IN THE SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JOHN ROBERT SEBO, individually and as Trustee under Revocable Trust Agreement of John Robert Sebo dated November 4, 2004,

Appellant/Cross-Appellee,

v.

AMERICAN HOME ASSURANCE COMPANY, INC., et al.,

Appellees/Cross-Appellants.
_____/

CASE NO. 6D23-2213
L.T. No.: 07-0054-CA
Twentieth Judicial Circuit
Consolidated with
Case No. 07-1539-CA

APPELLEE/CROSS-APPELLANT'S ANSWER BRIEF AND CROSS INITIAL BRIEF

Jack R. Reiter, Esq.
Florida Bar No.: 0028304
jack.reiter@gray-robinson.com
Sydney Feldman D'Angelo, Esq.
Florida Bar No.: 1017798
Sydney.feldman@gray-robinson.com
GrayRobinson, P.A.
333 SE Second Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887

Counsel for Appellee/Cross-Appellant, American Home Assurance Company

TABLE OF CONTENTS

Page

TABLE OF CONTENTS--CONTINUED

Page

TABLE OF CONTENTS--CONTINUED

Page

TABLE OF CONTENTS--CONTINUED

Page

TABLE OF CONTENTS--CONTINUED

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

TABLE OF AUTHORITIES--CONTINUED

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES--CONTINUED

Statutes **Page(s)**

Rules

INTRODUCTION

Plaintiff John Robert Sebo brought this bad faith property insurance case against American Home Assurance Company, Inc. ("AIG"). Following a two-week trial, a jury returned a defense verdict, finding neither that AIG handled Sebo's claim in bad faith nor that AIG caused Sebo any damages. R.100941.[1] The trial was fair, the court accurately applied Florida law, and the verdict was amply supported by the evidence. This Court should affirm.

This case arises out of damage from water intrusion to Sebo's $11.2 million-dollar Naples house following Hurricane Wilma. Sebo did not originally sue AIG; instead, he originally sued the individuals who sold him the house, and the contractors and companies who built the house (the "Tortfeasors"), blaming them entirely for construction defects that led to water intrusion. *Infra*, at pp.6-18.

Sebo waited two years after filing suit against the Tortfeasors to sue AIG, which had denied insurance coverage based on specific policy exclusions. Sebo eventually settled with the Tortfeasors for

[1] Citations to the Record on Appeal are "R.[page number]," Sebo's Appendices are "A.[page number]," Sebo's Initial Brief are "IB.[page number]," and AIG's Supplemental Appendix are "SA.[page number]."

approximately $6.1 million, and the case proceeded against only AIG. During the ensuing coverage lawsuit, the parties disputed the applicable doctrine to determine coverage of a loss caused by a combination of covered perils (Hurricane Wilma and other rainstorms) and uncovered perils (the construction defects for which Sebo had sued the Tortfeasors). *Infra*, at pp.20-24.

The trial judge agreed with the causation doctrine Sebo argued was applicable, and the coverage trial jury found Sebo's loss was covered, but a three-judge panel on the Second District Court of Appeal unanimously agreed with AIG's coverage position and reversed. R.101306-13. Thereafter, the Florida Supreme Court accepted conflict jurisdiction and reinstated the verdict in Sebo's favor. R.101674-88. On remand, the trial court entered judgment on the verdict and conducted a multi-day evidentiary hearing to award Sebo his reasonable attorneys' fees and costs. R.101314-41, 101348-68; *infra*, at pp.23-24. In total, Sebo recovered approximately $15 million from AIG in connection with the coverage case.

Sebo then filed this bad faith lawsuit, asserting AIG acted in bad faith when it investigated and denied his insurance claim. At the

outset, Sebo sought damages of (1) attorneys' fees, costs, and related interest incurred in connection with the coverage lawsuit; (2) house-related damages; (3) attorneys' fees and costs incurred to sue third parties, including the Tortfeasors; (4) interest on debt incurred to pay attorneys' fees; and (5) prejudgment interest. The Honorable Lauren L. Brodie, the same judge who presided over the evidentiary hearings related to the reasonableness of Sebo's attorneys' fees and costs incurred in the coverage lawsuit, presided over Sebo's bad faith claim. She granted summary judgment on some elements of Sebo's claimed damages, including certain house-related damages Sebo sought in the underlying coverage lawsuit that the jury did not award him, and the attorneys' fees and costs she had previously determined in connection with the coverage lawsuit. Judge Brodie submitted the rest of Sebo's claims, including his claim for punitive damages, to the jury. *Infra*, at pp.25-41. After a two-week trial, the jury returned a verdict for AIG. This Court should reject Sebo's improper request that it step into the shoes of the jury and rewrite the outcome of his trial.

Preliminary Statement Regarding Sebo's Statement of Facts

Sebo's Statement of Facts is argumentative and replete with argument the jury rejected. For example, Sebo asserts as "fact" that the "number of statutory and common law acts of bad faith AIG committed was staggering," IB.10; that AIG's inspection of the property was "inadequate," "flawed," and "incomplete," IB.10-11; and that "AIG's unlawful conduct was an entrenched business practice," IB.10. But it is neither the trial court nor this Court's role to sit as a seventh juror.[2] Sebo had a fair trial. This Court should affirm.

---

[2] Sebo cites *only* his own counsel's closing argument, rather than the evidence, in support of the following assertions (and many others) in his Statement of Facts. This not only constitutes a one-sided, argumentative statement of facts, but it demonstrates these exact arguments were presented to—and rejected by—the jury:

- "For a multi-million dollar first-party loss with multiple causes, a proper investigation would minimally involve an inspection of the entire property for obvious and hidden damage." IB.11.
- "When contacted by [Sebo's] repair contractor, AIG's property inspector was told to 'stand down.'" IB.14.
- "AIG's offers to resolve the claim were paltry: $100, $2,500, and $100,000, all made in late 2010. Its claims expert again candidly admitted that none of these offers complied with Section 626.9541(1)(i)(f). Ironically, AIG's final settlement offer was actually a payment demand." IB.16.
- "AIG repeatedly failed to acknowledge and act promptly in response to [Sebo's] communications." IB.17.
- "The evidence at trial demonstrated that AIG adopted the wrong causation standard. This was no honest mistake, but another

STATEMENT OF THE CASE AND FACTS

1. The House

In April 2005, Sebo, the co-founder of a company called Paychex, R.105903, purchased a house in Naples, Florida for $11.2 million. R.106309, 106315. Sebo was enamored with the house from his first visit: he explained, when he "walked in, … it was like walking into a Polynesian village." R.106309, 106314.

Sebo insured the house through AIG Private Client Group, A.613, which was created about five years earlier to "sell insurance in the high-net-worth space." R.104624-25, 106773-74, 106794-96. In those close-knit circles, "business is strictly word of mouth," R.106776: PCG's target clients "refer[red] people to service providers that they like[d]" and "discourage[d] their friends and acquaintances from doing business with those they d[id]n't like." R.106776-77. Such customers "expect a high level of service." R.106775. Evidence at trial established, from the outset, "[i]t was important for AIG to … establish a reputation" of providing superior services. R.106773-74, 106778.

---

calculated decision to ignore the prevailing causation doctrine in Florida." IB.18.

2. Sebo's discovery of the defects in the House

Sebo spent about two months in the house after he bought it—"the rest of" April and "some of May"—and then returned to another house he owned in Ohio. R.106311. He hired a property manager, Rebecca "Becky" Thorngate, to watch over and handle any cleaning or repair needs at the Naples house. R.106311-12, 106730.

Although a pre-purchase inspection identified "minor problems," "[m]ost" of which were "superficial," R.104353, Sebo observed water leaks and other issues almost immediately after closing. R.105784, 106314-15, 106739-43. Ms. Thorngate kept fastidious notes. R.106731-43; *see* R.101293, 101144-50. Within a week of closing, on April 25, 2005, she noted a "rotting bridge" on the property, and between May 5 through 10, 2005, she documented the "[f]irst water issues" following rain: "stain marks" on the "roof walkway and a problem with the "closet garage wall." R.105783, 106740-41. On May 17, 2005, she observed roof leaks. R.106753-54.

Sebo explained, "it got progressively worse. It was like every time I saw on my phone it says it was Becky Thorngate calling, I'm thinking, oh my G[-]d, now what? ... [I]t had progressed" to the point

that "she was calling almost every day with something new that she found." R.106314-15. The problems "had a lot to do with water." R.106320.

Sebo later testified he believed the sellers, Paul and Sarah Jacobson, "weren't altogether honest about the condition of the house." R.106359. By November or December 2005, Sebo's cousin and financial advisor, George Hissong, estimated Sebo had spent "about half a million dollars" doing remedial work and a "facelift" to address the problems he discovered. R.105836-37; *see also* R.101151. Sebo testified that the repairs "worked until whatever the problem was bubbled up, the paint peeled off, and the leaks reappeared.... [I]t was in a multitude of different places .... [W]e were just like a dog chasing his tail, we'd catch it, lose it, and start all over again." R.106321.

3. Hurricane Wilma and Sebo's continuing problems with the house

On October 24, 2005, six months after Sebo purchased the house, Hurricane Wilma made landfall. R.106321. The water leaks in Sebo's house progressed, but Sebo did not immediately contact AIG. Instead, Ms. Thorngate, who had been "attempt[ing] to locate

[a] window expert/problem solver" since August 2005, R.106757, 101148, contacted Craig Kobza, a general contractor and certified mold remediator in the business of "provid[ing] litigation support for construction defect cases." R.105773-74, 105712-13. Mr. Kobza would ultimately serve as Sebo's "quarterback," assuming overall responsibility for forensic discovery, and hiring and coordinating with numerous experts to investigate the problems. R.105733; *see also* R.105775-77, 105788-89, 105804-05.

Mr. Kobza first spoke with Ms. Thorngate in late December 2005. R.106760; 101150. Days later, he toured the house and observed "signs of water leaks" and "staining," and "smell[ed]" an "organic … odor" of mold. R.105715.

Mr. Kobza spoke with Mr. Hissong and others again on December 29, 2005. R.105787-88; *see also* R.101151, 103005. Afterward, Mr. Hissong sent an email to Sebo's insurance broker, Michael Todorovich, explaining that Mr. Kobza was "putting a package together for a local attorney who will be suing everybody and anybody who could have insurance to try to get the Sebo's money back." R.101151. Mr. Hissong also wrote to Mr. Todorovich, "[w]e

should begin to think about where we think the 'homeowners' policy will come into play." R.101151.

4. Sebo's Insurance Claim and the Preliminary Investigation

Sebo submitted a claim to AIG on December 30, 2005, and AIG acknowledged receipt that day.[3] R.105937. The claim was assigned to Jed Usich, who contacted Sebo's representatives on January 3, 2006. R.104952, 105937-38.

Three days later, on January 6, 2006, Mr. Usich and another AIG representative, Dale Tomlinson, inspected the property, accompanied by Mr. Kobza, Ms. Thorngate, Mr. Todorovich, and Sebo's attorney Ed Cheffy. R.104957, 105019, 105728, 105938; *see also* R.105725-28. Mr. Kobza testified he was still "trying to figure out" the relevant issues, but he "showed Mr. Usich and [Mr.] Tomlinson all the various things that [he] had seen ... which were concerning to [him] from a building standpoint." R.105726-27.

After the meeting, Mr. Todovorich emailed Mr. Hissong and Mike Wilcox (a "financial adviser, insurance representative, salesman" who "led [Sebo] to Mr. Todovorich," R.105842), explaining

[3] AIG was told not to contact Sebo directly and instead to communicate with his representatives. R.105037-38, 106353-54.

that Mr. Usich was "not prepared to state AIG's position for a week or so, but the obvious we all know; all preexisting damage will not be covered and there is considerable preexisting damage." R.101212, 105939-40.

At Mr. Kobza's recommendation, Sebo (through Mr. Kobza) retained Architectural Testing, Inc. ("ATI") on January 13, 2006 to test the windows and "determine the source of water leakage." R.101224, 103007, 105730. AIG hired Interscience, an engineering firm, to investigate the cause of the water intrusion and whether there were manufacturing defects. R.104217-18, 104983-84. Interscience was present during ATI's testing and worked collaboratively with Sebo's team. R.105732-33, 105741-42, 105045.

On January 19, 2006, AIG sent a reservation-of-rights letter[4] to Mr. Hissong to advise that it was "continuing to investigate the claim but [that] there might be some issues" because "the damage may have occurred prior to the actual policy being written." R.105043-

[4] A reservation-of-rights letter is a "heads-up" there are "some potential problems" with coverage, but "not a final decision." R.105042.

44; *see* R.101133-36. Mr. Usich discussed the letter with Mr. Todorovich that day. R.105047-48, 102413.

The investigation continued. On January 31, 2006, Mr. Usich wrote in a "[m]emo to the" file that he spoke with Irving Leepack, an engineer from Interscience, regarding Mr. Leepack's "observations at the Sebo residence." R.102322. Mr. Usich concluded, "the preliminary information is that there is a manufacturing defect in these windows," which "would have preexisted … the AIG policy and therefore likely would not be covered." R.102323. However, Mr. Usich also noted there was "ensuing water damage to be considered," and "[a]t the end of the day there could be three losses: the construction defect, hurricane Wilma, and a May wind/rain event"; so he would "proceed with the investigation." R.102323-24.

Mr. Usich reinspected the house on February 2, 2006. R.104959-61. In a "memo to the … claim file," Mr. Usich reported there had already been testing on two of the windows in the foyer, and there was evidence of design/manufacturing defects with the windows and installation defects with two sliding glass doors. R.102518-19. Additional windows "in the piano room were being tested" during his visit. R.102519. He noted that further

information, including a "timeline for damages," was forthcoming and would be "important" to his determination. R.102520.

5. Sebo's pursuit of the contractors, subcontractors, and sellers

Sebo began pursuing the contractors, subcontractors, and seller (the "Tortfeasors") in February 2006, before AIG communicated its coverage position to Sebo. Sebo sent pre-suit notices pursuant to Florida Statute section 558.004(1)[5] ("558 Notices"), requesting the Tortfeasors to repair the issues "to avoid litigation." R.104214, 104224-25, 104305; *see* R.100953-59, 100965-67, 101419-21.[6]

---

[5] Section 558.004(1) provides, "[i]n actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action, … serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter."

[6] Sebo served 558 Notices on the seller and builder (Mr. Jacobson), R.100957; general contractor (Mike Shipley), R.100953; window supplier (Twin Windows), R.100955; the door supplier (Omni Track), R.101421; window and door installer (Bruce Tansey), R.100967; architect (Frank Neubek), R.100965; HVAC subcontractor and installer (Weigold), R.101412; roof installer (RLK Roofing), R.101419; concrete, masonry, and wood framing installer (Phoenix Houses), R.101449; and engineer (American Engineering), R.101449. *See* R.104226-31. As he continued to identify "issues," Sebo served notices on additional contractors. R.104225-31; *see* R.101437-47.

In the 558 Notices, Sebo advised that he discovered multiple construction defects, "the majority" of which "relate[d] to the original windows installed at the property," that "caused significant leaks and damage ... to the interior walls, flooring, electrical and interior finishes." R.100953-54. He also noted "deficient installation of the sliding glass door assemblies" and "microbial contamination." R.100953-54.

On February 22, 2006, Sebo sent a "formal request for rescission of the Sales Contract for the Property" to Mr. Jacobson, reiterating the "substantial construction deficiencies and defects." R.100961, 104215-17. Mr. Jacobson rejected the offer. R. 100963.

6. AIG's Denial of Sebo's Claim

While Sebo pursued the Tortfeasors, AIG continued to evaluate the insurance claim. Kelly Gibbons (a hygienist from Interscience) issued her report in February 2006, finding "significant levels of mold contamination" and detailing remediation recommendations. R.105742, 105769-71, 101838; *see* R.101822-43. In March 2006, ATI reported its findings, which Mr. Kobza summarized as being "concerned about ... the volume of water that was being allowed

through both the sliding glass doors and the windows." R.105734; *see* R.103010-44.

On April 4, 2006, Mr. LeePack issued his report. R.105739; *see* R.102307-21. Mr. Leepack "s[aw] the same thing [Sebo's] team was seeing," R.105740: that "moisture entered the main house primarily through window units and sliding glass door assemblies," because of "improper manufacturing of the window frames." R.102309. Mr. LeePack also found that "faulty workmanship" of the sliding glass doors "[e]xacerbat[ed] and contribut[ed] to the moisture damage." R.102320.

