For Opinion See 2009 WL 2601700

District Court of Appeal of Florida, Third District.
NORTH POINTE INSURANCE COMPANY, Appellant,
v.
Miguel **TOMAS** and Francine **Tomas**, Appellees.
No. 3D08-2245.
March 2, 2009.

L.T. Case No. 0722470
On Appeal from the Circuit Couit of the Elevnth Judicial Circuit of Florida, in and for Miami-dade County, Florida

Initial Brief of Appellant

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PREFACE

This Brief is submitted by Appellant/Defendant North Pointe Insurance Company who will be referred to as "NORTH POINTE" throughout this Brief. Appellees/Plaintiff Miguel and Francine TOMAS will be referred to as "TOMAS." References to the record on appeal will contain either an "R" reference followed by page citation from the Index to the Record on Appeal and/or an "A" reference corresponding to NORTH POINTE's Appendix followed by a page number citation. All emphasis appearing in quoted material provided is done so by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case arises from a homeowner's (TOMAS) first party insurance claim which sought complete replacement of marble tile flooring throughout their house because of a single chipped tile purportedly damaged by the insured's relative dropping an object on the kitchen floor. (See Petition to Compel Appraisal and for Declaratory Relief (R6-20) and First Amended Petition to Compel Appraisal and for Declaratory Relief (R24-70) and Appraisal Award (A1)(Exhibit "E" to Defendant's Motion to Strike Plaintiff's Motion for Confirmation of Appraisal Award and for Entry of Judgment (R676-712) (Al) [FN1]. NORTH POINTE did initially conduct an investigation of the claim and denied coverage (See "Background" of Defendant's Motion for Reconsideration/Rehearing of Court's Granting Plaintiff's Motion for Confirmation of Appraisal Award for Entry of Judgment" (R805-876).

> FN1. TOMAS actually sought the complete replacement of their entire marble flooring, loss of use, additional living expenses, contents/personal property, storage and handling and debris removal all from the single chipped tile.

TOMAS initially filed a Two Count Complaint: (I) a Petition to Compel Appraisal against NORTH POINTE after it's denial of the claim to require an appraisal as provided for under the insurance policy; as well as (2) a claim for Declaratory Relief that the dropped object was covered. (R6-20). TOMAS did not file a Complaint for Breach of Contract. TOMAS did not allege a breach of contract claim until they moved (for a second time) to amend their complaint that was not served upon NORTH POINTE until May 7, 2008 (R409-411 and R412-457)[FN2] and later filed a "Motion for Determination of Entitlement To and Award of Interest From The Date of Loss On Defendant's Confession of Judgment Payment During Litigation" was filed. (R288-291).

> FN2. NORTH POINTE opposed this amendment (R474-530) as it injected completely new issues into the lawsuit and because TOMAS simultaneously plead bad faith claims with breach of contract causes of action and sought punitive damages and the court allowed the amendment on June 4, 2008 (R713-714). NORTH POINTE appealed this ruling and the court's denial of NORTH POINTE's Motion to Dismiss Bad Faith Claims by way of two (2) Petitions for Writ of Certiorari and this court has granted the relief sought in one of the Petitions. See Case No. 3D08-2270, Opinion issued

12/31/08 (A30-33).
NORTH POINTE did withdraw its original denial of the claim, agreed to submit to appraisal and stipulated to Plaintiffs entitlement to attorney's fees up until the date of its agreement to proceed to appraisal. This was done by way of correspondence dated September 5, 2007. (Exhibit "C" to Defendant's Motion to Strike Plaintiffs Motion for Confirmation of Appraisal Award and Entry of Judgment (R676-712) (A2-3).

Subsequently, the Court did order a stay of the litigation until the appraisal was complete and acknowledged, on the record, NORTH POINTE's stipulation to attorney's fees up until September 5, 2007. (Transcript of hearing dated January 8, 2008, R242-267, p. 19, line 4-14)(A22). At that time, TOMAS moved for summary judgment (R105-118) but the court refused to enter summary judgment on the Petition to Compel Appraisal and Petition for Declaratory Relief as NORTH POINTE had withdrawn its defenses and there was no basis to enter summary judgment as the parties did not litigate coverage for the claim. (R242-267, p. 18, line 7-17) (A21).

An appraisal award was signed in this matter and was entered on February 14, 2008. (Exhibit "C" to Defendant's Motion for Reconsideration (R805-876) (A1). In accordance with the policy of insurance, NORTH POINTE had sixty (60) days from the date the award was entered to make payment (A47). Accordingly, NORTH POINTE had until April 14, 2008 to make payment on the award. (R6-20, Exhibit "A," Policy of Insurance Section 1-Conditions p. 4 of 7) (A47).

NORTH POINTE issued a check payment with the date of March 6, 2008 in full payment of the appraisal award in the amount of $114,899.52 (Exhibit "F" to Defendant's Motion to Strike Plaintiff's Motion for Confirmation of Appraisal Award and for Entry of Judgment (R676-712)(A60). TOMAS submits that the check was tendered to them on March 25, 2008 (page 4 of Plaintiff's Revised Motion for Summary Judgment on Breach of Contract, paragraph 13 (R2406-2438). NORTH POINTE made payment of the appraisal award naming the loss payees as, "Miguel Tomas and Francine Tomas, Bank of America, ISOA, East Coast Public Adjusters, Inc., and Mintz, Truppman, P.A."

TOMAS's counsel rejected the payment of the award after it was received demanding that the checks be reissued just to name the firm's trust account and stating that, "*The insureds do not need to travel to our office just to endorse the check for deposit.*" TOMAS counsel did not 'carbon copy' any of the parties who might claim an interest in the proceeds, to wit, the mortgagee or the public adjuster but simply demanded that the check be reissued solely to his trust account. (See Correspondence dated March 27. 2008 from TOMAS's counsel, Exhibit "H" to Plaintiff's Amended Motion for Summary Judgment on Breach of Contract) (A61) (R354-408). TOMAS's counsel returned the check and stated, "*The check is enclosed for reissuance just to the firm's trust account." The correspondence further stated that, "The public adjuster will be paid from the cleared proceeds and does not need to be on the check* As stated, TOMAS'S counsel did not copy the East Coast Public Adjusters, the current mortgagee, Bank of America, or even TOMAS on this correspondence. (Exhibit "H " to R354-408)

(A61).

In an attempt to comply with TOMAS's counsel's request but at the same time protect its interest against future lawsuits, NORTH POINTE sent correspondence to TOMAS dated April 2, 2008 requesting that the Plaintiffs provide: a Satisfaction of Mortgage as to all mortgagees; and correspondence from East Coast Appraiser's, Inc., the insured's public adjuster who claimed an interest in the insurance proceeds by way of retainer agreement approving the Plaintiffs request to exclude them as payees on the award payment. (Exhibit “C“ to the Affidavit of Rhonda Jefferson filed in support of Defendant's Motion to Strike and Response to Plaintiff's Amended Motion for Summary Judgment on Breach of Contract (R638-675) (A70-71).

Prior to the contractual time period that NORTH POINTE had to pay the award and subsequent to NORTH POINTE having issued a check payment in full payment of the award, on or around April 7, 2008, Plaintiff served upon NORTH POINTE a Motion for Confirmation of Appraisal Award and entry of Judgment and Motion For Determination of Entitlement to an Award of Interest from the Date of Loss on Defendant's Confession of Judgment Payment during Litigation. (R284-287; and R288-291). On the same date, TOMAS did also file a Motion for Entitlement to Attorney's Fees and Costs and a Motion for Summary Judgment on “Breach of Contract.” (R292-299). TOMAS's motion to amend its Complaint for “Breach of Contract” was filed (I) subsequent to the claim being submitted to appraisal; and (2) subsequent to NORTH POINTE withdrawing coverage defenses on the claim and stipulating to entitlement. (Plaintiff's Motion For Leave to File Second Amended Complaint was filed on April 29, 2008 (R409-411).

Rather than provide NORTH POINTE with the requested information to reissue the check, TOMAS filed a Motion for Leave to File a Second Amended Complaint to set forth the following causes of action: Count I for Breach of Contract; Count II for Breach of Covenant of Good Faith and Fair Dealing; and Count III for Bad Faith Breach of Florida Statute §624.155 and §624.9541. (R409-411; 412-457). Only as a result of receipt of this Motion did NORTH POINTE finally receive Plaintiffs Satisfaction of Mortgage as it was an attachment. (R538-545). (Exhibit “I“ to Plaintiff's Revised Motion for Summary Judgment on Breach of Contract (R1034-1087). Then, finally, on May 5, 2008, NORTH POINTE did receive correspondence from TOMAS's Public Adjuster, East Coast Appraisers, Patrick Catania, expressly permitting the removal of his firm's name from the appraisal award check. (Exhibit “G“ to Defendant's Motion for Reconsideration/Rehearing R805-876) (A 130). In effect, NORTH POINTE did not receive all the requested documentation from TOMAS until May 5, 2008. Affidavit of Rhonda Jefferson in support of Defendant's Motion to Strike and Response in Opposition to Plaintiff's Amended Motion for Summary Judgment or Breach of Contract (R739-747)(A62-73).

TOMAS moved for Summary Judgment on a Breach of Contract claim that had not been filed on April 8, 2008 (R300-353). See, also, transcript of June 10, 2008 hearing (R764-804, p. 18, line 2- p. 22, line 10) (A92-96).

