IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC21-883

AMERICAN COASTAL INSURANCE COMPANY,

Petitioner,

v.

SAN MARCO VILLAS CONDOMINIUM ASSOCIATION, INC.,

Respondent.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE

Whether the opinions relied upon in the citation PCA conflict with the referenced cases from another district on the following question:

Whether, when an insurer concedes coverage by paying part of a claim, the insured may invoke appraisal pursuant to the policy.

STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal in this case was a citation PCA, certifying conflict with three cases from the Fourth District Court of Appeal. Because the option was a citation PCA, none of the facts of this case were recited in that opinion. Nevertheless, based upon the citation to *Am. Cap. Ass. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n.,* 306 So. 3d 1238 (Fla. 2d DCA 2020) (*Leeward*) and *Villagio at Estero Condo. Ass'n v. Am. Cap. Assur. Corp.,* Case No. 2D20-1414 (Fla. 2d DCA Jan. 20, 2021), ____ So. 3d ___, 46 Fla. L. Weekly d1939 (Fla. 2d DCA Jan. 20, 2021), opinion withdrawn and substituted, ___ So.3d. ___, 2021 WL1432160 Fla. 2d DCA April 16, 2021 (certifying conflict, not released for

publication) (*Villagio*), this Court should assume that the facts in this case are not materially different from *Leeward* or *Villagio*.

The parties in this case are San Marco Villas Condo. Ass'n ("San Marco") and Am. Coast. Ins. Co. (the "Insurer"). The remainder of the facts are stated generically.

Condominium buildings in Collier County, Florida sustained significant damage as a result of Hurricane Irma. Each condominium association made claims with their insurer. The insurers accepted coverage and made partial payment on the claims. Later, the insurers asserted that the claims being presented were fraudulently exaggerated, creating an alleged defense to coverage arising from the amount of the insured's loss. The insurers denied further payment on the claim, but did not demand or seek reimbursement of amounts previously paid.

Each condominium association sued its insurer for breach of contract, and demanded appraisal. The insurers resisted appraisal, asserting that their unproven claim of fraud voided the policy and completely vitiated the contractual right to demand appraisal, relying on *Johnson v. Nationwide Mut. Ins. Co.,* 828 So.2d 1021 (Fla. 2002). The Insurer concedes this reliance. Pet. Jur. Br. at 11.

The trial courts either granted the associations' motion to compel appraisal (*Leeward* and *San Marco*) or denied it (*Villagio*), and the aggrieved party appealed to the Second District pursuant to Fla. R. App. P. 9.130(a)(3)(C)(iv).

The Second District compelled appraisal, finding that the insurer "cannot avoid appraisal by claiming that the insured fraudulently overinflated its claim after [the insurer] previously admitted coverage…. [The insurer] initially made payment under the policy, thereby admitting coverage under the policy. When the insured filed what [the insurer] found to be an overinflated claim, it denied the claim and declared the policy void. Thus, 'this case necessarily involves the amount of loss; any coverage dispute is intertwined with the amount of loss.'" *Villagio* at *3, quoting *Leeward*, 306 So.3d at 1242.

The Second District certified conflict with three cases from the Fourth District: *Citizens Prop. Ins. Corp. v. Demetrescu,* 137 So. 3d 500 (Fla. 4th DCA 2014); *Citizens Prop. Ins. Corp. v. Michigan Condo. Ass'n,* 46 So. 3d 177 (Fla. 4th DCA 2010); *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129 (Fla. 4th DCA 2010). The insurer in *Leeward* and the Insurer invoked this Court's discretionary jurisdiction, as did

similarly situated insurers. Initially this case was a "pipeline" case in this Court, but it has since been made the lead case.

ARGUMENT

I. The Insurer Posits a Conflict Based on *Johnson* That Does Not Exist.

The Second District certified conflict with the three Fourth District cases that relied on each other or on *Johnson* directly. However, read properly and especially in light of subsequent opinions from the Second District, neither these cases nor *Johnson* conflict with *San Marco* or the cases cited therein: *Leeward*, *Villagio* and *Am. Cap. Ins. Co. v. Cayman I at Tarpon Bay Condo. Ass'n,* 313 So.3d 847 (Fla. 2d DCA 2021)(citation PCA). In fact, the illusion of conflict is created by and goes back to the tortured reading of *Johnson* that is promoted by many insurers, including the Insurer in this case.

According to the Insurer's mistaken argument, *Johnson* would require a trial court in all cases to resolve all issues of coverage prior to referring to appraisal any issues relating to the amount of loss, curtailing the trial court's discretion to control its docket. In fact, *Johnson* says nothing of the kind. *Johnson* does not address the relative timing of appraisal of loss and resolution of coverage defenses

at all, and says nothing about restricting or eliminating a trial court's exercise of discretion in directing this timing. As there is no actual conflict, this Court should exercise its discretion and decline to exercise jurisdiction.

