IN THE SUPREME COURT OF FLORIDA

ORLANDO NOA,

Petitioner,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.
_____/

Supreme Court Case No.: SC17-738

Lower Tribunal Case No(s).:
3D16-1367; 132011CA012182000001

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

On Discretionary Conflict Review Article V, Section 3(b)(3), Florida Constitution

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STATEMENT OF THE CASE AND THE FACTS

Introduction

This matter arises out of the denial of Plaintiff Orlando Noa's ("Plaintiff") Motion to Compel Appraisal to compel Ordinance & Law ("O&L") coverage. Plaintiff, an elderly homeowner, seeks continuance of the original appraisal to include "O&L" coverage where, after the initial appraisal, local building code required a full roof replacement, not repair. Identical to the homeowner in *Jossfolk v. United Prop. & Cas. Ins. Co.*, 110 So. 3d 110 (Fla. 4th DCA 2013), Plaintiff's original appraisal award specifically excluded "O&L" from appraisal by noting it as "not appraised," instead of zero.

After Plaintiff filed his Motion to Compel Appraisal for the pending "O&L" amount, Defendant Florida Insurance Guaranty Association ("FIGA"), rather than appraise the outstanding issue, sought to reopen the entire appraisal process. The trial court denied both parties' requests regarding appraisal and requested trial on the issue. Plaintiff subsequently appealed the trial court's order on the basis that it directly contradicted the holding in *Jossfolk*. The Third District Court of Appeal opinion affirmed the trial court's ruling on the erroneous basis that the appraisal panel presumptively incorporated additional coverages such as "O&L" in determining the amount of the loss. *See Noa v. Fla. Ins. Guar. Ass'n*, 2017 WL 1076922 at *2-3 (Fla. 3d DCA Mar. 22, 2017). This contradicts the analysis and holding of *Jossfolk*, wherein the Fourth District Court of Appeal held that "O&L"

was not included in the original appraisal because (1) the award stated "O&L" was "not appraised" and (2) that "O&L" was properly excluded from the original appraisal proceeding because it had not yet been "incurred". *Jossfolk*, 110 So. 3d at 113. This Court properly exercises its jurisdiction in this matter to resolve the conflict between the Third and Fourth Districts.

The Claim and Litigation

On October 24, 2005, Plaintiff's home sustained a covered loss because of Hurricane Wilma. Plaintiff's insurance company, First Home Insurance Company ("First Home") acknowledged coverage for the claim, but wrongfully determined that the Hurricane Wilma damages did not exceed the $4,392.00 policy deductible.

Plaintiff subsequently had his roof re-inspected, learned he had been underpaid by First Home, re-opened his claim, and submitted a Sworn Statement in Proof of Loss in support of his re-opened claim for damages to his Property. First Home improperly "rejected" the Sworn Statement in Proof of Loss and invoked the appraisal provision contained in the Policy.

The Plaintiff complied, and the claim went to appraisal in or about April 2010 and resulted in an award to Plaintiff of $17,602.10 ("Appraisal Award") for Hurricane Wilma damage to his home, approximately four times more than the amount originally estimated by the Defendant. Prior to the appraisal, Plaintiff's adjuster requested the entire roof be replaced and provided a professional engineer's

report which stated that the total roof damages encompassed over thirty percent (30%) of the total roof area. The umpire's final estimate identified 120 broken roof tiles. The umpire's estimate **did not include** the actual square footage of the roof tile repair; however, the umpire allotted approximately 1,200 square feet of roofing underlayment plywood and 3,488 square feet of roofing paint in addition to the 120 individually broken roof tiles.

After the Appraisal Award was entered, Plaintiff hired a Florida licensed roofer to effectuate the allotted repairs. Plaintiff, as required under law, applied to the Miami-Dade County Building Department ("MDCBD") for a permit and attested to the proper scope in accordance with the Appraisal Award. MDCBD denied the application because the scope exceeded the percentage of repairs permitted under the Florida Building Code ("FBC"). Because more than 25% of the roof required repairs, the MDCBD required a full roof replacement, thus triggering the "O&L". Plaintiff re-applied, as required, and obtained a permit to replace the entire roof, in compliance with the FBC – the cost was $26,000.00.

Plaintiff re-opened his claim with First Home to recover his incurred "O&L" costs. In response, First Home unilaterally "did the calculation" and sent an undated letter alleging that because the roof only needed 120 tiles replaced, out of the 3,400 square feet of the roof, this meant only three percent (3%) of the roof needed replacement. Plaintiff brought the instant lawsuit. During litigation, First Home

became insolvent and FIGA was substituted as the party defendant. FIGA adopted the same improper position as First Home and affirmatively denied Plaintiff's claim. Plaintiff filed his Motion to Compel Appraisal to re-open and perform the "paper appraisal" of his incurred "O&L" costs. FIGA sought to re-open the entire appraisal.

On May 23, 2016, the trial court held a hearing on both motions. The trial court denied Plaintiff's Motion to Compel Appraisal and FIGA's Motion to Reopen Appraisal. Plaintiff appealed.

