IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D20-1469
L.T. CASE NO.: 20-4561

HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY,

Appellant,

v.

CONDOMINIUM ASSOCIATION OF GATEWAY HOUSE APTS., INC.,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On Non-Final Appeal from the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Florida

RUBINTON & ASSOCIATES, P.A.
Jeffrey A. Rubinton, Esq.
Veronica Dossat, Esq.
Trial Counsel for *HERITAGE*
400 N. Ashley Dr.
Suite 2633
Tampa, FL 33602
jrubinton@rubintonlaw.com
vdossat@rubintonlaw.com
Eservice@rubintonlaw.com

LINK & ROCKENBACH, PA
Kara Rockenbach Link, Esq.
David A. Noel, Esq.
Appellate Counsel for *HERITAGE*
1555 Palm Beach Lakes Blvd.
Suite 930
West Palm Beach, FL 33401
kara@linkrocklaw.com
david@linkrocklaw.com
troy@linkrocklaw.com

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PREFACE

Appellant, HERITAGE PROPERTY & CASUALTY INSURANCE COMPANY, was the Defendant below and will be referred to in this brief as “Heritage.” Appellee, CONDOMINIUM ASSOCIATION OF GATEWAY HOUSE APTS., INC., was the Plaintiff below and will be referred to as “Plaintiff” or by name.

The appendix to this brief will be cited as "[A.__]."

INTRODUCTION

In this first-party Hurricane Irma property insurance lawsuit, the trial court erred by compelling appraisal because Plaintiff failed to comply with its post-loss conditions precedent to appraisal. Specifically, despite repeated requests by Heritage, Plaintiff (a condominium association) failed to submit its board meeting minutes to Heritage. Plaintiff had an obligation under Florida law to keep such records and an obligation under the Heritage policy to submit them to Heritage upon request.

Plaintiff's failure to comply with Florida law by failing to keep board meeting minutes (allegedly due to a lack of a quorum for the meetings) was a violation of the policy's post-loss conditions precedent to appraisal. Therefore, the order compelling appraisal must be reversed.

STATEMENT OF THE CASE AND FACTS

The Policy of Insurance

Heritage issued a Commercial Property policy of insurance to Plaintiff, policy number HCP005415-0, for policy period January 10, 2017 to January 10, 2018, for the property located at 16710 and 16740 NE 9th Ave., North Miami Beach, Florida, 33162. [A.10].

Plaintiff's Initial Hurricane Irma Claim

On September 22, 2017, Plaintiff, through its public adjuster Stellar Public Adjusting Services, reported a claim to Heritage for damage caused by Hurricane Irma. [A.178, 264-65, 266].

By letter dated December 6, 2017, Heritage informed Plaintiff that its Hurricane Irma damage was below the Heritage policy's $277,410.00 hurricane deductible. [A.471]. The letter attached Heritage's 91-page estimate showing the damage to Plaintiff's first building (16710 NE 9th Ave.) was $103,470.72 and the damage to the second building (16740 NE 9th Ave.) was $73,025.54. [A.475-565].

Plaintiff's Supplemental Hurricane Irma Claims

Over seven months later, on August 9, 2018, Plaintiff's public adjuster submitted a supplemental claim to Heritage in the amount of $1,987,210.30. [A.566].

Three months later, on November 13, 2018, the public adjuster submitted a second supplemental claim in the amount of $3,585,297.55. [A.569]. This claim included a request for payment or appraisal. [A.571].

By letter dated November 21, 2018, Heritage advised Plaintiff's public adjuster that appraisal would be premature because Heritage was still investigating the supplemental claims. [A.572]. Heritage's letter also requested several categories of documents, including Plaintiff's condominium association board meeting minutes for the previous five years. *Id*.

Heritage's Repeated Requests for Plaintiff's Board Meeting Minutes

After failing to receive any board meeting minutes from Plaintiff, Heritage continued to request them by letters dated February 15, 2019, March 21, 2019, May 6, 2019, July 5, 2019, August 14, 2019, and August 19, 2019. [A.575-93].

In its February 15, 2019 letter to Plaintiff's public adjuster, Heritage stated, in pertinent part:

Dear Mr. Boaziz:

This letter is in response to your further request for appraisal demand as it relates to this claim and to advise you that based on your revised claim submission received on November 20th 2018 and the fact that as we have still not received full response to the attached letter dated November 21st 2018 appraisal would be premature at this time.

