IN THE SUPREME COURT OF FLORIDA

ORLANDO NOA,

Petitioner,

vs.

FLORIDA INSURANCE GUARANTY ASSOCIATION,

Respondent.
_____/

Supreme Court Case No.: SC17-738

Lower Tribunal Case No(s).:
3D16-1367; 132011CA012182000001

INITIAL BRIEF OF ORLANDO NOA

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STATEMENT OF THE CASE AND THE FACTS

Introduction

This matter arises out of a denial of Plaintiff Manuel Noa's Motion to Compel Appraisal to determine Ordinance & Law coverage under his insurance Policy.[1] Plaintiff is simply seeking to recover Ordinance & Law benefits under his insurance Policy for out of pocket costs incurred in repairing the roof on his home. As a matter of law, Mr. Noa is due his Ordinance & Law benefits. *See Jossfolk v. United Property & Cas. Ins. Co.*, 110 So. 3d 110 (Fla. 4th DCA 2013) (it is clear on the face of the appraisal award that Ordinance and Law coverage was "not appraised"). As in *Jossfolk*, on its face, the initial Appraisal Award on Plaintiff's roof did not include Ordinance & Law. App-1, April 12, 2010 Appraisal Award: **"Law & Ordinance not appraised."**[2] Despite the clear, unambiguous language on the face of the Appraisal Award showing that Ordinance & Law was **"not appraised,"** the Defendant Florida Insurance Guaranty Association ("FIGA") has taken the position that the coverage was somehow included. Simply stated, Ordinance & Law was not appraised. In fact, Ordinance & Law could not have been appraised because that additional coverage was not "incurred" at the time of the appraisal. Plaintiff has his

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[1] Fla. R. Civ. P. 9.130(3)(C)(iv).

[2] "App.", refers to the Appendix being filed with this Brief, followed by the Tab number in the Appendix. "AA.", refers to Florida Insurance Guaranty Association's Appendix, followed by the page number.

amount of loss and FIGA has its amount of loss. All that remains in the matter below is a simple half-hour paper appraisal of the Plaintiff's receipts for monies already spent for benefits he is due pursuant to his insurance policy. *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1023 (Fla. 2002) (when the insurer admits that there *is* a covered loss, but there is a disagreement on the *amount* of loss, it is for the appraisers to arrive at the amount to be paid). The trial court erred when it denied the Motion to Compel Appraisal.

Plaintiff's Claim

This is a lawsuit where Plaintiff seeks recovery of benefits due to him pursuant to a homeowner's insurance policy initially with Citizens Property Insurance Corporation ("Citizens"). Under the terms of the policy, Citizens agreed to provide insurance coverage to Plaintiff against certain losses. On or about June 29, 2005, First Home Insurance Company, ("First Home"), assumed coverage under the Citizens policy. First Home then issued policy number FRJH02817069 (the "Policy") in place of the policy originally issued by Citizens. AA.-094.

The damaged property is located at 9221 SW 122nd Avenue, Miami, Florida 33186 (the "Property"). A-10, Plaintiff's Motion to Compel Appraisal and to Abate the Action and/or for Evidentiary Hearing on the Pleadings and Evidence. On or about October 24, 2005, while the Policy was in full force and effect, the Property sustained a covered loss as a result of Hurricane Wilma. *Id.* First Home

acknowledged coverage for the claim, assigned claim number PDFH009433 and assigned an insurance adjuster to adjust the loss. *Id.* On December 6, 2005, First Home wrongfully advised Plaintiff that the damages caused by Hurricane Wilma to his home did not exceed the Policy deductible of $4,392.00. *Id.* As required by the Policy, Plaintiff submitted a Sworn Proof of Loss to First Home. *Id.* Subsequently, First Home improperly rejected the Sworn Proof of Loss and invoked the appraisal provision contained in the Policy, disputing the amount of Plaintiff's damages. *Id.*

The appraisal process resulted in an award to Plaintiff and Plaintiff was paid $17,602.10 for damage to his home, approximately four times more than the deductible. App.-1. The specific items that were **"not appraised"** were: 1) Ordinance & Law;[3] 2) Auxiliary Private Structures ("APS"); 3) Contents; and 4) Alternative Living Expenses ("ALE"). *Id.* The Appraisal Award was signed by the Umpire and the Appraiser for the Insurer. *Id.* However, Plaintiff's Appraiser did not sign the Appraisal Award. *Id.* The Plaintiff's Appraiser submitted an affidavit attesting to the fact that the entire roof required replacement and Ordinance & Law

