IN THE SUPREME COURT OF FLORIDA

CASE NO: SC01-1459

THIRD DISTRICT
CASE NO: 3D00-843

ALLSTATE INSURANCE COMPANY,)
)
Petitioner,)
v.)
)
LUIS SUAREZ and LILIA SUAREZ,)
)
Respondents.)
_____)

RESPONDENTS' BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

This is the answer brief on the merits of Respondents/Appellees/Plaintiffs, LUIS B. and LILIA E. SUAREZ, filed in response to the brief of Petitioner/Appellant/Defendant, ALLSTATE INSURANCE COMPANY. ALLSTATE seeks review of the decision of the District Court of Appeal, Third District, which held that where ALLSTATE's policy clearly provided for appraisal for settling disputes, the dispute is to be settled by the appraisal method clearly and meticulously set forth in the policy. Contrary to ALLSTATE's argument and as specifically found by the District Court of Appeal, the Arbitration Code does not govern because the policy provides for appraisal and the Florida Arbitration Code §682.06 states that it applies "unless otherwise provided by the agreement". Since the policy specifically provided for appraisal, the Arbitration Code does not govern.

STATEMENT OF THE FACTS

The decision of the District Court of Appeal, Third District, sets forth all the relevant facts which may be summarized as follows:

On August 24, 1992, the SUAREZs suffered substantial damage to their residence and personal property due to Hurricane Andrew. ALLSTATE made payment on the claim in September, 1992. The parties disputed the value of the payment by ALLSTATE and, in June, 1997, submitted a supplemental claim. After ALLSTATE denied the supplemental claim, SUAREZ filed a Complaint for Declaratory Relief and/or Petition to Compel Appraisal. The trial court granted the Petition to Compel Appraisal and appointed a neutral appraisal umpire. Two neutral appraisers were appointed by the parties. ALLSTATE sought a formal hearing under Florida's Arbitration Code.

The Florida Arbitration Code provides that "[u]nless otherwise provided by the agreement ... (2) [t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing" §682.06 Fla. Stat. (1999). The neutral appraisal umpire determined that the Florida Arbitration Code did not apply because ALLSTATE's policy, Subsection 9, provided for appraisal and therefore the hearing should be conducted informally.

ALLSTATE's counsel had advised the Court:

> And we're not here -- we are absolutely correct, this is not a coverage issue. The only thing we are addressing is the appraisal, is the scope and amount of damages." (R. 99).

The umpire and two appraisers rendered an award. The trial court entered a Final Judgment and Order Granting Plaintiffs' Motion To Confirm Appraisal Award.

The District Court, Third District, affirmed on the following ground:

The insurance contract provided an appraisal provision for the purpose of settling disputes relating to the valuation of a loss, citing Liberty Mut. Fire Ins. Co. v. Hernandez, 735 So.2d 587 (Fla. 3d DCA 1999) which held that appraisal clauses and arbitration clauses are not identical.

Hernandez also stated:

> "The appraisal clause in this case provides that "[t]he appraisers will *separately* set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. *If they fail to agree, they will submit their differences to the umpire.*" ... Whether the party-appointed appraisers visit the premises together or separately, the clause contemplates inspection and valuation by each appraiser individually, not a trial-type hearing."

The District Court also cited Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So.2d 817 (Fla. 2d DCA 1963) which held:

> "... appraisers are generally expected to act on their own skill and knowledge; they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions reached."

The District Court in adhering to its reasoning in Hernandez as persuasive said that to hold otherwise would transgress the fundamental nature of an appraisal hearing; Section 682.06 applies "unless otherwise provided by the agreement". In the present case as well as in Hernandez, the agreement specifically provided for an appraisal and that it was difficult to imagine that a formal arbitration hearing was within the contemplation of the parties when entering into the agreement.

In so holding, the District Court certified conflict with Hoenstine v. State Farm Fire and Cas. Co., 736 So.2d 761 (Fla. 5th DCA 1999), and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).

Respondents submit that the District Court of Appeal's decision correctly followed ALLSTATE's policy provision and should be affirmed.

SUMMARY OF ARGUMENT

Respondents SUAREZ submit that the decision of the District Court of Appeal in affirming the trial court's order correctly followed the policy provision and the clear provisions of Section 682.06. Contrary to Petitioner's argument, this was not an "arbitration award" but rather an Order Confirming An Appraisal Award. The appraisal award tracked the language of the policy provision and followed the mandate of the arbitration code §682.06 which limited its applicability by stating "unless otherwise provided by the agreement or provision for arbitration". Since ALLSTATE's policy provided for an appraisal procedure and the arbitration code limits it applicability by stating "unless otherwise provided by the agreement or provision for arbitration" ALLSTATE was afforded the exact procedure its policy required, i.e., appraisal.

The distinction between arbitration and appraisal was initially recognized in Preferred Ins. Co. v. Richard Parks Trucking Co., supra, in 1963. If ALLSTATE had decided that it did not want to be governed by an appraisal procedure, it had many years opportunity to amend its policy. Having failed to change the policy provision, it cannot argue that it was deprived of any right under the Florida Arbitration Code which it painstakingly avoided.

