DOCKET NO. 13-11416-DD

United States Court of Appeals

for the

Eleventh Circuit

MIAMI YACHT CHARTERS, LLC,
and ALBERTO LAMADRID,

Appellants,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH PENNSYLVANIA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
IN CIVIL DOCKET FOR CASE #: 1:11-cv-21163-JG
(Hon. Jonathan Goodman)(Consent Case)

OPENING BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

The Appellants submit this list, which includes the trial judge, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review:

1. American International Group, Inc. (NYSE: AIG).
2. Caine, Daniel B., Esq., Counsel for Plaintiffs
3. Chartis, Inc.
4. Daniel, W. Aaron, Esq., Counsel for Appellants
5. Goldman, Michael I., Esq., Counsel for Defendant
6. Goldman, Steve E., Esq., Counsel for Defendant
7. Goldman & Hellman, Counsel for Defendant
8. Goodman, Judge Jonathan, United States Magistrate Judge
9. Kula, Elliot B., Esq., Counsel for Appellants
10. Kula & Samson, LLP, Counsel for Appellants
11. LaMadrid, Alberto, Plaintiff/Appellant
12. Miami Yacht Charters, LLC, Plaintiff /Appellant
13. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Defendant /Appellee
14. Samson, Daniel M., Esq., Counsel for Appellants

15. Stabinski, Todd J., Esq., Counsel for Plaintiffs

16. Stabinski & Funt, P.A., Counsel for Plaintiffs.

Pursuant to Federal Rule of Appellate Procedures 26.1 and Eleventh Circuit Rules 26.101 through 26.1-3, Appellants, Miami Yacht Charters, LLC and Alberto LaMadrid make the following statement as to corporate ownership:

Miami Yacht Charters, LLC is a privately held company, and is not a subsidiary of any other entity.

Alberto LaMadrid is an individual.

Pursuant to information provided by counsel for Defendant/Appellee, Defendant/Appellee National Union Fire Insurance Co. is a privately held subsidiary of Chartis, Inc., which is a privately held subsidiary of American International Group, Inc., which is a publically traded company on the New York Stock Exchange under ticker symbol “AIG”.

STATEMENT REGARDING ORAL ARGUMENT

Miami Yacht Charters, LLC, and Alberto LaMadrid (collectively, "LaMadrid") are appealing a summary judgment entered in favor of the insurer in a marine insurance claim on an all-risks policy. The operative facts are entirely undisputed: (i) the engine on LaMadrid's vessel failed 750 hours into its 2500-3500-hour expected lifespan resulting in the claimed loss; and (ii) neither party's expert could determine the ultimate cause of the engine failure. The Magistrate, who heard this case by consent of the parties, ruled as a matter of law that, because neither party's expert could determine the ultimate cause of the loss, LaMadrid had failed to prove "fortuity." (DE:175:2–3). The Magistrate reasoned that where there is a vessel to inspect (*i.e.*, where the vessel has not sunk), an insured must point to some evidence of the "fortuitous event" responsible for the loss, and proof that the loss is unexplainable is not evidence of a "fortuitous event." *Id*. at 14–16.

This appeal thus presents a pure question of law: does a plaintiff in a marine insurance dispute arising out of an all-risk policy meet his burden to establish fortuity through a showing that the ultimate cause of the loss cannot be explained and was unexpected? The Magistrate struggled with this question, first ruling that fortuity could be established by a showing that the cause of the loss cannot be explained and was unexpected, then ruling the other way upon the insurer's Rule 59(e) motion, and then re-enforcing that ruling on the insured's Rule 59(e) motion.

Appellant respectfully suggests that oral argument would be of assistance to the Court in resolving this pure question of insurance law.

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STATEMENT OF JURISDICTION

The district court properly exercised subject-matter jurisdiction over this case under 28 U.S.C. § 1332 (2011), because the parties are diverse and the amount in controversy exceeds the jurisdictional threshold. And the case was properly before the Magistrate judge for all purposes by the parties' consent. *See* DE:6-1; DE:6-2.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 (2012), because this appeal arises from a final judgment of the district court. (DE:151; DE:153; DE:175).

STATEMENT OF THE ISSUE

Whether an insured, under an all-risk marine insurance policy, meets its burden to establish a fortuitous loss by establishing that the cause of the loss is both unexplainable and unexpected.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS.

A. The Complaint.

On February 2, 2011, Alberto LaMadrid and Miami Yacht Charters, L.L.C (collectively, "LaMadrid") filed a Complaint in the 11th Judicial Circuit for the State of Florida, Miami-Dade County, against National Union Fire Insurance Company of Pittsburgh Pennsylvania ("National Union"), which Complaint was removed to the Southern District of Florida on April 4, 2011, on the basis of diversity jurisdiction under 28 U.S.C. § 1332 (2011). DE:1 & DE:1-2. In this

single-count complaint, seeking recovery under an all-risk marine insurance policy, LaMadrid alleged that: (i) the damaged vessel was insured by National Union; (ii) the vessel was damaged while covered by the policy and as a result of a covered peril under the all-risk marine insurance policy; (iii) LaMadrid satisfied all conditions precedent to the filing of the lawsuit; (iv) National Union denied coverage in breach of the all-risk marine insurance policy; and (v) LaMadrid was damaged as a result of that breach. DE:1-2:3–5.[1]

On April 4, 2011, concurrently with the removal, DE:1:1–7, National Union filed both its Answer and Affirmative Defenses, denying that the vessel's damage was a result of a covered peril, that notice of loss was timely, and that National Union breached the insurance policy. DE:3:1–2. Additionally, National Union asserted six affirmative defenses: (i) failure to state a claim, (ii) failure to join an indispensable party, (iii) lack of coverage under the policy for the incident, (iv) coverage was precluded by a policy exclusion, (v) the policy was void due to breaches of express and/or implied warranties, and (vi) the policy was void due to misrepresentations or failures to disclose material facts. DE:3:2–3. On March 8, 2012, National Union filed its Amended Answer and Affirmative Defenses, DE:38-3:1–6, adding a seventh affirmative defense of intentional misrepresentation. DE:38-3:3.

[1] On April 29, 2011, the parties consented to the full jurisdiction of a Magistrate judge over all matters before the court, including trial. DE:6-1; DE6-2.

B. The Cross-Motions for Summary Judgment.

On May 29, 2012, National Union filed its Motion for Summary Judgment along with supporting memoranda and documents. DE:69–DE:74. While National Union's summary judgment and related motions were pending, on July 6 2012, LaMadrid filed his own Motion for Summary Judgment, DE:98, along with supporting memoranda and documents. DE:97; DE:99. Both motions were fully briefed. DE:104; DE:110; DE:111; DE:112.

Following a September 24, 2012 evidentiary hearing, at which hearing both parties' respective experts testified, *see* DE:129, and upon additional briefing at the Magistrate's request, *see* DE:128; DE:132; DE:133, the Magistrate issued his October 24, 2012 Omnibus Order on Pending Motions, in which he: (i) denied both National Union and LaMadrid's motions for summary judgment; and (ii) denied National Union's Motion to Strike the Affidavit and Deposition Testimony of Plaintiff's Expert Witness, Mirkos Pichel. DE:134.

