YESSENIA CARRERAS and ALBERTO CARRERAS, JR., Plaintiffs, vs. FEDERATED NATIONAL INSURANCE COMPANY, Defendant. Circuit Court, 20th Judicial Circuit in and for Collier County. Case No. 12-CA-2836. August 19, 2014. Honorable Cynthia A. Pivacek, Judge. Counsel: David Bierman, Florida Advocates, Dania Beach, for Plaintiffs. Michael A. Cassel, Kirwan Spellacy & Danner, P.A., Fort Lauderdale, for Defendant.

FINAL ORDER GRANTING DEFENDANT'S AMENDED

MOTION FOR SUMMARY JUDGMENT OR, IN THE

ALTERNATIVE, DEFENDANT'S MOTION

FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE having come before the Court on August 7, 2014, on Defendant's Amended Motion for Summary Judgment or, in the alternative, Defendant's Motion for Judgment on the Pleadings, and the Court, having considered the motion and related filings, heard argument of counsel, and been otherwise advised, hereby states its decision as follows:

I. Background and Facts

This case stems from a one (1) count breach of contract action filed by YESSENIA CARRERAS and ALBERTO CARRERAS, Jr. (hereinafter the "Insureds" or "Plaintiffs") against FEDERATED NATIONAL INSURANCE COMPANY (hereinafter "Federated" or "Defendant"), their homeowner's insurance provider, wherein Plaintiffs seek damages for a dropped object causing a chipped tile at the subject property located at [Editor's Note: Address Omitted], Naples, FL 34120 (hereinafter the "subject property").

On February 14, 2012, as alleged by all record evidence set forth by Plaintiffs[1], a wine bottle carried by an Insured was dropped on the tile flooring at the subject property causing the affected tiles to chip and/or crack. After completing its investigation, Defendant denied Plaintiffs' claim relying upon an exclusionary provision contained within the subject policy of insurance which states, in pertinent part, as follows:

SECTION I -- PERILS INSURED AGAINST

COVERAGE A -- DWELLING and COVERAGE B -- OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property.

* * *

We do not insure, however, for loss:

* * *

2. Caused by:

* * *

e. (1) Wear and tear, ***marring***, deterioration;

* * *

(hereinafter the "marring" provision) (Emphasis added). *See* the subject policy filed with the Court on January 30, 2013. On or about August 1, 2012, based on Defendant's denial of their claim, Plaintiffs filed the instant lawsuit. Thereafter, on or about February 1, 2013, Defendant filed its Answer, Affirmative Defenses, and Demand for Jury Trial. Included in Defendant's Affirmative Defenses was the above referenced marring provision.

II. Legal Discussion

a. Standard of Law -- Motion for Summary Judgment

Rule 1.510 of the Florida Rules of Civil Procedure allows for a party to move for summary judgment "any time after the expiration of 20 days from the commencement of the action. . ." *See* Fla. R. Civ. P. 1.510(a) (2014). Additionally, "[s]ummary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Volusia Cnty. V. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. The facts are to be viewed in the light most favorable to the non-moving party, and the standard of review is de novo. *Id*.

b. Standard of Law -- Motion for Judgment on the Pleadings

Rule 1.140 of the Florida Rules of Civil Procedure allows for any party to move for judgment on the pleadings after the pleadings are closed. Fla. R. Civ. P. 1.140(c) (2014). It is well settled that a Rule 1.140(c) Motion for Judgment on the Pleadings must be decided wholly on the pleadings. *See Swim Indus. v. Cavalier Mfg. Co.*, 559 So. 2d 301, 301 (Fla. 2d DCA 1990) (stating that a Rule 1.140(c) motion "must be decided wholly on the pleadings and may only be granted if the moving party is clearly entitled to a judgment as a matter of law"). If the pleadings themselves reveal that there are no facts to be resolved by a trier of fact, the court may apply the law to the uncontroverted facts and enter a judgment accordingly. *See Hart v. Hart*, 629 So. 2d 1073 (Fla. 2d DCA 1994). In making this determination, all material allegations of the opposing party's pleadings must be taken as true, and all those of the movants, which have been denied, must be taken as false. *See Butts v. State Farm Mut. Auto. Ins. Co.*, 207 So. 2d 73, 75 (Fla. 3d DCA 1968).

c. Defendant's Arguments

Defendant moves for judgment as a matter of law based on the theory that an object dropped onto tile flooring causing damage in the form of a chip or a crack constitutes superficial marring damage and, as such, should be excluded from the subject policy under the marring provision.

The subject policy is an "all risk" policy and, as such, provides coverage for all fortuitous loss or damage other than that resulting from willful misconduct, fraudulent acts, or those expressly excluded from coverage; however, although the term "all risk" is afforded a broad, comprehensive meaning, an "all risk" policy is not an "all loss" policy and, thus, does not extend coverage for every conceivable loss. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082 (Fla. 2005) [30 Fla. L. Weekly S203a]. Rather, under an all-risk policy, an exclusion applies if the loss clearly and unambiguously fits within its provisions. *Liebel v. Nationwide Ins. Co.*, 22 So. 3d 111 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D2032a]. Only when a policy is actually ambiguous may the court resort to the rule that the policy

will be construed in favor of coverage. *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) [30 Fla. L. Weekly S633a].