The Appeal and Jurisdictional Conflict

The matter was fully briefed and the panel in the Third District had the opportunity to follow *Jossfolk*. In *Jossfolk*, Hurricane Wilma damaged the homeowner's (Jossfolk) home. *Id.* at 111. United Property & Casualty Insurance Company inspected the property, acknowledged coverage, and issued underpayment for the loss. *Id.* Because Jossfolk disputed the amount of the claim, the parties went to appraisal. *Id.* The umpire awarded, among other areas of damage, the removal and replacement of two squares of concrete tile roof, or 220 square feet. *Id.* at 112. The appraisal award stated that "O&L" was **"not appraised."** *Id.* (emphasis added).

Jossfolk embarked on repairs. *Id.* Jossfolk's contractor applied for a roofing repair permit wherein the contractor claimed that 1359 square feet, or approximately 34%, of the roof needed repair. *Id.* The City of Weston rejected the roofing repair permit because the required repairs exceeded 25% of the total roof area, mandating

a full roof replacement under the operative building code. *Id.* Because compliance with the applicable building code required additional money, Jossfolk requested United acknowledge coverage for the entire roof repair under the "O&L" coverage of the policy. *Id.* United refused. *Id.* Jossfolk brought an action for declaratory relief wherein he sought a ruling that United must participate in an appraisal for "O&L". *Id.* United moved for summary judgment on the basis that the appraisal award specifically excluded "O&L" and thus the homeowner was not entitled to appraisal. *Id.* United's motion was granted. *Id.*

On appeal, the Fourth District held that "O&L" is not recoverable until it is incurred and thus could not have been appraised at the time of the original appraisal. *Id.* at 113. Pursuant to the Supreme Court of Florida's holding in *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811 (Fla. 2007), the appraisers properly excluded a determination of "O&L" because it had not yet been "incurred". *Id.* The homeowner had not incurred or become liable for any additional expense until the City of Weston required compliance with current ordinances at the time in order to complete repairs. *Id.*

The Fourth District also rejected United's argument that "O&L" was not implicated because the appraisers allowed for only two square feet of tile replacement, which was considerably less than the 25% of total area which would trigger the City's requirement that the entire roof be replaced to current ordinance

standards. *Id.* at 113. The Fourth District reviewed an affidavit of the homeowner's general contractor stating that the City would require replacement because the original roof tiles were no longer made and could not be replaced. *Id.*

In this matter, the Third District was faced with a factual scenario identical to *Jossfolk*. However, the Third District affirmed the trial court's ruling on the basis that the appraisal process must have or should have considered and included "O&L" coverage, despite the face of the Appraisal Award[1] evidencing that "O&L" was "not appraised". *Noa* at *2-3.

The Third District distinguished *Noa* based on the United's failure in *Jossfolk* to raise an "under 25%" roof replacement argument in the insurer's motion for summary judgment, though it was part of the *Jossfolk* pre-appraisal damage model. *Id.* at *3. The Third District further distinguished *Noa* from this Court's opinion in *Ceballo v. Citizens Property Insurance Corp.*, 967 So. 2d 811 (Fla. 2007), a case relied upon as "determinative" in *Jossfolk*, on the basis that *Ceballo* centered on whether Florida's Valued Policy Law (VPL) required the insured to demonstrate an incurred loss before payment could be required for "O&L" coverage, and Noa's case did not involve a total loss or the VPL and a request for a full roof repair had been previously submitted to the appraisal panel. *Id.*

[1] The award further stated "[a]ward is subject to all terms and conditions of the Policy," where "O&L" is clearly a term of the Policy.

The conflict between the Fourth District and Third District is clear: where the Third District effectively holds that every appraisal must dispose of *all* considerations that could affect the amount of loss-whether they have occurred or not, while the Fourth District acknowledges that certain matters may necessarily be left out of appraisal by choice of the umpire or until incurred.

The following chart reveals the cases to be the same with different outcomes:

Jossfolk v. United Prop. & Cas. Ins. Co.	*Noa v. Fla. Ins. Guar. Ass'n*
Hurricane Wilma damage to roof.	Hurricane Wilma damage to roof.
Insurance company acknowledges coverage and issues underpayment.	Insurance company acknowledges coverage and issues underpayment.
Parties enter appraisal to resolve amount dispute.	Parties enter appraisal to resolve amount dispute.
Insured requests roof replacement prior to original appraisal award.	Insured requests roof replacement prior to original appraisal award.
Neutral umpire allows for removal and replacement of two (2) "squares" of concrete tile roof (220 square feet) in appraisal award.	Neutral umpire allows for removal and replacement of one-hundred and twenty (120) non-contiguous concrete roof tiles and approximately 1200 square feet of plywood underlayment.
Appraisal award states that "O&L" is **not appraised.**	Appraisal award states that "O&L" is **not appraised.**
Insured applies to city for roofing repair permit to perform repairs to 1359 square feet of the roof.	Insured applies to Miami-Dade County for roofing repair permit to perform repairs to 1100 square feet of the roof.
City rejects request for roofing repair permit because 1359 square feet of the roof exceeds 25% of the total area of the roof, requiring replacement of the whole roof to conform with city code.	City rejects request for roofing repair permit because 1100 square feet of the roof exceeds 25% of the total area of the roof, requiring replacement of the whole roof to conform with applicable code.
Insured seeks coverage for "O&L" from insurance company.	Insured seeks coverage for "O&L" from insurance company.

