

Appeal No.: 21-14361

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NEUBERT AERO CORP.,

Plaintiff-Appellant,

v.

STARSTONE NATIONAL INSURANCE CO. AND LONDON
AVIATION UNDERWRITERS, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO.: 5:20-cv-45-JSM-PRL

JUDGE JAMES S. MOODY, JR., PRESIDING

APPELLANT'S INITIAL BRIEF

Tracey K. Jaensch, B.C.S.
Florida Bar No. 907057
Email: tjaensch@fordharrison.com
FORD & HARRISON LLP
101 E. Kennedy Blvd., Suite 900
Tampa, FL 33602
Telephone: (813) 261-7800
Facsimile: (813) 261-7899
Attorneys for Appellant

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The undersigned, as attorney for Appellant, Neubert Aero Corp. (“Appellant” or “NAC”), hereby files the following Certificate of Interested Persons and Corporate Disclosure Statement, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1.

1. The name of the trial judge, and all attorneys, persons, association of persons, firms, partnerships, or corporations that has or may have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, including any publicly held corporation that owns 10% or more of the party’s stock, and all other identifiable legal entitles related to a party:

James S. Moody, Jr. (United States District Court Judge)

Philip R. Lammens (Magistrate Judge)

Neubert Aero Corp. (Appellant)

FordHarrison, LLP (Counsel for Appellant)

Tracey K. Jaensch, Esq. (Counsel for Appellant)

StarStone National Insurance Co. (Appellee)

London Aviation Underwriters, Inc. (Appellee)

Hinshaw & Culbertson LLP (Counsel for Appellees)

Jenelle E. La Chuisa, Esq. (Counsel for Appellees)

Rory E. Jurman, Esq. (Counsel for Appellees)

James H. Wyman, Esq. (Counsel for Appellees)

2. Appellant is not aware of any other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings.

3. Appellant is not aware of any other entity likely to be an active participant in the proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument, pursuant to Fed. R. App. P. 34(a)(1) and 11th Cir. R. 28-1(c). This case presents an important issue of first impression in this Circuit, one which this Court may consider certifying to the Florida Supreme Court; *i.e.*, whether Florida’s Anti-Technicality Statute, § 627.409(2), Fla. Stat., applies to aviation insurance policies and not just “wet marine and transportation” policies as Appellees, StarStone National Insurance Co. (“StarStone”) and London Aviation Underwriters, Inc. (“LAU”) (collectively, “Appellees”) contend. (*See, e.g.*, Doc. 78 at 6) (“Fla. Stat. § 627.409(2) only applies to ‘wet marine or transportation policies’”).

In addition to proving a breach, Florida’s Anti-Technicality Statute places the burden on the insurer to demonstrate the breach caused the accident or increased the hazard:

(2) A breach or violation by the insured of a warranty, condition, or provision of a wet marine or transportation insurance policy, contract of insurance, endorsement, or application does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

Fla. Stat. § 627.409(2). *See also Fla. Power & Light Co. v. Foremost Ins. Co.*, 433 So. 2d 536, 536-37 (Fla. 4th DCA 1983) (noting that “[t]he burden of pleading and proving a breach of condition and a resulting increase of the hazard” was on the

defendant insurer). Appellant has asserted from the outset of the case that Florida's Anti-Technicality Statute prevents Appellees from avoiding coverage under the aviation insurance policy at issue on the basis of a technicality that did not cause or contribute to the accident. (Compl., Doc. 1-1 at 5, ¶¶ 27-8). Appellant argued, again, in the summary judgment papers at issue here that § 627.409(2) required Appellees to prove, in addition to a breach, that the actual or immediate cause of the loss—the *hazard* that occurred—was brought about or increased by Appellant's purported "breach" of a "warranty, condition, or provision" of the contract documents.

In their Renewed Motion for Summary Judgment (Doc. 107), Appellees argued and the district court found that Appellant breached the requirements of the Special Conditions section of the aviation insurance policy at issue. As to their burden of proof under § 627.409(2), Appellees previously argued that the statute only applies to "wet marine or transportation policies." (*See, e.g.*, Doc. 78 at 6). Appellees then failed to address their burden of proving causation between the breach and the accident in their Renewed Motion for Summary Judgment, apparently in the mistaken belief that simply showing a technical breach was sufficient to deny coverage under the policy.

The applicability and requirements of Florida's Anti-Technicality Statute, however, were central issues to the case and to the cross-motions for summary

judgment. Despite Appellant's principle argument that an alleged breach of the Special Conditions was insufficient to grant summary judgment in Appellees' favor because Appellees had not sustained their burden of proof under Florida's Anti-Technicality Statute, the Magistrate and district court determined "summary judgment should be granted in favor of Defendants because Plaintiff failed to satisfy the pilot requirements under the insurance policy," without any analysis or discussion of the applicability of Florida's Anti-Technicality Statute. (Doc. 147 at 1).

Appellees failure to prove a causal connection between the purported technical violation of the Special Conditions clause and the accident should have either resulted in summary judgment being entered in favor of Appellant or denial of both of the cross-motions for summary judgment. The district court's disregard of this important statute and Appellees' failure to plead and prove that the actual or immediate cause of loss, *i.e.*, the *hazard* that occurred, was brought about or increased by Appellant's purported "breach" of a "warranty, condition, or provision" of the contract documents was reversible error.

This Court has not directly addressed and decided whether, as Appellees' contend, Florida's Anti-Technicality Statute applies only to wet marine or transportation policies to the exclusion of all other insurance policies, including the aviation insurance policy at issue here; or whether, as Appellant contends and the

Legislative history and Florida case law demonstrate, the statute applies to insurance policies generally – and should have been applied here to deny Appellees’ motion for summary judgment. *See Fla. Power & Light Co.*, 433 So. 2d at 536-7 (reversed directed verdict in favor of aircraft insurer because the insurer failed to prove that a breach of the pilot warranty clause increased the hazard and remanded the case to trial court for further proceedings on causation between breach and accident); *Pickett v. Woods*, 404 So. 2d 1152, 1152 (Fla. 5th DCA 1981) (judgment in favor of aircraft insurer reversed and remanded because “issue of whether the breach of the policy provision, i.e., that the aircraft be properly certified, increased the hazard as provided in section 627.409(2), Florida Statutes (1979), has not been judicially determined.”), *petition for review denied*, *Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982); *Clarendon Am. Ins. Co. v. Bayside Rest., LLC*, 2006 WL 3337499, *2 (M.D. Fla. Nov. 16, 2006) (denying property insurer’s summary judgment motion due to court’s inability to determine if alleged breach increased the hazard pursuant to § 627.409(2), “regardless of supposed ambiguities in the policy language”).

This Court has, however, cited *Fla. Power & Light* and *Pickett* (both of which applied § 627.409(2) to aviation insurance policies) with approval on several occasions. In *Travelers Prop. Casualty Co., v. Ocean Reef Charters LLC*, this Court found that Florida law and specifically Fla. Stat. § 627.409(2) governed the effect of the insured’s breaches of the captain and crew warranties in a marine insurance

policy. 996 F.3d 1161, 1170 (11th Cir. 2021). The Court explained that, “[o]n remand, the district court will need to apply § 627.409(2), and consider any other related arguments raised parties.” *Id.* In support, the Court cited *Pickett*, 404 So. 2d at 1153, for “explaining that § 627.409(2) was ‘designed to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss.’” *Id.* The Court cited *Fla. Power & Light*, 433 So. 2d at 536-37, in support of its conclusion that “under Florida law, the burden of proving a breach and ‘a resulting increase of the hazard’ is on the insurer.” *Id.* *Cf. Oretsky v. Infinity Ins. Co.*, 524 F. App’x 517, 524 (11th Cir. 2013) (in dicta, a panel of this Court stated: “§ 627.409(2) ‘likely’ did not apply to motor vehicle casualty insurance policies because the provision ‘only’ applied to wet marine or transportation policies, ‘and not to other types of insurance,’ but applied the “increased risk of hazard” standard by finding insured’s breach of condition “increased the danger of theft” of classic car).

This case involves an important issue of public policy which should be clarified to avoid confusion caused by cases such as *Oretsky*. As Florida courts have explained, “[t]he statute is designed to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss.” *Pickett*, 404 So. 2d at 1153. Surely, that statutory purpose is not served by limiting the reach of § 627.409(2) to only “wet marine or transportation policies,” to the exclusion of all other types of insurance. “[A]ny law or precedent to the contrary of this Florida statute ... would

contravene public policy, allowing insurance companies a grant of summary judgment for the most de minimis of alleged breaches of an insurance policy. This would leave many an insured customer stranded without coverage in their time of need ... [and] coverage would then be deemed illusory due to mere *alleged* technicalities.” *Clarendon*, 2006 WL 3337499 at *2.