On April 19, 2006, Mr. Usich wrote to Sebo's attorney regarding "the outcome of the claim investigation." R.105049; *see* R.101137. Mr. Usich explained he had received the two reports from Interscience and three reports from Sebo, including a March 22, 2006 ATI Report, the January 18, 2005 pre-purchase inspection report,[7] and test results from "various dates." R.101137-41. He noted that the Interscience and ATI reports "c[a]me to the same general

[7] The pre-purchase inspection was performed by Landry's Inspection. R.106736, 106761.

conclusions." R.101139. Mr. Usich concluded there was partial coverage—$50,000 for the mold limit—but because the window and door defects "were present at the time of original construction" and pre-dated the policy, they were not covered. R.101140. Mr. Usich also found the policy exclusion for "faulty, inadequate, or defective planning" precluded coverage. R.101140.

On May 25, 2006, AIG issued a $50,000 check for the mold limit. R.104416-17, 104212, 105054; *see* R.101143. Sebo's attorney returned the check on June 21, 2006 and wrote that he "reject[ed] th[e] settlement" and would "be in touch with [Mr. Usich] shortly." R.101142, 105054-56.

About ten months later, in April 2007, Sebo's counsel sent a letter to Mr. Usich, R.102263, who had, by then, moved to a new position. R.104949. The letter stated that counsel wanted to discuss "any prior claims made on the property" and the "prior response to [Sebo's] claim for insurance." R.102263, 104241-42, 102263. Sebo's counsel did not receive a response, R.104246, and did not communicate with AIG's claims department for another year. R.104416-19, 105054.

7. The Construction Defect Lawsuit

Sebo sent a second rescission letter to Mr. Jacobson on June 22, 2006, which was rejected. R.100964, 104217. Sebo also continued to investigate and remediate the house, sending additional 558 Notices to contractors he "perceived to be liable." R.104230-31.

On January 8, 2007, Sebo sued ten parties, R.101017-36, including the Jacobsons and several contractors (the "Construction Defect Lawsuit"), alleging he had "discovered numerous construction defects" and "code violations." R.101020-21, 104332, 106334. He asserted counts for failure to disclose, negligence, and violation of building codes. R.101017-36. He did not sue AIG. R.104332, 106360; *see* R.101017.

Sebo amended his complaint on December 28, 2007 to add additional defendants and a claim for misrepresentation against the Jacobsons. R.101037-63, 104333-35. He consistently asserted the construction defects predated his purchase. R.101037-63. As he averred:

> Little did I know, the few days that I lived in the main house immediately after purchase would be the only time that I would actually be able to live at the property without the knowledge of many problems in the main house and guest house. A copy of an early communication which I

> received from Ms. Thorngate identifying certain of the problems discovered is attached hereto as Exhibit "A." Additional problems continued to be discovered throughout the main house and guest house throughout the Summer and Fall of 2005. Hurricane Wilma, which came through the area on October 24, 2005, exposed more problems and prompted a more coordinated and extensive investigation of the main house and guest house structures.

R.101371. Sebo also testified in a deposition during the Construction Defect Lawsuit that he "had personal knowledge of everything that was wrong with th[e] home before the hurricane," and "[t]he hurricane had absolutely nothing to do with the problems … in that" house but was "very helpful in speeding up the discovery process." R.106363.

8. <u>The 50 Percent Rule</u>

The Federal Emergency Management Authority ("FEMA") sets base levels at which a structure must be built, and, if an existing house is below that base level, "you can't spend more than 50 percent of the value of the house doing renovations, repairs, [or] expanding the house" unless "[you] bring[] the house above the" flood elevation (the "Fifty Percent Rule"). R.104602,105794-95. Local municipalities "typically will not issue a building permit that violates the" Fifty Percent Rule. R.104602. Sebo's house was below the base

flood elevation, so his renovations were subject to the Fifty Percent Rule. R.103080, 105799.

Sebo applied for a permit from the City of Naples in February 2006 to "replace existing windows and doors." R.103045-53, 101215-23. The permit application—which was signed under oath by Mrs. Sebo and a director of Mr. Kobza's company, Mark P. Strain, R.103046-47—cautioned, "[s]ince your structure is located in a Flood Zone, ... the 50% rule shall apply." R.101220, 103051, 105794-800. That permit application attached a "cost estimate of reconstruction/ improvement" totaling $166,329. R.103048, 101215-19, 105793-800.

By December 2006, however, Mr. Kobza advised building officials that Sebo may seek "an additional permit in the near future." R.103054-55. Mr. Kobza had "developed serious concerns about" the house's structural integrity and "uncovered a number of conditions" inconsistent "with the approved construction drawings." R.103054-55. In April 2007, Mr. Kobza requested an abeyance from the City of Naples, explaining the issues had "migrated way beyond the original intent of th[e] permit" the City granted a year earlier. R.103057. He detailed twenty additional "anticipated scopes" that would be

"required to restore [the] house." R.103061. From May through July 2007, Mr. Kobza continued to correspond with the City. R.105751-52; *see* R.103079-90. In July 2007, however, the City determined the scope of work exceeded the rule's 50 percent threshold and denied Sebo's permit request. R.103090, 105752-53.

Mr. Kobza testified that even after the permit denial, until approximately September 2007, he expected in good faith that the house would ultimately be repaired and restored. R.105806-07; *see also* R.105805-06, 101179. But eventually, it was determined that the house could not be repaired, and it was demolished. R.106335-36; *see also* R.101179-80, 106636-37.

9. <u>Sebo's Renewal of his insurance claim</u>

On May 12, 2008, more than two years after AIG's denial and nearly two years after Sebo returned the $50,000 check, one of his attorneys, David Zulian, contacted AIG to "renew [Sebo's] claim." R.104249. Mr. Zulian submitted additional information to adjuster Debra Osborne, including expert reports prepared years earlier. R.104250-51, 104325-26. Mr. Zulian testified that he did not provide the information sooner because "we were still investigating the

process," "still in the 558 process to a large extent," and "still trying to resolve things." R.104250-51*; see* R.101870.

Ms. Osborne responded on May 15, 2008, reaffirming the prior denial because her "review of the new information" did not change the conclusion that the policy excluded coverage for "design/construction defects." R.102235-36.

10. <u>The Coverage Lawsuit</u>

Sebo waited another year and a half before adding AIG as a party to the Construction Defect Lawsuit in November 2009. R.101068-122, 104253-54, 106338-39. He eventually settled with the Tortfeasors and their insurers for a total of over $6.1 million (the "Settlements") but maintained his claim against AIG (the "Coverage Lawsuit"). R.104339, 104342.

i. The Concurrent Causation Doctrine

On November 12, 2010, Sebo moved for partial summary judgment in the Coverage Lawsuit regarding the applicable causation doctrine to determine coverage under the policy. Sebo argued that under Florida law, the "concurrent causation doctrine" applied and mandated coverage for damages caused in part by a covered loss and in part by an excluded or uncovered loss. R.101634, 104259; *see*

generally 101627-35; *see also* R.24441-48. AIG opposed the motion. R.28389-92. On February 9, 2011, the court found the concurrent causation doctrine applied. R.101634-35.

ii. Trial and the Final Judgment in the Coverage Lawsuit

The Coverage Lawsuit was tried from February 14 to March 3, 2011. R.104267; *see also* R.30880. The jury returned a verdict for Sebo. SA.129-30. On March 11, 2011, Sebo moved for the entry of judgment, arguing that the judgment should include prejudgment interest "from the time of the loss" (October 23, 2005), or, "[a]t a minimum, ... from the date Defendant AIG denied the claim" (April 19, 2006). SA.138-40; R.31084, 31090-91. AIG opposed the motion and argued that prejudgment interest should only accrue from the date of the verdict. R.32274-77. The court entered a final declaratory judgment on July 19, 2011 and awarded interest accruing from the date of the verdict, March 3, 2011. SA.183-86; R.32574.

Sebo and AIG each moved to alter or amend the judgment, SA.193, 216; R.32622, 32644. Both parties argued that the amount of the final judgment was incorrect, and Sebo also tried to revisit the prejudgment interest issue. SA.196-99; R.32625-28. Following a hearing, R.37427-28, on November 10, 2011, the court entered an

amended final judgment, SA.221, R.101642-43; *see* R.105909, and an order explaining its calculation of the amended final judgment. R.37747-51.

The amended judgment totaled $8,070,000, which consisted of the $6,600,000 million policy limit for the constructive total loss of Sebo's house and $1,470,000 for loss of use, which the court found was an additional coverage under the policy.[8] The court ruled the jury's award of $1,680,000 for "precautionary repairs," a type of house-related damage, was "not recoverable" because "the policy limits of $6,600,000 [were] already … reached." R.37749-50.

The court declined Sebo's request to amend the judgment to include additional prejudgment interest and, in the ensuing appeal and cross appeal, Sebo abandoned the prejudgment interest issue. R.37750; *See* A.5222 ("Sebo does not dispute that Sebo … did not raise the prejudgment interest issue" in the Florida Supreme Court).

[8] Although the jury found "the repair/reconstruction of the house would be" $6 million, the court found Sebo was entitled to the policy limit of $6,600,000 because there was a "constructive total loss" of the house. Additionally, the court found that loss of use was "an additional policy coverage" that should be included in the judgment, but it reduced the jury's award from $7,680,000 to $1,470,000 because "that was the figure testified to in court." R.37750.

11. AIG's appeal to the Second District

On September 18, 2013, the Second District Court of Appeal reversed the final judgment and remanded for a new trial. R.101306-13, 104276-77. It concluded the "efficient proximate cause" doctrine, rather than the "concurrent causation" doctrine, governed. R.101311, 106238.

12. The Florida Supreme Court's reversal

Sebo sought review in the Florida Supreme Court, which accepted conflict jurisdiction. R.101674. On December 1, 2016, the Florida Supreme Court reversed, concluded the concurrent causation doctrine governed the claim, and reinstated the judgment for Sebo. R.101674-88, 104277, 106239.

13. Sebo seeks attorneys' fees on remand

On remand, Sebo sought his fees incurred at the trial level and on appeal.[9] The court took evidence and heard argument from

[9] Sebo filed a motion for entitlement to fees on March 11, 2011, R.31084-94, and a motion for entry of judgment for fees and costs on August 18, 2011. R.32666-71. Following the appeal, he filed motions for his appellate fees and costs. R.41409-16, R.41498-503. On December 21, 2017, December 22, 2017, and January 2, 2018, He filed supporting affidavits and on February 18, 2018 he filed a supplemental memorandum. *See* R.101316, R.41596-610.

February 20 through 23, 2018 and again from July 16 through 19, 2018. R.101317-18; *see* R.46593.

On September 18, 2018, it entered a final judgment of $3,331,456.91 on Sebo's attorneys' fees and prejudgment interest after making detailed findings regarding the reasonableness of Sebo's requested fees. R.101341. That same day, the court entered a separate final judgment on costs and prejudgment interest of $319,631.13. R.101348-68. The court declined to award specific costs, including those "incurred before AIG was served and became a party" to the lawsuit. R.101358, 101360, 101363. Sebo initially appealed the final judgments on fees and costs but later dismissed his appeal. R.56909-10, 56932.

14. AIG pays the judgments in full

AIG paid the judgments and interest, totaling approximately $15 million. R.104277-78, 104300-01; *see also* SA.469 (order acknowledging AIG's October 18, 2018 payment and satisfaction of $8,020,000 principal and $3,058,866.10 interest).

15. Sebo's bad faith claim

On November 7, 2018, the court granted Sebo leave to amend his complaint to assert a bad faith claim against AIG, R.56919-20;

A.801-02, and on November 30, 2020, granted Sebo leave to amend his complaint again to seek punitive damages, A.1068-69. The operative complaint at trial was Sebo's Fifth Amended Complaint. A.897-936; *see* A.1070-1119. Sebo asserted a single count for bad faith, titled "Unfair Claims Practices Pursuant to Fla. Stat. § 624.155." A.910.

i. AIG's Motion for Partial Summary Judgment

On June 7, 2021, AIG moved for partial summary judgment on Sebo's damages. A.2610-30; SA.5-864 (evidence in support); SA.865-98 (reply in support). It argued, *inter alia*, that under the doctrines of collateral estoppel, res judicata, and law of the case, Sebo should be precluded from seeking damages he sought or could have sought in connection with the underlying Coverage Lawsuit, including (1) attorneys' fees, costs, related interest incurred in connection with the Coverage Lawsuit; and (2) house-related damages such as loss of use, precautionary repairs, and prejudgment interest. A.2610-30, A.5591-93.

AIG argued that, following the jury verdict in the Coverage Lawsuit, the court "conducted a multi-day hearing and issued two final judgments conclusively determining the amount of attorneys'

fees, costs, and interest to be awarded to [Sebo] in connection with the coverage case," and Sebo was "bound by the result."[10] A.2623. AIG also argued that Sebo's "demand for the house-related expenses" as compensatory damages in the Bad Faith lawsuit was "even based on the same exhibit used at [the coverage] trial," and he could not "simply re-characterize" his "coverage" damages as "consequential bad faith damages." A.2624. AIG asserted the court had already made a determination regarding the allowable prejudgment interest in the Coverage Lawsuit and, in doing so, rejected Sebo's argument that the prejudgment interest should be calculated from the date of the loss. A.2624. AIG argued that Sebo did not appeal the prejudgment interest issue and was "bound by the result." A.2625.

The court heard argument on December 20, 2021 and January 7, 2022 and initially granted AIG's motion in part, precluding Sebo from seeking damages that "w[ere] sought or could have been sought" in the coverage action. R.87627-30, A.5864-87, 6473-76 (brackets

[10] Sebo elected not to seek fees for an attorney who performed some services but then "discovered [his] firm had a conflict after trial began and therefore withdrew." *See* R.101325; R.41603. AIG argued Sebo waived the ability to pursue those fees. A.5591-92.

omitted). Sebo moved for reconsideration on February 22, 2022, R.87356, which the trial court denied, R.87624-26.

On April 8, 2022, Sebo renewed his motion for reconsideration, asserting that the court should allow him to pursue the $1.68 million portion of the Coverage Lawsuit jury verdict not included in the final judgment because it exceeded the policy limit. R.88216. AIG argued in opposition that Sebo's damages theory based upon an "excess judgment" was inapplicable in a first-party property bad faith case because Sebo could not show AIG's alleged bad faith conduct caused Sebo to incur the precautionary repairs. R.88265.

The court granted Sebo's renewed motion for reconsideration. R.88482-83. AIG moved for the court to "clarify or reconsider" its ruling, R.88346, which the court denied, R.90374.

ii. The Bad Faith Trial

a. Sebo's Claims

The bad faith trial proceeded for ten days. Sebo argued that AIG acted in bad faith and sought three categories of compensatory damages, *see* R.100907 (verdict form):

(1) Precautionary repairs: Sebo sought the $1,680,000 the jury awarded in the Coverage Lawsuit which exceeded the policy limit, R.107111;

(2) Attorneys' fees: Sebo sought the fees he incurred to sue third parties, including the Tortfeasors and their insurers, R.107113.

(3) Interest on debt: Sebo sought interest on debt purportedly incurred to pay his attorneys' fees, R.107113-14; and

Sebo also sought punitive damages, which required him to show (1) AIG's acts giving rise to Sebo's lawsuit occurred with such frequency as to indicate a general business practice and (2) those acts were willful, wanton, and malicious or in reckless disregard for Sebo's rights. R.107089. Sebo argued AIG used metrics and goals that incentivized improper claims-handling as a general business practice. R.107118-23.

b. AIG's Case at Trial

AIG asserted (1) it did not act in bad faith; (2) it did not cause Sebo damages; (3) and it did not have a general business practice of mishandling claims in bad faith.

First, AIG argued that the evidence did not support a finding of bad faith because AIG presented evidence that it timely acknowledged Sebo's claim, hired experts, investigated, and reviewed Sebo's experts' reports before concluding the damage was preexisting. Sebo's expert at trial, Berndt Heinze, agreed that AIG

acted promptly and in accordance with generally accepted customs and practices by responding to Sebo's claim, assigning an adjuster, and inspecting the house within days after the claim was submitted. R.106613-14. AIG also presented evidence from an expert, former Florida Supreme Court Justice Kenneth Bell, that Florida law was "unsettled" regarding the applicable causation doctrine when AIG decided coverage. R.105340-43.

