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SUPREME COURT OF FLORIDA

CASE NO. 85,200

STATE FARM FIRE AND
CASUALTY COMPANY,

Petitioner,

v.

ELICER AND HERMIDA LICEA,

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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REPLY TO THE STATEMENT OF THE CASE AND FACTS

Petitioner State Farm responds to the Respondent Liceas' 'statement of the case and facts' by noting that it is inaccurate and largely unsupported — and unsupportable — by record citations. The thrust of the Liceas' statement of the case and facts is to suggest — incorrectly — that State Farm somehow left the Liceas in the lurch in connection with their Hurricane Andrew claim, and that State Farm deliberately interjected delays into the process of getting their roof damage appraised and repaired. The dearth of record cites for these allegations is just one indicia of their falsity and impropriety. The facts and pleadings which ***are*** of record show the inaccuracy of the Liceas' present contentions, and show that both State Farm's and Liceas' actions in connection with the Hurricane Andrew roof problems for the Liceas' are *exactly the opposite* of how the Liceas' now portray them.

The record in fact shows without dispute that after the Liceas' home was damaged in Hurricane Andrew, State Farm paid them over $185,000 for claims in connection with their home. (R. 56, 257). The only item the Liceas and State Farm were unable to resolve when the $185,000 in repairs and replacements were ongoing was a question about whether the roof needed to be repaired or totally replaced. (R. 84, 211). Therefore, on July 20, 1993, Mr. Licea wrote a letter to State Farm stating that he was responding "to the appraisal process that has been presented to me as an option for settling on this claim[.]" (R. 19). Opting *for* the appraisal process, Mr. Licea identified in his letter a certain roofing company to act as the appraiser for the Liceas. (R. 19). The Liceas subsequently selected a different appraiser, and State Farm also selected an appraiser — with

both parties following the format provided in the appraisal clause of the State Farm homeowners' policy held by the Liceas. (R. 111, 118).

The appraisal process was thus embarked upon by both of the parties, and it reached a temporary stopping point only when the appraisers were unable to agree upon an umpire. (R. 111, 118). Thereafter, State Farm — far from *delaying* the appraisal process — was the party who tried to resolve the impasse over the umpire. (R. 20, 15-21). State Farm Claim Representative Michael Moreno wrote to the Liceas:

> It has been brought to my attention that both appraisers have not been able to reach an agreement in the selection of an umpire. ***Please note, the appraisal provision of your homeowners policy provides a fifteen day time period for appraisers to elect an umpire.*** If the appraisers are unable to agree on an umpire, you or we can ask a judge of court to select the umpire.
>
> Pursuant to the policy provisions stated above, ***we urge you to contact your appraiser and express the importance of having him contact our appraisers so that the appraisal process can continue. If our appraisers do not receive a response within 10 days from receipt of this letter, we will request a court to appoint an umpire.***

(R. 20). Claim Representative Moreno's letter was written on January 8, 1994 and, when the Liceas failed to respond, State Farm filed a motion in Dade County Circuit Court asking a judge to appoint an umpire — precisely as provided in the appraisal clause of the homeowners policy. (R. 15-21).

The Liceas' response to this motion — despite the fact that the parties had mutually started the appraisal process — was to ***object*** to appointment of an umpire and to file a 'counterclaim' alleging that State Farm had breached the insurance contract by not just replacing the Liceas' roof without an appraisal and agreement as to the amount of loss. (R. 23-28). At the urging of the

Liccas, the trial court denied the motion for appointment of an umpire, and State Farm appealed. (R. 2-4).

In short, the record shows that it was the ***Liceas*** who were responsible for the delays in getting their roof damage appraised and repaired, and the ***Liceas*** who insisted that this dispute be interjected into the court system rather than continuing with the simple appraisal process which had already been begun and which lacked only an umpire to reach an amount for the loss which — by the terms of the appraisal clause — would have been binding on both parties. (R. 15-18, 23-28, 69-74, 236-241, 243).

There is ***no*** record support for the Liceas' statements in their Answer Brief that State Farm "refused to pay for the roof damage" or that State Farm "provided a list of State Farm-approved appraisers, but unilaterally rejected their appraisals." (Respondents' Answer Brief, pp. 2-3). Neither is there any record support for the Liceas' implication that State Farm was responsible for delays and was somehow treating the Liceas badly, as for example, when their brief says: "A year and a half after Hurricane Andrew, the Liceas were no closer to receiving their policy benefits than the day the storm ravaged their home." (Respondents' Answer Brief at p. 3).