C. The Final Judgment Entered Upon Successive Rule 59(e) Motions and Orders.

On November 1, 2012, National Union timely filed its Motion for Reconsideration of the Court's Order Denying Defendants [sic] Motion for Summary Judgment. (the "Motion for Reconsideration"). D:145. After full briefing, DE:148; DE:149, the Magistrate judge issued his November 29, 2012 Order Granting Defendant's Motion for Reconsideration (the "Order Granting Reconsideration"), in which order he reversed his previous Omnibus Order by:

(i) granting National Union's motion for summary judgment; and (ii) dismissing LaMadrid' claim with prejudice. DE:151.

Final Judgment was entered upon the Order Granting Reconsideration on November 30, 2012 (the Merits Order). DE:153.

On December 21, 2012, LaMadrid timely filed a Rule 59(e) Motion to Alter or Amend Judgment, seeking: (i) reversal of the Final Judgment and Order Granting Reconsideration; and (ii) an entry of summary judgment in his favor. DE:160. The Magistrate, after extensive supplemental briefing, DE:165–172, and a hearing, DE:174, denied LaMadrid's Motion to Alter or Amend Judgment. DE:175.

LaMadrid timely noticed his appeal of the decision on the merits. DE:177. On April 23, 2013, the magistrate entered an order awarding National Union their taxable costs (the Costs Order), DE:180, and LaMadrid timely filed his notice of appeal from that Costs Order (DE:181). LaMadrid moved to consolidate the two appeals on May 28, 2013, and this Court entered its order granting consolidation on July 29, 2013.

II. STATEMENT OF THE FACTS.[2]

A. LaMadrid's Yacht Was Damaged.

LaMadrid owns an 85-foot Broward Motor Yacht, the "Alicia," powered by two turbocharged Detroit Diesel 12v71 engines. DE:70-5. During the Memorial Day weekend in 2010, LaMadrid and his family were returning to Miami from the Bahamas, DE:72-1:76; DE:99-2, when LaMadrid observed billowing smoke emanating from the turbocharger and exhaust manifold of the starboard engine. DE:99-2:1. After instructing his captain to reduce speed, LaMadrid went to the engine room and observed grayish smoke escaping from the air filters and valve covers. *Id*.

Following the vessel's safe return to its dock, LaMadrid, a Purdue-educated engineer, who owns and operates Miami Yacht & Engine Works, DE:72-1:10–11, 14–15, 31–32, worked with his mechanics to attempt to determine the cause of the smoke. DE:72-1:85–97; DE:99-2. Following unsuccessful efforts to determine the cause of the engine failure and to repair the engine, DE:72-1:85–98; DE:99-2:1-2; DE:129:81, LaMadrid concluded that the starboard engine was beyond repair and contacted his insurance agent to report a claim. DE:99-2:2.

[2] At the February 6, 2013 hearing on Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment, the Magistrate set forth, and the parties agreed to, a series of undisputed facts upon which the Magistrate based his legal rulings. DE:174:4–6. For the sake of completeness, LaMadrid here provides a full recitation of the record, but notes that the stipulated facts are set forth at point II(F)(2), *infra*.

B. National Union Denied Coverage.

On July 26, 2010, National Union sent its surveyor, Stewart Hutcheson, to inspect the Alicia. DE:70-5:2. Hutcheson, who is neither an engineer nor a mechanic, DE:74-1:8–9, 15, did not hire a mechanic to facilitate his inspection of the Alicia. DE:129:37, 51–52. Upon his arrival at Miami Yacht & Engine Works, Hutcheson found that the Alicia's starboard engine had been broken down and the relevant parts removed from the vessel. DE:70-5:4. He interviewed LaMadrid regarding the initial attempts to repair the starboard engine, examined the starboard engine parts, and he reviewed the opinions of two Detroit Diesel specialty repair shops hired by LaMadrid. DE:70-5:4; DE:72-1:63–64, 74–75; DE:129:65.

Hutcheson relied on his own inspection to conclude that the engine had lost oil, but offered that he could not pinpoint the precise cause of loss because the starboard engine had been disassembled prior to his inspection. DE:70-5:4; DE:74-1:50–51. Hutcheson thus was unable to conclude that the starboard engine's failure was a result of wear and tear, and in fact, he was never able to establish at all the cause and origin of the Alicia's engine failure. DE:74-1:47, 126–128.

On October 12, 2012, notwithstanding Hutcheson's failure to provide any opinion as to the cause of the loss, National Union denied LaMadrid's insurance claim, citing *only* the wear and tear policy exclusion, and without mention of any lack of accidental cause. DE:99-3.

C. LaMadrid's Expert.

LaMadrid retained Mirkos Pichel to inspect the Alicia's starboard engine and prepare a report with his opinions on the cause of the engine failure. DE:73-1:12–13; DE:99-4. Pichel, a highly experienced mechanic specializing in Detroit Diesel engines like those installed on the Alicia, who had rebuilt or inspected upwards of 60 such engines in just the five years preceding his work in this matter, DE:129:70-72, determined that the cause of the starboard engine's failure was a relief valve in the oil system that was stuck in the open position. DE:129:75.

Pichel explained that the open relief valve caused a loss of oil pressure, which diverted lubrication away from the moving parts, thereby creating heat, friction, and eventually engine failure. *Id*. at 75–76; DE:99-4. According to Pichel, the smoke that LaMadrid initially observed and again while attempting to repair the engine in his boatyard, as well as the engine damage itself (*i.e*,. a holed piston, spun bearings, scouring on the liner, crankshaft and connecting rods), all appeared to be consistent with a lack of lubrication. DE:129:75–76.

And Pichel concluded that the starboard engine's damage could not have been caused by wear and tear, nor by gradual deterioration, because the relief valve is buried deep inside the oil system, within the engine block, such that it is not a serviceable item. DE:99-4; DE:73-1:53–54, 59; DE:129:105–07. Pichel further opined that the Alicia's engine was well-maintained and serviced regularly, and that there was no evidence of wear-and-tear. DE:99-4.

Pichel could not determine the precise, external force that caused the relief valve to stick open, DE:73-1:59, but noted that this Detroit Diesel engine that had

refurbished in 2007, "should have lasted at least 10-15 years and between 2500-3500 hours of use." DE:99-4. But at the time of the starboard engine's failure, it had only *three years* and *750 hours* of use. *Id*.

D. The Cross Motions For Summary Judgment.

National Union's Summary Judgment Motion. At the close of discovery, both parties moved for summary judgment. DE:71; DE:98. National Union argued that LaMadrid had failed to carry his burden of demonstrating that the engine failure was fortuitous or accidental. DE:71:18, 20–21. In order to show fortuity, argued National Union, LaMadrid was required to show not just that the relief valve caused the engine failure, but also the precise, actual cause that caught the relief valve in the open position. *Id*. National Union contended that such an unexplained mechanical failure should be presumed the result of wear and tear because mechanical systems inevitably fail over time. DE:71:20.

LaMadrid's Summary Judgment Motion. LaMadrid, on the other hand, moved for summary judgment arguing that the relief valve mysteriously sticking in the open position *was* the fortuitous event triggering coverage under the policy. DE:98:5. LaMadrid contended that because his insurance policy was an "all-risk" policy, as opposed to a named-peril policy, the mysterious failure of the relief valve was precisely the type of loss the policy was intended to cover. DE:98:3–5. Under such a policy, argued LaMadrid, the insured need not prove the precise cause of loss to demonstrate fortuity. DE:98:4–5. Because all evidence submitted

pointed toward an accidental engine failure, LaMadrid contended he had, in fact, met his relatively low burden to establish fortuity. *Id*.

