IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 3D23-938
L.T. Case No.: 2019-033925 CA 01

AMERICAN COASTAL INSURANCE COMPANY,

Appellant,

v.

LA RIVE GAUCHE CONDOMINIUM ASSOCIATION, INC., et al.,

Appellee.
_____/

APPENDIX TO APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE INITIAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed on December 8, 2023, via the Florida Courts E-Filing Portal and sent via e-mailed to:

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IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 3D20-1230
L.T. Case No.: 19-033925 CA 01

AMERICAN COASTAL INSURANCE COMPANY,

Appellant,

v.

LA RIVE GAUCHE CONDOMINIUM ASSOCIATION, INC., ET AL.,

Appellee.

ON APPEAL FROM A FINAL ORDER ENTERED BY THE ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA

ANSWER BRIEF OF LA RIVE GAUCHE CONDOMINIUM ASSOCIATION, ET. AL.

Date: January 15, 2021.

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STATEMENT OF THE CASE AND FACTS

Introduction

This matter is ripe for appraisal and the order on appeal should be affirmed. American Coastal Insurance Company ("Defendant") admitted liability 3 times: on October 13, 2017 when it first inspected and adjusted the claim; on March 2, 2018 through its desk adjuster Mr. E. Earl Williams, PCLA of CJW Associates ("CJW"); and in its November 6, 2019 response to Plaintiff's Civil Remedy Notice. Defendant never created or provided a written estimate – despite 7 separate requests spanning over a year - to back up its assertion that the covered damage was below the 5% Wind Deductible. A-114.[1] Defendant's assessed amount is less than La Rive Gauche Condominium Association, Inc.'s ("Plaintiff") estimate of damage and there exists clearly identifiable amount of loss dispute ripe for appraisal. The Defendant's sole argument against appraisal is that Plaintiff's estimate is fraudulent because it is too high, and thus inflated. In addition to being factually incorrect, there is no case in the state of Florida that finds a dispute as to the amount of loss, with no other fraud or post-loss obligation factors involved, constitutes fraud that voids a policy of insurance. If Defendant's

[1] "A" refers to the Defendant's Appendix. "SA" refers to the Plaintiff's Supplemental Appendix being filed with this Response.

position were permitted, then every dispute over an amount of loss would be unilaterally deemed fraud - effectively allowing the Defendant an escape-hatch to always avoid appraisal or further indemnity.

In *American Capital Assurance Corp. v. Leeward Bay at Tarpon Bay Condominium Assoc., Inc.*, 2D20-165, 2020 WL 6478224 (Fla. 2d DCA Nov. 4, 2020), the court of appeal rejected the exact same argument being made before this Court by the same attorneys. SA-80, Opinion of the Second District. This Court should reject their argument here as well.

The Claim

On September 10, 2017, Plaintiff suffered extensive covered damage due to Hurricane Irma. For the next 26 months, Plaintiff complied with all post-loss obligations - a fact that was conceded by Defendant at the time of the evidentiary hearing below. A-307:14-27. On October 13, 2017, Defendant met with the Plaintiff to inspect the Property and admitted coverage in an amount they have adamantly refused to disclose, somewhere below the policy's hurricane deductible in the amount of $489,939.15. A-114-115.

Shortly after the hurricane, the City of Miami Beach ("the City") inspectors identified multiple missing balcony railings and sought to inspect the property. A-210. There were balcony railings visible from Collins Avenue.

A-230. The City issued multiple fines for damage to the Property. A-263. That included fines for the balconies, fire alarm and sprinkler systems and elevators all damaged during the hurricane. A-263, 266-268, 293. On January 11, 2018, the City cited them for an unsafe structure due to the extensive damage to the Property. A-275.

On February 27, 2018, the claim was assigned to Defendant's desk adjuster E. Earl Williams, Executive General Adjuster at CJW. SA-44-45. After acknowledging assignment of the file, Mr. Williams emailed stating that he would review the file and call on or before March 2, 2019. SA-44.

On March 2, 2018, CJW was put on notice that this was a multi-million-dollar claim. Later that same day CJW wrote Plaintiff's counsel admitting coverage for a second time but claiming the damages did not exceed the 5% Wind Deductible and was waiting for an estimate from Plaintiff "so we may proceed with discussions and/or verification of the scope of damages as they relate to the loss date in question." SA-43. The policy does not require the Plaintiff to provide an estimate of damages and Defendant was apparently trying to pass of its own duty to properly adjust the loss onto Plaintiff.

Plaintiff then, at its own expense so as to assist the Defendant, retained Al Brizuela Engineering, Inc. ("ABE") to inspect the property. A-203.

Separately, Plaintiff was given an proposal of $33,000.00 to make emergency repairs to the balconies and railings. A-203.

In order to undertake emergency repairs and due to the Defendant's failure to provide emergency funds, on March 22, 2018 Plaintiff made its first special assessment in the amount of $63,900.00 to start certain immediate repairs. A-199-203.

On May 5, 2018, Plaintiff received its first invoice from ABE in the amount of $10,000.00. A-203. Plaintiff would end up spending $60,000.00 to provide the Defendant with the engineering estimates it requested. On the same date, Defendant was informed that there were life-safety issues primarily relating to the balconies but also including other conditions on the property. A-318.

Defendant hired Rimkus Consulting Group, Inc. to inspect the balconies and railings. On May 18, 2018, after being urged by Plaintiff for action as to the life-safety issues regarding the balconies and railings, Defendant's field adjuster forwarded a May 15, 2018 letter from Rimkus captioned "Notice of Potentially Unsafe Condition." The letter stated that no access to any of the buildings balconies should be allowed and that temporary shoring, bracing and temporary replacement of the railings should be done immediately due to their "serious life-threatening condition." SA-49.

