Filing # 86354384 E-Filed 03/13/2019 05:26:57 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2018-1624

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

Petitioner/Cross-Respondent

vs.

ARK ROYAL INSURANCE COMPANY,

Respondent/Cross-Petitioner

ANSWER BRIEF/CROSS-INITIAL BRIEF

On Appeal from the Fourth District Court of Appeal
Lower Court Case No.: 4D17-1113

GUNSTER, YOAKLEY &
STEWART, P.A.

KENNETH B. BELL, ESQ.
Florida Bar No.: 347035
LAUREN V. PURDY, ESQ.
Florida Bar No.: 93943
215 South Monroe Street, Suite 601
Tallahassee, FL 32301
kbell@gunster.com
lpurdy@gunster.com

Attorneys for Ark Royal Insurance Company

RECEIVED, 03/13/2019 05:27:47 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

State Cases

Federal Cases

State Statutes

State Rules

Other Authorities

PRELIMINARY STATEMENT

In *West Florida Grocery Co. v. Teutonia Fire Insurance Co*., 77 So. 209 (Fla. 1917), this Court adopted the "well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does not apply to an assignment after loss." *Id*. at 210-11. The decisional conflict to resolve in this appeal is: Does that common law rule apply to a different policy provision requiring only the consent of other insureds and named mortgagees to an assignment after a loss?

The Fourth District upheld enforcement of this distinct clause by honoring the principle that absent "some great prejudice to the dominant public interest" or specific pronouncement by the Florida Legislature, courts strive to uphold the parties' freedom of contract.[1] It recognized that, unlike the insurer's consent clause in *West Florida Grocery*, requiring the consent of other insureds is not "superfluous" because other insureds and named mortgagees have vested interests in the benefits being assigned. The Fifth District, in *Security First*, had earlier issued a conflicting decision which for the first time extended the narrow *West Florida Grocery* rule to the distinct insured consent clause at issue.

[1] *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 102 (Fla. 1944).

As the Fourth District recognized, the *Security First* decision represents an unsupported and improper expansion of the narrow common law rule as adopted in *West Florida Grocery* and its progeny.

Because Respondent Ark Royal Insurance Company's ("Ark Royal") insured consent clause is not inconsistent with Florida law, and extension of the narrow *West Florida Grocery* rule requires a public policy decision by the Florida Legislature, this Court should resolve the decisional conflict by affirming the Fourth District's decision and quashing the Fifth District's *Security First* decision.

ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

Petitioner/Cross-Respondent's statement of the case and the facts should include "the nature of the case, the course of the proceedings, and the disposition of the lower tribunal." Fla. R. App. P. 9.210(b)(3). Instead, its first twelve pages offer an irrelevant and inaccurate depiction of the Office of Insurance Regulation ("OIR") process. (IB at 1-12). The apparent intent is to cast aspersions on Ark Royal and its proper certification of a policy containing the disputed clause at issue.

Restoration 1 of Port St. Lucie's ("Restoration 1") statement about the OIR process is irrelevant because, as the Fourth District observed:

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

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., 255 So. 3d 344, 347 (Fla. 4th DCA 2018) (emphasis added).

In other words, the Fourth District affirmed the trial court's finding of fact and law that the OIR has not acted to disapprove Ark Royal's policy form, as it is required to do if it finds that clause does not meet the requirements of the

Insurance Code. Restoration 1 does not challenge the validity of these findings of fact and law by either court; nor can it because OIR has not challenged Ark Royal's use of the assignment of benefits provision. As such, Restoration 1's reliance on OIR disapproval of Security First's request to amend its policy language to include a clause similar to Ark Royal's is misleading and irrelevant. Its suggestion that Ark Royal improperly certified to OIR that its policy was consistent with Florida law is similarly baseless. Both the Fourth and Second District Courts of Appeal have affirmed the enforcement of that clause under Florida law.

Given Restoration 1's misstatement, Fla. R. App. P. 9.210(c) allows Ark Royal to include a satisfactory statement. For brevity, Ark Royal instead refers the Court to the statement of the case and facts in its Cross-Appeal Initial Brief and to the Fourth District's opinion. Both sources provide a succinct, accurate statement of the nature of the case, the course of the proceedings, and the disposition below. The Fourth District's opinion also provides a succinct analysis of its disagreements with the *Security First* decision on which it certified conflict.

SUMMARY OF THE ARGUMENT – ANSWER BRIEF

Paragraph 7 of Ark Royal's insurance contract is the standard insurer's consent to assignment addressed in *West Florida Grocery*. Paragraph 18 is a much different clause. If a third party presents Ark Royal with an assignment of a claim benefit, Paragraph 18 simply assures that those insureds with a vested interest in the claim benefit being assigned have consented to the assignment. This condition protects the rights and interests of all parties to the insurance contract.

Restoration 1 presented Ark Royal with an incomplete or partial assignment of the claim benefit that it took from Ms. Squitieri. It failed to present any written consent to that assignment from the other named insured, Mr. Squitieri, or the named mortgagee, PNC Bank. Consistent with the terms of the insurance contract, Ark Royal declined to accept that incomplete or partial assignment, but agreed to honor the direct payment authorization and to otherwise fulfill its duty to indemnify.

In response, Restoration 1, as an assignee of both Jon and Liza Squitieri, filed suit against Ark Royal for breach of contract and declaratory judgment. The trial court properly dismissed the case. The indisputable fact is that Restoration 1 did not have an assignment of the entire claim benefit or chose in action that Paragraph 18 of the parties' contract required. At best, it had an incomplete or partial assignment of that claim.

The freedom of contract allows parties to a casualty insurance contract to agree that an assignment of claim benefits must have the written consent of other insureds and the named mortgagees. No Florida law or public policy precludes a court from enforcing such a condition.

The foundation of the narrow common law rule adopted in *West Florida Grocery* is that an insurer's consent to a post-loss assignment of a claim benefit is superfluous because the insurer's rights under the policy are in no way affected by an assignment after a loss. That rationale does not apply to an insured consent clause because insureds and named mortgagees have a vested interest in the proceeds being assigned. Paragraph 18's requirement that an assignment of claim benefits have the consent of all insureds and named mortgagees serves valid purposes. It is not superfluous. This condition protects all parties against partial assignments and split causes of action. It also allows the parties with a vested interest to agree to remediation work from legitimate third-party contractors and to ensure their mutual interests in the mortgaged property are protected.

Restoration 1's contention that insured consent clauses are not workable because of the time-sensitive nature of some remediation work is unfounded. Paragraph 18 does not require consent before any remediation may occur. In fact, when Restoration 1 presented its claim to Ark Royal nine days after the remediation work was complete, Ark Royal immediately informed Mr. and Ms.

Squitieri that it would honor the direct payment authorization and accept the assignment if it had the consent of PNC Bank, the named mortgagee.

Finally, the procedural issues Restoration 1 raises to avoid resolution of the decisional conflict all fail. Restoration 1 either failed to preserve those issues by not seeking leave to amend its complaint or failed to properly plead the claims it raises now on appeal.

