstate Fire and Cas. Ins. Co.*, 25 Fla. L. Weekly Supp. 293a (Fla. Broward County Ct. May 8, 2017) (Fishman, J.); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.*, 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Lee, J.); *Clear*

Vision Windshield Repair LLC (a/a/o Frances Soto) v. Progressive Amer. Ins. Co., 23 Fla. L. Weekly Supp. 862a (Fla. Broward County Ct. December 14, 2015) (Skolnik, J.).

Conclusions of Law

To be entitled to declaratory relief, a party must demonstrate that "there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertain or ascertainable state of facts or present controversy as to a state of facts; that some impurity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *Bartsch v. Costello*, 170 So.3d 83, 88 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1414a] (quoting *Olive v. Maas*, 811 So.2d 644, 657-58 (Fla. 2002) [27 Fla. L. Weekly S139a]. Declaratory relief in the insurance context is rendered by the trial court after determining the state of facts giving rise to the application of the policy provisions. *See Northwest Center for Integrative Medicine & Rehabilitation, Inc. v. State Farm Mutual Automobile Ins. Co.*, 214 So.3d 679 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D446b]. Plaintiff has sufficiently stated causes of action for declaratory relief in each of the counts asserted in the Amended Complaint.

There are three elements for the courts to consider in ruling on a motion to compel arbitration or appraisal of a given dispute: (1) whether a valid written agreement to appraisal exists; (2) whether an issue for appraisal exists; and, (3) whether the right to appraisal is waived. *Heller v. Blue Aerospace LLC*, 112 So. 3d 635(Fla. 4th DCA 2013) [38 Fla. L. Weekly D930a]. In this case, Plaintiff seeks the Court's interpretation and construction of insurance policy language, including the appraisal provision itself. As a threshold matter, it has yet to be determined whether there exists a valid written agreement that calls for appraisal. In fact, the very declarations the Plaintiff seeks in this case involve the validity of the appraisal and limit-of-liability provisions in the policy[2].

If the Court interprets and construes the agreement to appraise as valid, the next step is to determine whether an issue for appraisal exists. While appraisal is a preferred non-judicial method of dispute resolution, it is only appropriate when the sole issue to be decided is a determination of the amount of damages sustained by the insured. *See Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So.3d 500 (Fla. 4th DCA 2014) [39 Fla. L. Weekly D629a]; *Citizens Prop. Ins. Corp. v. Michigan Condominium Ass'n*, 46 So.3d 177 (Fla. 4th DCA 2010) [35 Fla. L. Weekly D2369a]. In other words, an appraisable issue only exists when there is a dispute over money. In this case the Defendant does not even agree that the Plaintiff has standing. Appraisal is not appropriate when a case presents only issues of contract interpretation or coverage. *Antencio v. U.S. Sec. Ins. Co.*, 676 So.2d 489 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1472a] ("Questions of policy interpretation and coverage are ordinarily for the court, rather than arbitrators or appraisers to decide."); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.*, 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016) (Hon. Robert W. Lee) ("In the instant case, the operative issue is how the value of the loss should be determined, and making this determination is not within the purview of the appraisal process."). This case presents issues of contract interpretation or coverage to be determined by the Court as a matter of law. Specifically, the Court must determine whether the term "cost to repair or replace" is ambiguous or capable of more than one reasonable interpretation. It is not an action for damages.

Further, appraisal for windshield glass repair or replacement is not contemplated by the appraisal provision in the policy. The provision requires the appraisers to determine the actual cash value and the amount of the loss. Neither of those determinations are necessary or even relevant when the issue is the meaning of the term "cost to repair" windshield glass. If appraisal was intended to determine the cost to repair or replace a windshield, the appraisal provision would say so. It does not. This Court is not at liberty to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So.3d 494, 497 (Fla. 2014) [39 Fla. L. Weekly S75a], quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen,* 498 So.2d 1245, 1248 (Fla. 1986).

