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

REPLY BRIEF OF ORLANDO NOA

PAUL B. FELTMAN, ESQUIRE
ALVAREZ, FELTMAN & DASILVA, P.L.
2121 Ponce De Leon Blvd., Suite 1100
Coral Gables, FL 33134
Telephone: (786) 409-6000
Facsimile: (786) 362-5175
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Florida Rules of Appellate Procedure

REPLY BRIEF

I. INTRODUCTION

The Ordinance & Law coverage at issue in this matter is an "Additional Coverage" under the policy, which is triggered by the increased costs Plaintiff incurred due to the enforcement of any ordinance or law; in this case it would be costs associated with replacement of his roof. R-288-89, the policy Coverage D – Loss of Use Ordinance or Law. The Third District opinion below contradicts this Court's opinion in *Ceballo v. Citizens Property Ins. Corp.*, 967 So. 2d 811 (Fla. 2007) as well as two subsequent Fourth District opinions, *Jossfolk v. United Property & Cas. Inc. Co.*, 110 So. 3d 110 (Fla. 4th DCA 2013) and *Pedersen v. Citizens Property Ins. Corp.*, 157 So. 3d 431 (Fla. 4th DCA 2015). In the instant case, the Third District shakily attempted to distinguish *Ceballo* by limiting its holding to Florida's Value Policy Law (VPL) involving a total loss. This in and of itself establishes that the Third and Fourth District courts are applying the *Ceballo* holding in two very different and distinct ways when analyzing Ordinance & Law. Accordingly, this Court should quash the opinion of the Third District and approve of the opinion of the Fourth District.

II. THE APPRAISAL PANEL WOULD HAVE ACTED PER SE OUTSDE OF THE SCOPE OF ITS DUTIES IF ORDINANCE & LAW HAD BEEN APPRAISED IN THIS MATTER

In *Ceballo*, this Court determined when Ordinance & Law is "incurred" for purposes of timing of payment by the insurer to the insured.

> The Ceballos were entitled to, and received, the face value of their insurance policy for the loss of their home, but that loss does not affect their obligation to show that they have incurred an additional loss in order to recover under the supplemental coverage. Citizens' counsel conceded in oral argument that "to incur" means to become liable for the expense, but not necessarily to have actually expended it. We agree. However, we also agree with Citizens that the VPL does not mandate the payment of the policy limits of the additional coverage without proof of loss where the unambiguous language of the policy requires such proof.

Id. at 815. The Fourth District has twice addressed the issue of when Ordinance & Law is incurred in the appraisal context. In *Jossfolk*, 110 So. 3d 110, the Fourth District properly reasoned the correct timing for when Ordinance & Law is triggered and why it cannot be part of the original appraisal.

> *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.

Id. at 113 (emphasis added). Nearly two years after *Jossfolk*, the Fourth District ruled that a plaintiff's claim for Ordinance & Law had not been incurred and suit was premature. In *Pedersen*, 157 So. 3d at 432-33 the Fourth District stated:

> Additionally, at the time the trial court entered summary judgment, nothing remained to be done—the appraisal which the insured sought was completed, the award for building damage had been paid, and there was no evidence in the record that the insured had actually "incurred" any ordinance or law damages. It is well-settled in the law, and the policy language makes clear, that the recovery of supplemental ordinance or law damages is predicated on the insured having "incurred" such expenses.

Id. at 433 citing *Ceballo*. The Fourth District reiterated the fact that Ordinance & Law is ordinarily not ripe for determination at the original appraisal. *Id.*[1] In each of the above three cases, the insurer did not want to make payment until the Ordinance & Law had been incurred.

In this matter, despite the face of the appraisal award that states Ordinance & Law was "not appraised," FIGA has taken the position that it was appraised. In its opinion, the Third District stated: "This is an area for professional construction industry expertise and should be 'baked into' the appraisers' and umpire's computations, and not left open for a re-appraisal or for a determination by the court." *Noa v. Florida Ins. Guar. Assoc.*, 215 So. 3d 141, 143 (Fla. 3d DCA 2017). The Third District's analysis contradicts Florida law, because it diametrically

[1] *Pedersen* stated that the award included language regarding Ordinance & Law to be payable "if incurred." *Pedersen*, 157 So. 3d at 432. Likewise, in this matter the face of the appraisal award states: "This award is subject to all the terms and conditions of the insurance policy." R-46. Ordinance & Law is a term and condition of the insurance policy, so the award considered that it may be "incurred" at a later date. ALE was also "not appraised."

