SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

PETER JOHNSON and CHRISTINE JOHNSON,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, a foreign corporation,
Respondent.

CASE NO. SC01-91

PETITIONERS, PETER JOHNSON AND CHRISTINE JOHNSON, INITIAL BRIEF ON THE MERITS

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STANDARD OF REVIEW

The issue in this case involves the interpretation of an insurance contract. Florida courts, including this one, have long held that the construction of an insurance policy and the extent of coverage is generally a question of law for the court. See, Jones v. Utica Mut. Ins. Co., 463 So.2d 1153, 1157 (Fla. 1985).

STATEMENT OF THE CASE AND FACTS

The Plaintiffs/Petitioners, Peter and Christine Johnson,[1/] purchased a property insurance policy from Nationwide which covered rental property located in Hudson, Florida.[2/] (A. 1-54) The property coverage in the policy provides in pertinent part:

> A. Coverage
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss. (A. 31)
>
> 3. Covered Causes of Loss
>
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> a. Excluded Section B., Exclusions; or
>
> b. Limited in Paragraph A.4., Limitations; that follow. (A. 32)

The policy also contains a Florida changes endorsement which states in pertinent part:

[1/] For ease of reference herein, the Plaintiffs/Petitioners, Peter and Christine Johnson, will be referred to as the Johnsons or as the Plaintiffs. The Defendant/Respondent, Nationwide Mutual Insurance Company, will be referred to as Nationwide or the Defendant.

[2/] Since the appeal below was brought pursuant to Fla.R.App.P. 9.130 as an appeal from a non-final order, there is no record on appeal, and the facts that were provided to the court were provided in an appendix. The appendix submitted by Nationwide below is attached in its entirety and will be referred to as (A) followed by citation to the appropriate page number of the appendix.

This endorsement modifies Insurance provided under the Business Provider Policy . . .

D. Paragraph H.6.A of the PROPERTY DEFINITIONS In the Business Provider Special Property Coverage Form is replaced by the following:

a. Sinkhole collapse means the sudden sinking or collapse of land into underground empty spaces created by the action of water or limestone or similar rock formations. This cause of loss does not include:

(1) The cost of filling sinkholes; or

(2) Sinking or collapse of land into man-made underground cavities. (A. 53)

Nationwide's policy also provides certain exclusions. The relevant exclusion in this case is as follows:

EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

. . .

k. Other Types of Loss:

4. Settling, cracking, shrinking or expansion;

. . .

> But if loss or damage by the "specified causes of loss" or building glass breakage results, we will pay for that resulting loss or damage. (A. 36-38)

The policy also contains certain definitions of terms used in the property section. The policy states:

PROPERTY DEFINITIONS

6. "Specified Causes of Loss" means the following:

> Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicle; riot or civil commotions; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic reactions; falling objects; weight of snow, ice or sleet; water damage . . . (A. 46)

In June, 1996, the Johnsons discovered damage to their home which included progressive physical damage to the walls and floors of the residence. They maintained that the damage was due to sinkhole activity, a covered peril under the policy. (A. 58)

In March of 1999, they brought suit against Nationwide in the Circuit Court in Pasco County for breach of contract. (A. 58-60) They maintained that they had made appropriate application for the benefits under the policy, but that Nationwide had refused to pay them the benefits and, therefore, breached the contract. The Johnsons demanded a jury trial and sought all damages covered under the policy as well as interest and attorneys' fees pursuant to Fla. Stat. § 627.428. Nationwide generally

denied the allegations in the complaint, and as its first affirmative defense, maintained that there was no coverage available under the policy as the damage was excluded by virtue of Exclusion B.1.k.(4). (A. 61-62) Nationwide stated that the damage to the Plaintiffs' residence was not the result of the covered cause of loss. (A. 62) Nationwide also maintained that it had invoked its right to appraisal in a letter to the Plaintiffs. (A. 62-63) In conjunction with its answer and defenses, Nationwide also moved to stay the case in favor of appraisal. (A. 69-73)

At the hearing on the motion, Nationwide's counsel maintained that there were three issues in the case. (A. 77) The first was whether the damage the Johnsons sustained was the result of a sinkhole. The second was the cost to repair or replace the damage, and the third related to the application of an exclusion as it pertained to the extent of Nationwide's obligation to pay for damages. Nationwide further maintained that the first two issues were appropriate for appraisal under this Court's decision in State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996). (A. 78) Nationwide argued that the issue of whether damage was caused by a covered peril or a cause not covered was an issue for appraisal under the Licea holding.