Defendant relies upon *Progressive Select Ins. Co. v. Cornerstone Network, Inc. (a/a/o Dakota Sowell)*, Case No.: CACE 16-021830 (AW), FLWSUPP 2503SOWE, (Broward County, Circuit Court) (Appellate Capacity) (May 25, 2017) [25 Fla. L. Weekly Supp. 229b] and *Progressive American Ins. Co. v. Broward Insurance Recovery Center, LLC (Isabella Cardona),* Case No.: CACE 16-021757 (AW) (Broward County, Circuit Court) (Appellate Capacity) (May 26, 2017) (unpublished) for the proposition that appraisal is proper for windshield repairs, and should be employed instead of the judicial process. Those cases are distinguishable from the instant matter as they were lawsuits for breach of contract seeking only damages. They were not claims for declaratory relief like those raised by the Plaintiff in this case. Further, the *Progressive* damages cases involve different policies and provisions than the Allstate policy at issue here. In contrast to the Progressive cases the issues set forth in the Plaintiff's complaint require judicial interpretation and declaratory relief involving terms in both the limit of liability and appraisal provisions in the policy.

The simple fact is that without a judicial interpretation as to the meaning and/or possible ambiguity of the term "cost to repair or replace" the Plaintiff faces the potential of being forced into an appraisal process without knowing whether the Defendant has complied with the limit of liability provision in its policy. While alternative dispute resolutions are favored by the courts they cannot be used as vehicles by either party to avoid the terms, conditions and construction of the contract which is subject of the suit.

For these reasons, Defendant's Motion is hereby **DENIED**.

Since the Court is denying the Defendant's Motion to Dismiss, it does not need to reach the issues of Allstate's compliance (or lack thereof) with the appraisal provision by selecting AGIS, an appraiser whose disinterest is questioned by the Plaintiff, or whether appraisal should be precluded under the prohibitive cost doctrine. Those issues are moot.

---

[1]Plaintiff contends it is of vital import that AGIS has retained their own attorneys in the past to threaten repair facilities -- including Auto Glass America, LLC -- with litigation about the appraisal process.

[2]Curiously, Allstate maintains Plaintiff lacks standing for two reasons. First, Allstate argues Plaintiff lacks standing because the insured did not comply with the appraisal provision; therefore, according to Allstate, the right to additional payment did not vest in the insured so the insured had no rights or benefits to assign. Second, Allstate argues that the assignment of benefits constitutes a violation of Fla. Stat. § 626.854, which provides a definition of "public adjuster." The Court makes no finding as to standing at this time.

* * *

IN THE COUNTY COURT OF
BROWARD COUNTY, FLORIDA

AUTO GLASS AMERICA LLC AS ASSIGNEE OF DIANE BLOOM,

Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,

Defendant.
_____/

CASE NO.
CONO-17-003385 Division 73

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL AND MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY

THIS CAUSE came to be heard on October 18, 2017 on Defendant Allstate Insurance Company's Motion to Dismiss Plaintiff's Complaint, Demand into Appraisal, and Motion for Protective Order Regarding Discovery. The Court, after having reviewed the pleadings, heard the arguments of counsel, and being otherwise fully advised on the premises, it is hereby:

ORDERED AND ADJUDGED:

1. That Defendant's Motion to Dismiss Plaintiff's Complaint, Demand into Appraisal, and Motion for Protective Order Regarding Discovery is DENIED. Defendant shall have 30 days from the date of this order to respond to discovery.

DONE and **ORDERED** in Chambers in Deerfield Beach, Broward County, Florida, this 3 day of November, 2017.

HONORABLE STEVEN DELUCA

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Alison Haney Bruck, Esq., 110 SE 6th Street, Suite 1800, Fort Lauderdale, FL 33301

IN THE COUNTY COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 17-005712 COCE 51

AUTO GLASS AMERICA, LLC (a/a/o [redacted]

vs.