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 because the district court's order granting summary judgment to Appellees is a final decision.

STATEMENT OF THE ISSUES

I. Whether the District Court Erred as a Matter of Law in Determining the Special Conditions and All Pilots Clauses in an Aviation Insurance Policy Are Unambiguous and that Appellant Breached those Conditions.

The district court adopted the Magistrate's Report and Recommendation without comment or clarification. The Magistrate recommended summary judgment should be granted in favor of Appellees "because [Appellant] failed to satisfy the pilot requirements under the insurance policy, and thus, there is no coverage for the damages to the airplane." (Doc. 147 at 1). In reaching that recommendation, the Magistrate determined that there were no disputed facts, despite Appellees having filed nearly 1000 pages of documents in support of their motion for summary judgment and despite Appellant's vigorous and well-supported opposition to the facts as presented by Appellees. The Recommendation erred as well by viewing the evidence in the light most favorable to Appellees. Despite finding the language of the insurance to be unambiguous, the Recommendation impermissibly relied on

voluminous heavily redacted FAA documents and other extrinsic evidence to determine the meaning of the policy’s language regarding “multiengine rating and an instrument rating for multiengine aircraft,” “prior to solo in in N1ZR,” “must successfully complete formal ground and flight training...” and other similar provisions regarding pilot qualifications.

Appellant contends that the policy provisions were ambiguous and that summary judgment in favor of Appellees was reversible error.

II. Whether the District Court Erred in Ruling on Both Parties’ Summary Judgment Motions without Addressing the Applicability of Florida’s Anti-Technicality Statute, Fla. Stat. § 627.409(2).

Having determined that Appellant “failed to satisfy the pilot requirements [if the Special Conditions] under the insurance policy,” the district court disregarded Appellees’ obligation under Florida law to prove that the breach of the conditions resulted in an increase of the hazard of the loss. Fla. Stat. § 627.409(2). *See also Fla. Power & Light Co. v. Foremost Ins. Co.*, 433 So. 2d 536, 536-37 (Fla. 4th DCA 1983) (noting that “[t]he burden of pleading and proving a breach of condition and a resulting increase of the hazard” was on the defendant insurer). The district court’s failure to consider Appellees’ burden of proof under § 627.409(2) or to even mention the statute is reversible error. *See Fla. Power & Light Co.*, 433 So. 2d at 536-7 (reversed directed verdict in favor of aircraft insurer because the insurer failed to

prove that a breach of the pilot warranty clause increased the hazard and remanded the case to trial court for further proceedings on causation between breach and accident); *Pickett v. Woods*, 404 So. 2d 1152, 1152 (Fla. 5th DCA 1981), (judgment in favor of aircraft insurer reversed and remanded because “issue of whether the breach of the policy provision, i.e., that the aircraft be properly certified, increased the hazard as provided in section 627.409(2), Florida Statutes (1979), has not been judicially determined.”), *petition for review denied, Foremost Ins. Co. v. Pickett*, 412 So. 2d 465 (Fla. 1982); *Clarendon Am. Ins. Co. v. Bayside Rest., LLC*, 2006 WL 3337499, *2 (M.D. Fla. Nov. 16, 2006) (denying property insurer’s summary judgment motion due to court’s inability to determine if alleged breach increased the hazard pursuant to § 627.409(2), “regardless of supposed ambiguities in the policy language”)

STATEMENT OF THE CASE

A. Nature of the Case

This case concerns the interpretation of an aviation insurance policy. NAC purchased the aviation policy at issue from Appellees specifically to provide coverage for a 1977 Cessna T337GP (the “Aircraft”) recently purchased by NAC. NAC initiated this case by filing a declaratory judgment action seeking a coverage determination as a result of Appellees’ wrongful denial of coverage under the policy for property damage to the insured Aircraft. The Aircraft was damaged when, on November 8, 2018, while continuing mandated flight training under the policy, NAC’s President Tim Neubert (“Neubert”), a Named Pilot in the policy, was confronted with an emergency reminiscent of the “Miracle on the Hudson.” Just fourteen (14) miles short of the Brooksville Airport, the insured Aircraft lost thrust in both engines as did the commercial jet piloted by Capt. Sully Sullenberger. Like Capt. Sullenberger, Neubert quickly and correctly evaluated the crisis confronting him, identified an off-airport landing location, and expertly guided the Aircraft to a safe emergency landing. Like Capt. Sullenberger, Neubert suffered no personal injuries and, in both dual engine-failure emergency landings, only the aircraft was damaged.

Despite his demonstrated superior ability to fly the insured Aircraft and

despite having achieved an outcome few qualified pilots could have duplicated,¹ Appellees denied coverage for the damage to the insured Aircraft on the basis of mere technicalities, *e.g.*, that Neubert did not have a class rating for the multi-engine aircraft on his pilot's license, a fact known to Appellees when the policy was issued. In fact, Appellees included a condition in the policy that Neubert complete "formal ground and flight training for a Cessna T337GP at a school acceptable to the Company...." (emphasis added). It is undisputed that, at the time of the accident, Neubert was still in the process of completing flight training on the Cessna T337GP as directed and approved by his Certified Flight Instructor. Appellees failed to meet their burden to show that the ratings on Neubert's pilot's license increased the hazard that the Aircraft would suffer an in-flight emergency in the first instance or increased the resulting damages to the Aircraft. To the contrary, Neubert's demonstrated superior ability to fly the Aircraft even under emergency conditions and to successfully land the Aircraft in a marsh approximately 14 miles from his airport destination completely negates Appellees' contention that, by not having a Multi-Engine Land; Instrument Airplane on his Pilot Certificate, "Mr. Neubert was not proficient to fly the subject aircraft solo at the time of the incident, which directly or

¹ See, *e.g.*, National Transportation Safety Board, Aviation Accident Final Report, CEN19FA124, (July 21, 2020), <https://data.nts.gov/Docket?ProjectID=99291> (during approach to the destination airport, both engines lost total power due to fuel exhaustion; fully-certificated pilot was able to restart one engine but aircraft crashed resulting in six (6) fatalities).

indirectly caused the subject incident.” See Defendants’ Affirmative Defense (Doc. 36 at 9). See also *Fla. Power & Light Co.*, 433 So. 2d at 536-7 (“[t]he burden of pleading and proving breach of condition and a resulting increase of the hazard is on defendant,” and reversing a directed verdict where the aircraft insurer failed to prove that a breach of the pilot warranty clause increased the hazard) (emphasis added).²

Because Appellees denied coverage for the damage to the Aircraft, NAC filed a complaint for declaratory relief. (Doc. 1). The Complaint sought entry of a final declaratory judgment determining the Aircraft was fully covered under the aviation policy for the damage incurred during the incident. (*Id.* at 15). In response to Appellees’ defenses, NAC argued that it did not breach the Special Conditions because Neubert was participating in flight training as required by the Policy and authorized by his CFI and applicable FARs when the incident occurred. Contrary to Appellees’ reliance on a purported exclusion to deny coverage, NAC argued that the “All Pilots” clause³ did not apply to Neubert. Alternatively, even if a technical

² See also, *Clarendon Am. Ins. Co. v. Bayside Rest., LLC*, 567 F. Supp. 2d 1379, 1385 (M.D. Fla. 2008) (“The insurer bears the burden of proving that the insured increased the hazard.”); *Great Lakes Reins. v. Rosin*, 757 F. Supp. 2d 1244, 1258 (S.D. Fla. 2010) (“Under § 627.409(2), the burden of proving an increase of the hazard is on Great Lakes.”); 1 Insuring Real Property § 2.07 (2020) (“The burden is on the insurer to prove the hazard has been increased; the insured is not required to prove the contrary.” (citing *Fla. Power & Light Co.*, 433 So. 2d 536)).

³ As used in the Recommendation, the “All Pilots” clause provides: “all pilots ... must be certificated for the make and model being flown, and must be currently rated for the flight involved, unless other stated.” (Doc. 147 at 8 n. 6).

breach were found, NAC argued Florida's Anti-Technicality Statute, § 627.409(2), Fla. Stat., precluded Appellees from avoiding coverage on a technical omission playing no part in the loss. (*Id.* at 14).

B. Statement of Facts

Appellant NAC is an airport safety products company. (Doc. 124-1 at 3). Its President, Neubert, is a private instrument-rated pilot who has held a pilot's license and successfully flown aircraft for over thirty years. (Doc. 124-1 at 12). Neubert has over 1,400 hours of flight time, the majority of which was attained in complex aircraft. Neubert is a highly experienced instrument pilot. (Doc. 103-1 at 4; Doc. 124-1 at 7, 13; Doc. 124-2 at 40).

