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IN THE FLORIDA SUPREME COURT

CASE NO. SC17-738

L.T. CASE NO. 3D16-1367

ORLANDO NOA,

Petitioner,

v.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.

FLORIDA INSURANCE GUARANTY ASSOCIATION'S ANSWER BRIEF ON THE MERITS

Respectfully submitted by,

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PREFACE

In this Brief, the Petitioner, ORLANDO NOA, will be referred to as "NOA". The Respondent, FLORIDA INSURANCE GUARANTY ASSOCIATION, will be referred to as "FIGA". References to the Record on Appeal will be designated (R._____).

POINTS ON APPEAL

I. THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THIS CASE AND JOSSFOLK OR CEBALLO; THE THIRD DISTRICT'S OPINION IN THIS CASE CLEARLY DISTINGUISHES BOTH CASES OF THEIR FACTS AND ON THE APPLICABLE LAW.

II. THE TRIAL COURT WAS CORRECT IN DENYING NOA'S MOTION TO COMPEL APPRAISAL IN LIGHT OF THE FACT THAT THE CLAIM HAD ALREADY BEEN APPRAISED AND THE PRIOR AWARD WAS BINDING ON THE PARTIES THERETO.

STATEMENT OF THE CASE AND FACTS

Introduction

This was a non-final appeal from the trial court's order denying ORLANDO NOA'S (NOA) Motion to Compel Appraisal of his Ordinance or Law[1] claim with

[1] Ordinance or Law coverage provides protection in the event that an insured is forced to expend funds after a loss to bring the insured property or any part of it up to the current Code or Ordinance. (R.289) NOA'S policy reads:

> Ordinance or Law
>
> a. You may use up to twenty-five percent (25%) of the limit of liability that applies to COVERAGE A for the **increase [sic] costs you incur due to the enforcement of any ordinance or law which requires or regulates:**
>
> (1) The construction, demolition, remodeling, renovation or repair of that part of a covered building or other structure damaged by a PERIL INSURED AGAINST; or
>
> (2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damage by a PERIL INSURED AGAINST to another part of that covered building or other structure; or
>
> (3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part of the covered building or other structure damaged by a PERIL INSURED AGAINST.

(R.289) (emphasis added).

his then-carrier First Home Insurance Company ("First Home") arising out of alleged roof damage sustained in Hurricane Wilma in 2005. In 2010, well after the hurricane and well before this suit was filed, NOA'S insurance claim, which included damage to his roof, was appraised. In his Proof of Loss, NOA sought to recover the cost of an entirely new roof. The appraisal award allotted a certain amount of benefits for roof damage to about 120 roof tiles out of 3960 total roof tiles (96 square feet), or 3%, of the total number of roof tiles. The appraisal award, less the deductible, was timely paid in full.

Within a month after NOA'S claim was paid, his roofing contractor filed for a permit to repair 30% of the roof. Pursuant to the governing building codes, if more than 25% of a roof needs to be repaired within a 12-month period, then the entire roof needs to be replaced. NOA filed a supplemental claim with First Home Insurance Company and the carrier denied the claim because NOA'S roof damage claim had already been appraised and the appraisers had determined that only 3%, and not 30%, of the roof required repair. Because a repair to 3% of the roof would not require replacement of the entire roof under the applicable Building Codes, Law or Ordinance coverage was not implicated and not payable.

NOA filed suit against First Home, which became insolvent during the pendency of the litigation, necessitating the substitution of Florida Insurance Guaranty Association (FIGA). NOA alleged that First Home breached its contract

by refusing to appraise his Supplemental Claim for a new roof and NOA moved to compel appraisal of his Supplemental Claim. The trial court denied the motion to compel and NOA appealed that order to the Third District Court of Appeal which affirmed the Court's order. NOA has sought Supreme Court review on the ground that the Third District's opinion expressly and directly conflicts with Fourth District and Supreme Court case law.

Relevant Facts

NOA was insured by First Home at the time of Hurricane Wilma in October, 2005. (R.266) He sustained roof and other damage during the storm and after the carrier adjusted his claim, it concluded that the amount of NOA'S loss did not exceed his $4,392.00 wind deductible.