ALLSTATE INSURANCE COMPANY

_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DEMAND INTO APPRAISAL, MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY, AND MOTION TO DISMISS ANY CLAIM FOR ATTORNEYS' FEES

THIS CAUSE came before the Court on January 25, 2018 for hearing on Defendant's Motion to Dismiss Plaintiff's Complaint, Demand into Appraisal, Motion for Protective Order Regarding Discovery, and Motion to Dismiss any Claim for Attorneys' Fees (the "Motion"), and the Court, having reviewed the Motion and entire court file; having reviewed the relevant legal authorities; having heard argument of counsel; and having been sufficiently advised in the premises,

ORDERS AND ADJUDGES that the Motion is **DENIED** in all respects for the reasons set forth below.

Background

In this case regarding the replacement of Allstate's insured's windshield performed by Auto Glass America, LLC, the Amended Complaint asserts four counts for declaratory relief:

1. Count 1 seeks a judicial declaration interpreting the term "cost to repair or replace" contained in the Limit of Liability provision under the comprehensive portion the Allstate policy;

2. Count 2 seeks a judicial declaration that the appraisal provision in the property damage portion of the Allstate policy is not applicable to the instant claim;

3. Count 3 seeks a judicial declaration that appraisal in the context of the subject claim violates the prohibitive cost doctrine; and

4. Count 4 seeks a judicial declaration that Allstate failed to select a disinterested appraiser (this count was pled in the alternative).

In response, Allstate filed the Motion in an effort to dismiss the case and compel appraisal with its chosen appraiser, Auto Glass Inspection Services ("AGIS"). In its response Allstate also challenged whether the Plaintiff has standing. The Defendant contends that the assignment of benefits violates Florida Statute § 626.854 in that the assignment violated the "public adjusting statute".

The Allstate insurance policy provides for appraisal when there is only a dispute as to the specific dollar amount of the loss, and states:

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> Our limit of liability is the least of:
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> 1. The **actual cash value** of the **property** at the time of the loss, which may include a deduction for depreciation;
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> Right to Appraisal
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> Both you and we have a right to demand an appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court of record, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the loss amount payable.

The Plaintiff opposes the Motion on several grounds, including: (1) appraisal is an inappropriate process to resolve such equitable claims as declaratory relief regarding the interpretation of the insurance policy; (2) Allstate's appraisal provision does not apply to repair and replacement of windshields; (3) Allstate's chosen appraiser, AGIS, is not "disinterested" as required by the policy in the event appraisal was appropriate; and (4) the cost of the appraisal likely exceeds the amount of damages and that expense is not a taxable cost at the conclusion of the process, such that Plaintiff could recoup the cost of the appraisal even if it were the prevailing party.

Plaintiff contends that the primary issue in this case is one of insurance policy interpretation, for which appraisal is not an appropriate method of dispute resolution because appraisal is only proper when the sole issue is the amount of the loss or the actual cash value of the entire vehicle (as opposed to a part thereof, like the windshield). When the insurer determines that the part can be repaired or replaced, the actual cash value of the property (i.e., the entire vehicle) is no longer at issue and the only determination required is the cost to repair or replace the part which is not the subject of appraisal. The only valuation to be made is the cost to repair or replace the part or property. Therefore, the court must determine whether the term "cost to repair or replace" is either ambiguous or can reasonably be interpreted in more than one manner as alleged by the plaintiff in the complaint. The Court believes that not only does this policy term require judicial interpretation, but that the "cost to repair or replace" windshield glass is not an issue for which appraisal exists as evidenced by the terms of the appraisal provision itself.