Once NORTH POINTE received the correspondence from TOMAS's public adjuster, four (4) days later, on May 9, 2008, NORTH POINTE reissued the previously made check payment that was received by TOMAS on or around May 14, 2008. The check was express mailed to TOMAS. (Affidavit of Rhonda Jefferson R638-675) (A75-114) and Affidavit of Justin Fowler (R2351-2353, 2356-2358) (A 119-130). In the interim, NORTH POINTE had filed a Motion to Determine Proper Loss Payees to seek a Court determination of the correct loss payees to be named on the check payment. This Motion was filed on May 7, 2008. (R458-473), but was never heard by the Court.

The lower court held a hearing on TOMAS'S Motion for Confirmation of Appraisal Award and for Entry of Judgment, Motion for Determination of Entitlement to Award of Interest from the date of loss on Defendant's Confession of Judgment Payment During Litigation on June 10, 2008. (R764-804) (A75-114). At this hearing, the court acknowledged that if it was a refinance mortgage company, the new mortgage holder could require the homeowner to agree to protect them with regard to that insurance claim. (R764-804, p.7, line 18-35)(A81). The Court asked TOMAS'S counsel if it was an issue with the refinance or they paid off and took another mortgage and TOMAS'S counsel did not know. (R764-804, p.8, line 1-4) (A82).

On June 10, 2008, the court did grant Plaintiffs Motion for Confirmation of Appraisal Award and for Entry of Judgment and also granted TOMAS'S Motion for Determination of Entitlement to Award of Interest from the date of loss and these are the Orders appealed from (A135, A136). Specifically, the lower court ruled that TOMAS was entitled to interest from the date of loss in the amount of $115,899.52 until the reissuance of the appraisal award on May 14, 2008. (R2519) (A136). The lower court also confirmed the appraisal award. (R2520)(A137). Both of these orders were entered on June 10, 2008.

On the same date of the hearing and subsequent thereto, TOMAS's counsel sent correspondence to NORTH POINTE demanding payment of the interest. Otherwise, TOMAS would file a Motion for Interest “on the interest” and for additional attorney's fees related to same. (Correspondence, Exhibit “C“ to Defendant's Motion to Strike Plaintiff's Motion to Compel Defendant's compliance with Court Order dated June 10, 2008 awarding Plaintiffs interest from the date of loss and For Sanctions (R2058-2087). NORTH POINTE, through various correspondence, had TOMAS confirm its prejudgment interest calculation and TOMAS accepted the calculation and demanded its immediate payment (Exhibit “F“ to R2058-2087). TOMAS also demanded “interest” on the interest running from June 10, 2008, to June 30, 2008, that was never ordered by the court. (Exhibit “F“ to R2058-2087) and on June 23, 2008, NORTH POINTE issued a check payment in the amount of $30,558.16 to TOMAS pursuant to the Court's judgment of June 10, 2008, including the alleged “interest accrued on the prejudgment interest” demanded by TOMAS. (Exhibit “H“ to R0058-2087). TOMAS accepted the appraisal award payment and interest payments. (R2439-2443).

NORTH POINTE did timely move for reconsideration/rehearing of the June 10, 2008, orders by motion dated June 20, 2008 (R805-876). In that motion, NORTH POINTE also requested that the Court confirm the two June 10, 2008, orders as final judgments. (R805-876). Without

granting any hearing on NORTH POINTE'S Motion for Reconsideration/Rehearing, the court did deny NORTH POINTE'S Motion by order dated July 21, 2008, and entered on July 30, 2008. (R2521-2522) (A133-134). The order denying NORTH POINTE'S Motion for Reconsideration/Rehearing was a proposed order submitted by TOMAS over NORTH POINTE'S objection and signed by the Court. This timely appeal followed. (R2444-2450; 2508-2509) (A131-137).

STATEMENT OF THE ISSUES

The parties in this case never litigated coverage but submitted the claim to appraisal pursuant to the policy provision that governs appraisal. The contract provides when payment is due subsequent to an appraisal, sixty (60) days. Contrary to the prevailing case law in this state and district, the trial court erred in awarding prejudgment interest to the date of loss. Apparently, the entire basis for the award of prejudgment interest to the date of loss was made on the Court's unilateral opinion and legal and factual conclusion that a lawyer letter with no copy recipients telling the insurance company not to include a public adjuster and mortgagee on the appraisal award check (despite having been provided by TOMAS with his retainer agreement requiring him to be placed on the check) should have been sufficient. According to the court, it followed that since NORTH POINTE waited to get correspondence directly from this entity, they should be punished in the form of awarding prejudgment interest to the date of loss.

TOMAS's counsel did not copy the public adjuster, his client or the mortgagee on this letter telling NORTH POINTE to leave everyone but his firm, off of the check. Also, apparently based on its own conclusion that NORTH POINTE caused the delay, it appears the trial court justified a decision to confirm an appraisal award that was paid and despite a prior concession of entitlement to attorneys fees (previously acknowledged by the court) thus enabling TOMAS to continue to extend its claim for attorneys fees beyond the stipulation, through appraisal and perhaps without any limitation.

Cases in this district hold that it is unnecessary and in fact contrary to the idea of alternative dispute resolution to confirm an appraisal award that has been paid. Confirming an appraisal award is not simply a ministerial act that should be done in every case. In this case, TOMAS moved to confirm an appraisal award even before the contractual time period had passed to make payment. When the motion was heard, payment had been made but the trial court still confirmed it and NORTH POINTE submits this was reversible error. The Court confirmed the award and awarded interest to the date of loss at a time when a breach of contract claim had not yet been asserted and even prior to the time that NORTH POINTE had to respond to this new cause of action. Further, the award was confirmed after TOMAS had abandoned its initial Petition to Compel Appraisal.

SUMMARY OF THE ARGUMENT

The lower court erred in awarding pre-judgment interest to the date of loss in this case. The dispute between the parties was submitted to appraisal pursuant to the insurance policy con-

tractual provision for appraisal. Pursuant to this contractual provision, payment on the award was due within sixty (60) days from the date the award was entered. The date of the award was the date that the claim became 'liquidated." It has been held in this District that when there is an appraisal award, pre-judgment interest if any, is owed on the date on which damages are liquidated and therefore, the date of the appraisal award. *Aries Insurance Company v. Hercas Corp.*, 781 So.2d 429 (Fla. 3rd DCA 2001) citing *DeSalvo v. Scottsdale Insurance Company*, 705 So.2d 694, 696 (Fla. 1st DCA 1998). This District has specifically held and the lower court disregarded, controlling precedent reversing an award of pre-judgment interest to the date of loss where there is payment made on an appraisal award. The lower court also ignored another decision from this District wherein an award of pre-judgment interest was reversed when awarded to the date of loss following the entry of an appraisal award. *Allstate Insurance Company v. Martinez*, 790 So.2d 1151 (Fla. 3rd DCA 2001).

The second assignment of error for which NORTH POINTE seeks review is the Court's confirmation of an appraisal award that was paid. In this case, TOMAS moved for confirmation the Award and this Motion was filed before the contractual period had run for NORTH POINTE to make payment on the award. Before the date of the hearing and before the contractual sixty (60) day period expired, NORTH POINTE did make payment on the award. It has been held in this state that a Trial Court should not confirm an appraisal award and enter judgment for an insured after an insurer timely pays an award. *Federated National Insurance Company v. Esposito*, 937 So.2d 199 (Fla. 4th DCA 2006). There is further support for NORTH POINTE'S position in the case of *Nationwide Property and Casual Insurance Company v. Bobinksi*. 776 So.2d 1047 (Fla. 5th DCA 2001), wherein the Fifth District Court of Appeal held that confirmation of an appraisal award that has been paid is inappropriate.

Prior to the time that TOMAS filed its Motion for Confirmation of an Appraisal Award, NORTH POINTE had stipulated to TOMAS entitlement to attorney's fees. Therefore, the Motion to Confirm the Appraisal Award can only be viewed as an effort to extend the time period for Plaintiff's entitlement to attorney's fees as the relief sought in the initial petition had already been granted. Furthermore, at the time of the hearing, TOMAS had moved to amend its pleading, the amendment had been granted and therefore TOMAS abandoned its Petition to Compel Appraisal by having failed to re-plead it. Thus, the Court was without jurisdiction to confirm the award because the initial Petition to Compel Appraisal was no longer pending. A reading of the transcript of the hearing on Plaintiffs Motion for Confirmation of the Appraisal Award makes clear that the Court only confirmed the award and awarded interest payable to the date of loss because in its sole opinion, NORTH POINTE was guilty of delay.

The Court wrongly acted as complete fact finder in determining that the payment was late because it had to be re-issued and could not be re-issued until TOMAS had provided assurances from its public adjuster that he was satisfied to be compensated by TOMAS'S attorney. Reissuance of payment to correct the payees was ultimately stymied by TOMAS'S failure to provide the requested information.

Pursuant to the contract between the parties, NORTH POINTE had until April 14, 2008 to

make payment on the award. TOMAS filed its Motion for Confirmation of Appraisal Award and for Entry of Judgment on Appraisal Award and for Entry of Judgment on April 8, 2008. Therefore, as a matter of record, it is clear that TOMAS filed this motion prematurely. The record is also clear that at the time the court confirmed the award, NORTH POINTE had paid it in full.

15ARGUMENT

I. THE LOWER COURT ERRED IN AWARDING PREJUDGMENT INTEREST TO THE DATE OF LOSS

A. Argonaut Should Not Have Served As Controlling Precedent For This Case

TOMAS's argument for an award of prejudgment interest to the date of loss was based almost entirely on the case of *Argonaut Insurance Company v. May Plumbing Company*, 474 So.2d 212 (Fla. 1985). Secondarily, TOMAS relied on a case that has been implicitly reversed by the Florida Supreme Court. *Independent Fire Ins.Co. v. Lugass*, 593 So.2d 570 (Fla. 3rd DCA 1992). On the other hand, the cases relied upon from NORTH POINTE arise in the appraisal context, are from this District and have never been overruled.