ARGUMENT – ANSWER BRIEF

I. STANDARD OF REVIEW

The standard of review is de novo. *Morin v. Fla. Power & Light Co.*, 963 So. 2d 258, 260 (Fla. 3d DCA 2007). If deemed relevant, the OIR decision regarding the *Security First* policy is not entitled to any deference from this Court. *See Fair Ins. Rates in Monroe, Inc. v. Office of Ins. Reg.*, 244 So. 3d 396 (Fla. 1st DCA 2018).[2]

II. WITH ONLY AN INCOMPLETE OR PARTIAL ASSIGNMENT, RESTORATION 1 ONLY STOOD IN THE SHOES OF MS. SQUITIERI

Restoration 1 contends that Ms. Squitieri assigned it "all insurance rights, benefits, proceeds and any causes of action" when she executed the Assignment of Benefits. (IB at 25). On this basis, Restoration 1 contends that "for all practical legal purposes" it became "the named insured" and therefore Ark Royal was obligated to recognize the assignment. (IB at 25-26).

Ark Royal agrees with Restoration 1 that "[a]n 'assignment' is a transfer of all the interest and rights to the thing assigned." *See Lauren Kyle Holdings, Inc. v. Health-Peterson Const. Corp.*, 864 So. 2d 55, 58 (Fla. 5th DCA 2003). The

[2] This is particularly true given the OIR's long, post-submission failure to disapprove of Ark Royal's policy language despite being statutorily required to retroactively disapprove any submitted forms that do not meet the requirements of the Insurance Code. *See* Fla. Stat. § 627.411(1). Thus, Restoration 1's long-winded recitation of the OIR decision regarding the *Security First* policy and repeated reliance on the agency's misapplication of Florida common law is irrelevant to the Court's resolution of this appeal.

assignee of a complete transfer stands in the shoes of the assignor and that assignor retains no rights to enforce the claim. *Leesburg Comm. Cancer Ctr. v. Leesburg Regional Med. Ctr., Inc*., 972 So. 2d 203, 206 (Fla. 5th DCA 2007); 3A Fla. Jur 2d Assignments § 1; 29 Williston on Contracts § 74:60 (4th ed).

That is not true of an incomplete or partial assignment; a party cannot transfer more than its rights to the thing assigned. 6A Corpus Juris Secundum § 88 ("[A]n assignment does not confer upon the assignee any greater right or interest than that possessed by the assignor, as the assignee can stand in no better position than the assignor.").

Here, Restoration 1 took an assignment that transferred less than "all the interest and rights to the [benefit claim]," because it did not receive an assignment from all parties with an interest in that claim. It is undisputed that Restoration 1's assignment was only from Ms. Squitieri. Neither Mr. Squitieri nor PNC Bank consented in writing to that assignment. Ms. Squitieri could not transfer the rights of the other insured and named mortgagee without their consent.

With an incomplete assignment, Restoration 1 is, at best, a partial assignee that only stood only in Ms. Squitieri's shoes. In such circumstances, this incomplete or partial assignment results in split causes of action and other problems for the insureds and the insurer. *See Space Coast Credit Union v. Walt Disney World Co.*, 483 So. 2d 35, 35-36 (Fla. 5th DCA 1986) (describing the

problem of split causes of action in a similar context).

With only an incomplete or partial assignment, Restoration 1's reliance on assignment case law is misplaced. *See, e.g.*, *Spa Creek Servs., LLC v. S.W. Cole, Inc.*, 239 So. 3d 730 (Fla. 5th DCA 2017); *Cordis Corp. v. Sonics Intern., Inc.*, 427 So. 2d 782 (Fla. 3d DCA 1983); *C.P. Motion, Inc. v. Goldblatt*, 193 So. 3d 39 (Fla. 3d DCA 2016); *Aldana v. Colo. Palms Plaza, Ltd.*, 591 So. 2d 953 (Fla. 3d DCA 1991). None of Restoration 1's authority addresses incomplete or partial assignments or addresses a scenario where multiple parties with an interest in the chose in action have not consented to the assignment.

III. A POST-LOSS INSURANCE CLAIM IS A CHOSE IN ACTION THAT IS FREELY ASSIGNABLE UNLESS OTHERWISE PROVIDED BY LAW OR CONTRACT

Restoration 1's contention that the post-loss insurance claim is a chose in action property right that is per se freely assignable fails as a matter of law. That contention is also contrary to settled authority regarding partial assignments.

Procedurally, this "chose in action" argument was not preserved below. Restoration 1's argument to this Court relies on the contention that a post-loss insurance claim is a chose in action. This argument was not raised before the trial court. (R. 385-403). Thus, Restoration 1's chose in action argument was waived and should not be considered.

On the merits, the premise of Restoration 1's argument is incorrect.[3] That a post-loss insurance claim is a chose in action does not negate the right of parties to an insurance contract to agree to place conditions on assignment of the insurance proceeds. Indeed, Paragraph 18 protects—not improperly restricts—the right to the chose in action by assuring that all parties with a property interest in that chose are protected and have consented to its assignment.

Another problem with Restoration 1's contention is that, to avoid split causes of actions that may arise, a partial assignment of a chose in action cannot be enforced against the parties who have not consented to the assignment. This would include Mr. Squitieri, PNC Bank and the obligor, Ark Royal. For example, in *Space Coast*, 483 So. 2d at 35, an employee executed a partial wage assignment to assign some of his wages to a credit union in order to pay a debt. The employer refused to consent to the partial assignment, and the credit union sued. *Id.*

While acknowledging the partial wage assignment was a chose in action, the Fifth District also recognized that as a partial assignment, it "cannot be enforced

[3] Indeed, Restoration 1's argument is largely based on the contention that the chose in action arises the moment that the loss occurs. But that contention is unsettled. *See, e.g.*, 42 Tort Trial & Ins. Prac. L.J. 763, 789 Corporate Succession and Insurance Rights After Henkel: A Return to Common Sense (2007) ("An insured has no right to money due from a liability insurer as soon as injury or damage occurs, because a critical precondition to coverage—the filing of a suit by the injured party—has not yet occurred, and may never occur . . . Under standard insurance policies, an insurer has no duty or obligation until a 'suit' is filed against the policyholder and tendered to the insurer.").

against the debtor, or the employer, without his consent." *Id.* at 36. The "rationale for this rule is that the debtor, here the employer, should not be subjected to multiple suits or claims not contemplated by the original assigned contract." *Id.* *See also* 6 Am. Jur. 2d Assignments § 76. Other courts have recognized this principle. *See Richard's Paint Mfg., Co. v. Onyx Paints, Inc.*, 394 So. 2d 1064, 1066 (Fla. 4th DCA 1981).

The Second Restatement of Contracts, which is cited in *Space Coast*, has acknowledged this principle as well:

> (1) Except as stated in Subsection (2), an assignment of a part of a right, whether the part is specified as a fraction, as an amount, or otherwise, is operative as to that part to the same extent and in the same manner as if the part had been a separate right.
>
> (2) If the obligor has not contracted to perform separately the assigned part of a right, no legal proceeding can be maintained by the assignor or assignee against the obligor over his objection, unless all the persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder.

Restatement (Second) Contracts § 326.

The Comment to Section 326 further states, in relevant part:

> Historically, the right of a partial assignee could be enforced only by a suit in a court of equity and it was therefore sometimes described as an "equitable" right. But the right of a total assignee also had historically an "equitable" character. Under the rule stated in Subsection (1), a partial assignment and a total assignment are equally effective, subject to the protection of the obligor under the rule stated in Subsection (2).

Restatement (Second) Contracts § 326 cmt.

In other words, Florida law recognizes that a partial assignment of a chose in action may lead to split causes of action and serial litigation. Unlike the insurer's consent clause at issue in *West Florida Grocery*, the consents required by Paragraph 18 are permissible and enforceable.