opposes *Ceballo* and *Jossfolk*. The Third District also suggested that a roofer be used in the appraisal process to determine the Ordinance & Law. However, doing so would also be improper. If we were to accept the Third District's reasoning, the appraisal panel would have to determine and place value on an additional coverage before it is incurred; which would turn this Court's *Ceballo* test on its head. It is exactly what cannot occur and what the insurers in *Ceballo, Jossfolk* and *Pedersen* were arguing against: i.e. premature payment/appraisal of supplemental coverage(s). Indeed, if the appraisal panel had included the supplemental coverage for Ordinance & Law in the award, it would have been premature and FIGA would be certainly objecting to that outcome. Simply put, the Third District eliminated Noa's paid-for, Additional Coverage under his policy.[2]

III. THE APPRAISAL PANEL DID NOT DETERMINE THAT ONLY 3% OF NOA'S ROOF WAS DAMAGED

The assertion that only 3% of Noa's roof was damaged is patently incorrect. The Third District and FIGA rely upon an undated First Home Insurance Company Inc. 2010 letter from one of its senior property examiners as proof of the alleged 3% damage to the roof. Nowhere in the appraisal award does it refer to 3%. In its

[2] The Third District's opinion is a classic "catch 22" due to mutually conflicting positions. Ordinance & Law cannot be appraised until incurred. *Ceballo*, 967 So. 2d at 815. And, the additional coverage will not be incurred until after the first appraisal leaving the insured without the paid for additional coverage of Ordinance & Law.

Answer, FIGA incorrectly states the appraisers found 3% damage to the roof: "given the appraisal panel's conclusion that only 3% of the roof needed to be repaired"; "as the Third District so found, the appraisers new that repairing 3% of the roof would not require NOA to replace the entire roof under the Building Code"; "There is no good reason why the appraisers' conclusion that 3% of the roof was damaged... ." *See* Answer Brief pp. 20-22. However, this assertion is false because the appraisers did not conclude that 3% of the roof was damaged. R-40, Appraisal Award. Nowhere on the Appraisal Award did the appraisers state "3%" of the roof was damaged. First Home's in-house examiner did.

> In his award, Mr. Gale allowed $3,780.00 as the actual roof repair. It was for the replacement of 120 broken roof tiles. This calculates to less than 3% of the total roof area.

R-71, letter from First Home calculating 3% [120 tiles/3,400 tiles]. Thus, it was the in-house examiner for the now bankrupt First Home that came up with that number. It is perplexing that the Third District took First Home's examiner at face value and ignored the requirements of the licensed roofer and Miami-Dade County Building Department in making the repair. Especially since First Home's examiner had no personal knowledge of the damage to the roof outside of a file review in her office in Maitland, Florida, where the letter was written. *Id.*

This "3%" calculation does not even comport with standards in the roofing industry, where repairs are measured by "squares" comprising of a 10 by 10-foot

roof area, or 100 square feet. The area that actually needed to be fixed was 120 cracked tiles encompassing 1,100 square feet. R-59, Affidavit of Billy Turner of Perfect Roofing at §§ 6-11. The 120 tiles were spread throughout the entire roof, not in one single area. As set forth in Mr. Turner's Affidavit, the 120 tiles spread throughout the whole roof requires not only the repair of each broken roofing 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 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.

R-59.[3]

That is why the Miami-Dade County Building Department refused to issue a permit, unless it was for an entire roof replacement. *Id.* Subsequently, Perfect Roofing applied for a second permit to "re-roof" Plaintiff's property, which cost $26,000.00, which was issued by the Miami-Dade County Building Department. *Id.* at Exhibits "A" and "D", Roof Contract and Second Permit Application, respectively. The 3% relied upon by FIGA and the Third District is simply incorrect. It is important to note, that the necessary 1,100 square feet of roof replacement is not the only reason why the roof needs to be replaced in its entirety. Pursuant to § 626.9744 (2), Florida Statutes, an insurer is required to replace the entire adjoining area, i.e. the entire roof, if the replacement materials will not match in quality, color or size. Steadfast Engineering Group confirmed that the tiles present on Plaintiff's roof from the Old Havana Tile Company had long since been out of circulation and could not be matched. R-69. Further, Plaintiff's appraiser confirmed that Ordinance & Law was left off of the appraisal award, so that it could be determined later if

[3] 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* R-96, 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.

necessary, which is what was required because it was not and could not be incurred at the time of the original appraisal. *Ceballo*, 967 So. 2d at 815; *Jossfolk*, 110 So. 3d at 113; *Pedersen*; 157 So. 3d 432-33.

