

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

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

This Petition seeks review of a decision of the Second District involving appraisal in the context of a property insurance claim that certified conflict with three Fourth District decisions. *See* Fla. R. App. P. 9.030 (a)(2)(A)(vi). The issue presented is whether, when an insurer denies coverage as a whole (as, for example, when it claims that the amount claimed is fraudulently overstated), a court may first send the case to appraisal to determine the amount of the loss before deciding coverage.

The Fourth District concluded that, just as a determination of liability must precede a determination of damages, so the issue of whether the claim is covered at all must precede a calculation of the amount of the loss. The Second District's Opinion, a citation PCA, relied on a line of recent Second DCA cases holding that, even when an insurer wholly denies coverage, the court may decide the order in which those issues are resolved.

The case the Opinion principally relies was previously pending review, prior to the Appellant's request to voluntarily dismiss the appeal. *See, Florida Ins. Gua. Ass'n v. Leeward Bay at Tarpon Bay Condo. Ass'n, Inc.*, SC20-1766. Further, this issue was pending in

another matter, until the insurer in that case went into receivership and a stay of the case was entered. See, *Weston Prop. & Cas. Ins. Co. v. Riverside Club Condo. Ass'n, Inc.*, SC21-567. For the same reasons the Court accepted jurisdiction in that case, it should accept jurisdiction here.

STATEMENT OF THE CASE AND FACTS

The Opinion affirmed the decision of the trial court and, in doing so, relied on three contemporaneous opinions:

- *American Cap. Assur. Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238 (Fla. 2d DCA 2020);
- *American Cap. Assur. Corp. v. Cayman I at Tarpon Bay Condo. Ass'n*, 46 Fla. L Weekly D221 (Fla. 2d DCA Jan. 22, 2021) and,
- *Villagio at Estero Condo. Ass'n v. American Cap. Assur. Corp.*, 46 Fla. L. Weekly D193 (Fla. 2d DCA Jan. 20, 2021). [A. 4-5]

The Second DCA also 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); and,
- *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129 (Fla. 4th DCA 2010). [A. 4-5].

Leeward Bay

In *Leeward Bay*, the insurer denied coverage and voided the policy based on its conclusion that the insured had fraudulently overinflated its claim. *Leeward Bay*, 306 So. 3d at 1240. The insured moved to compel appraisal, and the trial court granted the motion. In doing so, the trial court concluded that the dispute concerned the scope of the insured's loss, rather than whether there was coverage for the loss. *Id.*

The Second District affirmed. 306 So. 3d at 1243. In doing so, the Second District analyzed this Court's decision in *Johnson v. Nationwide Mutual Insurance Co.*, 828 So. 2d 1021 (Fla. 2002), which held that "coverage issues are judicial questions for the court; amount-of-loss issues are questions for appraisers". *Leeward Bay*, 306 So. 3d at 1241. The Second District also quoted from this Court's opinion in *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996), which held that "where there is a demand for an appraisal under the policy, the only 'defenses' which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation

of the usual policy conditions such as fraud, lack of notice, and failure to cooperate” *Id.*

The Second District in *Leeward Bay* recognized this Court’s holding in *Johnson* that “appraisers may not determine what caused the damage ‘when an insurer wholly denies that there is a covered loss’ because causation is exclusively a judicial question.” *Id.* at 1241. (quoting *Johnson*, 828 So. 2d at 1022-23, 1026). Nevertheless, the Second District concluded that this Court “did not hold that the trial court had to resolve coverage issues *before* compelling appraisal.” *Id.* (emphasis in original). Adopting the Third District’s dual-track approach, it held that a trial court has the discretion to decide the order in which it resolves coverage and appraisal issues. *Id.* at 1242.

This Court accepted jurisdiction in *Leeward Bay*, and briefing was in progress until the insurer went into receivership, staying the case until Florida Insurance Guarantee Association was substituted in for the carrier and requested a voluntary dismissal, which this

Court granted. See Order, *Florida Ins. Guar. Ass'n v. Leeward Bay at Tarpon Bay Condo. Ass'n, Inc.*, SC20-1766 (Jan. 19, 2022)¹.