IV. AN INSURER MAY NOT REQUIRE ITS OWN CONSENT TO A POST-LOSS ASSIGNMENT; BUT, IT MAY REQUIRE A COMPLETE ASSIGNMENT BY ALL AFFECTED INSUREDS AND NAMED MORTGAGEES

As articulated by the Fourth District and as detailed in the Cross-Appeal Initial Brief, the narrow common law rule from *West Florida Grocery* is that the standard policy provision requiring the insurer's consent to the transfer of an interest in the policy will not be enforced against the assignment of a post-loss claim. The public policy behind that rule is that an insurer's consent to a post-loss assignment of benefits is superfluous because the insurer has no rights affected by that assignment once the loss occurs. *See W. Fla. Grocery*, 77 So. at 211 (quoting *Ga. Co-Operative Fire Ins. Ass'n v. Borchardt & Co.*, 51 S.E. 429, 430 (Ga. 1905)).

That public policy rationale does not apply to Paragraph 18's insured consent clause because insureds and named mortgagees have vested interests in the insurance benefits being assigned to a third party; as such, their rights are indisputably affected by the assignment. And, an insurance contract may properly

require the insureds and named mortgagees to consent to an assignment of post-loss benefits.

Security First was the first Florida appellate court to extend the narrow common law rule from *West Florida Grocery* to an insured consent clause.[4] In fact, none of the cases relied upon in *Security First* address a clause like Paragraph 18. *See Sec. First Ins. Co. v. State, Office of Ins. Regulation*, 177 So. 3d 627, 629 (Fla. 1st DCA 2015) (affirming OIR's denial of a request to approve a provision requiring the *insurer*'s consent to post-loss assignment of benefits); *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 753 (Fla. 4th DCA 2015) (discussing a general assignment provision); *Cont'l Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 377 n.7 (Fla. 2008) (citing *West Florida Grocery* in dicta and addressing clause prohibiting any assignment); *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So. 3d 1, 2 (Fla. 5th DCA 2015) (addressing only whether Fla. Stat. § 627.405 requires a post-loss assignee to have an insurable interest at the time of the loss); *Better Constr., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 651 So. 2d 141, 142 (Fla. 3d DCA 1995) (insured consent clause).

Restoration 1's Initial Brief fails to acknowledge this glaring deficiency in the *Security First* decision and essentially ignores the Fourth District's contrary

[4] The Second District also upheld a similar insured consent clause. *See Bio Logic, Inc. v. ASI Preferred Ins. Co.*, 238 So. 3d 769 (Fla. 2d DCA 2017) (per curiam affirmance of trial court's order upholding clause requiring insured and mortgagee's consent to post-loss assignment of benefits).

reasoning. Instead, Restoration 1 glosses over the public policy foundation for the *West Florida Grocery* rule and asks this Court to extend that narrow common law rule regarding insurer consent clauses to *any* condition on post-loss assignments, regardless of its purpose, and regardless of whether it comports with the public policy rationale of *West Florida Grocery*.

Because there is no basis under Florida law for this Court to extend the narrow common law rule of *West Florida Grocery* to *any* condition on post-loss assignments, Restoration 1's argument should be rejected. And, as discussed next, there is no basis to extend that rule to the contractual conditions in Paragraph 18.

V. ARK ROYAL'S CONDITION REQUIRING A TRUE ASSIGNMENT SERVES A VALID PURPOSE AND IS NOT SUPERFLUOUS

Hoping to sidestep the obvious inapplicability of *West Florida Grocery* to insured consent clauses, Restoration 1 relies on the hollow argument that such a clause serves no valid purpose and, therefore, is as superfluous as the insurer consent clauses. (IB at 32). Restoration 1's argument is incorrect.

First, the consents required by Paragraph 18 are not superfluous. As discussed earlier, requiring a complete assignment alleviates the problem of incomplete or partial assignments and the resulting split causes of action by assuring there has been a complete or true assignment.

Without an assignment of the entire claim, Restoration 1 may stand only in Ms. Squitieri's shoes; but her husband and their mortgagee still have property

interests and rights to the very same claim Restoration 1 seeks to enforce. As the Fourth District recognized, those interests include, among other things, the right to consent to a reputable, legitimate third-party contractor performing the remediation work on the home. *Restoration 1 of Port St. Lucie*, 255 So. 3d at 348.

Florida courts have similarly long-recognized a mortgagee's interest in insurance proceeds that protect the mortgagee's interest in the insured property. *Langford v. Wauchula State Bank*, 4 So. 2d 10 (Fla. 1941); *Atwell v. W. Fire Ins. Co*., 163 So. 27 (Fla. 1935); *Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n,* 691 So. 2d 1104 (Fla. 3d DCA 1997). Indeed, in this case, the mortgagee has a priority interest in the proceeds at issue. (R. 122-23).[5] As a named mortgagee, PNC Bank also has a vested interest in ensuring that damages to the mortgaged property are properly repaired by an agreeable remediator. Thus, the written consents required by Paragraph 18 protect the vested interests of the named insureds and named mortgagees under the policy. This condition serves an indisputably valid purpose. Unlike the insurer's consent clause addressed in *West Florida Grocery*, the consents required by this clause are not superfluous.

Second, Restoration 1's contention that remediation is too time-sensitive to justify obtaining the consent of other insureds and named mortgagees is misguided.

[5] In addition to the interests outlined in the motion to dismiss below, the Florida Bankers Association's amicus brief will further inform the Court of the significant rights and interests a named mortgagee has to claim benefits similar to the one Restoration 1 attempted to take.

Paragraph 18 does not require that the written consents be secured before remediation may occur. Furthermore, the Work Order Agreement executed between Restoration 1 and Ms. Squitieri also provides that "[i]f there is no insurance billing provided, The Company will collect an equipment deposit fee of ____ in order to ***start the job***." (R. 330) (emphasis added). In other words, full payment by the Squitieris at the time of service was not required for Restoration 1 to timely begin its work, irrespective of any assignment of benefits agreement. In fact, Restoration 1 began its work the day of the flood and completed that work before invoicing Ark Royal. (R. 6, 15-16, 25-26, 330-36).

Indeed, upon receipt of the partial assignment nine days after the remediation work was complete, Ark Royal immediately notified Restoration 1 and the Squitieris that it would accept the post-loss assignment upon receipt of PNC Bank's written consent. (R. 25-26). Ark Royal also accepted the direct payment authorization. (R. 25-26). Any concern regarding timely remediation is unfounded.

Finally, Paragraph 18 facilitates Ark Royal satisfying its contractual obligations and statutory duty to act in good faith owed to all insureds, including mortgagees, *see* Fla. Stat. § 624.155, by assuring that any assignment of benefits is a complete assignment. As discussed above, this avoids the problems inherent

with split causes of action. It also avoids disputes with the non-consenting insureds.

In sum, requiring the consent of other insureds and the named mortgagee to a post-loss assignment of claim benefits serves a valid purpose. This condition is not superfluous. And, there is no public policy concern justifying a court of law refusing to enforce this term of the parties' contract.

VI. RESTORATION 1'S REMAINING ARGUMENTS FAIL AS A MATTER OF LAW

Although this Court accepted jurisdiction on the basis of a certified conflict regarding the application of *West Florida Grocery* and its progeny, the Initial Brief raises three additional arguments. Each argument should be rejected.