1. Copies of minutes of Association's board minutes for the past five years.
2. Copies of invoices for any and all previous work or maintenance completed on the buildings.

Please be advised that we have revised document request number 2 above to reflect all previous work or maintenance completed on the buildings for the previous five years.

[A.575 (highlighting added)].

In a letter to Heritage dated March 14, 2019, the public adjuster replied that the requested documents were available for review and copying by Heritage:

Dear Mr. Walsh:

As you are aware, our office represents the above named Insured as their Public Adjuster with regard to the above styled claim. Please accept this as a formal response to your letter dated February 15, 2019 in which you request documentation from the Insured and state that Appraisal is Premature at this time.

First, as mentioned in your letter, you are requesting the following documentation from the Insured:

1. Copies of minutes of Association's board minutes for the past five years.
2. Copies of invoices for any and all previous work or maintenance completed on the buildings.

.

Please note that the documents in request are much too large in paper work to be sent. Due to this, please inform us as to when the carrier would like to visit The Gateway House and review the documents on site. The Insured will have the documents available on site for your representative to review and make copies of if needed.

[A.598 (highlighting added)].

Heritage followed up with the public adjuster by letter dated March 21, 2019 and attempted to arrange copying of the requested documents:

We have made arrangements with Black's Copy Services to visit the property to pick up the above requested documents. They will sign for the documents, make copies off premise and then return the originals to the property. Please contact Gail Stapleton at Black's Copy Services at 305-374-7826 to make arrangements. You may also reach her by sending an email to her attention at Digital@Blackscopy.com. We have also provided your contact information to her so she can follow up with you if she has not heard from you timely.

[A.577 (highlighting added)].

Heritage followed up again regarding copying of the documents by letter dated May 6, 2019:

Pursuant to our attached prior correspondence dated March 21th, 2019 we had made arrangements with Black's Copy Services to visit the property and copy the above requested documents. Please be advised that we have verified with Gail Stapleton of Blacks Copy Services that no one from your firm has contacted them to schedule date for her firm to make the copies.

[A.580 (highlighting added)].

Heritage followed up once again regarding copying of the documents by letter dated July 5, 2019:

> We had previously advised that we had made arrangements with Black's Copy Services, at our expense, to visit the property to pick up the above requested documents. They would sign for the documents, make copies off premise and then return the originals to the property. We had requested you contact Gail Stapleton at Black's Copy Services at 305-374-7826 Digital@Blackscopy.com to make arrangements.
>
> It is our understanding that you had not contacted Blacks Copy Service to arrange for the copying of the above documents. We again request that you contact them to arrange the copying of said documents at our expense.

[A.582 (highlighting added)].

Heritage sent similar letters to Plaintiff's public adjuster on August 14, 2019 and August 19, 2019:

> It is our understanding that you have still not contacted Blacks Copy Service to arrange for the copying of the above documents. We again request that you contact them to arrange the copying of said documents at our expense.

[A.586, 590 (highlighting added)].

Despite Heritage's repeated requests, Plaintiff's board meeting minutes were never provided for Heritage's review or copying. [A.281].

Plaintiff's Lawsuit

On February 27, 2020, without first providing the requested board meeting minutes, Plaintiff filed suit against Heritage to compel appraisal and for breach of contract. [A.4].

The Complaint alleged that Heritage "breached the Policy by failing to properly adjust the Claim in accordance with the terms and conditions of the Policy, failing to submit the Claim to appraisal, and failing to fully compensate Plaintiff for the covered damages to the Property." [A.7].

Plaintiff's Motion to Compel Appraisal

On March 20, 2020, Plaintiff filed its Motion to Compel Appraisal and Appoint a Neutral Umpire. [A.84]. The motion made no mention of Plaintiff's failure to submit the board meeting minutes requested by Heritage.

Heritage's Opposition to Appraisal

Heritage opposed appraisal on several legal grounds, including Plaintiff's failure to comply with its post-loss conditions precedent to appraisal. [A.183-86]. Heritage argued, *inter alia*, that appraisal was improper because Plaintiff failed to submit any board meeting minutes despite Heritage's repeated requests and Florida law requiring Plaintiff to keep such records. [A.183-86, 443-50].

