IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY

Appellant,

CASE NO. SC01-1459

Third District
CASE NO. 3D00-843

vs.

LUIS SUAREZ and LILIA SUAREZ,

Appellees.

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

PAGE

INTRODUCTION 5

STATEMENT OF THE CASE AND FACTS 5

SUMMARY OF THE ARGUMENT 9

STANDARD OF REVIEW 11

ARGUMENT 12

CONCLUSION 17

CERTIFICATE OF SERVICE 18

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

CASES PAGE

Allstate Insurance Co. v. Suarez, 786 So.2d 745
(Fla. 3rd DCA 2001) 5

Cassoutt v. Cessna AirCraft Co., 742 So.2d 493
(1st DCA 1999) 11

Delgado v. Allstate Insurance Company, 731 So.2d 11
(Fla. 4th DCA 1999) 15

Florida Farm Bureau Casualty Ins. Co. v. Sheaffer,
687 So.2d 1331 (Fla. 1st DCA 1997 8

Fogel v. Mirmelli, 413 So.2d 1204 (Fla. 3rd DCA 1982) 15

Gonzalez v. State Farm Fire & Casualty Co., 2000 WL. 1671415
(Fla. 3rd DCA 2000) 16

Hoenstine v. State Farm Fire & Casualty Co.,
736 So.2d 761 (Fla. 5th DCA 1999) 8

Liberty Mutual Fire Ins. Co. v. Hernandez,
735 So.2d 587 (Fla. 3rd DCA 1999) 7

Lobue v. Travelers Insurance Co., 388 So.2d 1349
(Fla. 4th DCA 1980) 15

Nationwide Mutual Ins. Co. v. Johnson,
774 So.2d 779 (Fla. 2nd DCA 2000) 16

New Amsterdam Casualty Co. v. J.H. Blackshear, Inc.,
116 Fla. 289, 156 S0. 695 (Fla. 1934) 13

Opar v. Allstate Insurance Company, 751 So.2d 758
(Fla. 1st DCA 2000) 16

Preferred Ins. Co. v. Richard Parks Trucking Co.,
158 So.2d 817, 820-21 (Fla. 2nd DCA 1963) 12

Schnurmacher Holding, Inc. v. Noriega,
542 So.2d 1327 (Fla. 1989) 11

State Farm Fire & Casualty Co. v. Licea,
685 So.2d 1285 (Fla. 1996) 9

Walter v. Walter, 464 So.2d 538 (Fla. 1985) 11

INTRODUCTION

This is an appeal from a final judgment rendered pursuant to an arbitration award in favor of the appellees, LUIS B. and LILIA SUAREZ ("SUAREZs"), and against Appellant, ALLSTATE INSURANCE COMPANY ("ALLSTATE"). This Initial Brief is submitted on behalf of ALLSTATE. References to the Record On Appeal will be by the symbol "R" and all emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The relevant facts are outlined in the Third District's opinion, ***Allstate Insurance Co. v. Suarez,*** 786 So.2d 745 (Fla. 3rd DCA 2001), and they are as follows. In June of 1997, the SUAREZs submitted a "supplemental" claim under their homeowners' policy with ALLSTATE, seeking recovery for damages allegedly incurred to their home as a result of Hurricane Andrew, which hit South Florida on August 24, 1992.

ALLSTATE responded by denying that the alleged damage, which served as the basis for supplemental claim, was caused by Hurricane Andrew and thus covered under the ALLSTATE policy, and by contending that the amounts originally paid to the insureds in September of 1992, shortly after Hurricane Andrew, fully reimbursed the SUAREZs for their storm damage. (R. 10-20; 21-22). The SUAREZs then filed a petition to compel appraisal, as well as an action for declaratory relief, seeking a declaratory decree ordering ALLSTATE to appraisal. (R. 1-9).

The ALLSTATE policy contained the following appraisal/arbitration

provision:

> **Appraisal.** If you and we fail to agree on the amount of loss, either party may make written demand for an appraisal. Upon such demand each party must select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge or a court of record in the state were the residence premises is located to select an umpire.
>
> The appraisers shall then determine the amount of loss, stating separately the actual cash value and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by any two will determine the amount of loss.

On October 26, 1998, the trial court granted the SUAREZs' petition to compel appraisal. (R. 29-30). ALLSTATE then filed a motion to determine appraisal/arbitration procedures and specifically requested that any arbitration/appraisal hearing be conducted in accordance with the **Florida Arbitration Code**, **§682.01 et. seq. Fla. Stat**. (R. 35-53).

On April 9, 1999, the court entered an order directing that the "[A]rbitrator shall proceed as Florida law requires including **Arbitration Code**." (R. 83). However, at the subsequent appraisal/arbitration hearing, the SUAREZs' counsel persuaded the neutral umpire that the **Florida Arbitration Code** did not apply and that the hearing should be conducted "informally."