In early 2018, Appellant purchased the Aircraft, a Cessna T337GP Riley Rocket Super Skymaster, which is a center-line thrust twin-engine, fixed-wing aircraft with a propeller in the front and rear. (*Id.* at 6-7). Due to the center-line configuration of its engines, the Cessna 337 series is easier to fly than aircraft with an engine on each side either of the fuselage or wings which can cause an aircraft to roll in the event of asymmetric thrust due to loss of an engine. (*Id.* at 14).

Neubert had previously completed multi-engine training and had received an endorsement to take his multi-engine check ride in a different type of aircraft. When Appellant purchased the insured Aircraft at issue, Neubert elected to continue his multi-engine training in connection with the specialized training required by

insurance policy (see below) for the Aircraft type and then apply for his check ride in the Aircraft to obtain his formal Multi-engine Land class rating on his Pilot Certificate. (Doc. 124-1 at 9-10).

1. The Aviation Insurance Policy

On March 21, 2018, Appellant received an Aircraft Insurance Application from LAU with a thirty-day coverage Binder. (Doc. 124-7 at 1, 6-7). Under a “MINIMUM PILOT REQUIREMENTS” provision, the Application provided that the Aircraft would not be covered unless it was operated “by the pilot(s) designated or who meet the Open Pilot Warranty” provision. (*Id.* at 8). The Application’s Pilot Warranty provision provided as follows:

APPROVED PILOTS: The above coverages do not apply while N1ZR is operated by other than the following:

A. Named Pilot(s): Timothy Neubert

B. Additional Pilot Clause: any Pilot, aged between 25 and 65, having a Private (or better) Pilot Certificate with Multiengine Land and Instrument Ratings who has flown a minimum of 1000 total flying hours as Pilot In Command, 250 of which shall have been Multiengine Land hours, including 25 hours in a Cessna T337GP, and who has had no accidents, incidents, violations, or suspensions within the past five years, and who has the Insured’s full approval and consent. All such pilots to have successfully completed, within 24 calendar months preceding the intended flight, initial or recurrent training, in the same make and model being flown, with a school acceptable to the company. Furthermore, all pilots must be in compliance with the requirements of both FAR 61.56 (Flight Review) and FAR 61.23 (Medical Certificates: Requirement and Duration), and must be certificated for the make and model being flown, and must be currently rated for the flight involved, unless otherwise stated.

SPECIAL CONDITION(S): Prior to solo in N1ZR, Timothy Neubert must have obtained a multiengine rating and an instrument rating for multiengine aircraft, and must successfully complete formal ground and flight training for a Cessna T337GP at a school acceptable to the Company, and must have completed 10 hours of dual instruction in a Cessna T337GP with a Certificated Flight Instructor who meets all the requirements of the Additional Pilot Clause. Up to 5 hours of the required dual instruction may be accomplished in a full motion simulator. The formal school requirement shown above must be completed within 60 days of binding in order for Timothy Neubert to remain an approved pilot.

No coverage for Bodily Injury to Passengers applies while Timothy Neubert is at the controls of N1ZR, until Timothy Neubert has completed the requirements shown above and logged 15 total hours in a Cessna T337GP[.]

(*Id.* at 9).

In April 2018, Appellant received StarStone Aviation Insurance Policy number SAV100311200, effective March 22, 2018 to March 22, 2019 (“the Policy”). (*Id.* at 2, 14-35). With one immaterial change, the Policy’s Declarations page contains the identical Pilot Warranty provision listed above.⁴ (*Id.* at 15-16). The Policy also contained several exclusions barring coverage in various circumstances, including the following:

B. when the **aircraft** is operated by persons who are not specifically named as a pilot on the declarations page, or in any endorsement to this policy; or, who do not meet all of the requirements of the Additional Pilot Clause, if applicable; or, when the **aircraft** is operated by any pilot

⁴ In the Special Conditions provision, the Policy changed the formal school completion date from “within 60 days of binding” to “5/20/2018.” (Doc. 124-7 at 36).

who is not in compliance with the requirements of FAR 61.56, (Flight Review); or, is not in compliance with the requirements of FAR 61.23, (Medical Certificates: Requirement and Duration); or is not certificated for the make and model being flown and currently rated for the **flight** involved[.]

(*Id.* at 341).

Under the Special Conditions, Neubert was required to (1) obtain a multiengine rating and an instrument rating for multiengine aircraft which he would have received upon completion of his flight training and check ride, (2) successfully complete formal ground **and flight training for the Aircraft** at an acceptable school, and (3) complete ten hours of dual instruction in the Aircraft with a Certified Flight Instructor (“CFI”). There is no dispute Neubert completed the formal ground school training for the Aircraft and that he was in the process of completing flight training as directed and approved by a CFI when the accident occurred. Neubert completed his formal ground school training at an LAU approved training center in Tampa, Florida in April 2018, and was certificated as meeting the requirements of 14 C.F.R. § 61.56 Flight Review. (Doc. 124-1 at 27; Doc. 124-7 at 37; Doc. 124-8 at 3-24; Doc. 124-9 at 2). Neubert also completed ten hours of dual-flight training with CFI Nathan Gary. (Doc. 124-1 at 7-8). Thereafter, CFI Gary certified that Neubert had received training “to qualify for solo flying” and was “proficient to make solo flights in a C-337P.” (Doc. 124-1 at 29-30; Doc. 124-7 at 3, 36). The endorsement was pursuant to 14 C.F.R. § 61.87(e), which provides for the

maneuvers and procedures “for pre-solo flight training in a multiengine airplane.” (Doc. 124-1 at 29-30; Doc. 124-2 at 11; Doc. 124-7 at 3). CFI Gary entered the written endorsement in Neubert’s log book and authorized Neubert to continue his flight training by flying solo in the Aircraft to “build on [his] aeronautical experience” while waiting for a check ride. CFI Gary’s endorsement to Neubert’s log book contained no limitations for flight in the Aircraft. (Doc. 124-1 at 7; Doc. 124-2 at 11; Doc. 124-4 at 14).⁵

2. The Incident and Subsequent Coverage Dispute

On the afternoon of November 6, 2018, Neubert was set to complete the final part of a three-leg solo flight training trip. (Doc. 124-1 at 30-31; Doc. 124-7 at 11, 12). As required by 14 C.F.R. § 61.09, Neubert recorded each leg in his logbook to obtain a Certificate for Multi-Engine Land; Instrument Airplane. (Doc. 124 at 3-4). While taxiing from the ramp to the runway, the right main tire blew out and the flight was aborted. (*Id.* at 4). Two days later after the tire was repaired, Neubert continued his solo training flight in the Aircraft. (*Id.*). Fourteen nautical miles from landing in Brooksville, Florida, both Aircraft engines failed. Neubert skillfully performed a “textbook” off-field emergency landing in a marsh. (*Id.*). While Neubert was not injured, the Aircraft sustained substantial, but not irreparable, damage. (*Id.*).

⁵ While CFI Gary subsequently revised the endorsement to reference a different regulation, it is undisputed that occurred after the flight at issue. (Doc. 124-1 at 32; Doc. 124-7 at 3).

Although never conclusively determined, it has been suggested that the reason for the dual engine failure was fuel exhaustion, possibly caused by the Aircraft being raised at an angle during the tire replacement.

Appellant filed a claim under the Policy for the damage to the Aircraft. On March 11, 2019, LAU denied coverage, asserting Neubert “failed to meet the special conditions of the policy that required [him] to obtain a multiengine rating and an instrument rating for multiengine aircraft prior to solo flight.”⁶ (Doc. 107 at 50-52). (*Id.* at 51).

C. Procedural History

In December 2019, Appellant filed a declaratory judgment action in Florida state court against Appellees. (Doc. 1). The Complaint sought entry of a final declaratory judgment determining the Aircraft was fully covered under the Policy for the damage incurred during the incident. (*Id.* at 15). Alternatively, NAC argued that, should a technical breach be found, Florida’s Anti-Technicality Statute, § 627.409(2), Fla. Stat., precluded StarStone and LAU from avoiding coverage on a technical omission playing no part in the loss. (*Id.* at 14). The matter was subsequently removed to the Middle District of Florida by LAU. (*Id.* at 1-9).

⁶ LAU also asserted that due to the type of flight plan Neubert filed and the weather conditions at the time of the incident, coverage was excluded under the Policy. (Doc. 107 at 51-52). While Appellant has disputed this as a basis for denial throughout this case, neither the Magistrate Judge nor the district court addressed this alternative basis in ruling on summary judgment.

Once removed, Appellees filed an initial motion to dismiss. The district court granted the motion and dismissed Appellant's Complaint with prejudice. (Doc. 17). In doing so, the district court determined that Neubert, despite being listed as a Named Pilot in the Policy, was subject to the requirements of the Additional Pilots Clause, and specifically the All Pilots provision requiring certification for the make and model being flown. (*Id.* at 7-8). The district court concluded that the exclusion barring coverage when the aircraft is flown by a person not certificated for the make and model being flown and rated for the flight involved applied to prohibit coverage applied to Neubert, thereby rendering superfluous the Special Conditions which mandated that Neubert participate in flight training in the Aircraft. (*Id.* at 6-8). The district court also determined § 627.409(2) was inapplicable because the "All Pilots" exclusion applied to preclude coverage. (*Id.* at 9).