It also informed Plaintiff to forward the Notice to the Building Official at the Miami Beach Building Department pursuant to Florida Statute 471 and Rule 61G15 that regulates the engineering profession in Florida. *Id*. Defendant was certainly aware of this dangerous condition when it made its inspection on October 13, 2017, 7 months earlier as the damage to the balconies and railings were visible to the Miami Beach Building inspectors from street level on Collins Avenue. A-209; 230. CJW informed the Plaintiff that it was working on an estimate of the scope of damages. In-fact, the Defendant never provided written estimate for any damage to the property contrary to its repeated promises to do so and despite its prior assertion that the claim fell below the hurricane deductible of approximately $490,000.00 back on March 2, 2018 by Mr. Williams at CJW. SA-43.

In May 2018, Defendant's field adjuster requested a reinspection of the Property and Plaintiff agreed to same.

On May 21, 2018, Plaintiff, again at its own expense, hired ThyssenKrupp Elevator to inspect the elevators in the condominium. A-264-266. ThyssenKrupp provided an estimate but could not make the repairs because Plaintiff had not been paid on the claim. *Id*. As a result, the permits on the elevators remain open. *Id*. ThyssenKrupp ultimately estimated the

cost to repair as $150,000.00, which was included in Plaintiff's final estimate of damages as a bid item. SA-26, ABE Final Estimate.

On July 25, 2018, ABE provided its preliminary partial estimate of damages, composed a sketch of the different unit configurations, in the approximate amount of $1,100,000.00. A-115.

The Final Estimate

On October 3, 2018, the Plaintiff provided Defendant its engineer's Damage Assessment Report dated August 20, 2019 and Pre-Construction Estimate (the "Final Estimate"). SA-26; 41-43, Final Estimate and correspondence transmitting same.

There were 24 units damaged by the hurricane. The building has 8 separate unit floor plans. Because the damage was uniform throughout the 24 units that were damaged by Hurricane Irma, ABE used the Xactimate program, which is standard in the industry, to calculate the damages based on the 8 separate unit floor plans. Xactimate automatically applies the cost of construction materials in South Florida. The cost to repair any damaged unit was dependent on which of the 8-unit floor plans were at issue. The 8 cost amounts were: 1) $76,193.18; 2) $60,563.24; 3) $77,396.04; 4) $76,193.18; 5) $66,792.14; 6) $71,831.96; 7) $63,263.47; and 8) $66,750.76. SA-32. ABE then used the program to extrapolate the total

damage to the 24 damaged units depending on each one's floor plan to create the Final Estimate in the amount of $6,371,757.56 for interiors and balconies. SA-32, "Total Interior with Balconies." The roof damage totaled $412,510.14. SA-26. There are 13 damaged hallways on the property. ABE used the damage calculation for one hallway in the amount of $6,266.44 to extrapolate the uniform damage to each of the 13 damaged hallways in the building for a total of $81,463.72. SA-28, "Hallways." SA-166. The "Elevator and Mechanical" damage in the amount of $150,000.00 is in the Final Estimate as a bid item provided by ThyssenKrupp. SA-26. Therefore, the Final Estimate totaling $8,273,234.17 was not inflated, rather simply reflects all reported damaged areas. Defendant did not "do the math," or more likely did not even take the time to understand the preliminary estimate used to extrapolate the damages to the units and hallways. This is because, from the outset of the claim, Defendant did everything possible to not do any adjusting work on the claim. This is evident from its decision to arbitrarily advise Plaintiff that the damages fell below the deductible, demand that Plaintiff provide an estimate, and never provide one itself. Defendant either does not know how to estimate damages or, more likely, made up the accusation of fraud because it did not like Plaintiff's number. It cannot be that Defendant's desk adjuster, field adjuster and attorneys did not truly

understand how the final estimate arrived at $8,273,234.17. Each of those parties know how the Xactimate program works as it is standard in the industry and used by adjusters for both insureds and insurers.

On October 4, 2018, the day after delivering the Final Estimate, Plaintiff's counsel again demanded Defendant's estimate. SA-166.

> Please note we have gone above and beyond. This is an approximately $9,000,000.00 claim affecting more than 80 families. Most notably, we gave you notice that there are life-safety issues present. The policy does not require us to produce an estimate, nor an engineer's report. Obtaining these extraneous items create delay and significant recoverable expenses. However, you requested these items and we have produced them in good faith. I hope now, after over a year, you reciprocate in good faith and send payment immediately.
>
> I would appreciate a response by no later than 4 pm tomorrow, Friday, October 4, 2018.
>
> Let's please try to get this matter resolved.

SA-39.

On October 5, 2018, CJW's account manager responded.

> Leo,
>
> I am the account manager assigned to handle this claim. I am in receipt of the estimates you provided on behalf of the Insured. Now that we have additional damages being claimed, including the roof, we will need an additional inspection of the property. Mike Fuller with Sedgwick will contact you to schedule the inspection.

SA-39. The assertion that the roof was not in the Final Estimate was factually incorrect as shown above. As to the "additional damages," the Final

Estimate took into account all the damages by extrapolating the cost of the repairing the 24 damaged units depending on floor plan and the cost of repairing the 13 damaged hallways. And Defendant knew that Thyssenkrupp handled the elevators as it was put on notice and inspected them at the same time. Defendant knew or should have known about all of the damages being claimed in the Final Estimate, but chose to label these damages as "additional damages" to support its scheme to launch an improper fraud defense by alleging some sort of improper inflation between the preliminary July 25, 2018 partial estimate of damages and the August 20, 2019 Final Estimate and Damage Assessment Report.

On October 5, 2018, Plaintiff's counsel responded and made it clear that there were no "additional damages" and that Plaintiff had always sought "all damages" caused by the hurricane, including the roof. SA-38. In spite of Defendant's failure to adjust the claim in good faith as required by statute, Plaintiff agreed to yet another inspection and wanted the date to be agreed to at that time. SA-37. Defendant's adjuster responded the same day two (2) minutes later saying simply "thanks." SA-32. Plaintiff responded within fifteen (15) minutes asking "[c]an we set up the inspection for today, please?" SA-32.