If anything, the Liceas' inaccurate statement of the case and facts confirms the validity of the appraisal process — the issue before this Court in these proceedings. Although they are now attempting to pretend and suggest otherwise, the Liceas caused their own delays and problems by refusing to participate in the appraisal process as they had contractually agreed to do, and by insisting on being in litigation instead.

REPLY TO ARGUMENT

I. Reply to arguments on the merits

Respondents have made four arguments about why the appraisal clause in this homeowners policy — and other appraisal clauses like it — should be held invalid, but all of Respondents' arguments are deficient for two reasons: (1) the arguments are not supported by any case law which is actually on point, i.e., dealing with appraisal clauses, but rather are based on general principles of law taken from other contexts which are not helpful in resolving the issue here; and (2) Respondents' arguments just do not comport with common sense as they seek a result which can only be burdensome and expensive for all involved, especially for the insurance buying public.

Respondents' arguments are addressed *seriatim* below. Petitioner respectfully submits that the arguments should be rejected, and that appraisal clauses should continue to occupy their historically proven, utilitarian, and litigation-reducing function in society.

A. There is nothing illusory about the subject appraisal clause's mutually binding commitment to establish the amount of the loss

Respondents' first argument is that the procedures for setting the amount of a loss in the subject appraisal clause are somehow illusory, and that therefore the clause should be held unenforceable. Specifically, Respondents say that: "An insurer's promise to set the amount of the loss through appraisal is illusory ***when accompanied by a reservation of the right to reject or reduce that amount.***" (Respondents' Answer Brief, p. 7). Respondents' phrasing of the problem makes it self-evident that it is a straw man — the subject policy self-evidently does ***not*** reserve to State Farm the right to 'reject or reduce [the appraisal] amount'. (R. 43).

On the contrary, as detailed fully in the Petitioner's initial brief — and as the appraisal clause itself makes clear — the amount of loss set through the appraisal process is ***fully binding on both parties.*** There is absolutely nothing about the wording of the appraisal clause — or any other wording in the policy — that gives the insurer the right to "reject or reduce [the] amount", as Respondents incorrectly suggest in attempting to mount their 'illusory-therefore-unenforceable' argument.

Once the amount of the loss is set pursuant to the appraisal process, that portion of the parties' work is done — never to be revisited as the terms of the appraisal clause make clear. The appraisal clause — after describing the procedures for selecting appraisers and umpire — concludes by stating unequivocally: "***Written agreement signed by any two of these three [the umpire and two appraisers] shall set the amount of the loss.***" (R. 43).

The clause speaks for itself, and it obviously does not allow State Farm to go back and reduce or reject ***the amount*** after the appraisal process is complete. ***That*** issue — i.e. ***the amount of the loss*** — is governed entirely by the appraisal process and is binding as to both parties.

Other issues may remain between the parties, including whether there is coverage at all for a given loss, but that in no way detracts from the binding nature — and mutuality — of the appraisal clause for purposes of determining the amount of the loss. Again, as detailed in the initial brief, coverage issues have always been reserved for the courts (Initial Brief at pp. 11-13), but Florida law has already firmly established that agreements to submit *some* issues to arbitration or appraisal while other issues are left for resolution by the courts does ***not*** render the agreements illusory or unenforceable. This Court has specifically held (1) that parties may select certain issues and not

others to submit to arbitration, in which the case the award will be binding only as to the issues submitted, *Roe v. Amica Mutual Insurance Co.*, 5333 So. 2d 279, 280 (Fla. 1988); and (2) that provisions in insurance policies may enforceably require the parties to submit some issues to arbitration or appraisal while reserving the question of coverage for the courts. *Meade v. Lumberman's Mutual Casualty Company*, 423 So. 2d 908 (Fla. 1982); *Hanover Fire Insurance Company v. Lewis*, 10 So. 297 (Fla. 1891).

In sum, the language of the appraisal clause itself plainly shows that Respondents are just factually wrong in saying that the State Farm policy reserves to State Farm the unilateral right to reduce or reject the amount of a loss set by the appraisal process. And, insofar as Respondents are making a legal argument that the policy is rendered illusory because it provides for determination of some issues by appraisal while leaving coverage determinations to the courts, Respondents are just ignoring all of the Florida law — including from this Court — which has held precisely the opposite.

B. There is nothing 'intertwined' about coverage issues and amount of loss issues which renders the appraisal process invalid

Respondents next argue that the appraisal process will be 'futile' or unfair because Respondents speculate that an insurer who believes that an appraisal award is too high "is free to reduce the amount by further 'negotiating' or litigating its coverage defenses." (Respondents' Answer Brief, pp. 9-10). This is not a legal argument, but an invitation to the Court to speculate — irrelevantly — about how the parties might use other portions or rights they may have to 'negotiate' with each other over appraisal awards they deem disappointingly high or low in amount.