Appellant filed a motion for reconsideration, arguing the district court had misconstrued various Policy provisions, in particular the "All Pilots" clause, and that the relevant language applicable to Neubert was solely contained in the Special Conditions. (Doc. 18 at 5-12). Appellant also argued that § 627.409(2) applied to both policy conditions and exclusions, even assuming for sake of argument that the All Pilots exclusion was deemed applicable to Neubert. (*Id.* at 12-14).

In ruling on the motion, the district court reiterated that the All Pilots provision applied to Neubert, and that § 627.409(2) did not apply because of the Policy

exclusion. (Doc. 27 at 5). Nonetheless, the district court granted the motion and allowed Appellant leave to amend to specifically allege “Neubert had obtained the requisite multiengine rating and instrument rating for multiengine aircraft” at the time of the incident. (*Id.* at 5-6).

On June 18, 2020, Appellant filed an Amended Complaint. (Doc. 29). Appellant, again, asserted Neubert met the requirements of the Policy because the terms “multiengine” and “rating” are ambiguous with regard to the type of Aircraft and training described in the Special Conditions. (*Id.* at 8). Additionally, Appellant asserted that § 627.409(2) applied to prevent denial of coverage. (*Id.* at 8-9).

On November 6, 2020, Appellees filed an initial motion for summary judgment containing nearly seventy pages of supporting record evidence. (Doc. 57). The motion failed to address § 627.409(2) at all. Appellant filed a response containing nearly ninety pages of supporting record evidence, arguing (1) the Policy was ambiguous, (2) even if the Policy was not ambiguous, Neubert met the Policy conditions, and (3) even if the Policy was unambiguous and Neubert did not meet the Policy conditions, § 627.409(2) applied to preclude denial of coverage. (*Id.* at 8-22). Four months after Appellees filed their summary judgment motion, in which they argued the Policy was unambiguous on its face, Appellees submitted a “Supplemental Exhibit” of computer screen shots purporting to be from the FAA

Safety Performance Analysis System to assist the district court in deciphering the purportedly “unambiguous” policy. (Doc. 89).

In ruling on the motion, the district court again determined Neubert was subject to the All Pilots provision requiring certification for the make and model being flown, but nonetheless denied summary judgment because “the record contain[ed] genuine issues of material fact as to whether Neubert satisfied the Policy’s requirements to cover the damages to the Aircraft.” (Doc. 93 at 9). Specifically, the district court concluded there was a genuine issue of material fact as to whether Neubert complied with the Special Conditions due to a conflict between the CFI’s endorsement and FAA records. (*Id.* at 9). The district court declined to address the applicability of § 627.409. (*Id.* at 9 n. 5).

Less than two weeks after the district court denied summary judgment, Appellees filed an “expert disclosure” and report from a lawyer. (Doc. 97). The report was fifteen-pages of legal argument about the meaning of FAA regulations and documents and contained over seventy pages of attachments. Appellees also filed a seven-page supplemental report with nearly 100 pages of attachments to explain the meaning of the Policy clauses at issue. (Doc. 105). In response, Appellant filed a comprehensive motion to strike the lawyer’s testimony pursuant to

the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).⁷ (Doc. 122).

Having already filed close to a thousand pages in support of their claim that the Policy is unambiguous on its face, Appellees filed a “Renewed” Motion for Summary Judgment on July 8, 2021. (Doc. 107). The Renewed Motion contained nearly 500 pages of supporting documents, including over fifty pages of heavily redacted FAA documents relating to the incident. (Doc. 107-2). Appellant filed its response, arguing (1) the FAA documents established nothing as a matter of law, (2) the Policy language is ambiguous and must be interpreted in favor of coverage and strictly against Appellees, and (3) § 627.409(2), which was not even mentioned by Appellees, applied to preclude the denial of the claim, even if a technical breach of a condition or exclusion were found. (Doc. 130).

On August 24, 2021, Appellant filed its Corrected Motion for Partial Summary Judgment and approximately 390 pages of supporting evidence. (Doc. 130; Doc. 124). Appellant argued Neubert had met the Policy requirements while solo flight training under the CFI’s endorsement to fly the Aircraft. (*Id.*) Alternatively, Appellant argued Appellees had failed to show as a matter of law that

⁷ Appellees filed their own motion to exclude Appellant’s expert on non-*Daubert* grounds. (Doc. 106).

the Policy was unambiguous and failed to meet their burden under § 627.409(2). (Doc. 130).

The two summary judgment motions and the motions to exclude expert testimony were referred to Magistrate Judge Philip R. Lammens. (Doc. 116; Doc. 125; Doc. 131). On October 21, 2021, the Magistrate issued its Report and Recommendation (“Recommendation”) recommending the district court (1) grant Appellees’ summary judgment motion, harkening back to the district court’s initial dismissal of the complaint, (2) deny Appellant’s summary judgment motion, and (3) deny the motions to exclude expert testimony as moot. (Doc. 147 at 12). In doing so, the Magistrate first relied on the district court’s prior orders to conclude the All Pilots provision applied to Neubert, disregarding Appellant’s argument to the contrary, and thereby interpreting ambiguous clauses in favor of the insured. (*Id.* at 8 n.7). The Magistrate then determined the Special Conditions had three requirements Neubert needed to satisfy “[p]rior to solo in N1ZR,” without addressing the ambiguity inherent in that undefined term. The Magistrate found that Neubert failed to meet the requirement that he obtain “a multiengine rating and an instrument rating for multiengine aircraft,” prior to the incident. (*Id.* at 9). The Magistrate rejected Appellant’s argument that the phrases “multiengine rating” and “prior to solo” were ambiguous in light of the Special Conditions requirement that Neubert participate in and complete flight training specifically on the Aircraft,

finding that (1) Neubert was not required to perform solo training to obtain a multiengine rating, and (2) even if the CFI's endorsement authorized solo flight training, it did not make the Special Conditions ambiguous, despite the fact that the Policy did not specifically define the term "flight training" nor proscribe solo flight training. (*Id.* at 10). The Magistrate did not address Appellant's arguments relating to § 627.409(2).

Appellant filed its Objections to the Magistrate's Recommendation, arguing in great detail as to why the Magistrate erred. (Doc. 158). Four days after receiving Appellant's thirty-one pages of Objections, and without waiting for a response from Appellees, the district court adopted, confirmed, and approved all aspects of the Recommendation without addressing any of Appellant's arguments or making any specific findings as to those arguments. (Doc. 161). As a result, Appellant's summary judgment motion was denied and Appellees' summary judgment motion was granted. (*Id.*). On November 17, 2021, judgment was entered in Appellees' favor and against Appellant. (Doc. 162). This appeal follows. (Doc. 169).

D. Standard of Review

This Court reviews the district court's grant of summary judgment *de novo*, viewing all evidence and drawing all reasonable factual inferences in favor of the nonmoving party. *Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012). Summary judgment is appropriate if the movant shows that "there is no

genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Strickland*, 692 F.3d at 1154. This Court must draw all reasonable inferences in favor Appellant (the nonmoving party) and may not weigh evidence or make credibility determinations which “are jury functions, not those of a judge.” *Strickland*, 692 F.3d at 1154 (quoting *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255 (1986)).

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment in favor of Appellees and the judgment should be reversed. The district court made impermissible determinations of fact to reach its conclusion that the “underlying facts are not in dispute,” despite Appellant’s record evidence to the contrary. The district court relied on extrinsic evidence to interpret the language used in the aviation insurance policy but then concluded that, “**after reviewing the record**,” the “Special Conditions provision is unambiguous.” (Doc. 147 at 9) (emphasis added). The court relied on inadmissible and unqualified “expert” witness testimony by Appellees’ lawyer witness who simply presented argument on the meaning and application of FAA regulations and Neubert’s qualifications including the following: the “endorsement in this case did not constitute any sort of rating and did not constitute any rating issued by the FAA.” (Doc. 147 at 10) (citing Doc. 105-1, Supp. Expert Report of Kathleen A. Yodice, at 6)). The court considered

heavily redacted FAA documents submitted by Appellees in further support of their arguments concerning the meaning of the Special Conditions and the requirements for solo flight.

In summary, the Recommendation impermissibly determined that the Special Conditions' requirement that Neubert "obtain[] a multiengine rating and an instrument rating for multiengine aircraft" was unambiguous. In reaching that determination, the district court (1) failed to consider the evidence in the light most favorable to Appellant as required, (2) impermissibly relied on extrinsic evidence to determine the Policy language was unambiguous, and (3) erroneously concluded there were no facts in dispute.

