

**IN THE SUPREME COURT OF FLORIDA**

PETER JOHNSON AND CHRISTINE  
JOHNSON,

Petitioners,

vs.

CASE NO. SC01-91  
Lower Tribunal No. 2D00-287

NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Respondents.

\_\_\_\_\_ /

STATE FARM FIRE AND CASUALTY  
COMPANY,

Petitioner,

vs.

CASE NO. SC01-321  
Lower Tribunal No. 3D00-185

MARIANO R. GONZALEZ AND RENE  
GONZALEZ,

Respondents.

\_\_\_\_\_

**ANSWER BRIEF ON THE MERITS OF RESPONDENTS,  
MARIANO R. GONZALEZ AND RENE GONZALEZ**

\_\_\_\_\_

LINDA SPAULDING WHITE  
DOUGLAS T. MARX  
CONRAD & SCHERER, LLP  
Attorneys for Respondents  
P.O. Box 14723  
Fort Lauderdale, FL 33302  
Telephone: (954) 462-5500

Facsimile: (954) 463-9244

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

STATEMENT OF THE CASE AND OF THE FACTS ..... 3

SUMMARY OF THE ARGUMENT ..... 8

ARGUMENT ..... 10

**THE CAUSE OF AN INSURED'S LOSS UNDER STATE FARM'S HOMEOWNERS POLICY IS A COVERAGE QUESTION TO BE RESOLVED BY THE COURT, NOT AN AMOUNT OF LOSS QUESTION TO BE RESOLVED BY THE APPRAISERS.**

A. Standard of Review ..... 11

B. Whether the Insured's Loss was Caused by a Covered Peril under State Farm's Homeowners Policy is a Coverage Question for the Court, Not an Amount of Loss Question for the Appraisers ..... 11

C. The Plain Language of State Farm's Policy Confirms that Appraisers Determine Only the Amount of the Loss, Not its Cause ..... 23

D. The Majority of Jurisdictions Who have Addressed the Issue Agree that Causation is Not an Issue for the Appraisers. .... 28

CONCLUSION ..... 31

CERTIFICATE OF SERVICE ..... 32

CERTIFICATE OF TYPE SIZE AND STYLE ..... 33

**TABLE OF AUTHORITIES**

<i>Cases</i>	<i>Page No.</i>
<i>AIU Insurance Company v. Block Marina Investment, Inc.</i> , 544 So. 2d 998 (Fla. 1989) .....	22
<i>American Reliance Insurance Company v. Village Homes at Country Walk</i> , 632 So. 2d 106 (Fla. 3d DCA 1994) .....	15, 22
<i>Atencio v. U.S. Security Insurance Company</i> , 676 So. 2d 489 (Fla. 4th DCA 1996) .....	13
<i>Auto Owners Insurance Co. v. Kwaiser</i> , 476 N.W. 2d 467, 469 (Mich. Ct. App. 1991) .....	30
<i>Country Manors Association, Inc. v. Master Antenna Systems, Inc.</i> , 534 So. 2d 1187 (Fla. 4th DCA 1989) .....	23
<i>Florida Select Insurance Company v. Keelean</i> , 727 So. 2d 1131 (Fla. 2d DCA 1999) .....	7, 13, 18
<i>Gonzalez v. State Farm Fire and Casualty Company</i> , 26 Fla. L. Weekly D390 .....	<i>passim</i>
<i>Hanover Fire Insurance Company v. Lewis</i> , 10 So. 297 (1891) .....	<i>passim</i>
<i>Hudson v. Prudential Property and Casualty Insurance Company</i> , 450 So. 2d 565 (Fla. 2d DCA 1984) .....	26
<i>Jones v. Utica Mutual Insurance Co.</i> , 463 So. 2d 1153 (Fla. 1985) .....	11
<i>Jordan v. General Insurance Company of America</i> , 88 S.E.2d 198 (Ga. Ct. App. 1955) .....	31

<i>Cases</i>	<i>Page No.</i>
<i>Marr Investments, Inc. v. Greco</i> , 621 So. 2d 447 (Fla. 4th DCA 1993) .....	11
<i>Merrimack Mutual Fire Insurance Company v. Batts</i> , 2001 WL 513882 (Tenn. Ct. App. May 15, 2001) .....	29
<i>Midwest Mutual Insurance Company v. Santiesteban</i> , 287 So. 2d 665 (Fla. 1973) .....	12, 20
<i>Munn v. National Fire Insurance Co.</i> , 115 So. 2d 54 (Miss. 1959) .....	30
<i>Nationwide Mutual Insurance Company v. Johnson</i> , 774 So. 2d 779 (Fla. 2d DCA 2000) .....	1, 7, 17, 18
<i>New Amsterdam Casualty Co. v. Blackshear</i> , 156 So. 695 (Fla. 1934) .....	<i>passim</i>
<i>Opar v. Allstate Insurance Company</i> , 751 So. 2d 758 (Fla. 1st DCA) .....	16, 17, 18
<i>Phoenix Insurance Company v. Branch</i> , 234 So. 2d 396 (Fla. 4th DCA 1970) .....	26
<i>Powertel, Inc. v. Bexley</i> , 743 So. 2d 570 (Fla. 1st DCA 1999) .....	11
<i>Preferred Insurance Company v. Richard Parks Trucking Co.</i> , 158 So. 2d 817 (Fla. 2d DCA 1963) .....	12
<i>Prudential Property and Casualty Insurance Company v. Swindal</i> , 622 So. 2d 467 (Fla. 1993) .....	23
<i>Roumel v. Niagara Fire Insurance Company</i> ,	

225 A.2d 658 (D.C. 1967) ..... 30

**Cases** **Page No.**

*Scottsdale Insurance Company v. DeSalvo*,  
666 So. 2d 944 (Fla. 1st DCA 1995) ..... 14