Such speculation has no bearing on the legal issue presented, and is really pointless. The Liceas have pointed out how they think insurers ***may*** try to 'negotiate' in connection with appraisal awards. But *any* party is free to attempt to 'negotiate' anything at any time. The Liceas — or other homeowners — would be just as free to attempt to 'negotiate' an appraised loss as would the insurer. If the Respondents simply wish to engage in speculation about pressures that parties *may* bring to bear on each other, insureds too have pressure to bring as they can always litigate statutory and common law bad faith claims. Thus, if Respondents are attempting to suggest that insurers are in a better or stronger position with respect to appraisal awards, because there are other issues for which they can initiate litigation, Respondents are simply wrong. Again, ***anyone*** can attempt to negotiate better terms, including through the questionable process of threatening litigation. It is to be hoped that no one will threaten or pursue baseless litigation simply to gain an advantage — but there is no group of persons or entities who has greater access to the court system than another. And, in the case of well-founded claims, there is no reason why they should *not* be litigated.

In short, Respondents' argument in this section simply has no legal support, nor is this Court in any way bound to engage in the speculation suggested by Respondents on the ways in which parties *might* seek to 'negotiate' better positions for themselves. Respondents' argument is particularly inappropriate in this case where it was Respondents themselves who ***insisted*** on turning this into a litigation matter when they might well have been perfectly content with the appraisal award had they simply completed the appraisal process. There is no point in here speculating that ***if*** the appraisal process had been completed, and ***if*** either of the parties had been unhappy with the

result, then either might have threatened the other with frivolous litigation in hopes of negotiating a better number.

C. The policy terms are clear

Respondents' next point — repetitious of its previous arguments — is that the appraisal clause is 'illusory' because, they say, the clause "is actually a promise to pay only if State Farm wants to." This argument is not well-taken because the appraisal clause is only what it purports to be — and what it explicitly says — which is a procedure for fixing the amount of loss when the insurer and insured are unable to agree. An insurer's actual obligation to pay is *always* dependent on there being coverage under the policy, and dependent upon the policy limits.

Many times — as here — there will be no real disputes between the parties except the amount of the loss. It is undisputed that State Farm paid the Liceas over $185,000 for their Hurricane Andrew related losses and damages at their home. The single issue remaining between them was whether the roof needed to be repaired or replaced, and every indicia in the whole case was that State Farm was urging the Liceas to proceed rapidly with the appraisal process so the matter could be resolved and completed. However the appraisal award came out, the roof was certainly going to cost much less than State Farm had already paid the Liceas. It was the Liceas who exploded this single issue into a protracted litigation matter — thereby confirming the wisdom of the many cases over the years upholding the validity of the appraisal process.

D. Use of arbitration and appraisal to resolve some issues is a practical — and judicially favored — method of dispute resolution

Respondents' final argument appears to be an attempt to suggest that use of arbitration and appraisal processes for some issues somehow generates more expense and litigation than if parties were simply required or forced to litigate *all* issues through the expedient of invalidating appraisal and arbitration clauses. To make this argument, the Respondents must — and do — simply ignore all of the Florida law which has approved arbitration and appraisal clauses, and has approved the concept of parties using such alternative dispute resolution mechanisms to dispose of as many issues as they can, reserving to the courts just those issues which may *only* be resolved by the courts.

Respondents also ignore the self-evident realities of requiring every loss adjustment to be litigated in the courts. To suggest that such an alternative would be *less* expensive and result in *less* litigation is an obvious impossibility. As the brief of *amicus* The American Insurance Association points out, there were over 700,000 homeowners who filed insurance claims within a month after Hurricane Andrew hit south Florida. Without the effective and expeditious appraisal process set up in the homeowners policies, the south Florida courts would have been completely overwhelmed. Furthermore, in no way would the homeowners have been well-served since litigating their amounts of loss would obviously have been more time-consuming (particularly since they would have been competing with 700,000 other homeowners for hearing and trial dates), and would equally obviously have been more costly since legal expenses would have been required where none were necessary.

It is actually very difficult to understand precisely why the Respondent homeowners in this case want to do away with the appraisal process. The appraisal process has been favored by the courts for over a hundred years, and has served many Floridians during that time. The system of allowing parties to resort to arbitration or appraisal for resolution of at least some of their disputes works well — and it often results in eliminating all disputes. There are no benefits to be had — nor have Respondents identified any — from displacing the system.