Plaintiff's Belated, Post-Suit Disclosure that it Failed to Keep Board Meeting Minutes

On August 25, 2020, six months after filing suit and contrary to its public adjuster's March 14, 2019 letter stating the documents were available for review, Plaintiff, through its counsel, notified Heritage for the first time that Plaintiff "does not maintain any minutes and therefore has none to produce." [A.594].

Evidentiary Hearing on September 24, 2020

At the September 24, 2020 evidentiary hearing on Plaintiff's Motion to Compel Appraisal, the parties focused on Plaintiff's failure to submit the requested board meeting minutes to Heritage.

Heritage's representative testified that the meeting minutes were important to Heritage's investigation of Plaintiff's supplemental claims and the documents were never provided by Plaintiff. [A.281, 285].

The board meeting minutes were significant to Heritage's investigation because they typically disclose, among other things, decisions to undertake capital improvements affecting the damaged property, expenses incurred in maintaining or repairing a roof or other common elements, the nature and dates of prior damage or repairs, and/or individuals with pertinent knowledge so they could be contacted during the investigation of the claim. [A.319-20, 322-24].

Plaintiff's representative testified that, despite a statutory requirement to keep such records, Plaintiff failed to keep any board meeting minutes because the meetings lacked a quorum. [A.336-37].

Order Compelling Appraisal

On October 2, 2020, the trial court entered an order granting Plaintiff's Motion to Compel Appraisal. [A.451]. This timely appeal followed. [A.460].

SUMMARY OF THE ARGUMENT

The trial court erred by compelling appraisal of Plaintiff's supplemental Hurricane Irma claim because Plaintiff failed to comply with its post-loss conditions precedent to appraisal.

Specifically, despite repeated requests by Heritage, Plaintiff (a condominium association) failed to submit its board meeting minutes to Heritage. Plaintiff had an obligation under Florida law to keep such records and an obligation under the Heritage policy to submit them to Heritage when requested.

The board meeting minutes were significant to Heritage's investigation because they typically disclose, among other things, decisions to undertake capital improvements affecting the damaged property, expenses incurred in maintaining or repairing a roof or other common elements, the nature and dates of prior damage or repairs, and/or individuals with pertinent knowledge so they could be contacted during the investigation of the claim.

Plaintiff's failure to keep board meeting minutes (allegedly due to a lack of a quorum for the meetings) was a violation of Florida law and a violation of the policy's post-loss conditions precedent to appraisal.

Accordingly, the order compelling appraisal must be reversed and the case remanded for litigation of Plaintiff's breach of contract action (Count II of the

Complaint). This is not a forfeiture of coverage because Plaintiff can seek a finding of coverage and damages via the litigation.

STANDARD OF REVIEW

This Court reviews the trial court's order compelling appraisal under a *de novo* standard of review. *See MKL Enterprises LLC v. Am. Traditions Ins. Co.*, 265 So.3d 730, 731 (Fla. 1st DCA 2019) ("The standard of review applicable to an order compelling appraisal under an insurance policy is de novo.").

ARGUMENT

I. THE TRIAL COURT ERRED BY COMPELLING APPRAISAL OF PLAINTIFF'S SUPPLEMENTAL HURRICANE IRMA CLAIM BECAUSE PLAINTIFF FAILED TO COMPLY WITH ITS POST-LOSS CONDITIONS PRECEDENT TO APPRAISAL.

A. Appraisal cannot be compelled unless the insured has fully complied with all post-loss conditions precedent to appraisal.

Florida law is well-settled that appraisal is premature where the insured has failed to comply with its post-loss obligations. *See Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So.3d 342, 344 (Fla. 2d DCA 2011) ("Despite Citizens' argument that the insured failed to comply with its duties after loss, the circuit court failed to make the preliminary determination as to whether the insured's demand for appraisal was ripe. We therefore reverse the order compelling appraisal and remand for an evidentiary hearing on that issue."); *Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc.*, 54 So.3d 578, 581 (Fla. 3d DCA 2011) ("No disagreement or arbitrable issue exists unless 'some meaningful exchange of information sufficient for each party to arrive at a conclusion' has taken place. Thus, ***an 'insured must comply with all of the policy's post-loss obligations before the appraisal clause is triggered***.'") (internal citation omitted; emphasis added); *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So.3d 188, 191 (Fla. 3d DCA 2010) ("Until these [post-loss] conditions are met and the insurer has a reasonable opportunity to investigate and adjust the claim, there is no 'disagreement' (for purposes of the

appraisal provision in the policy) regarding the value of the property or the amount of loss. Only when there is a 'real difference in fact, arising out of an actual and honest effort to reach an agreement between the insured and the insurer,' is an appraisal warranted.").