The Johnsons, on the other hand, maintained that Nationwide had denied coverage. Nationwide's position was simple: there was no sinkhole on the property. (A. 81) The Johnsons' counsel explained to the court that unlike State Farm in Licea

who admitted that at least some of the damage was covered, Nationwide was taking the position that none of the damage was covered. The Johnsons' counsel also reminded the court of its discretion to proceed with the coverage action prior to the appraisal to avoid the expensive and cumbersome procedure sought to be invoked by Nationwide.

The trial court concluded that the appraisal clause in the policy was precisely that and not an arbitration clause. (A. 91-92) The court further concluded that the appraisal process was not an appropriate process for determining whether there was or was not a covered loss, and instead, that process was a judicial function. The appraisal process was to resolve the dispute of the amount of the loss, not whether such a loss had occurred. The court denied Nationwide's motion to stay. (A. 94)

Nationwide sought review of the order denying its motion to stay in the Second District. The Second District reversed the circuit court order denying the motion to stay and remanded with directions to allow the appraisal to proceed. (A. 95-99) The Second District stated that the issue presented to it was whether causation is a coverage question for the court or an amount of loss question for an appraisal panel. Citing to this Court's decision in State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996) and its own decision in Florida Select Ins. Co. v. Keelean, 727 So.2d 1131 (Fla. 2d DCA 1999), the Second District held that the Licea court had stated that

causation was an issue for appraisal. The Second District noted its conflict with the decision of the First District in Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st DCA), rev. den., 767 So.2d 459 (Fla. 2000) in which the First District concluded that the only issue to be determined in appraisal is the amount of loss and not causation. The Johnsons timely applied to this Court for review of that decision and the order denying their motion for attorneys' fees pursuant to Fla. Stat. § 627.428. (A. 100-104)

ISSUE

I.

WHETHER THE ISSUE OF CAUSATION, UNDER A PROPERTY INSURANCE POLICY TO DETERMINE IF A LOSS IS AN INSURED OR EXCLUDED LOSS, IS A COVERAGE QUESTION FOR THE JUDICIARY AND NOT AN AMOUNT OF LOSS QUESTION FOR AN APPRAISAL PANEL?

SUMMARY OF THE ARGUMENT

The issue involved in this appeal is straightforward. Nationwide denied coverage to the Johnsons on their property damage claim which they maintain arose from a covered sinkhole loss. Nationwide maintained that the loss arose from an excluded event. The Johnsons brought suit against Nationwide for breach of contract. Nationwide invoked its appraisal clause and maintained that since its coverage denial was based upon its contention that the loss was not caused by a covered insured event, and instead was caused by an excluded one, that the amount of the covered loss was zero such that the appraisal clause in the policy required appraisers and not a court to make the determination. The trial court rejected the argument and denied Nationwide's motion to stay the case and to send it to appraisal.

The Second District reversed the trial court and ruled that appraisers should make a determination of whether loss was caused by a covered or excluded peril when determining the amount of the loss pursuant to a standard appraisal agreement. Most respectfully, in reaching its conclusion, the Second District either misinterpreted or misapplied the holding of this Court in State Farm Fire & Cas Co. v. Licea, 685 So.2d 1285 (Fla. 1996). Nowhere in that decision did this Court say that the appraisal process was the appropriate forum to have coverage determinations of this type made. Rather, this Court stated that such coverage determinations were judicial functions.

Moreover, this Court indicated that when an insurer denies coverage for the loss as a whole, a coverage issue is presented. Here, that is precisely what Nationwide has done and yet the Second District's decision allows the appraisers to make this coverage determination. Finally, the Second District erred when it determined that the language contained in Nationwide's appraisal provision authorized appraisers to make determinations concerning whether damage resulted from a covered or excluded cause of loss. Nationwide's appraisal provision is limited to allowing the appraisers to determine the amount of loss. That is, they are restricted to determine the actual cash value of the loss. Even assuming for sake of argument that Nationwide could lawfully shift the responsibility for making coverage determinations from the court to the appraisers, the language Nationwide chose to include in its appraisal provision in this case certainly did not do so. As such, it was error for the Second District to reverse the trial court's decision and require that the parties solve these coverage issues through the appraisal. This Court should quash the decision of the Second District with directions on remand to reinstate the trial court's verdict.