As set forth in the initial brief, the Third District's decision here — and in the *American Reliance Insurance Company v. Village Homes of Country Walk* case which the Third District felt obliged to follow in this case — stand at complete odds with all of the other Florida decisions from this Court and the other district courts of appeal. The Third District's decision should be disapproved, and this case should be reversed and remanded with directions to the trial court to proceed with appointing an umpire to complete the appraisal process between these parties.

II. Response to respondents' arguments on jurisdiction

A. There is conflict with decisions from this Court and decisions of the other district courts of appeal

Petitioner respectfully submits that the express and direct conflicts between the Third District's decision here and decisions from this Court and other Florida district courts of appeal were identified and briefed fully in the Petitioner's initial brief. Respondents' attempts to explain away the conflicts and to 'harmonize' the decisions are unavailing because the conflicts are perfectly apparent from reading the decisions cited.

The Third District itself certified the conflict with other district court opinions. Additionally, this Court's jurisdiction was invoked on the basis of the obvious conflict between the Third District's decision and this Court's decision in *Hanover Fire Insurance Co. v. Lewis*, 10 So. 297 (Fla. 1891). There are no material differences between the appraisal/arbitration clauses involved in *Hanover* and the instant case. This Court has already decided precisely the issue presented in this case in the *Hanover* decision, and the Third District below reached the opposite conclusion from the *Hanover* court. Conflict exists, and it should be resolved. The *Hanover* rule — allowing for arbitration or appraisal as to the amount of a loss while reserving coverage issues to the courts — is the right rule and it has stood the test of time. It should be reaffirmed here, and the Third District's contrary decision disapproved.

B. State Farm's appeal to the Third District was timely

Respondents' final argument on jurisdiction is that State Farm's initial appeal to the Third District was untimely. This argument is without merit, and should be rejected.

Respondents' position in this regard is based on the fact that Respondents contend that State Farm should have appealed an earlier order denying State Farm's motion to stay the Respondent Liceas' counterclaim which, the Liceas contend, was tantamount to an order denying a motion to compel appraisal. The motion to which Respondents make reference states, in its entirety:

MOTION TO STAY ACTION ON COUNTERCLAIM

Plaintiff, State Farm Fire and Casualty Company, moves the Court, pursuant to Fla. Stat. 682.03(3), to stay all proceedings herein

on Defendants Counterclaim, including discovery, on the following grounds:

1. Plaintiff has filed an application for appointment of an Umpire herein so that the appraisal may go forward. Defendant by its Counterclaim has filed a breach of contract Counterclaim to recover repair cost under the policy which is the issue to be resolved in the arbitration proceeding.

2. State Farm has paid a total of $186,844.92 on Defendants' claim and now the only issue is the total amount of repair or replacement cost which is what appraisal is to determine. The problem is that the appraisers could not agree on an Umpire so the Court was requested to appoint one.

/s/ [Attorney for State Farm]

(R. 56-57). The order denying that motion simply states that "the motion to stay is denied". (R. 67). That order was dated March 30, 1994, and Respondents' argument is that the order denying stay should have been deemed to determine the entitlement of a party to arbitration so as have been reviewable under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v).

Given the wording of the motion to stay and the order denying the stay, there is no way the order would or should have been characterized by an appellate court as an order determining entitlement to arbitration. The order simply declined to stay discovery or other proceedings pending determination of the motion for appointment of an umpire — which *was* the motion raising the issue of entitlement to arbitration (R. 15-17).

The order denying the motion to appoint an umpire did have the direct effect of determining that State Farm was not entitled to arbitration. (R. 4). That order was dated April 27, 1994, and it was timely appealed by notice of appeal of non-final order dated May 26, 1994. (R. 2-3). Respondents filed a motion with the Third District to dismiss the appeal on the basis of the

identical jurisdictional argument which Respondents present here (R. 5-11), and it was properly rejected by the Third District. (R. 205). The argument should be rejected here as well.

CONCLUSION

Based on the foregoing facts and authorities and those set out in Petitioner's initial brief, Petitioner State Farm Fire and Casualty Company respectfully submits that this Court should exercise its discretionary jurisdiction in this cause, and should reverse the decision of the Florida Third District Court of Appeals and disapprove the *American Reliance v. Country Walk* decision upon which it was based.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief on the Merits was mailed this 29th day of August, 1995 to: HAL VOGEL, ESQUIRE, 20801 Biscayne Boulevard, Suite 454, Aventura, Florida 33180 and BARRY FINKEL, ESQUIRE, Frankel & Finkel, P.A., 404 East Atlantic Boulevard, Pompano Beach, Florida 33060.

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