As required under the policy, NOA submitted a Sworn Proof of Loss, in which he claimed $67,290.47 in total damage as a result of the hurricane, which included a claim for damage to part or all of his roof.[2] (R.46) First Home invoked the Appraisal provision in its policy, which provided:

SECTION I -- CONDITIONS

E. Mediation or Appraisal

[2] NOA'S own pre-appraisal estimate, prepared by his Public Adjuster/Appraiser Jason Pyle, is not included in the Record and therefore, we do not know the breakdown of NOA'S claim, but only the total. (R.43) While Mr. Pyle filed an affidavit in this case, he did not attach his estimate or any other filings with the appraisal panel to that affidavit. (R.42-45)

> If you and we fail to agree on the amount of loss, either may:
>
> . . .
>
> 2. Demand an appraisal of the loss. In this event, each party will choose a competent appraiser within twenty (20) days after the receipt of a written request from the other. The two appraisers will choose a competent and independent umpire. If they cannot agree upon an umpire within fifteen (15) days, you or we may request that the choice be made by a judge of a court of record in the state where the 'residence premises' is located. The appraisers will separately set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be 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 set the amount of the loss.**

(R.277) (emphasis added)

The parties proceeded to appraise NOA'S loss, with each party selecting an appraiser and mutually agreeing to the appointment of an Umpire as required by the policy. The appraisal resulted in an award of $17,602.10 for building damage, including roof repair, which First Home timely paid.[3] (R.40, 104-110) The award included an amount for 120 roof tiles out of 3960 total roof tiles (96 square feet), or

[3] In 2009, six months before the appraisal award, NOA obtained, and we assume submitted, a letter from Fred Perdomo of the Steadfast Tile Company stating that the original roof tiles were out of stock and "have been out of circulation for a considerable time", rendering it "difficult" to match the color of the remaining tiles. (R.69) NOA has misstated the record evidence by asserting that it was impossible to match the floor of the old tiles. Initial Brief, p. 7. The appraisal award included $3,780.00 for replacement of 120 roof tiles, $1,200.00 for repair of the underlayment, and **$4,360.00 for treatment of the entire roof after installation to ensure a color match**. (R.105)

3% of NOA'S roof area. (R.105) The appraisers did not consider Ordinance or Law, APS (Auxiliary Private Structure), Contents or ALE (Additional Living Expenses) coverages because none of those coverages were triggered by the nature and extent of the loss.[4] (R.40, 104-110) NOA'S appraiser did not agree to the amount of the loss as set by First Home and the Umpire, and therefore, only the latter two appraisers signed the award. (R.40) NOA did not seek review of the appraisal or ask the panel to clarify the award.[5]

Thereafter, in May 2010, less than a month after the appraisal award was entered and First Home paid the award (less its deductible), NOA'S roofing contractor sought a permit from the Miami-Dade County Building Department to repair **30%** of his roof (at a cost of $8,700.00), well over the 3% of roof surface area the appraisers had concluded was necessary and caused by Hurricane Wilma. (R.48)

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[4] The first page of the Appraisal award states that Law or Ordinance coverage was "not appraised." (R.40) The pages attached to the award detail the nature and extent of the appraisal. (R.104-110) Contrary to NOA'S Statement of the Case and Facts, it is not a "fact" that "the award contemplated, among other things, additional coverage like Ordinance & Law if and when it is incurred." Initial Brief, p. 4. As will be demonstrated, that is simply NOA'S argument and it is inappropriately cited as a "fact."

[5] Pursuant to section 682.13(1)(a), Florida Statutes (2016), a party may seek to vacate an arbitration or appraisal award on certain specified grounds such as "corruption, fraud or other undue means." Id.; Magaldi v. Safeco Ins. Co. of Am., 2010 WL 2542011 (S.D. Fla. June 22, 2010) (noting that this section of the Arbitration Code applies to appraisal awards as well arbitration awards).