Several AIG employees testified that Sebo's claim was not handled in bad faith. Kathleen Spinella, a home office examiner for property claims, R.103912, believed the adjuster on Sebo's file was "doing a good job, was looking for coverage," and "had engaged the appropriate persons to help him ... in the myriad causes of loss that there might have been." R.103927. Ms. Spinella did not see anything in the claim file that AIG should have done but failed to do, or that AIG did do and should not have done. R.103934. AIG's former Zone Claims Manager, Gregory Jones, testified that, although "in retrospect," the Florida Supreme Court disagreed with AIG's coverage determination, he believed AIG "tried [its] best" when it made its determination "to manage [Sebo's] claim, just as any other claim, with the facts made available to [it], the details of that specific loss,

the contract language that was in place at the time, and with an eye on fairness and trying to do the right thing for [its] clients ...." R.104723-24. Similarly, Frank O'Brien, AIG's vice president of property claims, R.104377, testified that Mr. Usich handled Sebo's claim "in accordance with [AIG's] best practices." R.104916. Mr. O'Brien further explained, like Mr. Jones, that when AIG made its coverage determination it "thought [it] made the right decision based on the information that [it] had and based upon the terms of [the] policy." R.104400-02.

Second, AIG asserted that its conduct did not cause Sebo damages. With respect to Sebo's claim that AIG caused him to incur attorneys' fees to sue the Tortfeasors, AIG presented an email from Mr. Hissong, which was sent before Sebo submitted his claim to AIG, indicating Sebo would be "suing everybody and anybody who could have insurance to try to get Sebo's money back." R.101151, R.106379-82. AIG also presented evidence that Sebo sent 558 Notices to the Tortfeasors before AIG made a determination on his claim, sued the Tortfeasors years before suing AIG, and ultimately settled with the Tortfeasors. R.104214, 104224-25, 104305, 100953-59, 100965-67, 101419-21, 101017-36, 104339. With

respect to Sebo's claim that AIG caused him to incur interest on debt, AIG cited Mr. Hissong's testimony that Sebo could have paid his attorneys' fees without taking out a loan. R.105902-04. Mr. Hissong explained that opening a credit line was the best financial decision for Sebo because he could borrow "at a relatively low cost," which allowed his Paychex shares to appreciate. R.105903-04, 105913-14, 106369-70. As Mr. Hissong testified, "I don't apologize for" the decision to take out a loan to make Sebo more money. R.105913. With respect to Sebo's assertion that AIG caused him to incur precautionary repairs by not disclosing the Fifty Percent Rule,[11] AIG argued that Sebo could not establish causation because he and his team knew the Fifty Percent Rule applied to the house in February 2006, before AIG communicated its coverage position. *See* R.103080, 105799.

Finally, AIG argued the evidence did not support Sebo's allegation of a general business practice. AIG'S employees testified

[11] While Sebo's expert, Mr. Heinze, initially opined that AIG's representative Mr. Tomlinson had made a material misrepresentation in September 2005 by not telling Sebo that the base floodplain elevation had changed, R.106602-03, Mr. Heinze later admitted that the base flood elevation did not change until two months later, in November 2005. R.106602-06

that AIG's business model—insuring high-net worth individuals—was strictly "word-of-mouth," so it was critical that AIG maintain a reputation of good faith and properly handling insureds' claims, which it did. R.105028, 104629, 104700-01.

- Mr. Usich testified, in his experience at AIG, denying claims was "very rare" because "you're in the business of paying claims fast, ... finding ways to pay claims quickly." R.105029. He testified that he was "[n]ever" incentivized or pressured to cut corners in claims investigations, and doing so would hurt business. R.105031-32.
- Mr. O'Brien testified that AIG "handle[s] every claim with a goal of handling it in good faith and providing a high level of service to [its] customers," R.104383-85, R.104402, and "the objective is to pay the customer a fair and reasonable amount and to pay them promptly." R.104700.
- Patrick Flaherty, AIG's assistant vice president over property claims, testified that AIG did not encourage adjusters to pay less than what was owed or to close a claim without adequately investigating. R.104714.

- Michael Taylor, AIG's former global claims officer, testified that AIG did not encourage underpayments or inadequate investigations to improve metrics. R.106717.
- Mr. Jones testified that underpaying on a claim was "[a]bsolutely not" a way to improve metrics and rather, was a "good way to underperform" and "get yourself fired." R.104725.
- Ms. Spinella testified that AIG adjusters "should and … do" look for coverage wherever possible. R.103922.
- Peter Piotrowski, AIG's former vice president of claims, testified that AIG's "main focus was service"—"find a way to service the insureds. Fast payment, quick response, evaluate coverage, but above all, good service." R.106798. He explained AIG did not utilize metrics to cut corners or incentivize underpayments; to do so "would have been disastrous" to AIG's "reputation" and growth. R.106800-06.
- Stephen Poux, AIG's senior vice president, testified that AIG's client retention was "excellent"—over ninety percent of AIG's customers renewed their policies every year. R.106780.

c. Jury Selection

During jury selection, prospective juror Gabriela Murray disclosed her husband had "his own insurance company." R.103433. When the court asked what kind, Ms. Murray responded, "he's more of a broker, he works with, like, 50 companies." R.103434. Sebo's counsel requested the court to ask whether "her husband writes for AIG." R.103434. Ms. Murray was "not sure." R.103435.

Later, when Sebo's counsel asked whether there was "[a]nyone here who has any specialized knowledge or has worked directly in the insurance industry," Ms. Murray raised her hand. R.103521. She explained, "I don't have like specialized [sic] in insurance, but I help my husband with his company, merging and doing books and just work." R.103521. Ms. Murray also clarified she was "99 percent sure" her husband writes business for AIG. R.103521. Sebo's counsel asked Ms. Murray whether "it would be hard for [her] to be the judge of AIG's behavior in this case" "because [her husband] writes business with AIG and [she] work[s] with that business sometimes." R.103522. She responded, "[p]robably. I might be leaning on the insurance side." R.103522.

When voir dire concluded, the court asked counsel for both parties whether they would "accept" Ms. Murray as an alternate juror. R.103778. Both parties answered affirmatively three times, and the jurors were sworn. R.103778-79; 103784.

On the sixth day of trial, January 30, 2023, Sebo's counsel told the court he discovered that juror Wayne Tye, "has an insurance broker's license and is actively seeking the sale of insurance products on social media." R.105701. Sebo's counsel explained, "[w]e asked a question in voir dire about whether anybody had experience in the insurance industry, several people answered," but "Mr. Tye did not." R.105701-02. AIG's counsel responded, "we just don't know one way or the other, we just don't remember ... whether Mr. Tye raised his hand or not.... [R]espectfully, Your Honor, I'm not sure where there is to go with this." R.1005702-03. Sebo's counsel replied, "I just wanted everyone to be on notice." R.105703. He did not request the court to dismiss Mr. Tye, move for a mistrial, or seek other relief. R.105703.

d. Sebo's Settlements with the Tortfeasors

Pre-trial, AIG moved for partial summary judgment on Sebo's claim for attorneys' fees to sue the Tortfeasors. A.2625. AIG argued,

as a matter of law, those fees were not recoverable as damages because (1) AIG did not cause Sebo to sue the Tortfeasors; and (2) even if it did, Sebo recovered more from Tortfeasors than he spent to sue them, so he was not damaged. A.2625-26; *see* A.5597-99. The court denied AIG's motion. A.6473.

Because the court denied summary judgment, AIG argued that evidence of the Settlements was relevant to causation and whether Sebo was harmed. A.6156-58. At a pre-trial, February 10, 2022 hearing on Sebo's motion in limine to exclude evidence of the Settlements, AIG clarified it was "not seeking a setoff." A.6155-62. Rather, it argued, "[t]he jury is entitled to understand … what transpired in that litigation [against the Tortfeasors]" because Sebo was suing for damages related to his lawsuit against the Tortfeasors. A.6155-62. The court ruled the settlements were admissible because "the jury needs to know why [Sebo] spent $3 million" in fees and "what he got"; "otherwise I think it's in a vacuum and it makes no sense." A.6369.

On January 18, 2023 (three business days before trial), Sebo filed a "Memorandum of Law Regarding the Inadmissibility of Settlements with Other Parties." R.92126-34. AIG responded.

R.92260-63. The court reiterated that evidence regarding the Settlements would "come in" and granted Sebo's request for a jury instruction that "there would be no set-offs." R.108023, 108032, 108066-67. Sebo advised he would prepare a proposed instruction. R.108067.

After the jury was sworn, the court heard argument on the parties' objections to demonstrative exhibits, including one that identified the Settlements. R.103816. Sebo argued:

> There's a specific -- it's not even an objection. They can make their arguments however they wish. Maybe the evidence will support them and the instructions will not. But as you can see from the second page, they intend to focus -- and the ones they're after, they intend to focus on the monies that [Sebo] received in construction settlements. We would just ask that either before or after the openings, preferably after, that you give the no set-off instruction.

R.103816-17. Sebo presented the court with his proposed jury instruction on set-offs. R.103817-28. The court ruled it would decide the appropriate instruction later in trial, but the "facts," including "what [Sebo] has received" by way of settlements could "be presented to the jury." R.103827-28.

On the ninth day of trial, the court ruled that AIG could not argue in closing as to how "the amount of money" Sebo received

would "affect whatever [Sebo] is seeking." R.105511; *see generally* R.105510-14; R.105456-57. At the charge conference, Sebo proposed the following instruction, which the court accepted:

> The court instructs you as a matter of law that you should not consider any settlements Plaintiff obtained in the underlying construction case when you assess his damages in this case. The Court has already determined those settlements cannot, as a matter of law, reduce his damages in this case.

R.105496-501, 107084; *see* R.100873, 100881.

e. Motions for Directed Verdict

At the close of evidence, Sebo moved for a directed verdict "that AIG is in violation of subsection (h)" of section 626.9541, Florida Statutes. R.105458-61. AIG's counsel argued that Sebo did not plead a separate claim under section 626.9541, so he was "moving for a directed verdict on a count that [he] ha[d]n't advanced." R.105468. AIG further argued "whether or not [AIG] failed to do anything in this case ... is a question of fact for the jury." R.105461-62, 105468. The court denied the motion. R.105469. AIG also moved for a directed verdict on Sebo's claims at the close of Sebo's case-in-chief, R.106855-85, and renewed its motions at the close of its case, R.105470-85, which the court denied. R.105485.

f. The Verdict Form

Both parties filed proposed verdict forms on the day of the charge conference, February 2, 2023. R.100863-66, 100904-10.

Sebo's proposed verdict form asked the jury to make separate findings regarding whether AIG acted in bad faith and whether AIG violated any of the provisions of the Florida Unfair Claim Settlement Practices Act. R.100906-07, 105561. AIG again argued that Sebo did not plead a separate count for a violation of the Unfair Claim Settlement Practices Act. Thus, AIG argued that whether AIG violated the Unfair Claim Settlement Practices Act should not appear as a separate interrogatory on the verdict form, but that the jury could be instructed to consider the statutory factors in evaluating whether AIG acted in bad faith under the totality of the circumstances. R.105561-66. The court agreed with AIG. R.105566.

Sebo's proposed form also combined the questions of bad faith and causation into a single question. R.100906. At the charge conference, however, Sebo's counsel argued that the verdict form should separate bad faith from causation. R.105552. He asserted that a separate question should be presented because even if the jury

"disagree[d]" that the alleged bad faith caused compensatory damages, the jury "still would get to go down to the punitives." R.105552; *see* R.105546-58. AIG's counsel challenged the notion that the jury could award punitive damages without a finding of compensatory damage as "fundamentally contrary to Florida law": "in the absence of a damage, of a harm, there is no bad-faith claim, and if there's no bad faith claim, … then there's no damage." R.105552-53.

The following morning, the parties submitted amended proposed verdict forms. R.100914-17, 100944-48. Despite his argument the day before, Sebo's proposed form again combined the questions of bad faith and causation, and also referenced the Unfair Claim Settlement Practices Act:

> 1. Did the Defendant, American Home Assurance Company, fail in good faith to timely pay Mr. Sebo's insurance claim and/or violate any of the provisions of the Florida Unfair Claims Settlement Practices Act, which was or were the legal cause of loss, injury, or damages to Plaintiff?

R.100946. AIG's proposed form presented bad faith and causation in separate interrogatories and did not specifically reference the Unfair Claim Settlement Practices Act. R.100916. AIG challenged

Sebo's first question as "inconsistent with the Court's ruling" regarding Sebo's failure to plead a claim under the Unfair Claim Settlement Practices Act, R.107038, but the court accepted Sebo's proposed question number one for the final verdict form. R.107041. The jury returned a defense verdict on February 3, 2023. R.100941, 107193.

g. Post-Trial Motions

On February 17, 2023, Sebo filed a post-trial motion. R.107263-305. Sebo requested the court to allow him to interview jurors Tye and Murray based on his discovery that they had active insurance licenses. R.107273-77. Sebo also argued he was entitled to a new trial or directed verdict based upon, *inter alia*, the admission of testimony regarding the Settlements, the fact that the verdict form combined causation and liability, and because, he asserted, the verdict was against the manifest weight of the evidence. R.107277-305. The court denied Sebo's motion, R.107364-65, and entered final judgment for AIG. R.108664.

STANDARD OF REVIEW

This Court reviews questions of law, including the application of statutes and legal doctrines, and rulings on a motion for directed verdict, *de novo*. *See State Farm Mut. Auto. Ins. Co. v. Williams*, 943 So.2d 997, 1000 (Fla. 1st DCA 2006). The Court reviews decisions regarding the admissibility of evidence and motions for new trial for an abuse of discretion. *Id. Tower Hill Signature Ins. v. Speck*, 199 So.3d 350 (Fla. 5th DCA 2016).

SUMMARY OF ARGUMENT

Sebo enjoyed an exceedingly fair jury trial. The Court should affirm.

First, the court correctly exercised its discretion when it admitted evidence of Sebo's settlements with the Tortfeasors. The settlement agreements were not admitted into evidence, but the fact of the settlements was relevant to the totality of the circumstances and AIG's defense that did not cause Sebo to sue the Tortfeasors. AIG never argued, as Sebo contends on appeal, that the settlements "fully compensated [Sebo] for AIG's breach," *see* IB.27. Additionally, the trial court carefully instructed the jury—with an instruction prepared by Sebo—that the jury could *not* consider the settlements

to reduce Sebo's recovery if it found AIG was liable for bad faith. Thus, there was no improper use of—or harm from—the admission of this critical evidence. And contrary to Sebo's argument, neither the collateral source rule nor sections 768.041 or 90.408 apply. The court correctly exercised its discretion in admitting testimony regarding the settlements.

Second, the court correctly ruled as a matter of law that res judicata and collateral estoppel precluded Sebo from relitigating the same claims that were litigated in connection with the Coverage Lawsuit. Contrary to Sebo's argument, the fees and costs the court found were unreasonable, and the house-related damages that the Coverage Lawsuit jury declined to award, did not transform into extracontractual damages simply because Sebo did not recover them in his first attempt. Sebo's fees and costs were fully litigated. Florida law does not permit him a do-over because he was dissatisfied with the Coverage Lawsuit verdict or with the results of the fee hearings following the Coverage Lawsuit

Third, Sebo was not entitled to a directed verdict for a violation of the Unfair Claim Settlement Practices Act because he never pled a claim for a violation of section 626.9541(i)(3)(h). And when the issue

arose at trial, Sebo did not seek leave to conform the pleadings to the evidence, so he waived the issue. Regardless, Sebo's argument is meritless because whether AIG acted in bad faith was a jury question. Contrary to Sebo's argument, AIG's expert, Mr. Richmond, did *not* "admit[] that AIG breached its duty of good faith and fair dealing." *see* IB.27. Even if he had, the jury is always empowered to reject an expert's opinion and reach its own conclusion.

Fourth, Sebo's contentions that he was entitled to a separate bad faith question regarding section 626.9541 and that he was allowed to pursue punitive damages without proving compensable harm is meritless. Again, he failed to plead a separate claim under section 626.9541 and did not seek leave to amend. Additionally, harm is a requisite element of any bad faith claim. Sebo's argument that the jury could have awarded punitive damages without first finding liability for a cause of action contravenes fundamental jurisprudential principles and common sense.