ARGUMENT

I.

THE ISSUE OF CAUSATION, UNDER A PROPERTY INSURANCE POLICY, TO DETERMINE IF A LOSS IS AN INSURED OR EXCLUDED LOSS IS A COVERAGE QUESTION FOR THE JUDICIARY AND NOT AN AMOUNT OF LOSS QUESTION FOR AN APPRAISAL PANEL.

This case is not complex. The Johnsons maintained that the damage to their property was caused by a covered peril under the policy issued by Nationwide. Nationwide, on the other hand, while admitting that sinkhole damage is, by statute, required to be insured under its policy, nevertheless maintained that there is no coverage for the loss as a whole because the loss was not caused by a sinkhole. The issue which has been presented by Nationwide's denial of benefits in this case is a coverage question, the resolution of which rests solely with the judiciary. Most respectfully, the Second District either misinterpreted or misapplied the rule announced by this Court in State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996) or impermissibly rewrote Nationwide's appraisal provision to authorize submission of coverage issues to appraisers. Under any of those circumstances, this Court should quash the decision below with instructions to reinstate the trial court's order on remand.

Florida law is clear that a challenge to coverage is exclusively a judicial question. Midwest Mut. Ins. Co. v. Santiesteban, 287 So.2d 665, 667 (Fla. 1974). Coverage issues are to be determined by a court notwithstanding the existence of an arbitration or appraisal provision in the policy. Aetna Cas. & Surety Co. v. Goldman, 346 So.2d 111 (Fla. 3d DCA 1977). Questions of policy interpretation as it applies to the coverage are likewise for the court, not arbitrators or appraisers to decide. Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988); Atencio v. U.S. Security Ins. Co., 676 So.2d 489 (Fla. 3d DCA 1986); State Farm Fire & Cas. Co. v. Wingate, 604 So.2d 578 (Fla. 4th DCA 1992).

Historically, Florida courts have also addressed what is encompassed within the appraisal process. For instance, more than 65 years ago in New Amsterdam Cas. Co. v. Blackshear, 116 Fla. 289, 156 So. 695 (1934), this Court stated:

> 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.

Id. at 291.

> But to entitle the insurer to the benefit of such an appraisal as that invoked in this case, the clause must have been invoked in good faith by the insurer. And since the object of the appraisal clause is merely to fix the amount of recoverable damage, it follows that unless liability under the policy for some recoverable amount is affirmatively admitted by the insurer when appraisal is demanded, a refusal by the insurer to submit to an appraisal would not be unjustified, since the law does not require the

> insured to submit to a purely speculative appraisal of damages as to which it may be contended no liability at all exists.

Id. at 291.[3/]

Likewise, Florida courts have historically noted the distinction between arbitration on the one hand and appraisal on the other. For instance, the Second District in Preferred Ins. Co. v. Richard Parks Trucking Co., 158 So.2d 817, 820 (Fla. 2d DCA 1963) explained one of the significant differences as follows:

> An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for appraisal 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.

Id. at 820. See also, United States Fidelity & Guaranty Co. v. Romay, 744 So.2d 467, 469 (Fla. 3d DCA 1999). With those historical principles in mind, this Court can easily resolve the issue presented in this case.

In State Farm Fire & Cas. Co. v. Licea, 685 So.2d 1285 (Fla. 1996), this Court addressed the issue of whether an appraisal clause contained in the Licea's homeowners policy was void for lack of mutuality. The Third District had determined that the appraisal clause was void. This court quashed the decision of the Third

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[3/] The Fifth District has noted that an appraisal is "a valuation or estimation of value of property by an impartial, disinterested person of suitable qualifications." Cheek v. Bugg, 639 So.2d 144, 146, n. 3 (Fla. 5th DCA 1994).