Defendant ignored the request and finally responded 10 days later on October 15, 2018 asking Plaintiff's counsel to "give me a call to discuss." SA-37. Incredibly, Defendant's adjuster wrote later in the day: "I am still coordinating the engineers but it looks like 25-27 of October **to inspect all units and full building**." SA-37 (emphasis supplied). Defendant now wanted to inspect the entirety of the building inside and out despite its assertion that the new inspection was due to "additional damages," further illustrating the falsity of Defendant's position. Apparently, Defendant did not bother to fully inspect the building during the initial October 13, 2017 inspection when it adjusted the claim a year earlier.

On October 16, 2018, Defendant requested all invoices for the repairs Plaintiff made out of pocket and the floor plans for the building. SA-35. On October 25, 2018, the property was reinspected. A-318.

On November 6, 2018, Plaintiff again asked for Defendant's "estimate and report of damages at this time." SA-34. To which Defendant replied: "We're working on the file." *Id*. On November 28, 2018, Plaintiff again wrote and requested Defendant's estimate and report of damages. SA-33. On November 29, 2018, Defendant wrote back: "Our engineers are in the process of making their determinations of findings and estimate preparation." *Id*. This contradicts Defendant's prior statements when it told Plaintiff as far

back as October 13, 2017, one year earlier, and again on March 2, 2018, that it had determined that the claim was covered but below deductible. A-317; 318. Later on November 29, 2018 Plaintiff wrote back: "It's been months, when will it be done?" SA-169.

Examination Under Oath

It was a new year, 2019, and with it came a new request – an Examination Under Oath. Plaintiff agreed and on May 20, 2019 the association's Vice President Jesus Bujan, Esq., a practicing lawyer in good standing with The Florida Bar since 1983, sat for the EUO. A-160. He executed a Sworn Proof of Loss in front of Defense counsel at that time in the same amount of ABE's Final Estimate in the amount of $8,557,292.42. SA-277-278. A Sworn Proof of Loss had not been requested until the EUO. Mr. Bujan brought two phone book-sized volumes worth of information with him. A-184. The roof on the Property was replaced 12 years earlier in 2007 along with the main air conditioning unit on the roof, alarm system, security cameras, and electronic key openers. A-175-177; 250. The Plaintiff was provided a twenty (20) year warranty for the roof starting December 14, 2007. A-255.

The initial damage that was a life-safety issue consisted of damaged balcony railings throughout the property that were blown off the building,

hanging from the twelfth and fifteenth floor and visible at street level from Collins Avenue. A-203; 229-230. He testified to the March 22, 2018 special assessment in the amount of $63,900.00 and a subsequent assessment on December 19, 2018 in the amount of $63,000.00. A-199 and 202, respectively. The special assessments were necessary to begin repairs to the extensive damage to the Property while awaiting funds from the Defendant. A third assessment was made on January 15, 2019. A-207.

Water Damage

The extensive water intrusion into the 3rd floor resulted in 12 inches of water into all of the units and the social room. A-211. The water intrusion affected all of the units throughout the entire building. A-217-218. Water came in through two large balconies, the windows, the elevator shaft and into the lobby. A-220-221. "Every floor had water intrusion." A-225:2; 256. Water went into the electrical room and came all the way down from the 11th floor. A-233-234. Penthouse 6 facing Collins Avenue "looked like you were basically in the beach – The entire floor was full of sand." A-247:8-10. Every floor has resulting damage to the drywall and in the hallways. A-256. The water also caused black mold so baseboards were removed. A-259. Every floor was remediated for water damage. A-263. On January 11, 2018, the Plaintiff was cited by the City for having an unsafe structure. A-209; 275.

Balconies and Railings

Some balcony railings were completely blown off and others were hanging from the building and visible at street level. A-203; 229-230; 239-244. The preliminary estimate to repair and shore up the balconies was $33,000.00. A-241; 273. The Plaintiff hired a company to put up wood to attempt to secure the balconies and make temporary repairs as it was a life-safety issue for the residents. A-208-209; 236. For example, Mr. Bujan was living in the penthouse with two small children with no balconies. A-273.

On October 19, 2017, the City cited Plaintiff for several violations related to the fire alarm and sprinkler suppression system ("the System"). R-267. Four (4) months later in January 2018 the City reported seventy-nine (79) problems with the System. A-266-267. The System was brand new prior to the hurricane. *Id*. The water pumps for the System needed to be replaced. A-268. The Plaintiff entered into a payment plan with the company repairing the System due to lack of funds. *Id*.

Elevator Damage

The elevators in the building were severely damaged and are being repaired piecemeal. A-263. Several people have been stuck in the elevators as they break down sporadically. A-266. On May 21, 2018, ThyssenKrupp gave an estimate to repair the elevators but they have not been repaired

because the claim has not been paid. A-264. The damage to the elevators has resulted in another fine by the City. A-263.

Electric Room Damage

There was water intrusion into the electric room. A-233-234. The unit in the room was replaced in 2012. *Id*. However, Plaintiff has been unable to afford to have the electrical room and the components related to it throughout the building inspected to determine any life-safety issues regarding its condition due to lack of funds. A-235.

Air Conditioner Damage

The air conditioning unit on the roof of the building was damaged with doors on the unit being ripped off. A-233.

Other Damage

The southeast corner of the building facing the ocean came off. A-237. Pieces of the building were falling off. A-282. Cameras were ripped off or suffered water damage. A-206-207. The backup generator for the building was inspected immediately before the storm and was in working order. A-211; 270-271. It broke during the hurricane and needed to be repaired. *Id*. Drywall throughout the building has not been repaired. A-248. And the building is still having water intrusion problems. A-251. Attorney Bujuan's testimony concluded after four and a half hours. A-162.