Fifth, while Sebo complains about the form of the verdict, he initially proposed a verdict form that combined liability and causation and, although he temporarily retreated from that position at the charge conference, he came full circle by then presenting a question

that combined both elements. He cannot now complain about a purported error he invited or waived.

Finally, the court correctly exercised its discretion by denying Sebo's motion for new trial.[12] An appeal is not a retrial; yet Sebo asked the trial court and now asks this Court to reweigh the evidence as a seventh juror. The jury heard overwhelming evidence that AIG acted in good faith. Before and during the litigation against the Tortfeasors, Sebo blamed them completely for the harm he suffered. He threatened them with 558 notices before AIG denied his claim, sued them two years before suing AIG, and recovered more than $6 million from them in settlements for *their own* misconduct. The jury heard that AIG began investigating Sebo's claim immediately after he submitted it, and it heard that Florida law was unsettled regarding the applicable causation doctrine to determine coverage when AIG denied his claim. The jury also heard that the Second District Court of Appeal *agreed* with AIG regarding its coverage position. Sebo

[12] As discussed herein, Sebo also requested to interview two jurors. Sebo references those jurors in his Statement of Facts but does not argue that the trial court erred by denying his motion to interview them, so he waived the issue. Nonetheless, the court correctly denied that request, too.

prevailed on the coverage issue in the underlying Coverage Lawsuit, but in this case, he failed to meet his burden of proving any bad faith or damages caused by AIG. The evidence amply supported a defense verdict. This Court should affirm.

ARGUMENT

I. THE COURT CORRECTLY ALLOWED EVIDENCE OF SEBO'S SETTLEMENTS WITH THE TORTFEASORS

A. Sebo did not preserve his argument for appeal

Sebo argues that AIG's demonstrative exhibit regarding settlements Sebo received from the Tortfeasors was "misleading and prejudicial," IB.20, 22, and that the court "ignored" his "repeated requests for curative instructions." *See* IB.23, 37-39. But the court *gave Sebo's requested instruction* after the close of evidence on this precise issue. R.105497-501, 107084. Sebo never moved for a mistrial or argued that his proposed instruction was insufficient to cure the claimed prejudice. Thus, his argument is waived. *See Aris v. Applebaum*, 184 So.3d 633, 634 (Fla. 3d DCA 2016) (objection to improper question not preserved because the objection was sustained, a curative instruction given, and the party did not "contemporaneously move for a mistrial").

B. The settlements were relevant to Sebo's damage claims and did not prejudice Sebo because AIG never argued the settlements should be considered as set-offs

Sebo acknowledges his "pursuit of [the Tortfeasors]" was relevant to his bad faith claim but asserts that "whether he recovered any money" from that pursuit "never was." IB.31-32. But Sebo cannot have it both ways. By claiming AIG was liable for millions of dollars in fees that Sebo incurred suing the Tortfeasors, Sebo placed the circumstances surrounding his litigation against the Tortfeasors front-and-center: indeed, to recover the fees as damages, Sebo was required to prove that AIG acted in bad faith under the totality of circumstances and that AIG's bad faith conduct caused him to sue the Tortfeasors and thus incur the fees which he claimed as damages. *See Perera v. U.S. Fidelity and Guaranty Co.*, 35 So.3d 893, 901-02 (Fla. 2010) (insured must prove a causal connection between insurer's actions and claimed harm); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 62 (Fla. 1995) (whether insurer engaged in bad faith is evaluated under the totality of the circumstances); *see* R.107080 (court instructing jury, "[i]n determining whether an

insurer acted in bad faith, a totality of the circumstances approach must be used").

As the court correctly ruled,[13] the settlements went to the heart of Sebo's claim that he would not have sued the Tortfeasors but for AIG's conduct, and to AIG's related defense that Sebo would have sued the Tortfeasors regardless of AIG's conduct. Indeed, when Sebo first encountered water damage, he steadfastly—and solely—blamed the Tortfeasors. He initially sued only the Tortfeasors—not AIG—and repeatedly testified in those proceedings that the Tortfeasors' fraudulent conduct *preceded* his purchase of the House (and thus preceded any purported bad faith by AIG). Yet Sebo argues he should have been permitted to pursue the fees he incurred to sue the Tortfeasors as damages purportedly caused by AIG while concealing the outcome of his lawsuit against the Tortfeasors. Excluding the outcome would have been misleading, presented a risk that the jury would speculate and draw incorrect conclusions, and deprive the jury

[13] The court did not suddenly "reverse[] course" at trial, as Sebo argues. *See* IB.20. The court consistently ruled that the settlements were admissible and, as discussed above, gave Sebo's requested limiting instruction. *See* R.92260-63; *see also* R.92281.

of critical context. The fact that Sebo ultimately settled with the Tortfeasors supported AIG's argument that he would have sued regardless of AIG's actions.[14]

Sebo's argument that AIG "develop[ed] [a] money grab theme" and "told the jury that [Sebo] had already obtained a windfall" via the settlements, IB.30, mischaracterizes AIG's defense. *See also* IB. 37-38. AIG's argument had nothing to do with reducing Sebo's claimed damages based on the settlements. AIG *agreed* pre-trial that the Settlements did not constitute set-offs, A.6155-62, and it carefully heeded the court's ruling not to reference the settlements as set-offs at trial. Rather, AIG argued that the settlements, in conjunction with the other circumstances surrounding Sebo's pursuit of the

[14] Sebo cites *Cunningham v. Progressive Select Ins.*, No. 18-cv-325, 2019 WL 4671194 (M.D. Fla. July 29, 2019) for the proposition that the court "reject[ed]" an insurer's argument that there was "no causal connection between [the] insurer's bad faith conduct and [the] insured's prior excess judgment." IB.40. Sebo's reliance on *Cunningham* is misplaced. There, the court did not "reject" the insurer's argument, as Sebo claims, but denied summary judgment finding there were issues of fact regarding causation. *Id.* Moreover, *Cunningham* involved a third-party bad faith case where the insurer's claim denial may have caused an excess judgment against its insured. But Sebo's was a first-party case, and Sebo pursued the Tortfeasors *before* AIG denied his claim, so *Cunningham* is inapposite.

Tortfeasors—i.e., that Sebo sent 558 Notices before AIG denied the claim, sued the Tortfeasors before suing AIG, and testified in the Construction Defect Lawsuit that the defects in the house pre-dated Hurricane Wilma—demonstrated that Sebo sued the Tortfeasors because of their own misconduct, not because of anything AIG did or did not do. *See* R.107129.

The trial judge also prevented any improper consideration of the settlement evidence by giving Sebo's proposed limiting instruction, which prohibited the jury from considering the settlements as a setoff or using the settlements to reduce Sebo's damage award. And it is well-settled that "jurors are presumed to follow the court's instructions." *Nolan v. Kalbfleisch*, 369 So.3d 346, 347 (Fla. 5th DCA 2023) (quotations omitted). Nothing in Sebo's Brief or the Record rebuts this presumption. Thus, the court correctly exercised its discretion by allowing testimony regarding the Settlements.

C. The collateral source rule is irrelevant

Sebo argues the collateral source rule barred the admission of the settlement amounts, but he confuses his burden of proving causation with collateral sources of recovery. The collateral source rule is "based on the principle that a defendant tortfeasor may not

benefit from the fact that the plaintiff has received any money from other sources *as a result of the defendant's tort*." *State Farm Fire & Cas. Co. v. Pettigrew*, 884 So.2d 191, 197 (Fla. 2d DCA 2004) (quotations omitted, emphasis added)). But the collateral source rule does not vitiate Sebo's burden to prove a causal connection between AIG's conduct and his claimed damages; rather, causation is a fundamental element of a Sebo's bad faith claim. *Perera*, 35 So.3d at 901-02.

As discussed above, the settlement evidence was directly relevant to Sebo's claims against AIG as they related to Sebo's pursuit of the Tortfeasors. And the collateral source rule, which applies only to payments "made as a result of *the defendant's* tort," was inapplicable because the Settlements were not made because of AIG's alleged bad faith; rather, they were made because of *the Tortfeasors'* independent misconduct. *See Pettigrew*, 884 So.2d at 197 (emphasis added, explaining "a payment is from a collateral source only if the payment is made as a result of the defendant's tort, that is, arises from the same event that is at issue in the plaintiff's current claim."). Thus, because the settlements resulted from the Tortfeasors' *own* misconduct arising out of independent torts unrelated to AIG's

alleged bad faith, "the source of payment [wa]s an *unrelated* source, not a collateral source," and the collateral source rule was inapplicable. *Id.* (italics in original; quotations and citations omitted).

The Fifth District addressed a similar issue in *Tower Hill Signature Ins.,* 199 So. 3d at 352, where homeowners sued their insurance company for a breach of their insurance contract. The court excluded evidence of the amount of a settlement the homeowners received from a prior insurance company for a prior sinkhole claim on the same property, and the Fifth District held this was an abuse of discretion. *Id.* at 351-52. The court rejected the plaintiffs' argument that the evidence was inadmissible because it was "analog[ous] … to evidence of a collateral source payment." *Id.* at 353. The court explained that—as in this case—the prior settlement funds "sp[oke] to an element of the plaintiff's claim." *Id.* at 352. Thus, it held, there "was little risk of prejudice because, unlike evidence of collateral source payments, which can lead to a windfall for the tortfeasor, the evidence of the amount of the [plaintiff's] previous settlement [went] directly to [the defendant's] liability," and the court abused its discretion by excluding it. *Id.* at 353.

Like in *Tower Hill*, Sebo is wrong that the collateral source rule precluded admission of the settlement evidence because the settlements were not collateral sources. Moreover, Sebo's pursuit of and recovery from the Tortfeasors went to the heart of AIG's defense that there was no causal connection between AIG's conduct and Sebo's pursuit of the Tortfeasors. Thus, the court correctly exercised its discretion by admitting this evidence; it would have been an abuse of discretion *not* to allow it. *See id.* (court abused its discretion by excluding the amount of a prior settlement that went to an element of the claim).

D. Florida statute sections 768.041 and 90.408 are irrelevant

Sebo's reliance on sections 768.041 and 90.408 to support his assertion that the settlement evidence was inadmissible is also misplaced. Section 768.041 precludes the admission of evidence concerning the release or dismissal of one defendant in a case against another defendant for the same tort. *See* Fla. Stat. § 768.041(1) ("A release … as to one tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or

discharge the liability of any other tortfeasor *who may be liable for the same tort* or death." (emphasis added)).

"By its relatively clear language, it is apparent that the legislature intended section 768.041 to apply only to cases involving joint tortfeasors." *Williams*, 943 So. 2d at 1000, *rev. denied*, 958 So.2d 922 (Fla. 2007); *see also Broz v. Rodriguez*, 891 So. 2d 1205 (Fla. 4th DCA 2005) (finding section 768.041 applies only to joint tortfeasors, and holding section did not apply where plaintiff settled her negligence claim against a landowner and thereafter sued several doctors for medical malpractice because the alleged torts by the landowner and doctors were not "identical"). As in *Williams* and *Broz*, and as discussed above, the Tortfeasors and AIG are not joint tortfeasors. The Settlements resulted from the Tortfeasors' *independent* torts concerning the construction defects, while the claim against AIG concerned the handling of Sebo's insurance claim. Thus, section 768.041 does not apply.

Sebo's reliance on section 90.408 is also misplaced. That section prohibits evidence of a party's offer to settle *the claim at issue. See* Fla. Stat. § 90.408 ("Evidence of an offer to compromise *a claim* … is inadmissible to prove liability or absence of liability for *the claim*

or its value." (emphasis added)). As the First District explained in *Rease v. Anheuser-Busch, Inc.*, 644 So.2d 1383, 1388 (Fla. 1st DCA 1994), "[a] fundamental premise for the application of [section 90.408] is that the offer to compromise must relate to the claim disputed in the lawsuit." AIG did not introduce evidence of negotiations between it and Sebo related to the bad faith claim. Therefore, section 90.408 had no bearing on this case.

Sebo's cases analyze sections 768.041 and 90.408 where an alleged tortfeasor settled with the plaintiff in the same lawsuit for the same injury alleged against the remaining defendant; his cases thus reinforce AIG's argument and the trial court's conclusion that the statutes are inapplicable here. For example, Sebo cites *Saleeby v. Rocky Elson Constr., Inc.*, 3 So.3d 1078 (Fla. 2009), where the plaintiff, a construction worker, was injured after roof trusses collapsed. The plaintiff sued the manufacturer and the installer for negligence and settled with the manufacturer. The Florida Supreme Court held that sections 768.041 and 90.408 precluded the installer from introducing evidence that the manufacturer was a prior defendant who "had settled with" the plaintiff. *Id.* at 1081. The court explained section 768.041(3) "plainly and unambiguously prohibits

the disclosure to the jury of any evidence of settlement or that *a former defendant* was dismissed from the suit," and section 90.408 was "equally clear" that "[n]o evidence of settlement is admissible at trial on the issue of liability." *Id.* at 1082-83 (emphasis added). But *Saleeby* has no bearing on this case because unlike the manufacturer and installer there, the Tortfeasors were never defendants in the Bad Faith lawsuit, and their settlements with Sebo stemmed from their own *independent* torts that Sebo alleged, in a *separate* lawsuit against the Tortfeasors, caused him *different* damages.

Sebo's reliance on *Hernandez v. CGI Windows & Doors, Inc.*, 347 So.3d 113 (Fla. 3d DCA 2022) is misplaced for the same reason. There, the plaintiffs sued a stucco contractor, window installer, and window manufacturer for negligence resulting in water intrusion into their house. The plaintiffs settled with the stucco contractor and window installer but went to trial against the window manufacturer. The Third District held it was error to admit evidence which demonstrated that the stucco contractor and window installer were previously defendants and which "yielded the inescapable inference" that these "former defendants had settled." *Id.* at 119. Because the Tortfeasors were never defendants in the Bad Faith lawsuit, and their

settlements related to different, independent misconduct and injury, *Hernandez* is inapposite.

Sebo's remaining cases are equally inapposite because in those cases—unlike here—the precluded settlement evidence involved a former co-defendant or joint tortfeasor who resolved liability *for the same injury* the plaintiff sought against the remaining tortfeasor.[15] But the nature of Sebo's claims and alleged injuries against the Tortfeasors and AIG were fundamentally different, so sections 768.041 and 90.408 are inapplicable. The court correctly exercised its discretion by admitting testimony regarding the Settlements.

---

[15] *See also* IB.36-39 (citing *City of Coral Gables v. Jordan*, 186 So.2d 60 (Fla. 3d DCA 1966) (where passenger of a motor scooter sued the city for negligence alleging a city police officer caused a vehicle collision, passenger could not elicit testimony that driver settled with the city); *Muhammad v. Toys R Us, Inc.*, 668 So.2d 254 (Fla. 1st DCA 1996) (in action against Toys 'R' Us for negligence and strict liability for sale of a defective toy, error to allow statement in opening implying the plaintiff settled with the toy manufacturer); *Henry v. Beacon Ambulance Serv., Inc.*, 424 So.2d 914 (Fla. 4th DCA 1982) (in personal injury action against ambulance attendants whom, plaintiff alleged, aggravated her injuries from a motor vehicle collision, error for defense counsel to inform the jury that plaintiff settled with the other driver); *Baudo v. Bon Secours Hosp./Villa Maria Nursing Ctr.*, 684 So.2d 211 (Fla. 3d DCA 1996) (in personal injury case, plaintiffs' settlement with a property owner and management company did not discharge hospital from liability for its negligence)).

II. THE COURT CORRECTLY BARRED SEBO FROM RELITIGATING ISSUES FULLY DETERMINED IN CONNECTION WITH THE COVERAGE LAWSUIT

A. Res judicata barred Sebo from seeking the fees and costs and the house-related damages that he sought or could have sought in connection with the Coverage Lawsuit

Sebo's argument rests upon the incomprehensible premise that the same fees and costs he sought but did not recover in connection with the Coverage Lawsuit, and the fees and costs he could have sought but declined to seek in connection with the Coverage Lawsuit, transformed into "never-before litigated" "extra-contractual damages" simply because he did not recover them. *See* IB.39, 45. He contends res judicata does not apply because the nature of his bad faith case and his underlying coverage case was different. *See* IB.41-43.

