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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.

RESPONDENT FLORIDA INSURANCE GUARANTY ASSOCIATION'S ANSWER BRIEF ON JURISDICTION

Respectfully submitted by,

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THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THIS CASE AND THE FOURTH DISTRICT'S OPINION IN JOSSFOLK; THE THIRD DISTRICT'S OPINION IN THIS CASE CLEARLY DISTINGUISHES JOSSFOLK ON ITS FACTS AND ON THE LAW.

STATEMENT OF THE CASE AND FACTS

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). To the extent that the Petitioner ORLANDO NOA ("NOA") improperly refers to alleged facts that are not in the District's Court's unanimous opinion, those omitted facts cannot be considered in determining whether, as the Petitioner contends, this Court has jurisdiction between two opinions "expressly and directly" in conflict with one another. Therefore, we will confine our Statement of the Facts to those contained within the four (4) corners of the Third District's opinion.

This non-final appeal was taken from the trial court's order denying NOA'S motion to compel appraisal of a supplemental insurance claim arising from Hurricane Wilma in October 2005. Noa v. Florida Ins. Guaranty Assoc., 215 So.

3d 141 (Fla. 3d DCA 2017)[1]. The initial hurricane claim, made shortly after the Hurricane, was deemed not to exceed the insured's $4,392.00 deductible. Id.

In August 2009, almost four years after the Hurricane, NOA filed a Supplemental claim with his then-insurer First Home Insurance Company seeking $71,682.97, or $67,290.47 more than the deductible. Id. In support of his claim, NOA submitted a letter from a tile company stating that NOA'S roof tiles were no longer in stock and had been "out of circulation" for some time. Id. at 2, 4. First Home rejected the claim, for reasons unclear in the Third District's opinion, and invoked the appraisal clause in its policy, which permitted either party to seek appraisal where the parties dispute the scope and/or amount of a covered loss. Id. at 2. Once the appraisal clause is invoked, both parties choose their own appraisers and those appraisers agree on a third to act as Umpire. Id. The decision of two of the three appraisers is binding on both parties. Id.

The claim was appraised for the first time in October 2010. Id. The umpire and the insurer's appraiser agreed that the actual cash value of NOA'S claim was $17,602.10, which included specific amounts for the repair and replacement of 120 roof tiles, including the underlayment and a treatment for the entire roof which

[1] The Westlaw copy of the case does not contain page numbers. For purposes of this Brief, we will cite to the case as we have paginated it in our Appendix.

would provide a color match. Id. The 120 roof tiles represented approximately **3%** of the 3200 square feet of roofing. Id.

The appraisal award, which was not signed by NOA'S appraiser who disagreed with it, specified that law and ordinance coverage[2] was "not appraised". Id. First Home paid the appraisal award, less the deductible and prior payments. Id.

Less than a month after First Home paid the appraisal award, NOA hired a roofing contractor who applied for a permit seeking to repair **30%** of his roof, far in excess of the amount determined at appraisal. Id. Because the Miami-Dade building code requires replacement of the entire roof if more than 25% of it requires repair, replacement or recovering, the contractor's permit for a partial roof repair was rejected. Id. at 2-3. Thereafter, NOA signed a contract with the roofer for a total roof replacement, at a cost of $26,000. Id. at 3.

NOA filed a third claim with First Home under his "Law and Ordinance" coverage seeking coverage for the cost of his new roof. Id. The insurer denied the claim and in 2011, NOA filed suit against First Home seeking to recover the

[2] The Third District explained that "Ordinance and Law" coverage "provides additional reimbursement to the insured, in amount and on other terms specified in the policy, to cover 'costs necessary to meet applicable laws and ordinances regulating the construction, use, or repair of any property or requiring the tearing down of any property, including the costs of removing debris." Id. at 3 (citing Fla. Stat. 627.7011(1)(b)(2011). Such claims do not become ripe until the insured has incurred the actual cost of repair. See, Ceballo v. Citizens Property Ins. Corp., 967 So. 2d 811 (Fla. 2007).

difference between the appraisal award and the cost of the new roof. Id. While suit was pending, First Home became insolvent and FIGA assumed the handling of the claim and was substituted as the Defendant. Id.

During the litigation, NOA sought to compel a new appraisal of his claim, prompting FIGA to seek to reopen the second appraisal to obtain clarification of the appraisers' notation that Law and Ordinance coverage was "not appraised", a motion NOA opposed. Id. The trial court denied both motions and NOA appealed the Court's order denying his motion to compel appraisal. Id.