The permit application was rejected because the Building Code requires a new code-compliant roof when more than 25% of a roof is repaired, replaced or recovered in a 12-month period pursuant to Florida Building Code Sec. 611.1.1 and Miami-Dade County Code Sec. 8-2 (2001). (R.50, 54, 59-60) NOA'S contractor submitted a second permit application for replacement of NOA'S entire roof at a cost of $26,000 and then filed a Supplemental Claim with First Home seeking Ordinance or Law coverage.[6] (R.49) First Home denied that claim by letter to Jason Pyle, NOA'S Public Adjuster and Appraiser, explaining that because the appraisal panel only awarded NOA benefits for the repair of 3% of the roof area, there was no Ordinance or Law coverage for a new roof because damage to 3% of the roof did not require replacement of the entire roof under the applicable Building Codes.[7] (R.51)

Thereafter, First Home became insolvent and Florida Insurance Guaranty Association (FIGA) assumed the handling of this claim. (R.203) NOA brought suit

[6] Section 611.11 of the Florida Building Code provides, in pertinent part, that "[n]ot more than 25 percent of the total roof area or roof section of any existing building or structure shall be repaired, replaced or recovered in any 12-month period unless the entire roofing system or roof section conforms to the requirements of this code."

[7] NOA'S contractor never sought a permit to repair only that portion of the roof, or to replace only those roof tiles, the appraisers determined was damaged by the hurricane.

against FIGA for breach of contract and declaratory judgment, seeking to compel FIGA to pay his claim for Ordinance or Law coverage. (R.80-85)

FIGA moved for final summary judgment arguing that the total amount of NOA'S Hurricane Wilma loss had been set by the appraisal award and paid in full by First Home. (R.179-188) NOA responded by arguing that Ordinance or Law coverage is only payable after an insured has incurred a covered expense and therefore, his claim for this coverage was not "ripe" and could not have been considered in the initial appraisal. (R.191-202) After hearing argument on the motion, the trial court denied FIGA'S motion for summary judgment without comment. (R.210-235)

NOA moved to compel Appraisal of his Ordinance or Law claim, arguing that because the prior appraisal award showed that Ordinance or Law coverage was "not appraised," he was entitled to an appraisal of his Ordinance or Law claim because the claim only became "ripe" after he paid for the new roof and therefore, the claim was necessarily excluded from the first appraisal. (R.112-117) FIGA objected to a second appraisal, on the grounds that the prior appraisal was valid and binding as to **all** damages suffered as a result of Hurricane Wilma, and certainly those relating to roof damage. (R.128, p. 7) FIGA contended that Ordinance or Law coverage was not triggered because damage to 3% of the roof tiles was not sufficiently extensive to implicate that coverage. (R.128, p. 7) Since the Building Code did not mandate a

new code-compliant roof unless it was necessary to repair or replace at least 25% of the roof, well in excess of the extent of loss determined by the appraisers, the award was valid and binding on not only the issue of the amount of NOA'S loss, but also as to whether Ordinance and Law coverage was triggered. (R.128, pp. 8-10)

In the alternative, FIGA moved to reopen the initial Appraisal, with the same appraisers on the original panel, for the purpose of clarifying whether the panel intended to exclude Ordinance or Law coverage because the damage did not trigger that coverage or because it was not yet ripe for consideration. (R.96, 100-102) Oddly, although NOA himself sought a second appraisal, he **opposed** reopening the original appraisal for clarification as to why Ordinance or Law was not appraised, arguing that the appraisal could not be reopened because it was valid and binding on both parties absent an allegation of fraud or collusion, neither of which was made here. (R.256-260)

After a hearing on both motions, the trial court denied the motion to compel appraisal and to abate the action during the pendency of appraisal. (R.126-133, 262-263) The Court also denied FIGA'S motion to reopen appraisal. (R.262-263)

NOA appealed the denial of his motion to compel appraisal to the Third District Court of Appeal. (R.10-11) The appellate court rendered its decision in favor of FIGA with a lengthy opinion. (R.325-332)