In *Johnson*, this Court accepted jurisdiction based on a conflict as to "whether causation is a coverage question for the court or an amount of loss question for the appraisal panel when the insurer wholly denies that there is a covered loss." *Johnson,* 828 So.2d at 1022. The holding of *Johnson* is "that causation is a coverage question for the court when an insurer wholly denies that there is a covered loss, and an amount-of-loss question for the appraisal panel when an insurer admits that there is a covered loss, the amount of which is disputed." *Id.* In the two conflict cases in *Johnson*, "the issue…was not appraising the amount of a loss which the insurer admitted was covered. Rather, the issue was one of whether the policies covered the losses for the claims that were made." *Id.* at 1025. In one case, the question was whether the loss was caused by a sinkhole (a covered peril) or by earth movement (an excluded cause). *Id* at 1023. In the other, the question was whether the damage was caused by blasting (a covered peril) or settlement of the building (an

excluded cause). *Id.* Whether a loss is covered by an insuring clause, or excluded by an exclusion, is a judicial question. *Eg., Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665 (Fla. 1974). On the other hand, an assertion that a claim has been fraudulently exaggerated is fundamentally a question of the amount of loss that must be referred to the appraisal panel. *Leeward*.

The Insurer simply cannot claim that it has wholly denied coverage in this case. The facts conclusively demonstrate otherwise. As in *Leeward* and *Villagio*, the Insurer has already paid portions of the claim, thereby admitting coverage. Moreover, the Insurer has not requested reimbursement of the amounts paid on the claim. This fact precludes equating this case or the others like it with any of the cases cited for conflict. In the words of *Johnson*, this case presents "an amount-of-loss question for the appraisal panel [because the Insurer] admits that there is a covered loss, the amount of which is disputed." *Johnson,* 828 So.2d at 1022.

II. <u>There is No Conflict with the Fourth District.</u>

In *Demetrescu,* the insurer denied coverage based on the exclusions for wear and tear, constant seepage, faulty design and maintenance, neglect and preexisting damage. *Demetrescu,* 137 So.

3d at 501. The insurer in *Demetrescu* made no defenses predicated on the amount of loss.

In *Michigan Condo.,* the opinion simply fails to address the basis for the insurer's denial of coverage, so the opinion cannot be in conflict. *Michigan Condo.,* 46 So. 3d at 178.

In *Corridori*, the denial of the claim was predicated on the failure of the insured to complete a sworn proof of loss or to sit for an examination under oath. *Corridori*, 28 So. 3d at 130. The Second District addresses these fact patterns as issues of ripeness for appraisal, and, like the Fourth District and all others, denies appraisal of unripe claims. *Eg., Am. Coast. Ins. Co. v. Ironwood, Inc.,* 330 So. 3d 570 (Fla. 2d DCA 2021).

There is no conflict between this case and the Fourth District cases cited by the Insurer. The Insurer has simply misstated the issue presented in the Fourth District cases and mischaracterized the facts of this case. The Insurer did not completely deny San Marco's claim on coverage grounds, as the insurers did in *Demetrescu* and *Michigan Condo*. In fact, the Insurer partially paid San Marco's claim, thereby admitting coverage. The Insurer has simply asserted that it may have a defense based on the amount of the claim. Unlike

the appraisal requested in *Corridori* , the ripeness of the appraisal demand in this case has never been questioned. The Insurer's position in this case is entirely different from the position of the insurers in *Demetrescu* and *Corridori*, and the opinion in *Michigan Condo.* states insufficient facts to show conflict.

Other Fourth District cases further elucidate the lack of conflict. In cases like this where the insurer admits some coverage by at least offering to pay, the insurer did not "wholly deny" the claim and cannot refuse appraisal. *Merrick Preserve Condo. Ass'n, Inc. v. Cypress Prop. & Cas. Ins. Co.*, 316 So.3d 45, 48 (Fla. 4th DCA 2021). This goes both ways. In *People's Trust Ins. Co. v. Tracey*, 251 So.3d 931, 933 (Fla. 4th DCA 2018), the insurer offered to pay part of the claim and sought appraisal, but the insured homeowner argued that appraisal was not required because the issue was one of coverage. The Fourth District reasoned that because the insurer admitted coverage at least in part, whether the additional damage was caused by a covered peril is for appraisal, not the court. *Id.* at 933. *See also*, *People's Trust Ins. Co. v. Nowroozpour*, 331 So.3d 193, 196, 197 (Fla. 4th DCA 2021)(Where insurer admitted some coverage, the scope of covered repair is for the appraisal panel).

Likewise, the Second District, just like the Fourth District, denies appraisal when, like *Demetrescu*, the insurer completely denies coverage on a claim. *Heritage Prop. & Cas. Ins. Co. v. Fairway Oaks, Inc.*, 341 So. 2d 1164 (Fla. 2d DCA 2022); *Heritage Prop. & Cas. Ins. Co. v. Veranda I at Heritage Links Ass'n, Inc.* 334 So.2d 373 (Fla. 2d DCA 2022). The districts are consistent.

The Insurer's argument regarding the claimed unfairness of appraisal should not be entertained. Pet. Jur. Br. at 13, 14. Appraisal is a preferred method of dispute resolution. Indeed, the Insurer chose it when drafting its policy. Appraisers are experts in the field of construction and repair, and are not the naïve dupes of insureds, as the Insurer fears. What's more, the Insurer will choose one of the three appraisers, and have a voice in the choice of the third. The Insured is adequately protected against an unjust appraisal award.

Correctly framing the cases relied upon by the Insurer, it becomes apparent that there is no conflict in this case, and the Second District improvidently certified conflict. This Court should decline to exercise jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should decline to exercise jurisdiction.

Dated: February 6, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 3, 2023, the foregoing was electronically filed with the clerk of the court and electronically served on the following counsel of record.

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Dated: February 6, 2023.

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