[3] "Ordinance and Law" coverage was explained in *Citizens Property Ins. Corp. v. Mallett*, 7 So. 3d 552, 554 n. 1 (Fla. 1st DCA 2009):

[L]aw and ordinance coverage under the policy provides reimbursement for up to 25% of dwelling policy limits for increased repairs and replacement costs incurred by the insured to comply with the requirements of the applicable laws and ordinances regulating the construction or repair of property. *See, e.g.*, § 627.7011(1)(b), Fla. Stat. (2004).

was left off the Appraisal Award, so that it could be considered later, if necessary. App.-2, Affidavit of Jason Pyle. The award further states: "This award is subject to all terms and conditions of the Policy," where "Ordinance & Law" is clearly a term of the Policy. Thus, the award contemplated, among other things, additional coverage like Ordinance & Law if and when it is incurred.

Subsequent to the appraisal proceedings, Plaintiff attempted to make the necessary allowed repairs to his roof and hired a Florida licensed roofer in order to make said repairs. App.-3 and 4, Affidavit of Orlando Noa and Billy Turner of Perfect Roofing & Services, Inc. ("Perfect Roofing") incorporated into Plaintiff's Motion to Compel Appraisal regarding scope of necessary repairs attaching Permit Applications and Miami-Dade County Building Department Denial, respectively. As required by law, Perfect Roofing applied to the Miami-Dade County Building Department to make the "repairs." *Id.* Perfect Roofing's original estimate to "repair" the roof in the amount of $8,700.00. App.-4 at Exhibit "B". The Miami-Dade County Building Department denied Plaintiff's first application for a permit to repair his roof, indicating that Florida Building Code requires Plaintiff to replace the entire roof because a repair that exceeds 25% of the total roofing area requires a full replacement. *Id.*[4] Specifically, Miami–Dade County's building code requires that

[4] It was at this point in time that Plaintiff "incurred" Ordinance & Law. As this Court stated in *Ceballo v. Citizens Property Insurance Corp.*, 967 So. 2d 811, 815 (Fla. 2007), "'to incur' means to become liable for the expense, but not necessarily

not more than 25% of the total roof area can be repaired, replaced, or recovered in any twelve month period unless the entire roofing system or roof section complies with the current code. Fla. Bldg. Code § 611.1.1 (2007); Miami–Dade County, Fla., Code § 8–2 (2001).

The area that needed to be fixed was 120 cracked tiles encompassing 1,100 square feet. App.-4 at §§ 6-11. The 120 tiles were spread over the entirety of the roof. As set forth in the Affidavit of Billy Turner of Perfect Roofing, the 120 tiles spread throughout the whole roof requires not only the repair of each cracked tile, but also the surrounding area. *Id.* As a result of 120 cracked tiles, the standard repair methodology required repairs to over 1,100 square feet of the 3,400 square feet total roof area. *Id.* Mr. Turner testified:

> 5. Upon my inspection, I noticed a number of cracked roof tiles that needed replacement; damage of which was indicative of hurricane damage.
>
> 6. A typical repair of a single cracked tile requires making repairs not only to the single cracked tile but also to the surrounding areas.
>
> 7. As a result of one-hundred twenty (120) cracked tiles, the standard repair methodology required repairs to over 1,100 square feet of the roof.
>
> 8. I applied for a permit based upon the areas of the roof that were damaged due to cracked tiles.
>
> 9. I attempted to obtain this permit in order to make the repairs for those roof tiles; however, my application for the permit was rejected

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to have actually expended it."

> by Miami-Dade County Building Department because of the Florida Building Code which required a full replacement of the roof due the percentage of the roof that we were seeking to repair as a result of the cracked tiles.

App.-Tab 4.[5]

That is why the Miami-Dade County Building Department required the entire roof be replaced. *Id.* Perfect Roofing applied for a second permit to "re-roof" Plainitff's property in the amount of $26,000.00. *Id.* at Exhibits "A" and "D", Roof Contract and Second Permit Application, respectively.