In its opinion, the Third District acknowledged that while coverage issues are exclusively within the province of the courts, the amount of a loss is an issue to be determined by the appraisers. (R.329) Because appraisers are tasked with determining the amount of a property loss, they must necessarily have expertise in evaluating the loss in the context of not only the materials and labor costs of repair, but also against the backdrop of any applicable building code requirements that would necessarily affect the nature and scope of necessary repairs. (R.329) Accordingly, the Third District determined that code requirements are "baked into" the appraisers' computations and not excluded for later reconsideration, unless a building requirement was imposed after the appraisal but before the repair work was commenced. (R.329-330)

For this reason, the appellate court opined, the notation on the appraisal award that "Law & Ordinance" was "not appraised" signified the appraisal panel's conclusion that the current Code requirements did not require replacement of the entire roof, in light of its finding that only 3% of the roof tiles needed to be replaced, far below the 25%+ needed to warrant a new roof under the Code. (R.330) The Court further opined "[t]he notation [that Law & Ordinance was 'not appraised'] surely cannot mean that the appraisal is subject to circumvention a month later if the insured can just find a roof contractor to sign a proposal stating that 30%, not 3%, of the roof needs replacement." (R.330) "To hold otherwise would allow the

insured's post-appraisal roofing contractor to step into the adjustment process as a super-umpire whose opinion supersedes the appraisal and requires a new round of valuation estimates." (R.330) The Court also noted that if the insured intended to rely on a roofer's professional opinion that an entirely new roof was required, then he could have, and should have, offered that opinion during the appraisal process.[8] (R.331)

The Third District rejected NOA'S argument that the Fourth District's opinion in Jossfolk v. United Property & Cas. Co. 110 So. 3d 110 (Fla. 4th DCA 2013), was persuasive authority supporting his contention that because his Ordinance or Law claim was not "ripe" until such time as the repairs had been concluded, the omission of that claim from the appraisal award should not preclude him from seeking a second appraisal after his roof was replaced. (R.331) The Third District distinguished Jossfolk on the basis that, in that case, the insurer did not raise the argument raised by FIGA with respect to the 25% in its motion for summary judgment. (R.331) The Third District was likewise unpersuaded by NOA'S reliance on Ceballo v. Citizens Property Insurance Corp., 967 So. 2d 811 (Fla. 2007), cited in Jossfolk, because in that case, this Court addressed the issue of whether Florida's Valued Policy Law (VPL) required the insured to demonstrate that he had actually

[8] There is nothing in the record as to why NOA did not do so.

incurred the loss before payment was required under Law & Ordinance coverage. Id. The Third District noted that this case did not involve a total loss and did not implicate Florida's Valued Policy Law, set forth in Section 627.702, Florida Statutes (2016), which requires an insurer to pay the face amount of the policy if the property is a total loss as a result of a covered peril. (R.331) The appellate court concluded that "Mr. NOA'S submission of increased costs is not a legally sufficient basis for re-opening the existing appraisal or conducting a new one," and accordingly, it affirmed the trial court's denial of NOA'S motion to compel appraisal. (R. 326)

NOA seeks review of the Third District's opinion, on the grounds that it expressly and directly conflicts with the Fourth District's opinion in Jossfolk and this Court's opinion in Ceballo. FIGA disputed that the two cases were in express and direct conflict in light of their distinguishing facts, but this Court accepted this case under its discretionary conflict jurisdiction.

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction to consider this case because it is not in express and direct conflict with any other District Court's opinion, nor does it conflict with this Court's precedent. The Jossfolk and Ceballo cases NOA asserts are in conflict with this case is readily distinguishable on both its facts and the law and the Third District's opinion in this case sets forth the reasons why. Specifically, while the facts in the two cases are similar, the issues raised were entirely different from both a procedural and substantive aspect. Therefore, since the cases did not address the same issues against the backdrop of sufficiently similar facts as to render them irreconcilable, there is no requisite conflict between the two that would render this case subject to review under this Court's conflict jurisdiction.

The Third District correctly affirmed the trial court's denial of NOA'S Motion to Compel Appraisal of his Ordinance or Law claim. NOA'S roof claim had already been appraised, and the appraisal award indicated that less than 3% of the roof area needed repairs. Under the Miami-Dade Building Code, a new roof is only required where repairs will be made to more than 25% of the roof. Therefore, Ordinance or Law coverage was not implicated, and not payable, on NOA'S claim.