On appeal, the Third District found that the notation on the appraisal award meant that the appraisers had not appraised the "Law and Ordinance" claim because it was simply not implicated. Pursuant to the appraisal award finding that only 3% of the roof needed repair or replacement, the Third District found it was far less than the 25% requiring a new roof under the building code. Id. The Third District explained "[t]he notation surely cannot mean that the appraisal is subject to circumvention a month later if the insured can just find a roofing contractor to sign a proposal stating that 30%, not 3%, of the roof needs replacement" and that "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 . . . ." Id.

The Third District further explained why its opinion in this case was distinguishable from Jossfolk v. United Property & Casualty Co., 110 So. 3d 110 (Fla. 4th DCA 2013). Id. at 3-4. In Jossfolk, the insurer did not raise the argument that because the insured's roof claim did not exceed the 25% Code requirement, the insured was not entitled to a new roof. Both First Home and FIGA raised that very issue as grounds for a denial of NOA'S third claim for the same damage which had been previously appraised. Id. at 4. The Court noted that Jossfolk relied heavily on this Court's opinion in Ceballo v. Citizens Property Ins. Corp., 967 So. 2d 811 (Fla. 2007). 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 Law and Ordinance coverage before payment under that coverage is due, and Jossfolk's reliance on that case provided further proof that Jossfolk was concerned only with the ripeness of the insured's claim, and not whether that claim would be covered once it became ripe. Id. The Third District found that Ceballo had no application here because there was no loss falling within the scope of Law and Ordinance coverage and because the insured had already tried, and failed, to have the first appraisal panel find that he was entitled to an entirely new roof based on the scope of his damage. Id. Accordingly, the Third District affirmed the trial court's order denying NOA a second appraisal. Id.

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.

SUMMARY OF ARGUMENT

This Court does not have the 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 the Court's precedent. The Jossfolk case NOA asserts is 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.

ARGUMENT

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 ON 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 (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 (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 County, 928 So. 2d 1663 (Fla. 2006).

B. The Merits

This Court has no jurisdiction to consider this case because, as the Third District correctly found, there is no express and direct conflict between this case and Jossfolk which is readily distinguishable on both the facts and the law.

In Jossfolk, as here, the insured sought a new roof in the initial appraisal, but unlike in this case, the appraisers did not consider Law and Ordinance coverage as part of its determination. During subsequent litigation, the insurer sought summary judgment, relying on the prior appraisal as a bar to that litigation, but at no time did the carrier argue that the insured's Law and Ordinance coverage was simply not implicated because the damages incurred did not exceed the threshold that would trigger that coverage; the carrier only argued that because the loss had previously been appraised (during which the panel did not consider Law and Ordinance coverage), the insured was not entitled to seek Law and Ordinance coverage in a

subsequent claim. Because there was a legitimate question as to whether the appraisal panel in that case did not consider Law and Ordinance only because the claim was not ripe, the Fourth District found there was a genuine issue of material fact precluding summary judgment in the carrier's favor.

In this case, the issue of whether the extent of the insured's loss could ever warrant payment of a Law and Ordinance claim was raised by the carrier at the inception of the claim and by FIGA throughout the litigation. The ripeness of NOA'S Law and Ordinance claim was never at issue and in fact, NOA'S 2009 supplemental claim expressly **included** a claim for an entirely new roof, based on his inability to find matching tile. As the Third District found, there was no reason why NOA could not have presented his roofer's opinion that more than 30% of his roof needed repair before or during the appraisal and he was therefore foreclosed from ignoring the original appraisal award of his roofing claim by presenting the insurer with a different reason why he needed a new roof after the appraisal was concluded.

Jossfolk does not provide this Court with conflict jurisdiction because the Third District in this case effectively distinguished the cases on their facts, and explained that Jossfolk never addressed the primary issue in this case, which is whether the first appraisal was binding on NOA when it was apparent that the appraisers **did** consider the issue of whether the amount of roof damage exceeded

25%, while in Jossfolk there was a question of fact as to whether the first appraisal in that case failed to address the Law and Ordinance claim because it was not yet ripe. Put another way, in Jossfolk, the carrier never raised the primary issue in our case and in our case, FIGA never raised the ripeness issue at the center of Jossfolk.

CONCLUSION

Because this case can be readily reconciled with Jossfolk, there is no express and direct conflict vesting this Court with the jurisdiction to review this case. The Court should deny review.

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 9th day of June, 2017.

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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.

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