A. There are no material issues of fact preventing dismissal.

Restoration 1 asserts the trial court erred in dismissing its claim when "factual issues remained which prevented dismissal" of Restoration 1's claim. (IB at 39). In support, Restoration 1 notes its complaint included the conclusory allegation that it complied with all conditions precedent. But, it is undisputed that Restoration 1 failed to obtain the written consent of all insureds and named mortgagees as required by the policy. Had Restoration 1 obtained the requisite consents before it decided to take an appeal, it could have amended its pleading to include this allegation. Instead of seeking the requisite leave to amend its complaint, Restoration 1 chose to take its appeal to the Fourth District. This

decision waived that argument. *See Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1198 (Fla. 4th DCA 2006).

Restoration 1 also complains that a certified copy of Ark Royal's policy is not in the record. Restoration 1 ignores the fact it attached a copy of the policy along with the incomplete assignment to its complaint, thereby incorporating them both into the pleadings. *See One Call*, 165 at 752; *Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011). Restoration 1 waived any argument regarding the authenticity of that policy it attached and relied upon in its own complaint.

B. Restoration 1 did not allege actual or apparent agency.

Restoration 1's agency argument cannot be considered on the merits. Restoration 1 never sought leave to amend or otherwise argued to the trial court that it could amend its allegations to state an agency claim. Instead it took an immediate appeal to the Fourth District Court. *Merkle*, 940 So. 2d at 1198. This agency argument was waived.

If the merits of this argument are considered, this argument fails as a matter of law. Restoration 1 asserts Ms. Squitieri "may have been acting as the actual or apparent agent of the mortgagee or of her husband." (IB at 41). Its complaint did not allege any such agency as to PNC Bank and its speculative and conclusory

allegation in the complaint regarding her husband were insufficient. *Horowitz v. Laske*, 855 So. 2d 169, 172-73 (Fla. 5th DCA 2003).

C. Restoration 1 did not allege equitable assignment.

Restoration 1's equitable assignment argument also fails as a matter of law. Equitable assignment only applies where ***all*** parties involved behave as though the contract has been assigned. *Giles v. Sun Bank, N.A.*, 450 So. 2d 258 (Fla. 5th DCA 1984); *SourceTrack, LLC v. Ariba, Inc*., 958 So. 2d 523 (Fla. 2d DCA 2007). In *SourceTrack, LLC*, for example, the Second District Court of Appeal recognized an equitable assignment because all parties to the transaction—both parties to the assignment, and the insurer who was party to the underlying contract assigned—treated the contract as assigned, even if no formal assignment was memorialized in writing. 958 So. 2d at 526. Indeed, the evidence for the insurer's consent was its agreement to make payments directly to the assignee and its failure to ever object to the validity of the assignment. *Id.*

Restoration 1's complaint fails to allege a claim of equitable assignment. The complaint does not allege that either Ark Royal or the named mortgagee, PNC Bank, behaved as though the proceeds were appropriately assigned to Restoration 1. There is no allegation Ark Royal consented implicitly or in writing. There is no allegation that Ark Royal treated the claim as having been assigned. In fact,

attached to the complaint is Ark Royal's letter expressly stating it did ***not*** recognize the assignment. (R. 25-26).

As such, Restoration 1 failed to sufficiently allege a claim for equitable assignment of the policy or its benefits. Restoration 1's implicit contention that it could have met the requirements of equitable assignment through development of the facts alleged is belied by the undisputed facts in the case. (IB at 41-42). Regardless, Restoration 1 never sought leave to amend its allegations or otherwise argue before the trial court that a further amendment would cure any defects in the case. Instead, Restoration 1 took an immediate appeal. Thus, the equitable assignment argument was not preserved and fails as a matter of law.

CROSS-APPEAL BRIEF

STATEMENT OF THE FACTS

Ark Royal issued a homeowner's insurance policy to John and Liza Squitieri. (R. 232).[6] PNC Bank, N.A. ("PNC Bank") is the mortgagee named in the policy. (R. 232). The policy includes two distinct assignment clauses. The assignment clause at issue requires an *assignment of claim benefits* to have the consent of all *insureds*, including any named mortgagee:

> **SPECIAL PROVISIONS FOR FLORIDA**
> * * *
> **SECTION I – CONDITIONS**
> * * *
> **18. Assignment of Claim Benefits.** *No assignment of claim benefits*, regardless of whether made before loss or after loss, *shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s)* named in this policy.
> * * *

(R. 25, 272) (emphasis added).

A separate assignment clause requires an assignment of *the policy* itself to have the *insurer's* consent:

> **SECTIONS I AND II – CONDITIONS**
> ***
> **7. Assignment.** Assignment of this policy will not be valid unless we give our written consent.
> ***

(R. 263).

[6] The policy was issued to Jon and Liza Squitieri, but the complaint Restoration 1 filed was "a/a/o John and Liza Squitieri." For briefing purposes, Mr. Squitieri will be referred to as "John".

The Squitieri's home sustained flood damage on August 24, 2016. (R. 330-32). Ms. Squitieri contracted with Restoration 1 to provide clean up services. (R. 15, 332). In connection with those services, Ms. Squitieri signed Restoration 1's Work Order Agreement to Perform Services and/or Repairs, a Direct Payment Authorization and a blanket Assignment of Insurance Benefits. (R. 330-332).

The Work Order Agreement provided: "[i]f there is no insurance billing provided, The Company will collect an equipment deposit fee of ____ in order ***to start the job***." (R. 330) (emphasis added). In other words, if a customer like Ms. Squitieri was unable to provide insurance billing information on August 24, 2016, Restoration 1 would not require full payment upfront. Instead, the work would start upon collection of an equipment deposit.

The Assignment of Insurance Benefits states that Ms. Squitieri assigns "any and all insurance rights, benefits, proceeds and any causes of actions under any applicable insurance policies" to Restoration 1 "for services rendered or to be rendered." (R. 15, 332). Mr. Squitieri, the other named insured, and PNC Bank, the named mortgagee, did not sign or otherwise give written consent to this assignment as required by Paragraph 18. (R. 15, 25, 386). Ms. Squitieri signed a "Certificate of Completion & Satisfaction" on August 29, 2016 indicating that Restoration 1 had completed its work. (IB at 14; R. 336).

On Thursday, September 7, 2016, nine days after work was completed and fifteen days after the flooding, Restoration 1 submitted to Ark Royal a claim for $20,305.74. (R. 509). Along with that claim, Restoration 1 provided a six-page itemized claim and the Assignment of Insurance Benefits signed only by Ms. Squitieri. (R. 15-21).

Ark Royal responded to that claim on Sunday September 11, 2016 by sending the Squitieris a letter that it copied to Restoration 1. (R. 25-26). Ark Royal explained that, given the "Assignment of Claim Benefits provision which is intended to protect the interest of all insureds," Ark Royal could not accept the assignment to Restoration 1 because it was not signed by the named mortgage, PNC Bank, as required by Paragraph 18 of the policy. (R. 25).[7] Nonetheless, Ark Royal made it clear to the Squitieris that it would work with them to adjust their claim, would comply with the Direct Payment Authorization, and would work with Restoration 1 directly. (R. 25-26).