Neither Jossfolk nor Ceballo addressed the issues raised in this case and therefore, they are not only not in conflict with this case, but they were, and are, simply irrelevant because they address the issue of whether an Ordinance or Law

claim is ripe before the insured has incurred the expenses of bringing a property, or a part thereof, up to Code, if required. Whether NOA'S Ordinance or Law claim would have been "ripe" if the appraisers had determined that more than 25% of the roof had been damaged is simply a red herring because First Home/FIGA'S position has **never been** that NOA is not entitled to a second appraisal because his Ordinance or Law claim should have been part of the first appraisal. Rather, their argument has **always** been that the first appraisal established, as a matter of fact, that Ordinance or Law coverage simply had not, and would not, be triggered by the nature and extent of the loss.

This Court should discharge its discretionary jurisdiction because there is no express and direct conflict between this case and any others. If this Court retains jurisdiction, it should approve the Third District's opinion.

ARGUMENT

I. THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THIS CASE AND JOSSFOLK OR CEBALLO; THE THIRD DISTRICT'S OPINION IN THIS CASE CLEARLY DISTINGUISHES BOTH CASES OF THEIR FACTS AND ON THE APPLICABLE LAW.

A. Standard of Review

This Court has the limited jurisdiction to review cases in which there is an "express and direct" conflict apparent on the face of the decision. Fla. Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). While the opinion on review need not specifically cite to or identify a conflicting case in the body of the opinion, see, Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1982), that conflict must nevertheless be apparent within the four corners of the opinion and "it is neither appropriate nor proper for [this Court] to review a record to find conflict." Paddock v. Chacko, 553 So. 2d 168, 168-169 (Fla. 1989). If the allegedly conflicting opinions are readily reconcilable on their facts, there is no true conflict warranting this Court's review. See Aravena v. Miami-Dade Cty., 928 So. 2d 1163, 1167 (Fla. 2006).

B. The Merits

This Court should reconsider its decision on jurisdiction. As we argued in our Answer Brief on Jurisdiction and, as the Third District correctly found, its decision

in this case is not in conflict with Jossfolk or Ceballo, both of which are readily distinguishable on both the facts and the law. [9]

In Jossfolk, as here, the insured sought a new roof in the initial appraisal, but unlike in this case, the appraisers did not consider the insured's Ordinance or Law coverage as part of the appraisal and thereafter, the insured sought a second appraisal for the purpose of considering that claim. After the carrier refused to engage in a second appraisal, the insured filed suit. The insurer moved for summary judgment, relying on the prior appraisal as a bar to a second appraisal as well as the litigation, **but at no time** did the carrier argue that the insured's Ordinance or Law coverage was not implicated. Rather, the carrier based its denial on the argument that the insured was entitled to a single appraisal, regardless of whether a subsequent or supplemental claim was "ripe" for payment at the time of the original appraisal. Because there was a legitimate question as to whether the appraisal panel in that case did not consider the insured's Ordinance or Law claim **only** because his claim, which

[9] The relevant facts for purposes of determining whether this Court has conflict jurisdiction are only those set forth in the Third District's opinion. See Reaves v. State, 485 So. 2d 829 (Fla. 1986)(only those facts contained in the appellate court's majority opinion are relevant to the issue of whether there is an express and direct conflict between two or more appellate cases). In his Initial Brief on Jurisdiction, NOA improperly referred to alleged facts that are not contained in the District's Court's per curiam opinion, those omitted facts should not have been considered by this Court in determining whether the Third District's opinion conflicts with that of any other court.

required that he have already incurred the expenses attendant to Ordinance or Law mandated repairs, the Fourth District found there was an issue of material fact precluding summary judgment in the carrier's favor.

In this case, First Home's denial of NOA'S Ordinance or Law claim was never predicated on its timing; rather, First Home denied NOA'S claim because the nature and scope of the necessary repairs to the roof had already been appraised by virtue of the panel's **factual** determination that the necessary repairs were not of a nature and magnitude as to require building code upgrades. That factual finding was dispositive of the issue of whether Ordinance or Law coverage would **ever** be payable.