Continued Post-Loss and Extra Post-Loss Compliance

On May 31, 2019, Plaintiff's counsel *sua sponte* provided defense counsel, Evelyn Merchant, Esq., the additional documents requested at the EUO and requested payment of the undisputed amount of the claim. SA-55.

On June 2, 2019, Plaintiff's counsel wrote defense counsel suggesting an undisputed payment now and then appraisal "might be a good outcome." SA-54. In fact, from May 31, 2019 to November 18, 2019, Plaintiff's counsel asked for appraisal 3 times and an undisputed payment 7 times. After continuing to attempt some sort of settlement Plaintiff's counsel asked if he was being "coaxed into suing." SA-51-52.

On November 6, 2019, Defendant responded to Plaintiff's Civil Remedy Notice. SA-77. In the letter Defendant admitted coverage for a third time stating: "The Insured first gave notice of the loss on October 2, 2017. The Property was inspected on October 13, 2017 and covered damages were found not to exceed the applicable deductible . . .." *Id*.

On October 11, 2019, Defendant asked for the extracontractual EUO of Plaintiff's expert ABE. SA-59. After being challenged by Plaintiff as to the impropriety of the requested EUO, Defense counsel conceded that she did not have the right to take ABE's EUO under the terms of the policy. SA-58-59. On October 17, 2018, Plaintiff's counsel reminded defense counsel that

all post-loss obligations had been long complied with and urged it to "pay additional funds (and express how much) or stand on their original 'covered but under deductible' decision." SA-57.

On November 15, 2019, Defendant wrote that it would be denying the claim but stated they would like to continue to discuss settlement – something completely at odds with the current position that the policy is void.

> Leo,
> Sorry, don't think we will have a bow. Client does not want to go to appraisal. They have instructed that we deny the claim based on the claim being grossly inflated beyond its reasonable value. I am 70% done with the denial letter. I will finish over the weekend, but thought you deserved our response as promised. **They did tell me that they would consider discussing settlement, but our numbers are not even close. I am happy to discuss a number.** Call if you want over the weekend.

SA-66, November 15, 2019 email (emphasis supplied). So, the sole issue was and remains the amount of the loss.[3]

The Lawsuit

On November 18, 2019, Plaintiff filed suit. A-9. On December 12, 2019, Plaintiff moved to compel appraisal. A-90. On March 26, 2020, Defendant filed its Amended Answer and Affirmative Defenses to Plaintiff's Complaint. A-96. Defendant's 7th affirmative defense stated that "Plaintiff

[3] Defendant's first denial letter was sent on January 28, 2020, two months after the filing of the lawsuit and 848 days after the initial claim. A second denial letter was sent on July 7, 2020. A-318.

has falsely inflated the claim well beyond it actual value which constitutes an intentional misrepresentation and/or concealment of a material fact." A-105. Of note, no allegation of fraud or misrepresentation was claimed other than the Defendant's belief the Final Estimate was too high. Defendant did not comply with Fla. R. Civ. P. 1.120(b) requiring: "In averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances permit." With multiple inspections performed, thousands of documents reviewed, multiple interviews taken, and hundreds of pictures reviewed, one would think Defendant would have been able to comply with the Rule.

On July 23, 2019, Defendant filed its Amended Response in Opposition to Plaintiff's Motion to Compel Appraisal. A-113. Because Defendant did not understand, or chose to ignore how the Final Estimate was formulated, Defendant argued that Plaintiff had falsely inflated the claim from the July 25, 2018 preliminary estimate of $1.1 million to the Final Estimate dated August 20, 2018 in the amount of $8.2 million. A-2. In its "Statement of Facts" it claimed that its inspection of the property revealed damage to the balconies, but no damage to the roof or interiors. A-115. Defendant did not mention attorney Bujan's EUO testimony regarding the extensive damage to the interior of the property and the pictures showing

water intrusion throughout the building. Defendant stated that it "advised that it estimated the cost to repair the covered damages to the property did not exceed the Policy's $489,939.15 deductible." A-115. To date, Defendant has never disclosed the amount of its initial adjustment of the loss when it determined the claim to below deductible. Indeed, to date, Defendant has never provided any estimate after its multiple after-the-fact inspections and repeated requests by Plaintiff and promises to produce same by Defendant. Defendant's Statement of the Fact raised ABE's July 25, 2018 Xactimate estimate in the amount of "$1.1M" and then jumped straight to Mr. Bujan's execution of the Sworn Proof of Loss on May 20, 2019 in the amount of $8,557,292.42 to make it appear as if nothing had occurred between those two dates. A-115. Defendant did not mention the receipt of the Final Estimate 7 ½ months earlier on October 3, 2018 in the same exact amount of the later executed May 20, 2020 Sworn Proof of Loss. It did not acknowledge that the Final Estimate was not fraud, but rather, a failure on Defendant's part to "do the math." Defendant went on to discuss the inapplicable case law that a denial of coverage precludes appraisal. A-116-117. It did not tell the trial court that it had admitted coverage on October 13, 2017 and in the March 2, 2018 email and in its November 6, 2019 response to the Civil Remedy Notice each time confirming covered damage to the

property but claiming it was below deductible. This is nothing more than a case where the Defendant refused to do its job, never adjusted the claim, passed its responsibilities onto the Plaintiff, then found its only escape route: to simply call Plaintiff's estimate fraud and cross its arms. Defendant's behavior should not be encouraged.