ALLSTATE's argument that this Court should therefore quash the Third District's decision and approve Hoenstine v. State Farm Fire and Cas. Co., supra, and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, supra, should be rejected because these decisions ignore the basic difference between arbitration and appraisal, ignore the clear policy provisions and engage in the forbidden act of writing another policy for the parties or rewriting the policy to make it more advantageous for one of the contracting parties, especially in the situation where the party is a drafter against whom the agreement must be construed.

STANDARD OF REVIEW

The standard of review of the District Court's decision that the appraisal award provision of the policy applied rather than the Arbitration Code, is a pure issue of law - - and, therefore, is de novo. Menendez v. Palms West Condo. Ass'n, Inc., 736 So.2d 58 (Fla. 1st DCA 1999).

POINT INVOLVED

WHERE ALLSTATE'S POLICY PROVIDED FOR APPRAISAL AND THE APPRAISAL PROCEDURE WAS FOLLOWED THE TRIAL COURT CORRECTLY ENTERED A FINAL JUDGMENT BASED UPON THE APPRAISAL AWARD AND THE DECISION OF THE DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE ORDER GRANTING PLAINTIFFS' MOTION TO CONFIRM APPRAISAL AWARD.

ARGUMENT

ALLSTATE's argument ignores three undisputed facts:

1) Appraisal and arbitration are entirely different procedural concepts.

2) The Arbitration Code, Section 682.06(2) limits its applicability by stating that "unless otherwise provided by the agreement or provision for arbitration." When this occurs, as it does in ALLSTATE's policy, the Arbitration Code does not govern.

3) ALLSTATE's policy provides for an appraisal and sets forth in detail the precise procedure to be followed. Therefore, when the Court followed the mandatory provisions of ALLSTATE's policy, ALLSTATE cannot complain about right to present evidence and call witnesses and "due process"."

The District Court stated that "it is difficult to imagine that a formal arbitration hearing was within the contemplation of the parties when entering into the agreement." An examination of the policy provision which sets forth in detail the exact procedure to be followed supports the District Court's statement. Furthermore, it must be noted that the distinction between arbitration and appraisal was initially set forth in the 1963 decision of Preferred Ins. Co. v. Richard Parks Trucking Co., supra. This provided ALLSTATE more than ample opportunity to change its policy to provide for arbitration rather than appraisal if it had been dissatisfied with the appraisal procedure. Having steadfastly adhered to its policy provision of appraisal, it certainly is in no position at this point, after a claim has been made, to suddenly want to treat appraisal as arbitration and when faced with its own choice (as drafter of the insurance policy) attempt to switch to arbitration and argue the lack of due process and denial of the right to call witnesses. Simply stated, ALLSTATE is bound by its own choice.

The District Court certified conflict with Hoenstine v. State Farm Fire and Cas. Co., supra, and Florida Farm Bureau Cas. Ins. Co. v. Sheaffer, supra. It is respectfully submitted that both Hoenstine and Sheaffer incorrectly failed to recognize the basic differences between arbitration clauses and appraisal clauses and in effect engaged in

the prohibited act of writing another policy for the parties or rewriting the contract to make it more advantageous for one of the contracting parties, especially in the situation where the party is a drafter of the contract, against whom the agreement must be construed. RX Solutions v. Express Pharmacy Services, 746 So.2d 475 (Fla. 2d DCA 1999); Excelsior Ins. Co. v. Pomona Park Bar & Package, 369 So.2d 938 (Fla. 1979) [courts are not allowed to re-write contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties]; Medical Center Health Plan v. Brick, 572 So.2d 548 (Fla. 1st DCA 1990) [a party is bound by a contract and a court is powerless to re-write clear and unambiguous terms of a voluntary contract. Nor is it the role of courts to make an otherwise valid contract more reasonable from the standpoint of one of the contracting parties]; Home Dev. Co. Of St. Petersburg v. Bursani, 178 So.2d 113 (Fla. 1965) [a court is not authorized to re-write a contract of the parties].

ALLSTATE argues that the Third District Court of Appeal's decision ignores this Court's decision in State Farm Fire & Casualty Co. v. Licea, 685 So.2d 1285 (Fla. 1996). However, an examination of Licea compels the conclusion that the Third District Court's decision follows Licea and is in perfect harmony with that case. In Licea this Court upheld the appraisal clause in State Farm's policy, rejected the argument that the appraisal clause was void for lack of mutuality and held in part:

> "...As this Court pointed out in *Midwest Mutual Insurance Co. v. Santiesteban*, 287 So.2d 665 (Fla.1974), "A challenge of *coverage* is exclusively a *judicial question ...*" *Id.* at 667. If a court decides that coverage exists, the dollar value agreed upon under the appraisal process will be binding upon both parties.
>
> Thus, 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. We interpret the appraisal clause to require an assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes."