*State Farm Fire and Casualty Company v. CTC Development Corp.*,  
720 So. 2d 1072 (Fla. 1998) ..... 23

*State Farm Fire and Casualty Company v. Licea*,  
685 So. 2d 1285 (Fla. 1996) ..... *passim*

*State Farm Fire & Casualty Co. v. Lichtman*,  
227 So. 2d 309 (Fla. 3d DCA 1969) ..... 11

*United States Fidelity and Guaranty Company and Indemnity Company  
v. American Fire and Indemnity Company*,  
511 So. 2d 624 (Fla. 5th DCA 1987) ..... 23

*United States Fidelity and Guaranty Company v. J.D. Johnson Co., Inc.*,  
438 So. 2d 917 (Fla. 1st DCA 1983) ..... 26

*United States Fidelity & Guaranty Company v. Romay*,  
744 So. 2d 467 (Fla. 3d DCA 1999) ..... 12, 13

*Warth v. State Farm Fire and Casualty Company*,  
695 So. 2d 906 (Fla. 2d DCA 1997) ..... 26

**Statutes**

§ 627.426, Fla. Stat. .... 23

§ 627.428, Fla. Stat. .... 4

*Other Authorities*

15 COUCH ON INSURANCE § 210:42 (3d ed. 1999) ..... 13

## **INTRODUCTION**

This is a proceeding for discretionary review of a decision of the Third District Court of Appeal ("Third District") based on a certified conflict with the decision of the Second District Court of Appeal ("Second District") in *Nationwide Mutual Insurance Co. v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000). The Third District determined that the appraisers impermissibly decided whether the entire claim was within the coverage of the property insurance policy, and reversed the final judgment entered in favor of State Farm Fire and Casualty Company that confirmed the appraiser's award of \$0.00 for the homeowner's entire loss.

Petitioner, State Farm Fire and Casualty Company ("State Farm"), was the defendant before the trial court and the appellee before the Third District. Respondents, Mariano Gonzalez and Rene Gonzalez, (collectively, the "Gonzalezes" or "Respondents") were the plaintiffs before the trial court and the appellants before the Third District.

This case has been consolidated for review with Peter Johnson and Christine Johnson vs. Nationwide Mutual Insurance Company, Case Number SC01-91. The Gonzalezes adopt and incorporate by reference Peter Johnson's and Christine Johnson's (collectively, the "Johnsons") Initial Brief On The Merits. The Gonzalezes further adopt and incorporate by reference Pages 8 through 10 (Argument, Section 1)

and Pages 19 through 36 (Argument, Sections 4 and 5) of Nationwide Mutual Insurance Company's ("Nationwide") Answer Brief On The Merits.

The following symbols will be used:

(R. ) Record on Appeal

(B. ) State Farms's Initial Brief on the Merits

(J.B. ) Johnsons' Initial Brief on the Merits

(N.B. ) Nationwide's Answer Brief on the Merits

(A. ) Appendix to State Farms's Initial Brief on the Merits

(A.A. ) Appendix to the Gonzalezes' Answer Brief on the Merits

All emphasis is supplied by counsel unless otherwise indicated.

## STATEMENT OF THE CASE AND OF THE FACTS

The facts pertinent to this appeal are not complex and, in large part, are undisputed. State Farm issued a homeowners policy to the Gonzalezes providing coverage for all losses to their home unless specifically excluded. Beginning in or around June, 1997, the Gonzalezes' home suffered structural damage, which they maintained was due to blasting activities of home developers in the surrounding areas. (R. 3 and 6-30) As a result of the damage sustained, the Gonzalezes submitted a claim to State Farm under their homeowners policy. By letter dated December 8, 1997, State Farm denied the claim in its entirety contending that the Gonzalezes' damages were not caused by blasting, but instead were caused by settlement, an excluded peril.

(R. 40-42) In their denial letter, State Farm stated:

Based on the circumstances of your loss and our inspection and investigation to determine the cause of loss, we regret to inform you that we ***cannot provide coverage for the damage*** to your tile floor. Your policy, FP-7923, insures your dwelling for accidental direct physical loss. However, there are certain exclusions and conditions which may apply. (R. 40)

State Farm based its denial of coverage on the report issued by Omega Engineering Consultants dated November 7, 1997, which concluded the following:

The cracking in the Gonzalez residence is not consistent with routine activity in buildings of this type and construction, and has not been caused by blasting

vibrations. The floor tile is a reflection of cracking in the foundation slab below. This foundation slab cracking is due to minor differential settlement caused by instability in the supporting soils. (R. 49-52)

Based upon State Farm's denial of coverage for the loss, the Gonzalezes filed suit against State Farm for breach of contract. (R. 2-30) The Gonzalezes alleged that they had made appropriate application for the benefits under the policy, but that State Farm had denied coverage and refused to pay them the benefits under the policy for the covered loss, and therefore, breached the contract. The Gonzalezes demanded a jury trial and sought all damages covered under the policy, as well as interest and attorney's fees pursuant to § 627.428, Fla. Stat.

State Farm generally denied the allegations in the complaint and asserted several defenses, including that the claimed damage was either not caused by a covered peril or was excluded by certain policy conditions. State Farm invoked its right of appraisal under the policy and moved to compel appraisal pursuant to the appraisal provision contained in the policy (R. 31-36), which provides, in pertinent part:

If you and we fail to agree on the *amount of loss*, either one can demand that the *amount of loss* be set by appraisal ... If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the *amount of the loss*. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the *amount of the loss*. (R. 35)

The parties disagreed over the propriety of an appraisal and its scope. Over the Gonzalezes' objection and affidavit filed in opposition, the trial court ordered the parties to complete an appraisal to determine not only the amount of the damage to the Gonzalezes' residence, but also the cause of the damages. (R. 38-42; A. 1) The Gonzalezes requested the court to reconsider or clarify its order, contending that State Farm had already retained an engineer who issued a report that concluded that the damage sustained was not the result of a covered loss. In essence, State Farm had already denied coverage for the loss. The Gonzalezes requested that the appraisers be required to place an actual monetary value on the subject loss without considering whether the loss was covered under the policy. (R. 43-56) The trial court denied any reconsideration of its order directing the appraisers to give an opinion as to both causation and damages. (R. 57)