Even assuming for sake of argument that Appellant failed to fulfill all of the Special Conditions, a breach of a condition in an insurance policy is not sufficient to deny coverage. Rather, Appellees had the burden of pleading and providing a breach of a condition and a resulting increase of the hazard of the loss incurred. Fla. Stat. § 627.409(2); *Fla. Power & Light Co.*, 433 So. 2d at 536-37. Appellees failed to meet their burden under § 627.409(2) and, as a result, the district court should have denied their motion for summary judgment. The district court failed consider or even mention § 627.409(2) and ended its inquiry with the finding of a breach of a condition, alone, which is reversible error.

The summary judgment in favor of Appellees should be reversed.

ARGUMENT

I. The District Court Erred as a Matter of Law in Determining the Special Conditions Provision is Unambiguous.

The basis for the Magistrate’s Recommendation was its determination that the Special Conditions’ requirement that Neubert “obtain[] a multiengine rating and an instrument rating for multiengine aircraft” was unambiguous. However, in so ruling, the Magistrate (1) failed to consider the evidence in the light most favorable to Appellant as required, (2) impermissibly relied on extrinsic evidence to determine the Policy language was unambiguous, and (3) erroneously concluded there were no facts in dispute. As the Recommendation (and errors therein) was adopted in full by the district court, reversible error occurred.

A. The district court failed to view the evidence in the light most favorable to Appellant as the non-moving party.

It is axiomatic that on a motion for summary judgment, “[i]f there is a conflict between the parties’ allegations or evidence, the non-moving party’s evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party’s favor.” *Shotz v. City of Plantation*, 344 F.3d 1161, 1164 (11th Cir. 2003). This standard “is not affected by the filing of cross-motions for summary judgment. The court must evaluate each individual motion on its own merits, viewing the evidence in favor of the nonmoving party in each instance.” *Wilson v. Browne*, 2012 WL 1605877, *2 (N.D. Fla. Apr. 20, 2012); *see also Shaw Constructors v. ICF*

Kaiser Eng'rs, Inc., 395 F.3d 533, 538-39 (5th Cir. 2004) (“Cross-motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.”). Finally, the fact that both parties filed motions for summary judgment does not dictate summary judgment be granted. *See Munoz v. CitiMortgage, Inc.*, 2021 WL 4133748, *2 (M.D. Fla. Sept. 10, 2021) (“[T]he filing of cross-motions for summary judgment does not give rise to any presumption that no genuine issues of material fact exist.”). It is clear these well-establish principles were violated below.

Appellant presented evidence that via the CFI endorsement, Neubert was qualified for and proficient to make solo flights in the Aircraft. Pursuant to the Special Conditions’ requirement that Neubert complete flight training, the endorsement was for flight training required by Neubert’s flight instructor, *and* permitted by the applicable FAA regulations. The undisputed fact is that at the time of the incident, Neubert was operating the Aircraft under an endorsement from his flight instructor that required solo flight training. Appellees’ own purported expert acknowledged that pilots training to submit an application for a multiengine class rating must satisfy certain training requirements, and that Neubert’s operation of the Aircraft was authorized under the FAA regulations pertaining to class-rating training. (Doc. 97). This was confirmed by the testimony of other witnesses, including the insurance adjuster. (Doc. 124; 130). When both the FAA regulations

authorize *and* require solo training, it is reasonable to interpret a flight instructor's endorsement for solo training pursuant to those regulations as a "multiengine rating" under the Policy. *See Airmanship, Inc. v. U.S. Aviation Underwriters, Inc.*, 559 So. 2d 89, 91-92 (Fla. 3d DCA 1990) (finding policy term ambiguous where reasonable people could differ as to the definition of the term and the term was undefined in the policy). And because that interpretation is reasonable, the term "multiengine rating" must be considered ambiguous. *See Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) ("If the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the another [sic] limiting coverage, the insurance policy is considered ambiguous."); *Airmanship*, 559 So. 2d at 92 ("Construing the term in the manner favorable to sustaining coverage, we hold that the 'commercial aviation' exclusion in USAU's policy does not apply to Tasso's services as a safety pilot or instructor.").⁸

The ambiguity of the term "multiengine rating" in the Special Conditions is further demonstrated when the provision is considered with the other terms of the Policy. *See Dahl-Eimers v. Mut. of Omaha Life Ins. Co.*, 986 F.2d 1379, 1381 (11th Cir. 1993) ("Under Florida law, courts must construe an insurance contract in its entirety, striving to give every provision meaning and effect."). As previously noted,

⁸In this diversity action, the Court is required to apply the substantive law of Florida. *Gossard v. Adia Servs., Inc.*, 120 F.3d 1229, 1231 (11th Cir. 1997).

under the All Pilots provision, a pilot “must be certificated for the make and model being flown, and must be currently rated for the flight involved.” The physical layout of the insurance application page clearly demonstrates that the “All Pilots” provision is *part* of the Additional Pilots Clause. (Doc. 124-7 at 9). And because Neubert is a Named Pilot on both the application and the Policy, the Additional Pilots Clause does not apply to him. Despite this, the district court erroneously determined Neubert was subject to the All Pilots provision in its order on the initial motion to dismiss, and then that determination was reiterated again and again as though it was binding, immutable law. In fact, the Magistrate relied on the district court’s prior orders to disregard one of Appellant’s main arguments against summary judgment as though it was legally foreclosed.

Regardless, even assuming Neubert was subject to both the All Pilots and Special Conditions as determined by the Magistrate (he was not), such an interpretation of the Policy *demonstrates* its inherent ambiguity. Under the All Pilots provision, Neubert would have been required to be “certificated for the make and model being flown,” and “currently *rated* for the flight involved.” If that were the case, Neubert would not have needed to also obtain “a multiengine rating and instrumental rating for multiengine aircraft” to fly the Aircraft, making the Special Conditions’ requirements superfluous. *See Port Consolidated, Inc. v. Int’l Ins. Co. of Hannover, PLC*, 826 F. App’x 822, 827 (11th Cir. 2020) (recognizing that

“[u]nder Florida law, a contract should not be read so as to make one section superfluous”); *Universal Prop. & Cas. Ins. Co. v. Johnson*, 114 So. 3d 1031, 1036 (Fla. 1st DCA 2013) (“[A] contract will not be interpreted in such a way as to render a provision meaningless when there is a reasonable interpretation that does not do so.”). The fact that both the Magistrate and district court misinterpreted the Policy language demonstrates the Policy’s ambiguity, particularly when the term “multiengine rating” is undefined. *Dahl-Eimers*, 986 F.2d at 1382 (“[F]ailing to define a term does not create ambiguity per se,” but the “insurer cannot, by failing to define the terms . . . , insist upon a narrow, restrictive interpretation of the coverage provided.”) (marks and citations omitted)); *Franqui v. Liberty Mut. Fire Ins. Co.*, 2014 WL 1092405, *4 (M.D. Fla. Mar. 18, 2014) (“[D]iffering interpretations of the same provision are evidence of ambiguity, particularly when a term is not explicitly defined or clarified by the policy.”).

Similarly, the Special Conditions use of “prior to solo in N1ZR” is undefined and ambiguous. The Policy period extended beyond Neubert’s training. Logically, “prior to solo” in the context of the Special Conditions meant for the remainder of the Policy period – after Neubert completed his flight training and was no longer being supervised by his CFI. In fact, that introductory clause continues with “and must successfully complete formal ground **and flight training** for [the Aircraft], and must have completed 10 hours of dual instruction in [the Aircraft]” (emphasis

added). Given the structure of the sentence, it is clear that the restriction purportedly imposed of not flying solo until after Neubert obtained a multiengine rating and an instrument rating for multiengine aircraft did not apply until after Neubert completed all formal ground and flight training for the Aircraft. It is undisputed that Neubert was flying the Aircraft on November 18, 2018, after having completed all formal ground training and while he was in the process of completing all flight training as directed by his CFI and consistent with applicable FAA regulations. (See Doc. 135 at 22-28).

Accordingly, whether the “flight training” referred to in the Special Conditions includes “solo flight training” as it clearly does under the FAA regulations makes the Special Conditions ambiguous. As such, the Special Conditions must be interpreted in favor of coverage and strictly against Defendants, which the district court failed to do.