Insurance company rejects coverage for "O&L" because insurance company believes that the neutral umpire considered and rejected request.	Insurance company rejects coverage for "O&L" through unilaterally determining only 3% of the roof needed repair and because insurance company believes that the neutral umpire considered and rejected request.
Insured filed declaratory judgment action seeking a ruling that insurance company must participate in appraisal for "O&L" coverage.	Insured filed declaratory judgment action seeking a ruling that insurance company must participate in appraisal for "O&L" coverage.
Insurance company files motion for summary judgment based on the prior appraisal not including coverage for "O&L".	Insurance company files motion for summary judgment based on the prior appraisal not including coverage for "O&L". Insured filed motion to compel appraisal. Insurance company moved to re-open the entire appraisal.
Trial court grants insurance company's motion.	Trial court denied all motions and stated case would proceed to trial.
Insured appeals.	Insured appeals.
4th DCA finds that, based on face of the award, "O&L" was "not appraised."	3d DCA finds that "not appraised" means the appraisal panel determined that "O&L" was not awarded to the insured.
4th DCA relies on *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811 (Fla. 2007), holding that an insured had to show incurred expenses before recovering "O&L".	3d DCA holds that determining "O&L" is "baked into" the appraisers' and umpire's considerations based on their qualifications.
4th DCA cites to *Ceballo* to support proposition that "O&L" is not recoverable until it is "incurred" and thus could not have been appraised at the time of the original appraisal.	3d DCA reasons that to allow "O&L" to be subsequently appraised lets a roofing contractor act as a "super-umpire" whose opinion supersedes the appraisal panel.

4th DCA rejects insurance company's argument that the replacement of only two squares of concrete tile does not amount to 25% of the roof because it was not argued by the insurance company and insured offered a general contractor affidavit stating the city would require replacement because the original roof tiles were no longer made and could not be replaced.	3d DCA distinguishes *Jossfolk* on the basis that the insurance company in *Jossfolk* did not raise the "under 25%" roof replacement argument in the insurance company's motion for summary judgment. 3d DCA distinguishes *Ceballo* because the issue was whether Florida's Valued Policy Law required an insured to demonstrate an incurred loss before the insurance company would be required to pay "O&L."
4th DCA reverses summary judgment and remands for further proceedings to determine O&L through appraisal.	3d DCA affirms the trial court order denying appraisal of O&L.

There are additional considerations regarding the conflict between the Fourth District and Third District on this point of law. The duties of appraisers are specifically illustrated in *Johnson v. Nationwide*, 828 So. 2d 1021 (Fla. 2002) and its progeny. Simply put, where an insurer admits that there is a covered loss, but there is a disagreement as to the amount of loss, it for the appraisers to arrive at the amount. *Johnson*, 828 So. 2d at 1025. In doing so, the appraisers inspect the property and determine how much is to be paid on account of a covered peril. *Id.* This includes identifying causes of loss such as normal wear and tear, long-term, and other specifically excluded causes and excluding those portions of the claim as necessary. *Id.* However, *coverage* issues are solely for determination by the court. *Id.; see also Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So. 3d 500, 502 (Fla. 4th DCA 2014). For the appraisal panel in *Noa* to consider "O&L" would mean the panel *per se* acted

outside the scope of its duties, and thus improperly determined coverage issues outside the scope of the initial appraisal.

Independent of the failure of the appraisal award to appraise "O&L", the Third District in *Noa* has now bestowed additional responsibilities upon the appraisers not otherwise found in Florida law. Appraisers will now be expected to project "incurred" costs as opposed to those strictly pertaining to the amount to repair a loss. Similar to "O&L," additional living expenses are generally paid for as incurred by the homeowner. Should appraisal completely foreclose an insured from pursuing any subsequent coverages arising from the claim, the holding in *Noa* would mandate that the insured is left "out in the cold" in the event unforeseen additional living expenses are required. This logic further extends to other portions of a policy that are not payable until "incurred". Appraisal should not and does not permanently extinguish an insured's rights to seek portions of coverage for a claim when the need for same arises. Determining the amount of loss is properly separate and apart from the determination of whether additional coverages are triggered or incurred.

Conclusion

The Third District's opinion in this matter is in direct conflict with the Fourth District's opinion in *Jossfolk*. Plaintiff respectfully requests this Court invoke jurisdiction to resolve the conflict.

Dated: May 15, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Electronic Correspondence: hklein@conroysimberg.com and eservicehwdappl@conroysimberg.com to: Hinda Klein, Esq., on this 15th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Paul B. Feltman
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