As the Gonzalezes feared, State Farm's appraiser and the umpire appraiser found that the amount of Gonzalezes' damages was \$0.00. (A.A. 2) This award was predicated upon the conclusion that the Gonzalezes' damages were not caused by a covered peril under State Farm's policy. State Farm moved to confirm the appraisal award with the trial court. (R. 58-60) The Gonzalezes again objected and asserted that in entering the award the appraisers impermissibly decided the issue of whether the damage claimed was caused by a covered peril. The trial court, while noting the

apparent confusion in appraising damage in light of a coverage defense, confirmed the appraisal award and entered judgment in favor of State Farm. (A.A. 3; R. 61 and 64)

The Gonzalezes appealed the final judgment. (R. 62-63) The Third District reversed the final judgment and remanded the matter for further proceedings consistent with the opinion. Specifically, the Third District concluded that the appraisers had impermissibly decided whether the entire claim was within the coverage of the policy. (A.A. 5) Relying on this Court's decision in *State Farm Fire and Casualty Company v. Licea*, 685 So. 2d 1285 (Fla. 1996), the Third District determined that State Farm's defense to the claim was that there was "no coverage" under the policy for the loss as a whole. As such, the question of whether the loss was caused by blasting (a covered peril) or settlement of the foundation (an excluded peril) was for the court, not the appraisers. (A.A. 5) Because State Farm took the position that there was no coverage for the loss as a whole, there was no dispute as to the amount of damage, as in *Licea*. The Third District also granted the Gonzalezes attorney's fees and costs and remanded this issue to the trial court to fix the amount contingent on the Gonzalezes being the prevailing parties at the conclusion of the case. (A.A. 4)

The Third District denied State Farm's amended motion for rehearing en banc and motion for rehearing and clarification. State Farm also requested that the Third District certify conflict with *Florida Select Insurance Company v. Keelean*, 727 So.

2d 1131 (Fla. 2d DCA 1999), and later supplemented its motion to request that the court certify conflict with *Nationwide Mutual Insurance Company v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000). The Third District denied State Farm's motion for certification of conflict with *Keelean*, but granted its supplemental motion and certified conflict with *Johnson*. State Farm timely applied to this Court for review of that decision. This case and *Johnson* are now consolidated for review before this Court.

## SUMMARY OF THE ARGUMENT

The Gonzalezes submitted a property damage claim to State Farm after their house was damaged by nearby blasting activities. State Farm denied coverage for the claim, maintaining that the damage was not caused by blasting, but was caused by settlement and was excluded under the policy. After the Gonzalezes sued for breach of contract, State Farm invoked the policy's appraisal clause, which provides for an appraisal of the amount of loss only. State Farm, however, did not dispute the amount of the loss. Instead, it challenged whether the loss was covered at all and claimed that the amount of the Gonzalezes' damage was zero dollars.

State Farm convinced the trial court that appraisal was appropriate to determine both the amount of the Gonzalezes' loss and whether it was caused by a covered peril. In so doing, State Farm relied upon this Court's decision in *Licea*, notwithstanding *Licea's* pronouncement that appraisal is not binding when the insurer retains its right to "dispute the issues of coverage as to the whole loss..." *Id.* at 1288. That is precisely what State Farm did in this case. The Third District correctly reversed the trial court's ruling. The court found the facts of this case fell squarely within *Licea's* statement that coverage issues arise when the insurer denies coverage for the loss as a whole.

The same result should be reached when an insurer denies coverage for the

claim in part, as well. Coverage issues, including whether the loss was caused by a covered peril, must be resolved by the court and not the appraisers. Appraisal is limited to determining the actual cash value of the loss. State Farm's position in this case contradicts both of these well-settled principles under Florida law and the law in the majority of other jurisdictions addressing this issue.

State Farm's argument also contradicts the plain language of its policy. Appraisal is only appropriate when the parties disagree on *the amount of loss*. In order to circumvent the plain language of the appraisal clause and the parties' intent, State Farm ignores the language of its policy and embarks on a strained interpretation of what it submits are "coverage issues" included under *Licea*. Neither this Court nor any other Florida court has held that coverage issues are limited to "coverage defenses" in the context of appraisal clause cases.

If State Farm is correct, the ramifications will be unconscionable. It will effectively deny the Gonzalezes, and perhaps thousands of other insureds, of their day in court and their right to have the court resolve coverage disputes simply because the insurer denied the claim, whether in whole *or in part*, for lack of coverage. Surely, this result cannot be harmonized with Florida law, and contradicts any reasonable interpretation of the appraisal clause.

## ARGUMENT

### **THE CAUSE OF AN INSURED'S LOSS UNDER STATE FARM'S HOMEOWNERS POLICY IS A COVERAGE QUESTION TO BE RESOLVED BY THE COURT, NOT AN AMOUNT OF LOSS QUESTION TO BE RESOLVED BY THE APPRAISERS.**

State Farm denied coverage for the Gonzalezes' property damage claim in its entirety. After the Gonzalezes filed suit to compel coverage, State Farm invoked the policy's appraisal clause not because it disputed the amount of the loss, but because it contended that the damage was caused by settlement (an excluded peril) and not blasting (a covered peril). Relying on *dicta* from this Court's opinion in *State Farm Fire and Casualty Company v. Licea*, 685 So. 2d 1285 (Fla. 1996), State Farm convinced the trial judge that the appraisers could determine the issues of both causation and damages, despite State Farm's denial of coverage for the claim, and notwithstanding the plain language of the appraisal clause to the contrary. The Third District correctly reversed. The appraisal clause was never intended to deprive the Gonzalezes of their right to have a court, and not appraisers, decide all issues except for the amount of the loss. "Amount of loss" means just that -- the dollar value of the damages -- and nothing more.