The standard for compliance with post-loss obligations prior to appraisal is full compliance with all post-loss obligations, not a lesser standard such as "sufficient" compliance:

> The trial court in this case found that the Plaintiffs had "sufficiently complied" with the policy's post-loss obligations, citing this Court's opinion in *Mango Hill 12*. ... The trial court's order seems to suggest that our *Mango Hill 12* decision substantially changed the requisite standard to obtain appraisal to require something less than ***full compliance with all post-loss obligations***, as had been ***mandated by our numerous past holdings***. However, a full reading of *Mango Hill 12*, along with a litany of our other cases on this subject, confirms that ***"sufficient compliance" still requires that all post-loss obligations be satisfied*** before the trial court can properly exercise its discretion to compel appraisal.

State Farm Fla. Ins. Co. v. Cardelles, 159 So.3d 239, 241 (Fla. 3d DCA 2015) (emphasis added).

Subsequent decisions of this Court cited *Cardelles* with approval and followed its holding. *See State Farm Fla. Ins. Co. v. Fernandez*, 211 So.3d 1094, 1095 (Fla. 3d DCA 2017) ("It is well-settled in Florida that ***all post-loss obligations must be satisfied*** before a trial court can exercise its discretion to compel appraisal.") (emphasis added); *State Farm Fla. Ins. Co. v. Hernandez*, 172 So.3d 473, 476–77

(Fla. 3d DCA 2015) ("The law in this district is clear and has been for nearly twenty years: the party seeking appraisal **must comply with all post-loss obligations** before the right to appraisal can be invoked under the contract.") (emphasis in original); *State Farm Ins. Co. v. Xirinachs*, 163 So.3d 559, 559 (Fla. 3d DCA 2015) ("***all post-loss obligations must be satisfied*** before a trial court can exercise its discretion to compel appraisal") (emphasis added).

While this Court's recent decision in *People's Trust Insurance Co. v. Ortega*, 45 Fla. L. Weekly D1523 (Fla. 3d DCA June 24, 2020) mentioned substantial compliance, it did not address, recede from or otherwise overrule *Cardelles* and its progeny. As such, the standard in this district remains *full* compliance with *all* post-loss conditions precedent to appraisal -- a standard Plaintiff did not and cannot meet.

B. Plaintiff failed to fully comply with all post-loss conditions precedent to appraisal by failing to maintain and submit condominium board meeting minutes to Heritage.

Section 718.111(12)(a), Florida Statutes, imposes a duty on condominium associations, like Plaintiff, to maintain certain official records. Among the official records that must be maintained for at least seven years are the condominium association's board meeting minutes:

> (12) OFFICIAL RECORDS.—
>
> (a) From the inception of the association, the association shall maintain each of the following items, if applicable, which constitutes the official records of the association:

* * *

> 6. A book or books that contain the minutes of all meetings of the association, the board of administration, and the unit owners, which minutes must be retained for at least 7 years.

§ 718.111(12)(a)(6), Fla. Stat.

Chapter 718 of the Florida Statutes (the Condominium Act), including section 718.111(12)(a) regarding official records, was incorporated by law into the contract of insurance between Heritage and Plaintiff (a condominium association regulated by Florida law). *See Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc.*, 765 So.2d 836, 839 (Fla. 4th DCA 2000) ("'all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention'"); *Weldon v. All Am. Life Ins. Co.*, 605 So.2d 911, 914 (Fla. 2d DCA 1992) ("Where a contract of insurance is entered into on a matter surrounded by statutory limitations and requirements, the parties are presumed to have entered into such agreement with the reference to the statute and the statutory provisions become a part of the contract."); *see also Madison at Soho II Condo. Ass'n, Inc. v. Devo Acquisition Enterprises, LLC*, 198 So.3d 1111, 1119 (Fla. 2d DCA 2016) ("It is of little consequence that the Association's initial argument was based in contract. This is not a case where the contractual language possesses a 'scope independent of

the proper construction of the statute' based on some specific facts or the intent of the parties at formation.").