In addition, the tiles that were used on Plaintiff's roof were no longer available. As set forth in a letter from Old Havana Tile Company, the tiles are no longer manufactured.

> To Whom it may concern,
>
> In reference to the pictures of the 9"-10" Concrete broom wept tile, The Old Havana Tile Company does not have any in stock. The tiles in the pictures have been out of circulation for a considerable time now. Any broom swept tile without identifying marks on them found in the market place are most probably reclaimed tile and getting a color match would be difficult.

[5] The logical inference is that the panel identified 120 damaged tiles (where each approximately one foot by one foot replacement tile would require the lifting of eight surrounding tiles, for approximately a nine-square foot repair per tile), over a sparse area, requiring 1200 feet of underlayment plywood, followed by roof paint to match. The estimate attached to the Appraisal Award provides for 1,200 feet of underlayment. *See* App.-9, Defendant Florida Insurance Guarantee (sic) Association's Motion to Re-Open Appraisal at Exhibit "A" Appraisal Award attaching Gale Claims Service, Inc.'s estimate at p. 2 Roofing repair – underlayment QUANTITY 1.00 EA UNIT COST 1,200.00.

A-5, November 4, 2009 letter from The Old Havana Tile Company letter regarding the tiles were no longer available in the market place. This is a separate reason why the Plaintiff was required to replace all of the tiles. FIGA's position is that the Plaintiff must look for and find "reclaimed," or used tiles, because his roof tile was no longer manufactured.[6] Even if old used tiles were somehow found they would not match. *See* § 626.9744 (2), Fla. Stat. "Claim settlement practices relating to property insurance."[7]

Plaintiff then made a supplemental claim to First Home under the Ordinance & Law provision in his Policy, which was triggered by the additional amount necessary to replace the roof. Incredibly, First Home took the position that because the roof only needed 120 tiles replaced out of 3,400 square feet that meant only 3% (120/3,400) of the roof needed replacement. App.-6, First Home Letter denying Ordinance & Law. This improper determination by Defendant that only 3% of the

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[6] The Third District stated that Plaintiff would receive "new tiles." *Noa v. Florida Ins. Guar. Assoc.*, 215 So. 3d 141, 142 (Fla. 3d DCA 2017). However, the evidence is clear that is impossible.

[7] The relevant section of the statute reads:

(2) When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas. In determining the extent of the repairs or replacement of items in adjoining areas, the insurer may consider the cost of repairing or replacing the undamaged portions of the property, the degree of uniformity that can be achieved without such cost, the remaining useful life of the undamaged portion, and other relevant factors.

roof was affected was made months after the Appraisal Award, and with no evidence of the independent umpire's input. After First Home denied the supplemental claim, Plaintiff was forced to pay with his own funds to repair his roof in order to comply with the Miami-Dade County Building Code. A-3, Affidavit of Orlando Noa.

First Home improperly denied Plaintiff's request for Ordinance & Law coverage by making the bad faith argument that the initial determinations made at appraisal for Coverage A were binding and final, including Ordinance & Law, even though it was specifically **"not appraised"** pursuant to the express terms of the Appraisal Award. Ordinance & Law could not have been appraised because it had not been "incurred" at the time of the appraisal and, therefore, Ordinance & Law coverage had not been triggered. As such, Plaintiff was forced to initiate a lawsuit in an attempt to recover his additional damages against First Home.

During the course of litigation, First Home became insolvent and on October 23, 2012, FIGA was substituted in as the party defendant due to the insolvency and the receivership. Rather than expeditiously resolving Plaintiff's claim, FIGA adopted the same improper position as First Home and has affirmatively denied Plaintiff's claim. FIGA has set forth several frivolous affirmative defenses. App.-7, Answer and Affirmative Defenses. FIGA asserts, contrary to the very face of the document, that the original Appraisal Award allegedly included Ordinance & Law. *Id.* It asserts the defenses of satisfaction and accord; election of remedies; and set-

off, among others. *Id.* It also asserts the coverage defense of failure to mitigate. *Id.* However, the Plaintiff has paid out of pocket to replace his roof and is seeking reimbursement at this time. App.-3, Affidavit of Orlando Noa at ¶ 11. Further, the defense of failure to mitigate was waived because FIGA does not contest that Plaintiff complied with *all post-loss obligations*. App.-8, FIGA Answer to Second Set of Interrogatories. FIGA affirmatively answered "**Yes**" in response to the interrogatory regarding all post-loss obligations being complied with prior to suit. *Id.*