While it is not at all clear from the lower court's ruling whether it actually relied on *Argonaut* and *Lugassy* in rendering its judgment, for the reasons set forth below, *Argonaut* does not, upon the facts of this case, equate to precedent or support for what the lower court did in awarding prejudgment interest to the date of loss. Rather, the cases relied upon by NORTH POINTE from this District were controlling in the context of an appraisal case where damages became liquidated upon entry of the Appraisal Award.

A trial court' decision concerning a plaintiffs entitlement to prejudgment interest is reviewed *de novo*. ***16***Berloni v. Della Casa. LLC*, 972 So.2d 1007 (Fla.4th DCA 2008) at 1011 citing *Wyatt v. Milner Document Prods., Inc.* 932 So.2d 487, 489 (Fla. 4th DCA 2006).

The *Argonaut* case did not arise in the context of an appraisal. The *Argonaut* case did not even arise in the context of an arbitration. The primary holding of Argonaut is thus,
"Once a verdict has liquidated the damages as of a date certain, computation of prejudgment interest is merely a mathematical computation." *Argonaut* at 215.

Argonaut specifically distinguishes between liquidated and unliquidated claims and holds that, "To punish a defendant for failure to pay a sum which was not yet certain or which he disputed would be manifest injustice."

Argonaut at 215.

It is undisputable that the facts of the Argonaut case arose upon the entry of a ***jury verdict*** in favor of an insurer on a subrogation action for damages from a fire caused by the negligence of an employee of a plumbing company. All of the cases cited in *Argonaut*, the conflict cases

upon which the Florida Supreme Court accepted jurisdiction, were ***negligence cases decided upon jury verdict.*** These cases were: *Chicago Insurance Co. v. Argonaut Insurance Co.*, 451 So.2d 876 (Fla. 4th DCA 1984) that relied upon McCoy v. Rudd, 367 So.2d 1080 (Fla. 4th DCA 1979) and ***17***Bergen Brunswig Corporation v. State, Department of Health and Rehabilitative Services*, 415 So.2d 765 (Fla. 1st DCA 1982). In fact, the Argonaut decision is expressly limited to cases decided upon jury verdict,

"In short, when ***a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses,*** plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." (Emphasis Added)

Argonaut at 215. [Emphasis added].

The policy issued to TOMAS upon which the Petition to Compel Appraisal was based, specifically provides when payment is due upon entry of an appraisal award:

10. Loss Payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we received your proof of loss and:

a. Reach an agreement with you;

b. There is an entry of a final judgment; or

c. There is a filing of an appraisal award with us. Page 13 of 36, Your

Duties After Loss, HO 00030491.

Exhibit "A" to First Amended Petition to Compel Appraisal, p. 4 of 7, 10. Loss Payment (R24-70) (A47).

TOMAS has argued that NORTH POINTE failed to timely pay the award because it first listed the incorrect payee, and TOMAS relies upon this quoted contractual provision of the policy for the date the debt was due. TOMAS cannot have it both ways. That is to say, TOMAS cannot pick and choose when the ***18** contractual provisions apply to suit its arguments and ignore those provisions when it does not.

The parties chose to have the dispute resolved through appraisal, and in fact, this was the relief sought by TOMAS. Appraisal fully and finally set the amount of loss under the policy and when payment was due. The debt did not become liquidated until the Award was signed. It defies common contract principles to hold that prejudgment interest could accrue prior to the date the amount due even became known. As for any argument that this case should present some sort of exception because NORTH POINTE first denied coverage, the record is clear ***that TOMAS did not even allege a breach of contract claim until they moved (for a second time) to amend their complaint*** that was not served upon NORTH POINTE until May 7, 2008 (and order granting the amendment on June 4, 2005 (R732) and therefore ***after*** TOMAS's "Motion for Determination of Entitlement To and Award of Interest From The Date of Loss On Defendant's Confession of Judgment Payment During Litigation" was filed. Clearly, NORTH POINTE could not have confessed judgment on a Breach of Contract claim prior to TOMAS having alleged the cause of action.[FN3]

FN3. If there was a "confession of judgment," this occurred after TOMAS filed its Petition to Compel Appraisal and Complaint for Declaratory Relief when NORTH POINTE agreed to proceed to appraisal and stipulated to entitlement. By stipulating to entitlement by correspondence dated September 5, 2007, NORTH POINTE acknowledged that it would not be asserting coverage defenses to the claim and TOMAS counsel was entitled to attorney's fees. The Court refused to enter a judgment at that time because there was nothing left to adjudicate except the amount of attorney's fees. Transcript of January 8, 2008 hearing A4-29).

***19** B. Cases Subsequent To Argonaut From This District Should Have Controlled The Lower Court's Decision On When Prejudgment Interest Accrues That Hold That Interest Accrues After The Expiration of The Contractual Time Period to Pay an Appraisal Award (60 Days)

The cases cited by NORTH POINTE should have controlled the lower court's determination regarding prejudgment interest.

In *Aries v. Hercas Corp.*, 781 So.2d 429, 430 (Fla.3d DCA 2001), this court held,
First, we reverse the prejudgment interest award. The trial court erred in awarding Hercas prejudgment interest from the date of the last loss. Hercas was entitled to interest from the date of the appraisal award as that is the date on which the damages were liquidated. *See De Salvo v. Scottsdale Ins. Co.*, 705 So.2d 694, 696 (Fla. 1st DCA 1998)(appraisal award gives rise to liquidated damages entitling insured to prejudgment interest), approved, 748 So.2d 941 (Fla.,1999). Accordingly, the award of prejudgment interest from the date of loss is error.

The *Hercas* case, as well as the following two cases: *Allstate Insurance Company v. Martinez*, 790 So.2d 1151 (Fla.3d DCA 2001) and *Allstate Insurance Co. v. Blanco*, 791 So.2d 515 (Fla.3d DCA 2001) are both subsequent to Argonaut and are on point with the facts of this case.

In the *Martinez* case, similar to this case, the insured filed for a Petition to ***20** Compel Appraisal (this court should keep in mind that this was the relief sought and obtained by TOMAS under their initial Complaint) on a supplemental Hurricane Andrew claim. Eventually, the court ordered the parties to appraisal.[FN4] An award was entered and the trial court entered a final judgment awarding Martinez prejudgment interest from the date of loss. This court reversed the trial court. This court held that it was error for the court to award prejudgment interest to be paid from the date of loss. The court specifically acknowledged that the policy provided for sixty (60) days to pay the award and so that Martinez was to be awarded interest that it was to be calculated from the termination of sixty (60) days *after* the date of the appraisal award. *Martinez* at 1151 citing *Allstate Ins. Co. v. Blanco*, supra. In *Blanco*, this district specifically held that the insureds were not entitled to prejudgment interest prior to receiving an appraisal award which determined their actual loss and furthermore that as the insurance policy provision allowed (Allstate) sixty (60) days within which to pay the appraisal award and Allstate made payment within the allotted time, that the Blancos were not entitled to receive any prejudgment interest. *Blanco* at 517.

FN4. Whereas, in this case, NORTH POINTE agreed to proceed to appraisal and the two appraisers even agreed to the selection of an umpire, the court was reminded of this at the hearing, on Plaintiff's Motion to Confirm the Appraisal Award and Award Interest to Date of Loss that was held on June 10, 2008 (R764-804), p. 19, line 22-25)(A93).

Martinez made the same argument that TOMAS has made, that prejudgment ***21** interest should run from the date of loss because of [Allstate's] delay tactics and this court rejected that argument as not borne out by the record. In this regard, the trial court had acted as complete fact finder in holding that the appraisal award was not timely paid because NORTH POINTE'S *reissuance* of the check *at the TOMAS's request* was after the sixty (60) day time period in the contract and because NORTH POINTE should have exclusively relied upon a lawyer letter telling NORTH POINTE to leave off other parties with a claimed and known interest without their authorization. (See page 30, line 8-13 of the June 10, 2008, hearing (R764-804) (A104) where the court was reminded that NORTH POINTE reissued the appraisal check three (3) days after Plaintiff finally provided a letter from the public adjuster confirming his consent to be omitted from the check). The court summarily determined at the hearing that the letter from TOMAS'S counsel was sufficient and awarded prejudgment interest and attorneys' fees as seemingly some sort of penalty. The court held this at the June 10, 2008 hearing:

"***THE COURT:*** I believe that they're entitled to fees as a result of the fact that the payment was delayed by the insurance company's wrongful listing of the mortgage company that was then entitled to be listed on the check, and its delay and unreasonable insistence of having the appraiser submit a release and the fact that the attorney representing the insured confirmed that they would pay the appraiser out of their trust account. You should have relied on this letter and reissued the check immediately. I do believe a lot of the delays here were caused by the insurance company sitting on their hands, to be honest." I think that's exactly what happened."