Additionally, Plaintiff seeks a declaration that Defendant's appointed appraiser, AGIS, is not "disinterested" as is required by the policy of insurance. See *Heritage Prop. and Cas. Ins. Co. v. Romanach,* 224 So.3d 262 (Fla. 3d DCA 2017); *Florida Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488 (Fla.5th DCA 2014). The Plaintiff presented the Court with correspondence dated June 21, 2013 from attorneys retained by AGIS which threatened various repair shops with litigation.[1] The correspondence states the Alvarez & Gilbert, PLLC law firm represents AGIS in its capacity as appraiser for Allstate's various entities. Further, the letter contains threats of litigation against these shops by AGIS relating to disputes at issue in the appraisal process. The firm, on behalf of AGIS further warns repair shops to "govern [themselves] accordingly."

The Plaintiff also presented the Court with a print-out of the AGIS website on which AGIS states its mission is "to verify glass damage for the insurance industry." The website also represents that "AGIS sole purpose is to report back to the insurance industry what type of damage exists or lack thereof." It further indicates that "AGIS has no affiliation with any companies in the glass industry and only serves large insurance companies."

The Plaintiff also presented correspondence sent between Plaintiff and Allstate in numerous claims requesting AGIS be removed as appraiser because AGIS is not disinterested

[1] Plaintiff contends it is of vital import that AGIS has retained their own attorneys in the past to threaten repair facilities – including Auto Glass America, LLC – with litigation about the appraisal process.

and that Allstate appoint a disinterested appraiser. In response, Allstate issued numerous letters retaining the position that AGIS is disinterested. Allstate continues to retain this position as stated in Defendant's motion. Plaintiff argues that despite making a good faith effort to remove AGIS and to obtain a disinterested appraiser Allstate's position remains, thus; creating a basis to believe that sending additional letters requesting the removal of AGIS would be futile. See *Waksman Enterprises, Inc. v. Oregon Properties, Inc.*, 862 So.2d 35 (Fla. 2d DCA 2007).

Plaintiff also seeks a declaration that the appraisal provision is unenforceable and illusory because the expense to enter appraisal is prohibitive upon both the insured and Plaintiff. The appraisal provision at issue requires that each party bears the costs of its own appraiser and split the costs for the umpire if the appraisers do not agree on the amount of the loss. Plaintiff relies on various county court decisions that have considered whether appraisal provisions may be illusory in the context of the small monetary amounts of windshield damage cases. See *Broward Ins. Recovery Cntr., LLC (a/a/o Charlie Gari) v. Allstate Fire and Cas. Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County Ct. May 8, 2017)(Fishman, J.); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Lee, J.); *Clear Vision Windshield Repair LLC (a/a/o Frances Soto) v. Progressive Amer. Ins. Co.*, 23 Fla. L. Weekly Supp. 862a (Fla. Broward County Ct. December 14, 2015)(Skolnik, J.).

Conclusions of Law

To be entitled to declaratory relief, a party must demonstrate that "there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertain or ascertainable state of facts or present controversy as to a state of facts; that some impurity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity." *Bartsch v. Costell,* 170 So.3d 83, 88 (Fla. 4th DCA 2015)(quoting *Olive v. Mass*, 811 So.2d 644, 657-58 (Fla. 2002). Declaratory relief in the insurance context is rendered by the trial court after determining the state of facts giving rise to the application of the policy provisions. *See Northwest Center for Integrative Medicine & Rehabilitation, Inc. v. State Farm Mutual Automobile Ins. Co.,* 214 So.3d 679 (Fla. 4th DCA 2017). Plaintiff has sufficiently stated causes of action for declaratory relief in each of the counts asserted in the Amended Complaint.

There are three elements for the courts to consider in ruling on a motion to compel arbitration or appraisal of a given dispute: (1) whether a valid written agreement to appraisal exists; (2) whether an issue for appraisal exists; and, (3) whether the right to appraisal is waived. *Heller v. Blue Aerospace LLC*, 112 So. 3d 635(Fla. 4th DCA 2013). In this case, Plaintiff seeks the Court's interpretation and construction of insurance policy language, including the appraisal provision itself. As a threshold matter, it has yet to be determined whether there exists a valid

written agreement that calls for appraisal. In fact, the very declarations the Plaintiff seeks in this case involve the validity of the appraisal and limit-of-liability provisions in the policy[2].