District and found that merely because State Farm's appraisal clause had a retained rights provision, that it was not void for lack of mutuality of obligation. In its decision which addressed a claim arising out of a loss from Hurricane Andrew, this Court stated that a challenge of coverage was exclusively a judicial function. Should a court decide that coverage exists, then the dollar value agreed upon under the appraisal process will be binding upon both parties. The Licea court further stated:

> Thus, where there is a demand for an appraisal under the policy, the only "defenses" which remained 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 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.

Id. at 1288.

The above-quoted language has caused some confusion among the District Courts of Appeal. For instance, in the present case and in its decision in Florida Select Ins. Co. v. Keelean, 727 So.2d 1131 (Fla. 2d DCA 1999), the Second District determined that this Court's decision authorized appraisers to make determinations of whether a loss was a covered cause of loss, and as such, presented an arbitrable issue for the appraisal panel and not for the court.

The First and Third Districts have specifically rejected that proposition and come to the exact opposite conclusion. For instance, in Opar v. Allstate Ins. Co., 751 So.2d 758 (Fla. 1st DCA 2000), Michael and Caroline Opar obtained an insurance policy from Allstate covering their property located in Destin. In October, 1995, Hurricane Opal struck northwest Florida, and the Opars' beach-front residence was destroyed. Allstate denied the claim for loss on the ground that the damage was caused by a storm surge, a loss not covered under the policy. The Opars replied that their property was damaged in full or in part by a windstorm, Hurricane Opal, which was indeed a covered peril. The Opars made a formal demand for appraisal under the terms of the insurance policy. Like Nationwide's policy here, Allstate's policy provided that "if you we fail to agree on the amount of loss, either party may make a written demand for appraisal." Allstate refused appraisal, and the Opars filed a complaint for declaratory relief seeking an order declaring their right to an appraisal. The trial court found that there was nothing in the record indicating that there was a disagreement regarding the amount of loss and because the clause required a forced appraisal only if there was a dispute as to the amount of loss, the court determined that the appraisal clause was not implicated until it was first decided whether the loss was covered. The court granted Allstate's motion for summary judgment in the suit for declaratory relief.

On appeal, the parties did not dispute the enforceability of the appraisal provision, that they are considered binding arbitration agreements, that they are considered conditions precedent to the insured's right to maintain suit on the policy and that they were enforceable to determine the disputes as to the amount of the loss. Nevertheless, the court noted that it was well-established that the appraisal process could not be used to determine coverage issues which were judicial determinations.

Under the circumstances, the court concluded that Allstate was required to comply with the appraisal provision before a determination was made regarding whether an uncovered peril, storm surge, or a covered peril, wind storm, damaged the Opars' property. Citing to the Second District's decision in Keelean, the court stated that the facts were very similar and noted that based upon Keelean and the Third District's decision on Paradise Plaza Condominium Assn., Inc. v. Reinsurance Corp. of New York, 685 So.2d 937 (Fla. 3d DCA 1996) (*en banc*), the trial court erred as a matter of law by failing to require the parties to proceed with the appraisal.

The First District also considered the argument of the Opars, which is the same argument made by Nationwide below, that the appraisal process should address both the amount of the loss and its cause, which the Opars maintained was required by virtue of the above-quoted language from this Court's Licea decision. The First District stated that although the language could arguably support their position that

appraisals may determine the cause of the damage, this Court had also reiterated the long-established rule that a challenge of coverage is exclusively a judicial question. The court noted further that the agreements to arbitrate were binding only as to the issues submitted to arbitration. The insurance policy before it, the operative language of which is identical to Nationwide's in this case, provided that the only issue to be resolved by the appraisal process was the amount of the loss. The court stated that if the trial court determined when the case was fully tried on the merits, that the damage was caused by a covered peril, wind storm, then Allstate would be bound immediately by the amount of the ascertained appraisal. If, on the other hand, a coverage defense was determined successful in whole or in part, then Allstate either would not be liable or would be liable only in part for the amount. Citing, Montavo v. Travelers Indemnity Co., 643 So.2d 648 (Fla. 5th DCA 1994).

More recently, the Third District has likewise rejected the Keelean interpretation of the quoted provision from Licea in Gonzalez v. State Farm Fire & Cas. Co., ___ So.2d ___, 26 Fla. L. Weekly D390 (Fla. 3d DCA, 2001). In Gonzalez, the insureds appealed following an appraisal award of zero in their claim against their homeowners insurer. The Third District concluded that the appraisers impermissibly decided whether the entire claim was within the coverage of the insurance policy. As such, the court reversed the final judgment entered in favor of State Farm.