***22** (R764-804, p.32, line 8-25) (A106).

NORTH POINTE has argued that at the very least, this was a question of fact that should have been decided by a jury because the reissuance of the appraisal award could not be effectuated until TOMAS provided correspondence from its public adjuster that it not be included on the check and TOMAS refused to provide this until *after* the sixty (60) day time period had run. NORTH POINTE had even filed a Motion To Determine Proper Loss Payee within the sixty (60) day period to have these issues resolved and to avoid delay (R458-473). NORTH POINTE presented to the Court the contract between East Coast and TOMAS that was provided to NORTH POINTE during the claim that states as follows:

The policyholder hereby assigns East Coast, that portion of the insurance proceeds sufficient to pay East Coast's fee as determined in accordance with the terms of this initial cap agreement. The assignment created hereby is **absolute and unconditional.** In the event the insurance company fails to issue a check payable to the Policyholder and East Coast, the policyholder hereby grants East Coast, a lien on recovered proceeds received by the Policyholder to

the extent of the fee due to East Coast, pursuant to the terms of this Agreement. **Notwithstanding the foregoing, the Policyholder directs the insurance company to comply with the payment instructions set forth herein, without any further act or authorization** arising out of this Agreement. In the event legal proceedings are brought by East Coast to enforce this Agreement, the prevailing party shall be entitled to recover its court costs and reasonable attorney's fees including those of any appellate proceedings. [Emphasis added].

***23** Exhibit L to Defendant's Motion for Reconsideration/Rehearing on the Court's Orders granting Plaintiffs' Motion for Confirmation of the Appraisal Award and For Entry of Judgment and Motion for Determination of Entitlement to an award of Interest from the Date of Loss on Defendant's Confession of Judgment Payment During Litigation". (R805-876)(also Exhibit "B" to Rhonda Jefferson's Affidavit (A68).

The court summarily overlooked all of these factors and simply deemed that the payment date was May 14, 2008, and due to this fact, as some sort of penalty apparently (as evidenced by TOMAS's self crafted order that the court signed) (R2519) awarded interest to the date of loss.

The *Blanco* case that Martinez followed, when considered in conjunction with Argonaut is harmonized because the Blanco court held that the debt, a vested property right, is not vested until the Appraisal Award fixes the amount, Blanco at 561-517, and therefore unliquidated such that a party should not be penalized to pay interest before the debt is fixed. *See also American Reliance Co. v. Devecht*, 820 So.2d 378 (Fla.3d DCA 2002), where this district once again held that upon entry of an appraisal award, prejudgment interest is to be awarded from the date of the award unless the policy provisions allow the insurer to pay the award within a certain time period, and payment was made within the allotted time, and *see, also, Lifsey v. Savich*, 2004 WL 326753 (13th Judicial Cir. 2004), distinguishing ***24** *Argonaut* where arbitration was not a factor.

TOMAS's counsel's only argument against the application of these clearly controlling cases was that they are distinguishable because, "The parties did not litigate the issue of coverage." See Transcript of June 10, 2008 hearing at page 12. (R764-804) (A86). In *this* case, the parties did not *litigate* coverage either and so TOMAS's argument fails. NORTH POINTE'S payment of the appraisal award was not a "confession of Judgment payment made during litigation" as labeled by TOMAS's counsel but was the payment of an appraisal award. TOMAS filed a Petition to Compel Appraisal that was obtained as the parties agreed to proceed to appraisal and NORHTPOINTE stipulated to TOMAS'S attorneys fees up until that point. Coverage was never litigated in this case and TOMAS had not sued NORTH POINTE for breach of contract at the time TOMAS sought prejudgment interest and confirmation of the award.

C. The Lugassy Case Is Not On Point With The Facts Of This Case And Has Been Significantly Limited If Not Implicitly Overruled By The Florida Supreme Court

TOMAS also relied upon the *Lugassy* case, *Independent Fire Ins.Co. v. Lugassy*, 593 So.2d 570 (Fla.3rd DCA 1992). See transcript of hearing from June 10, 2008 page 10 through II. (R764-804) (A84-85). TOMAS relied upon this case without any concession that it has been

effectively overruled by the Florida Supreme Court. The court asked TOMAS'S counsel whether the decision was ***25** upheld in various cases and he said that it was. See transcript of hearing from June 10, 2008 at page 12. (R766-804) (A86).

In fact, *Lugassy* is a 1992 case, did not involve an appraisal and has been significantly limited if not implicitly overruled. The *Lugassy* case was also decided upon a jury verdict. There was no appraisal in Lugassy and the insurer denied coverage all the way up until the Court awarded payment by way of final judgment. The Court held upon those facts that the insurer could not rely upon the contractual provision regarding the submission of a Proof of Loss as the time to make payment.

TOMAS relied on *Lugassy* because, as they argued, NORTH POINTE had breached the contract by denying coverage. However, as detailed above, at the time TOMAS filed the motion, *they had not yet alleged a breach of contract claim* until they moved (for a second time) to amend their complaint that was not served upon NORTH POINTE until May 7, 2008 (granted on June 4, 2008) and therefore after TOMAS'S "Motion for Determination of Entitlement To and Award of Interest From The Date of Loss On Defendant's Confession of Judgment Payment During Litigation," was even filed. NORTH POINTE could not have confessed judgment on a Breach of Contract claim prior to TOMAS having alleged the cause of action. In any event, TOMAS chose its remedy, appraisal and the parties never litigated coverage. Having elected its remedy, TOMAS can not also seek damages ***26** that might be awardable in a breach of contract claim or else what incentive would a carrier ever have to proceed to appraisal if it would still be subject to breach of contract damages?[FN5]

> FN5. Additionally, the facts TOMAS relied upon in support of its motion for prejudgment interest and to confirm the award related to alleged actions (or inactions) of NORTH POINTE that occurred subsequent to (and therefore during the pendency of the stay of litigation) and had nothing to do with its initial denial of the claim.

TOMAS sought a Petition To Compel Appraisal (and for Declaratory Relief) in its initial complaint. This relief was obtained by TOMAS as NORTH POINTE agreed to appraise the claim, withdrew its denial and stipulated to attorney's fees up until the date the parties agreed to appraisal. TOMAS previously moved for summary judgment on coverage before the appraisal and the court refused to enter such an order as NORTH POINTE had withdrawn its defenses. TOMAS's argument for prejudgment interest to the date of loss was based on the alleged late payment and relies upon the contractual provision for appraisal that requires payment within sixty (60) days of the award. TOMAS cannot rely on this provision for the relevant time period but then tell the court to disregard it for purposes of prejudgment interest, otherwise, the provision is without any legal effect and is rendered a nullity.

The case of *Ocean Harbour South Condominium Association v. Empire Indemnity,* 2007 WL 1059577 (S.D.Fla.2007) treated the *Lugassy* case. In this ***27** case, also decided upon a jury verdict, the court held as follows:

Prejudgment interest accrues from the date payment is due. *Golden Door,* 117 F.3d at 1341

(citing Lumbermans II, 653 So.2d at 390). The Eleventh Circuit recognized the Florida Supreme Court's implicit reversal of Lugassy by quoting Lumbermans II, ***"The Supreme Court of Florida approved a lower court's determination that in contract actions interest is allowable from the date the debt is due."*** *Id.* In rejecting the 'date of loss' as the date from which prejudgment interest accrues, *Golden Door* recognized that Florida courts have equated the date of the loss with the date that payments would have been due under the policy. *Id. Ocean Harbour* at *2. [Emphasis Added].

In *Chalfonte v. QBE Insurance Corporation,* 526 F.Supp.2d 1251 (S.D.Fla.2007), the court held with respect to the notion that policy terms can be ignored where there is a denial of liability,

The first exception, stating that where the insurer has denied liability, the insured is entitled to prejudgment interest accruing from the date of loss, appears to ***no longer be good law.*** Id. at 1262. (Emphasis added).

Chalfonte referred to the case of *Golden Door Jewelry Creations, Inc. v. Lloyd Underwriters Non Marine Assoc.* 117 F.2d of 1328 (11th Cir. 1997), (also cited in Ocean Harbor, supra) wherein the Eleventh Circuit recognizes that the Florida Supreme Court may have implicitly overruled the holding from the 1992 *Lugassy* case in a subsequent case called *Lumbermans II* decided in 1995, *Lumbermans Mut. Cas. Co. v. Peaceful,* 653 So.2d 389 (Fla. 1995).

At the June 10th hearing, Plaintiff's counsel actually represented to the court ***28** that *Lugassy* was upheld on various cases with no mention of this entire line of cases limiting its effect. (p. 12, line 16-18)(R764-804) (A86).

Therefore, considering the implicit reversal of Lugassy, the fact that it did not involve appraisal, was decided upon a jury verdict and was decided well prior to the cases relied upon by NORTH POINTE, it was error for the court to rely upon it in awarding interest to the date of loss.

NORTH POINTE argued below that it was improper and in fact, frivolous to confirm an award that was already paid. The standard of review in reviewing this Confirmation of Appraisal Award should be de novo since it was a final order that was based upon a contractual provision *Tiny Treasures Academy & Get Well Center, Inc. v. Stirling Place. Inc.*, 916 So.2d 991 (Fla. 4th DCA 2005). Alternatively, if it is a question of the application of the construction of a procedural rule with respect to the confirmation of the award, this is also reviewed de novo. *Barco v. School Board of Pinellas County,* 975 So.2d 1116 (Fla. 2008). NORTH POINTE also submits that the trial court's confirmation of the appraisal award and award of interest involved legal determinations made by the court in confirming the award that are also subject to de novo review. *Southern Baptist Hospital of Fl. Inc. v. Welber,* 908 So.2d 317 (Fla. 2005); ***29***Wade v. Hirschman,* 903 So.2d 928 (Fla. 2005).