### **A. Standard of Review**

This case involves the interpretation of a property insurance policy and, specifically, the scope of the appraisal clause. Florida courts have long held that the construction of an insurance policy and the extent of coverage is generally a question of law for the court. *See, Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153 (Fla. 1985); *Marr Investments, Inc. v. Greco*, 621 So. 2d 447 (Fla. 4th DCA 1993); *State Farm Fire & Casualty Co. v. Lichtman*, 227 So. 2d 309 (Fla. 3d DCA 1969). This Court reviews a lower tribunal's construction and interpretation of a contract *de novo*. *See, Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999), *rev. denied*, 763 So. 2d 1044 (Fla. 2000).

While the Gonzalezes do not dispute that a presumption exists in favor of appraisal (B. 14), that presumption has no relevance to either the appropriate standard of review, or the issue in this case. This case involves the proper scope of the appraisal clause.

### **B. Whether the Insured's Loss was Caused by a Covered Peril under State Farm's Homeowners Policy is a Coverage Question for the Court, Not an Amount of Loss Question for the Appraisers.**

The question presented is whether, under State Farm's homeowners policy, the cause of the Gonzalezes' loss is a coverage question to be resolved by the court, or

an amount of loss question to be resolved by appraisers. In resolving this issue, the court is guided by firmly established legal tenets and canons of construction for interpreting insurance provisions, including State Farm's appraisal clause.

The law in Florida is well-settled that "a challenge of *coverage* is exclusively a *judicial question* and may not be decided by arbitration." *Midwest Mutual Insurance Company v. Santiesteban*, 287 So. 2d 665, 667 (Fla. 1973). As set forth above, the construction of an insurance policy and the extent of coverage is also a question of law for the court. (Answer Brief, *supra* at p. 11)

Furthermore, Florida courts have historically noted a distinction between arbitration and appraisal. In *Preferred Insurance Company v. Richard Parks Trucking Co.*, 158 So. 2d 817 (Fla. 2d DCA 1963), the court explained:

An agreement for arbitration ordinarily encompasses disposition of the entire controversy between the parties upon which judgment may be entered, **whereas an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of the loss, all other issues being reserved for determination in a plenary action before the court.**

*Id.* at 820 [quoting 5 Am.Jur. 2d, Arbitration and Award § 3, Alternative Dispute Resolution § 12)]. *See also, United States Fidelity & Guaranty Company v. Romy*, 744 So. 2d 467, 469 (Fla. 3d DCA 1999). While the Johnsons and Nationwide

acknowledge the fundamental difference between arbitration and appraisal, State Farm fails to do so. (N.B. 19-23, J.B. 14)

This distinction comports with the narrow scope of appraisal long recognized by Florida courts. Specifically, appraisal resolves only those matters expressly agreed upon by the parties and is restricted to resolving the specific issues of actual cash value and amount of loss. *See, Atencio v. U.S. Security Insurance Company*, 676 So. 2d 489, 490 (Fla. 4th DCA 1996); *Romay*, 744 So. 2d at 469. An appraisable issue only exists when there is a dispute over the **dollar amount** of the loss.

This Court confirmed the narrow scope of appraisal more than one hundred years ago in *Hanover Fire Insurance Company v. Lewis*, 10 So. 297 (1891), when it stated:

Both in the policy and in the subsequent submission to the appraisers the *liability of the insurers was expressly excepted and reserved from the consideration of said arbitrators. The naked question submitted to them was: What is the amount of the damage here?* Whether the insurers were legally liable or obligated to pay that loss, was not submitted to them, and did not enter into their sphere of inquiry ...

*Id.* at 303. *See also, Florida Select Insurance Company v. Keelean*, 727 So. 2d 1131, 1133 (Fla. 2d DCA 1999) (the purpose of appraisal is to determine the amount of a loss); 15 COUCH ON INSURANCE § 210:42 (3d ed. 1999) (the sole purpose of an

appraisal is to determine the amount of damage). While State Farm relies on the *Hanover* decision as authoritative, it glosses over the court's clear statement regarding the narrow scope of appraisal. (B. 13, 15-16, 19)

Similarly, issues regarding an insurer's liability also fall outside an appraisal's purview. A challenge of coverage is equivalent to a challenge of the insurer's liability. This Court has held that, in order for an insurer to properly invoke appraisal in the first instance, it must affirmatively admit liability for some recoverable amount. *See, New Amsterdam Casualty Co. v. Blackshear*, 156 So. 695, 696 (Fla. 1934); *Scottsdale Insurance Company v. DeSalvo*, 666 So. 2d 944, 947 (Fla. 1st DCA 1995) (appraisal is only binding as to the value of the property and the amount of the loss; if the insurer invokes appraisal, it waives any coverage defense it may have otherwise had).

In *Blackshear*, this Court found that an insured would be justified in refusing appraisal unless the insurer admitted liability. The court reasoned that:

[T]o entitle the insurer to the benefit of such an appraisal clause as that involved in this case, the clause must have been invoked in good faith by the insurer. ***And since the object of the appraisal clause is merely to fix the amount of recoverable damage, it follows that unless liability under the policy for some recoverable amount is affirmatively admitted by the insurer*** when appraisal is demanded, a refusal of the insured to submit to an appraisal would not be unjustified.

*Id.* at 696. It is axiomatic, therefore, that appraisal is not appropriate when the insurer

denies liability as State Farm did in this case.