Hearing on Motion to Compel Appraisal

On July 27, 2020, the trial court held a hearing on the Motion to Compel Appraisal and Abate Action. A-303. In Plaintiff's opening, the trial court was informed that Defendant had admitted there was coverage on October 13, 2017, March 2, 2018 and on November 6, 2019, but that Defendant claimed the loss was below deductible. A-306-307. Defense counsel agreed that post-loss obligations had been complied with – "[w]e agree that they substantially complied with post-loss conditions to the extent that they gave an EUO, they allowed inspections, blah, blah, all of those things." *Id*. Defense counsel went on to argue there was no need for the hearing on post-loss compliance stating that it denied the claim due to an alleged inflation in Plaintiff's Final Estimate. A-307-308. None of the cases cited by Defendant in support of its fraud argument contained a fraud allegation based merely on the Defendant disagreeing with an insured's estimate. *Id.* In all of

Defendant's distinguishable cases, there were supplemental facts and arguments connected to the alleged fraud: missed post loss obligations, deception regarding the occurrence of the loss, inclusion of damage known not to be related to the underlying cause, and other issues, that coupled with a question of amount. *Id.* None of Defendant's distinguishable fraud cases deal solely and exclusively with an amount of loss difference – such as here. A-313.

Plaintiff's counsel pointed out that Ms. Merchant had made the same exact argument that inflation of a claim by itself is enough to void the policy in *200 Leslie Condominium Association, Inc. v. QBE Ins. Corp.*, 965 F. Supp. 2d 1386 (S.D. Fla. 2013), but the district court rejected that argument. *Id*. at 1403-1405. Plaintiff's counsel walked the trial court through the claim from the admission of coverage and that there had been no inflation of the amount of the damages. A-317-319. In response to questioning from the trial court Defense counsel stated:

> MS. MERCHANT: Your Honor, we have alleged that they included damage that was in their amount that is not damaged, and it was not damaged by the hurricane. We also set forth –
>
> THE COURT: Let me make sure I understand that. So what you're saying is in the sworn proof of loss and the 8 million, and let's just say whatever it may be, roof damage you're claiming – I made up the roof damage – but you're claiming – although it may be accurate – they're claiming that that damage is by the

> hurricane, and you're saying they know that it's not and it's fraudulent that they're putting it in; is that what your argument is?
>
> MS. MERCHANT: That's one of the arguments, yes, Your Honor.
>
> THE COURT: Okay.
>
> MS. MERCHANT: Same goes for windows and sliding glass doors, I believe, as well as replacement of the roof in its entirety.
>
> This is a relatively new roof in the sense that it was only ten years old. It was replaced after Wilma.

A-320.[4] Plaintiff pointed out the obviousness of Defendant's strategy which is to gut the appraisal clause from the policy by claiming if there is a difference in each parties' amount of loss then the claim must be fraudulent. A-331. The trial court ruled that the appraisal issue and fraud would go forward simultaneously on a dual track and that the jury may not see the appraisal award if the Defendant prevails on its fraud claim at trial. A-331-334.

The trial court entered an order that included a neutral umpire to oversee the appraisal. A-5. Therefore, there would be two disinterested

[4] Defendant, through counsel, is trying to attribute a motive to or incentive for Plaintiff to claim the roof was damaged by the hurricane. That makes absolutely no sense since Mr. Bujan told Ms. Merchant during his EUO that the roof has a 20-year warranty that will run out in 2027. If there was damage to the roof not caused by the hurricane, it would presumably be covered under the 20-year warranty.

appraisers and a neutral umpire inspecting the property to determine the scope and amount of damages caused by Hurricane Irma.[5] Defendant moved for a stay which was granted by the trial court for 30 days. Defendant filed the Motion to Stay and this Court ordered a response. Thereafter, the stay was denied.

SUMMARY OF THE ARGUMENT

There is no case in the state of Florida that supports Defendant's position that a dispute as to the amount of loss on its own constitutes fraud. If that were the case, then any insurer could gut the appraisal provision of a policy when it did not like an insured's damage calculation – something that happens routinely. Conversely, it would make every claim that later proved to be more than the insurer's original estimate a fraud committed by the insurer.

The Second District in *Leeward Bay* adopted this Court's precedents allowing a dual track approach to appraisal and coverage on the same facts as those before this Court. The district court in *200 Leslie* rejected the same argument being made in this matter. In both of those cases the counsel for the insurer was the counsel for Defendant in this matter. It is clear that this

[5] Plaintiff's counsel stipulated below to a disinterested appraiser. *See State Farm Florida Ins. Co. v. Crispin*, 290 So. 3d 150 (Fla. 5th DCA 2020).

case involves the amount of loss; any coverage dispute is intertwined with the amount of loss. As the Second District found in *Leeward Bay,* "[t]he appraisal would likely assist the trial court when it later determines whether Leeward Bay fraudulently inflated its claim."

There is no case in the state of Florida that supports Defendant's position that a dispute as to the amount of loss by itself is fraud. However, there are two cases *Leeward Bay* and *200 Leslie* that have found it is not. One state court of appeal and one U.S. district court have rejected the Defendant's argument. This Court should too. The order on appeal is properly affirmed.

STANDARD OF REVIEW

It is within the trial court's discretion to decide "the order which the issues of damages and coverage are to be determined by arbitration and the court." *Citizens Property Ins. Corp. v. Mango Hill Condo. Ass'n 12, Inc.*, 54 So. 3d 578, 581 (Fla. 3d DCA 2011) citing *Sunshine State Ins. Co. v. Rawlins*, 34 So. 3d 753, 754-55 (Fla. 3d DCA 2010). The compliance with all post loss obligations triggers the appraisal clause and allows the trial court

to exercise its discretion to order the parties to appraisal. *Mango Hill*, 54 So. 3d at 581.[6]

ARGUMENT

I. A DISPUTE SOLELY AS TO THE AMOUNT OF LOSS IS NOT FRAUD

There is no case in the state of Florida that supports Defendant's position that a disagreement solely over the amount of the loss constitutes fraud, misrepresentation or concealment. The law of the state of Florida requires fraud or misrepresentation be of a material fact, rather than a mere opinion or misrepresentation of the law. *Chino Elec., Inc. v. U.S. Fid. & Guar. Co.*, 578 So. 2d 320, 323 (Fla. 3d DCA 1991); *see also Thor Bear, Inc. v. Crocker Mizner Park, Inc.,* 648 So. 2d 168, 172 (Fla. 4th DCA 1994). Plaintiff has its opinion as to the scope and amount of the loss and Defendant, presumably, has its own. Indeed, that Defendant has an opinion about the amount of the loss at all can only be assumed because Defendant has consistently failed to provide an estimate of damages despite several requests. This leads to the very reasonable assumption that Defendant has