Ark Royal also stated that if it was "provided with a valid assignment of claim benefits which satisfies the policy conditions, [it would] accept that assignment of benefits." (R. 25-26). In other words, if PNC Bank's written

[7] Though only Ms. Squitieri signed the documents Restoration 1 relies upon, this expedited letter mistakenly states the both Jon and Liza Squitieri had signed. (R. 25).

consent to the assignment of the claim benefits was obtained, Ark Royal would honor that assignment.

STATEMENT OF THE CASE

Restoration 1 confirms in its Initial Brief that Ms. Squitieri alone "signed an "Assignment of Insurance Benefits" and that Ark Royal later "issued a letter to the Squitieris that rejected Ms. Squitieri's AOB." (IB at 14). Nonetheless, in the suit it brought against Ark Royal, Restoration 1 entitled itself as the "a/a/o of John and Liz Squitieri." (R. 4).

Restoration 1 sued Ark Royal for breach of contract for not accepting the assignment and not paying the claim submitted. (R. 4-13). Restoration 1 also sought a declaratory judgment that Paragraph 18 is unenforceable under Florida common law. (R. 4-13). Restoration 1 did not allege this provision was unconstitutional.

Ark Royal moved to dismiss Restoration 1's complaint because neither Mr. Squitieri nor PNC Bank had given their written consent to the assignment. (R. 108-324). Ark Royal explained that, unlike Paragraph 7, Paragraph 18 does not require Ark Royal's consent to the assignment of claim benefits. It only requires the consent of other insureds and named mortgagees. (R. 112-113, 121-123). Ark Royal also explained in detail that Paragraph 18 does not prevent repair of the property, that the named mortgagee has vested rights and interests in the assigned

benefits, and that the condition on the assignment of claim benefits was not superfluous. (R. 122-129).

The trial court agreed with Ark Royal and dismissed the complaint. It found the Assignment of Insurance Benefits did not comply with Paragraph 18's unambiguous condition that such assignments have the written consent of all insureds and named mortgagees in the policy. (R. 606-07). Instead of seeking leave to file an amended complaint, Restoration 1 appealed to the Fourth District Court of Appeal.

While Restoration 1's case was pending, the Fifth District Court of Appeal issued its decision in *Security First*. The *Security First* appeal originated from the insurer's appeal of an OIR final order disapproving a request to amend its policy language to add an assignment of benefits clause similar to Ark Royal's Paragraph 18.

The Fifth District found Security First's proposed assignment of benefits clause was unenforceable under the Florida common law rule adopted in *West Florida Grocery*. The court interpreted *West Florida Grocery* and its progeny to hold that *any* condition on assignment of post-loss benefits is unenforceable. *Security First*, 232 So. 3d at 1158-60.

After supplemental briefing addressing the *Security First* decision, the Fourth District issued an opinion certifying conflict with *Security First*. That

opinion explains how *Security First* misquotes and overstates the holding of *West Florida Grocery* and relies solely upon insured consent and general anti-assignment cases. *Restoration 1 of Port St. Lucie*, 255 So. 3d at 347.

Contrary to the Fifth District's decision, the Fourth District found "[t]he central reasoning and holding of *West Florida Grocery* does not extend to" a condition on assignments like Paragraph 18. *Id.* at 348. It then certified conflict "[t]o the extent that the Fifth District in *Security First* has expanded upon" this Court's decision in *West Florida Grocery*. *Id.*

SUMMARY OF THE ARGUMENT – CROSS-APPEAL

The Fourth District upheld the enforcement of Ark Royal's casualty insurance clause requiring a post-loss assignment of benefits to have the written consent of all insureds and named mortgagees. Restoration 1's assignment was incomplete under the unambiguous terms of the contract because it did not have the written consent of a named insured and a named mortgagee, both of whom had vested rights and interests in the benefit being assigned. As such, Restoration 1's complaint was properly dismissed.

The fundamental freedom of contract is safeguarded by both the Florida and federal constitutions. This freedom compels Florida courts to exercise extreme caution before invalidating a private contract on the grounds that it is contrary to public policy. Where there is no great prejudice to a dominant public interest, Florida courts uphold parties' rights to freely negotiate the terms of their contracts and leave policy judgments regarding restrictions on that right to the Florida Legislature.

The narrow common law exception to enforcement of contracts adopted in *West Florida Grocery* is this: the provision in an insurance policy requiring the consent of the insurer to the transfer of an interest therein does not apply to a post-loss assignment. Before a loss occurs, the insurer may require its consent to the assignment of the policy and its benefits. This allows the insurer to protect itself

against unbargained-for-risks that may arise with a new policyholder. The same is not true for an assignment of post-loss benefits because those benefits have vested and the insurer's rights or interests are not affected. On this basis, the insurer's consent to a post-loss assignment is considered superfluous, and the non-assignment clause is deemed unenforceable as a matter of a judicially-determined public policy.

The narrow common law rule adopted in *West Florida Grocery* does not extend to a clause conditioning assignments of post-loss benefits on having the consent of other insureds and named mortgagees. First, this clause does not require the insurer's consent. Second, unlike the consent of the insurer, the consent of other insureds and named mortgagees is not superfluous because these other insureds have vested rights and interests in the benefits being assigned. The insurer's interests are also affected if it is presented with an incomplete assignment, one not consented to by parties to whom it is contractually obligated to indemnify and owes a statutory duty to act in good faith. Thus, the consents required by Paragraph 18 are not a superfluous contractual condition and not contrary to any public policy.

In *Security First*, the Fifth District refused to recognize this distinction between insurer and insured consent clauses. In doing so, the Fifth District misstated the narrow rule of law adopted from *West Florida Grocery* and

mischaracterized its progeny. These missteps led to a narrow rule being extended so far that it would preclude *any* conditions on post-loss assignments.

The Fourth District opinion clearly states why it declined to adopt the Fifth District's misapplication and improper expansion of the *West Florida Grocery* rule. Extending that rule to preclude enforcement of a contract condition requiring the consent of other insureds to post-loss assignments of benefits, much less to preclude "any" condition on such assignments, is a public policy decision. That decision is one for the Florida Legislature to make, not a Florida court.

ARGUMENT – CROSS-APPEAL

I. STANDARD OF REVIEW

The standard of review on an order granting a motion to dismiss is *de novo*. *Morin*, 963 So. at 260.

II. FLORIDA LAW FAVORS THE ENFORCEMENT OF CONTRACTS UNLESS THEY ARE CLEARLY CONTRARY TO PUBLIC POLICY

Florida courts have long espoused a "policy that favors the enforcement of contracts." *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 260 (Fla. 2015). "It is only in clear cases that contracts will be held void as contrary to public policy as it is a matter of great public concern that freedom of contract be not lightly interfered with." *Bituminous*, 17 So. 2d at 101 (reversing lower tribunal determination that contract was void as against public policy and finding contract should not be struck down unless "clearly injurious to the public good or [in contravention to] some established interest of society").

Consequently, Florida courts have exercised "extreme caution" before invaliding a contractual provision freely entered into by private parties:

> [C]ourts should be guided by *the rule of extreme caution* when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clear to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract.

Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier, 67 So. 3d 315, 318 (Fla. 2d DCA 2011) (internal quotation marks omitted).