The burden then shifted, argued LaMadrid, to National Union to demonstrate that the engine failure actually fell into one of the excluded perils, *i.e.* wear and tear. *Id*. at 5–6. Yet because National Union had put forth no evidence of wear and tear — nor any other exclusion (nor the actual cause of loss) — LaMadrid argued he was entitled to judgment as a matter of law on that issue. *Id*.

The Magistrate's Omnibus Order. Initially, the Magistrate agreed, in part, with LaMadrid that an insured must not show the "precise cause of loss to demonstrate fortuity," DE:134:32, and ruled that fortuity and questions of proximate cause are normally fact questions for a jury. *Id*. The Magistrate denied both summary judgment motions. *Id*. at 42.

E. The Magistrate Reversed Himself Upon National Union's Rule 59(e) Motion.

National Union moved for reconsideration, arguing for a rule of law that would require an insured to establish the precise cause of its loss under an "all-risk" marine insurance policy. DE:145:1. That is, National Union asserted that part of an insured's burden in presenting a *prima facie* case for coverage under an "all-risk" policy is to present evidence of the fortuitous event itself. *Id*. at 3.

LaMadrid argued that there is no such burden, and to adopt it would create burdens heretofore unseen in marine insurance jurisprudence. DE:148:1. LaMadrid pointed out that, in effect, National Union was trying to burden the insured with rebutting an insurer's policy exclusions before the insurer has

presented any evidence of those exclusions. *Id*. LaMadrid concluded that he had met his burden of showing fortuity and coverage under an all-risk policy because he showed that the engine failed due to a stuck relief valve, not wear and tear, and that this failure occurred a mere *750 hours* into an expected *2,500–3,500 hour* lifetime. *Id*. at 3.

Treating the "Motion for Reconsideration" as a Rule 59(e) motion (DE:151:2), the Magistrate ruled that because there remain several potential causes for why the release valve was left in an open position causing the engine to fail, LaMadrid had not demonstrated a fortuitous loss. DE:151:3–4. That is, notwithstanding that the cause of loss was unexplained, the Magistrate granted summary judgment upon a ruling that part of the insured's burden to establish a *prima facie* cause of action is to demonstrate the "proximate cause of the damage." *Id*. at 3–6. The Magistrate distinguished "mysterious disappearance" case law from the unexplained mechanical failure that did not result in a total loss, on the ground that experts have the ability to examine a faulty engine. *Id*. at 4-6.

F. Lamarid's Rule 59(e) Motion.

(1) The Pleadings.

LaMadrid moved under Rule 59(e) for the Magistrate to alter or amend his Order Granting Reconsideration. DE:160. LaMadrid argued that the Magistrate "created a presumption out of whole cloth that unexplained mechanical failures occur from wear and tear unless a plaintiff can prove the cause of the unexplained event." DE:160:2. In other words, LaMadrid contended that — contrary to long-

established marine insurance principles — in order to show that the loss was fortuitous (thereby establishing a *prima facie* case of coverage), the Magistrate was now requiring him to prove the precise cause of the relief valve's failure. *Id*. at 7–10.

Certainly, conceded LaMadrid, an insured must show some evidence of fortuity to establish a prima facie case for coverage, and so he reiterated that such evidence had, indeed, been shown: neither expert could determine the precise cause of the relief valve failure, which failure occurred a mere *750 hours* into an expected *2,500–3,500 hour* lifespan. *Id*. at 8. By ignoring such evidence of fortuity, and instead requiring LaMadrid to prove the precise, actual, or proximate cause of the relief valve's failure, the Magistrate had "transformed an 'all risks' policy into a 'named peril' policy by creating a presumption that an *unexplained loss* is a *non-fortuitous loss*." *Id*. at 9 (emphasis added).

On January 7, 2013, the Magistrate ordered supplemental briefing, requesting LaMadrid to:

(1) pinpoint those portions of National Union's pleadings alleged to contain misstatements of law;

(2) pinpoint where LaMadrid previously had advised the Magistrate of such alleged misstatements;

(3) pinpoint where in LaMadrid's pre-Rule 59(e) papers LaMadrid had preserved the arguments made in his Rule 59(e) motion; and

(4) provide legal authority in support of the Magistrate's authority to grant the Rule 59(e) motion.

DE:164:1-2. LaMadrid answered these queries from the Magistrate in his Supplemental Brief in Support of Rule 59(e) Motion to Alter or Amend Judgment. DE:165.

In National Union's Opposition to the Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment, it reiterated that LaMadrid had not made any showing of fortuity, DE:166:8, and his burden of demonstrating fortuity was higher in this unexplained mechanical failure scenario than in cases of unexplained cargo loss or unexplained sinking. *Id*. at 3–7, 9.

(2) The Hearing.

The Magistrate held oral argument on LaMadrid's motion on February 6, 2013. DE:174. The Magistrate began the hearing by reciting certain facts, believed to be undisputed, and permitting both Plaintiff and Defense counsel to agree or modify that factual recitation. *Id*. at 4–5. Both parties agreed that the Magistrate had accurately set forth the undisputed facts, and that no disputes of fact existed. *Id*. at 4-7. The Magistrate's agreed factual recitation is as follows:

> First of all, the insured vessel, in particular, the starboard engine suffered damage.
>
> The plaintiff's expert, Mr. [Pichel], determined that the cause of the damage to the starboard engine was the relief valve being stuck in the open position, and that caused the engine to lose oil pressure which in turn caused the overheating of the piston and related parts which caused the damage in this case.
>
> This particular starboard engine had been rebuilt in 2007. An engine like that should have lasted about 10 to 15 years with about 2,500 to 3,500 hours of use following the rebuilding, but at the time of this particular damage, the engine had less th[a]n 750 hours of use.

> Although Mr. [Pichel] determined that a stuck relief valve in the open position caused the damage, he could not say or opine why the relief valve was stuck in the open position. He simply didn't know.
>
> Ultimately, National Union's expert, Mr. Huchinson, had the opportunity to examine the relief valve and he, too, could not determine why the relief valve was stuck in the open position, and Mr. [Pichel] testified that he saw no evidence of wear and tear during his inspection of the engine.

Id. at 4-5.

The parties then argued their respective positions, as outlined above. DE:174:6-60.

(3) The Order.

The Magistrate entered his order denying LaMadrid's motion on March 4, 2013, and in so doing clarified the order granting National Union's Motion for Reconsideration. DE:175. The court began by stating that it had not required LaMadrid to prove the cause of the unexplained event, but merely made the legal finding that LaMadrid failed to prove the loss was fortuitous because neither expert could determine what caused the loss. *Id*. at 2-3. The court further ruled that although there is an exception to the fortuity rule where cargo is lost or a vessel sinks, that there is no such exception for unexplained mechanical failure. *Id*. at 3.

After noting the undisputed facts, as set forth above, DE:175:4-11, the court ruled that "Plaintiffs are seeking to expand or modify the exception to the rule requiring an insured to prove fortuity" to "encompass unexplained mechanical breakdown." *Id*. at 13. Because no authority supports that proposition, the court determined it was being asked to make new law. *Id*. And the court reasoned that sunken ships and lost cargo cases are different from unexplained mechanical

failures because with the former there is nothing to inspect which would render it impossible for an insured to show fortuitous loss. *Id*. at 14. Where there is a vessel to inspect, however, the court ruled that an insured must do more than establish that a loss is unexplainable. *Id*.

The Magistrate further concluded that it had not required LaMadrid to demonstrate the precise cause of the loss, and had required only that an insured must provide some evidence of the "fortuitous event [that] was responsible" for the accident. DE:175:16. Thus, submitting proof that the accident is unexplainable is not any evidence of fortuity. *Id*.