[6] Defendant argues that the trial court made no explicit findings and therefore review is *de novo*. Initial Brief at 4. The trial court was not required to make findings regarding the triggering of the appraisl clause because Defendant agreed that all post-loss obligations had been complied with and that it had admitted coverage on three separate occasions prior to suit.

never created an estimate and merely "eye-balled" its below deductible opinion to Plaintiff. And yet, Defendant has the gall to accuse Plaintiff's reasoned and calculated estimate of being fraudulent. As set forth in *Chino Elec.*, 578 So. 2d at 323, a difference of opinion cannot constitute fraud. Here, Defendant does not even have its own opinion, it simply does not like Plaintiff's. By the Defendant's own words, they simply think the estimate was too high or that certain items should not be included in the scope of damages. SA-195.

Leeward Bay At Tarpon Bay Condominium Association, Inc., 2D20-165, 2020 WL 6478224 is on all fours with this case.[7] American Capital appealed a nonfinal order compelling appraisal and staying the proceedings in favor of Leeward Bay. 2020 WL 6478224 at *1. The relevant facts follow.

> American Capital insured Leeward Bay's thirty-four buildings. After Hurricane Irma damaged its buildings, Leeward Bay filed a claim under the policy. American Capital agreed that approximately $76,000 of the loss was covered and issued payment. Leeward Bay subsequently submitted a proof of loss for $8,135,118 and requested an appraisal under the policy. The next month, Leeward Bay sued American Capital for breach of contract and moved to stay and compel appraisal. In response, American Capital alleged that the policy was void. It denied the claim, allegedly, because Leeward Bay overinflated its claim, thus voiding the policy because of fraud.

[7] Counsel for American Capital in that matter represents the Defendant in this matter. Counting *200 Leslie Condominium Association* and *Leeward Bay* this is the third known attempt by this counsel to make its flawed fraud argument.

> At the nonevidentiary hearing on the motion, American Capital reasserted its position that Leeward Bay's claim was void because Leeward Bay "falsely inflated the claim well beyond its actual value which constitutes an intentional misrepresentation and/or concealment of fact." American Capital contended that Leeward Bay included "things in their estimate that shouldn't have been included."
>
> The trial court found that the case was "a dispute as to scope of loss [or amount] not whether there is coverage," and granted Leeward Bay's motion. In its written order, the trial court directed the appraiser to "itemize each category and component of damage appraised, the cause of damage, as well as costs thereof."

2020 WL 6478224 at *1.

American Capital, like the Defendant in this matter, asserted that appraisal was premature because it claimed the overinflation of the claim constituted fraud voiding the policy because "there is no appraisable issue until and unless a trial court determines there is a covered loss to appraise." *Id*. Leeward Bay, like the Plaintiff in this matter, asserted American Capital cannot avoid appraisal by claiming fraud after it previously admitted coverage. *Id.* Further, the trial court properly exercised its discretion to allow the resolution of the appraisal issue first because it conserves judicial resources, the coverage dispute is preserved for later determination and the appraisal is necessary in order to resolve whether there is fraud. *Id*. The Second District found that a trial court may order appraisal when the demand

for appraisal is ripe. *Id*. at *2 citing *Fla. Ins. Guar. Ass'n v. Hunnewell*, 173 So. 3d 988, 991 (Fla. 2d DCA 2011) (citing *Mango Hill Condo. Ass'n 12, Inc.*, 54 So. 3d at 581). Additionally, as in this matter, there was no claim of failure to comply with post-loss obligations. *Leeward Bay*, 2020 WL 6478224 at *2. The demand is ripe when post-loss conditions are met and the insurer has had a reasonable opportunity to investigate and adjust the loss and there is a disagreement as to value. *Leeward Bay*, 2020 WL 6478224 at *2 citing *Citizens Prop. Ins. Corp. v. Galeria Vilas Condo. Ass'n*, 48 So. 3d 188, 191 (Fla. 3d DCA 2010) and *State Farm Fla. Ins. Co. v. Hernandez*, 172 So. 3d 473, 476-77 (Fla. 3d DCA 2015).

The Second District adopted this Court's precedents that allow for a dual track allowing the appraisal and coverage issues to go forward simultaneously. The dual track approach is necessary to avoid any "adverse effects on the expeditious, out of court deposition of litigation" and to "save[] 'judicial resources which might otherwise be required in resolving the factual and legal issues involved in the [coverage issue] by a relatively swift and informal decision by the appraisers as to the amount of loss.' " *Leeward Bay*, 2020 WL 6478224 * 3 citing *Rawlins*, 34 So. 3d at 755 (quoting *Paradise Plaza Condo. Ass'n v. Reinsurance Corp. of N.Y.*, 685 So. 2d 937, 941 (Fla.

3d DCA 1996) (en banc)). In adopting this Court's dual-track approach, the Second District stated:

> We now join the Third District and adopt the dual-track approach because the specific facts of this case demonstrate why it is preferable. Notably, American Capital initially conceded coverage. It then claimed fraud when it disagreed with Leeward Bay's allegedly overstated estimate of its loss. It seems clear to us that this case necessarily involves the amount of loss; any coverage dispute is intertwined with the amount of loss. The appraisal would likely assist the trial court when it later determines whether Leeward Bay fraudulently inflated its claim. The dual-track approach is not only judicially efficient, see Rawlins, 34 So. 3d at 755, but it may also be necessary where the findings in the appraisal are interconnected to the trial court's finding of liability.

2020 WL 6478224 at *3. The trial court's ruling in this matter mirrors that of the trial court in Leeward Bay affirmed by the Second District.