At the time TOMAS filed a Motion for Confirmation of an appraisal award and for entry of judgment (April 8, 2008) (R284-287), the time to pay the award, pursuant to the policy provision had not even expired. The appraisal award was entered on February 14, 2008. Pursuant to

the policy provision regarding loss payment, NORTH POINTE was to pay the appraisal award by April 14, 2008 (TOMAS agreed in its revised Motion for Summary Judgment that this was the date NORTH POINTE was to pay the award. See p.11, paragraph 28. (R1034-1087) or sixty (60) days after there was a filing of an award). NORTH POINTE issued payment on the award on March 6, 2008. Plaintiffs counsel chose to reject the check payment. All of the delays, if any, associated with the reissuance of the check arose from TOMAS'S counsel. Ultimately, TOMAS's counsel both: (1) attached the satisfaction of mortgage to its Motion for Leave to File Second Amended Complaint and (2) provided correspondence from East Coast Appraisers that confirmed their consent to be omitted from the appraisal award payment (on May 5, 2008). NORTH POINTE reissued payment of the award four (4) days later on May 9, 2008, received by TOMAS on or about May 14, 2008. (Affidavit of Justin Fowler in Opposition to Plaintiff's Amended Motion for Summary Judgment on Breach of Contract (R2356-2358 and 2351-2353) (Al 19-130).

Therefore, at the time the court heard the motion to confirm the award, there ***30** was no question that the award had been paid and reissued at TOMAS'S request. Also, at the time that TOMAS filed its Motion to Confirm Appraisal Award, NORTH POINTE had previously stipulated to TOMAS's entitlement to attorney's fees and the court acknowledged this stipulation. Alternatively, as has already been argued, it seems, the court confirmed the award simply on its own unilateral factual and legal determination that NORTH POINTE should have accepted a lawyer letter from TOMAS to leave off its Public Adjuster from the appraisal award check despite prior notice from this company that it must be included on the check as evidenced by its contractual relationship with TOMAS.

It has been held in this state that a confirmation of an appraisal award is unnecessary after the insurer timely pays the award because no dispute remains. *Federated National Insurance Company v. Esposito,* 937 So.2d 199 (Fla.4th DCA 2006); *Nationwide Property & Casualty Co. v. Bobinski,* 776 So.2d 1047 (Fla.5th DCA 2001).

In *Esposito,* the Fourth District Court of Appeal held that the trial court should not have confirmed an appraisal award that was timely paid by the insurer. The Esposito court looked to the cases of *Nationwide Property and Casualty Insurance Company v. Bobinski,* 776 So.2d 1047 (Fla. 5th DCA), review denied, 791 So.2d 1094 (Fla.2001) and *Travelers Indemnity Insurance Company of Illinois v. Meadows MRI. LLP,* 900 So.2d 676 (Fla.4th DCA 2005) as instructive. The ***31** court held there was no need to confirm the award where it was timely paid because to do so would only authorize a future award of attorney's fees. *Esposito* at 202.

The primary reason an insured will seek to confirm an appraisal award is where there is a need to compel payment or to establish a 'judgment' pursuant to Florida Statute § 627.428 (2005) so that attorneys' fees may be awarded. In this case, as a *matter of record,* NORTH POINTE had already stipulated to TOMAS's entitlement to its attorney's fees all the way up until the time the parties entered appraisal. TOMAS previously sought to have the court enter a summary judgment after that time based upon NORTH POINTE'S initial denial of the claim but the court *refused* to do this because NORTH POINTE had already withdrawn any defenses

and stipulated to entitlement so there was nothing to adjudicate. See transcript of hearing from January 8, 2008, where the court held:
I'm not entering any judgment. Here's what I can do. I can enter an order that acknowledges North Pointe's withdrawing of its previous denial of the claim, that the drop tile was excluded under the policy provision excluding loss die to wear, tear, marring deterioration. I further order that the cause of action is abated pending completion of the appraisal process. I can enter that order. I cant give you a summary judgment, there's no evidence upon which I can give you a summary judgment. Page 18, line 7 through 17. (R242-267) (A21).

Therefore, the court recognized that since NORTH POINTE had withdrawn ***32** its defenses it was completely moot to enter summary judgment on the Declaratory Judgment Action and because there was no evidence to do so because (the claim was not litigated). The court simply refused to do so (and quite properly NORTH POINTE suggests). The court seemed to acknowledge that the only remaining issue would be the amount of fees owed to be determined subsequent to appraisal. Therefore, the primary purpose of confirming an award, to establish a basis for fees, had been completely mooted as NORTH POINTE had stipulated to this entitlement.

In *Tristar Lodging, Inc. v. Arch Speciality Ins. Co.*, 434 F.Supp.2d 1286 (M.D.Fla.2006) the court held,
Absent a judgment of breach, a “confession of judgment,” or a settlement on a disputed claim, Plaintiff seeks a judgment on the appraisal. This, too, is misguided. The Second Amended Complaint did not seek a judgment on the appraisal, and in fact, the appraisal award was timely paid as of the date of filing the Second Amended Complaint. Thus, the motion to confirm the award was moot when filed months later. Plaintiff is not entitled to a judgment under these circumstances. *Nationwide Property & Casualty Insurance v. Bobinski, 776 So.2d 1047 (Fla. 5th DCA 2001)* (no attorney's fees awarded when appraisal is paid prior to suit, and appraisal award is not a final judgment under *Section 627.428). Tristar* at 1299.

The facts of this case are similar to the extent that not only had the time to pay the award *not even expired* at the time TOMAS filed its Motion to Confirm the Award but at the time the court confirmed the award, it had been paid and there ***33** was no longer a Petition to Compel Appraisal pending before the court (as more fully addressed below). Considering the fact that NORTH POINTE had withdrawn its defenses to appraisal and the declaratory action, stipulated to entitlement and the court refused to enter judgment on the declaratory judgment action as moot or without legal justification, the subsequent confirmation of the award subsequent to payment was unsupported in law and was error.

III. TOMAS ABANDONED ITS ORIGINAL CLAIM TO COMPEL APPRAISAL AND SO THE COURT ERRONEOUSLY CONFIRMED AN AWARD WITHOUT JURISDICTION

The procedural time line and state of the pleadings in this case was seemingly ignored by the lower court in both awarding interest to the date of loss and confirming the Appraisal Award.

On or around August I, 2007, TOMAS filed it Petition to Compel Appraisal and for Declarat-

ory Judgment. (R6-20). On August 24, 2007, TOMAS filed an Amended Petition to Compel Appraisal and For Declaratory Judgment. (R24-70). Subsequently, after appraisal was complete and the award was paid, TOMAS sought leave to file a Second Amended Complaint that was received by NORTH POINTE on or around May 7, 2008, and filed *before* leave was granted on April 29, 2008 (R409-411). The Second Amended Complaint alleged three counts Breach of Contract, Count II Breach of Covenant of Good Faith and Fair Dealing and Count III -Ba Faith" Breach of Florida Statutes Section 625.155 and ***34** Statute 626.9541. Defendant opposed the amendment and moved to strike the motion on May 12, 2008, filed on May 14, 2008 (R474-530). TOMAS did not reinstate or reassert their causes of action to compel appraisal and/or for declaratory relief that were alleged in their Initial Petition or First Amended Complaint.

TOMAS's failure to re-allege these original causes of action constituted an abandonment of the prior claims. An amended pleading that is complete in itself, and that does not refer to or adopt a former pleading as part of it, supersedes the former pleading. *Dee v. Southern Brewing Co.,* 1 So.2d 562 (1941). The original pleading is superseded by an amended pleading which does not preserve any portion of the original pleading. *Downtown Investments, Ltd. v. Segalall,* 551 So.2d 561 (Fla.3d DCA 1989). An amended complaint supersedes the prior complaint where the amended complaint did not expressly state an intent to preserve portions of the previously-filed complaint. *State Farm Fire and Cas. Co. v. Tippett,* 864 So.2d 31 (Fla.4th DCA 2003). In an amended complaint wherein new claims are asserted, absent a court's order dismissing the omitted count, an amended pleading that fails to include it is often held to reflect a waiver or abandonment of the claim. *Coachmen Industries, Inc. v. Royal Surplus Lines, Ins. Co.,* 2007 WL 1837842 (M.D.Fla. 2007) citing *Kolling v. Am.Power Conversion Corp.*, 347 F.3d 11 at 16 (C.A. 1 Mass. 2003).

***35** As TOMAS had abandoned its Petition To Compel Appraisal, the lower court lacked jurisdiction to confirm the Appraisal Award that was already paid. At the time of the hearing on the Motion to Confirm the Appraisal Award, TOMAS's motion for leave to file the Second Amended Complaint was filed and the pleading deemed filed on June 4, 2008 (R713-714).[FN6] Therefore, when the lower court entered the order Confirming the Appraisal Award on June 10, 2008, it lacked jurisdiction to do so as the Petition To Compel Appraisal had been abandoned (and relief already afforded).

> FN6. TOMAS moved again to amend this pleading by interlineation granted June 16, 2008 (R748).

A review of the transcript of the June 10, 2008, hearing shows that the court's decision to award interest and confirm the award was based on its own factual and legal finding of delay relative to events that occurred subsequent to the appraisal. None of these events had occurred or were alleged in the Initial Petition to Compel Appraisal, but to the contrary, were alleged as part of TOMAS'S Breach of Contract Claim that was not even deemed filed until after they moved to confirm the award. The lower court granted Plaintiff's Motion for Leave to File Second Amended Complaint on June 4, 2008 (R713-714). Therefore, at the time the court

confirmed the award and awarded interest, it did so before NORTH POINTE had even filed an answer to the Second Amended Complaint that was filed on June 17, 2008 (R759-763).

***36** Based on the procedural history of this case, the trial court confirmed an appraisal award that had been paid, based on an abandoned cause of action apparently on its own determination that there had been a breach of contract, a cause of action that had not even been plead at the time the Motion to Confirm Appraisal had been filed and had not even been responded to (by way of an Answer) at the time the court heard and confirmed the award.