But Judge Brodie correctly rejected Sebo's argument and precluded Sebo from getting a do-over. Res judicata precludes re-litigation of "matters actually raised and determined in the original proceeding" and of "matters which could have properly been raised and determined." *See Dadeland Depot Inc. v. St. Paul Fire and Marine Ins. Co.*, 945 So.2d 1216, 1235 (Fla. 2006). "The purpose of the doctrine … is to prevent relitigation of matters and to produce

certainty as to individual rights." *Schmidt v. Sabow*, 331 So.3d 781, 785-86 (Fla. 2d DCA 2021) (brackets omitted). It "prevents [a party] from attempting a second bite at the apple to correct failures in legal strategy occurring in previous litigation." *Id.* at 787.

The doctrine requires four "identit[ies]": (1) the thing sued for, (2) the cause of action, (3) the parties, and (4) the quality in the person for or against whom the claim is made. *Chavez v. Tower Hill Signature Ins. Co.*, 278 So.3d 231, 236 (Fla. 3d DCA 2019). However, Florida "courts have made it clear that *identity* does not mean *identical*"; "[w]hat is required is" only "that the elements in each case [are] 'substantially similar' to those elements in the other case." *Id.* at 237 (emphasis added) (citing *Fla. Power Corp. v. Garcia*, 780 So.2d 34, 35 (Fla. 2001) and *S. Bell Tel & Tel. Co. v. Roper*, 438 So.2d 1046 (Fla. 3d DCA 1983)).

Sebo asserts res judicata does not apply because his "bad faith claim had not … accrued at the time of the verdict in the coverage phase." IB.42. But "[t]ime and again, the courts have expressly rejected the proposition … that a claimant may avoid the res judicata prohibition by changing either the relief requested or the theory under which the claim is made." *Schmidt*, 331 So.3d at 785-86

(quoting *Pelphrey-Weigand v. Weigand*, 283 So.3d 822, 827 (Fla. 2d DCA 2019)); *cf. Sanchez v. Martin*, 416 So.2d 15, 16 (Fla. 3d DCA 1982) (in negligence action, plaintiffs' claims were barred by res judicata because the defendant previously sued the plaintiffs for the same incident; it did not matter to res judicata analysis whether plaintiffs' "claim had matured" at the time of the first suit because "[t]he dispositive issue of fault was litigated" in the first suit). In *Pelphrey*, 283 So.3d at 824, the Second District held that, where the court previously denied a motion for attorneys' fees filed in a divorce proceeding, res judicata barred a second fee motion, even though the second motion was based upon a different theory of entitlement. The court explained, the "assertion that res judicata requires that the theories of recovery in the two proceedings must be identical is simply wrong." *Id.* at 827.

Likewise, Sebo's argument that the fees and costs incurred in connection with the Coverage Lawsuit that the court had already determined were unreasonable then transformed into recoverable damages when he filed his bad faith claim is "simply wrong." Under Florida law, Sebo was permitted to pursue his reasonable fees and costs after he prevailed in the Coverage Lawsuit, *see* Fla. Stat.

§ 627.428, ***or*** as damages in his bad faith case, *see McLeod v. Continental Ins. Co.*, 591 So.2d 621, 626 (Fla. 1992) (damages in a first-party bad faith case may include "interest, court costs, and reasonable attorneys' fees incurred by the plaintiff"). *See also Brookins v. Goodson*, 640 So.2d 110, 113-14 (Fla. 4th DCA 1994), *disapproved on other grounds*, *Laforet*, 658 So.2d at 62 (possible damages available in a bad faith lawsuit include "reasonable attorneys' fees"). But not both.

Sebo elected the former—and his "interest, court costs, and reasonable attorneys' fees," *see McLeod, supra*, incurred in connection with the Coverage Lawsuit were fully litigated, determined, and awarded by Judge Brodie following the Coverage Lawsuit. In arguing that the fees and costs were not litigated, IB.42-43, Sebo omits any reference to the six-day evidentiary hearing following the Florida Supreme Court's remand, during which Judge Brodie heard extensive evidence regarding the reasonableness of his claimed fees and costs. Sebo also does not mention the $3.3 million fee judgment or the $319,631 cost judgment he declined to appeal. In fact, while Sebo complains that the court denied his ability to seek the full extent of his so-called extra-contractual damages, *see* IB.27,

39-51, the "Verified Damages Summary" he relies upon, *see* IB.48-49, reinforces that the vast majority of his claimed damages were "previously [s]ought by Sebo," *see* A.2690-93. It would contravene fundamental principles to allow Sebo to reframe those same amounts as bad faith damages and to re-litigate fees already determined to be unreasonable in order to pursue them again.[16] The court correctly disallowed it.

B. The court correctly ruled collateral estoppel barred Sebo from relitigating the fees incurred during the Coverage Lawsuit

Judge Brodie also correctly found collateral estoppel barred Sebo from relitigating the fees and costs she determined were unreasonable after the Coverage Lawsuit.

Collateral estoppel precludes "identical parties from relitigating the same issues that have already been decided." *Kaplan v. Nautilus*

[16] The court's ruling on summary judgment also precluded Sebo from seeking house-related damages that he sought, but the jury did not award, in the Coverage Lawsuit. Sebo does not specifically challenge on appeal the court's ruling in that regard, and his failure to brief the issue constitutes a waiver. *See Victorino v. State*, 23 So.3d 87 (Fla. 2009) ("failure to fully brief and argue" points in brief "constitutes a waiver"). Regardless, the same principles of res judicata and collateral estoppel apply: Sebo does not get a second attempt to prove identical damages that the Coverage Lawsuit jury already rejected.

Ins. Co., 861 Fed. App'x 798, 801 (11th Cir. 2021). The "rationale" underlying this doctrine "is that courts should not, 'absent some legal infirmity in the first trial,' give a party 'multiple bites at the same apple' after that party fully participated in a suit and had the opportunity to challenge and argue an issue.'" *Kaplan*, 861 Fed. App'x at 801 (quoting *Fridman v. Safeco Ins. Co.*, 185 So.3d 1214, 1225 (Fla. 2016)). It applies where "the parties and issues" are "identical" and "the particular matter" was "fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Dadeland Depot*, 945 So.2d at 1235 (quoting *Dep't of Health v. B.J.M.*, 656 So.2d 906 (Fla. 1995)).

As discussed above, the reasonableness of Sebo's attorneys' fees and costs and the amount of his house-related damages were fully litigated in the Coverage Lawsuit. Numerous Florida federal courts support the application of collateral estoppel under these circumstances. *See, e.g., Kaplan v. Nautilus Ins. Co.*, No. 1:17-cv-24453, 2019 WL 12265654 (S.D. Fla. Nov. 4, 2019), *aff'd* 861 Fed. App'x 798 (11th Cir. 2021); *Newman v. Am. Home Assurance Co.*, No. 22-cv-20979, 2024 WL 1209801, at *15-16 (S.D. Fla. March 20, 2024) (where plaintiffs "requested (or should have requested)" a

category of damages during their coverage proceeding, holding the plaintiffs could not pursue those same damages in their bad faith claim because "[p]laintiffs cannot use this bad faith action to recover damages that were within the scope of the [coverage] appraisal but not awarded"); *Kafie v. Northwestern Mut. Life Ins. Co.*, No. 11-21251, 2011 WL 4499051, at *8 (S.D. Fla. Sept. 27, 2011) (plaintiff "may *not* seek any contractual damages under the Policies in this bad-faith action," and "[i]n light of [the plaintiff's] earlier litigation with [the insurer], the doctrine of *res judicata* also prevents the Court from revisiting or awarding damages available to [the plaintiff] within the scope of the Policies"); *Magaldi v. Safeco. Ins. Co. of Am.*, No. 10-80280, 2010 WL 2542011, at *4 (S.D. Fla. June 22, 2010) ("Because neither party appealed from that judgment, it is final and conclusive as to any issues actually litigated and determined in that first filed proceeding.").

In *Kaplan*, 861 Fed. App'x at 799, the Eleventh Circuit affirmed the trial court's finding that insureds were collaterally estopped from seeking fees and costs in a bad faith action which they previously sought but were not awarded in a coverage action. The Eleventh Circuit rejected the insureds' arguments that they "could not bring

[their bad faith] claim until after the arbitration panel found that [the insurer] was liable under the insurance policy" and that they were "alleging an extra-contractual claim," "not relitigating their breach of contract claim"—the same arguments Sebo makes here. *Id.* at 802-03. The *Kaplan* Court found the *characterization* of the insureds' claim as extra-contractual "d[id] not change the fact" that the insureds were "asking for the exact same fees that they requested but did not recover in the Underlying Arbitration." *Id.* at 803. Thus, the court found, it "would violate the principles of collateral estoppel to allow [the insureds] to relitigate this issue simply because they recharacterized their claim as one of bad faith …." *Id.*

The Eleventh Circuit distinguished several of the cases Sebo relies upon in his brief.[17] The court explained: "[a]ll of [the insureds'] arguments addressing this issue [of collateral estoppel] start with the incorrect assumption that their claims *are* extra-contractual.

[17] *See* IB.45-46 (citing *Diagnostic Leasing, Inc. v. Assoc. Indem. Corp.*, No. 8:16-cv-958, 2017 WL 3669491 (M.D. Fla. Apr. 12, 2017); *MI Windows & Doors, LLC v. Liberty Mut. Fire Ins. Co.*, No. 8:14-cv-3139, 2018 WL 2288288 (M.D. Fla. May 18, 2018), and *Royal Marco Point I Condo. Ass'n, Inc. v. QBE Ins. Corp.*, No. 3:07-CV-16, 2010 WL 2757240 (M.D. Fla. July 13, 2010)).

Therefore, the cases they cite for support are not applicable or persuasive here because those cases *involve* extra-contractual claims." *Id.* at 802 n.2 (emphasis added).[18]

Sebo also cites *Levesque v. Gov. Emps. Ins. Co.*, No. 21-12257, 2022 WL 1423477 (11th Cir. May 5, 2022)[19] and *Milling v. Travelers Home & Marine Ins. Co.*, 311 So.3d 289 (Fla. 2d DCA 2020), but both are distinguishable. IB.51. In *Levesque*—unlike here—the plaintiffs "had no statutory right to recover their attorney's fees" in their underlying uninsured motorist coverage case; rather, they *had* to file a subsequent, bad-faith suit in which, pursuant to an exception under Florida law, "the recoverable damages include[d] attorney's fees and costs expended in the original action." *Levesque*, 2022 WL 1423477, at *3 (emphasis omitted). Similarly, in *Milling*, the plaintiff sought as damages in her bad faith case only fees she was not

[18] Sebo's attempt to distinguish *Kaplan* is unavailing. He argues there is a difference under Florida law between "contractual and statutory bad faith and liability, and contractual and bad faith damages." IB.47-48. But, again, Sebo sought the *identical* damages in his Coverage Lawsuit, so they are not properly characterized as "extra-contractual damages." *Kaplan* is directly on-point.

[19] Contrary to Sebo's assertion, *Levesque* is *not* "a published decision." *See* IB.51.

entitled to recover in her underlying UM case. *See Milling*, 311 So.3d at 293 (explaining Milling was not entitled to recover prevailing party attorney's fees in the underlying UM case).

The doctrine of collateral estoppel was never implicated in *Levesque* or *Milling* because the plaintiffs in those cases only sought fees in their bad faith claims that could not be recovered in their breach of contract cases. Conversely, Sebo sought his attorneys' fees in connection with the Coverage Lawsuit, the court awarded the fees it deemed reasonable, and Sebo did not challenge those findings on appeal; similarly, Sebo asked the jury in the Coverage Lawsuit to award him house-related damages and it awarded a portion of them. Although *reasonable* attorneys' fees may be available as a measure of damages in a bad faith action, *supra*, Sebo's Bad Faith Lawsuit did not resurrect the ability to pursue fees deemed in the Coverage Lawsuit to be *unreasonable* or claimed contractual damages Sebo sought and failed to prove the first time around.

III. THE COURT CORRECTLY DENIED A DIRECTED VERDICT ON THE ISSUE OF BAD FAITH

A. The court properly denied a directed verdict on a claim that Sebo never pled

Sebo did not plead a cause of action under Section 626.9541 or seek leave to conform the pleadings to the evidence, so his claim that the court should have directed a verdict in his favor on this statute is meritless. While a plaintiff may bring a claim for bad faith under section 624.155[20] and a separate claim for unfair claim settlement practices under section 626.9541—the statutes can also support a single cause of action for bad faith whereby the unfair practices delineated in section 626.9541 are "*part of*" the claim for bad faith claims handling. *Kearney v. Auto-Owners Ins. Co.*, No. 8:06-cv-00595, 2010 WL 1507067, at *3 (M.D. Fla. April 14, 2010), *aff'd* 422 Fed. App'x 812 (11th Cir. 2011); *see* Fla. Stat. § 624.155(1)(a) ("Any person may bring a civil action against an insurer when such person is damaged [b]y a violation of ... [s]ection 626.9541(1)(i)"). For this reason, if Sebo sought to advance two separate causes of action, it

[20] *See Urena v. Allstate Prop. & Cas. Ins. Co.*, No. 8:13-cv-911, 2015 WL 12838322, at *7 n.3 (M.D. Fla. Apr. 9, 2015) ("§ 624.155 is routinely referred to as the 'bad faith statute'").

was "vital" for him to "clearly plead his claim." *Kearney*, 2010 WL 1507067, at *3.

In *Kearney*, the plaintiff alleged a single count for bad faith and alleged "facts that, if true, would prove that [the insurer] acted in bad faith, first, by failing to pay [the plaintiff's] insurance claim" when it could and should have done so, and "second, by violating Florida Statute § 626.9541 ... in the handling of the claim." *Id.* at *1. Although the plaintiff's bad faith claim "was based partly on conduct prohibited by Florida Statute § 626.9541(1)(i)(3)," the plaintiff did not bring a separate claim for unfair claim settlement practices. *Id.* The district judge rejected the plaintiff's attempt to present two separate counts on the verdict form and approved one "that asked the jury a single question about bad faith." *Id.* It also instructed the jury to consider the six specific unfair claim settlement practices in determining whether the insurer acted in bad faith.

Following a defense verdict, the plaintiff moved for a new trial and argued that the claim for unfair claim settlement practices should have been treated as "an independent claim." *Id.* at *3. The court again rejected that argument, explaining, "an unfair claim settlement practices claim can exist independent of a bad faith

claim—and can also exist as *part* of a bad faith claim." *Id.* at *4 (emphasis added). Thus, the plaintiff in *Kearney* "*could* have brought a separate claim under Florida Statute § 624.155 for unfair claim settlement practices," but "simply did not do so." *Id.* at *3 (emphasis added). The Eleventh Circuit affirmed, finding the plaintiff "only pled one theory of liability," so the verdict form and jury instructions were appropriate. *Kearney*, 422 Fed. App'x at 817.

As in *Kearney*, Sebo's complaint alleged one count for "unfair claims practices pursuant to Fla. Stat. § 624.155." A.910. Within that count, Sebo alleged, "[t]his is an action under Florida's Civil Remedies statutes, including Fla. Stat. § 624.155(1)(a) and (b) and certain incorporated provisions of Fla. Stat. § 626.9541 set forth below." A.911. Sebo never pled an independent count for a purported violation of section 626.9541, so he was barred from moving for a directed verdict on this basis.

B. Whether AIG acted in bad faith under the totality of the circumstances was a question of fact for the jury

Even if Sebo had pled a separate statutory claim under 626.9541, it is immaterial because "[r]esolution of a statutory bad faith claim is rarely possible as a matter of law"; on the contrary,

whether an insurer's conduct "rises to the level of bad faith is ordinarily a question reserved for a jury." *See Urena*, 2015 WL 12838322, at *6 (citations and quotations omitted). For this reason, Sebo's contention that the Court should discard a verdict and replace it with a judgment in his favor is a non-starter.

Moreover, AIG's expert, Douglas Richmond, did not "admit[] that AIG violated 626.954(1)(i)(3)(h)," as Sebo claims. IB.52. Sebo relies upon the following testimony:

> Q. And that is, could an insurance company simply tell the insured, we've concluded our handling of the claim, but if there's anything else you think we should have considered, just send it along. Does that comply with the statute [section 626.9541(1)(i)(3)]?
>
> A. It may well comply with part (g). It certainly wouldn't comply with part (h).

