

IN THE SUPREME COURT OF FLORIDA

ORLANDO NOA,

Supreme Court Case No.: SC17-738

Petitioner,

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

vs.

FLORIDA INSURANCE GUARANTY
ASSOCIATION,

Respondent.

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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

PAUL B. FELTMAN, ESQUIRE
ALVAREZ, CARBONELL, COOKE, FELTMAN & DASILVA, P.L.
75 Valencia Avenue, Suite 800
Coral Gables, FL 33134
Telephone: (305) 444-5885
Facsimile: (305) 444-8986
Attorney for Petitioner

RECEIVED, 05/17/2017 02:38:26 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....5

CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

CERTIFICATE OF COMPLIANCE.....12

TABLE OF CITATONS

Cases

Ceballo v. Citizens Prop. Ins. Corp.,
967 So. 2d 811 (Fla. 2007).....4,8

Citizens Prop. Ins. Corp. v. Demetrescu,
137 So. 3d 500 (Fla. 4th DCA 2014).....10

Citizens Prop. Ins. Corp. v. Mallet,
7 So. 3d 552 (Fla. 1st DCA 2009).....2

Johnson v. Nationwide,
828 So.2d 1021 (Fla. 2002).....9

Jossfolk v. United Prop. & Cas. Ins. Co.,
110 So. 3d 110 (Fla. 4th DCA 2013).....3,5

Noa v. Fla. Ins. Guar. Ass’n,
2017 WL 1076922 (Fla. 3d DCA Mar. 22, 2017).....3

Florida Rules of Appellate Procedure
Fla. R. App. P. 9.210(a)(2).....12

STATEMENT OF THE CASE AND OF THE FACTS

On October 24, 2005, Plaintiff Orlando Noa'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 claim went to appraisal in or about April 2010 and resulted in an award to Plaintiff of \$17,602.10 for Hurricane Wilma damage to his home, approximately four times more than the deductible ("Appraisal Award"). 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.

The face of the appraisal award evidences certain coverages that were specifically “**not appraised**”: (1) Ordinance & Law¹; (2) Auxiliary Private Structures (“APS”); (3) Contents; and (4) Alternative Living Expenses (“ALE”).²

After the Appraisal Award was entered, Plaintiff hired a Florida licensed roofer to effectuate the allotted repairs. Plaintiff, as required by 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, FBC requires a full roof replacement, thus triggering the “Ordinance & Law” coverage. Plaintiff re-applied and obtained a permit to replace the entire roof, in compliance with the FBC, for \$26,000.00.

Plaintiff re-opened his claim with First Home to recover his incurred “Ordinance & Law” costs. In response, First Home unilaterally sent an undated letter alleging that because the roof only needed 120 tiles replaced out of the 3,400 square

¹“Ordinance & Law” coverage was explained in *Citizens Prop. Ins. Corp. v. Mallet*, 7 So. 3d 552, 554 n.1. (Fla. 1st DCA 2009):

[L]aw and ordinance coverage under the policy provides reimbursement for up to 25% of dwelling policy limits for increased repairs and replacement costs incurred by the insured to comply with the requirements of the applicable laws and ordinances regulating the construction or repair of property. *See, e.g.*, § 627.7011(1)(b), Fla. Stat. (2004).

²The award also subjected itself by its plain language to the Policy’s Terms and Conditions – one of which being “Ordinance and Law” Coverage.

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 denied Plaintiff's claim.

Plaintiff filed his Motion to Compel Appraisal to re-open and perform a "paper appraisal" of his incurred "Ordinance & Law" costs. FIGA sought to re-open the entire appraisal or otherwise obtain summary judgment against Plaintiff. 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 Third District was faced with nearly identical facts to those found in the Fourth District's Opinion in *Josfolk v. United Prop. & Cas. Ins. Co.*, 110 So. 3d 110 (Fla. 4th DCA 2013). However, the Third District affirmed the trial court's ruling on the basis that the appraisal process necessarily considered and included Ordinance & Law coverage, despite the face of the Appraisal Award³ evidencing that Ordinance & Law was "not appraised". *Noa v. Fla. Ins. Guar. Ass'n*, 2017 WL 1076922 at *2-3 (Fla. 3d DCA Mar. 22, 2017). The Third District distinguished *Noa* based on the United's failure in *Josfolk* to raise an "under 25%" roof replacement

³ The award further stated "[a]ward is subject to all terms and conditions of the Policy," where "Ordinance and Law" is clearly a term of the Policy.

argument in the insurer’s motion for summary judgment. *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 ordinance and law 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.* This appeal follows.