37CONCLUSION

The lower court in this case initially refused to enter summary judgment on a Petition to Compel Appraisal and Declaratory Relief where Appellant, NORTH POINTE, had withdrawn coverage defenses, agreed to appraise the claim and stipulated to Appellee, TOMAS's entitlement to attorney's fees. This case should have concluded with the entry and payment of an appraisal award. Instead of supplying minor and easily accessible information to NORTH POINTE to reissue the check, TOMAS decided to evolve this case into convoluted litigation, no doubt in an effort to broaden its attorneys' fee claim. TOMAS had been afforded all the relief it sought under its initial lawsuit.

In complete contradiction to its own ruling and prevailing case law, the court (acting as complete fact finder) awarded TOMAS interest to the date of loss on an abandoned cause of action. As this court reviews the trial court's action de novo on the award of interest, the record should be clear that NORTH POINTE timely paid the award and/or that at the very least, factual issues regarding the timeliness of the check payment should have prevented the court from awarding interest to the date of loss. After all, the facts that seemingly led the Court to award interest to the date of loss and confirm the award were events that occurred subsequent to appraisal and before a breach of contract action was even at issue between the parties. Similarly, this court should find that for the same reasons, the ***38** lower court erred in confirming the appraisal award as it was fully paid at the time of confirmation.

NORTH POINTE INSURANCE COMPANY, Appellant, v. Miguel TOMAS and Francine Tomas, Appellees.
2009 WL 1161559 (Fla.App. 3 Dist.) (Appellate Brief)

END OF DOCUMENT

For Opinion See 2009 WL 2601700

District Court of Appeal of Florida, Third District.
NORTH POINTE INSURANCE COMPANY, Appellant,
v.
Miguel **TOMAS** and Francine **Tomas**, Appellees.
No. 3D08-2245.
June 22, 2009.

Lower T.C. No: 07-22470
Florida Bar No. 137172

Brief and Appendix of Appellees

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*5 *TABLE OF CITATIONS AND AUTHORITIES*

Cases

I.

INTRODUCTION

The Appellees, Miguel Tomas and Francine Tomas, are the Plaintiffs in the trial court and the Appellant, North Pointe Insurance Company, is the Defendant. In this Brief of Appellees, the parties will be referred to as the Plaintiffs and the Defendant and, where necessary for clarification or emphasis, by name. The symbols “R,” “A,” and “SA” will refer to the Record on Appeal, the Appendix which accompanied the Defendant's brief and the Plaintiffs' Appendix, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

STATEMENT OF THE CASE AND FACTS

Because the Defendant's Statement of the Case and Facts is argumentative and presents matters of fact irrelevant to the subject matter of the two orders appealed [three, if one can lawfully appeal from an order denying a motion for reconsideration directed to non-final orders] the following is respectfully submitted:

A. On or about October 23, 2005, a relative of Plaintiffs dropped an object on the marble kitchen floor in the Plaintiffs' residence.

B. The marble chipped.

C. Plaintiffs made claim against their insurance carrier, present Defendant, for complete replacement of the marble tile flooring. The Defendant received notice and assigned the claim, number H0037455.

D. Defendant conducted an investigation of the claim and, on *March 2, 2007*, in a letter to the Plaintiffs, *denied coverage*:
***7** "... after further review it is found that this loss is *excluded* under the policy..." (SA. 1).

E. Subsequent to the coverage denial, Plaintiffs filed a two Count Complaint (1) Petition to Compel Appraisal and (2) a claim for declaratory judgment relief [for a "coverage exists" determination] (R. 6-20);

F. On August 21, 2007, the Defendant moved to dismiss the Complaint, for its alleged failure to attach the insurance contract (R. 21-23);

G. On August 24, 2007, Plaintiffs filed their First Amended Petition (R. 24-70);

H. On September 5, 2007, the Defendant, in writing, advised Plaintiffs' counsel that it would attend appraisal and that it was:
"... *withdrawing its previous denial of the claim* that the 'dropped pot' *was excluded* under the policy provision excluding loss due to 'wear and tear, marring and deterioration.' " (SA. 3 and 4).

The Defendant further advised:
"... to prevent excessive litigation, we will *stipulate* to your entitlement of attorney's fees up *until the date of your receipt of this correspondence*... Additionally, in the interest of resolving this matter, *we ask that you dismiss the petition to compel appraisal* and for declaratory judgment that you have filed against our client as *all those issues* are *now* moot..." (SA. 3 and 4).

I. On February 14, 2008, an appraisal award was entered in an amount of $115,899.52 (A.1);

J. On March 6, 2008, the Defendant tendered a check (as full payment for the appraisal award and naming numerous payees) to Plaintiffs' counsel, who returned the check:
***8** "... demanding that all payees be removed from the check payment except 'Mintz, Truppman, P.A.' (A. 63, at paragraph 9).

K. On April 2, 2008, Plaintiffs filed their *motion to confirm the appraisal award* and for entry of judgment arguing, *inter alia*, that:
"...the Plaintiffs are entitled to attorney's fees, costs *and pre-judgment interest from the date of loss"* (R. 284-287).

In support Plaintiffs filed their Motion for Determination of Entitlement to, and an Award of Interest, from the date of loss on Defendant's confession of judgment payment during litigation (R. 288-291).

L. On May 29, 2008, the Defendant filed a motion *to strike* Plaintiffs' Motion for Confirmation of Appraisal Award and for entry of judgment (R. 676-712) contending:
"*Plaintiffs Motion to Confirm the Appraisal Award, is moot* and should be stricken and/or denied because the North Pointe has timely paid the appraisal award. A confirmation of ap-

praisal award is unnecessary after the insurer timely pays the award because no dispute remains (citations omitted)...” (R. 676-712, at I.)

M. On June 10, 2008, hearing was held on the various and pending motions (A. 74). At that hearing, the trial court:
1. Granted the Motion to Confirm the Appraisal Award,
2. Granted the Motion for Pre-Judgment Interest from date of loss; and,
3. Granted the Motion for Attorney's Fees:
“*...the amount will be determined at a later time* in a ***9** hearing if that becomes necessary, unless you have some agreement with respect to the amount of fees” (A. 105).

Having heard argument of all counsel, the Court noted:
“I do believe a lot of the delays here were caused by the insurance company sitting on their hands, to be honest. I think that's exactly what's happened...” (A. 106).

N. On June 10, 2008, the Court entered the following written orders consistent with the above noted oral pronouncements:
1. The *order on* Plaintiffs' Motion for Determination of Entitlement to and Award of Interest from the date of loss on Defendant's confession of judgment provides as follows:

* * *

“ORDERED AND ADJUDGED that *said motion* be, and the same *is hereby Granted*. Plaintiff is entitled to interest from the date of loss on the $115,899.52 (2/14/08) appraisal award, until it was paid on 5/14/08.” (A. 115).

* * *

and
2. The *order on* Plaintiffs' Motion for Confirmation of an Appraisal Award and for Entry of Judgment provided as follows:

* * *

“ORDERED AND ADJUDGED that *said motion* be, and the same *is hereby* ****10*** *Granted and the appraisal award* dated February 14, 2008 *is confirmed.*” (A. 116)

* * *

O. On June 20, 2008, the Defendant moved for reconsideration of the June 10, 2008 orders (R. 805-876) which motion was denied on July 30, 2008 (R. 1143-1144).

P. Asserting that the orders entered on *June 10, 2008* were “rendered” on July 30, 2008, *on August 27, 2008*, the Defendant filed a Notice of Appeal directed to those June 10, 2008 orders (A. 131, 132).

Q. On September 2, 2008, the Defendant filed a “Corrected” Notice of Appeal, appealing (in addition to that which was previously appealed, to wit: two orders granting motions) the order *denying Motion for Reconsideration* (A. 138).

III.

POINTS INVOLVED ON APPEAL

A.

THE TRIAL COURT DID NOT ERR IN AWARDING PRE-JUDGMENT INTEREST FROM THE DATE OF LOSS WHERE THE DEFENDANT, PRIOR TO THIS LAWSUIT BEING INSTITUTED, DENIED COVERAGE FOR THE CLAIM, REQUIRING THE PLAINTIFFS TO FILE SUIT TO OBTAIN COVERAGE.

***11** B.

AN ORDER MERELY CONFIRMING AN APPRAISAL AWARD IS NOT AN APPEALABLE ORDER; ASSUMING IT IS, THE TRIAL COURT DID NOT ERR IN ITS RULING AS, ON THE DATES OF FILING AND HEARING, ISSUES REMAINED TO BE DETERMINED, INCLUDING ATTORNEY'S FEES, COSTS, AND PRE-JUDGMENT INTEREST.

C.

ASSUMING THAT PLAINTIFFS' “COMPLAINT” TO “COMPEL” APPRAISAL WAS “ABANDONED” THE PLAINTIFFS' (INDEPENDENT AND OBVIOUSLY POST-APPRAISAL) MOTION TO CONFIRM APPRAISAL AWARD, FILED ON APRIL 8, 2008 PROVIDED THE NECESSARY “JURISDICTION” SUCH THAT THERE EXISTED NO JURISDICTIONAL IMPEDIMENT TO THE ENTRY OF THE ORDER CONFIRMING THE APPRAISAL AWARD.

IV.

SUMMARY OF THE ARGUMENT

For the reasons which follow, the orders appealed should be affirmed in all respects.

A.