> THE COURT: Okay. Thank you.
>
> All right. So here's what we're going to do, a few issues. First of all, I understand that there's the fraud accusation. Again, I'm not opining on it one way or the other. It doesn't appear to me that just because of the detrimental reliance it would be summary judgment doubt. But again, I'm not ruling on that today without other evidence.
>
> But in addition, it doesn't appear to me that it wouldn't be more of an affirmative defense to a jury than barring everything else that happens between now and a jury trial.
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> So based on that, and just like defense said, it may come down the road where it changes in the appraisal, but the Court believes that down the road is now, that there's no harm to defense if there is an appraisal, that this needs to go on both tracks. It's possible

> that the appraisal amount and/or process won't end up being relevant or admitted at trial.
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> But again, if both parties are agreeing that the fraud issue – I don't think plaintiff's even saying or agreeing to it being a fraud issue, but assuming they were, agreeing that it was a fraud issue and it was only a jury question, then this court would have both the breach of contract, we're moving forward with the appraisal, and the fraud denial simultaneously. Because unless there's a reason for the Court to believe that there's overwhelming evidence that the fraud exists, I'm not going to stop, which is really what you're asking for, or staying all other proper remedies.
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> So based on that, the Court is granting the appraisal and we'll take up everything else as it comes up in time.

A-332:21-25-334:1-6.

The trial court's ruling is identical to the ruling in *Leeward Bay*. And it is imminently correct. The issue here is a disagreement as to the amount of the loss as revealed by the evidence. The Defendant admitted three times during the adjustment of the claim that there is a coverage for hurricane damage. Causation is "an amount-of-loss question for the appraisal panel when an insurer admits to a covered loss and the parties disagree regarding the amount of the loss." *Leeward Bay*, 2020 WL 6478224 at *2 citing *Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002); *Mango Hill #6 Condo. Ass'n*, 117 So. 3d 1226, 1227 (Fla. 3d DCA 2013). The Defendant does not agree to Plaintiff's number. That is not fraud. By Defendant's logic the appraisal provision would be written out of any insurance policy when an

insurer disagrees with an insured's estimate of damages – which happens routinely – making every disagreement fraud on the part of the insured. Moreover, if Defendant's logic was correct, insurance carriers including Defendant would be guilty of fraudulent conduct on each of the millions of claims that have ended in appraisal in an amount exponentially higher than its initial adjustment. The argument simply does not make sense in this context. If it were not for differences of opinion as to the amount, the appraisal process that Defendant wrote into its policy would not exist.

Further, the issue of the amount of the loss and Defendant's allegation of fraud are inextricably intertwined. The whole purpose of the appraisal is to determine the amount of the loss which is the dispute here and the basis for the Defendant's attempt to claim fraud. "The appraisal would likely assist the trial court when it later determines whether [Plaintiff] fraudulently inflated its claim." *Leeward Bay,* 2020 WL 6478224 at *3.

This Court's *en banc* decision in *Paradise Plaza* supports the trial court ruling. In *Paradise Plaza*, the insurer "rather portentously referred the claim to the fraud division of the Insurance Commissioner's Office and then denied 'coverage' essentially because, it said, any nonfraudulently claimed windstorm damage fell within the policy's $28,000.00 deductible." 685 So. 2d at 938. It was the insurer seeking to enforce the appraisal provision in

that matter. *Id*. In agreeing with the insurer's argument, this Court found that the rule espoused by the insured to require the coverage determination regarding the issue of coverage based fraudulently claimed damage go forward first "might have severely adverse effects on the expeditious, out of court disposition of litigation, which is the very reason that arbitration is such a favored remedy." citing *Roe v. Amica Mut. Ins. Co.,* 533 So. 2d 279, 279 (Fla. 1988) *State Farm Fire & Casualty Co. v. Middleton,* 648 So. 2d 1200 (Fla. 3d DCA 1995).

Defendant acknowledges this Court en banc opinion in *Paradise Plaza* but seeks to distinguish it citing *Johnson v. Nationwide Mutual Insurance Company*. Initial Brief at p. 12 fn. 3. It claims that *Johnson* requires the coverage issue to go forward first when the insurer denies there is a denial of a claim. *Id*. However, *Johnson* holds that when an insurer admits coverage but there is a disagreement as to the amount of the loss, then it is for the appraisers to arrive at the amount to be paid. 828 So. 2d at 1025-26. Here the Defendant admitted coverage three (3) times. The plaintiff's sinkhole claim in *Johnson* was never covered by Nationwide. And Defendant's position is belied by Defense counsel's email to Plaintiff's counsel.

Leo,

> Sorry, don't think we will have a bow. Client does not want to go to appraisal. They have instructed that we deny the claim based on the claim being grossly inflated beyond its reasonable value. I am 70% done with the denial letter. I will finish over the weekend, but thought you deserved our response as promised. **They did tell me that they would consider discussing settlement, but our numbers are not even close. I am happy to discuss a number.** Call if you want over the weekend.

SA-66, November 15, 2019 email (emphasis supplied). The sole issue was and remains the amount of the loss.

The order on appeal is properly affirmed and this matter remanded for further proceedings so as to avoid any "adverse effects on the expeditious, out of court deposition of litigation" and to "save[] 'judicial resources which might otherwise be required in resolving the factual and legal issues involved in the [coverage issue] by a relatively swift and informal decision by the appraisers as to the amount of loss.' " *Leeward Bay*, 2020 WL 6478224 * 3 citing *Rawlins*, 34 So. 3d at 755 quoting *Paradise Plaza*, 685 So. 2d at 941.