Despite strenuous objections from ALLSTATE 's counsel, the neutral umpire

precluded ALLSTATE's counsel from meaningfully participating in the appraisal/arbitration hearing; refused to allow ALLSTATE's counsel to call the claimants for purposes of examining them regarding their supplemental claim; and refused to permit ALLSTATE to call additional witnesses, including an expert witness. (R. 135-36).

As a result, the appraisal/arbitration hearing was no hearing at all, and it simply amounted to the neutral umpire and the parties' respective appraisers/arbitrators, discussing the issues off the record, and ultimately rendering an award in favor of the SUAREZs in the amount of $38,078.38. ALLSTATE then moved to vacate the award arguing that the appraisal/arbitration hearing was conducted contrary to the provisions of the **Arbitration Code**, with the result that ALLSTATE was deprived of its due process rights. (R. 142-52). The trial court denied ALLSTATE's motion to vacate, and in effect, reversed its prior ruling that the **Arbitration Code** would apply. The court then affirmed the award. (R. 168).

On appeal, the Third District affirmed the judgment, finding that the trial court was correct in upholding the neutral umpire's decision to conduct the appraisal/arbitration in an informal manner. In so ruling, the Third District acknowledge that, while appraisal provisions are generally treated the same as arbitration provisions, the **Florida Arbitration Code** was nonetheless not applicable.

In so ruling, the court cited with favor its earlier decision in ***Liberty Mutual Fire Ins. Co. v. Hernandez***, 735 So.2d 587 (Fla. 3rd DCA 1999) in which the Court stated:

> Although appraisal clauses are treated as arbitration clauses for most purposes, the two processes are not identical. "[A]ppraisers 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 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 evaluation by each appraiser individually, not a trial - type hearing.

In finding the **Arbitration Code** procedures and provisions inapplicable, the Third District noted and certified conflict with ***Hoenstine v. State Farm Fire & Casualty Co.***, 736 So.2d 761 (Fla. 5th DCA 1999), and ***Florida Farm Bureau Casualty Ins. Co. v. Sheaffer***, 687 So.2d 1331 (Fla. 1st DCA 1997). In ***Hoenstine*** and ***Florida Farm Bureau***, the Fifth and First Districts respectively, interpreted identical appraisal clauses as binding arbitration agreements governed by the procedures set forth in the **Arbitration Code**.

Following the Third District's ruling, ALLSTATE invoked the discretionary jurisdiction of this Court and on July 27, 2001, this Court entered an order postponing its decision on jurisdiction and setting forth a briefing schedule. Appellant ALLSTATE's Initial Brief now follows.

SUMMARY OF THE ARGUMENT

The trial court erred in failing to vacate the arbitration award since the appraisal/arbitration hearing was conducted in a manner that substantially prejudiced the rights of ALLSTATE. ALLSTATE was deprived of its rights under **§682.06(2)** of the **Arbitration Code,** since ALLSTATE was denied the opportunity to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing. As such, **§682.13(1)(b)** of the **Code**, which indicates that the court shall vacate an award when the hearing is conducted contrary to the provisions of **§682.06**, was applicable, and the award should have been vacated.

The Third District's decision, that in the context of this dispute, the policy provision called for appraisal, or a simple resolution of a dispute as to the amount of loss. ignores this Court's decision in ***State Farm Fire & Casualty Co. v. Licea***, 685 So.2d 1285 (Fla. 1996). As ***Licea*** indicates, under these circumstances, the appraisers/arbitrators determine not only the amount of loss, but whether the loss was <u>caused</u> by a covered peril or a cause not covered.

There is no realistic way that appraisers/arbitrators can determine causation without the parties having the traditional rights to present evidence, examine and cross - examine witnesses. Only under these circumstances will similar claims submitted under similar appraisal/arbitrations provisions be resolved on their merits. This Court should therefore quash the Third District's ruling and approve ***Hoenstine v. State Farm Fire & Casualty Co***., and ***Florida Farm Bureau Ins. Co. v. Sheaffer***. The case should then be remanded with directions to the trial court that the judgment be vacated, and that the appraisal/arbitration be conducted in conformity with the

Arbitration Code.

<u>STANDARD OF REVIEW</u>

The standard of review of the trial court's ruling that the **Arbitration Code** does not apply - a pure issue of law - is *de novo*. ***Walter v. Walter***, 464 So.2d 538 (Fla. 1985); ***Cassoutt v. Cessna AirCraft Co.***, 742 So.2d 493 (1st DCA 1999).