Finally, the Magistrate recognized that there may be policy considerations for adopting a rule that an insured meets the fortuity burden by showing that a loss is unexplainable. DE:175:19-21. The court determined, however, that it was not the forum to adopt such a rule. *Id*. at 20-21.

III. STATEMENT OF THE STANDARD OF REVIEW.

Because summary judgment involves pure legal determinations, the Court of Appeals reviews "the district court's grant of summary judgment *de novo*, applying the same legal standards as the trial court." *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1333 (11th Cir. 2003); *accord Steward v. Champion Intern. Corp.*, 987 F.2d 732, 734 (11th Cir. 1993). "[S]ummary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *In re*

Optical Technologies, Inc., 246 F.3d 1332, 1334 (11th Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).[3]

SUMMARY OF ARGUMENT

LaMadrid demonstrated that the loss was caused by an open relief valve, and that it was impossible to determine why the relief valve, encased deep within the engine, was stuck in the open position a mere 750 hours into its 2,500–3,500 hour life expectancy. National Union presented no countervailing evidence, and its expert agreed that the cause of loss cannot be explained. Under all applicable case law, LaMadrid met the very light burden to establish fortuity.

The Magistrate granted summary judgment in National Union's favor, however, finding that LaMadrid "could not identify *a specific cause* for the relief valve being stuck," and "was not able to *pinpoint the actual cause*" of the mechanical failure. DE:175:9 (emphasis added). Ruling that LaMadrid "provided no evidence that the loss was fortuitous," *id*. at 16, 18 n.9; DE:151:6, however, is a legal ruling that an unexplainable loss is a non-fortuitous loss. That is error. To

[3] The denial of a Rule 59(e) motion is reviewed for abuse of discretion, *Shuford v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1341 (11th Cir. 2007), but LaMadrid does not seek independent review of the Magistrate's determination not to alter the judgment. *See, e.g.*, *Jarmak v. Ramos*, 497 F. App'x 289, 295 n.7 (4th Cir. Nov. 16, 2012) (where appellate court determines summary judgment was entered improperly, it is not necessary to consider an appeal from the subsequent Rule 59(e) order); *Martinez v. City of Chicago*, 499 F.3d 721, 726–27 (7th Cir. 2007) (denial of Rule 59(e) motion tends to merge with the underlying order). LaMadrid refers to the Magistrate's Order Denying Plaintiffs' Rule 59(e) Motion to Alter of Amend Judgment, DE:175, only insofar as it purports to clarify the Magistrate's prior Order Granting Defendant's Motion for Reconsideration, which order granted summary judgment in National Union's favor. DE:151.

require an insured to prove the precise cause of loss impermissibly heightened the well-established *light* burden to establish fortuity.

The Magistrate could not excuse National Union from its contractual duties to LaMadrid by forcing him to jump down a bottomless metaphysical rabbit-hole in search of the ultimate force that caused the relief valve to stick open. By purchasing an all-risk policy — one that *did not* specifically exclude unexplained mechanical failures — LaMadrid insured against an unforeseeable and unexplainable mechanical failure. *Atl. Lines Ltd. v. Am. Motorists Ins. Co.*, 547 F.2d 11, 13 (2nd Cir. 1976) ("[c]arriers which do not wish to insure against this broad risk customarily incorporate an exclusionary clause in their policies exempting from coverage unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory") (internal citation and quotation omitted). And by requiring LaMadrid to prove the precise cause of loss, the Magistrate impermissibly rewrote the insurance contract to exclude mysterious losses, and effectively to transform the all-risk policy into a named-peril policy.

ARGUMENT

I. THE FORTUITY DOCTRINE AND ALL RISK INSURANCE.

A. The Origin.

As the name suggests, an "all-risk" insurance policy "provides coverage against all risks." *Int'l Ship Repair & Marine Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 944 F. Supp. 886, 892 (M.D. Fla. 1996). Indeed, all-risk insurance "covers every kind of insurable loss except what is specifically excluded."

BLACK'S LAW DICTIONARY 815 (8th ed. 2004). This type of insurance is distinguished from named-peril insurance, which provides coverage for only a limited number of enumerated risks. *Fisher v. Certain Interested Underwriters at Lloyds*, 930 So. 2d 756, 758 (Fla. 4th DCA 2006). Thus, all-risk policies confer a special benefit to the insureds in that they cover "any loss without putting upon the insured the burden of proving that the loss was due to a peril falling within the policy's coverage." *Int'l Ship*, 944 F. Supp. at 892.

The fortuity doctrine developed as "all risk" insurance policies became increasingly popular in the early part of the 20th century. Stephan A. Cozen & Richard C. Bennett, *Fortuity: The Unnamed Exclusion*, 20 FORUM 222, 224, 228–231 (1985). As expansive as all-risk policies were, courts were tasked with placing some limit on such policies to cover *risks*, but not *certainties*. *Id.* at 224; *accord Mellon v. Fed. Ins. Co.*, 14 F.2d 997, 1002 (S.D.N.Y. 1926) (noting that all-risk policies "cover[] a risk, not a certainty" (quoting *British & Foreign Marine Co. v. Gaunt*, (1921) 2 A.C. 41 at page 57) (internal quotation marks removed)).

And so, in order to delineate between perils under all-risk policies that were indeed *risks*, and those perils that were *certainties*, the early courts to address all-risk policies fashioned a threshold requirement for coverage: "fortuity." Cozen at 222–23. The fortuity doctrine, as it came to be known, established that a peril occasioned by a fortuitous cause would be covered under an all-risk policy. *Gaunt*, 2 A.C. at page 47; *Mellon*, 14 F.2d at 1002.

The fortuity doctrine thus was first announced by the British courts in *British & Foreign Marine Co. v. Gaunt*, (1921) 2 A.C. 41, and shortly thereafter by

American courts in *Mellon v. Fed. Ins. Co.*, 14 F.2d 997 (S.D.N.Y. 1926). Cozen at 222.

In *Gaunt*, the insured's bales of wool were mysteriously wetted, and thereby destroyed, sometime during their journey from Argentina to the British Isles. *Gaunt*, 2 A.C. at pages 44–46. The insurance policy covering these bales of wool was "all-risk," and the House of Lords recognized that such a policy did not "cover all damage however caused," but was "intended to cover all losses by any *accidental* cause of any kind." *Id*. at 46–47, 51–52, 56–57 (emphasis added). Applying this new threshold requirement to the facts of the case, the House of Lords held the loss fortuitous because soggy wool under the circumstances was "exceptional damage such as did not arise under the normal conditions." *Id*. at 51.

In *Mellon*, two steamship boilers were covered by an all-risk policy. 14 F.2d 997, 998, 1002. Both were subjected to a mandatory hydrostatic pressure test, and the port boiler burst under pressure of only 275 pounds, despite possessing a capacity to withstand 1,000 pounds of pressure. *Id*. at 998–99. The court held that the port boiler's bursting — although its cause remained unknown — was "*fortuitous* and *unusual*," and was thus a covered peril under the all-risk policy. *Id*. at 1002 (emphasis added). *Mellon* cited the *Gaunt* opinion, *Id*., and "followed the English authorities," thereby importing the fortuity doctrine into American jurisprudence. *Id*. at 1004 ("[E]ven in an all risk policy, there must be a fortuitous event — a casualty — to give rise to any liability for insurance.").