Jurisdiction was also accepted in *Weston Prop. & Cas. Ins. Co. v. Riverside Club Condo. Ass'n, Inc.*, SC21-567, until that insurer, too, filed a Notice of Mandatory Stay of Proceedings due to its placement into receivership. This Court has stayed *Riverside* indefinitely. See Order, *Weston Prop. & Cas. Ins. Co. v. Riverside Club Condo. Ass'n, Inc.*, SC21-567 (Sept. 2, 2022).

Cayman I

The next case cited in the Opinion was similarly affirmed by the Second District in a citation PCA (citing *Leeward Bay*) and certified conflict with the same Fourth District cases. 313 So. 3d at 847. Petitioner filed a notice to invoke this Court's jurisdiction, and this Court stayed the case "pending disposition of" *Leeward Bay* originally and, now, this case. See Order, *Am. Cap. Assur. Corp. v. Cayman I at Tarpon Bay Condo. Ass'n*, SC21-268 (Jan. 23, 2023).

¹ Jurisdiction was also accepted in *Weston Prop. & Cas. Ins. Co. v. Riverside Club Condo. Ass'n, Inc.*, SC21-567, until that insurer, too, filed a Notice of Mandatory Stay of Proceedings due to its placement into receivership. This Court has stayed *Riverside* indefinitely. See Order, *Weston Prop. & Cas. Ins. Co. v. Riverside Club Condo. Ass'n, Inc.*, SC21-567 (Sept. 2, 2022)

Villagio

The final case cited in the Opinion is similarly situated factually. The insurer determined the insured's claim was grossly inflated to the point of an intentional misrepresentation and/or concealment of fact and denied coverage. *Villagio*, 2021 Fla. App. LEXIS 5278, at *3. Unlike the other cases, however, the trial court denied the insured's motion to compel appraisal, finding that "the issue of coverage has to be determined before the appraisal provision... will apply." *Id.* at *7-8 (quoting *Leeward Bay*, 306 So. 3d at 1242-43). The Second District, however, reversed the trial court's order "to the extent it orders the determination of all coverage matters prior to appraisal." *Id.* at *8-9. It also certified conflict with the three Fourth DCA cases cited in the Opinion.

ARGUMENT

I. The Second District Opinion Certified Conflict with Decisions From the Fourth District, and Conflict Exists.

This Court undoubtedly has jurisdiction, as it has already granted jurisdiction in *Leeward Bay* and *Riverside* on this issue. The Second District certified that its decision conflicts with the Fourth District's decisions in three different cases: (1) *Demetrescu*,

137 So. 3d at 503, (2) *Corridori*, 28 So. 3d at 131, and (3) *Michigan Condominium*, 46 So. 3d at 177. See *State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007) (noting that the certification of conflict grants the Court jurisdiction *per se*).

As the Second District recognized in *Leeward Bay*, “[t]he district courts have yet to reach a consensus regarding the order in which the trial court should resolve appraisal and coverage issues.” *Id.* at 1242. Both courts considered whether a trial court may compel appraisal when coverage issues are disputed. The Second District said “yes,” the Fourth District said “no.” Compare *Demetrescu*, 137 So. 3d at 503, *Corridori*, 28 So. 3d at 131, and *Mich. Condo.*, 46 So. 3d at 177, with *Leeward Bay*, 3-6 So. 3d at 1202. Thus, this is a conflict seeking resolution.

In each of the the Fourth District cases, insureds submitted claims and insurers denied all coverage. See *Demetrescu*, 137 So. 3d at 501; *Corridori*, 28 So. 3d at 130; *Mich. Condo.*, 46 So. 3d at 178. In each case, the trial court granted the insured’s motion to compel appraisal despite the coverage disputes. See *Demetrescu*, 137 So. 3d at 501; *Corridori*, 28 So. 3d at 130; *Mich. Condo.*, 46 So. 3d at 178. On appeal, the Fourth District reversed, holding that

all coverage disputes must be resolved before a trial court compels appraisal. See *Demetrescu*, 137 So. 3d at 501; *Corridori*, 28 So. 3d at 130; *Mich. Condo.*, 46 So. 3d at 178.