The Third District cogently explained why its opinion in this case was distinguishable from Jossfolk v. United Property & Cas. Co., 110 So. 3d 110 (Fla. 4th DCA 2013). Specifically, the Court explained that in Jossfolk, "the insurer had not raised its 'under 25%' roof replacement argument in its motion for summary judgment," and "[t]he present case only involves the denial of the insured's request for a second appraisal – not a summary judgment in favor of the insurer – **on the grounds that the appraisal panel had previously considered and determined the percentage of replacement required.**" (R.331) (emphasis added). Thus, the Jossfolk case has never been in express and direct conflict sufficient to vest this Court with the discretionary jurisdiction to consider this case.

The same is true with respect to Ceballo v. Citizens Property Ins. Corp., 967 So. 2d 811 (Fla. 2007), which, as the Third District recognized, was deemed dispositive by the Fourth District in Jossfolk. Ceballo, the Third District explained, merely stood for the proposition that the insured must demonstrate that the insured had already incurred the additional costs under its Ordinance or Law coverage before payment under that coverage is due. As the Third District recognized in this case, Ceballo, like Jossfolk, was concerned with the "ripeness" of an insured's Ordinance or Law claim and ensuring that if such a claim accrues after an appraisal, the insured is not foreclosed from seeking a second appraisal of a claim that potentially existed, but was not ripe for payment, at the time of the first appraisal. In this case, the first appraisal was dispositive of whether the Ordinance or Law claim **could ever** exist, and that fact distinguishes this case from both Jossfolk and Ceballo.

NOA has sought review by this Court arguing that the Third District's opinion "expressly and directly" conflicts with the Fourth District's Jossfolk opinion and this Court's opinion in Ceballo. For the reasons set forth in the Third District's opinion, which clearly distinguishes this case from both Jossfolk and Ceballo, there is no express and direct conflict vesting this Court with jurisdiction to consider this case. This Court should reconsider its acceptance of this case and deny review.

II. THE TRIAL COURT WAS CORRECT IN DENYING NOA'S MOTION TO COMPEL APPRAISAL IN LIGHT OF THE FACT THAT THE CLAIM HAD ALREADY BEEN APPRAISED AND THE PRIOR AWARD WAS BINDING ON THE PARTIES THERETO.

A. The Standard of Review

The standard of review from an order denying a motion to compel appraisal is de novo. See Sunshine State Ins. Co. v. Corridori, 28 So. 3d 129 (Fla. 4th DCA 2010).

B. The Merits

There is no question, and NOA has never argued, that the appraisal in this case was improperly conducted in accordance with his policy, which requires that each party appoint an appraiser and then agree on an Umpire and further provides that the decision of any two out of three is binding on both parties. Nor has NOA ever contended that First Home did not comply with its duties under the policy by promptly paying the appraisal award.

The Third District correctly affirmed the trial court's order denying NOA'S Motion to Compel Appraisal in light of the undisputed fact that his roof loss had already been appraised, and that appraisal was valid and binding on both the carrier and the insured. NOA'S **entire** hurricane claim was appraised at that time, and while the appraisal award indicated that Ordinance or Law coverage was "not appraised" given the appraisal panel's conclusion that only 3% of the roof needed to be repaired,

the only reasonable conclusion that could be drawn is that Ordinance or Law was not appraised because, as the Third District so found, the appraisers knew that repairing 3% of the roof would not require NOA to replace the entire roof under the Building Code.

The very purpose of property insurance appraisal is to encourage the settling of the amount of a covered loss **outside** the court system. First Protective Ins. Co. v. Hess, 81 So. 3d 482 (Fla. 1st DCA 2011).[10] Thus, when appraisal is invoked by either party to an insurance policy, the appraisers are "tasked with determining both the **extent** of covered damage and the **amount** to be paid for repairs." Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc., 162 So. 3d 140 (Fla. 2d DCA 2014) (emphasis supplied).