B. Modern Development.

While those initial all-risk cases referred to fortuity as "accidental," or "unusual," they did not delve much deeper into the definition of "fortuity." But in the decades that followed, courts have given more shape and meaning to the concept of fortuity. That is, building on the early articulations in *Gaunt* and *Mellon*, the courts have "agreed that the words '*accident*' and '*accidental*' mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, *unusual*, and unforeseen." *St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1202 (1st Cir.1994) (emphasis added) (internal quotations and citations omitted). And so, "fortuity" does not include intentional misconduct or wear and tear. *Int'l Ship*, 944 F. Supp. 892–93.

Moreover, modern courts that have considered all-risk polices generally have followed the definition of a "fortuitous event" enunciated in the Restatement of Contracts, which focuses on the subjective knowledge of the parties:

> A fortuitous event … is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

RESTATEMENT OF CONTRACTS § 291 cmt. a (1932), *cited with approval in Morrison Grain Co., Inc. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430–31 (5th Cir. 1980), and *Int'l Ship*, 944 F. Supp. at 892.

Moreover, as suggested in the Restatement, "the words 'accident' and 'accidental', as used in insurance contracts, mean that which happens by chance or

fortuitously, without intention or design, and which is *unexpected*, *unusual*, and *unforeseen*." *Aetna Ins. Co. v. Webb*, 251 So. 2d 321, 322 (Fla. 1st DCA 1971) (emphasis added). *See also* BLACK'S LAW DICTIONARY 654 (6th ed. 1991) (defining "fortuitous" as "[o]ccurring unexpectedly, or *without known cause*" (emphasis added)). Indeed, under Florida law, "the element of the 'unexpected' is important in reaching a true definition of the term 'accident,'" or fortuity. *Webb*, 251 So. 2d at 322.

And so, while an insured bears the burden of demonstrating a fortuitous loss as part of his *prima facie* case, because of the broad coverage provided by all-risk insurance, this burden is *light*. *Gaunt*, 2 A.C. at page 58 (commenting that meeting an insured's burden "is easily done"); *Egan v. Wash. Gen. Ins. Corp.*, 240 So. 2d 875, 876 (Fla. 4th DCA 1970) (recognizing that "[p]laintiff's burden of proof under [an all-risk] policy is a light one"); *Int'l Ship*, 944 F. Supp. at 893 (recognizing that "the burden of demonstrating a fortuitous event is not an onerous one").

Certainly, an insured need not "show the precise cause of loss to demonstrate fortuity." *Int'l Ship*, 944 F. Supp. at 893; *accord Morrison Grain Co., Inc.*, 632 F.2d at 430–31; *Egan*, 240 So. 2d at 876 ("Plaintiff's burden of proof under such a policy is a light one: to make a prima facie case for recovery, he must show only that a loss has occurred."); *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 84 (2d Cir. 2002) (holding that requirement of showing fortuitous loss does not require insured to "explain the precise cause of the loss").

Indeed, that this burden is *light* is a bedrock principle of all-risk insurance. At the doctrine's inception, the House of Lords in *Gaunt* held that an insured "discharges his special onus when he has proved that the loss was caused by some event covered by [the all-risk policy], and he is not bound to go further and prove the exact nature of the accident or casualty which, in fact, occasioned his loss." *Gaunt*, 2 A.C. at page 47, *cited with approval in Mellon*, 14 F.2d at 1002.

And, the courts have consistently applied this principal of law, without deviation, in every context in which it has arisen. *E.g.*, *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68, 77 (2nd Cir. 1996); *Int'l Multifoods*, 309 F.3d at 84; *Morrison Grain*, 632 F.2d at 430; *Tex. Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 563-64 (10th Cir. 1978); *Atl. Lines Ltd. v. Am. Motorists Ins. Co.*, 547 F.2d 11, 12–13 (2nd Cir. 1976); *Fed. Ins. Co. v. PGG Realty, LLC*, 538 F. Supp. 2d 680, 699–700 (S.D.N.Y. 2008); *Formosa Plastics Corp (U.S.A) v. Sturge*, 684 F. Supp. 359, 365-67 (S.D.N.Y. 1987); *Great Northern. Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351–52 (S.D.N.Y 1985); *Egan*, 240 So. 2d at 876.

For example, in *Texas Eastern*, the Tenth Circuit Court of Appeals examined a situation in which a cavern collapsed inexplicably. 579 F.2d at 563-64. The insured's fortuity evidence showed that "the principal contractor in the entire world with respect to this type of structure" built the collapsed cavern, the contractor had previously built 31 "substantially similar" caverns that had not collapsed, and that the collapsed cavern "was a good cavern … which should not have collapsed." *Id.* at 564–65.

More specifically, in that case, the insurer argued that "as a practical matter proof of cause of the loss is necessary in order to establish that the loss was by a fortuity," and that the insured failed to meet this burden. *Id*. at 564. The Tenth Circuit disagreed. Relying on *Gaunt*, and section 291, comment a of the Restatement of Contracts, the court opined that if the insurer's argument were upheld, it would be "difficult to see what risks the insurance company was insuring against." *Tex. Eastern*, 579 F.2d at 565. Thus, the Tenth Circuit's opinion dovetails with the broad purposes of all-risk insurance; namely, to insure against unexplainable and unexpected losses. Despite lacking any evidence of the cause of collapse, the Tenth Circuit held: "When past experience indicated that this particular design would be satisfactory, and it was not [satisfactory] for *some reason which is uncertain*, a fortuitous event occurred within the loss provisions of the contract, not excluded by the 'deficiency in design' clause." *Id*. at 565 (emphasis added).

And as the fortuity doctrine developed, in addition to its ordinary application, it became necessary to fashion a rule that an insured meets its fortuity burden in the case of a missing vessel or cargo merely by showing the loss occurred. *See e.g. Atl. Lines*, 547 F.2d at 12–13 (fortutity established because equipment went missing); *Markel Am. Ins. Co. v. Pajam Fishing Corp.*, 691 F. Supp. 2d 260, 265–66 (D. Mass. 2010) (insured met its burden of showing fortuity where the cause of ship's sinking was unknown, and no evidence of wear and tear or intentional misconduct was presented; "To establish a fortuitous loss it is generally sufficient for the insured to show only that the loss occurred.");

Contractors Realty Co., Inc. v. Ins. Co. of N. Am., 469 F. Supp. 1287, 1292–93 (S.D.N.Y. 1979) (insured established *prima facie* case under all risk policy by showing that a fire caused by the failure of a Detroit Diesel engine, the precise cause of which fire was unknown, resulted in the loss of his yacht because fire is not an ordinary incident of wear and tear).

Application of the fortuity doctrine to the circumstance of a missing vessel, however, did not result in an exception to the fortuity doctrine; rather, what developed was a natural outgrowth of the rule that an insured need not pinpoint the cause of the loss. That is, without the vessel or the cargo it would be impossible to ever provide evidence of fortuity. But this does not mean that where there is a vessel to examine that the outcome is somehow different (and the Magistrate's attempt to draw a distinction along this line is at the heart of this appeal). Indeed, it defies logic to fashion a rule that fortuity is demonstrated where it is impossible to examine the vessel, but fortuity is not demonstrated where a vessel is examined and experts still cannot offer any theory whatsoever as to the cause of loss. *See Mellon*, 14 F.2d 997 (unexplainable mechanical failure was fortuitous, despite availability of property); *PGG Realty, LLC*, 538 F. Supp. 2d at 699–700 (same).