R.105998-99.

Mr. Richmond explained the requirements under the statute, and the jury was free to accept or reject his testimony based on the totality of the circumstances in finding no bad faith. *See Advanzeon Solutions, Inc. v. State ex rel. Florida Dep't of Fin. Servs.*, 321 So.3d 911, 914-15 (Fla. 1st DCA 2021) (citing *Durousseau v. State*, 55 So.3d 543, 562 (Fla. 2010) for proposition that "[w]here expert testimony is

admitted, it is still the sole province of the jury or court as trier of facts to accept or reject such testimony, even if it is uncontroverted").

IV. THE VERDICT FORM ACCURATELY REFLECTS THE LAW

A. Sebo prepared and presented the verdict form so he cannot be heard to complain, and regardless, he is not entitled to punitive damages when the jury found he did not establish the essential elements of his cause of action

1. Sebo waived his ability to challenge the first question on the verdict form because he prepared it

Sebo proposed a verdict form that asked whether AIG "fail[ed] in good faith to timely pay [Sebo's] insurance claim, *causing injury or damage to* [*Sebo*]." R.100906 (emphasis added). At the charge conference, Sebo's counsel argued his proposed form was "the only way to set up the verdict form" to comply with Florida law. R.105554; *see also* R.105557.

After the charge conference, Sebo's counsel submitted an amended verdict form, and the initial question again incorporated causation by asking whether AIG "fail[ed] in good faith to timely pay [Sebo's] insurance claim and/or [whether it] violate[d] any of the provisions of the Unfair Claims Settlement Practices Act, *which was or were the legal cause of loss, injury, or damages to* [*Sebo*]."

R.100946 (emphasis added). Sebo's proposed form was the question ultimately given to the jury. R.100941.

Since Sebo prepared the Verdict Form, he cannot now complain his own proposed language was improper. *See Allen v. State*, 322 So.3d 589, 598 n.4 (Fla. 2021) ("unreviewable, invited error occurs when a party … proposes (i.e., requests) an instruction and therefore cannot argue against its correctness on appeal"); *Baker v. R.J. Reynolds Tobacco Co.*, 158 So.3d 732, 737 (Fla. 4th DCA 2015) ("[A] party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make.").

2. Actual damage is an essential element of Sebo's claim for bad faith, so Sebo's failure to prove damage was dispositive of his claim

i. Without damage, there is no bad faith cause of action

Even if Sebo did not waive the issue or invite it, his argument that the verdict form contained an "erroneous compound question," IB.53, is meritless.

Sebo brought his first-party statutory claim under section 624.155, which "is in derogation of the common law" and thus "must

be strictly construed." *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So.2d 1278, 1283 (Fla. 2000). It provides that "[a]ny person may bring a civil action against an insurer *when such person is damaged*" by enumerated acts of the insurer. § 625.155 (emphasis added). As the Florida Supreme Court explained in *Auto-Owners Ins. Co. v. Conquest*, 658 So.2d 928, 929 (Fla. 1995), the section "evidence[s]" the legislature's "desire that all persons be allowed to bring civil suit *when they have been damaged by* enumerated acts of the insurer." *Id.* (emphasis added).

Thus, to prove his claim, Sebo was required to show that he "[wa]s damaged." *See id.*; *see also Conquest v. Auto-Owners Ins. Co.*, 637 So.2d 40, 43 (Fla. 2d DCA 1994) (*Conquest I*) (damages are "a necessary element explicitly required by the language of section 624.155"); *Conquest v. Auto-Owners Ins. Co.*, 773 So.2d 71, 75 (Fla. 2d DCA 1998) (*Conquest II*) (same).

Moreover, in *Perera*, 35 So.3d at 903, the Florida Supreme Court established the bedrock principle that a causal connection between conduct and injury is a fundamental element of a bad faith claim. So Sebo was also required to show, as an element of his claim, that his damages were caused by AIG's alleged bad faith conduct.

Thus, Sebo was required to show not only (1) bad faith conduct, as he argues, but also (2) causation and (3) damage as elements of his cause of action under section 624.155. By asking whether AIG "fail[ed] in good faith to timely pay [Sebo's] insurance claim and/or violate[d] any of the provisions of the Florida Unfair Claims Settlement Practices Act, which was or were the legal cause of loss, injury, or damages to [Sebo]," the verdict form correctly combined the necessary elements of Sebo's claim into a single interrogatory. The jury's finding of "no" was dispositive of Sebo's claim.

ii. Nominal damages are not available in a claim under section 624.155 but, even if they were, Sebo waived entitlement to them and failed to prove his cause of action

Sebo's assertion that the jury could have awarded nominal damages is misplaced for three reasons. First, consistent with the principle that damage is an essential element of a bad faith claim, the Second District has held that "nominal damages may not be recovered in a civil claim brought pursuant to section 624.155." *Conquest II*, 773 So.2d at 75 (citing *Conquest I* and *Auto-Owners Ins. Co.*, 658 So. 2d at 928).

Second, even if nominal damages were available, Sebo never requested a jury instruction on nominal damages and never requested them during closing. Thus, even if they were available in a lawsuit brought under section 624.155, he waived entitlement to them. *See Bluth v. Blake*, 128 So.3d 242, 245 (Fla. 4th DCA 2013) ("[E]ven if nominal damages were available for a legal malpractice claim, the [plaintiffs] waived entitlement to nominal damages because they did not request a jury instruction regarding nominal damages or request nominal damages during their closing argument.").

Third, nominal damages can be awarded, if at all, only if "the underlying cause of action has been proved to the satisfaction of the jury." *Ault v. Lohr*, 538 So.2d 454 (Fla. 1989) (quoting *Lassiter v. Int'l Union of Operating Engineers*, 349 So.2d 622, 625-26 (Fla. 1976)). But Sebo's underlying claim for a violation of section 624.155 was not "proved to the satisfaction of the jury"; on the contrary, the jury rejected it. Thus, nominal damages were not available to him.

iii. Sebo failed to prove his cause of action, so the jury could not award punitive damages

Sebo next contends that even if he could not prove a causal connection between AIG's conduct and his claimed damages, the jury

could still award punitive damages. IB.54-56. This argument is also meritless. "A demand for punitive damages is not a separate and distinct cause of action; rather, it is auxiliary to, and dependent upon, the existence of an underlying claim." *R.J. Reynolds Tobacco Co. v. Spurlock*, 376 So.3d 726, 729 (Fla. 4th DCA 2023) (quoting *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So.3d 1219, 1221 (Fla. 2016)). The jury found that Sebo never proved his underlying claim.

Sebo relies upon *Ault* to argue that "punitive damages are available even where no compensatory damages have been proven." IB.56. But *Ault* is inapposite. There, the Florida Supreme Court held that "a finding of *liability* alone will support an award of punitive damages even in the absence of financial loss for which compensatory damages would be appropriate." *Ault*, 538 So.2d at 456 (emphasis added). In *Ault*, however, damage was not an essential element of the plaintiff's claims for assault and battery, so the jury could find *liability* for assault and battery without awarding compensatory damages. *See id.* at 457 (Ehrlich, C.J., concurring) ("the torts of assault and battery" "do not require proof of actual damage."). In contrast, damage *was* an element of Sebo's statutory claim. *Supra*, Part IV.A.2.i.

This case is like *Morgan Stanley & Co. Inc. v. Coleman (Parent) Holdings, Inc.*, 955 So.2d 1124, 1132 (Fla. 4th DCA 2007), *rev. denied* 973 So.2d 1120 (Fla. 2007), where the Fourth District rejected the plaintiff's reliance on *Ault* and found that a punitive damage award could not stand absent actual damages. There, the plaintiff's claim was for fraud which—like bad faith—requires actual damages as an element of the claim. As the *Morgan Stanley* Court explained in finding *Ault* inapplicable, "[a]ssault and battery torts [as in *Ault*] ... are fundamentally different from fraud" because the latter requires "actual injury or compensatory damages" to state a cause of action, while the former does not. *Id.* Because "the fraud [wa]s not actionable" without actual damages, punitive damages were unavailable. *Id.*; *see also James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So.3d 68, 76 (Fla. 4th DCA 2010) (reversing punitive damage award because tortious interference claim could not stand where there was "no legally cognizable damage ... as a result of the alleged wrongdoing"); *see also In re Chiquita Brands Int'l, Inc.*, Nos. 08-MD-01916-KAM, 13–80146–CIV–MARR, 2017 WL 5447714, at *4 n.3 (S.D. Fla. Apr. 26, 2017), *aff'd* 709 Fed. App'x 684 (11th Cir. 2017) (where damage is an essential element of the claim, "punitive

damages cannot be recovered" absent a showing of actual damage or loss and "cannot be based on nominal damages alone").

Sebo also cites *Howell-Demarest v. State Farm Mut. Auto. Ins. Co.*, 673 So.2d 526 (Fla. 4th DCA 1996) and *Scott v. Progressive Express Ins. Co.*, 932 So.2d 475 (Fla. 4th DCA 2006), IB.54-55, but those cases do not support his argument, either. In *Howell-Demarest*, 673 So.2d at 528 n.1, the insurer "paid the compensatory damages after suit was filed," and then argued that there could "be no claim for punitive damages in the absence of a claim for compensatory damages." The Fourth District rejected the insurer's argument, however, holding there was "a settlement of the compensatory damage claim, but no settlement of the punitive damage claim." *Id.* Therefore, the *Howell-Demarest* Court did not allow punitive damages to proceed in the absence of compensatory damages, as Sebo argues this Court should do. Rather, the *Howell-Demarest Court* allowed punitive damages to proceed *because* compensatory damage liability was established via settlement. *Id.*; *see also Scott*, 932 So.2d at 479 ("A settlement is the functional equivalent of a confession of judgment or a verdict in favor of the insured.") (citing *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So.2d 217,

218 (Fla. 1983)). Likewise, in *Scott*, the Fourth District relied upon *Howell-Demarest* to find that a plaintiff could bring a bad faith claim for punitive damages even though he did not "allege[] additional compensatory damages other than those which [were] already paid." *Id.* at 476.

Unlike the insurers in *Howell-Demarest* and *Scott,* the damages Sebo was claiming at trial to support their claim for punitive damages was exactly the claim that the jury rejected. AIG did not settle or argue Sebo's bad faith claim was barred simply because it paid the underlying judgment. Rather, AIG argued that because damage is a requisite element of a bad faith claim, a jury's finding of no damage meant Sebo could not state a cause of action. Nothing in *Howell-Demarest* or *Scott* supports a departure from the principle that damage is a prerequisite to a bad faith claim and that without proving a cause of action, a plaintiff cannot receive nominal or punitive damages. *See* Fla. Stat. § 624.155 (permitting bad faith claim by any person who "is damaged").

B. Sebo had no right to a separate line item on the Verdict Form for a claim under the Florida Unfair Claim Settlement Practices Act

1. Sebo's argument is a non-starter because the Verdict Form allowed the jury to find for Sebo based upon *either* a failure to act in good faith *or* a violation of section 626.9541, despite his pleading failure

Sebo is incorrect that the verdict form precluded the jury from finding for Sebo based upon a violation of the Unfair Claim Settlement Practices Act. IB.57-59. On the contrary, the court rejected AIG's requested verdict form and gave the first question presented by Sebo, which asked whether AIG "fail[ed] in good faith to timely pay Sebo's insurance claim *and/or* [whether it] violate[d] any of the provisions of the Florida Unfair Claims Settlement Practices Act" causing "loss, injury, or damages to" Sebo. R.100941 (emphasis added); *see* 100944-46. Thus—over AIG's objection—the verdict form allowed the jury to find for Sebo based upon either violation. His argument on appeal is misplaced.

2. Sebo was not entitled to an interrogatory for a violation of section 626.9541 because he failed to plead a cause of action under that subsection

As discussed above, *supra* Part III.A, Sebo pled only one count against AIG for bad faith. Because he did not plead an independent

claim under section 626.9541, the court correctly ruled the verdict form should not contain separate questions for sections 624.155 and 626.9541. It also correctly instructed the jury: "In determining whether [AIG] acted fairly and honestly towards [Sebo] and with due regard for his interests, you should consider ... whether [AIG] complied with Florida's Unfair Claims Settlement Practices Act." R.107081. Then, the court instructed, "[t]he next issue for your determination is whether [AIG] acted in bad faith towards [Sebo] by violating one or more of the provisions of the Unfair Claims Settlement Practices Act," and the court listed the provisions of the Act. R.107081-82. Sebo does not challenge these instructions on appeal.

Sebo argues that Florida "recognizes two distinct types of bad faith claims" under sections 624.155 and 626.9541, and he cites *Kearney*, *supra*, in support of his argument that he was entitled to separate questions on the verdict form. IB.57-58. Sebo quotes the *Kearney* Court's finding that "an unfair claim settlement practices claim can exist independent of a bad faith claim." IB.58. But Sebo omits the remainder of that sentence and thus fails to acknowledge what *Kearney* holds: "The fact that an unfair claim settlement

practices claim can exist independent of a bad faith claim—*and also can exist as part of a bad faith claim—made it vital that [the plaintiff] clearly plead his claim*." *Kearney*, 2010 WL 1507067 at *3 (emphasis added).

Sebo also cites *Cooper v. Federated Nat'l Ins. Co.*, 285 So.3d 1036 (Fla. 5th DCA 2019), IB.57, but that case further supports the court's approach. In *Cooper*, the plaintiffs requested the trial court to instruct the jury that "[b]ad faith on the part of an insurance company also includes violating Fla. Stat. § 626.9541 by committing any of the following acts …." *Id.* at 1038. The trial court rejected the proposed instruction and gave only the standard instruction for bad faith, which defines bad faith as "failing to settle a claim when under all the circumstances it could and should have done so had it acted fairly and honestly toward its insured and with due regard for their interests." *Id.*

The Fifth District held it was error to refuse the plaintiffs' requested instruction. It explained, "the trial court's instruction was a correct statement of the law" but "failed to encompass the pleadings and proof elicited at trial" because "the jury was not instructed that it could consider whether [the insurer] committed any act identified

in section 626.9541(1)(i)3 *in determining whether the [insurer] acted in bad faith*." *Id.* at 1038-39 (emphasis added). In so finding, the Fifth District looked to *Kearney* as "instructive." *Id.* at 1039 n.2.

But unlike *Cooper*, the jury in Sebo's case was instructed on both the standard instruction, R.107080, *and* each of the provisions of section 626.9541(1)(i)(3) that Sebo asserted were violated, R.107081-82. His only complaint is that the court should have separated those questions on the verdict form. There is no authority for that proposition. And as the *Kearney* court explained, "if [the plaintiff] also wanted to bring an independent statutory claim of unfair claim settlement practices, [he] should have done so in a separate count." *Kearney*, 2010 WL 1507067, at *3.

V. SEBO DOES NOT ARTICULATE ANY OTHER BASIS FOR REVERSAL

The court did not, as Sebo argues, "los[e] sight of the recognized policies bad faith actions are intended to further," and the verdict is not "against the weight of the evidence." IB.60-64. On the contrary, the verdict is consistent with the evidence.

The jury heard that, even before AIG denied the claim, Sebo sent 558 Notices to the Tortfeasors, blaming them entirely for the

problems in his house. R.104214, 104224-27, 104230, 104305, 100953-54. It heard that Sebo sued the Tortfeasors before suing AIG, and Sebo recovered more than $6 million from the Tortfeasors for the Tortfeasors' misconduct. R.104214, 104224-25, 104305, 100953-59, 100965-67, 101419-21, 101017-36, 104339. AIG's expert, Mr. Bell, testified it was reasonable for AIG to conclude Sebo's loss was not covered based upon uncertainties in Florida law at the time of the coverage determination. R.105340-42. The jury also heard from Mr. Usich, who detailed his investigation and conclusions; it heard from Mr. Kobza, who detailed the investigation from Sebo's representatives; and it received the claims notes and reports along with other critical documents. *Supra*, pages 6-20; *E.g.* R.104952, 104957, 104983-84, R.105043-48, 104959-61, 104983, 102518-20, 105739-42, 105769-71, 101838, 105049, 101137-40.