Therefore, ALLSTATE's argument that the decision ignores Licea is without merit. On the contrary, ALLSTATE merely disagrees with Licea and ignores the fact that its insurance policy specifically required appraisal even after being on notice for many years that there is a basic difference between appraisal and arbitration.

ALLSTATE's argument that Licea appears to conflict with this Court's earlier opinion in New Amsterdam Casualty Co. v. J.H. Blackshear, Inc., 116 Fla. 289, 156 So.695 (Fla. 1934) is also without merit. New Amsterdam held inter alia:

> "The object of an appraisal clause like that above quoted is to fix, by the contract of insurance itself, a certain mode by which the amount of any claim required to be paid shall be ascertained...".

On the contrary, Licea follows this principle as does the present case.

ALLSTATE's argument that there is no realistic way that even the most experienced appraiser could determine causation in the absence of evidence, testimony and cross-examination overlooks the following: ALLSTATE examined the property right after the hurricane and made a determination of damage without presentation of evidence, testimony and cross-examination. If ALLSTATE had done a proper job at that time, and realistically and correctly appraised the damages, this lawsuit would have been unnecessary. Therefore, the evidence that ALLSTATE gathered from its first appraisal, faulty as it may have been which allowed it to make an appraisal the first time, constituted a sufficient basis for it to re-examine the property the second time. Since ALLSTATE and its policy did not require testimony and evidence the first go around and did not invoke the appraisal procedure the first time, it can hardly argue at this stage that it now needs evidence and witnesses and cross-examination.

ALLSTATE argues that the majority of Florida courts to date have recognized

that the formal procedures outlined in the Florida Arbitration Code should govern the

appraisal procedure undoubtedly referring to Hoenstine (5th DCA), Sheaffer (1st DCA) and Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st DCA 2000). But this overlooks the fact that when a policy provides for an appraisal, the parties are required to follow the appraisal procedure. Florida Select Ins. Co. v. Keelean, 727 So.2d 1131 (Fla. 2d DCA 1999) which following Licea , reversed an order denying the insurer's request for an appraisal pursuant to the terms of its policy. The "majority" decisions incorrectly ignore this Court's Licea decision.

It is submitted that Licea is the proper decision and should be followed.

Finally, ALLSTATE refers to two decisions which are now before this Court on the issue of whether causation is a factual issue for an appraisal panel to decide as a part of the "amount of loss" determination or is a coverage issue to be decided by the Court, not an appraisal panel. These cases are Nationwide Mut. Ins. Co. v. Johnson, 774 So.2d 779 (Fla. 2d DCA 2000) [causation is a factual issue for the appraisal panel to decide as part of the "amount of loss" determination]. Gonzalez v. State Farm Fire & Casualty Co., 25 Fla.L.Weekly D2614 (Fla. 3d DCA November 8, 2000) [question of whether loss was caused by covered peril or excluded peril was for

Court rather than appraiser]; and Opar v. Allstate Ins. Co., supra, [only issue to be resolved by the appraisal process is the amount of loss, not causation]. The guiding principle to be utilized in this dispute is where a policy clearly provides for appraisal, not arbitration, the policy provision governs and the parties are bound to follow the appraisal procedure set forth in the policy.

In summary, Respondents, LUIS SUAREZ and LILIA SUAREZ, submit that the decision of the District Court of Appeal correctly held that the policy provision mandating appraisal governs, and Section 682.06 of the Florida Arbitration Code does not govern. Section 682.06 specifically applies "unless otherwise provided by the agreement .. Since ALLSTATE's policy provided for appraisal, the Arbitration Code does not apply. As stated by the District Court of Appeal, "It is difficult to imagine that a formal arbitration hearing was within the contemplation of the parties when entering into the agreement." To hold otherwise, would be to rewrite the insurance policy to suit one of the parties, ALLSTATE, the drafter of the policy.

CONCLUSION

For all the reasons set forth above, it is submitted that the Third District Court of Appeal's decision is correct and should be affirmed. It follows the policy provision requiring appraisal. Respondents submit that the Final Judgment and Appraisal

Award and the decision of the Third District Court of Appeal are supported by the law and the contractual rights and procedures set forth in ALLSTATE's policy.

WHEREFORE, Respondents, LUIS SUAREZ and LILIA SUAREZ, respectfully request this Honorable Court to affirm the decision of the District Court of Appeal, Third District, affirm the Final Judgment and remand the cause for determination of the amount of attorney's fees pursuant to Motion for Attorney's Fees simultaneously filed herewith.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of September, 2001, to CHRISTOPHER J. LYNCH, ESQ., ANGONES, HUNTER, McCLURE, LYNCH & WILLIAMS, P. A., 66 West Flagler Street, Ninth Floor, Miami, FL 33130.

CERTIFICATE OF FONT SIZE

Throughout this Reply Brief Appellant has used as a font size Times New Roman, 14 Point, which is proportionately spaced.

_____
JEANNE HEYWARD