At bottom, the established legal principle that an insured need not pinpoint the precise cause of the loss is a necessary corollary to the legal principle that "all risk coverage extends to unexplained losses." *Allied Van Lines Int'l Corp. v. Centennial Ins. Co.*, 685 F. Supp. 344, 345–46 (S.D.N.Y. 1988). Indeed, "[n]ot every accident is explicable; yet accidents still occur. Which is why people have insurance." *PGG Realty*, 538 F. Supp. 2d at 700.

II. THE MAGISTRATE ERRED BY REQUIRING LAMADRID TO SHOW THE PRECISE CAUSE OF THE MECHANICAL FAILURE.

A. The Magistrate Ruled That an Unexplainable Loss is *Per Se* a *Non*-Fortuitous Loss.

In the Order Granting Reconsideration, DE:151, reversing his prior Omnibus Order, DE:134, the Magistrate ruled that an insured under an all-risk policy must prove the actual or specific cause of loss. DE:151:6, 8. And, according to the Magistrate, because LaMadrid was "not able to pinpoint the actual cause," nor "a specific cause" of the starboard engine's mechanical failure, he did not carry his burden to demonstrate fortuity. DE:175:9; DE:151:8, 11–13.

The Magistrate's articulation of this new and heightened burden in his Order Granting Defendant's Motion For Reconsideration, DE:151, could not have been more clear, and facially contradicting: the Magistrate ruled that because LaMadrid could not provide evidence of the exact fortuitous event that caused the relief valve to become stuck in the open position, fortuity could not be established as a matter of law. *Id*. at 3-12. The Magistrate noted "[t]here are several potential reasons – both fortuitous and non-fortuitous – why a relief valve may be stuck in the open position. Wear and tear, an inherent defect, the owner's intentional misconduct, poor workmanship, and decay and degradation are common examples of events which may have led to the relief valve being stuck in the open position." *Id*. at 3-4. While that analysis is surely true in the abstract, here, LaMadrid's expert testified that the relief valve is encased within the engine such that it is not serviceable and therefore the cause of loss must have been fortuitous. DE:129:105–07. And where

both the plaintiff and defense experts are unable to determine the ultimate cause, what is left is an unexplained and unexplainable failure.

The Magistrate justified this legal ruling on the ground that LaMadrid's expert "will certainly not be able to tell the jury [] his opinion on why the relief valve was stuck in the open position." DE:151:6. Further, the Magistrate indicated that it is necessary "to learn how and why the mechanical failure occurred." *Id*. at 11. By requiring LaMadrid to demonstrate "why", when even the defense expert had no theory, is the same as requiring the insured to pinpoint the precise cause of the loss.

And in his Order Denying Plaintiffs' Rule 59(e) Motion, the Magistrate attempted to bolster his ruling by clarifying that he had not required LaMadrid to prove the cause of the unexplained event, but merely to demonstrate some evidence of fortuity. DE:175:2. The clarification, however, served only to highlight the ungrounded nature of the ruling. That is, the Magistrate ruled that a sunken vessel and missing cargo are different from an unexplained mechanical failure because "the ship and cargo are simply unavailable for inspection and analysis," but where the engine is available for inspection, such as in the case of LaMadrid's claim, there is a requirement to point to a fortuitous event. *Id*.

Indeed, the Magistrate noted that LaMadrid's evidentiary failure was that Pichel "was not able to pinpoint the actual cause and could not say whether the cause was fortuitous." *Id*. at 9. The Magistrate's ruling then, no matter how worded, is that an unexplainable loss is a *non*-fortuitous loss. *Id*. at 14-15.

But if proof that the cause of loss is unexplainable, coupled with proof that the engine failed well before the end of its expected lifetime, does not satisfy an insured's fortuity burden, then what must an insured prove? Under the Magistrate's ruling, only proof of the precise cause of the loss would so satisfy the insured's burden. Indeed, the Magistrate's order absolutely and unequivocally states that an insured does not meet its fortuity burden by showing that the cause of loss is unexplainable. And there is simply no way to divorce that ruling from a requirement that an insured demonstrate the precise cause of loss.

B. Requiring an Insured to Show More Than That an Accident is Unexplainable is Contrary to Established Law and Eviscerates All-Risk Coverage.

(1) Unexplained events are fortuitous events.

Unexplainable losses are explicitly contemplated by all-risk insurance. *Morrison Grain*, 632 F.2d at 430–31. This is so whether the losses are unexplainable because there is no property to inspect, or simply because the inspected property offers no clues as to the ultimate cause of loss. *Mellon*, 14 F.2d 997 at 1002; *PGG Realty, LLC*, 538 F. Supp. 2d at 699–700. Had National Union intended not to insure against unexplained losses, it could have explicitly excluded them. *See, e.g., Atl. Lines Ltd.*, 547 F.2d at 13. But LaMadrid's contract is devoid of any such exclusion. And absent such an exclusion there is no basis to require an insured to demonstrate the proximate cause of the loss in order to demonstrate fortuity.

In *Atlantic Lines Ltd.*, the Second Circuit reversed the district court for imposing the same proximate cause requirement the Magistrate injected into this lawsuit. 547 F.2d at 12. The Second Circuit rejected such analysis because "all risk insurance arose for the very purpose of protecting the insured in those cases where difficulties of logical explanation or some mystery surround the disappearance of property." *Id.* at 12–13.

As the Second Circuit noted, "[c]arriers which do not wish to insure against this broad risk customarily incorporate an exclusionary clause in their policies exempting from coverage 'unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory.'" *Id.* at 13. *Accord Markel*, 691 F. Supp. 2d 260, 266 (D. Mass 2010) ("[I]f insurers intend to exclude 'unexplained losses' from coverage, they customarily include such an exclusion in the policy."). Since there was no "unexplained loss" exception in the insurance contract at issue in *Atlantic Lines*, the insured met its burden of showing fortuity. *Atl. Lines Ltd.*, 547 F.2d at 13.

In other words, unexplained losses are the very risk that insureds contract to insure against. The Magistrate's ruling otherwise is contrary to Florida law. In *Egan*, a yacht sank while docked due to water flowing into the hold, which resulted from the failure of a bolt in the sea strainer. 240 So. 2d at 876. Florida's Fourth District held that even though the experts in that case offered a multitude of conflicting opinions as to the cause of loss, that the loss could have been occasioned by a negligent repair. *Id.* at 878. Because a "[p]laintiff's burden of proof under [an all-risk] policy is a light one: to make a prima facie case for

recovery, *he must show only that a loss has occurred*." *Id*. at 876. That is so, the court reasoned, because in the absence of a determinative cause, it is always possible that the cause of loss was fortuitous. *Id*. at 878–79.

The only difference between the circumstances in *Egan* and those here is that trial was appropriate in *Egan* because both sides' experts offered conflicting possibilities for the cause of loss. *Id*. at 877–78. Here, however, LaMadrid is entitled to judgment as a matter of law because *neither side* has presented an explanation for the cause of the relief valve's failure, but LaMadrid has shown a fortuitous loss, *i.e.* that the starboard engine's failure a mere 750 hours into its expected lifetime as a result of an inexplicable failure of the relief valve, was highly unusual and unexpected. DE:99-4. At trial, National Union will present nothing to refute LaMadrid's demonstrated fortuity.