At the heart of the conflict between the Second and Fourth Districts is their interpretation of this Court's opinion in *Johnson v. Nationwide*. In *Demetrescu*, for example, the Fourth District noted *Johnson's* holding that causation is a coverage question for the court when an insurer wholly denies coverage and is an amount-of-loss question for the appraisal panel when an insurer admits that there is a covered loss but disputes the amount. See *Demetrescu*, 137 So. 3d at 502 (quoting *Johnson*, 828 So. 2d at 1022). The court acknowledged that coverage issues "are 'to be judicially determined by the court' and are 'not subject to a determination by appraisers.'" *Id.* (quoting *Johnson*, 828 So. 2d at 1025). It concluded that, consistent with *Johnson*, after "Citizens wholly denied that there was a covered loss, all coverage issues, including causation, were to be judicially determined by the trial court." *Id.*

Similarly, the *Corridori* court interpreted *Johnson* to require that coverage issues be resolved before appraisal. See *Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129, 131 (Fla. 4th DCA 2010).

An attempt to distinguish *Corridori* based on the timing of the coverage denial was rejected in *Michigan Condominium*,. See 46 So. 3d at 178. Relying on *Corridori*, the court also rejected the Third District’s dual-track approach, which allows a court to compel appraisal before resolving coverage “while preserving the insurer’s right to contest coverage as a matter of law.” *Id.* at 178 (certifying conflict with *Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753 (Fla. 3d DCA 2010)).

In contrast, the Second District held that *Johnson* does *not* require a court to determine coverage before compelling appraisal. It held that, although the appraisers may not decide what caused the damage, the appraisal itself may proceed.

In sum, the Second and Fourth Districts conflict about whether *Johnson* requires a trial court to determine coverage issues before compelling appraisal.

II. This Court Should Accept Jurisdiction to Resolve the Conflict and Clarify the Law

The districts conflict on whether coverage disputes must be resolved before appraisal. While the Second and Third Districts have adopted a “dual-track” approach—permitting trial courts to

compel appraisal before resolving coverage disputes—the Fourth DCA has consistently held that before the amount of loss can be determined, coverage under a policy must be confirmed—just as “[a] finding of liability necessarily precedes a determination of damages.” *Mich. Condo.*, 46 So. 3d at 178 (quoting *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1262-63 (Fla. 2006)). Yet both courts cite to this Court’s decision in *Johnson* to justify their positions.

This conflict creates confusion about the proper order of determining coverage and the amount of loss—an issue that continues to be litigated. Moreover, this conflict is not new. More than ten years ago, the Fourth DCA certified its conflict with the Third DCA. *See Mich. Condo.*, 46 So. 3d at 178 (certifying conflict with *Rawlins*, 34 So. 3d at 755)); *see also State Farm Fla. Ins. Co. v. Hernandez*, 172 So. 3d 473, 476 n.1 (Fla. 3d DCA 2015) (noting the conflict between the Fourth and Third DCAs).

The Court should also accept jurisdiction because when appraisal is allowed to proceed before coverage is resolved, the appraisal panel is limited to assessing the damages alleged at the time of the appraisal and cannot consider evidence of the insured’s misrepresentations, concealments, and false statements. In other

words, appraisers review the claims with blinders on. That assessment is useless if it is based on or affected by false or inflated claims. Yet, the result of the appraisal is binding on insurers no matter how inflated. See, e.g., *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So. 3d 846, 854 (Fla. 4th DCA 2013) (rejecting the insurer's assertion that there was duplication in the appraisal award because it "raise[d] an issue directly related to the 'amount of loss' sustained to the particular property—an issue solely within the province of the appraisers"). And appraisal based on a false or inflated claim is a waste of resources if a trial court later finds no coverage under the policy.

CONCLUSION

This Court should exercise its discretionary jurisdiction to resolve the certified conflict as it did previously in *Leeward Bay* and *Riverside*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure as it has been prepared in Bookman Old Style 14-point font and does not exceed 2,500 words.

/s/ PATRICK E. BETAR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail on January 27, 2023, to:

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