Despite the undisputed evidence referenced above and the inherent ambiguity in the Policy provisions, the Magistrate inexplicably determined that Neubert did not require solo flight training and thereby assumed, after-the-fact, the role of the CFI in directing Neubert’s flight training. Evidently, the Magistrate determined, after-the-fact, that Neubert should have disregarded his CFI’s instructions to continue to gain experience in the Aircraft through solo flight training prior to taking his check ride. Rather than comply with the CFI’s flight training instructions, the Magistrate

speculated that Neubert should have insisted that the CFI fly with him so that he could gain additional experience in the Aircraft through dual-flight. This determination is not only wholly speculative, it contradicts both the record evidence and the FAA regulations themselves. *See* Beard, FAA Office of Chief Counsel Opinion, Legal Interpretation re: Section 61.3(d) solo endorsement requirements for additional category and/or class ratings (January 9, 2013) (“[A] pilot who applies to add a category rating to a pilot certificate must, among other things, complete the required training and aeronautical experience required for that rating. . . . Generally, to meet the aeronautical experience requirements for a new category of aircraft, a pilot **must accomplish solo flight time**. Because the pilot does not hold the ratings necessary to act as pilot in command, a pilot must receive an endorsement for solo flight from an authorized instructor”) (emphasis added).⁹ Because it is clear that the Magistrate, and the district court by extension, failed to view the evidence in the light most favorable to Appellant, the order granting summary judgment must be reversed.

B. The district court erred in relying on extrinsic evidence.

It is both counterintuitive and legally impermissible for a court to rely on extrinsic evidence to determine a policy’s language is unambiguous. “A contract’s

⁹ Incredibly, the Magistrate cited the Beard opinion for an exact opposite interpretation. (Doc. 147 at 10 n. 8).

meaning is to be determined by its language, without resort to extrinsic considerations, unless the language is ambiguous.” *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1518 (11th Cir. 1985). “[W]hen a policy is unambiguous, there is no need to, and courts should not, consider extrinsic evidence.” *State Farm Fla. Ins. Co. v. Moody*, 180 So. 3d 1165, 1170 (Fla. 4th DCA 2015). However, that is exactly what happened below.

In determining the Special Conditions’ language regarding a “multiengine rating and an instrument rating for multiengine aircraft” was unambiguous, the Magistrate and district court relied upon (1) the purported, inadmissible opinions of Appellees’ lawyer “expert” witness who was not qualified as an expert by the district court and without determining the admissibility of that witness’s testimony which Appellant challenged (see Doc. 122), (2) FAA regulations, opinion letters, and preliminary findings, and (3) alleged “admissions” of Neubert in FAA settlement documents. (Doc. 147 at 4-11). By itself, this constitutes reversible error. *See Philadelphia Am. Life Ins. Co. v. Buckles*, 350 F. App’x 376, 379 (11th Cir. 2009) (noting that “[t]he district court, upon finding that the ‘actual charges incurred’ provision was unambiguous, was prohibited from looking outside the four corners of the contract”); *Shipner v. E. Air Lines, Inc.*, 868 F.2d 401, 405 (11th Cir. 1989) (“[A] Florida court may not consider extrinsic evidence to interpret a contract which

is ‘clear and unambiguous.’”). But the Magistrate compounded that error in the type of extrinsic sources it relied upon.

In rejecting Appellant’s argument regarding ambiguity, the Magistrate cited the opinion of Appellees’ purported lawyer expert. (Doc. 147 at 10). That opinion was that the “endorsement in this case did not constitute any sort of rating and did not constitute any rating *issued by the FAA.*” (*Id.*) (emphasis added). It is clear such an opinion was inadmissible, because it constitutes a legal opinion as to the interpretation of the FAA regulations. *See S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (noting that expert opinions as to whether party violated FAA regulations constituted inadmissible testimony on legal matters); *Flynn v. Tex-Air Helicopters, Inc.*, 2006 WL 5153149, *1 (E.D. La. Feb. 22, 2006) (striking expert testimony offering interpretations of FAA regulations because the opinions were legal conclusions); *AMTEC Corp. & AMTEC Less Lethal Sys., Inc. v. Non-Lethal Def., Inc.*, 2018 WL 5602906, *2 (N.D. Fla. May 24, 2018) (excluding expert testimony on meaning of ATF regulation and whether party violated the regulation because they were matters of law to be resolved by the court). As the opinion was inadmissible and could not be rendered admissible at trial, it could not be considered on summary judgment. *See Gen. GMC Trucks, Inc. v. Mercury Freight Lines, Inc.*, 704 F.2d 1237, 1239 (11th Cir. 1983) (“Upon a

motion for summary judgment, this court may generally consider only evidence that would be admissible at trial.”).

After specifically relying on the purported expert’s opinion to find the Special Conditions unambiguous, the Magistrate then incredibly determined the purported expert offered no opinion “relevant to the Court’s determination that Neubert failed to meet the requirements of the Special Conditions.” (Doc. 147 at 12). As such, the Magistrate recommended Appellant’s *Daubert* motion seeking to exclude the purported expert and her opinions be denied as moot. (*Id.*). In essence the Magistrate determined it was not going to rule on Appellant’s *Daubert* motion because Appellees’ expert did not offer any relevant opinions regarding the requirements of the Special Conditions, and then cited to those opinions to find Neubert did not meet those same requirements. This was without question improper.¹⁰

¹⁰ The Magistrate also erred by relying on heavily redacted FAA records relating to the incident. (Doc. 147 at 5); (Doc. 107-2 at 6-60). Apart from the inadmissibility of these documents, *see Gen. GMC Trucks, Inc.*, 704 F.2d at 1239, the records are irrelevant to whether coverage was properly denied, *see Ranger Ins. Co. v. Culbertson*, 454 F.2d 857, 864-65 (5th Cir. 1971) (finding alleged violation of FAA regulation did not constitute grounds for denial of coverage, and noting that “[i]nsurance is procured to protect the violator, and every [FAA regulation] violation cannot nullify coverage”).

C. The district court erred in concluding there were no facts in dispute.

In the Recommendation, the Magistrate determined that “[t]he underlying facts are not in dispute.” (Doc. 147 at 2). It is difficult to understand how the Magistrate came to such a conclusion. In its response to Appellees’ renewed summary judgment motion, Appellant dedicated over ten pages to responding and specifically disputing Appellees’ purported “Statement of Undisputed Material Facts.” (Doc. 135 at 3-14). Appellees similarly disputed the “Statement of Undisputed Facts” contained in Appellant’s corrected summary judgment motion. (Doc. 139 at 3). By failing to determine which facts were actually in dispute, the Magistrate could not have possibly reviewed the facts in the light most favorable to Appellant as the non-moving party. *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000) (“We review the district court’s grant of summary judgment de novo, reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, and applying the same standard as the district court.”). The district court’s adoption of the Magistrate’s Recommendation constitutes reversible error on this issue.

D. The district court's construction of the Policy leads to absurd results.

Taken to its logical, or illogical, conclusion, the Magistrate's interpretation of the Policy leads to two absurd results. *See Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998) ("Suffice it to say that insurance policies will not be construed to reach an absurd result."). First, the Magistrate determined that it could not "rewrite the unambiguous terms of the Special Conditions . . . simply because Neubert engaged in solo training that was permissible under the regulations, but not under the Policy." (Doc. 147 at 11). But as demonstrated, Neubert's solo training in the Aircraft was not only *permissible* under the FAA regulations, it was *required* under the endorsement he received and the directions of this CFI as part of his policy-mandated flight training. And Neubert's compliance with the FAA regulations cannot be grounds to conclude he breached the Policy.

Second, the Magistrate's conclusion implies Neubert's extensive flying experience was held against him in finding a breach. As noted, it is undisputed that at the time of the incident, Neubert was flying pursuant to an endorsement from his CFI. That endorsement related to student pilots training for a multiengine rating. 14 C.F.R. § 61.87(e). The evidence also shows that the endorsement for solo flight was for training requested by the CFI to increase and enhance Neubert's experience with the Aircraft prior to taking his final check ride. (Doc. 124-1 at 9-10). Therefore at

the time of the incident, Neubert (1) had an endorsement relating to student pilots, (2) was instructed by his CFI to engage in solo flight training, and (3) the Special Conditions specifically mandated flight training in the Aircraft. Despite this, the Magistrate determined that because Neubert was not actually a student pilot but instead seeking to receive an additional rating, a different FAA regulation applied and solo flight training was not required. (Doc. 147 at 10 n.8). Notably, the FAA regulation cited by the Magistrate does not prohibit solo flight training which then begs the question: if the CFI directed Neubert to continue to gain experience in the Aircraft under the CFI's endorsement and with his oversight as part of Neubert's flight training which Neubert was required to complete under the Special Conditions, is the insurer or Magistrate better qualified than the CFI to chart Neubert's flight training course in preparation for his check ride? Would the check ride airman have asked Neubert about his experience in solo flight training – to which under the Magistrate's guidance, Neubert would have had to respond, "none."

Aside from the fact this improperly discounts both Neubert and the CFI's understanding of the FAA requirements, it also leads to the bizarre conclusion that, from a coverage perspective, Neubert would have been better off flying the Aircraft at the time of the incident as a student pilot with little to no experience thereby increasing significantly the hazard that the incident would have resulted in a fatality

rather than as a highly experienced pilot with extensive flight time in complex aircraft. Such an interpretation of an aircraft insurance policy is absurd.