In the matter *sub judice*, Defendant denied the Insureds' claim for damages caused by a dropped object under the marring provision contained in the subject policy. *See supra.* It must be noted, however, that the subject policy does not define the term "marring." Defendant contends that, in such an instance, the court must give everyday meanings to undefined words, reading the terms of the policy in light of the skill and experience of everyday people, and not create ambiguity in otherwise clear contract provisions. *Direct Gen'l Ins. Co. v. Morris*, 884 So. 2d 1077, 1080 (Fla. 1st DCA 2004) [29 Fla. L. Weekly D2310a]; *Siegle v. Progressive Cons. Ins. Co.*, 788 So. 2d 355, 359-60 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1125a]. Furthermore, the fact that the subject policy does not define "wear and tear, marring, deterioration" does not make these terms ambiguous. *State Farm Mut. Auto. Ins. Co. v. Mashburn*, 15 So. 3d 701 (Fla. 1st DCA 2009) [34 Fla. L. Weekly D1320a]. Accordingly, Defendant contends that the Court must apply the plain meaning of these phrases to the policy as a whole by referring to the everyday meaning of the terms. *First Specialty Ins. Co. v. Caliber One Indem. Co.*, 988 So. 2d 708, 713-714 (Fla. 2nd DCA 2008) [33 Fla. L. Weekly D1996a].

In *Ergas v. Universal Property and Casualty Ins. Co.*, the court applied dictionary definitions to define the terms "mar" and "marring" to mean "to cause harm to; spoil or impair;" and "a disfiguring mark; blemish." *Ergas v. Universal Property and Casualty Ins. Co.*, 114 So. 3d 286 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D900a] *review denied* 133 So. 3d 525, (Fla. 2014) (holding that a dropped object, to wit, a hammer, causing damage to tile flooring constituted "marring" and was excluded from coverage under the marring provision of the insurance policy).

Shortly thereafter, in *Nunez v. Citizens Property Ins. Corp.*, the court of appeals *per curium* affirmed the lower court's granting of summary judgment in favor of the defendant holding that a chipped tile resulting from a dropped object is, as a matter of law, "marring" which fell under the policy's marring provision, thereby excluding coverage. *Nunez v. Citizens Property Ins. Corp.*, 123 So. 3d 85 (Fla. 3rd DCA 2013) [38 Fla. L. Weekly D1956f], *rehearing denied* 2013 Fla. App. LEXIS 17753, (Fla. 3rd DCA 2013). The Nunez court cited only to *Ergas* as the basis for its decision.

Furthermore, in *Rodriguez v. Citizens Prop. Ins. Corp.,* the Court upheld summary judgment in favor of the Insurer who relied solely upon the exact same marring provision contained in the subject policy in denying a claim stemming from a dropped object causing tile damage. *Rodriguez v. Citizens Prop. Ins. Corp.*, 124 So. 3d 237 (Fla. 2d DCA 2013). The Court relied upon definitions of the terms "mar" and "marring" that are substantially similar to those proffered in *Ergas* in upholding the insurer's denial of coverage.[2]

Defendant maintains that Plaintiffs' claim is unambiguously excluded from coverage based on the marring provision contained within the subject policy under the plain and ordinary meaning of "mar" and "marring" as established by the *Rodriguez*, *Ergas,* and *Nunez* courts.

d. Plaintiffs' Arguments

Plaintiffs contend that the term "marring" as utilized by the Defendant is ambiguous as it can be applied to all damages regardless of whether the damage is superficial or more serious. Plaintiffs cite to a footnote in *Ergas* wherein the court stated that the definitions of "mar" and "marring" as utilized therein "form no bright line between superficial damage and more serious damage." *See Ergas at* FN 1. Accordingly, Plaintiff asserts, in line with the *Ergas* footnote, that the definitions of "mar" and "marring" utilized by Defendant "might thus cover almost all damage to property insured, whether

slight or substantial. As this would cover most of what an insured would expect the policy to cover, a definition of 'mar' which included serious injury would essentially gut coverage under the insurance policy." *Id.*

Additionally, Plaintiffs insist that a term of an insurance policy should not be construed to reach an absurd result. *See Gen. Star Indem. Co. v. W. Fla. Village Inn, Inc*., 874 So. 2d 26 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D348a]. It is Plaintiffs' contention that the term "marring" is ambiguous as it may be used to exclude almost all damage to otherwise covered property whether the damage is slight, such as the instant matter, or substantial. To rule that the marring provision applies without boundary would net an absurd result which guts the insurance policy of coverage. Accordingly, Defendant should not be entitled to final judgment as a matter of law in the instant matter.

III. Conclusion

While the Court declines to comment on the applicability of the marring provision as it pertains to other types of damage, this Court holds, in line with *Rodriguez v. Citizens Prop. Ins. Corp.*, *supra*, that the causation of a dropped object generating damage to tile flooring constitutes marring and the resulting damage is considered superficial in nature. Furthermore, to apply the marring provision to superficial damages caused by a dropped object is not an absurd result. As such, Plaintiffs' claim of tile damage resulting from a dropped object is subject to the marring provision of the governing insurance policy and, consequently, coverage is precluded. Therefore, Defendant is entitled to final judgment as a matter of law. Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Defendant's Amended Motion for Summary Judgment or, in the alternative, Defendant's Motion for Judgment on the Pleadings is hereby GRANTED;

2. Plaintiffs' case is DISMISSED WITH PREJUDICE;

3. This Court shall retain jurisdiction over any additional motions pertaining to entitlement to attorney's fees and costs.

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[1]Defendant's initial assessment of the damages complained of by Plaintiffs was that the damages were not caused by a dropped object; however, Plaintiffs alleged that the damage was caused by a dropped object in their Complaint, Verified Responses to Interrogatories, and deposition testimony. Defendant conceded the cause of loss as alleged by the Plaintiffs for the purposes of Defendant's Amended Motion for Summary Judgment.

[2]As the lower court's decision in *Rodriguez* was *per curium* affirmed by the Second District Court of Appeals, Defendant in the instant matter filed a copy of the Defendant's Motion for Summary Judgment submitted to the lower court in *Rodriguez* with the instant Court in order to provide the definition of "marring" as upheld by the Second District Court of Appeals.

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