In light of the legal principles and authorities discussed above, this Court can easily resolve the issue presented in this case and the apparent conflict that has arisen among the district courts of appeal based upon the *dicta* in this Court's decision in *Licea*, 685 So. 2d 1285. The Gonzalezes acknowledge that a conflict does exist as indicated by State Farm, Nationwide, and the Johnsons, and as revealed in the following discussion. (B. 6-7; J.B. 15-16; N.B. 8-10)

This Court's decision in *Licea*, while consistent with these well established principles, addressed a different issue. *Licea* involved a dispute over the amount of hurricane damage to the insured's house. The Liceas challenged State Farm's right to invoke the policy's appraisal clause. The issue was whether the appraisal provision was void for lack of mutuality in light of State Farm's reservation of rights clause ("our request for an appraisal ... shall not waive any of our rights"). *Id.* at 1286.

This Court found that the appraisal provision was not void and, citing Judge Cope's dissenting opinion from *American Reliance Insurance Company v. Village Homes at Country Walk*, 632 So. 2d 106 (Fla. 3d DCA 1994), held:

[T]he appraisal clause at issue is not void for lack of mutuality of obligation simply because of a retained rights clause, where we interpret the clause as retaining only the right to dispute the issues of coverage as to the whole loss, or whether the policy conditions have been violated as

specified above.

*Id.* at 1288 (Cope, J., dissenting). The court did not directly consider whether the cause of loss was an appropriate determination for the appraisers. In discussing the appraisal process subject to coverage issues, however, this Court noted:

We interpret the appraisal clause to require an assessment of the amount of a loss. This necessarily includes determinations as to the cost or repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes.

*Ibid.* Contrary to State Farm's contention, the above quoted language is *dicta*, not this Court's holding. (B. 1 and 4)

The First District was the first court following *Licea* to address the issue at hand. In *Opar v. Allstate Insurance Company*, 751 So. 2d 758 (Fla. 1st DCA), *rev. denied*, 767 So. 2d 459 (Fla. 2000), the insureds made a property damage claim after their beachfront residence was struck by Hurricane Opal. They claimed that the damage was caused by wind-storm and was covered under their policy. Allstate denied the claim, concluding that the damage was caused by an excluded peril, storm surge. The trial court granted summary judgment in favor of Allstate, declining to declare that the Opars had a right to appraisal.

On appeal the First District considered whether appraisal of the "amount of

loss" included a determination of the cause of the loss. The court found, based on the plain language of Allstate's policy, that the appraisal provision was enforceable to determine the amount of loss only. *Opar*, 751 So. 2d at 761. The First District rejected the Opar's argument, which relied on the *dicta* in *Licea*, that the appraisers could determine both the amount of the loss and its cause. The court held that the appraisal process could not be used to determine coverage issues and explained:

If the **trial court** determines, when the case is **fully tried on its merits**, that the damage was **caused** by a covered peril ... then [the insurer] will be bound immediately by the amount ascertained by appraisal. ... If, on the other hand, a coverage defense is determined successful in whole or in part, then [the insurer] would either not be liable, or would be liable only in part for the amount.

*Opar*, 751 So. 2d at 760 [citing *Licea*, 685 So. 2d at 1285]. *Opar* was not decided "despite *Licea*" as State Farm suggests. (B. 6). Instead, the First District correctly resolved the appraisal issue in accord with *Licea* and the above authorities.

The Second District was the next court to address the issue in *Nationwide Mutual Insurance Company v. Johnson*, 774 So. 2d 779 (Fla. 2d DCA 2000). The Second District, however, reached a contrary result. The Johnsons submitted a claim to Nationwide after their property was damaged as a result of a sinkhole. Nationwide denied the claim, alleging the loss was caused by an excluded peril, earth movement. *Id.* at 780. After the Johnsons sued for breach of contract, Nationwide moved to stay

the litigation and to compel appraisal. The trial court correctly ruled it would decide whether there was a covered loss, and that only the dollar amount of the loss would be determined by appraisal. Nationwide appealed. The Second District correctly identified the issue, but reached the wrong result. It found that, under *Licea* and *Keelean*<sup>1</sup>, whether the loss was caused by a covered peril was an amount of loss issue for the appraisal panel. *Johnson*, 744 So. 2d at 781. The court, however, failed to reconcile its holding with other statements in *Licea* that coverage disputes are exclusively judicial questions and arise when the insurer disputes coverage as to the whole loss.

Finally, in *Gonzalez v. State Farm Fire and Casualty Company*, 26 Fla. L. Weekly D390 (Fla. 3d DCA Nov. 8, 2000), the Third District considered whether causation was an appropriate issue for appraisal. The Third District reached the same result as the First District in *Opar*, with slightly different reasoning. The Gonzalezes submitted a claim to State Farm after their house was damaged by blasting activities in the neighboring area. (R. 3 and 6-30) State Farm denied the claim in its entirety, contending that the Gonzalezes' damages were not caused by blasting, but instead

---

<sup>1</sup> Although *Keelian*, 727 So. 2d 1131, did not directly add of the loss was an appraisable issue, the Second District in order denying the insurance company's motion to contradict a from *Licea* quoted above.

were caused by settlement, an excluded peril.

After the Gonzalezes sued State Farm for breach of contract, State Farm answered and moved to compel appraisal under the policy. (R. 31-36) Over the Gonzalezes' objection, the trial court ordered the parties to proceed with appraisal to determine not only the amount of the damage to the Gonzalezes' residence, but also the cause of the damages. As the Gonzalezes feared, State Farm's appraiser and the umpire appraiser found that the amount of Gonzalezes' damages was \$0.00. (A.A. 2) The trial court confirmed the appraisal award and entered judgment in favor of State Farm. (A.A. 3; R. 61 and 64)

On appeal, the Third District reversed the final judgment and concluded that the appraisers had impermissibly decided whether the entire claim was within the coverage of the policy. (A.A. 5) Relying on this Court's decision in *Licea*, the Third District determined that State Farm's defense to the claim was that there was "no coverage" under the policy for the loss as a whole and, therefore, the question of whether the loss was caused by blasting (a covered peril) or settlement of the foundation (an excluded peril) was for the court, and not for the appraisers. (A.A. 5)