Mellon, the case on which the American fortuity doctrine emerged, is on point. 14 F.2d at 998-99. Like the port boiler in *Mellon*, 14 F.2d at 998–99, LaMadrid's starboard engine suffered an unexplainable mechanical failure. LaMadrid identified the event that caused the engine's failure: the relief valve stuck in the open position. DE:99-4. Beyond that, and like in *Mellon*, no expert could explain how, why, or what caused this mechanical failure. 14 F.2d at 998-1002; DE:74-1:47; DE:73-1:59. LaMadrid put forward evidence that the starboard engine failed a mere 750 hours into an expected 2,500–3,500 hour lifetime. DE:99-4. Like the port boiler's bursting under a mere 275 pounds of pressure in *Mellon*, the starboard engine's failure a mere 750 hours into its lifetime was highly unusual and unexpected. Thus, like the insured in *Mellon*, upon such evidence

LaMadrid was not "bound to go further, and prove the exact nature of the accident or casualty which in fact occasioned his loss." 14 F.2d at 1002. It is enough that LaMadrid has demonstrated the highly unusual circumstances of this unexplainable mechanical failure.

But one need not reach back to the rule's inception to support the proposition that an unexplainable loss is a fortuitous loss. In *PGG Realty,* 538 F. Supp. 2d at 700, an insured's megayacht was cruising to the Bahamas when it began experiencing mechanical difficulties: the vessel took on water in the engine room, the port and starboard generators both shut down, and both engines ultimately failed. 538 F. Supp. 2d at 686–87. Without power, the megayacht was unable to navigate a bad storm, eventually capsizing. *Id*.

But the actual, specific cause of the vessel's capsizing was never discovered. The court wrote that "no one ever presented a coherent theory that was consistent with the facts and that adequately explained why the vessel capsized." *Id.* at 700. In his Order Denying Motion to Alter or Amend, however, the Magistrate incorrectly attributed the vessel's wreck in *PGG Realty* to the "severe weather," stating that this was evidence of fortuity. DE:175:18. But the *PGG Realty* court made no such ruling, and instead ruled that weather was not the cause of the loss but rather that an unexplained loss of power was the cause of loss:

> The most that this Court can conclude with any confidence is that the unexpectedly bad weather was a critical condition in the capsizing and that, more probably than not, *the loss of power was the key ingredient* in the boat's failure to ride out the storm. But the cause of *the loss of power remains a riddle*.

538 F. Supp. 2d at 700 (emphasis added).

> Yet, even with the extreme weather, it is doubtful that the vessel would have capsized without loss of power.

Id. at 687.

> Thus, the Court concludes, it is reasonably certain that it was the combination of the bad weather *and the loss of power* that led to the vessel's demise. As discussed *infra*, however, *the reasons for the loss of power remain problematic*.

Id. (emphasis added).

> Only this much seems probable: the Princess Gigi capsized because, in the face of severe weather, its loss of power prevented it from navigating through the storm. The severity of the weather, the Court finds, was entirely unforeseeable and unpredictable. The cause of the loss of power *remains unproven and largely speculative.*

Id. at 699 (emphasis added).

And even though the key ingredient in the vessel's capsizing — the mechanical failure of the engines and generators — remained unexplained, the court in *PGG Realty* held that the insured had met its burden of showing fortuity. "Even after extensive investigation by both sides, a completely satisfactory explanation for the capsizing" remained elusive. *Id*. at 686. The court did not require the insured to go further and prove why the engines and generators failed, because to do so would render meaningless the all-risk policy. *Id*. at 700. The court concluded that unexplained mechanical failures are specifically insured by all-risk policies: "Not every accident is explicable; yet accidents still occur. Which is why people have insurance." *Id*.

Like the insured in *PGG Realty*, LaMadrid showed that an unusual and unexplained mechanical failure was the key ingredient in his loss. Following the unbroken line of cases beginning with *Mellon*, when losses are due to unexplained mechanical failures, showing the unusual nature of the loss is enough to meet an insured's burden under an all-risk policy. *E.g. Egan*, 240 So. 2d at 877–78 (concluding that where "it is impossible to conclude" the exact cause of the loss, and there are conflicting possibilities, it is for the jury to decide).

(2) There is no distinction between a vessel that cannot be examined and a vessel that is examined without yielding evidence as to the cause of the loss.

The Magistrate's distinction between events where it is impossible to examine the property and events where property is examined but the cause of loss remains a mystery is contrary to the very existence of an all risk policy:

> As has been recognized in other circuits, it would appear that all risks insurance arose for the very purpose of protecting the insured in those cases where *difficulties of logical explanation* or *some mystery* surround the (loss of or damage to) property. It would seem to be inconsistent with the broad protective purposes of "all risks" insurance to impose on the insured, as Insurer would have us do, the burden of proving the precise cause of the loss or damage. It is not surprising, therefore, that courts which have considered claims under insurance policies with essentially the same insuring language as the policy before us have consistently refused to require the insured to demonstrate that the loss or damage was occasioned by an external cause.

Morrison Grain, 632 F.2d at 430 (internal quotations and citations omitted; emphasis added), *quoted in B & S Assocs., Inc. v. Indem. Cas. & Prop. Ltd.*, 641 So. 2d 436, 437 (Fla. 4th DCA 1994) (insured demonstrated coverage despite that

"the specific cause of damage to the vessel and location where the damage occurred [remained] unknown"). *Accord Formosa Plastics Corp*, 684 F. Supp. at 366-67 (acknowledging that "some mystery" might surround the loss, but refusing to require the insured to demonstrate that the loss was occasioned by an external cause; plaintiffs were "not required to prove the precise cause of their loss to demonstrate 'fortuitousness'"); *Great Northern Ins. Co*, 620 F. Supp. at 351 ("all risks coverage is procured to protect the insured against unexplained losses").

Moreover, there is no logic to the distinction the Magistrate has drawn between property that cannot be examined and property which is examined and no cause can be discerned. Where there is property to inspect, but experts cannot determine the ultimate cause, there is no difference in the legal analysis between a sunken ship or missing cargo and an unexplained mechanical failure. That it is sometimes possible to identify a fortuitous loss from the damaged property itself, cannot mean, *ipso facto*, that it is always possible to do so. By creating an artificial distinction between sunken ships and lost cargo on the one hand and unexplainable mechanical failures on the other, the Magistrate nullified the all-risk nature of LaMadrid's policy, effectively transforming it into a named-peril policy and denying LaMadrid of the benefits of his bargain.

Because the purpose of an all-risk policy is to insure against unexplainable losses, requiring an insured to show the precise, exact, cause of loss eviscerates all-risk coverage entirely. *In re Balfour MacLaine*, 85 F.3d at 77; *Balogh v. Jewelers Mut. Ins. Co.*, 167 F. Supp. 763, 769-70 (S.D. Fla. 1958) (ruling that "[i]f plaintiff were required to go further … the inclusive character of the coverage of the

insurance policy would be a delusion, and a snare.") (internal quotations and citations omitted), *aff'd by Jewelers Mut. Ins. Co. v. Balogh*, 272 F.2d 889, 892 (5th Cir. 1959). This is so whether the property cannot be examined or whether the property is examined in vain. *E.g.*, *Mellon*, 14 F.2d at 1002; *PGG Realty,* 538 F. Supp. 2d at 700. Lack of an explanation, is a lack of explanation whether the ship is at the bottom of the ocean or available for inspection. *See Mellon*, 14 F.2d at 1002; *PGG Realty,* 538 F. Supp. 2d at 700.

(3) The case law relied upon by the Magistrate does nothing to alter the analysis.

