

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

ROBERT & SUZANN ANDERSON,

Plaintiffs,

v.

CASE NO. 51-2011-CA-1136-WS/G

AMERICAN STRATEGIC
INSURANCE CORPORATION,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR NEUTRAL
EVALUATION AND TO STAY LITIGATION PENDING NEUTRAL
EVALUATION**

This matter came before the court on June 8, 2011, upon the Defendant's Motion for Neutral Evaluation and to Stay Litigation Pending Neutral Evaluation. The court has had the benefit of the arguments of counsel. Based on the foregoing, it is

ORDERED as follows:

1. Plaintiffs' property suffered sinkhole damage, which was reported to the Defendant on or about January 7, 2010. The claim was initially denied. On December 15, 2010, Defendant submitted its Request for Neutral Evaluation to the Department of Financial Services. Florida Statute 627.7074(4) states that the request for Neutral Evaluation "must state the reason for the request and must include an explanation of all the issues in dispute at the time of the request." When Defendant submitted its request, it was aware that its own expert had determined that sinkhole conditions existed at Plaintiffs' property. Nevertheless, Defendant checked the box on the request form indicating that the reason for the requested Neutral Evaluation was "Sinkhole Claim Denial," rather than "Sinkhole Remediation Method" and indicated in the "Issues in Dispute" section

that "There is a dispute over the existence of a covered loss to the insured property as a result of alleged sinkhole activity." Defendant did not correct these inaccuracies by withdrawing and submitting a new request with the Department of Financial Services. Instead, Defendant simply sent a letter to the Neutral Evaluator, Mr. Ray Jones at Andreyev Engineering, on March 23, 2011, pointing out that the actual reason for the requested Neutral Evaluation was a dispute over the appropriate sinkhole remediation method.

On March 11, 2011, Plaintiffs filed a Declaratory Action. On March 29, 2011, Defendant responded by filing a Motion for Neutral Evaluation and to Stay Litigation Pending Neutral Evaluation. At the hearing on this motion, Defendant conceded that the wrong box was checked on the request for Neutral Evaluation and would be filing a corrected demand for Neutral Evaluation, acknowledging the existence of the sinkhole and showing that that the proper method of remediation was what is actually disputed. The Plaintiffs contend that the statutory scheme requiring Neutral Evaluation is unconstitutional.

2. Article II, section 3, of the Florida Constitution divides our state government into three branches and expressly prohibits one branch from exercising the powers of the other two branches. No branch may encroach upon the powers of another, and no branch may delegate its constitutionally assigned power to another branch. Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1990). As such, it would be an invasion of the authority of the Judicial Branch for the Legislature to pass a law that allows the Executive Branch to interfere with the final judicial determination in a case. See, Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

In cases involving sinkhole litigation, the Legislature has delegated to the Department of Financial Services, a part of the Executive Branch of government, the authority to act as (1) the judge by requiring the automatic admission of the Neutral Evaluator's report into evidence without considering its relevancy, credibility, authentication, or other evidentiary concerns and (2) trier of fact in determining whether or not sinkhole activity exists beneath a structure and determining the proper remediation. Only the Florida Supreme Court has the power to adopt rules for the practice and procedure in all the courts of the state. State v. McFadden, 772 So. 2d 1209 (Fla.

2000). Section 627.7074(8), however, specifically states that the Department must adopt rules of procedure for the Neutral Evaluation process. While the statute indicates that the Neutral Evaluation is non-binding, the statute still violates Plaintiffs' due process rights because the statute allows the Department of Financial Services to adopt its own procedural rules. It is also troubling that the "Neutral Evaluator" does not have to observe rules of evidence or any formal rules of procedure. See, §§ 627.7074(5) and 627.7074(8). If either party requests a Neutral Evaluation, it is mandatory under § 627.7074(4) and an opinion will be rendered that is admissible in court even without proper evidentiary principles being followed, as specified under § 627.7074(5). Permitting a Neutral Evaluator to give an opinion which is admissible in court without any formal evidentiary rules or procedures, particularly with no right to cross-examination, constitutes a violation of the Plaintiffs' due process, under Article I, section 9 of the Florida Constitution.

3. Based upon the foregoing, the Defendant's Motion for Neutral Evaluation and to Stay Litigation Pending Neutral Evaluation is hereby **DENIED**.

DONE AND ORDERED in chambers in New Port Richey, Pasco County, Florida this ____ day of June, 2011.

ORIGINAL SIGNED

JUN 17 2011

STANLEY R. MILLS
CIRCUIT JUDGE
STANLEY R. MILLS
Circuit Court Judge

Copies furnished to:
Jean F. Niven, Esq.
Jason Salgado, Esq.