Further, as ***Schnurmacher Holding, Inc. v. Noriega***, 542 So.2d 1327 (Fla. 1989) indicates, if the Court determines that the **Arbitration Code** is applicable, it may vacate the arbitration award if it determines the following provision of **§682.13 Fla. Stat**. has been violated:

> **Section 682.13 Vacating an Award**. -
>
> (1) Upon application of a party, the court shall vacate an award when . . .
>
> (d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.[1]

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[1] Section 682.06 Fla. Stat., indicates, in relevant part, as follows:

682.06 Hearing. - Unless otherwise provided by the agreement or provision for arbitration. . .

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross - examine witnesses appearing at the hearing.

ARGUMENT

<u>THE TRIAL COURT ERRED IN FAILING TO VACATE THE ARBITRATION AWARD SINCE THE ARBITRATION HEARING WAS CONDUCTED IN A MANNER CONTRARY TO THE PROVISIONS OF THE FLORIDA ARBITRATION CODE WITH THE RESULT THAT ALLSTATE'S RIGHTS WERE SUBSTANTIALLY PREJUDICED</u>

The traditional distinctions between arbitration and appraisal, relied upon by the Third District in ***Liberty Mutual Fire Ins. Co. v. Hernandez***, and in deciding this case, are further outlined by the Second District in ***Preferred Ins. Co. v. Richard Parks Trucking Co.,*** 158 So.2d 817, 820-21 (Fla. 2nd DCA 1963), a decision which was cited by the ***Hernandez*** court. The ***Preferred Insurance*** court indicated that:

> The distinctions between arbitration and appraisement are noted in 5 Am. Jur.2d. Arbitration and Award, §3, p.520:
>
> §3. Distinctions - appraisement.
>
> Although, because certain of the rules of law that apply to arbitration also apply to appraisement, the two are often confused, arbitration and appraisement are not the same. Indeed, arbitration should not be confused with what takes place in any case were parties refer to selected persons some ministerial trial duty or some matter involving only the ascertainment of facts, requiring neither hearing nor exercise of judicial discretion.
>
> An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which an award or judgment may be entered, whereas an agreement for appraisal <u>extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action before the court</u>. Furthermore, 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; and they are not obligated to give the rival claimants any formal notice or to hear evidence, but

> may proceed by ex-parte investigation so long as the parties are given the opportunity to make statements and explanations with regard to matters in issue. Arbitrators, on the other hand, must meet together at all hearings; they act quasi-judicially and may receive the evidence or views of a party to the dispute only in the presence, or a notice to, the other side, and may adjudge the matters to be decided only on what is presented to them in the course of an adversary proceeding.
>
> Whether the procedures required are those of an arbitration or of an appraisal is to be found from the intent of the disputants or from <u>the character of the questions and issues to be answered</u>, or both. However, where the agreement so contemplates, the results of an appraisal may be just as binding as the award of arbitrators.

ALLSTATE submits that the Third District's conclusion that the appraisal process should be conducted informally, ignores the character of the "questions and issues to be answered" when the appraisal clause has been invoked. In ***State Farm Fire & Casualty Co. v. Licea***, ***supra*** at 1288, this Court, interpreting an identical clause in a policy also covering a home damaged by Hurricane Andrew, indicated that the appraisers'/arbitrators' task was as follows:

> We interpret the appraisal clause to require an assessment of the amount of loss. This necessarily includes determination as to the costs of repair or replacement, and whether or not the requirement for a repair or replacement <u>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.</u>[2]

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[2] The determination by this Court in ***Licea***, that the appraisers/arbitrators are to determine causation in addition to the amount of loss, 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). In the latter case, the Court indicated that the object of the appraisal clause "[I]s merely to fix the amount of recoverable

In persuading the Third District that the appraisal/arbitration should be an informal process, the SUAREZs contended that the appraiser/arbitrators had the requisite experience and knowledge to resolve the claim, and that accordingly, there was no need for evidence or testimony. In light of this argument, it is important to view the legal issue on appeal as presented in the factual context of this case.

This is not a case, for example, where two appraisers who have expertise in appraising damage to an automobile, disagree as to the extent of damage to an automobile's fender and the amount necessary to replace or repair that damage. ALLSTATE paid the initial claim submitted by its insured in the months following Hurricane Andrew. More than five years later, the SUAREZs made a supplemental claim for damages, and invoked the appraisal/arbitration clause.

Once the supplemental proof of loss was filed, and the parties failed to agree, the appraisal/arbitration process proceeded. ALLSTATE defended the claim on the basis that the damage outlined in the supplemental proof of loss <u>was not caused by Hurricane Andrew</u>. Under this Court's decision in ***Licea***, however, appraisal/arbitration of the causation issue was called for.