Instead of agreeing to proceed to a paper appraisal on Ordinance & Law, FIGA filed "Defendant Florida Insurance Guarantee (sic) Association's Motion to Re-Open Appraisal" in response to the Motion to Compel Appraisal. App.-9. FIGA took the position that Ordinance & Law could not be appraised even though it had been incurred following the appraisal. FIGA also took the position that if Ordinance & Law is appraised then the whole original six-year old Appraisal Award should be reopened. *Id.* The motion to reopen appraisal was set at the same time as the Plaintiff's Motion to Compel Appraisal. App.-10, Motion to Compel Appraisal.

On May 23, 2016, the trial court held a hearing on both motions. App.-11, hearing transcript. FIGA argued that the trial court should reopen the Appraisal Award and send it back to the original appraisal panel or, alternatively, that the original award allegedly incorporated the Ordinance & Law even though, on its face,

it did not. FIGA's counsel misrepresented the necessary repairs to the roof claiming that only 3% of the roof was damaged due to the need to replace 120 tiles on a 3,400 square foot roof. FIGA did not consider the tiles being spread out over the entire roof and the additional need to fix the areas around them.

On the other hand, Plaintiff correctly argued that the appraisal could not be "reopened" as a matter of law.[8] Pursuant to *Jossfolk*, the Plaintiff had a right to an appraisal of his Ordinance & Law that could not have been appraised at the time of the first appraisal as it had not been "incurred" and, therefore, could not be awarded. The holding and facts in *Jossfolk* is "on all fours." Perfect Roofing and Plaintiff's Appraiser's testimony revealed the tiles were spread out over the entire roof and the repair method meant more than 25% of the roof required replacement. As a result, the Miami-Dade County Building Department required a full replacement. Plaintiff has incurred all the costs of replacing his roof, and that all that is necessary is a paper appraisal. The trial court denied both the Motion to Compel Appraisal and the Motion to Reopen.

The Appeal

The Third District was faced with a factual scenario nearly identical to that found in *Jossfolk*. However, the Third District affirmed the trial court's ruling on the

[8] *See Cassara v. Wofford*, 55 So. 2d 102, 105-6 (Fla. 1957); *J.J.F. of Palm Beach v. State Farm*, 634 So. 2d 1089, 1090 (Fla. 4th DCA 1994).

basis that the appraisal process necessarily considered and included Ordinance & Law coverage, despite the face of the Appraisal Award evidencing that Ordinance & Law was "not appraised". *Noa,* 215 So. 3d at 143. The Third District distinguished *Jossfolk* based on the Insurer's failure to raise an "under 25%" roof replacement argument in its motion for summary judgment. *Id.* at 144. The Third District further distinguished *Noa* from this Court's opinion in *Ceballo*, 967 So. 2d 811, a case relied upon as "determinative" in *Jossfolk*, on the basis that *Ceballo* centered on whether Florida's Valued Policy Law (VPL) required the insured to demonstrate an incurred loss before payment could be required for Ordinance & Law coverage, and Noa's case did not involve a total loss, or the VPL, and a request for a full roof repair had allegedly been previously submitted to the appraisal panel. *Id.*

The conflict between the Fourth District and Third District is clear: where the Third District effectively holds that the appraisal process disposes of *all* considerations that could affect the amount of loss, the Fourth District acknowledges that certain matters are necessarily not included in the appraisal process due to their inability to be considered at the time the appraisal occurs and do not become operative until the expenses, like Ordinance & Law, are "incurred." The following Chart reveals the cases to be the same with different outcomes.

Jossfolk v. United Prop. & Cas. Ins. Co.	*Noa v. Fla. Ins. Guar. Ass'n*
Hurricane Wilma damage to roof.	Hurricane Wilma damage to roof.