If the Court interprets and construes the agreement to appraise as valid, the next step is to determine whether an issue for appraisal exists. While appraisal is a preferred non-judicial method of dispute resolution, it is only appropriate when the sole issue to be decided is a determination of the amount of damages sustained by the insured. *See Citizens Prop. Ins. Corp. v. Demetrescu,* 137 So.3d 500 (Fla. 4th DCA 2014); *Citizens Prop. Ins. Corp. v. Michigan Condominium Ass'n*, 46 So.3d 177 (Fla. 4th DCA 2010). In other words, an appraisable issue only exists when there is a dispute over money. In this case the Defendant does not even agree that the Plaintiff has standing. Appraisal is not appropriate when a case presents only issues of contract interpretation or coverage. *Antencio v. U.S. Sec. Ins. Co.*, 676 So.2d 489 (Fla. 3d DCA 1996)("Questions of policy interpretation and coverage are ordinarily for the court, rather than arbitrators or appraisers to decide."); *Broward Ins. Recovery Cntr., LLC (a/a/o Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Broward County Ct. Nov. 3, 2016)(Hon. Robert W. Lee)("In the instant case, the operative issue is how the value of the loss should be determined, and making this determination is not within the purview of the appraisal process."). This case presents issues of contract interpretation or coverage to be determined by the Court as a matter of law. Specifically, the Court must determine whether the term "cost to repair or replace" is ambiguous or capable of more than one reasonable interpretation. It is not an action for damages.

Further, appraisal for windshield glass repair or replacement is not contemplated by the appraisal provision in the policy. The provision requires the appraisers to determine the actual cash value and the amount of the loss. Neither of those determinations are necessary or even relevant when the issue is the meaning of the term "cost to repair" windshield glass. If appraisal was intended to determine the cost to repair or replace a windshield, the appraisal provision would say so. It does not. This Court is not at liberty to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties." *Intervest Const. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 133 So.3d 494, 497 (Fla. 2014), quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So.2d 1245, 1248 (Fla. 1986).

Defendant relies upon *Progressive Select Ins. Co. v. Cornerstone Network, Inc. (a/a/o Dakota Sowell),* Case No.: CACE 16-021830 (AW), FLWSUPP 2503SOWE, (Broward County, Circuit Court)(Appellate Capacity)(May 25, 2017) and *Progressive American Ins. Co. v. Broward Insurance Recovery Center, LLC (Isabella Cardona),* Case No.: CACE 16-021757 (AW) (Broward County, Circuit Court)(Appellate Capacity)(May 26, 2017)(unpublished) for the proposition that appraisal is proper for windshield repairs, and should be employed instead of the judicial process. Those cases are distinguishable from the instant matter as they were

[2] Curiously, Allstate maintains Plaintiff lacks standing for two reasons. First, Allstate argues Plaintiff lacks standing because the insured did not comply with the appraisal provision; therefore, according to Allstate, the right to additional payment did not vest in the insured so the insured had no rights or benefits to assign. Second, Allstate argues that the assignment of benefits constitutes a violation of Fla. Stat. § 626.854, which provides a definition of "public adjuster." The Court makes no finding as to standing at this time.

lawsuits for breach of contract seeking only damages. They were not claims for declaratory relief like those raised by the Plaintiff in this case. Further, the *Progressive* damages cases involve different policies and provisions than the Allstate policy at issue here. In contrast to the Progressive cases the issues set forth in the Plaintiff's complaint require judicial interpretation and declaratory relief involving terms in both the limit of liability and appraisal provisions in the policy.

The simple fact is that without a judicial interpretation as to the meaning and/or possible ambiguity of the term "cost to repair or replace" the Plaintiff faces the potential of being forced into an appraisal process without knowing whether the Defendant has complied with the limit of liability provision in its policy. While alternative dispute resolutions are favored by the courts they cannot be used as vehicles by either party to avoid the terms, conditions and construction of the contract which is subject of the suit.