ALLSTATE submits that there is no realistic way that even the most experienced appraiser or umpire could determine causation absent the presentation of evidence, testimony and cross - examination. As this Court has interpreted the appraisal/arbitration provisions in ***Licea,*** there must be a determination of whether or

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damage." *Id.* at 696.

not the requirement for a repair or replacement was caused by a covered peril - Hurricane Andrew, a cause not covered, such as wear and tear, or indeed, whether the damage occured at all.

Without question, the resolution of this issue will in large part turn on evidence elicited from the insureds, who would be the only individuals who can shed any light on the extent of the damage incurred as a result of the storm. In most circumstances, an appraiser or umpire would have no basis for a viable opinion on the causation issue.

For this reason, ALLSTATE believes, as the majority of Florida courts to date have recognized, that the formal procedures outlined in the **Florida Arbitration Code** should govern the appraisal/arbitration provision in question. As such, ALLSTATE submits that Florida courts have recognized that the parties must be afforded a reasonable opportunity to be heard and present evidence on this issue. This right to present evidence and call witnesses is, perhaps, the most important due process right of a litigant, and the exclusion of the testimony of a witness is a drastic remedy which should be invoked only under the most compelling circumstances. ***Delgado v. ALLSTATE Ins. Co.***, 731 So.2d 11, 14 (Fla. 4th DCA 1999), citing ***Fogel v. Mirmelli***, 413 So.2d 1204 (Fla. 3rd DCA 1982) and ***Lobue v. Travelers Ins. Co.***, 388 So.2d 1349 (Fla. 4th DCA 1980).

In the present action, the due process rights of ALLSTATE, as these rights are codified in the **Florida Arbitration Code**, have been violated. Specifically, **§682.06** of the Code, provides, in subsection (2), that the parties are entitled to be heard, to

present evidence material to the controversy and cross-examine witnesses appearing at the hearing.

In sum, ALLSTATE submits that the Third District's reasoning that appraisal in this context is an informal process which concerns the amount of loss only, ignores this Court's decision in ***State Farm v. Licea***. ALLSTATE further submits that in light of ***State Farm v. Licea***, which calls for the appraisal/arbitration panel to determine causation and the amount of loss, the Court must find that the **Arbitration Code** is applicable.[3] Only through the procedures outlined in the Code will the appraisals/arbitrators will be in a position to make an informed and fair decision based on the merits of the particular claim. A contrary holding would ignore the reality of the process as dictated by this Court, and would result in an uninformed decision by the appraisal/arbitrators which would significantly prejudice a party's right to present his position regarding the claim.

For these reasons, ALLSTATE submits that **§682.13(d)** of the **Arbitration Code** warrants reversal. As this provision indicates, the trial court should have vacated

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3 The issue of whether appraisers/arbitrators determine causation in addition to the amount of loss, is once again before this Court in ***Nationwide Mutual Ins. Co. v. Johnson***, 774 So.2d 779 (Fla. 2nd DCA 2000), Supreme Court case number SC-019, and ***Gonzalez v. State Farm Fire & Casualty Co.***, 25 Fla. L. Weekly. D. 2614, - So.2d - , 2000 W.L. 1671415 (Fla. 3rd DCA 2000), Supreme Court case number SC-01321. In deciding the aforementioned cases, the courts referred to ***Opar v. Allstate Ins. Co.***, 751 So.2d 758 (Fla. 1st DCA 2000), rev. den. 767 So.2d 459 (Fla. 2000) in which the First District indicated that the only issue to be resolved by the appraisal process is the amount of loss and not causation. ALLSTATE submits that unless this Court, in deciding ***Johnson*** and ***Gonzalez,*** agrees with the scope of appraisal/arbitration as dictated by the ***Opar*** court, it should find that the **Arbitration Code** provisions are applicable to appraisal/arbitration pursuant to similar policy provisions.

the arbitration award since ALLSTATE clearly demonstrated that the arbitrators refused to hear evidence material to the controversy and otherwise conducted the hearing contrary to provisions of **§682.06(2)**. ALLSTATE's rights were undoubtedly prejudiced, and the lower court's ruling denying the motion to vacate should be reversed.

CONCLUSION

As set forth above, the Court should quash the Third District's opinion and approve ***Hoenstine v. State Farm Fire & Casualty Co***., and ***Florida Farm Bureau Casualty Ins. Co. v. Sheaffer***. The case should then be remanded to the trial court with directions that the final judgment be vacated and the appraisal/arbitration be conducted in accordance with the **Florida Arbitration Code**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Jeanne Hayward, Esq., 25 West Flagler Street, 900 City National Bank Building Miami, Florida 33130 on August 21, 2001.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief of appellant was prepared in 14-point Time New Roman font.

BY:______________________________
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