Applying the well-accepted legal principles discussed above, this Court should approve the decisions of the First District and the Third District and disapprove of the decisions from the Second District. This Court has consistently held that coverage

questions and liability issues are beyond the scope of appraisal. *See, Santiesteban*, 287 So. 2d at 667; *Blackshear*, 156 So. at 696; *Licea*, 685 So. 2d at 1287. Moreover, Appraisal is limited to disputes over the amount of the damage, not whether it was caused by a covered peril or whether the insurer is legally responsible for the loss. *Lewis*, 10 So. at 303. The plain language of the policy confirms the parties' intent to have the appraisers determine the narrow issue of the amount of damage. All other issues are decided by the court. Neither the policy nor the law confers upon appraisers the authority to usurp the court's role in deciding whether a loss was caused by a covered peril under the terms of the policy.

In this case, State Farm never challenged the amount of damage to the Gonzalez home or the cost of repair. Nor did State Farm ever admit liability, even in part. Instead, it claimed the Gonzalezes' loss was excluded in its entirety under the policy. In *Licea*, this Court expressly held that, in invoking appraisal, the insurer only retained the right "to dispute the issues of coverage as to the whole loss, or whether the policy conditions have been violated." *Licea*, 685 So. 2d at 1288. The Third District in this case properly interpreted *Licea* and found, by virtue of the quoted language, the appraisers could not consider whether the loss was caused by a covered peril because State Farm disputed "coverage as to the whole loss." (A.A. 5)

State Farm relies extensively on this Court's *dicta* in *Licea* that an assessment

of the amount of loss must consider whether the loss was caused by a covered peril. *Licea*, 685 So. 2d at 1285. The Gonzalezes request that this Court recede from this statement and affirmatively find that causation, regardless of whether the insurer denies coverage in whole or in part, is always an issue for the court and the ultimate trier of fact.

State Farm's position in this case is completely antithetical to the position it took in *Licea*. In *Licea*, State Farm argued that appraisal is only binding on the parties as to the amount of the loss and loss valuation. Coverage issues and general questions of the insurer's liability, State Farm asserted, are for the courts. More importantly, State Farm relied extensively on this Court's decision in *Lewis*, 10 So. 297. (A.A. 6, p. 5-8, 10-11, 13-16; A.A. 7, p. 6, 11)

More importantly, the Third District's decision comports with this Court's decisions in *Lewis* and *Blackshear* as more fully set forth above. To avoid this Court's holdings in *Lewis*, *Blackshear* and, in some measure, *Licea*, State Farm now attempts to draw a distinction between "coverage defenses" and defenses of "no coverage." (B. *passim*) This argument lacks merit. First, *Licea* and the other established authorities make no distinction between "coverage defenses" and defenses of "no coverage." Nor does Judge Cope's dissent in *American Reliance Insurance Company v. Village Homes at Country Walk*, 632 So. 2d 106 (Fla. 3d DCA 1994),

confer any special meaning on the words "coverage defenses" as State Farm contends. (B. 28-29) To the contrary, Judge Cope relied on this Court's decision in *Lewis* for the proposition that an appraisal award is only binding on the parties as to "the amount of such loss or damage, but shall not decide the *liability* of the companies." *Village Homes at Country Walk*, 632 So. 2d at 108-109 [citing *Lewis*, 10 So. at 303].

Furthermore, coverage issues in appraisal cases are not limited to "coverage defenses" as suggested by State Farm. Indeed, State Farm's reliance on § 627.426, Fla. Stat., and the cases interpreting it is misplaced. (B. 29-30) That statute, which included the term "coverage defense," governs liability insurance, not casualty insurance, and specifies what actions are necessary in order for a liability insurer to assert coverage defenses. For this reason, the term "coverage defense" carries special meaning in the context of § 627.426, Fla. Stat. The cases upon which State Farm relies simply hold that a liability insurer does not waive its right to assert a complete lack of coverage (i.e. no policy was in existence or the loss was expressly excluded) despite a failure to comply with the statute's notification requirements. *See, AIU Insurance Company v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989); *Country Manors Association, Inc. v. Master Antenna Systems, Inc.*, 534 So. 2d 1187 (Fla. 4th DCA 1989); *United States Fidelity and Guaranty Company and Indemnity*

*Company v. American Fire*, 511 So. 2d 624 (Fla. 5th DCA 1987). These cases do not apply to the instant case and cannot be reconciled with the above cited authorities which directly address the scope of appraisal in a casualty insurance policy.

**C. The Plain Language of State Farm's Policy Confirms that Appraisers Determine Only the Amount of the Loss, Not its Cause.**

A policy should be construed in accordance with its plain language. *Prudential Property and Casualty Insurance Company v. Swindal*, 622 So. 2d 467, 470 (Fla. 1993). Further, any ambiguities or policy provisions subject to differing interpretations are to be interpreted liberally in favor of the insured and against the insurer who drafted the policy. *Ibid.*; *See also, State Farm Fire and Casualty Company v. CTC Development Corporation*, 720 So. 2d 1072, 1076 (Fla. 1998).

State Farm's argument that a determination of the amount of an insured's loss also encompasses whether the loss was caused by a covered peril both ignores and contradicts the plain language of its appraisal clause. State Farm drafted this policy and it is bound by the plain language it chose. By its plain terms, the appraisal provision applies only to disputes over the *amount of a loss*. Appraisal does not contemplate whether the loss was caused by a covered peril, either in whole or in part.