Although not binding, this Court is also persuaded by the other county court decisions in favor of Plaintiff's position. *See e.g., Auto Glass America, LLC (a/a/o Joe Johnson) v. Allstate Ins. Co., 25 Fla. L. Weekly Supp. 833a* (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Auto Glass America LLC (a/a/o Marian Donovan) v. Allstate Ins. Co.*, Case No. 17-3260 COWE (82) (Fla. Broward County Ct. November 21, 2017) (Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Harry Drangsland) v. Allstate Ins. Co.,* 25 Fla. L. Weekly Supp. 294 (Fla. Broward County Ct. May 8, 2017)(Hilal, J.); *Broward Insurance Recovery Center, LLC (a/a/o Charlie Gari) v. Allstate Fire and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 293a (Fla. Broward County CT. May 8, 2017) (Fishman, J.); *Broward Insurance Recovery Center, LLC (a/a/o Jason Kemps) v. Allstate Ins. Co.,* Case No.: 16-012906 COWE (81) (Fla. Broward County Ct. May 8, 2017) (Fishman, J.); *Auto Glass Wizards, Inc. (a/a/o Noel Ramos) v. Allstate Ins. Co.*, Case No.: 16-11775 COCE (54) (Fla. Broward County Ct. January 12, 2018) (Barner, J.); *Auto Glass Wizards, Inc. (a/a/o William Diaz) v. Allstate Ins. Co.*, Case No.: 16-11461 COCE (54) (Barner, J.); *Auto Glass America, LLC (a/a/o Erica Gantley) v. Allstate Fire and Casualty Ins. Co.*, Case No.: 17-1041 CONO (72) (Fla. Broward County Ct. December 8, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Angelina Davinport) v. Allstate Fire and Casualty Ins. Co.,* Case No.: 17-1981 CONO (72) (Fla. Broward County Ct. November 16, 2017) (Hurley, J.); *Auto Glass America, LLC (a/a/o Diane Bloom) v. Allstate Ins. Co.,* Case No.: 17-3385 CONO (73) (Fla. Broward County Ct. November 3, 2017) (Deluca, J.); *Auto Glass America, LLC (a/a/o Amy Trucano) v. Allstate Ins. Co.,* Case No.: 17-3394 CONO (73) (November 3, 2017) (Deluca, J.); *Broward Insurance Recovery Center, LLC (a/a/o Ken Baker) v. Allstate Ins. Co.,* Case No.: 16-22873 COCE (56) (Fla. Broward County Ct. April 25, 2017); *Clear Vision Windshield Repair, LLC (Harold Becker) v. Allstate Prop. and Casualty Ins. Co.,* 25 Fla. L. Weekly Supp. 291b (Fla. Broward County Ct. April 21, 2016) (Marks, J.); *Broward Insurance Recovery Center, LLC (Shane Bushman) v. Progressive Select Ins. Co.,* 24 Fla. L. Weekly Supp. 761a (Fla. Broward County Ct. November 2, 2016) (Lee, J.); *Clear Vision Windshield Repair, LLC (a/a/o Jennifer Beckles) v. Progressive Amer. Ins. Co.,* 23 Fla. L. Weekly Supp. 486a (Fla. Broward County Ct. September 2, 2015)(Skolnik, J.).

For these reasons, Defendant's Motion is hereby **DENIED**.

Since the Court finds appraisal to be inappropriate in this case, it does not need to reach the issues of Allstate's compliance (or lack thereof) with the appraisal provision by selecting AGIS, an appraiser whose disinterest is questioned by the Plaintiff, or whether appraisal should be precluded under the prohibitive cost doctrine. Those issues are moot.

DONE and **ORDERED** at Plantation, Broward County, Florida on this 6th day of February, 2018.

HONORABLE KATHLEEN MCCARTHY
COUNTY COURT JUDGE

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