II. The District Court Erred in Failing to Address the Applicability of Florida's Anti-Technicality Statute, Fla. Stat. § 627.409(2).

Throughout this case, Appellant has continually asserted that coverage is mandated by virtue of Florida's Anti-Technicality Statute, § 627.409(2), Fla. Stat. The statute was a basis for Appellant's complaint for declaratory relief; Appellees rely on § 627.409(2) as a basis for multiple affirmative defenses; § 627.409(2) features prominently in Appellant's motion papers and opposition papers, including all the summary judgment motions; and the district court itself ruled, in denying Appellees' initial summary judgment motion, that it was refraining from ruling on § 627.409(2) only because there were issues of fact regarding whether Neubert breached the Policy in the first place. Clearly, § 627.409(2) was a central issue to the case and one of Appellant's principle arguments as to why an alleged breach of the Special Conditions was insufficient to grant summary judgment in Appellees' favor. Despite this, the Magistrate and district court determined Appellees properly denied coverage without any analysis of § 627.409(2). This was error.

The basis of the ruling below was the determination that Neubert breached the unambiguous requirements of the Special Conditions. Not surprisingly, the Special Conditions are insurance *conditions*, and under Florida law, a breach of conditions without more is an insufficient basis to deny coverage. § 627.409(2) places the

burden on the insurer to demonstrate the breach caused the accident or increased the hazard:

(2) A breach or violation by the insured of a warranty, condition, or provision of a wet marine or transportation insurance policy, contract of insurance, endorsement, or application does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

Fla. Stat. § 627.409(2). *See also Fla. Power & Light Co.*, 433 So. 2d at 536-37 (noting that “[t]he burden of pleading and proving a breach of condition and a resulting increase of the hazard” was on the defendant insurer); *Pickett*, 404 So. 2d at 1153 (finding of breach of insurance provision by not having aircraft properly certified must have increased the hazard). Appellees not only failed to meet their burden of showing Neubert’s alleged breach “increased the hazard by any means within [his] control,” they never even addressed the issue in their summary judgment motions. Given Appellees’ failure to meet the requirements of § 627.409(2), the district court was precluded from entering summary judgment in Appellees’ favor regardless of whether the Special Conditions were unambiguous or Neubert failed to meet them. *See Fla. Power & Light Co.*, 433 So. 2d at 536-7 (reversed directed verdict in favor of aircraft insurer because the insurer failed to prove that a breach of the pilot warranty clause increased the hazard and remanded the case to trial court for further proceedings on causation between breach and accident); *Pickett*, 404 So.

2d at 1152 (judgment in favor of aircraft insurer reversed and remanded because “issue of whether the breach of the policy provision, i.e., that the aircraft be properly certified, increased the hazard as provided in section 627.409(2), Florida Statutes (1979), has not been judicially determined.”); *Clarendon Am. Ins. Co.*, 2006 WL 3337499 at *2 (denying insurer’s summary judgment request due to court’s inability to determine if alleged breach increased the hazard pursuant to § 627.409(2), “regardless of supposed ambiguities in the policy language”). See also *Ocean Reef Charters*, 996 F.3d at 1170 (“Florida law, specifically § 627.409(2), governs the effect of Ocean Reef’s breaches of the captain and crew warranties.”).

Appellees’ failure to meet their burden under § 627.409(2) likely stems from their continued assertion throughout this case that the statute is limited to insurance matters related to wet marine or transportation. However, both the legislative history of § 627.409(2) and its application by Florida and Federal courts demonstrates this to be false.

A. Legislative History

“It is well settled that legislative intent is the polestar that guides a court’s statutory construction analysis.” *State v. J.M.*, 824 So. 2d 105, 109 (Fla. 2002). When a statute is unclear or ambiguous, meaning “reasonable persons can find different meanings in the same language,” courts apply rules of statutory construction and explore legislative history to determine legislative intent.

BellSouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Because reasonable persons can find different meanings in § 627.409(2), the language is ambiguous.

As noted, § 627.409(2) addresses breaches or violations of a warranty, condition, or provision “of a wet marine or transportation insurance policy, contract of insurance, endorsement, or application.” Appellees’ preferred meaning of this language is that the statute *only* applies to insurance policies, contracts, endorsements, or applications relating to wet marine or transportation. But that argument flies in the face of Florida courts’ decisions including *Fla. Power & Light* and *Pickett* applying § 627.409(2) to aviation policies and a host of other cases in which the statute was applied to other types of insurance policies. This Court recently described § 627.409(2) as follows: “A breach ... does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured,” without regard to the purported limitation of its application to only “wet marine or transportation” policies. *Ocean Reef Charters*, 996 F.3d at 1164 (ellipsis in original). *See also Clarendon Am. Ins. Co. v. Bayside Rest., LLC*, 567 F. Supp. 2d 1379, 1385 (M.D. Fla. 2008) (interpreting § 627.409(2) as applying to “any . . . contract of insurance”).

Moreover, the statute's legislative history compels a finding that it applies to a broad range of insurance types. Chapter 627 of the Florida Statutes addresses insurance rates and contracts, and Part II of the chapter applies specifically to insurance contracts. § 627.401 defines the scope of the chapter, and when originally enacted in 1959, "Wet marine and transportation insurance" was explicitly excluded. Ch. 59-205, § 450(3), Laws of Fla. Accordingly, when § 627.409 was originally enacted in 1959, it did not apply to wet marine or transportation insurance at all. Ch. 59-205, § 458, Laws of Fla. In 1971, the Florida legislature amended Chapter 627 "to provide that certain provisions . . . shall be applicable to wet marine and transportation insurance," and to create the provision that would eventually be renumbered into § 627.409(2). Ch. 71-45, § 2, Laws of Fla. Because the scope of Chapter 627 was specifically defined to exclude it, the *only* way for § 627.409(2) to apply to wet marine or transportation insurance was for the Legislature to *expressly include* the terms "wet marine and transportation" in the statutory language. But such an inclusion of an otherwise excluded type of insurance does not suggest the Legislature intended § 627.409(2) to be limited *only* to wet marine or transportation, as demonstrated in part by the most recent amendment of the statute.

In 2014, the Legislature clarified its original intent for § 627.409(2) to apply to all applications, and not only applications for wet marine or transportation insurance. *See* Fla. S. Comm. on Appropriations, CS for CS for SB 708 (2014) Post-

Meeting Staff Analysis 6 (Mar. 17, 2014) (describing specific amendments to § 627.409 and noting “[t]he bill does not change the law relating to *other* types of insurance” (emphasis added)); *see also Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 369 (Fla. 2005) (“[S]ince 1982 this Court has on numerous occasions looked to legislative history and staff analysis to discern legislative intent.”).

The above conclusion that the Legislature did not intend § 627.409(2) to be limited to wet marine or transportation matters is also supported by the other provisions of § 627.409. *See Fla. Dep’t of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (“The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature’s intent.”). § 627.409 addresses representations in applications and warranties generally. § 627.409(1) provides, *inter alia*, that any statement or description made by or on behalf of an insured in an application for an insurance policy is a representation and not a warranty, and that a misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the policy in certain circumstances. As the provisions in § 627.409(1) undoubtedly apply to

insurance contracts generally, it is reasonable to assume the Legislature intended the same scope for the provisions in § 627.409(2).¹¹

While both the legislative history and other provisions of § 627.409 indicate legislative intent for § 627.409(2) to be applied generally, so does the overall purpose of Chapter 627. *See Dep’t of State v. Fla. Greyhound Ass., Inc.*, 253 So. 3d 513, 521 (Fla. 2018) (noting “prefatory language may aid a court to determine legislative intent when the operative terms of a provision of law are ambiguous”). As previously recognized by this Court:

The average holders of most types of insurance policies are individuals; much of the statutory regulation has emerged to protect consumers in their dealings with large insurance companies. Chapter 627, which contains Section 627.409, expressly recognizes this, stating that the chapter’s purpose is to “promote the public welfare” and “protect policyholders and the public.” Fla. Stat. § 627.031 (1985). Section 627.409 in particular clearly exists for this purpose. Prior to its enactment, insurers could much more easily avoid their obligations to innocent policyholders. Section 627.409 protects consumers by making it harder for unscrupulous insurers to declare insurance contracts void based on technicalities.