The trial court did not err in awarding pre-judgment interest from the date of the loss. In this case, the Plaintiffs sustained a loss. The Plaintiffs made a claim to the Defendant under the insurance policy that the Defendant issued to the Plaintiffs. The Defendant denied coverage for the claim. The Plaintiffs field suit to obtain coverage. The Defendant ultimately “confessed judgment” conceding to the Plaintiffs that coverage existed. Appraisal occurred and the Plaintiffs' damages ***12** were liquidated.

An insurer is liable for pre-judgment interest on the amount payable for an insured's loss on the theory that failure to pay within the time frame contemplated by the agreement constitutes a breach of a contract to pay money. Generally, interest on a loss, payable under an insurance policy, is recoverable from the time payment is due under the terms of the policy. However, where there is a denial by an insurer of its liability for loss under the policy, to wit: a denial of coverage, interest begins to run from the date of the loss, even where the policy provides for payment at a later date. Where, as here, an insurance carrier denies coverage, the policy provision relating to time of payment of benefits, and thus the insurer's liability for interest, is rendered immaterial by the insurer's denial of liability.

Holding the insurer liable for pre-judgment interest recoverable from the time of loss - - where there is a wrongful refusal to pay - - is consistent with two public policies as expressed by the Supreme Court of Florida. First, it encourages the prompt settlement on insurance claims, and second, corrects the inequity created in contracts crafted by insurors which would deny pre-judgment interest to the insured as an element of “just compensation” for pecuniary loss.

The ruling of the trial court squares completely with Florida public policy on this issue. The instant cause did not present a dispute over the value of the loss or the price of a piece of tile. The Defendant denied coverage and invited the subject lawsuit. The ruling of the trial court on the issue of pre-judgment interest should be affirmed in all respects.

B.

Because the order appealed merely confirms an appraisal award and does not enter judgment, the appeal taken from the order confirming the appraisal award should be dismissed.

***13** Assuming review would otherwise be permissible, the dispute between the litigants had not completely terminated. While the Defendant asserts that the issue of attorney's fees was “moot” because the Defendant had previously stipulated to the Plaintiffs' entitlement of fees and the Court acknowledged the stipulation, the parties disagreed over the extent *and* the amount of same. In truth, this is precisely why the order granting Plaintiffs' Motion (to Confirm) the appraisal award must abide a final judgment. The argument Defendant advances may well “relate to” the order confirming the appraisal award but it bears directly on the ultimate issue of entitlement to, and quantum of, attorney's fees, an order not before this Court.

C.

The precise issue presented by the Defendant's third point on appeal is that the trial court confirmed an award without jurisdiction! The specific answer to that question lies in the fact that, on the date of the hearing, there was pending Plaintiffs' Motion to Confirm Appraisal Award. Given that the trial court had jurisdiction over the subject matter and that Plaintiffs' motion was duly noticed for hearing, it cannot be contended that the trial court was without jurisdiction to confirm the appraisal award. Moreover, Defendant's second point on appeal and third point on appeal are entirely inter related. For the reasons otherwise contained in the main section of the Argument portions of this Brief, it should be concluded that the trial court did not

err.

V.

ARGUMENT

A.

THE TRIAL COURT DID NOT ERR IN AWARDING PRE-JUDGMENT INTEREST FROM THE DATE OF LOSS WHERE THE DEFENDANT, PRIOR TO THIS LAWSUIT BEING INSTITUTED, DENIED COVERAGE FOR THE CLAIM, REQUIRING THE PLAINTIFFS TO FILE SUIT TO OBTAIN COVERAGE.

***14** The trial court did not err in awarding pre-judgment interest from the date of loss.

The operative facts of this case, pertinent to this issue on appeal, are as follows:
1. The Plaintiffs sustained a loss.
2. The Plaintiffs made a claim to the Defendant under the insurance policy that the Defendant issued to the Plaintiffs.
3. The Defendant denied coverage for the claim.
4. The Plaintiffs field suit to obtain coverage.
5. The Defendant ultimately "confessed judgment" conceding to the Plaintiffs "You win," coverage exists.
6. Appraisal occurred.

When the Defendants denied coverage, the Plaintiffs were required to file suit to obtain the benefits due under their insurance policy. The declination of coverage distinguished itself from a mere "dispute" over the "amount" of a loss! The rule of law applicable herein is found in this Court's opinion in INDEPENDENT FIRE INSURANCE COMPANY v. LUGASSY, 593 So.2d 570 (Fla. App. 3rd 1992) wherein a panel of this Court had occasion to discuss the subject issue and recognized the general rule as follows:
"An insurer is liable for pre-judgment interest on the amount payable for an insured fire loss on the theory that failure to pay within the time frame contemplated by the agreement constitutes a breach of a contract to pay money (citation omitted). The question presented here is from *what date does the obligation to pay pre-judgment interest commence*." 593 So.2d at page 572.

***15** In addressing the issue, this Court recognized *the general rule* that interest on a loss, payable under an insurance policy, is recoverable from the time payment is due *under the terms of the policy*. This Court further recognized that the general rule may not be applicable where there is a *denial by an insurer* of its liability for loss under the policy. This Court further recognized the generally accepted principle that if the insurer denies liability, interest begins to run from the date of the loss, even where the policy provides for payment at a later date. As this Court stated:
"... according to that established line of authority, the policy provision relating to time of pay-

ment of benefits, and thus the insurer's liability for interest, is rendered *immaterial by the insurer's denial of liability* (citations omitted)." 593 So.2d at page 572.

In affirming the award of pre-judgment interest from the date of loss in LUGASSY, this Court stated:
"... the underlying legal theory is that by denying liability, the insurer *waives its right* to withhold payment pursuant to a contractual provision deferring payment..." 593 So.2d at page 572.

In applying the above principles to settled Florida public policy, this Court reasoned:
"Holding the insurer liable for pre-judgment interest recoverable from the time of the loss - - where there is a *wrongful refusal to pay* - - is consistent with two public policies as expressed by the Supreme Court of Florida: (1) it encourages the prompt settlement on insurance claims (citation omitted) and (2) corrects the inequity created in contracts crafted by insurers which would deny pre-judgment interest to the insured as an element of 'just compensation' for pecuniary loss (citation ***16** omitted)..." 593 So.2d at page 572.

In accord: STATE FARM FIRE AND CASUALTY COMPANY v. ALBERT, 618 So.2d 278 (Fla. App. 3rd 1993) and LIBERTY MUTUAL INSURANCE COMPANY v. ALVAREZ, 785 So.2d 700 (Fla. App. 3rd 2001) wherein a panel of this Court, *reversed* a trial court ruling which had granted pre-judgment interest and rejected therein the application of LUGASSY *to the facts* of that case recognizing specifically that LUGASSY:
"... involved a carrier's *repudiation of coverage* which did not exist in *Aries [Insurance Co. v. Hercas Corp.*, 781 So.2d 429 (Fla. 3rd DCA 2001)] or here..." 785 So.2d at page 700.

In ARIES, supra, this Court began its discussion regarding entitlement to pre-judgment interest with the following observation:
"*Following covered losses* resulting from property theft and vandalism, *the parties resorted to the policy appraisal procedure* to determine the amount of the losses. *The parties did not litigate the issue of coverage*. The court entered a final judgment as to the appraisal amount and awarded Hercas pre-judgment interest from the date of the last theft. Subsequently, the court denied Hercas' motion for appraiser fees..." 781 So.2d at page 430.

ARIES, as was recognized in ALVAREZ, supra, began with the litigants recognizing that *coverage existed for the losses* but that litigation was necessary to *either* obtain the appraisal procedure (under the contract) or to determine the amount of the losses. ARIES does not conflict with LUGASSY, supra, nor weaken it in any way.

Similarly, in ALLSTATE INSURANCE COMPANY v. BLANCO, 791 So.2d 515 (Fla. App. 3rd 2001) a panel of this Court, on motion for rehearing ***17** granted, reversed an award of pre-judgment interest to the plaintiffs Roberto and Maria Blanco because:
"... pre-judgment interest should have been computed from the date of the appraisal award, not the date of loss..." 791 So.2d at page 516.

In that case, the Blancos were insured by Allstate when their home was damaged by Hurricane Andrew. They submitted a claim which Allstate *promptly paid*. Five years later, the Blancos

submitted a supplemental claim for Hurricane Andrew losses and received an appraisal award on February 26, 1999, *which Allstate paid* on March 30, 1999. *The Blancos were awarded pre-judgment interest from the date of the loss*. In reversing that award, this Court stated the well settled *general rule*:
"A plaintiff is entitled to pre-judgment interest when it is determined that the plaintiff has suffered an actual, out of pocket loss at some date prior to the entry of judgment (citation omitted)..." 791 So.2d at page 516.

However, the general rule applied in cases such as ARIES, supra, and BLANCO, supra, should have no application *to the exception to the general rule* as stated in LUGASSY, supra. Coverage was neither denied nor at issue in either ARIES or BLANCO. Consequently, LUGASSY should be found to control herein.

Here, as would otherwise happen *with a jury verdict*, the appraisal award liquidated the Plaintiffs' damages. However, the question presented here, as in LUGASSY, is: From what date does the obligation to pay pre-judgment interest commence? In LUGASSY, a panel of this Court recognized that *the general rule* [interest on a loss, payable under an insurance policy, is recoverable from the time payment is due *under the terms of the policy*] *may not be applicable* where there ***18** is a *denial by an insurer* of coverage under the policy. As this Court noted:
"... the policy provisions relating to time of payment of benefits, and thus the insurer's liability for interest, is rendered immaterial by the insurer's denial of liability..." 593 So.2d at page 572.