Insurance company acknowledges coverage and issues underpayment.	Insurance company acknowledges coverage and issues underpayment.
Insured invokes appraisal to determine amount of loss.	Insured invokes appraisal to determine amount of loss.
Insured put entire roof replacement at issue prior to appraisal award being issued.	Insured put entire roof replacement at issue prior to appraisal award being issued.
Insurer and insurance company enter appraisal process. Neutral appraiser is selected.	Insurer and insurance company enter appraisal process. Neutral appraiser is selected.
Neutral umpire allows for removal and replacement of two (2) "squares" of concrete tile roof (220 square feet) in appraisal award. • This amount was far less than 25% of Jossfolk's roof. • Jossfolk's roof repairs did not reach the extent required in Noa.	Neutral umpire allows for removal and replacement of one-hundred and twenty (120) concrete roof tiles and approximately 1200 square feet of plywood underlayment. • Unlike industry standard requires, a square footage of repair was not calculated. • However, the 120 tiles were spread out (non-contiguous) throughout the roof because the umpire awarded 1200 square feet of plywood underlayment and 3488 square feet of roof paint to match the different repair tiles throughout the roof.
Appraisal award states that "Ordinance and Law" is **not appraised.**	Appraisal award states that "Ordinance and Law" is **not appraised.** • The award also subjected itself by its plain language to the Policy's Terms and Conditions – one of which being "Ordinance and Law" Coverage.
Insured applies to city for roofing repair permit to perform repairs to 1359 square feet of the roof.	Insured applies to Miami-Dade County for roofing repair permit to perform repairs to 1100 square feet of the roof.
City rejects request for roofing repair permit because 1359 square feet of the roof exceeds 25% of the total area of the	City rejects request for roofing repair permit because 1100 square feet of the roof exceeds 25% of the total area of the

roof, requiring replacement of the whole roof to conform with city code.	roof, requiring replacement of the whole roof to conform with Miami-Dade County.
Insured seeks coverage for "Ordinance and Law" from insurance company.	Insured seeks coverage for "Ordinance and Law" from insurance company.
Insurance company rejects coverage for "Ordinance and Law" because insurance company believes that the neutral umpire considered and rejected request.	Insurance company rejects coverage for "Ordinance and Law" improperly unilaterally determining only 3% of the roof needed replacement and because insurance company believes that the neutral umpire considered and rejected request.
Insured filed declaratory judgment action seeking a ruling that insurance company must participate in appraisal for "Ordinance and Law" coverage.	Insured filed declaratory judgment action seeking a ruling that insurance company must participate in appraisal for "Ordinance and Law" coverage.
Insurance company files motion for summary judgment based on the prior appraisal not including coverage for "Ordinance and Law".	Insurance company files motion for summary judgment based on the prior appraisal not including coverage for "Ordinance and Law". Insured filed motion to compel appraisal. Insurance company moved to re-open the entire appraisal.
Trial court grants insurance company's motion.	Trial court denied all motions and stated case would proceed to trial.
Insured appeals.	Insured appeals.
4th DCA finds that, based on face of the award, "Ordinance and Law" was "not appraised."	3d DCA finds that "not appraised" means the appraisal panel determined that "Ordinance and Law" was not awarded to the insured.
4th DCA relies on *Ceballo v. Citizens Prop. Ins. Corp.*, 967 So. 2d 811 (Fla. 2007), which holds that an insured had to show incurred expenses to recover under supplemental coverage for "Ordinance and Law".	3d DCA holds that determining "Ordinance and Law" is "baked into" the appraisers' and umpire's considerations based on their qualifications.
4th DCA cites to *Ceballo* to support proposition that "Ordinance and Law"	3d DCA reasons that to allow "Ordinance and Law" to be