Home Guar. Ins. Corp. v. Numerica Fin. Servs., Inc., 835 F.2d 1354, 1358 (11th Cir. 1988) (citations and footnote omitted). If the purpose of Chapter 627 is to “protect

¹¹ In contrast, when the Legislature has intended to exclude the application of chapter 627 to a type of insurance, it has expressly stated that exclusion. For example, Florida has carved out a limited exception to the broad application of § 627.409(2) for surplus lines insurers. *See* Fla. Stat. § 626.913(4) (“[T]he provisions of chapter 627 do not apply to surplus lines insurance authorized under [sections] 626.913–626.937, the Surplus Lines Law.” (alterations added)). No such express exclusion of all types of insurance other than “wet marine or transportation” is stated in § 627.409(2).

policyholders and the public,” that purpose would be undermined by limiting the scope of § 627.409(2) to wet marine or transportation matters only. *See Carnes v. State*, 725 So. 2d 417, 418 (Fla. 2d DCA 1999) (“The judiciary should avoid interpreting a statute in a manner which ascribes to the legislature an intent to create an absurd result.”).¹²

B. Application by Courts

Given the preceding legislative history and intent, it is not surprising that Florida courts have previously applied § 627.409(2) to aviation insurance policies. In *Pickett*, the appellant’s husband was killed in an aircraft accident. 404 So. 2d at 1152. The trial court held that a policy issued by the insurer did not cover the liability because of a policy exclusion requiring a current airworthiness certificate. *Id.* On appeal, the appellant argued that because the accident was caused by pilot error and bad weather, not as a result of any malfunction related to the failure to have a valid airworthiness certificate on the aircraft. The appellant argued that

¹² Interpreting § 627.409(2) so as to require a causal connection between a breach and the ultimate loss is also consistent with Florida insurance law in general. *See State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071, 1079 (Fla. 2014) (holding that a policyholder’s breach of a policy’s compulsory medical examination provision “should not result in post-occurrence forfeiture of insurance coverage without regard to prejudice”); *Ramos v. Northwestern Mut. Ins. Co.*, 336 So. 2d 71, 75 (Fla. 1976) (“Not every failure to cooperate will release the insurance company. Only that failure which constitutes a material breach and substantially prejudices the rights of the insurer in defense of the cause will release the insurer of its obligation to pay.”).

§ 627.409(2) should apply to prevent the insurer from denying coverage. *Id.* at 1153. The Fifth District Court of Appeal agreed, reversing for a determination of whether the breach of the policy provision increased the hazard. *Id.* In doing so, the court applied § 627.409(2) despite the provision at issue being an “exclusion.” *Id.* (“[§ 627.409(2)] speaks of breach by the insured of any ‘warranty, condition, or provision’ of the policy. Here we are confronted with what was labeled in the policy as an exclusion. However, we believe that whether a policy warranty, condition, or exclusion is involved is not determinative.”).

Eight years later, the Fifth District was given the opportunity to recede from *Pickett*, “especially from its holding that section 627.309(2) . . . applies to aviation insurance policies,” but declined to do so. *United States Aviation Underwriters, Inc. v. Sunray Airline, Inc.*, 543 So. 2d 1309, 1311 (Fla. 5th DCA 1989). In the intervening years, the Fourth District Court of Appeal also applied § 627.409(2) to an aviation policy, holding that a verdict in favor of the insurer was inappropriate pending a determination of whether a breach of the policy’s pilot clause “increased the hazard by any means within the control of the insured.” *Fla. Power & Light Co.*, 433 So. 2d at 536-37; *see also Nat’l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc.*, 759 F.2d 873, 879 n.6 (11th Cir. 1985) (discussing the applicability of § 627.409(2) in aviation insurance policy dispute and determining statute was

“inapposite” only because insurer never argued the insurance contract was breached or violated).

As none of these cases have been overturned, and the scope of the statute has not been clarified by the Florida Supreme Court, this Court should give great weight to these intermediate appellate decisions, regardless of whether it agrees with them. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011) (“Where the highest court—in this case, the Florida Supreme Court—has spoken on the topic, we follow its rule. Where the court has not spoken, however, we must predict how the highest court would decide this case. Decisions of the intermediate appellate courts—here, the Florida District Courts of Appeal—provide data for this prediction. As a general matter, we must follow the decisions of these intermediate courts.” (citations omitted)); *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983) (“A federal court applying state law is bound to adhere to decisions of the state’s intermediate appellate courts absent some persuasive indication that the state’s highest court would decide the issue otherwise. A federal court is bound by this rule whether or not the court agrees with the reasoning on which the state court’s decision is based or the outcome which the decision dictates.” (citations omitted)); *RMI Holdings v. Aspen Am. Ins. Co.*, 2020 WL 6750294, *2 n.2 (N.D. Fla. Nov. 2, 2020) (agreeing with Middle District’s differing interpretation of Florida insurance statute “because it flows more naturally

from the statute’s plain language,” but nonetheless recognizing that “the Court is bound by the interpretation given to the statute by the state’s intermediate appellate courts because [the insurer] has not offered any persuasive indication that the Florida Supreme Court would decide the issue differently from [the intermediate appellate decision] and its progeny”).¹³ In fact, this Court has cited *Pickett* with approval several times recently further indicating the weight to be given to that opinion. *See, e.g., Ocean Reef Charters*, 996 F.3d at 1170; *Gamez v. Ace American Ins. Co.*, 638 F. App’x 850, 854 (11th Cir. 2016).

C. Certification to Florida Supreme Court

Appellant contends that the legislative history of § 627.409(2), coupled with the statute’s past application by both Florida and Federal courts, dictates it being applied to the matter at issue. However, should the Court disagree, Appellant requests certification of the issue to the Florida Supreme Court.

Thirty years ago, the Fifth District Court of Appeal in *Pickett* held that § 627.409(2) applied to an aviation insurance dispute to prevent the denial of

¹³ It is also important to note that despite § 627.409 being amended several times since 1981, the Legislature has not clarified the statutory language to indicate disagreement with *Pickett*. *See Dowell v. Gracewood Fruit Co.*, 559 So. 2d 217, 218 (Fla. 1990) (“Several legislative sessions have passed since our decision in *Bankston*, but no amendments to section 768.125 have been forthcoming. Therefore, we must assume that the legislature is content with our interpretation of the statute.”). In fact, as noted, the most recent amendment in 2014 removing the word “therefor” suggests the Legislature intended a broader application of § 627.409(2).

coverage. When presented with a chance to recede from that holding eight years later, the court denied the opportunity to do so. Despite this, courts weighing in on the issue have applied the statute inconsistently, leaving its scope and administration unresolved. These issues implicate matters of great public importance and should be determined once and for all by the court most appropriate to decide them: the Florida Supreme Court.

When substantial doubt exists about the answer to a material state law question upon which the case turns, a federal court should certify that question to the state supreme court in order to avoid making unnecessary state law guesses and to offer the state court the opportunity to explicate state law. “Only through certification can federal courts get definitive answers to unsettled state law questions. Only a state supreme court can provide what we can be assured are ‘correct’ answers to state law questions, because a state’s highest court is the one true and final arbiter of state law.”

Forgione v. Dennis Pirtle Agency, Inc., 93 F.3d 758, 761 (11th Cir. 1996) (citations omitted). Accordingly, if this Court cannot determine whether § 627.409(2) applies to the instant matter, Appellant requests the Court certify the following question to the Florida Supreme Court: Is § 627.409(2) applicable only to policies, contracts of insurance, endorsements, or applications relating to wet marine or transportation insurance?

CONCLUSION

For the reasons set forth above, Appellant, Neubert Aero Corporation, respectfully requests that the Court reverse the district court’s November 16, 2021

Order (Doc. 161) adopting the Magistrate's Report and Recommendation (Doc. 147) and entering summary judgment in favor of Appellees and remand the matter to the district court for further action consistent herewith.

Respectfully submitted,

FORD & HARRISON LLP

By: /s/ Tracey K. Jaensch

Tracey K. Jaensch, B.C.S.

Florida Bar No. 907057

Email: tjaensch@fordharrison.com

101 E. Kennedy Blvd., Suite 900

Tampa, FL 33602

Telephone: (813) 261-7800

Facsimile: (813) 261-7899

Attorneys for Appellant

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

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, as this brief contains 11,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman 14-point font.

/s/ Tracey K. Jaensch

Tracey K. Jaensch, B.C.S.

Florida Bar No. 907057

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2022, a true and correct copy of the Initial Brief of Appellant Neubert Aero Corp. was electronically filed using the Court's CM/ECF system which will send an electronic copy to those listed below and that four copies will be sent via FedEx (Tracking No. 2729 3919 1095) to the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit:

James H. Wyman, Esq.
jwyman@hinshawlaw.com
Rory Eric Jurman, Esq.
rjurman@hinshawlaw.com
Jenelle E. La Chuisa, Esq.
jlachuisa@hinshawlaw.com

HINSHAW & CULBERTSON LLP
One East Broward Boulevard, Suite 1010
Fort Lauderdale, Florida 33301

Attorneys for Appellees

/s/ Tracey K. Jaensch
Tracey K. Jaensch, B.C.S.
Florida Bar No. 907057