Any reasonable interpretation of the appraisal clause must compel the

conclusion that "amount of loss" means the amount of damage and the cost of making the necessary repairs. In fact, State Farm agreed with this literal reading of the same appraisal clause in *Licea*. In its brief submitted to this Court in *Licea*, State Farm more candidly asserted that "the appraisal clause is only what it purports to be -- and what it explicitly says -- which is a procedure for fixing the amount of loss when the insurer and insured are unable to agree." (A.A. 7, p. 8)

State Farm now takes a seemingly inconsistent position in this case by arguing that its own policy language -- appraisal shall set *the amount of the loss* -- really means that appraisal shall determine the amount of the loss **and** whether the loss was caused by a covered peril. Even if this Court should find the appraisal clause to be ambiguous or State Farm's recent interpretation of the provision to be plausible, the court must still construe the clause against State Farm and in favor of the Gonzalezes.

Under State Farm's interpretation of the appraisal clause, only "coverage defenses" are left to the court, because they involve application of the policy based on circumstances other than those giving rise to the loss. (B. 22) These circumstances include whether the policy is void due to actions of the insured or whether the claim is within the class of claims generally covered by the policy. (B. 22) A defense of "no coverage," State Farm contends, is not a coverage question because it involves factual matters connected to the actual loss itself.

In presenting this argument, State Farm suggests that only legal coverage issues are left to the court, while factual coverage issues are within the scope of the appraisers' determination. (B. 24) This distinction strains credulity and defies common sense. Even "coverage defenses" such as whether a policy is void due to the actions of the insured, the failure of the insured to comply with conditions subsequent, or whether the loss occurred during the policy period are *factual determinations* that are made by the court or the jury. (B. 8) There is nothing in State Farm's appraisal clause that would preclude the court or a jury from making a similar factual determination in deciding whether the Gonzalezes' loss was caused by a covered peril.

The Gonzalezes' interpretation of the appraisal clause does not thwart the parties' agreement as State Farm contends; their interpretation affirms it. (B. 17) It is State Farm's misinterpretation of its own policy that has thwarted the parties' agreement. Never did the parties intend for appraisal to determine whether the loss was caused by a covered peril. Nor did the Gonzalezes ever agree to waive their right to have all issues, except for the amount of damages, resolved by the court. That is exactly what State Farm attempted to achieve when it challenged, without any bona fide dispute over the true amount of the damages, whether the Gonzalezes' loss is a covered claim.

Practical concerns are also presented if appraisers are permitted to determine

causation under State Farm's interpretation. Most notable are the respective burdens of proof in evaluating an insurer's liability under a first party insurance claim. State Farm's policy is an all-risk policy. Under Florida law, the Gonzalezes must simply establish that they sustained an accidental loss during the term of State Farm's policy. State Farm must then meet its burden of proving the loss was caused by a peril specifically excluded under the policy. *See, Warth v. State Farm Fire and Casualty Company*, 695 So. 2d 906 (Fla. 2d DCA 1997); *Hudson v. Prudential Property and Casualty Insurance Company*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984); *United States Fidelity and Guaranty Company v. J.D. Johnson Company, Inc.*, 438 So. 2d 917 (Fla. 1st DCA 1983); and *Phoenix Insurance Company v. Branch*, 234 So. 2d 396 (Fla. 4th DCA 1970).

Appraisal does not account for or even consider these legal issues. Are the appraisers advised of this legal framework? If so, who is the appropriate party to instruct the appraisers of the respective burdens of proof? Who ensures that the instructions are being followed? Were these issues even addressed in the appraisal of this case? Clearly, these legally significant issues were never intended to be vested in the appraisers.

Other issues intended for the court's resolution could arise if appraisers were permitted to make coverage determinations. For example, in determining whether a

loss was caused by a covered peril or an excluded peril, disputes may arise as to what is contemplated by the specific coverages or exclusions. Who legally defines coverages and exclusions and when each applies? State Farm contends that this is a pure "coverage defense" which would be determined by the court. In reality, however, the appraisers are interpreting and applying the policy language to determine whether the loss is covered. Surely this is not what this Court envisioned in *Licea* when it held, "[i]f after such ascertainment of the amount of the loss, it should be found that the insurers were legally liable for such loss, they at once became bound for the 'amount' ascertained and awarded by such arbitrators." *Licea*, 685 So. 2d 1287.

The Gonzalezes agree with State Farm that appraisers should generally be skilled in the area of appraisal. (B. 16) This does not, however, define the proper scope of appraisal under the policy. Professional insurance adjusters, licensed contractors, or tradesmen for a particular specialty are better suited to value the damages sustained. State Farm, on the other hand, contends that an engineer is more suited for appraisal. That is because State Farm's goal is not to ascertain the true amount of the damage, but rather to dispute whether the loss is covered at all.

Had State Farm intended for appraisal to include a determination of the cause of the loss, its policy would have so provided. The parties' briefs identify cases, including those from other jurisdictions, discussing appraisal issues dating back more

than one hundred years. Surely, if State Farm believed its own policy language was not being interpreted as it had intended, it would have changed the language to read, "If you and we fail to agree on the amount of the *covered loss*," or "if you and we fail to agree on the amount of loss or the *cause* of loss ..." It chose not to do so. Of course, State Farm could not amend its policy in a manner contrary to law and public policy.

**D. The Majority of Jurisdictions Who have Addressed the Issue Agree that Causation is Not an Issue for the Appraisers.**

In its brief, Nationwide states that there is no clear precedent in Florida to answer the question presented in this consolidated appeal. (N.B. 13-19) The Gonzalezes do not entirely agree with this proposition in light of the *Lewis, Blackshear* and the other authorities discussed above. However, should this Court find that it has not directly addressed this issue, ten other jurisdictions clearly have. For purposes of brevity, the Gonzalezes defer to Nationwide's brief which provides a fair synopsis of the decisions reached in other jurisdictions. (N.B. 23-36)<sup>2</sup>

---

<sup>2</sup> State Farm relies on decisions from only two jurisdictions in its contention that the cause of loss is an appraisable issue however, unlike Nationwide in its brief (N.B. 23-36), fails to cite a significant body of case law from other jurisdictions where the cause of loss is not an appraisable issue.