Mr. and Mrs. Gonzalez submitted a claim to State Farm under their homeowners policy asserting that blasting in their neighborhood had caused cracks in the walls and tiles at their home. The policy provided coverage if blasting were the cause of damage. State Farm investigated and denied the claim and maintained that the cracking was attributable to minor settling of the foundation, and settlement fell within a policy exclusion. Like the Johnsons here, the Gonzalezs filed suit and State Farm in turn demanded appraisal. Relying upon the above-quoted language from Licea, State Farm argued that the appraisers were allowed to decide whether the entire claim was within or outside the policy coverage. The trial court agreed ruling that the appraisers should give an opinion as to causation and damages. State Farm's appraiser and the umpire determined that the entire loss was caused by settling and not blasting and entered an award of zero. The trial court confirmed that award.

State Farm's policy had an appraisal provision virtually identical to Nationwide's in this case. The Third District noted that State Farm's defense of the claim was that there was no coverage under the policy for the loss as a whole. The court stated that under Licea, the question of whether the loss was caused by blasting or settlement was for the court, not the appraisers. State Farm maintained that under Licea, the appraisers were allowed to determine the cause of the cracking or settling, and as such, return an award for zero. The Third District rejected the argument and

stated that State Farm was reading the quoted sentence out of context as earlier in the decision, this Court had explained that a challenge of coverage is a judicial question and that among the defenses which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole. The court noted that this was precisely the situation before since State Farm's position was that the entire loss fell within a policy exclusion. The Third District further explained that in Licea, this Court was merely saying that when an insurer admits that there is a covered loss, and there is a disagreement on the amount of the loss, it is for the appraisers to arrive on the amount to be paid. In that circumstance, the appraisers are to inspect the property and sort out how much of it is to be paid on account of a covered peril. The court further articulated that in the Licea situation, should the homeowners policy provide coverage for wind storm damage to a roof, but exclude coverage for dry rot, the appraisers are to inspect the roof and arrive at a fair value for the wind storm damage while excluding payment for the repairs required by the pre-existing dry rot. Distinguishing Licea from the case before it, the court noted that State Farm took the position that there was no coverage for the claim whatsoever (like Nationwide has done here) while the homeowners stated that the claim fell within applicable coverage. The court stated that whether the claim is covered by the policy is a judicial question, not a question for the appraisers.

The Second District erred when it misinterpreted Licea to allow the appraisers to make the coverage decision. Nationwide has not admitted that there is some covered damage in need of valuation. It maintains nothing is owed because there is no coverage. The decision on whether Nationwide is correct should be made in the judicial forum.

The Second District also misapplied Licea because it overlooked this Court's statement that a coverage situation is presented when the insurer takes the position that there is no coverage for the loss as a whole. Below, Nationwide carefully tried to avoid maintaining that there was no coverage under the policy as a whole for this loss. Rather, Nationwide took the position that there was coverage for sinkhole loss under its policy. It then claimed that no sinkhole had caused damage to the Johnson home, and as such, no question of coverage was presented. According to Nationwide, there was simply a question of "how much," which in Nationwide's view was zero. Nationwide's linguistic contortions to the contrary notwithstanding, Nationwide's position is quite clear. There is no coverage for this loss as a whole. Nationwide's position necessarily means that a judge, and not appraisers, should make the determination as to whether the damage to the Johnsons' property is covered under Nationwide's policy. Therefore, had the Second District properly applied Licea, it would have rejected Nationwide's position.

Even if this Court's decision in Licea specifically authorized appraisers to make coverage determinations, the Second District still erred because Nationwide's position contravenes well-established Florida law concerning the interpretation of agreements to arbitrate and the interpretation of insurance policies.