The judiciary's duty to enforce contracts and exercise extreme caution before invalidating a contractual provision applies to insurance contracts. "[I]f [an insurance] policy provision is clear and unambiguous, it should be enforced according to the terms whether it is a basic policy provision or an exclusionary provision." *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996). Courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986). Consequently, conditions on assignability of contracts or provisions of contracts are matters to be determined by the parties to that contract. *See Abraham K. Kohl, D.C. v. Blue Cross & Blue Shield of Fla., Inc.*, 955 So. 2d 1140, 1143 (Fla. 4th DCA 2007) ("All contractual rights are assignable *unless the contract prohibits the assignment*, the contract involves obligations of a personal nature, or *public policy dictates against the assignment*." (internal quotation marks omitted)).

While the rule of law this Court adopted more than a century ago in *West Florida Grocery* was based on a judicially pronounced public policy, modern restrictions on the freedom of contract must come from a clear pronouncement by the Florida Legislature reflecting its public policy judgment that imposing a

particular restriction on the freedom of contract is in the interest of Florida's citizens. *See Univ. of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) (noting that "[t]he Legislature has the final word on declarations on public policy."); *see also Griffin v. ARX Holding Corp.*, 208 So. 3d 164, 170-72 (Fla. 2d DCA 2016) (recognizing that courts should not ignore legislative directives regarding the insurance business where they appear to protect the public welfare); *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001) ("Public policy is determined by the legislature through its statutory enactments.").

Put simply, parties must have the freedom to sign contracts knowing that courts will enforce their terms with only limited exceptions. Here, there is no "great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract." *Johnson, Pope, Bokor, Ruppel & Burns, LLP*, 67 So. 3d at 318. As such, this Court should uphold the parties' right to freedom to contract and enforce the contract's assignment of claim benefits provision as written. To do otherwise would usurp the legislative power that the Florida Constitution vests in the Florida Legislature. Art. II, § 3 and Art. III, § 1, Fla. Const.

III. *WEST FLORIDA GROCERY* IS A NARROW COMMON LAW EXCEPTION TO THE GENERAL RULE OF CONTRACT ENFORCEMENT

West Florida Grocery's narrow exception to the general rule that courts will enforce the terms of a contract is this: courts will not enforce an insurance policy that conditions the assignment of post-loss claim benefits on obtaining the consent of the insurer. *See W. Fla. Grocery Co.*, at 77 So. at 210-11("[I]t is the well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does not apply to an assignment after loss."). *See also Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 643 (Fla. 2d DCA 2016) ("[P]ost-loss insurance claims are freely assignable without the consent of the insurer." (citations omitted)). This well-settled rule of Florida common law has been applied to insurer's consent to assignment of policy clauses since 1917.

The reason for this narrow exception is that requiring the insurer's consent to the assignment of post-loss claim benefits is "superfluous" because the insurer's rights and interests are in "no way affected by" the assignment. *See W. Fla. Grocery*, 77 So. at 211 (quoting *Ga. Co-Operative*, 51 S.E. at 430 and directing the reader to the notes in 3 Ann. Cas. 472). Before a loss occurs, the insurer may require its consent to an assignment of the policy because this "protect[s] an insurer against unbargained-for risks" in the event the policyholder seeks to

transfer the policy to a higher risk insured. *Lexington Ins. Co. v. Simkins Indus., Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998). Other jurisdictions have upheld pre-loss assignment clauses for this reason as well. *See, e.g.*, *Farmer's Ins. Exchange v. Udall*, 424 P.3d 420 (Ariz. Ct. App. 2018) (upholding insurer's consent before loss because insurer has the right to choose its insured); *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680 (Ky. 2012) (recognizing that purpose of requiring insurer's consent before loss is to protect insurer against unforeseen exposure).

By contrast, after a loss has occurred, all that remains is a claim of payment. *Cf. In re Surfside Resort & Suites, Inc.*, 344 B.R. 179, 189 (Bankr. M.D. Fla. 2006) ("Once the Hotel had sustained property damage, [the insurer] was already responsible for payment of whatever claim Debtor asserted. Hence, once the damage affected the property, [the insurer's] obligation to pay originated"). As such, the need to protect the insurer against unforeseen exposure no longer applies to a post-loss claim because the insured is simply assigning a vested claim under the policy, not the policy itself. *See Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 429 (Neb. 2016) (recognizing rationale for the rule and noting that "once a loss occurs, the indemnity policy is no longer an executory contract of insurance . . . [but] a vested claim against the insurer and can be freely

assigned or sold like any other chose in action or piece of property"). As Arizona courts have recognized:

> [a]n assignment made *after a loss occurs*, however, is not of the policy itself, but of a claim under, or a right of action on, the policy. Thus, after a loss has occurred and the rights under the policy have accrued, an assignment may be made without the consent of the insurer, and the rule enforcing anti-assignment provisions is not applicable.

Farmer's Ins. Exchange, 424 P.3d at 420 (internal alterations and citations omitted).

West Florida Grocery adopted the common law rule as articulated by the Georgia Supreme Court. That court further articulated the rationale[8] for the common law rule as follows:

> No right of the *insurer* being affected by the assignments of the policies, *it would be a mere act of caprice or bad faith* for it to take advantage of the stipulation that the transfers were subject to its consent, by withholding such consent, in order to defeat the claim of the assignee.

Ga. Co-Operative, 51 S.E. at 430 (emphasis added). Thus, enforcing the general insurer's consent to assignment of the policy in the post-loss benefit assignment

[8] Recently, the Second District expressed the additional public policy concern that the insurer, as the obligor, could delay repairs by delaying or withholding its consent to assignment injuring the public with no commensurate justification for the interference. *See, e.g.*, *Bioscience W., Inc.*, 185 So. 3d at 643 (explaining that it is "imprudent to place insured parties in the untenable position of waiting for the insurance company to assess damages any time a loss occurs").

context is "inconsistent with the covenant of indemnity and contrary to public policy." *Id*.

After a loss, the assignee of the related claim simply stands in the shoes of the assignor. *Id.* Any valid defense the insurer has against the insured may be asserted against the assignee (such as denial of coverage), and as such, there is no basis for the insurer to deny the validity of the assignment. *Id.*

Simply stated, *West Florida Grocery* held that, after a loss has occurred, it was contrary to Florida common law public policy to enforce a general provision requiring the insurer's consent to an assignment of the policy when the assignment is of a post-loss claim.

As discussed next, unlike the insurer's consent to assignment clause addressed in *West Florida Grocery* (a clause like Paragraph 7 of Ark Royal's policy), Paragraph 18 of Ark Royal's policy does not require the insurer's consent. It simply conditions a pre- or post-loss assignment of insurance benefits on having the consent of all insureds with a vested interest in the benefits being assigned.

IV. REQUIRING ALL INSUREDS AND NAMED MORTGAGEES TO CONSENT TO THE ASSIGNMENT OF A CLAIM BENEFIT AFFECTING THE SECURED PROPERTY IS AN ENFORCEABLE CONTRACTUAL CONDITION

The inter-district conflict between the Fourth District's decision below and the Fifth District's *Security First* decision is the result of the Fifth District's failure to acknowledge the difference between an insurer's consent to assignment

clause like Ark Royal's Paragraph 7, which is addressed by the narrow common law rule adopted in *West Florida Grocery*, and an insured's consent to assignment clause like Paragraph 18, which is beyond that narrow rule. *See Restoration 1 of Port St. Lucie*, 255 So. 3d at 345. *See also Bio Logic*, 238 So. 3d at 769 (per curiam affirmance of trial court's order upholding similar clause requiring insured and mortgagee's consent to post-loss assignment of benefits).