is not recoverable until it is "incurred" and thus could not have been appraised at the time of the original appraisal. • The roof replacement was at issue prior to the appraisal award.	subsequently appraised lets a roofing contractor act as a "super-umpire" whose opinion supersedes the appraisal panel. • The roof replacement was at issue prior to the appraisal award.
4th DCA rejects insurance company's argument that the replacement of only two squares of concrete tile does not amount to 25% of the roof because it was not argued by the insurance company and insured offered a general contractor affidavit stating the city would require replacement because the original roof tiles were no longer made and could not be replaced.	3d DCA distinguishes *Jossfolk* on the basis that the insurance company in *Jossfolk* did not raise the "under 25%" roof replacement argument in the insurance company's motion for summary judgment. 3d DCA distinguishes *Ceballo* because the issue was whether Florida's Valued Policy Law required an insured to demonstrate an incurred loss before the insurance company would be required to pay "Ordinance and Law".
4th DCA had the same variables (damaged tiles and total roof square footage) to perform calculation, but did not do so.	3d DCA opinion repeatedly cites to the 3% calculation First Home offered that was not substantiated in any Appraisal Award documents.
4th DCA reverses summary judgment and remands for further proceedings to determine Ordinance & Law through appraisal.	3d DCA affirms the trial court order denying appraisal of Ordinance & Law.

On April 21, 2017, Plaintiff filed his Notice of Intent to Invoke Discretionary Jurisdiction. Plaintiff filed a Jurisdictional Brief that was stricken followed by an Amended Discretionary Brief on May 17, 2017. FIGA filed its Answer Brief on June 9, 2017. This Court accepted jurisdiction on September 20, 2017.

SUMMARY OF THE ARGUMENT

The Plaintiff's loss is a covered loss under the terms of the Policy. The facts on the record reveal that Ordinance & Law was **"not appraised"** on the face of the Appraisal Award. Ordinance & Law could not be appraised because it had not been "incurred" at the time of the appraisal. The parties have a dispute as to the amount of loss. The trial court erred in denying Plaintiff's Motion to Compel Appraisal. The Third District's opinion in *Noa* is properly quashed and the Fourth District's opinion in *Jossfolk* approved.

STANDARD OF REVIEW

This Court reviews the order on appeal *de novo*. *See Sunshine State Ins. Co. v. Corridori*, 28 So. 3d 129 (Fla. 4th DCA 2010).

ARGUMENT

There is no issue as to post-loss compliance in this matter as FIGA has admitted that Plaintiff fully complied with his post-loss pre-suit duties pursuant to the Policy. A-8. The request for appraisal sought to expedite the appraisal of Ordinance & Law that was excepted from the original award when the parties did not know more than 25% of the roof was in need of replacement; thus, requiring complete replacement and triggering the Ordinance & Law coverage in the Policy. *See Ceballo*, 967 So. 2d at 815 (to "incur" means to become liable for the expense, but not necessary to have actually expended it); *see also Jossfolk*, 110 So. 3d at 112

(it is clear on the face of the appraisal award that Ordinance & Law coverage was "not appraised"). The Appraisal Award contemplated additional coverages stating: "This award is subject to all terms and conditions of the insurance policy." App.-1. Instead of agreeing to a simple appraisal of Ordinance & Law, FIGA has fought "tooth and nail" to avoid appraisal.

Jossfolk* and *Noa

The facts of this case are identical to the facts considered in *Jossfolk*. In *Jossfolk*, the plaintiff's appraiser objected to the appraisal award upon the belief that the building department would not allow for any repair of the roof without meeting the current building code. *Jossfolk*, 110 So. 3d at 112. The appraisal award allowed for removal and replacement of two squares of concrete tile roof (220 square feet). The appraisal award indicated that Ordinance & Law was "not appraised." *Id.* Subsequently, the plaintiff's contractor determined the area in need of repair was greater than that of the appraisal award. *Id.* He applied to the City of Weston for roof repair permit in which he claimed 1359 square feet, or about 34% of the roof needed to be repaired. *Id.* As a result, the roofing repair permit was rejected by the City because the required repairs exceeded the area allowed by the building code of 25% of the total roof area, which could not repaired without requiring replacement of the entire roof system in conformity with the building code. *Id.* The roofer's application to the City indicated the roof needed repairs greater than the amount

contemplated in the appraisal award. After the City rejected the permit Plaintiff's representative requested the insurance carrier, United, pay for the entire roof replacement under Plaintiff's Ordinance & Law coverage. *Id.* United denied the request basing its denial on the argument that the Ordinance & Law claim had been determined by the appraisal panel. *Id.*

Jossfolk filed a Declaratory Judgment action seeking a ruling that United must participate in an appraisal for Ordinance & Law coverage. *Id.* at 112. United moved for summary judgment arguing the appraisal did include Ordinance & Law and, therefore, plaintiff was not entitled to an appraisal on that issue. *Id.* at 112-13. The trial court granted summary judgment in favor of United. *Id.* However, the Fourth District reversed the trial court, finding that: 1) the appraisal award clearly indicated that Ordinance & Law coverage was not included in the original appraisal as the award stated "Ordinance and Law" was "not appraised;" and 2) Ordinance & Law had correctly been excluded from the original appraisal proceeding as it had not yet been "incurred" pursuant to *Ceballo*. *Id.* at 113.