The Heritage policy required Plaintiff to permit Heritage to examine and copy Plaintiff's "books and records:"

> **3. Duties In The Event Of Loss Or Damage**
>
> **a.** You must see that the following are done in the event of loss or damage to Covered Property:
>
> **(6)** As often as may be reasonably required, permit us to inspect the property proving the loss or damage and ***examine your books and records***.
>
> Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to ***make copies from your books and records***.

[A.24 (emphasis added)].

The plain meaning of the unambiguous words "books and records" includes the board meeting minutes required by section 718.111(12)(a)(6) because both the policy and statute refer to "records" and "books." Plaintiff's board meeting minutes are official records required by statute and they are referred to in the statute as "[a] ***book or books*** that contain the minutes ...." § 718.111(12)(a)(6), Fla. Stat. (emphasis added).

Plaintiff admittedly failed to keep any board meeting minutes because the meetings allegedly lacked a quorum. [A.336-37]. As such, Plaintiff can never comply with Heritage's request to produce the meeting minutes because, despite a statutory duty to create and maintain them, they do not exist.

As explained by Heritage's representative at the September 24, 2020 evidentiary hearing and reflected in this Court's caselaw, board meeting minutes and other condominium association official records are important to an insurance company's investigation of a property insurance claim. *See Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc.*, 48 So.3d 188, 191 (Fla. 3d DCA 2010) ("The association board and membership meeting minutes may disclose, for example, (1) decisions to undertake capital improvements affecting the damaged property, (2) expenses incurred in maintaining or repairing a roof or other common elements, and (3) the nature and dates of prior damage or repairs. ... All such records may identify individuals with pertinent knowledge so that they can be contacted during the investigation of the claim.").

Based on Plaintiff's failure to keep any board meeting minutes, Plaintiff did not and cannot fully comply with all post-loss conditions precedent to appraisal under the Heritage policy. Because the documents do not exist (despite Plaintiff's legal duty to create and maintain them), Plaintiff cannot produce them as required by the post-loss obligations in the Heritage policy.

Plaintiff's lack of full compliance with all post-loss obligations prevents the amount-of-loss dispute essential to appraisal from arising, and thus the trial court reversibly erred by granting Plaintiff's Motion to Compel Appraisal and Appoint a Neutral Umpire. *Citizens Prop. Ins. Corp. v. Mango Hill Condo. Ass'n 12 Inc*., 54 So.3d 578, 581 (Fla. 3d DCA 2011); *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc*., 48 So.3d 188, 191 (Fla. 3d DCA 2010).

As set forth in this Court's *State Farm Insurance Co. v. Xirinachs*, 163 So.3d 559 (Fla. 3d DCA 2015) decision, which addressed a similar instance of an insured's failure to provide documents to the insurer, the appropriate relief is reversal of the trial court's order compelling appraisal:

> The Insureds in this case failed to comply with all post-loss obligations. For example, they ***failed to produce necessary documentation*** and protect the property from further damage as required by the governing policy. Given their failure to comply with these obligations, the trial court erred in ordering appraisal.
>
> Reversed and remanded.

Xirinachs, 163 So.3d at 559–60 (emphasis added).

C. The trial court's order compelling appraisal was based on several erroneous rulings of law.

1. Production of documents that do not exist

The trial court's October 2, 2020 order granting Plaintiff's motion to compel appraisal erroneously relies on this Court's *Cardelles* decision for the proposition that "an insured is not required to produce documents it does not have, and an insurance

company cannot avoid appraisal because its insured did not produce something that does not exist." [A.455].

However, *Cardelles* contains no such holding. Instead, the *Cardelles* court reached the commonsense conclusion that an insured need not produce repair records for repairs that were never made, especially in the context of a supplemental property damage claim seeking the same damages as the original claim:

> ... The record establishes that State Farm believed the Plaintiffs were requesting reimbursement for newly discovered damages that had already been repaired, however, the Plaintiffs are in fact claiming additional payment for the damages initially incurred from the hurricanes that they allege have not been repaired to this day. The Plaintiffs did not submit any of the requested documents because ***they have not yet made any additional repairs, so there are no documents to be submitted***. Moreover, the Plaintiffs have made their home available to State Farm for inspection of the damages, and State Farm has inspected the home.
>
> * * *
>
> Despite the confusion on which standard to apply, we cannot say that the trial court abused its discretion by compelling appraisal of the Plaintiffs' claimed damages on these particular facts. State Farm admits that the Plaintiffs complied with all post-loss obligations immediately following the hurricanes in 2005, and the Plaintiffs have provided State Farm with an updated sworn proof of loss detailing all of the damages they are claiming. Moreover, ***because these damages are the same as those claimed from the original hurricane damage, State Farm already has all the required documentation*** of the damages, and the Plaintiffs have also agreed on many occasions to open their home to State Farm for further inspection of the damages. Thus, the trial court did not abuse its discretion by granting the Plaintiffs' motion to compel appraisal.

State Farm Fla. Ins. Co. v. Cardelles, 159 So.3d 239, 240, 241-42 (Fla. 3d DCA 2015) (emphasis added).

Here, unlike the non-existent repair records in *Cardelles*, Plaintiff had a statutory duty to keep condominium association board meeting minutes. § 718.111(12)(a)(6), Fla. Stat. This duty was incorporated into the Heritage policy's plain language regarding inspection and copying of Plaintiff's "books and records." [A.24].

While the insured in *Cardelles* had no duty to make permanent repairs and thus no obligation to produce records of those non-existent repairs, here Plaintiff was under a legal duty to keep board meeting minutes.

Further, unlike *Cardelles*, the supplemental damages sought by Plaintiff here were very different than those in the original Hurricane Irma claim.

On August 9, 2018, over seven months after Heritage's coverage determination on the original claim, Plaintiff's public adjuster submitted a supplemental claim to Heritage in the amount of **$1,987,210.30**. [A.567]. Three months later, on November 13, 2018, the public adjuster submitted a second supplemental claim in the amount of **$3,585,297.55**. [A.570].

Both multi-million-dollar supplemental claims included new damages outside the scope of the original below-deductible claim, including replacement of windows and doors. [A.381, 570 ("Ready Windows Proposal")].

As such, the trial court's broad ruling regarding non-existent documents is unsupported by *Cardelles* or any other caselaw. The ruling is also contrary to public

policy because it would reward an insured for refusing or discarding documents essential to an insurer's investigation of a property damage claim. *See State Farm Fla. Ins. Co. v. Hernandez*, 172 So.3d 473 (Fla. 3d DCA 2015) (applying post-loss obligations to a supplemental claim).

2. Statutes incorporated into policy of insurance

The trial court's order also erroneously concluded that the only Florida Statutes incorporated into a contract of insurance are those contained within the Florida Insurance Code. [A.455-56].

This legal conclusion is contrary to Florida caselaw. *See, e.g., Northbrook Prop. & Cas. Ins. Co. v. R & J Crane Serv., Inc*., 765 So.2d 836 (Fla. 4th DCA 2000) (incorporating OSHA regulations into insurance policy).

And the caselaw relied upon by the trial court undermines its conclusion. For example, *Lutz v. Protective Life Ins. Co.*, 951 So.2d 884 (Fla. 4th DCA 2007) contains no discussion or holding that the Florida Insurance Code is the only category of statutes incorporated into insurance contracts.

Further, *Citizens Prop. Ins. Corp. v. River Manor Condo. Ass'n*, 125 So.3d 846 (Fla. 4th DCA 2013) and *Sawyer v. Transamerica Life Ins. Co.*, 2010 WL 1372447 (S.D. Fla. Mar. 31, 2010) merely held that statutes cannot expand the coverage of an insurance policy. They did not address a situation where, as here, the

statute in question imposed a legal duty on one of the parties to the insurance contract.

3. Forfeiture of coverage

Additionally, the trial court's order erroneously stated that "assuming the Court accepted Heritage's contention, it would result in a forfeiture of coverage." [A.456].

This was legal error because the only issue before the trial court on Plaintiff's motion to compel appraisal was whether the case was appropriate for appraisal. The issue of insurance coverage was not before the court.

Had the trial court correctly ruled that appraisal was inappropriate, the litigation would have continued under Count II of Plaintiff's Complaint for breach of contract. There would have been no forfeiture of coverage because Plaintiff would have been entitled to seek a finding of coverage and damages via litigation.