We recognize that because Ordinance or Law coverage is only payable after those expenses are incurred, in some cases, the amount of the benefits due to the insured under this coverage may not be appraised at the same time as the insured's claim under other coverages. See Pedersen v. Citizens Prop. Ins. Corp., 157 So. 3d 431 (Fla. 4th DCA 2015)(where umpire provided for law and ordinance coverage "if incurred", insured was entitled to an additional appraisal to set the amount of that

[10] At the hearing on the Motion to Compel Appraisal, NOA'S counsel Mr. DaSilva argued that Hess was no longer good law. (R.129, pp. 10-11) In fact, it is. See Freeman v. Am. Integrity Ins. Co. of Fla, 180 So. 3d 1203 (Fla. 1st DCA 2015).

loss after incurring the expense of bringing his property up to Code). However, where it is apparent that that coverage is **not,** and will not, be implicated by virtue of the limited nature of the necessary repairs, there is no reason to conclude that the appraisers chose not to appraise Ordinance and Law solely because any such claim would be premature. This was **not** a case where the extent of the damage could not have been determined until a certain amount of repair had been accomplished because even NOA'S own contractor assessed all necessary repairs simply by viewing and counting the number of cracked tiles and their location. If an insured is permitted to have a second appraisal of a loss that has already been appraised in the first instance, the very purpose of appraisal, which is to afford the parties finality outside the litigation process, would be undermined. There is no good reason why the appraisers' conclusion that 3% of the roof was damaged is not binding on the parties to that appraisal, regardless of whether, after the fact, a contractor opines that the damage was more extensive.

Whether Ordinance or Law coverage is triggered is a function of the appraisers' factual conclusion as to extent of the loss, and was necessarily considered in the appraisal. It is therefore misleading to argue that, as NOA does, on pages 4 and 19 of his Initial Brief, **the** reason that Ordinance or Law damages were "not appraised" was because that claim did not become ripe until after he had paid for his

new roof and actually "incurred" the covered expenses.[11] As the Third District noted in its opinion, NOA'S roofing contractor submitted a permit application for the repair of 30% of the roof, which was **ten** times the extent of the roof damage found by the appraisers. In filing his Supplemental Claim, NOA did not contend that he suffered **additional** roof damage as a result of a subsequent covered loss; nothing at all had changed that would account for his contractor's determination that the roof suffered far more damage during Hurricane Wilma than the appraisers found in the first appraisal. Moreover, as the Third District noted, there was no reason why NOA could not have had his roofing contractor prepare an estimate for what he believed would be the true repair costs **before** NOA engaged in the appraisal process. His failure to do so should not be visited on FIGA and should not be grounds for what is essentially a "do-over".

The nature and extent of an insured's loss is **the** subject of an appraisal. State Farm Fire & Cas. Co. v. Middleton, 648 So. 2d 1200, 1201 (Fla. 3d DCA 1995). Whether NOA'S loss was sufficiently extensive so as to trigger Ordinance or Law coverage was subsumed within the first appraisal and the Third District correctly

[11] If the trial court had ordered the parties to a second appraisal, it would necessarily have had to divine the reason why Ordinance or Law coverage was excluded, which is not a matter for the Circuit Court's determination. See Hess, 81 So. 3d 482 (where the insured failed to request clarification of the appraisal award from the appraisers, the trial court was prohibited from holding a hearing to determine the basis for the award).

concluded that it cannot be revisited by the trial court by way of a second appraisal. Thus, if this Court maintains the jurisdiction to consider this case, the Third District's affirmance of the trial court's order denying NOA'S motion to compel a second appraisal of his roof damage must be approved.

CONCLUSION

The trial court was eminently correct in denying NOA'S motion to compel appraisal and this Court should affirm that order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to: Paul Feltman, Esq., Alvarez, Carbonell, Feltman and Da Silva, 75 Valencia Avenue, 8th Floor, Attorney for Appellee, pfeltman@acfdlaw.com; cmirabal@acfdlaw.com, COsegueda@acfdlaw.com by electronic mail on this 16th day of January, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in Times New Roman, 14-point font.

By: /s/Hinda Klein
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