II. DEFENDANT'S CASES ARE NOT ON POINT

Defendant relies on *State Farm Fire and Cas. Co. v. Wingate*, 604 So. 2d 578 (Fla. 4th DCA 1992), to argue that Plaintiff's claim cannot proceed to appraisal. In that matter, there was no admission of coverage at any time. Here, coverage was admitted 3 times. In *Wingate*, plaintiff's home was destroyed by fire. 604 So. 2d at 579. State Farm denied payment and voided the policy for concealment and/or misrepresentation of the cause of the fire

and circumstances surrounding the fire. *Id*. That case is unhelpful to the Defendant. Here, the only thing that Defendant claims was fraud is Plaintiff's opinion of the damage model. That is exactly what appraisal exists to determine. **Defendant's logic would make every dispute over the amount of loss a potential – and wholly subjective - claim of fraud by the insurer to thwart the insured's right to appraisal and effectively write the appraisal clause out of the policy.**

Defendant's reliance on *Corzo v. American Superior Ins. Co.*, 847 So. 2d 584 (Fla. 3d DCA 2003), is unhelpful. In that matter plaintiffs made a claim for damages to their home due to nearby blasting activities. *Id*. at 585. The insurer denied the claim asserting coverage is excluded by the insurance policy. *Id*. Plaintiffs filed suit demanding appraisal. *Id*. Defendant moved for summary judgment which was granted. *Id*. On appeal this Court upheld the grant of summary judgment on the suit for appraisal as there was never an admission of coverage. *Id*. Those facts are not even close to being on point in this matter.

Johnson, 774 So. 2d 779, did not involve a prior admission of coverage as the insurer claimed that the policy did not cover earth movement which it contended was the cause of the loss. *Id*. at 780. There was never an admission of coverage.

In *Gonzalez v. State Farm Fire and Cas. Co.*, 805 So. 2d 814 (Fla. 3d DCA 2000), the insurer denied the claim under the policy's exclusion for earth movement and therefore there was no coverage for the claim. *Id*. at 817. Again, there was no prior admission of coverage.

In *Schneer v. Allstate Ind. Co.*, 767 So. 2d 485 (Fla. 3d DCA 2000) the insurer denied a claim for fraud. There was no admission of coverage.

Here, the Defendant admitted coverage 3 separate times. Plaintiff's Final Estimate clearly shows how the damage amount was calculated. Defendant simply does not like the amount in Plaintiff's estimate. Defense counsel stated during the July 27, 2020 hearing: "Your Honor, we have alleged that they included damage that was in their amount that is not damaged, and it was not damaged by the hurricane." A-319. Counsel continued claiming fraud because due to its opinion there was no roof damage, nor damage to the windows and sliding glass doors included in the estimate. A-319. This is a classic dispute as to the scope and amount of the loss. *See Johnson*, 828 So. 2d at 1022. Defendant admitted that there is a covered loss 3 times but disputes the amount and, therefore, appraisal is ripe. *Id*. It is clear Defendant is trying to "crowbar" a fraud argument into what is a simple dispute as to the scope and amount of the loss. Two disinterested appraisers and a neutral umpire will go to the property and

determine what is hurricane damage and what is not hurricane damage. *Johnson*, 828 So. 2d at 1022.

Looking behind the curtain reveals that this is solely an issue of Defendant disagreeing with the amount of the loss and nothing more. That is why Defense counsel wrote: "Client does not want to go to appraisal. They have instructed that we deny the claim based on the claim being grossly inflated beyond its reasonable value. I am 70% done with the denial letter. I will finish over the weekend, but thought you deserved our response as promised. **They did tell me that they would consider discussing settlement, but our numbers are not even close. I am happy to discuss a number.** Call if you want over the weekend." SA-66. It is no surprise that an insurer might think a claim is grossly inflated and that is why there are appraisal provisions in insurance policies like the one Defendant drafted in this matter. Defendant's position is particularly hypocritical when considering that Defendant pronounced to Plaintiff that its covered claim fell below deductible without even preparing an estimate of the damages. Defendant, to date, has not prepared one and everything Defendant has done as set forth in the record supports that Defendant has simply crossed its arms and refused to adjust Plaintiff's claim for years.

Again, there is no case in the state of Florida that holds the disagreement with the amount of the loss after admission of liability constitutes fraud. Disagreements over the scope and amount of loss are routine and can vary by wide margins. *See People's Trust Inc. Co. v. Tracey*, 251 So. 3d 931 (Fla. 4th DCA 2018) (defendant's estimate of $4,354.00 versus plaintiff's estimate of $55,718.85); *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess and Surplus Lines Ins. Co.*, 916 So. 2d 12 (Fla. 3d DCA 2005) (defendant's estimate in the amount of less than $1,000.00 versus plaintiff's for $716,000.00); *ABC University Shops, LLC v. Scottsdale Ins. Co.*, 2018 WL 6271839 (Fla. S.D. 2018) (defendant's estimate in the amount of $1,266.68 versus plaintiff's estimate of $996,000.00). However, that disagreement over the scope and amount of the loss without some other conduct does not constitute fraud. In-fact, Defendant has **never** articulated the alleged fraud in its affirmative defense, response to the motion to compel appraisal, during the hearing on the Motion to Compel Appraisal, in the Motion to Stay or Initial Brief before this Court.

This Court should reject the Defendant's argument as the Second District did in *Leeward Bay* and the district court in *200 Leslie*. The Defendant's argument would allow it and other insurers to deny a claim when it disagreed with the amount of the insured's estimate of damages after

admitting there was a covered loss. This is simply an amount of loss dispute and appraisl is ripe. The order on appeal is properly affirmed and the matter allowed to proceed to appraisal.

III. CONCLUSION

For the foregoing reasons this Court properly affirms the order on appeal and remands this matter for further proceedings.

Dated: January 15, 2021.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Florida eFiling Portal to all counsel of record on this 15th day of January 2021.

Respectfully submitted,

/s/ Paul B. Feltman
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CERTIFICATE OF COMPLIANCE

I certify that this Petition has been submitted in Arial 14-Point font, and that the number of words in this brief total 8,426 in compliance with Fla. R. App. P. 9.045.

*/s/ Paul B. Feltman*_____