The Fourth District also addressed United's argument that Ordinance & Law was not implicated because the appraisers allowed for only two square feet of tile replacement, which was considerably less than the 25% of total area which would trigger the City's requirement to replace the entire roof in accordance with current ordinance standards. *Id.* at 113. United's argument was rejected. The Fourth

District also reviewed an affidavit of Jossfolk's general contractor stating that the City would require replacement because the original roof tiles were no longer made and could not be replaced. *Id.* In considering the facts of *Jossfolk* as applied to this matter, it is a textbook example of a case being "on all fours."

The facts in this matter are directly on point with *Jossfolk*. Plaintiff's home was damaged in a hurricane. The parties appraised the damage and an award was entered in Plaintiff's favor. The Appraisal Award on its face reads Ordinance & Law **"not appraised."** Plaintiff hired Perfect Roofing to apply to the Miami-Dade County Building Department for a permit. When Perfect Roofing filed its application, it was denied because the roof had to be completely replaced to meet code as more than 25% was damaged. It required repairing 1,100 square feet of the total 3,400 square feet of roof. Plaintiff attempted to find the tiles for his roof through the original tile company, The Old Havana Tile Company, but the tiles are no longer produced, which is a separate and independent reason why the roof needed to be replaced in its entirety. Oddly, the Third District did not address this issue at all and instead stated that Plaintiff was getting "new tiles." *Noa*, 215 So. 3d at 142. Plaintiff has the right to matching tiles, which is impossible in this case. *See* § 626.9744 (2), Fla. Stat.[9] FIGA clearly did not comply with that statute. When

[9] The Third District discusses "treatment" of "new tiles" to provide a color match. However, that presupposes new tiles could be found. But, that is not the case.

Plaintiff made a claim for Ordinance & Law, Defendant alleged it was included as part of the original Appraisal Award even though its states on its face that Ordinance & Law was **"not appraised."** App.-1. And, it affirmatively states: "This award is subject to the terms and conditions of the policy." *Id.* Ordinance & Law being a term in the Policy. FIGA also makes the incorrect argument that simply dividing 120 over 3,400 gives the actual percentage of the roof that needs to be replaced. Plaintiff filed a declaratory judgement action seeking a declaration that he had incurred his Ordinance & Law and appraisal of the claim. FIGA has affirmatively admitted that Plaintiff has complied with all pre-suit post-loss obligations, so there is no issue that the appraisal clause has not been triggered. This matter goes beyond the facts in *Jossfolk* because Plaintiff has already paid for the replacement of his roof as required by the Miami-Dade County Building Department; thus, he has incurred Ordinance & Law. All that is left is a half-hour paper appraisal. FIGA seeks to further delay having to pay Plaintiff his Policy benefits, which Plaintiff has already incurred out of pocket, having been forced to carry the burden of the financial obligation due to FIGA's bad faith delay of the process.

***Ceballo* is Determinative**

The Third District distinguished this Court's opinion on *Ceballo* because this matter does not involve a total loss, or VPL, and accepting that Ordinance & Law was considered at the time of the first appraisal. *Noa*, 215 So. 3d at 144. However,

the Third District overlooked the holding in *Ceballo*, which dealt with the issue of when additional coverages are "incurred." The Fourth District in *Jossfolk* found the holding in *Ceballo* determinative and it should be in this case too.

> *Ceballo* supports Jossfolk's contention that Ordinance and Law is not recoverable until it is incurred and thus could not have been appraised at the time of the original appraisal. Here, at the time of the original appraisal, Jossfolk had not applied for repairs of the roof. Thus, he had not incurred or become liable for any additional expense until the City had required compliance with current ordinances in order to complete repairs. It was at that point, according to *Ceballo* that Jossfolk incurred additional loss, for which he had the right to an appraisal.