Because there is no public policy precluding enforcement of an insurance contract conditioning post-loss assignment of insurance benefits on having the written consent of insureds and named mortgagees, the Fourth District's decision should be upheld and the conflicting Fifth District's decision quashed.

A. *Security First* fails to differentiate between two distinct assignment provisions and misstates the rule of law from *West Florida Grocery*.

Paragraph 7 is a general condition requiring the insurer's consent to an assignment of the policy: an "[a]ssignment of this policy will not be valid unless we give our written consent." (R. 263). This standard "insurer's consent" to assignment provision was addressed in *West Florida Grocery*. *See W. Fla. Grocery*, 77 So. at 211. That clause requires the insurer's consent to the assignment of the policy and is enforceable if the policy is being assigned. (R. 263). However, for the public policy reasons stated above, courts have long refused to enforce that provision against an assignment of post-loss benefits.

Paragraph 18 is a fundamentally different provision. It simply provides: "[n]o assignment of claim benefits, regardless of whether made before or after the loss, shall be valid without the written consent of all 'insureds', all additional insureds and all mortgagee(s) named in this policy." (R. 25, 272). In other words, unlike Paragraph 7, Paragraph 18 conditions a valid assignment of post-loss benefits on having the consent of those with a vested interest in the claim benefits being assigned. The insurer's consent to the assignment is not required.

The *Security First* decision fails to address this critical distinction and simplistically misstates the narrow rule adopted in *West Florida Grocery*. As noted above, addressing a standard "insurer's consent" to assignment provision like Paragraph 7, *West Florida Grocery* articulated the narrow common law rule as follows:

> [I]t is a well-settled rule that **the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does** not apply to an assignment after loss.

Id. at 210-11 (emphasis added).[9]

Instead of relying on this plain statement of the rule of law, the *Security First* Court begins its legal analysis with the following misstatement of that rule:

[9] Interestingly, the *Georgia Co-Operative* decision was principally based on Georgia's Civil Code 1895, § 2105 and buttressed by references to common law cases from other states. *Georgia Co-Operative*, 51 S.E. at 430.

> A hundred years ago the Florida Supreme Court recognized in *West Florida Grocery Co. v. Teutonia Fire Insurance Co.*, 77 So. 209, 210-211 (Fla. 1917) that "it is a well-settled rule that **[anti-assignment provisions do]** not apply to an assignment after loss." Our Supreme Court has repeatedly adhered to this basic principle.

Security First, 232 So. 3d at 1158 (emphasis added).[10]

This sweeping pronouncement obviously misquotes the actual holding of *West Florida Grocery* and, in doing so, extends the narrow common law rule to preclude any condition on post-loss assignments. As the Fourth District recognized, the judicial public policy behind the narrow common law rule is that the *insurer's* consent to a post-loss assignment is superfluous because the insurer's rights are not affected by the assignment. *Restoration 1 of Port St. Lucie*, 255 So. 3d at 347-48 (recognizing *West Florida Grocery* "invalidated only a provision requiring the consent of the insurer, with the court concluding it is 'superfluous' who the insurer ultimately pays as the insurer will still have to cover the insured loss").

B. *Security First* compounds this misstatement in its reliance on subsequent case law.

The *Security First* court compounds its misstatement of the *West Florida Grocery* holding by proclaiming the Florida Supreme Court has "repeatedly adhered to [that] basic principle." *Id.* The truth is *Security First* is the first Florida

[10] This misstatement appears to be derived from the misstatement of the *West Florida Grocery* holding in footnote 7 of Justice Pariente's opinion in *Continental Casualty*, 974 So. 2d at 377.

appellate decision to extend the *West Florida Grocery* rule to a clause conditioning an assignment of post-loss insurance benefits on the consent of all parties with an interest in those benefits. In other words, *Security First* is the first Florida court to deem such a contract clause unenforceable as contrary to the common law public policy.

In fact, ***none*** of the cases the *Security First* Court cites involve a condition on assignment of insurance benefits like Paragraph 18. Instead, those inapposite cases address general assignment provisions like Paragraph 7 that require the insurer's consent to assignment of the policy. *See Sec. First*, 177 So. 3d at 629 (*insurer*'s consent to post-loss assignment of benefits); *One Call*, 165 So. 3d at 753 (*insurer's* consent to assignment of policy); *Better Constr., Inc.,* 651 So. 2d at 142 (same).

The *Security First* court relies heavily on *Accident Cleaners*, 186 So. 3d at 2. But, as that decision explicitly states "the sole issue before [the] court is whether section 627.405 requires a post-loss assignee to have an insurable interest at the time of the loss." *Id.* (general assignment of policy provision prohibiting any assignment of the policy). That case had nothing to do with insured consent clauses requiring the consent of all parties with a vested interest in the insurance proceeds being assigned.

The Fourth District decision addresses these defects in the *Security First* decision. *Restoration 1 of Port St. Lucie*, 255 So. 3d at 347. It correctly finds that *West Florida Grocery* and its progeny do not address conditions on assignment of claim benefits like Paragraph 18.

C. *Security First* improperly extends the narrow common law rule to encompass any clause requiring conditions on a post-loss assignment.

As the Fourth District correctly states, "by its plain terms, *West Florida Grocery* does not stand for the pronouncement that any restriction [on a post-loss assignment] is per se invalid." *Id*.

Security First, in its misapplication of subsequent case law, concluded that *any* condition on a post-loss assignment is per se a violation of Florida public policy. As noted, it largely relied on a superfluous footnote in *Continental Casualty*, 974 So. 2d at 377 n.7. The issue in that case was whether certain parties could recover fees under Fla. Stat. § 627.428 without a valid assignment of an insurance policy. *Id.* at 379. Footnote 7 to that opinion is at best *obiter dictum* and cannot be relied upon as precedent—much less support *Security First*'s parenthetical revision of the settled common law rule as pronounced in *West Florida Grocery*.

In creating its sweeping revision of *West Florida Grocery*, the *Security First* decision mischaracterizes clauses like Paragraph 18 as "anti-assignment clauses."

The court fails to cite any authority that actually supports the proposition that a clause placing such conditions on assignment is the same as a clause prohibiting any assignment or precluding any assignments without the insurer's consent.

Paragraph 18 is not an "anti-assignment" clause. It does not prohibit the assignment of post-loss benefits or require an assignment to have the insurer's consent. Instead, Paragraph 18 simply imposes a condition requiring the consent of all insureds and mortgagees. These are parties who have a vested interest in the proceeds being assigned. This condition materially differs from an insurer consent clause, as it protects all parties the insurer is obligated to indemnify by ensuring they agree to their claim being assigned to a third party.

D. Unlike the insurer's consent, the consent of other insureds and named mortgagees is not superfluous.

In extending the common law rule, *Security First* ignores entirely the public policy basis for the narrow common law rule announced in *West Florida Grocery*. The rationale is that requiring the insurer's consent to a post-loss assignment is superfluous. The Fourth District acknowledges that rationale and correctly states, "[a] significant difference exists between requiring the insurer's consent and requiring the consent of the insureds and mortgages." *Restoration 1 of Port St. Lucie*, 255 So. 3d at 345.

Unlike an insurer, other insureds and named mortgagees have a vested interest in the benefits being assigned to the third party. Mortgagees have a vested

interest in ensuring that damages to the mortgaged property are properly repaired. Payment of insurance benefits in a proper amount for a proper repair or mitigation of damage to its security is of vital interest to any named mortgagee. Indeed, as the Fourth District recognized, "it is impossible to brand the contested provision as superfluous—as both of the insureds, as well as the mortgagee, have a vested interest that a reputably, legitimate third-party contractor perform repairs on the home." *Id.* at 348.