As Nationwide's survey confirms, all but two states (Delaware and Massachusetts) have found that causation is an issue for the court, not the appraisers. Since Nationwide submitted its brief, a tenth state has recently considered the same issue presented here and decided in accordance with the Gonzalezes position.

In *Merrimack Mutual Fire Insurance Company v. Batts*, 2001 WL 513882 (Tenn. Ct. App. May 15, 2001), the insured submitted a claim to her homeowners' insurer after her house was damaged by a tornado. Each party invoked the policy's appraisal provision after they could not agree on the amount of the loss. The appraisers found in favor of the homeowner as to the amount of the loss. The insurer filed suit challenging the appraisal award. The Tennessee Court of Appeals affirmed the trial court's ruling that the appraisers did not have authority to determine whether parts of the claimed damage had been caused by a peril covered under the policy. *Batts*, 2001 WL 513882 at \*7.

In support of its holding, the court distinguished appraisal from arbitration and stated:

Appraisal is something narrower. Appraisal is the act of estimating or evaluating something; it usually means the placing of a value on property by some authorized person. Specifically, the object of appraisal in cases of casualty insurance is to quantify the monetary value of a property loss.

*Id.* at \*4 (*internal citations omitted*). The court then found that the appraisers did not have authority to determine questions of coverage and liability under an insurance policy for the same reasons discussed above. Appraisal is limited to the specific grant of authority as expressed in the policy and determines only the monetary value of the damage. It does not vest the appraisers with the power to decide coverage or liability issues. *Id.* at \*7 [citing *Opar*, 751 So. 2d at 761; *Munn v. National Fire Insurance Co.*, 115 So. 2d 54, 56 (Miss. 1959); *Auto Owners Insurance Co. v. Kwaiser*, 476 N.W. 2d 467, 469 (Mich. Ct. App. 1991)].

While not squarely addressing the same issue presented in this case, the holdings from other jurisdictions further support the conclusion that appraisal only determines the amount of the damages and does not address issue of liability. *See, Roumel v. Niagara Fire Insurance Company*, 225 A.2d 658 (D.C. 1967) (appraisal is merely a method of ascertaining the amount of the loss or damage and does not determine issues of liability and coverage ... the award being merely conclusive proof of the damages involved); *Jordan v. General Insurance Company of America*, 88 S.E. 2d 198 (Ga. Ct. App. 1955) (an appraisal award is binding as to the measure of damages and does not decide the question of the insurer's ultimate liability under the terms of the policy).

Should this Court determine that is has not decided whether causation is an

appropriate issue for appraisal, the Gonzalezes respectfully request that this Court follow the overwhelming majority of other states which have, and hold that appraisal decides only the amount of the insured's damages. All other issues, including whether the loss was caused by a covered peril, should be reserved for the court's determination.

### **CONCLUSION**

For the forgoing reasons, Respondents, Mariano Gonzalez and Rene Gonzalez, respectfully request that this Court affirm the Third District's decision, and reverse the Second District's decision with directions on remand to reinstate the trial court's order. Respondents further request that this Court recede from the statement in *Licea* that an assessment of the amount of loss must consider whether the loss was caused by a covered peril, and affirmatively find that causation,

regardless of whether the insurer denies coverage in whole or in part, is always an issue for the court and the ultimate trier of fact, not the appraisers.

Respectfully submitted,

CONRAD & SCHERER, LLP

BY \_\_\_\_\_  
LINDA SPAULDING WHITE

Florida Bar No. 501824  
DOUGLAS T. MARX  
Florida Bar No. 0089834

**CERTIFICATE OF SERVICE**

**WE HEREBY CERTIFY** that a copy hereof has been furnished by U.S. Mail to all counsel of record listed on the attached Service List this 30th day of May, 2001.

CONRAD & SCHERER, LLP  
Attorneys for Respondents,  
Mariano R. and Rene Gonzalez  
Post Office Box 14723  
Fort Lauderdale, Florida 33302  
Telephone: (954) 462-5500  
Facsimile: (954) 463-9244

BY: \_\_\_\_\_  
LINDA SPAULDING WHITE  
Fla. Bar No. 501824

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this Brief complies with the font requirements of Fla. R. App. P. 9.210. This computer-generated Brief is submitted in Times New Roman 14-point font.

By: \_\_\_\_\_  
LINDA SPAULDING WHITE

## **SERVICE LIST**

Richard A. Warren, Esq.  
Hardeman & Suarez, P.A.  
Co-Counsel for Petitioner,  
State Farm Fire and Casualty  
Two Datan Center, Suite 1209  
9130 South Dadeland Boulevard  
Miami, Florida 33156

William S. Berk, Esq.  
Adorno & Zeder, P.A.  
Co-Counsel for Petitioner,  
State Farm Fire and Casualty  
2601 South Bayshore Drive,  
Suite 1600  
Miami, Florida 33133

Mariano R. Gonzalez, Esq.  
Mariano R. Gonzalez, P.A.  
Co-Counsel for Respondents,  
Mariano R. and Rene Gonzalez  
15600 N. W. 67th Ave.,  
Suite 308  
Miami Lakes, Florida 33014

George A. Vaka, Esq.  
Vaka, Larson & Johnson, P.L.  
Co-Counsel for Petitioners,  
Peter Johnson and Christine Johnson  
777 South Harbour Island Boulevard,  
Suite 300  
Tampa, Florida 33602

Alan S. Marshall, Esq. and  
Craig A. LeValley, Esq.  
Marshall & LeValley, P.L.  
Co-Counsel for Petitioners,  
Peter Johnson and Christine Johnson  
36410 U.S. Highway 19 North  
Palm Harbor, Florida 34684

W. Douglas Berry, Esq. and  
Anthony J. Russo, Esq.  
6200 Courtney Campbell Causeway  
Suite 1100  
Tampa, Florida 33607