IV. FIGA'S OTHER ARGUMENTS ARE FLAWED

FIGA argues that Plaintiff should have sought review of the appraisal or ask the panel to clarify its award and cites to § 682.13(1)(a), Fla. Stat. and *First Protective Ins. Co. v. Hess*, 81 So. 3d 482 (Fla. 1st DCA 2011). Answer Brief at p. 7 fn. 5 and p. 23 fn. 11, respectively. First, § 682.13(1)(a), Fla. Stat. of the "Florida Arbitration Code" is not applicable to appraisal awards." *See Citizens Property Ins. Co. v. Mango Hill #6 Condominium Assoc., Inc.*, 117 So. 3d 1226, 1230 (Fla. 3d DCA 2013). Second, there was no reason to request clarification on the issue of Ordinance & Law. The face of the award said it was "not appraised" and it could not have been appraised because it had not been "incurred." It does not say $0.00 for Ordinance & Law. And, because the award was subject to the terms and conditions of the policy, which includes Ordinance & Law coverage, there was certainly no reason or need for clarification at that time. FIGA's position is disproven by the fact that FIGA itself sought to appraise Ordinance and Law by re-opening the award with the original panel. R-96.

The Third District stated, and FIGA argues, that the Plaintiff would be receiving new tiles, but the only record evidence revealed that the tiles on Plaintiff's

roof were no longer available. R-69. Thus, they could not match. *Jossfolk*, 110 So. 3d at 113; § 626.9744 (2), Fla. Stat. "Claim settlement practices relating to property insurance.". This is another reason that the roof needed to be replaced. *Id.*

V. JURISDICTION

FIGA argues that this Court does not have jurisdiction. *See* Answer Brief Section I. It is FIGA's position that there is no conflict between the decisions of the Third and Fourth District. However, FIGA is speciously incorrect. As set forth in the Introduction, *supra*, the two District Courts treat this Court's holding in *Ceballo* as polar opposites. That in and of itself reveals a 180-degree conflict. In its Answer, the thrust of the jurisdiction argument centers on FIGA's assertion that the appraisal panel made a determination that 3% of the roof was damaged. However, the appraisal award does not say "3%" anywhere. R-46. That is because the appraisal panel made no such determination and boldly stated "O&L not appraised" on the face of the appraisal award. Further, as set forth in the Initial Brief and in Section III, *supra*, the purported 3% damage was created by an examiner at the now insolvent First Home, who was clearly seeking a way to deny Mr. Noa his paid-for Ordinance & Law coverage under the policy. Therefore, it is factually indisputable that the appraisal panel never made a determination that 3% of the roof was damaged.

First Home and now FIGA make a specious argument by using a fuzzy math equation of the number of tiles listed on the award, divided by the total tiles on the

roof. However, as set forth in the Initial Brief and Section III, *supra*, that assertion again has no foundation in fact. The licensed roofer very clearly set forth how the 120 tiles that were damaged and spread out over the entirety of the roof would need to be repaired i.e. 1,100 square feet, or 11 squares, of the roof area. First Home's calculation of 3% is nothing more than a bad faith attempt to deny Noa his additional coverage for Ordinance & Law. The reliance of FIGA on the 3% argument of the bankrupt First Home is not in keeping with its duty to provide coverage for Florida citizens whose insurer becomes insolvent. The conflict is also clear and unequivocal, based on the chart provided in Noa's Jurisdiction Brief and Initial Brief and arguments therein. For sake of brevity, Noa adopts the arguments in the Jurisdiction Brief as though fully set forth herein. This Court properly quashes the opinion of the Third District and approves the opinion of the Fourth District.

VI. CONCLUSION

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. *Ceballo*, 967 So. 2d at 815; *Jossfolk*, 110 So. 3d at 113; *Pedersen*; 157 So. 3d 432-33.

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." *Ceballo*, 967 So. 2d at 815; *Jossfolk*, 110 So. 3d at 113; *Pedersen*; 157 So. 3d at 432-33. Indeed, as found in *Ceballo*, even a total loss precludes a panel from determining additional coverage under a policy of insurance, because it will not be incurred until the insured becomes liable for it.

Plaintiff respectfully requests this Court quash the opinion of the Third District and approve of the opinion of the Fourth District.

Dated: March 19, 2018.

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 19th day of March, 2018.

Respectfully submitted,

/s/ Paul B. Feltman

PAUL B. FELTMAN, ESQ.
ALVAREZ, FELTMAN
& DASILVA, PL.
Fla. Bar. No.: 992046

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.