SUMMARY OF THE ARGUMENT

Plaintiff, an elderly homeowner, seeks appraisal to recover benefits under the additional coverage of “Ordinance & Law” in his homeowner’s insurance policy for expenses he was forced to incur to comply with applicable building code. “Ordinance & Law” was specifically not appraised in the original appraisal. Identical to the homeowner in *Jossfolk*, Plaintiff’s original appraisal award specifically, and on its face, excluded “Ordinance & Law” as “not appraised.” Like in *Jossfolk*, Plaintiff was required to perform a full roof replacement because the appraisal panel’s scope of repairs exceeded the permissible scope of repairs allowable under applicable building code. Plaintiff now seeks reimbursement and appraisal of his incurred costs.

Noa contradicts the analysis and holding of *Jossfolk*, wherein the Fourth District held that “Ordinance & Law” was not included in the original appraisal because (1) the award stated “Ordinance & Law” was “not appraised” and (2) “Ordinance & Law” 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.

ARGUMENT

The matter was fully briefed and the panel in the Third District had the opportunity to follow *Jossfolk*, but did not. 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, on its face, that “Ordinance and Law” 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 “Ordinance & Law” 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 “Ordinance & Law”. *Id.* United moved for summary judgment on the basis that the appraisal award specifically excluded “Ordinance and Law” and thus the homeowner was not entitled to appraisal. *Id.* United’s motion was granted. *Id.*

On appeal, the Fourth District held that “Ordinance & Law” 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 holding in *Ceballo*, the appraisers properly excluded a determination of “Ordinance & Law” 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 to complete repairs. *Id.* The Fourth District also rejected United’s argument that “Ordinance & Law” 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.* The conflict at issue is clear: where the Third District effectively holds that the appraisal process disposes of *all* considerations that could affect the amount of loss, the Fourth District acknowledges that certain matters are necessarily not included in the appraisal process due to their inability to be considered at the time the appraisal occurs and do not become operative until the expenses like Ordinance & Law are “incurred.”

The following Chart reveals the cases to be the same with different outcomes.

<i>Josfolk v. United Prop. & Cas. Ins. Co.</i>	<i>Noa v. Fla. Ins. Guar. Ass’n</i>
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 “Ordinance and Law” is not appraised.	Appraisal award states that “Ordinance and Law” 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	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 city code.	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 “Ordinance and Law” from insurance company.	Insured seeks coverage for “Ordinance and Law” from insurance company.
Insurance company rejects coverage for “Ordinance and Law” because insurance company believes that the neutral umpire considered and rejected request.	Insurance company rejects coverage for “Ordinance and Law” 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 “Ordinance and Law” coverage.	Insured filed declaratory judgment action seeking a ruling that insurance company must participate in appraisal for “Ordinance and Law” coverage.
Insurance company files motion for summary judgment based on the prior appraisal not including coverage for “Ordinance and Law”.	Insurance company files motion for summary judgment based on the prior appraisal not including coverage for “Ordinance and Law”. 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, “Ordinance and Law” was “not appraised.”	3d DCA finds that “not appraised” means the appraisal panel determined that “Ordinance and Law” was not awarded to the insured.
4th DCA relies on <i>Ceballo v. Citizens Prop. Ins. Corp.</i> , 967 So. 2d 811 (Fla. 2007), which holds that an insured had to show incurred expenses to recover under supplemental coverage for “Ordinance and Law”.	3d DCA holds that determining “Ordinance and Law” is “baked into” the appraisers’ and umpire’s considerations based on their qualifications.
4th DCA cites to <i>Ceballo</i> to support proposition that “Ordinance and Law”	3d DCA reasons that to allow “Ordinance and Law” to be

is not recoverable until it is “incurred” and thus could not have been appraised at the time of the original appraisal.	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 <i>Jossfolk</i> on the basis that the insurance company in <i>Jossfolk</i> did not raise the “under 25%” roof replacement argument in the insurance company’s motion for summary judgment. 3d DCA distinguishes <i>Ceballo</i> 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 “Ordinance and Law”.
4th DCA reverses summary judgment and remands for further proceedings to determine Ordinance & Law through appraisal.	3d DCA affirms the trial court order denying appraisal of Ordinance & Law.

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 “Ordinance & Law” 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.

The Third District has bestowed additional responsibilities upon the appraisers not 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 coverages like 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* will preclude recovery for additional living expenses. This logic further extends to other portions of a policy that are not payable until “incurred”. 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 17, 2017.

Respectfully submitted,

ALVAREZ, CARBONELL, COOKE,
FELTMAN & DA SILVA, P.L.
75 Valencia Avenue 8th Floor
Coral Gables, FL 33134
Email: pfeltman@acfdlaw.com
Tel: (305) 444-5885
Fax: (305) 444-8986

By: /s/ Paul B. Feltman
PAUL B. FELTMAN, ESQ.
Florida Bar No.: 992046
pfeltman@acfdlaw.com

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 17th day of May, 2017.

Respectfully submitted,

/s/ Paul B. Feltman

PAUL B. FELTMAN, ESQ.
ALVAREZ, CARBONELL, COOKE,
FELTMAN & DA SILVA, PL.
Fla. Bar. No.: 992046

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
PAUL B. FELTMAN, ESQ.