The Magistrate crafted a rule that an unexplainable loss is a non-fortutious loss by mistakenly relying on language in *Axis Reinsurance Co. v. Resmondo*, 2009 WL 1537903 *10 (M.D. Fla. June 2, 2009), stating that "[i]n order to assist the Court in determining whether a loss is covered under an insurance policy, the Court needs to examine the proximate cause of the loss." DE:151:8. But that case is markedly different from LaMadrid's circumstances: in *Resmondo*, only the insurer provided expert opinion on the cause of the accident, specifically identifying wear and tear of "the gimbal ring" as the cause of the accident, *Resmondo*, 2009 WL 1537903 at *2–3; whereas, here National Union presented *no evidence* of wear and tear, nor any other cause of loss, fortuitous or otherwise. The court in *Resmondo* ruled that even though the expert identified a chain of events linking the accident to the gimbal ring's failure, only the final cause — wear and tear — was relevant to the coverage analysis. *Id*. The court's discussion of proximate cause related to that specific chain of events and did *not* alter

whatsoever the longstanding and well-established rule that an insured need not "prove the cause of a fortuitous event in order to satisfy its burden of proving that the loss is covered." *Markel*, 691 F. Supp. 2d at 266.

Nor does the Magistrate's proximate cause analysis find support in *Great Lakes Reinsurance (UK) PLC v. Soveral*, 2007 WL 646981 (S.D. Fla. Feb. 27, 2007). DE:151:9–11; DE:175:19. Crucially, in that case, the cause of loss, *i.e.*, drained batteries, was *known*. *Id.* at *3. *Accord Markel*, 691 F. Supp. 2d at 266 (recognizing that in *Great Lakes* "the cause of the ship sinking was known," but that "there is nothing in *Great Lakes* which requires an insured to prove the cause of a fortuitous event in order to satisfy its burden of proving that the loss is covered"). Here, there is no known cause of the loss.

In *Soveral*, the loss was not a risk, but a certainty, because batteries eventually drain. 2007 WL 646981 at *3. Thus, drained batteries can *never* be covered by a general all-risk policy. But expert opinion exists here that the engine was 750 hours into a 2,500-3,500 hour life expectancy, *see* DE:99-4, rendering untenable any contention that the loss was anticipated or a certainty. More to the point, however, it appears that *Soveral* was decided incorrectly under Florida law, which of course governs insurance contract interpretation. The court in *Soveral* made the finding that "batteries do not last forever" in order to rule that the loss was not fortuitous. 2007 WL 646981 at *3.

As the Florida Fourth District Court of Appeal has explained, however, the fact of a part's gradual deterioration is not determinative as a matter of law:

> [A]lthough the parties do not dispute that the bolt in question did deteriorate over the 10-month period, this does not necessarily lead to the conclusion that the deterioration was gradual. It is impossible to determine from the record whether a deterioration period of ten months is normal or extraordinary for a bolt of this type under these conditions. This question is one which will require additional testimony for its determination, and thus presents an issue of fact precluding entry of summary judgment in favor of defendant on the record now before us.

Egan, 240 So. 2d at 879; *accord Acadia Ins. Co. v. Cunningham*, 771 F. Supp. 2d 172, 184 (D. Mass. 2011) (marine accident occurred because of a disconnected hose, but cause of disconnect unknown; distinguishing *Soveral*, 2007 WL 646981, the court ruled that hose disconnection was different from corroded batteries in that wear and tear is *the only explanation* for corroded batteries but not the only explanation for a disconnected hose).

C. Because An Unexplained Mechanical Failure Can Be Fortuitous, LaMadrid Has Met His Light Burden.

By demonstrating that the relief valve's failure was both unexplained and unexpected, LaMadrid has carried his light burden to demonstrate fortuity. But the Magistrate disregarded the fortuity case law on unexplained mechanical failures, and ruled that an insured cannot meet its burden without a precise explanation of such failures. DE:151:8, 1–13; DE:175:9, 16–19. The Magistrate's fundamental misunderstanding of the fortuity doctrine is underscored by his description of unexplained mechanical failures as "atypical." DE:175:10. To the contrary, unexplained mechanical failures are quite typical, which is why insureds purchase all-risk insurance in the first place. *PGG Realty, LLC*, 538 F. Supp. 2d at 700.

LaMadrid demonstrated that the engine failed 750 hours into an expected 2500-3500 hour lifespan. DE:99-4. LaMadrid further demonstrated through expert testimony that the relief valve is not serviceable or subject to wear and tear, such that whatever caused it to become stuck must have been a fortuitous event. DE:129:105–07. The ultimate cause of the relief valve's failure is simply unexplainable under these circumstances. But just as the unexplainable failure of the portside boiler in *Mellon*, 14 F.2d at 1002, there must be coverage for accidents that defy explanation.

The Magistrate understood LaMadrid to be seeking a "third exception" to the fortuity doctrine. DE:175:2-3. Examining the fortuity doctrine and finding two exceptions: (i) a sunken vessel; and (ii) lost cargo, *id*. at 2-3, the Magistrate ruled that because the facts of this case do not fit neatly into either exception, LaMadrid sought a third exception. *Id*. at 3. Not so. LaMadrid merely seeks application of existing law to the facts of this case. Indeed, LaMadrid does not seek to be excused from demonstrating fortuity, but merely argues that fortuity is demonstrated by having presented evidence that the loss is both unexplainable and defies logical explanation.

And so, the critical question in this case is not whether a third exception to fortuity exists, but rather it is "what more could Lamadrid have shown to demonstrate fortuity?" Lamadrid unequivocally demonstrated that the cause of the loss cannot be determined and Defendant's expert agreed! Lamadrid provided unrebutted evidence that the engine failed well before the end of its expected lifetime. What more evidence of fortutity could there have been? Lamadrid's

expert could have speculated that negligence or a freak accident caused the relief valve to become stuck. But it would have been mere speculation. And, indeed, under Florida law the inference of negligence or freak accident arises from the facts here, and such is enough to clear the low fortuity hurdle. *Egan*, 240 So. 2d at 877–79.

Contrary to the Magistrate's order, LaMadrird did not "show nothing." DE:175:18. LaMadrid showed that the accident was one that defies explanation and went even further, showing that the engine failed well before its expected lifespan. Making a showing that an accident defies explanation, *is* an affirmative showing of fortuity. *PGG Realty, LLC*, 538 F. Supp. 2d at 700.

III. THE COSTS ORDER SHOULD FALL WITH THE MERITS ORDER.

Should Lamadrid prevail on his appeal from the merits order(s), DE:151; DE:153, the costs order (DE:180) should be reversed as well. *See, e.g., Perez v. Miami-Dade County*, 186 Fed. Appx. 936, 937 (11th Cir. Jun. 29, 2006); *Gold v. City of Miami*, 151 F.3d 1346, 1354 (11th Cir. 1998). *Accord, Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986) ("[w]hen a district court judgment is reversed or substantially modified on appeal, any costs awarded to the previously prevailing party are automatically vacated").

CONCLUSION

Based on the foregoing, LaMadrid respectfully requests the Court to reverse the summary judgment, remand with directions to enter partial summary judgment on the issue of fortuity in LaMadrid's favor, and to grant such other and further relief as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses Times New Roman 14-point typeface and contains 9,863 words.

Daniel M. Samson

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I hereby certify that on August 22, 2013, one originally signed brief and 6 copies, along with one original and one copy of the appendix, were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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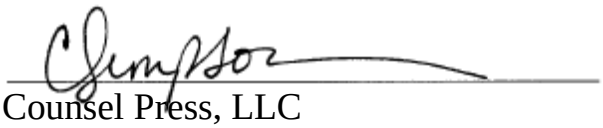

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