Furthermore, unlike the insurer in *West Florida Grocery*, when a third party presents an insurer with a post-loss assignment, the insurer has a significant interest in confirming the assignment is complete, and not an incomplete or partial assignment. As explained in the Answer Brief, an insurer has a contractual and statutory duty to all insureds and named mortgagees under the policy. (*See supra*, at Ans. Br. Sec. V, at 17). Accepting and paying claim benefits based on an incomplete assignment to a third party exposes the insurer to claims by non-consenting assignors that the insurer breached those duties owed. Again, as the Fourth District recognized, the consent of those with a vested interest in the benefit being assigned is not a superfluous contractual condition.

By ignoring the rationale for the rule adopted in *West Florida Grocery*, the *Security First* decision extends a narrow common law rule to circumstances entirely divorced from that rule's public policy underpinnings. Expanding that

narrow exception to preclude enforcement of clauses requiring that post-loss assignments have the consent of other insureds and named mortgagees is a public policy decision that must be left to the Florida Legislature. *See Bioscience W., Inc.*, 185 So. 3d at 643. Both the Fourth District and Fifth District agree with this general proposition. *See Restoration 1 of Port St. Lucie*, 255 So. 3d at 348; *Security First*, 232 So. 3d at 1160. But, only the Fourth District correctly applies the narrow exception to the common law rule adopted in *West Florida Grocery* and leaves public policy judgments regarding appropriate restrictions on the fundamental freedom of contract to Florida's elected representatives.

CONCLUSION

Absent "some great prejudice to the dominant public interest" or specific pronouncement by the Florida Legislature, courts strive to uphold the parties' freedom of contract. *See Bituminous*, 17 So. 2d at 102. Doing so preserves the freedom to contract and leaves any public policy concerns to the Florida Legislature.

This foundational principle compels affirmance of the Fourth District's decision. The narrow common law rule adopted in *West Florida Grocery* does not extend to an insurance contract provision requiring the consent of other insureds and named mortgagees to an assignment after a loss.

Dated the 13th day of March, 2019

Respectfully submitted,

GUNSTER, YOAKLEY & STEWART, P.A.

/s/ *Kenneth B. Bell*

KENNETH B. BELL, ESQ.
Florida Bar No. 0347035
LAUREN V. PURDY, ESQ.
Florida Bar No. 93943
215 South Monroe Street, Suite 601
Tallahassee, FL 32301
Tel: (850) 521-1980
Fax: (850) 576-0902
kbell@gunster.com
lpurdy@gunster.com
aarmstrong@gunster.com
eservice@gunster.com

Attorneys for Ark Royal Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by electronic mail and filed via ePortal this 13th day of March, 2019 to:

Scott Millard, Esq. Cohen Grossman 350 N. Lake Destiny Rd. Suite 300 Maitland, FL 32751 smillard@itsaboutjustice.law *Attorney for Petitioner*	Gray R. Proctor, Esq. Fox & Loquasto, P.A. 122 E. Colonial Drive, Suite 100 Orlando, FL 32801 gray@appealsandhabeas.com *Attorney for Petitioner*
Mark A. Nation, Esq. The Nation Law Firm 570 Crown Oak Centre Drive Longwood, FL 32750 mnation@nationlaw.com bhirt@nationlaw.com ppritchard@nationlaw.com *Attorney for Petitioner*	Thomas Keller, Esq. Anthony J. Russo, Esq. Butler Weihmuller Katz Craig LLP 400 N. Ashley Drive, Suite 2300 Tampa, FL 33602 tkeller@butler.legal arusso@butler.legal gkelly@butler.legal *Attorney for Respondent*
George N. Meros, Esq. Holland & Knight LLP 315 South Calhoun Street, Suite 600 Tallahassee, FL 32301 george.meros@hklaw.com charlene.roberts@hklaw.com *Attorney for Florida Justice Reform Institute*	William W. Large, Esq. Florida Justice Reform Institute 210 South Monroe Street Tallahassee, FL 32301 william@fljustice.org *Attorney for Florida Justice Reform Institute*

Philip M. Burlington, Esq. Burlington & Rockenbach, P.A. Courthouse Commons/Suite 350 444 West Railroad Avenue West Palm Beach, FL 33401 pmb@FLAppellateLaw.com kbt@FLAppellateLaw.com *Attorney for Florida Justice Association*	Ashley Kalifeh, Esq. Radey Law Firm 301 S. Bronough Street, Suite 200 Tallahassee, FL 32301 akalifeh@capcityconsult.com *Attorney for Florida Justice Reform Institute*
Russel Lazega, Esq. Yasmin Gilinsky, Esq. Florida Advocates 45 East Sheridan Street Dania Beach, FL 33004 eservice@fladvocates.com *Attorney for Restoration Association of Florida*	Brian P. Henry, Esq. Rolfes Henry Co., L.P.A. 1605 Main Street, Suite 1106 Sarasota, FL 34236 bhenry@rolfeshenry.com *Attorney for Coalition Against Insurance Fraud*
Kansas R. Gooden, Esq. Boyd & Jenerette, P.A. 201 North Hogan Street, Suite 400 Jacksonville, FL 32202 kgooden@boydjen.com *Attorney for Florida Defense Lawyers Association*	Mark Berlick, Esq. Bolin Law Group 1905 E. 7th Avenue Tampa, FL 33605 mrb@bolin-law.com *Attorney for Florida Defense Lawyers Association*

Carrie Ann Wozniak, Esq. Sara Brubaker, Esq. Akerman LLP 420 S. Orange Avenue, Suite 1200 Post Office Box 231 Orlando, FL 32802-0231 carrieann.wozniak@akerman.com sara.brubaker@akerman.com karilynn.alhasnawi@akerman.com *Attorney for Florida Bankers Association*	Trenton H. Cotney, Esq. Marci E. Britt, Esq. Cotney Construction Law, LLP 3110 Cherry Palm Drive, Suite 290 Tampa, FL 33619 tcotney@cotneycl.com mbritt@cotneycl.com courtfiling@cotneycl.com *Attorney for Florida Roofing and Sheet Metal Contractors*
Cory L. Andrews, Esq. Washington Legal Foundation 2009 Massachusetts Avenue, NW Washington, DC 20036 candrews@wlf.org *Attorney Washington Legal Foundation*	Thomas P. Crapps, Esq. Timothy J. Meenan, Esq. Kirsten Hope Matthis, Esq. Meenan, P.A. 300 S. Duval Street, Suite 410 Tallahassee, FL 32301 tom@meenanlawfirm.com tim@meenanlawfirm.com kirsten@meenanlawfirm.com *Attorney for American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Personal Insurance Federation of Florida and Florida Insurance Council*

Tyler J. Chasez, Esq. Lee Jacobson, Esq. Katie Monroe, Esq. Hale, Hale & Jacobson, P.A. 2876 S. Osceola Avenue Orlando, FL 32806 tyler@hhjlegal.com lee@hhjlegal.com Katie@hhjlegal.com monica@hhjlegal.com *Attorney for Florida Justice Association*	

/s/ *Kenneth B. Bell*
KENNETH B. BELL, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

/s/ Kenneth B. Bell
KENNETH B. BELL
Florida Bar No. 0347035