Florida law is quite clear that agreements to arbitrate are only binding as to the issues submitted to arbitration. See, Roe v. Amica Mut. Ins. Co., 533 So.2d 279, 280 (Fla. 1988). That rule must be read in conjunction with the law that insurance contracts are to receive a reasonable, practical and sensible interpretation which is consistent with the intent of the parties and not a strained, forced or unrealistic interpretation. See, Weldon v. All American Life Ins. Co., 605 So.2d 911, 915 (Fla. 2d DCA 1992); American Manufacturers Mut. Ins. Co. v. Horn, 353 So.2d 565, 568 (Fla. 3d DCA 1977), cert. den., 366 So.2d 885 (Fla. 1978). As such, courts are not authorized to place strained or unnatural constructions on terms of an insurance policy, and they are prohibited from adding meanings that are not otherwise present. See, Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So.2d 942 (Fla. 1979); Jefferson Ins. Co. of New York v. Sea World of Florida, Inc., 586 So.2d 95, 97 (Fla. 5th DCA 1991); St. Paul Guardian Ins. Co. v. Canterbury School of Florida, Inc., 548 So.2d 1159 (Fla. 2d DCA 1989). Any ambiguity in an insurance policy is to be construed strictly against the drafter and in favor of the insured. Prudential Prop.

& Cas. Co. v. Swindal, 622 So.2d 467, 470 (Fla. 1993); Gulf Life Ins. Co. v. Nash, 97 So.2d 4, 9-10 (Fla. 1957).

The appraisal provision in Nationwide's policy provides:

> Appraisal
>
> If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> a. pay its chosen appraiser; and
>
> b. bear the other expenses of the appraisal and umpire equally.
>
> If there is an appraisal, we still retain our right to deny the claim.

[emphasis supplied]

Like the other language in its policy, presumably, Nationwide carefully chose the words it used when it drafted the appraisal agreement in this contract. The appraisal agreement does not confer upon Nationwide the right to submit to appraisers, whether a particular loss resulted from a covered cause of loss, an excluded cause of loss or was subject to any one of the numerous limitations contained in its policy. Rather, Nationwide, limited its ability to request an appraisal as follows:

If we and you disagree on the amount of loss, . . .

When Nationwide chose those words, it did so with legal knowledge, actual or constructive, that those words had a definitive meaning. Those words mean the actual cash value of a loss. Those words do not mean that if Nationwide and the insured disagreed about whether a particular loss was a covered cause of loss as identified in Paragraph A. 3. of the property coverage, that those issues would also fall within the parameters of the agreement for appraisal. Under ordinary English, the term "amount of loss" would not include a determination of whether a particular loss fell within the parameters of the term "covered causes of loss," as used in Nationwide's policy. As the drafter of that policy, the contract must be construed against Nationwide, and it is prohibited from seeking to rewrite the contract to include such provisions which quite clearly the policy was not written to include. As such, even if appraisers were authorized under the law of this state to determine whether a loss resulted from a covered cause of loss as opposed to an excluded one, Nationwide's policy does not expressly confer such a right upon any appraisers in this case. Most respectfully, the Second District erred when it rewrote Nationwide's contract to authorize the appraisers to reach such a conclusion in this case.

This Court should quash the decision of the Second District and approve the decisions of the First and Third Districts respectively in Opar and Gonzalez and

reaffirm that coverage issues are to be purely judicial determinations. Insurers like Nationwide should not be able to avoid long-standing Florida law by resorting to semantic contortions through its assertion that the issue in this case presents an issue of amount of loss and not whether there is coverage for this particular loss. Nationwide has taken the position that there is no coverage for this loss as a whole. Thus, even under Licea, it should have conceded that the judicial forum was the appropriate place to have this case resolved. This Court should quash the decision below with directions on remand to approve the decision of the circuit court.

CONCLUSION

As this Court said in Licea, a challenge of coverage is exclusively a judicial question. Here, the Second District overlooked that clear statement of policy and law

from this Court when it authorized Nationwide's appraisers to make coverage determinations concerning whether damage was caused by a covered or excluded cause of loss. The decision of the Second District should be quashed with directions on remand to reinstate the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. MAIL to **W. Douglas Berry, Esquire and Anthony J. Russo, Esquire,** 6200 Courtney Campbell Causeway, #1100, Tampa, Florida 33607, on September 26, 2002**.**

_____
George A. Vaka, Esquire

CERTIFICATE OF COMPLIANCE

I hereby certify that Petitioners, Peter Johnson and Christine Johnson's, Initial Brief on the Merits complies with font requirements, and this brief is typed with 14 point New Times Roman.

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George A. Vaka, Esquire

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