Contrary to his argument that AIG's "conduct should not go unpunished," IB.61, Sebo is not entitled to judgment in his favor merely because Florida law permitted him to bring a lawsuit *alleging* bad faith. At the end of the day, the jury weighed the evidence and found Sebo failed to satisfy his burden of proof. His argument that he is entitled to a do-over because he disagrees with the jury's

evaluation of the evidence undermines the foundation of the judicial system.

Sebo also argues that the verdict was "the product of the prejudicial errors identified above" in his Brief. IB.59. As discussed above, none of those issues was error.

Finally, Sebo contends, without authority, that it was reversible error for the court to "summarily" deny his motion for new trial "without comment or evaluation." IB.64. On the contrary, the trial court has "broad discretionary latitude" in ruling on a motion for new trial "because of its direct and superior vantage point of the trial proceedings." *Wilson v. The Krystal Co.*, 844 So.2d 827, 829 (Fla. 5th DCA 2003). And the court should not grant a new trial "unless no reasonable jury could have reached the verdict rendered." *Id.*; *Brown v. Estate of Stuckey*, 749 So.2d 490, 498 (Fla. 1999) ("If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion."). The court acted within its broad discretion by denying Sebo's motion for new trial.

VI. SEBO WAIVED ANY CHALLENGE TO THE JURORS AND, REGARDLESS, WAS NOT ENTITLED TO JUROR INTERVIEWS

A. Sebo did not preserve the issue

Sebo failed in two critical respects to preserve any challenge to the denial of his motion to interview two jurors. First, while he references the jurors in his Statement of Facts, he does not present any argument in his Brief. It is fundamental that "[c]laims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived." *Hammond v. State*, 34 So.3d 58, 59 (Fla. 4th DCA 2010); *see also Duest v. Dugger*, 555 So.2d 849, 851-52 ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues."); *Stanton v. Florida Dep't of Health*, 129 So.3d 1083, 1085 (Fla. 1st DCA 2013) (same). "[I]solated, perfunctory references, vague comments, and conclusory statements" are insufficient. *Whited v. Fla. Commission on Offender Rev.*, 296 So.3d 557, 561 (Fla. 2d DCA 2020) (collecting cases).

Sebo also waived this issue in the trial court. Sebo discovered that Mr. Tye had an insurance license on the sixth day of trial but, rather than ask for a mistrial, to excuse Mr. Tye, or for any other relief, he explained he "just wanted everyone to be on notice" and proceeded with his case. R.105703. That constituted a waiver because Sebo did not request any relief, state a legal ground for objecting, or obtain a ruling from the court. *See Aills v. Boemi*, 29 So.3d 1105, 1108-09 (Fla. 2010) (to preserve issue for appellate review, party must make a "timely, contemporaneous objection" that is "sufficiently specific to inform the court of the perceived error" and must "state a legal ground for that objection"); *Carratelli v. State*, 832 So.2d 850 (Fla. 4th DCA 2002) (counsel's statement that he "would" challenge a juror "if you granted me more peremptories" was "neither a motion nor a request for additional peremptory challenges," and even if it was, he "did not preserve the issue for appellate review because [he] failed to pursue the motion and obtain a ruling on it").

Similarly, the assertion that Sebo would have challenged Ms. Murray for cause is a non-starter considering that she candidly admitted that she would lean in favor of insurers due to her husband's insurance business, yet Sebo chose not to challenge her

for-cause. R.103521-22. Sebo should not be heard to complain now about information he knew but disregarded during trial merely because he is disappointed with the outcome.

B. Sebo was not entitled to juror interviews

Although Sebo waived the issue and the Court need not evaluate it, Sebo's argument fails on its merits, too.[21]

To be entitled to a jury interview, the movant must demonstrate (1) the juror concealed information during questioning; (2) the concealed information was relevant and material to jury service in the case; and (3) the failure to disclose the information was not attributable to the complaining party's lack of diligence. *De La Rosa v. Zequeira*, 659 So.2d 239, 241 (Fla. 1995); *Children's Med. Ctr., P.A. v. Kim*, 221 So.3d 664, 668-69 (Fla. 4th DCA 2017).

Sebo failed on all accounts. Ms. Murray candidly disclosed—and did not "conceal"—her experience in the insurance industry, and Sebo did not establish that Mr. Tye concealed any information. *See*

[21] "Post-trial juror interviews should be rarely granted," and both "the jury process" and "the privacy rights of the jurors themselves should be closely guarded and protected." *Rodgers v. After School Programs, Inc.*, 78 So.3d 42, 44-45 (Fla. 4th DCA 2012).

R.105702-03 (AIG's counsel did not know or remember "whether Mr. Tye raised his hand or not" when jurors were asked in voir dire whether they had experience in the insurance industry); *cf. Travelers Home and Marine Ins. Co. v. Gallo*, 246 So.3d 560, 563 (Fla. 5th DCA 2018) (if a party claims a peremptory strike challenged as race-based was premised upon the juror's nonverbal behavior, that behavior must have also been observed by the court or opposing counsel, or supported by the record).

Second, Sebo did not establish that the fact that these jurors had insurance licenses was material to the case. *See Egitto v. Wittman*, 980 So.2d 1238, 1240 (Fla. 4th DCA 2008) (information is material if it is "substantial and important so that if the facts were known, [the party] may have been influenced to peremptorily challenge the juror from the jury"). Regardless, Sebo agreed to proceed even after he learned Mr. Tye allegedly had a license, and he accepted Ms. Murray as a juror despite knowing about her experience in the insurance industry and her candid acknowledgment that she might favor AIG. *See id.* (juror interview not warranted where "[t]he [movants'] counsel was given the opportunity to, and did, question [the juror] about [prior litigation during voir dire]" so he was "made

aware of [the juror's] attitudes toward the judicial system"). Sebo's counsel's speculative, conclusory statements about what further questioning may have revealed were not enough. *See Simon v. Maldonado*, 65 So.3d 8, 11 (Fla. 3d DCA 2011) (motion for juror interview cannot be "bottomed on mere conclusory statements based on speculation and surmise that, if interrogated, the jurors might have something to say that would be material to whether or not the court should award a new trial" (quoting *Albertsons, Inc. v. Johnson*, 442 So.2d 371, 372 (Fla. 2d DCA 1983)).

Last, Sebo did not show that the nondisclosure of Mr. Tye and Ms. Murray's licenses was not attributable to his lack of diligence. Counsel never asked the jurors if they held insurance licenses. *See Rodgers*, 78 So.3d at 45-46 (noting that where questioning of jurors "was imprecise and not designed to elicit the type of information that was supposedly concealed," motion did not demonstrate diligence). Thus, even if Sebo had preserved the issue, he cannot demonstrate the court abused its discretion by denying his motion.

CONCLUSION

AIG respectfully requests the Court to affirm the final judgment in its favor.

CROSS-APPELLANT'S INITIAL BRIEF

JURISDICTIONAL STATEMENT

This is a cross-appeal of a final judgment following a jury trial. The Court has jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.110(g).

STATEMENT OF PRESERVATION

Whether AIG is entitled to judgment as a matter of law on Sebo's claim for precautionary repairs was raised in AIG's motion for summary judgment, A.2610-30, motion to clarify or reconsider the court's ruling, R.88346-64, renewed motion for partial summary judgment, R.89185, and motion for directed verdict, R.106863, 106869-70. The court ruled on this issue in its order granting Sebo reconsideration, R.88479-83, order denying AIG's motion to clarify or reconsider, R.90374, and at trial, R.105485.

Whether AIG is entitled to judgment as a matter of law on Sebo's claims for attorneys' fees to sue the Tortfeasors and interest on debt was raised in AIG's motion for summary judgment, A.2610-30, and motions for directed verdict, R.106870-77. The court ruled on this issue in its order on summary judgment, A.6473-76, and at trial, R.105485.

Whether AIG is entitled to judgment as a matter of law on Sebo's claim for punitive damages was raised in AIG's motion for summary judgment on punitive damages, A.2631-63, and motions for directed verdict, R.106877-85. The court ruled on this issue in its order denying summary judgment, A.6473, and at trial, R.105485.

STANDARD OF REVIEW

This Court reviews *de novo* the denial of a motion for summary judgment and the denial of a motion for directed verdict. *Pickell v. Lennar Homes, LLC*, 372 So.3d 1279 (Fla. 6th DCA 2023) (summary judgment); *Hannah v. Malk Holdings, LLC*, 368 So.3d 1087 (Fla. 6th DCA 2023) (directed verdict).

SUMMARY OF THE ARGUMENT

If this Court affirms, it need not reach the Cross-Appeal. If, however, the Court reverses on Sebo's main appeal, the Court should find AIG is entitled to judgment as a matter of law on Sebo's claims for precautionary repairs; attorneys' fees; interest on debt; and punitive damages.

First, res judicata, collateral estoppel, and judicial estoppel barred Sebo from seeking as damages the amounts that were fully and finally determined in the underlying Coverage Lawsuit.

Moreover, Sebo was barred from seeking precautionary repairs because he could not prove AIG caused those damages. The court initially—and correctly—ruled Sebo could not seek the precautionary repairs the jury awarded in the Coverage Lawsuit. Its later retraction from that ruling was error.

Second, the court erred by allowing the jury to consider Sebo's attorneys' fees incurred in connection with suing the Tortfeasors. Sebo could not prove causation because there was no evidence that anything AIG did caused him to pursue the Tortfeasors. Sebo sued the Tortfeasors for *their* misconduct, not because of AIG. Additionally, as a matter of law, the fees were not a cognizable damage because Sebo recovered from the Tortfeasors more than he spent to sue them. Thus, even if AIG's conduct *had* caused Sebo to sue the Tortfeasors, Sebo was not damaged.

Third, the court erred by allowing Sebo to pursue interest on debt. Sebo could have paid his attorneys' fees without taking out a loan, and he did not present any evidence establishing that anything AIG did caused him to open a credit line; on the contrary, the loan *predated* AIG's alleged bad faith conduct.

Finally, the court erred by submitting Sebo's punitive damage claim to the jury. There was no evidence—much less clear and convincing evidence—to support the requisite findings that (1) AIG's conduct went beyond bad faith and was willful, wanton, malicious, or reckless; and (2) that AIG engaged in a general business practice of mishandling claims.

ARGUMENT ON CROSS APPEAL

I. RES JUDICATA AND COLLATERAL ESTOPPEL BARRED RE-LITIGATION OF THE PRECAUTIONARY REPAIRS

The court initially correctly applied collateral estoppel and res judicata to preclude Sebo from seeking $1.68 million in precautionary repairs that he pursued in the Coverage Lawsuit. R.87627-30, A.5864-87, 6473-76. But Sebo obtained reconsideration by relying on third-party bad faith cases[22] and arguing that the precautionary repair award from the Coverage Lawsuit constituted an excess judgment that he was entitled to

[22] Sebo's reliance upon third-party insurance cases to obtain reconsideration was misplaced because his was a *first-party* case, and the measures of bad faith damages in third-party and first-party cases are fundamentally different. *McLeod v. Cont. Ins. Co.*, 573 So.2d 864 (Fla. 2d DCA 1991) ("Fundamental differences between third- and first-party bad faith actions render damages that are appropriate for one inappropriate for the other.").

pursue as bad faith damages. *See* R.88216, 88482-83. This was incorrect as a matter of law, and the court's ruling allowing Sebo to seek precautionary repairs for a second time, reframed as bad faith damages, constitutes reversible error.

In a first-party insurance case like Sebo's, the available damages are split into two phases: first, the "value of the insured's claim, as determined by the underlying tort verdict, up to the insured's policy limits," and second, in the bad faith action, "those damages proximately caused by the insurer's bad faith." *See McLeod*, 573 So.2d at 864; *see also Citizens Prop. Ins. Corp. v. Manor House, LLC*, 313 So.3d 579, 582 (Fla. 2021) (citing *Talat*, 753 So.2d at 1283). Sebo's claim for precautionary repairs fit squarely within the former category; indeed, Sebo sought his precautionary repairs as an element of damages that, he asserted in the Coverage Lawsuit, were covered by the contract. The Coverage Lawsuit jury accepted his argument and awarded him some of his claimed precautionary repairs ($1.68 million). Following the coverage trial, Sebo obtained a judgment for and recovered his policy limits of $6.6 million.

Although Sebo did not *recover* the precautionary repairs awarded by the Coverage Lawsuit jury because the repairs exceeded

his policy limit, he was not entitled to pursue that same measure of damages again in the bad faith lawsuit. First, the precautionary repairs did not "constitute damages proximately caused by [AIG's] bad faith." *McLeod*, 573 So.2d at 867. Stated differently, there was no evidence the precautionary repairs were *caused* by AIG not settling Sebo's claim sooner; on the contrary, they were merely the result of Sebo incurring costs beyond his policy limits.

Second, as discussed above, *supra* Part II and incorporated herein, collateral estoppel and res judicata barred Sebo from re-litigating damages that he pursued in his Coverage Lawsuit. *See Kaplan*, 861 Fed. App'x at 803 ("It would violate the principles of collateral estoppel to allow [the insureds] to relitigate this issue simply because they recharacterized their claim as one of bad faith rather than breach of contract.").

Finally, judicial estoppel barred Sebo from re-litigating precautionary repairs as consequential damages—i.e., bad faith damages *not* covered by the contract—when, in the Coverage Lawsuit, he asserted they *were* covered by his policy. *Cf. Aery v. Wallace Lincoln-Mercury, LLC*, 118 So.3d 904 (Fla. 4th DCA 2013) ("The purpose of judicial estoppel is to preserve the integrity of the

judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."); *Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061 (Fla. 2001) ("The courthouse should not be viewed as an all-you-can-sue buffet, in which litigants can pick and choose which verdicts they want and which they do not."). The court erred by allowing Sebo to pursue these damages that were fully and finally adjudicated. If this Court reaches the issue, it should direct the trial court to enter judgment for AIG on this element of Sebo's damages.

II. THE TRIAL COURT ERRED BY SUBMITTING TO THE JURY SEBO'S CLAIMS FOR ATTORNEYS' FEES INCURRED SUING THE TORTFEASORS AND FOR INTEREST ON DEBT

"[T]he existence of a causal connection" was a "prerequisite" to Sebo's recovery of damages; "in other words, the claimed damages must [have] be[en] caused by the bad faith." *Perera*, 35 So.3d at 901; *see* § 624.155(6) (allowing damages that were "a reasonably foreseeable result of" an enumerated violation). Because the evidence established that AIG did not cause Sebo to incur fees or interest on debt as damages, the trial court erred by submitting those claims to the jury.

A. The court erred by allowing Sebo to pursue attorneys' fees incurred to sue the Tortfeasors

Sebo's claim for fees was a camouflaged claim for damages under the "wrongful act" doctrine, which provides that "attorneys' fees incurred in litigation with a third party may be a recoverable element of damage in a civil action if that litigation was caused by the defendant's wrongful act." *Arling v. State*, 559 So.2d 1274, 1275 (Fla. 2d DCA 1990). But Sebo failed to properly plead such special damages and thus should not have been allowed to pursue them as a matter of law. *See Cinco v. Coquina Palms Homeowners Assoc., Inc.*, 325 So.3d 137, 139 (Fla. 5th DCA 2020) (plaintiff "did not specifically plead the wrongful act doctrine" so could "[]not recover on this basis"); *see also Robbins v. McGrath*, 955 So. 2d 633, 634 (Fla. 1st DCA 2007) (reversing fee award under the wrongful act doctrine because appellees "never pled entitlement to attorney's fees" under that doctrine).

Moreover, whether analyzed under the wrongful act doctrine or insurance bad faith cases, *see Perera*, as a matter of law, Sebo could only pursue damages that were *caused* by AIG's alleged bad faith. *See Perera*, 35 So.3d at 901 ("the claimed damages must be caused

by the bad faith"); *Laforet*, 658 So.2d at 60 (damages must be "the natural, proximate, probable, or direct consequence of the insurer's bad faith"). But there was no evidence that AIG's purported bad faith conduct *caused* Sebo to sue the Tortfeasors.

Sebo began pursuing the Tortfeasors—and blamed them entirely for the damages to his house—before AIG denied his insurance claim. Before Sebo even *submitted* a claim, on December 29, 2005, Mr. Hissong wrote an email indicating that Sebo would be "suing everybody and anybody who could have insurance to try to get Sebo's money back." R.101151. Sebo then submitted his claim to AIG on December 30, 2005, R.105937, and, after a January 6, 2006 investigation by AIG, Sebo's agent wrote regarding the likely outcome of the claim: "[t]he obvious we all know; all preexisting damage will not be covered and there is considerable preexisting damage." R.105939-40, R.101212.