Jossfolk, 110 So. 3d at 113. Likewise, here Ordinance & Law is not recoverable until it is incurred by the Plaintiff. It could not have been appraised at the time of the original appraisal and the Appraisal Award reflects this on its face. *Id.* At the time of the appraisal Plaintiff had not applied with Miami-Dade County Building Department for a permit and, therefore, had not incurred, or become liable for, the additional expense of complying with the building code. *Id.* He incurred the additional liability when Miami-Dade County Building Department required compliance with the Florida Building Code via replacement of the entire roof. *Id.* It was at that point under this Court's holding in *Ceballo* that Plaintiff incurred additional loss for which he had the right to appraisal. *Ceballo*, 967 So.2d at 815 ("'to incur' means to become liable for the expense, but not necessarily to have actually expended it."). There is a conflict between the Third District's opinion in *Noa* and the Fourth District's opinion in *Jossfolk*. Plaintiff respectfully requests this

Court quash the opinion of the Third District and approve of the opinion of the Fourth District.

Noa Improperly Preempts Other Coverage Under the Policy

There are additional considerations regarding the conflict between the Fourth District and Third District on this point of law. The duties of appraisers are specifically illustrated in *Johnson*, 828 So. 2d 1021 and its progeny. Simply put, where an insurer admits that there is a covered loss, but there is a disagreement as to the amount of loss, it for the appraisers to arrive at the amount. *Johnson*, 828 So. 2d at 1025. In doing so, the appraisers inspect the property and determine how much is to be paid on account of a covered peril. *Id.* This includes identifying causes of loss such as normal wear and tear, long-term, and other specifically excluded causes and excluding those portions of the claim as necessary. *Id.* However, *coverage* issues are solely for determination by the court. *Id.; see also Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So. 3d 500, 502 (Fla. 4th DCA 2014). The division of labor is clear – appraisers are tasked with determining the amount of a covered loss while the trial court addresses all coverages issues. For the appraisal panel in *Noa* to consider "Ordinance & Law" would mean the panel *per se* acted outside the scope of its duties, and thus improperly determined coverage issues outside the scope of the initial appraisal. Additionally, the panel could not have appraised Ordinance & Law because it had not been incurred by the Plaintiff at that time.

Independent of the failure of the Appraisal Award to appraise "Ordinance & Law", the Third District in *Noa* has now bestowed additional responsibilities upon the appraisers not otherwise found in Florida law. Appraisers will now be expected to project "incurred" costs as opposed to those strictly pertaining to the amount of damage to the property. Similar to "Ordinance & Law," additional living expenses are generally paid for as incurred by the homeowner. Should appraisal completely foreclose an insured from pursuing any subsequent coverages arising from the claim, the holding in *Noa* would mandate that the insured is left "out in the cold" in the event unforeseen additional living expenses are required. This logic further extends to other portions of a policy that are not payable until "incurred." Appraisal should not and does not permanently extinguish an insured's rights to seek portions of coverage for a claim under an insurance policy when the need for same arises. Determining the amount of loss is properly separate and apart from the determination of whether additional coverages are triggered, or "incurred."

CONCLUSION

The Defendant has admitted coverage for the underlying loss and affirmatively admitted that all post-loss obligations have been completed. FIGA has its "amount of loss" in the amount of the Appraisal Award. The Plaintiff has his "amount of loss" incurred due to Ordinance & Law. Pursuant to *Johnson*, 828 So. 2d at 1023 this matter properly proceeds to appraisal. There is a conflict between

the Third District's opinion in *Noa* and the Fourth District's opinion in *Jossfolk*. Plaintiff respectfully requests this Court quash the opinion of the Third District and approve of the opinion of the Fourth District.

Dated: November 9, 2017.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Electronic Correspondence: hklein@conroysimberg.com and eservicehwdappl@conroysimberg.com to: Hinda Klein, Esq., on this 9th day of November, 2017.

Respectfully submitted,

/s/ Paul B. Feltman

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CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Paul B. Feltman

PAUL B. FELTMAN, ESQ.