The ruling of the trial court squares completely with Florida public policy on this issue. *See:* LUGASSY, supra, and cases cited therein. The instant cause did not present a dispute over the value of the loss or the price of a piece of tile. The Defendant denied coverage and invited the subject lawsuit. That it subsequently "agreed" that there was coverage (by "confession of judgment") and subsequently proceeded to appraisal should have no effect upon the controlling rule (which was adopted for this very circumstance):
"...holding the insurer liable for pre-judgment interest recoverable from the time of loss - - where there is a wrongful refusal to pay - - is consistent with two public policies as expressed by the Supreme Court of Florida: (1) it encourages the prompt settlement of insurance claims (citation omitted) and (2) corrects the inequity created in contracts crafted by insurors which would deny pre-judgment interest to the insured as an element of 'just compensation' for pecuniary loss (citation omitted)..." 593 So.2d at page 572.

The ruling of the trial court on the issue of pre-judgment interest should be affirmed in all respects.

B.

AN ORDER MERELY CONFIRMING AN APPRAISAL AWARD IS NOT AN APPEALABLE ORDER; ASSUMING IT IS, THE TRIAL COURT DID NOT ERR IN ITS RULING AS, ON THE DATE OF FILING AND HEARING, ISSUES REMAINED TO BE DETERM-

INED, INCLUDING ATTORNEY'S FEES, COSTS, AND ***19** PRE-JUDGMENT INTEREST.

The trial court did not err, under the subject facts, in confirming an appraisal award that was already paid.

First, and foremost, the order appealed was entered on a motion for confirmation of an appraisal award *and for entry of judgment*. There was no "entry of judgment" there was merely an order granting the motion - - confirming the award! Under this Court's recent opinion in FEDERATED NATIONAL INSURANCE COMPANY v. PALENZUELA, 34 Fla. L. Weekly D873 (Fla. App. 3rd 2009) this Court lacks jurisdiction to review same. Consequently, the Defendant's second point involved on appeal should be dismissed.

Second, and assuming review would otherwise be permissible, unlike the cases relied upon, *See:* Defendant's Brief at page 30, to wit: FEDERATED NATIONAL INSURANCE COMPANY v. ESPOSITO, 937 So.2d 199 (Fla. App. 4th 2006) and NATIONWIDE PROPERTY AND CASUALTY CO. v. BOBINSKI, 776 So.2d 1047 (Fla. App. 5th 2001) the dispute between the litigants had not completely terminated. Moreover, and as was recently noted by the District Court of Appeal, Fourth District, in LEWIS v. UNIVERSAL PROPERTY AND CASUALTY INSURANCE CO., 34 Fla. L. Weekly D1104 (Fla. App. 4th 2009) [in speaking to cases such as ESPOSITO, supra,] the decisions in these cases:
"... plainly indicate that whether suit is filed before or after the invocation of the appraisal process is not determinative of the insured's Right to fees; rather, *the Right to fees turns upon whether the filing of the suit served the legitimate purpose*..." 34 Fla. L. Weekly at D1105.

***20** That plaintiffs were required to file this lawsuit to obtain coverage is both undisputed and conceded by the Defendant. The fact that the Defendant contends that Plaintiffs' right to fees was "limited" up to the date of the "stipulation" and could never proceed past that point is both wrong and raises an issue not present in this appeal.

Although the Defendant asserts that the issue of attorney's fees was "moot" because the Defendant had previously stipulated to the Plaintiffs' entitlement of fees and the Court acknowledged the stipulation, the parties disagreed over the extent *and amount of same*! The issues of costs and, [as evidenced by Point I, supra,] pre-judgment interest were still at issue.

At page 30 of its Brief, the Defendant asserts:
"... the Court confirmed the award *simply on its own unilateral factual and legal determination that North Pointe should have accepted a lawyer letter from Tomas* to leave off its public adjuster from the appraisal award check despite prior notice from this company that it must be included on the check as evidenced by its contractual relationship with Tomas."

In truth, this is precisely why the order merely granting Plaintiffs' motion (to confirm) must abide a final judgment. The argument Defendant advances may well "*relate to*" the order confirming the appraisal award but *it bears directly on the ultimate issue of entitlement to, and quantum of, attorney's fees*, an order not before this Court.

Moreover, neither the order confirming the appraisal award nor the order "finding" that Plaintiffs are entitled to interest from the date of loss was followed either by a "judgment" confirming the appraisal award or a "judgment" quantifying the interest actually due. Given the lack of any conceivable final judgment, the ***21** arguments contained in the Defendant's second point on appeal are not properly before this Court.

Interestingly, assuming further that the issues found in the Defendant's Point II *are* properly before this Court *and* one accepts for purposes of this point *ONLY* that there existed no basis for the trial court to confirm the appraisal award, the interesting question remains: What *then* is the effect of *this point on* the Defendant's *third* point involved on appeal?

C.

ASSUMING THAT PLAINTIFFS' "COMPLAINT" TO "COMPEL" APPRAISAL WAS "ABANDONED" THE PLAINTIFFS' (INDEPENDENT AND OBVIOUSLY POST-APPRAISAL) MOTION TO CONFIRM APPRAISAL AWARD, FILED ON APRIL 8, 2008 PROVIDED THE NECESSARY "JURISDICTION" SUCH THAT THERE EXISTED NO JURISDICTIONAL IMPEDIMENT TO THE ENTRY OF THE ORDER CONFIRMING THE APPRAISAL AWARD.

In this point, the Defendant *strictly following* a timeline suggests that Plaintiffs abandoned their original claim to compel appraisal:
"... AND SO THE COURT ERRONEOUSLY CONFIRMED AN AWARD WITHOUT JURISDICTION."

However, if one were to inject into the Defendant's timeline the fact that on April 2, 2008, Plaintiffs filed their Motion to Confirm the Appraisal Award and for entry of judgment contending therein that the Plaintiffs *were entitled to attorney's fees, costs and pre-judgment interest from the date of loss* (R. 284-287) it is clear that on June 10, 2008, [and assuming the correctness vel non of the Defendant's ***22** argument that the "original pleadings" had been abandoned,] there existed *an independent motion* for the trial court to have confirmed the appraisal award! Moreover, and reverting to the arguments advanced by the Defendant in Point II, supra, there existed *another reason why the trial court was justified in confirming the appraisal award*, to wit: the Defendant's (now) contentions that the Plaintiffs' claims [which had existed in the prior pleadings] had all been "abandoned." At page 35 of its Brief, the Defendant states that the events upon which fees, costs, pre-judgment interest, etc. were based were not found in the Plaintiffs' *initial* pleadings and did not become "viable" (for lack of a more precise word):
"... until *after* they (Plaintiffs) moved to confirm the award. The lower court granted Plaintiffs' motion for leave to file Second Amended Complaint on June 4, 2008 (R. 713-714). Therefore, at the time the court confirmed the award and awarded interest, it did so before North Pointe had even filed an answer to the Second Amended Complaint that was filed on June 17, 2008 (R.759-763)."

Hence, the significance *of* the two motions Plaintiffs *had* filed, including Plaintiffs' Motion to

Confirm Appraisal Award. If this Court is even remotely considering reviewing the merits of the Defendant's second point involved on appeal, and is considering the correctness vel non of the argument Defendant presents there, Plaintiffs would ask this Court to consider the effect it would have on this Point (III), to wit: that there existed no jurisdiction "to do anything" as the Plaintiffs' initial pleadings had been abandoned and, according to the (second point raised on appeal by the) Defendant, the Plaintiffs' Motion to Confirm Appraisal Award served *no purpose*!

Lastly, in considering the relative merits of the arguments raised by the ***23** Defendant in Points II and III of their Brief, the underlying motivation for advancing the arguments that they do relates (obviously) to the issue of attorney's fees which have neither been quantified nor have been reduced to judgment. At the hearing held June 10, 2008, the trial court made several rulings which bore directly on the issue of attorney's fees (A. 106). The essence of the Defendant's second point on appeal is found at page 31 of its Brief, wherein it is stated:
"... in this case, as a matter of record, North Pointe had already *stipulated to* Tomas' *entitlement* to its attorney's fees *all the way up until the time the parties entered appraisal*..."

At the hearing on the Motion to Confirm the Appraisal Award, the parties disputed *whether* Plaintiffs were entitled to fees *post appraisal*! The purpose of noting this fact, at this point in time, is not to support, justify or even argue the correctness vel non of the trial court's ruling. It is only to call to this Court's attention *precisely why* piecemeal appeals are frowned upon in this state. Because the Defendant herein cannot do directly that which it wishes to do (to contest the trial court's "ruling" on the issue of attorney's fees) it seeks to do it indirectly by arguing *now* that since it paid the appraisal award, since it stipulated that Plaintiffs' attorney's were entitled to fees up to the appraisal award, there existed nothing else to be litigated. Obviously, from the face of the subject record, such is not the case.

The precise issue presented by the Defendant's third point on appeal is that the trial court confirmed an award *without jurisdiction!* The specific answer to that question lies in the fact that, on the date of the hearing, there was pending Plaintiffs' Motion to Confirm Appraisal Award. Given that the trial court had jurisdiction over the subject matter and that Plaintiffs' motion was duly noticed for hearing, it cannot be contended that the trial court was without jurisdiction to ***24** confirm the 'appraisal award. Consequently, this Court should reject the Defendant's argument as to this point.

***25 VI.**

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Plaintiffs respectfully urge this Honorable Court to affirm, in all respects, the orders appealed.

NORTH POINTE INSURANCE COMPANY, Appellant, v. Miguel TOMAS and Francine Tomas, Appellees.
2009 WL 2428594 (Fla.App. 3 Dist.) (Appellate Brief)