Sebo sent 558 Notices to the Tortfeasors in February 2006, before AIG made a determination on the claim. And he sued the Tortfeasors in January 2007—more than a year before AIG's second denial. He did not sue AIG until nearly three years after he filed the Construction Defect Lawsuit, in November 2009. R.104253-54,

106338-39, 101068-122. During that time before he sued AIG, he claimed in the Construction Defect Lawsuit that "the hurricane had absolutely nothing to do with the problems" in his house, and he blamed the Tortfeasors and construction defects entirely. R.106363.

As a matter of both logic and law, Sebo could not—and did not—show that AIG's purported conduct, which post-dated the conduct giving rise to the Construction Defect Lawsuit, caused him to sue the Tortfeasors. Therefore, the trial court erred by submitting this claim to the jury.

The court further erred because Sebo did not suffer any legally cognizable damage from suing the Tortfeasors. He sought approximately $3 million in fees and costs from AIG in this case. *See* R.100942 (verdict form instructing jury to award "not more than" $2,661,661.43); SA.61-64. But Sebo recovered more than $6 million in settlements only *because* he sued the Tortfeasors. If Sebo had never sued the Tortfeasors, he never would have recovered that $6.1 million. For this reason, as well, the trial court erred by denying AIG's motion for summary judgment and allowing the jury to consider Sebo's attorneys' fees as an element of bad faith damages against AIG. *Cf. Levin v. Lang*, 994 So.2d 445, 446 (Fla. 3d DCA

2008) (where sellers of property sought damages incurred during the period that a lis pendens was filed against a property, and "[t]he parties stipulated that the fair market value of the property had *appreciated* considerably" during that period, "there were no recoverable damages attributable to filing the lis pendens"); *FCD Development, LLC v. S. Fla. Sports Committee, Inc.*, 37 So.3d 905, 910 (Fla. 4th DCA 2010) (same). If the Court reaches the issue, it should direct the trial court to enter judgment for AIG on this claim.

B. The trial court erred by allowing Sebo to pursue interest on debt

Sebo also sought interest he claimed to have incurred on a loan he purportedly took out to pay his attorneys' fees. But Sebo could not establish AIG caused Sebo to incur that interest.

First, Sebo sought interest measured by the rate applicable to a credit line from Fifth Third Bank, but Sebo admitted that he opened the Fifth Third Bank loan in June 2005—shortly after he closed on the house, before Hurricane Wilma made landfall, before he submitted his claim to AIG, and before he sued either the Tortfeasors or AIG. R.106371-72. It defies logic to suggest that AIG's alleged bad

faith conduct caused Sebo to incur interest on a loan that predated AIG's alleged misconduct.

Second, Mr. Hissong admitted that Sebo did not have to borrow to pay his attorneys' fees; he could have liquidated existing assets to do so. R.105902-04, 105913. Opening a credit line was the best financial decision for Sebo because he could borrow "at a relatively low cost," thus allowing his shares to continue appreciating and earning Sebo *more* money. R.105902-04, 105913-14, 106369-70, 107146-47. As Mr. Hissong testified during trial, "I don't apologize for that." R.105913. Therefore, the evidence did not show that AIG's conduct caused Sebo to open a credit line; on the contrary, the evidence showed the loan was a deliberate business decision undertaken to advance Sebo's best interests.

Finally, Sebo failed to adduce evidence that he actually used the Fifth Third Bank loan to pay his attorneys' fees and costs. Mr. Hissong testified that Sebo deposited the money drawn from Fifth Third Bank into a different bank account—the "Key Bank account," R.105868—and then he paid the fees and costs out of "the Key Bank account." R.105867, 105870. But Mr. Hissong admitted that the money in the Key Bank account was "commingled"—there was money

in that account from other sources, and money that was used to pay for other expenses. R.105868-69.

Thus, because there was no basis to support a conclusion that AIG *caused* Sebo to incur the interest on debt that he claimed, Sebo should not have been permitted to pursue it as an element of his damages. If this Court reaches the issue, it should hold, on remand, Sebo is precluded from seeking interest on debt as a category of damages.

III. THERE WAS NO EVIDENCE TO SUPPORT SEBO'S CLAIM FOR PUNITIVE DAMAGES

Punitive damages are not available under section 624.155 unless the plaintiff establishes by clear and convincing evidence[23] that the insurer's acts were "willful, wanton, and malicious" or "[i]n reckless disregard for the rights of any insured," and that the acts "occur with such frequency as to indicate a general business practice." Fla. Stat. § 624.155(5). Sebo failed to present evidence on

[23] Clear and convincing means that "[t]he evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Merritt v. OLMHP, LLC*, 112 So.3d 559, 561 (Fla. 2d DCA 2013).

either of those elements sufficient to submit the question of punitive damages to the jury.

A. There was no evidence that AIG's conduct was willful, wanton, and malicious, or reckless

In the context of punitive damages," Florida courts have used the terms "reckless" and "willful or wanton" "interchangeably." *Williams v. City of Minneola*, 619 So.2d 983, 986 (Fla. 5th DCA 1993). To demonstrate either, the plaintiff must show not only a lack of good faith in handling his claim but "a degree of outrageous or egregious conduct." *Dunn v. Nat'l Sec. Fire and Cas. Co.*, 631 So.2d 1103, 1109 (Fla. 5th DCA 1993), *receded from on other grounds*, *Boozer v. Stalley*, 146 So.3d 139 (Fla. 5th DCA 2014).

Sebo's evidence did not even begin to approach that exacting standard. AIG acknowledged receipt of Sebo's claim the same day he submitted it. R.105937. Mr. Usich contacted Sebo just three days later. R.104952, 105937-38. And Mr. Usich inspected the house for the first time within one week after the claim was submitted. R.104957, 105938, 105726-28. Sebo's expert Mr. Heinze agreed that this timeline satisfied generally accepted customs and practices. R.106613-14. And numerous AIG employees and former

employees—including those who handled the claim—testified that they believed Sebo's claim was handled in good faith.

After receiving and reviewing reports from AIG's own experts and Sebo's experts, who worked collaboratively and reached the same general conclusions, R.104983-84, 104217, 105732-33, 105741-42, 105045, 105739, 102307-09, AIG partially denied Sebo's claim about three-and-a-half months after he submitted it. R.101137. Sebo never disputed that at least some of his loss was caused by construction defects; on the contrary, during the Construction Defect Lawsuit, he disavowed that the Hurricane Wilma caused him *any* damage, and he testified, "[t]he hurricane had absolutely nothing to do with the problems that" he had in the house. R.106363.

The crux of Sebo's bad faith case was that AIG applied the wrong causation doctrine. *See, e.g.*, R.107097-98, 107100, 107106 (Sebo's closing, arguing, *inter alia*, that AIG made misrepresentations by not "discuss[ing]" the causation doctrine; that AIG's "manuals contain[ed] the improper causation standard day after day, year after year"; that "AIG had the choice to pay [Sebo] every day after the claim was made and at any point in time in the continuum even after the Florida Supreme Court said AIG was wrong"). However, AIG's expert

Mr. Bell testified that, when AIG evaluated Sebo's claim, Florida law recognized both the efficient proximate cause doctrine and the concurrent causation doctrine. R.105349; *see also* 106282. Mr. Bell explained that the weight of legal authority was "unsettled," and there was an "inherent conflict" regarding the applicable causation doctrine. R.105341-43. Indeed, when AIG appealed the final judgment in the Coverage Lawsuit, a three-judge panel of the Second District Court of Appeal unanimously held that the efficient proximate cause doctrine governed. *See* R.106275.

Although Sebo's expert, Michael Higer, believed that a Third District Court of Appeal case, *Wallach* (which the Florida Supreme Court ultimately agreed with), was controlling, he admitted that the Florida Supreme Court had never weighed in on the appropriate causation rule until it accepted conflict jurisdiction in Sebo's coverage case. R.106285-86, 106287-88. As AIG later argued in support of its motion for directed verdict, "if learned judges could disagree as to whether or not something was covered under the state of the law in Florida, … this evidence does not support a clear and convincing basis to reach a jury on whether or not the conduct here was willful, wanton, malicious," or "reckless." R.105473.

Stated simply, reaching the wrong conclusion alone is not a basis for punitive damages; it is not even sufficient to support a bad faith claim. *See Vest v. Travelers Ins. Co.*, 753 So.2d 1270, 1275 (Fla. 2000) ("Even when it is later determined by a court or arbitration that the insurer's denial was mistaken, there is no cause of action if the denial was in good faith."); *see also McLeod*, 573 So.2d at 867 ("insurance companies can be incorrect without acting in bad faith"). There was no evidence that AIG intentionally applied the incorrect causation doctrine, undertook to underpay Sebo's claim regardless of what was owed to him, sought to harm him, or otherwise acted recklessly or willfully, wantonly, and maliciously. *Cf. Progressive Select Ins. Co. v. Ober*, 353 So.3d 1190, 1193 (Fla. 4th DCA 2023) (reversing order granting leave to *assert a claim* for punitive damages where there was "no proof" the insurer's acts were reckless or willful, wanton, and malicious, and where "the insurer's position was that Florida law permitted" its conduct).

The trial court erred by submitting this claim to the jury. If this Court reaches the issue, it should hold that AIG is entitled to judgment as a matter of law on Sebo's claim for punitive damages.

B. There was no evidence that AIG engaged in a general business practice of the alleged acts giving rise to Sebo's claim

To prove a "general business practice" under section 624.155(5), the plaintiff must show that the "acts giving rise to the violation" occurred with sufficient "frequency." Fla. Stat. § 624.155(5). While Florida case law on the meaning of "general business practice" is sparse, the Fourth District in *Howell-Demarest*, 673 So.2d at 529 made clear that a "general business practice" requires evidence that the insurer has engaged in the alleged acts "far more frequently" than three times. *See also Chicken Kitchen USA, LLC v. Maiden Specialty Ins. Co.*, No. 14-23282, 2016 WL 3982493 (S.D. Fla. July 22, 2016) ("[i]f the observation that an insurer denied or reduced three claims was enough for an insured to assert punitive damages, then virtually *every* single case could proceed with a punitive damages claim" (emphasis in original)); *Fox Haven of Foxfire Condo. IV Ass'n v. Nationwide Mut. Fire Ins. Co.*, No 2:13-cv-399, 2015 WL 667935, at *6 (M.D. Fla. 2015) ("Typically, a plaintiff establishes a general business practice by demonstrating that the insurer also acted in bad faith when evaluating numerous other claims."); *Shannon R. Ginn Const. Co. v. Reliance Ins. Co.,* 51 F. Supp.2d 1347,

1353-1354 (S.D. Fla. 1999) ("Florida law does not define the phrase 'general business practice.' Nonetheless, it seems clear that 'general business practice' means more than acting in the proscribed manner in plaintiff's own claim."); *Ticor Title Ins. Co. v. Univ. Creek, Inc.,* 767 F. Supp. 1127, 1138 (M.D. Fla. 1991) (no justiciable controversy where claimant alleged only that insurer "failed to act promptly with regard to its own claim").

There was no evidence to show such frequency in this case. AIG's current and former employees uniformly testified that, contrary to Sebo's theory, AIG's business model required them to look for ways to *pay* claims. Mr. Usich explained that claim denials were "very rare." R.105029. Mr. Jones testified that underpaying on a claim was "[a]bsolutely not" a way to improve metrics and rather, was a "good way to underperform" and "get yourself fired." R.104725. Ms. Spinella testified that AIG adjusters "should and … do" look for coverage wherever possible. R.103922; *see also supra.* pp. 31-33 (collecting testimony from AIG employees regarding business practices).

While Sebo argued that AIG "created metrics" which "create[d] a danger . . . that claim payments" would be manipulated, IB.19

(quotations omitted), the evidence conclusively refuted his contention: Mr. Usich testified that he was "[n]ever" incentivized to cut corners while investigating claims, R.105031-32; Mr. Flaherty testified that AIG did not encourage adjusters to pay less than what was owed or to close a claim without adequately investigating, R.104714; Mr. Taylor testified that AIG did not encourage underpayments or inadequate investigations, R.106717; and Mr. Piotrowski testified that utilizing metrics in the way Sebo alleged—i.e., as a way to cut corners or incentivize underpayments—"would have been disastrous" to AIG's "reputation" and growth. R.106800-06. Reinforcing this testimony was evidence regarding AIG's client retention, which was "excellent": over ninety percent of AIG's customers renewed their policies every year. R.106780. Moreover, Sebo presented no reliable, competing testimony to support his allegations: his expert, Mr. Heinze, "did not review *any* … claim files" other that Sebo's, so he could not reliably opine on AIG's general business practices handling other claims. R.106684 (emphasis added).

Sebo failed to meet his burden. There was no evidence—much less clear and convincing evidence—to support a claim for punitive

damages. The trial court erred by denying AIG's motion for summary judgment and motions for directed verdict on Sebo's claim for these damages.

CONCLUSION

AIG respectfully requests the Court to affirm the judgment in its favor. If the Court reverses on Sebo's main appeal, AIG requests the Court to find that AIG is entitled to judgment as a matter of law on Sebo's claims for precautionary repairs, attorneys' fees, interest on debt, and punitive damages.

Respectfully submitted,

/s/ Jack R. Reiter
Jack R. Reiter, Esq.
Florida Bar No.: 0028304
jack.reiter@gray-robinson.com
Sydney Feldman D'Angelo, Esq.
Florida Bar No.: 1017798
Sydney.feldman@gray-robinson.com
GrayRobinson, P.A.
333 SE Second Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887

Counsel for Appellee/Cross-Appellant, American Home Assurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and Cross-Initial Brief has been filed and served electronically this 30th day of May, 2024 upon:

Mark A Boyle, Esq.
Molly Chafe Brockmeyer, Esq.
Boyle Leonard & Anderson P.A.
9111 W. College Pointe Dr.
Fort Myers, FL 339191
Telephone: (239) 337-1303
mboyle@insurance-counsel.com
mbrockmeyer@insurance-counsel.com

Counsel for Appellant

R. Hugh Lumpkin, Esq.
Matthew Weaver, Esq.
Christopher Kuleba, Esq.
Jessica Gopiao, Esq.
Reed Smith LLP
200 S. Biscayne Blvd.
Suite 2600
Miami, FL 33131
Telephone: (786)-747-0200
hlumpkin@reedsmith.com
mweaver@reedsmith.com
ckuleba@reedsmith.com
jgopiao@reedsmith.com

Counsel for Appellant

James C. Martin, Esq.
Admitted Pro Hac Vice
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 288-3131
jcmartin@reedsmith.com

Co-Counsel for Appellant

Laura Besvinick, Esq.
Julie Nevins, Esq.
Clyde & Co US LLP
1221 Brickell AvenueSuite 1600
Miami, FL 33131
Telephone: (305) 446-2646
laura.besvinick@clydeco.us
julie.nevins@clydeco.us

Co-Counsel for Appellee

Jason Korn, Esq.
Joshua Hajek, Esq.
Dentons Cohen & Grigsby, P.C.
9110 Strada Place
Mercato- Suite 6200
Naples, FL 34108
Telephone: (239) 390-1900
Jason.korn@dentons.com
Joshua.hajek@dentons.com

Co-Counsel for Appellee

Monica Thompson, Esq.
Admitted Pro Hac Vice
Dentons US LLP
2398 E. Camelback Road
Suite 850
Phoenix, AZ 85015
Telephone: (602) 508-3900
monica.thompson@dentons.com

Co-Counsel for Appellee

M. Keith Moskowitz, Esq.
Admitted Pro Hac Vice
Dentons US, LLP
233 S. Wacker Drive
Suite 5900
Chicago, IL 60606
Telephone: (312) 876-8220
Keith.moskowitz@dentonts.com

Co-Counsel for Appellee

/s/ Jack R. Reiter

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, to which this Certificate is attached, complies with the applicable font and word count requirements of Florida Rule of Appellate Procedure 9.045 and 9.210(a)(2)(B). It is formatted in Bookman Old Style 14-point and contains [21,904] words.

/s/ Jack R. Reiter