4. Prejudice analysis

Finally, the trial court erred by applying a prejudice analysis to Plaintiff's violation of the post-loss conditions precedent to appraisal. Such an analysis is inconsistent with this Court's caselaw regarding appraisal. *See, e.g.*, *State Farm Fla. Ins. Co. v. Fernandez*, 211 So.3d 1094 (Fla. 3d DCA 2017) (no prejudice analysis); *State Farm Ins. Co. v. Xirinachs*, 163 So.3d 559 (Fla. 3d DCA 2015) (same); *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc*., 48 So.3d 188 (Fla. 3d DCA 2010) (same).

The caselaw relied upon by the trial court for its prejudice analysis arose in the context of litigation regarding breach of contract, not appraisal. *See Naveen v. Universal Prop. & Cas. Ins. Co.*, 45 Fla. L. Weekly D2044 (Fla. 3d DCA Aug. 26, 2020) (breach of contract action, not appraisal); *Allstate v. Farmer*, 104 So.3d 1242 (Fla. 5th DCA 2013) (same); *Kramer v. State Farm Fla. Ins. Co.*, 95 So.3d 303 (Fla. 4th DCA 2012) (same); *Mid-Continent Cas. Co. v. Basdeo*, 742 F. Supp. 2d 1293 (S.D. Fla. 2010) (declaratory judgment action in third-party liability case, not appraisal).

Had this case been in a different procedural posture, such as a defense motion for summary judgment or jury trial, the trial court would have been correct to apply a prejudice analysis. *See Am. Integrity Ins. Co. v. Estrada*, 276 So.3d 905, 916 (Fla. 3d DCA 2019) ("we agree with the Fifth District that the insurer must be prejudiced by the insured's non-compliance with a post-loss obligation in order for the insured to forfeit coverage").

However, in the context of a threshold decision regarding whether to send the case to appraisal or allow breach of contract litigation to proceed, the trial court erred by applying a prejudice analysis. This error, in addition to the others discussed above, resulted in an erroneous grant of Plaintiff's motion to compel appraisal when it should have been denied.

Even if a prejudice analysis had been appropriate (which it was not), prejudice to Heritage was presumed pursuant to this Court's caselaw. *Estrada*, 276 So.3d at 916. Plaintiff did not and could not rebut this presumption.

Moreover, the testimony of Heritage's representative at the evidentiary hearing established prejudice because she testified the missing meeting minutes were important to Heritage's investigation of Plaintiff's supplemental claims. Board meeting minutes were significant to Heritage's investigation because they typically disclose, among other things, decisions to undertake capital improvements affecting the damaged property, expenses incurred in maintaining or repairing a roof or other common elements, the nature and dates of prior damage or repairs, and/or individuals with pertinent knowledge so they could be contacted during the investigation of the claim. [A.281, 319-20, 322-24]; *Citizens Prop. Ins. Corp. v. Galeria Villas Condo. Ass'n, Inc*., 48 So.3d 188, 191 (Fla. 3d DCA 2010).

CONCLUSION

Heritage respectfully requests that this Court reverse the trial court's order compelling appraisal and remand with instructions to enter an order denying Plaintiff's motion to compel appraisal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished to all counsel of record by automatic email from the Florida Courts e-Filing Portal on December 28, 2020 pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

Jeffrey A. Rubinton, Esq.
Florida Bar No. 821756
Veronica Dossat, Esq.
Florida Bar No. 1015833
Rubinton & Associates, P.A.
Trial Counsel for Appellant, Heritage
400 N. Ashley Dr., Ste. 2633
Tampa, FL 33602
Telephone: (813) 712-8744
Fax: (954) 251-5501
Emails: jrubinton@rubintonlaw.com
vdossat@rubintonlaw.com

-and-

LINK & ROCKENBACH, PA
Appellate Counsel for Appellant, Heritage
1555 Palm Beach Lakes Blvd., Suite 930
West Palm Beach, FL 33401
Telephone: 561-847-4408
Facsimile: 561-855-2891
Emails: kara@linkrocklaw.com
david@linkrocklaw.com
troy@linkrocklaw.com

BY: */s/ David A. Noel*
KARA ROCKENBACH LINK, ESQ.
Florida Bar No.: 0044903
DAVID A. NOEL, ESQ.
Florida Bar No.: 0688231

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared in Microsoft Word, Times New Roman 14-point font and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

BY: */s/ David A. Noel*
Kara Rockenbach Link, Esq.
David A. Noel, Esq.