

**IN THE SUPREME COURT OF FLORIDA**

FIRST PROTECTIVE  
INSURANCE COMPANY,

Petitioner,

vs.

Case No.: SC12-447  
L.T. Case No.: 1D10-6577

ERIKA HESS,

Respondent.

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ON APPEAL FROM A FINAL ORDER OF THE CIRCUIT COURT  
OF SANTA ROSA COUNTY, CASE NO. 2008-CA-01808

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**ANSWER BRIEF ON JURISDICTION  
OF RESPONDENT, ERIKA HESS**

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## **SUMMARY OF ARGUMENT**

First Protective has offered no reason for this Court to intervene on its behalf in this narrow dispute over an appraisal award. The First District broke no new ground in its decision, but held only that a trial court may not look behind the face of an appraisal award and consider extrinsic evidence, such as sworn testimony from the appraisers, to determine the basis for the award.

First, despite the First District's certification, this appeal does not present an issue of great public importance. In the 120 years since this Court first began interpreting appraisal provisions, the question presented here has apparently never before arisen in a Florida court, so it stands to reason that First Protective cannot cite a single case at any level where this same issue is pending now. The ruling is consistent with Florida's public policy favoring appraisals and with the few cases around the country that have addressed the issue. The rule is neutral and applies equally to insureds and insurers. Finally, First Protective could have avoided the problem by asking the appraisal panel for clarification or asking the trial court to seek clarification from the panel. It did neither, so it has no standing to complain.

Second, the district court's decision is entirely consistent with every Florida case on appraisals, including the four cases cited by First Protective as "expressly and directly" conflicting with it. Indeed, none of those cases involved requests to consider extrinsic evidence to determine the basis for the appraisal award.

## **ARGUMENT**

The rule of law announced by the First District below—that “a trial court may not look beyond the face of an appraisal award and consider extrinsic evidence to determine the basis for the award”—is neither novel nor surprising. *App. at 8*. In the more than 120 years since similar appraisal clauses have been included in Florida insurance policies, no Florida court has ever suggested that the rule should be otherwise, because the entire purpose of an appraisal clause is to “provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits.” *App. at 6* (quoting *Fla. Ins. Guar. Ass’n, Inc. v. Olympus Ass’n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010)). Here, First Protective asked the circuit court to consider testimony from the appraisers to determine the basis for the award so that First Protective could apply special limits of liability found in its policy (but which could not be applied looking solely at the face of the award). Not surprisingly, both the trial court and the district court held that this was impermissible. First Protective has failed to offer any justification for this Court to use its limited time and resources to question this self-evident rule of law.

### **I.     The First District’s opinion did not address an issue of great public importance warranting this Court’s time and attention**

Though this Court has never fully defined the criteria it uses to decide whether a case truly involves an issue of great public importance, prior decisions and common sense demonstrate that a handful of factors may enter that equation.

Certainly, to be an issue of great public importance, the question involved must address more than a narrow question of law and must affect a wide range of parties, rather than just the litigants themselves. *See, e.g., State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999) (dismissing petition because the question certified by the district court “deals with an extremely narrow issue of law”); *see also Sunshine Vistas Homeowners Ass’n v. Caruana*, 597 So. 2d 809, 811 (Fla. 3d DCA 1992) (Schwartz, C.J., dissenting) (arguing that “the issue involved here—while perhaps interesting and certainly arguable—is of no concern, let alone of great importance, to anyone but the litigants and an abstractor or two”). Similarly, the Court is more likely to consider issues that reflect recent changes in the law or that may result in a departure from prior law. *See, e.g., Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (accepting jurisdiction over certified question as to whether Florida should replace the doctrine of contributory negligence with comparative negligence). The Court presumably would also be more inclined to review a case when the rule of law announced by the district court may prove unworkable or appears to favor one class of litigants over another. None of these factors is present here.

First, while First Protective argues that “[a] large number of claims are implicated by this decision,” *Petitioner’s brief at 4*, it cites no evidence to support this proposition. First Protective has failed to identify a single case pending in any court (trial or appellate) where this issue is present. Thus, First Protective’s

concerns about the opinion’s “far-reaching effects” are nothing more than unsupported speculation. Tellingly, though the First District issued its decision on December 9—more than five months ago—a check of Westlaw demonstrated that the opinion has not been cited by a single case or treatise anywhere in the country during that time, nor has it been cited in any appellate briefs included in the Westlaw database. If the opinion truly announced an issue of great public importance, surely someone would have found it by now.

Second, there is nothing novel or new about appraisal clauses in insurance policies. Indeed, this Court first addressed the scope of a strikingly similar appraisal clause in an insurance policy more than 120 years ago. *See Hanover Fire Ins. Co. v. Lewis*, 10 So. 297, 301 (Fla. 1891) (interpreting policy providing for submission of dispute “to arbitrators, indifferently chosen, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the companies, respectively, under this policy”). Yet, in the 120 years since this Court decided *Hanover Fire*, the question posed by the First District has *never* been addressed directly by any Florida court. If this issue was likely to “have a tremendous impact on the public,” *Petitioner’s brief at 5*, one would have expected the issue to arise *sometime* in the last century.

Third, perhaps the reason the issue has never arisen before now is that the answer was considered self-evident, and the result reached by the First District is



consistent with Florida law, as well as established law from around the country. The rule reinforces—rather than undermines—Florida’s long-standing public policy supporting the appraisal process by maintaining the appraisers’ autonomy. The rule is also consistent with analogous challenges to arbitration awards. So, for example, in *Wachovia Secs., LLC v. Vogel*, 918 So.2d 1004, 1008-09 (Fla. 2d DCA 2006), the court refused to vacate an arbitration award because the panel did not explain the basis on the face of the award. As the court observed in *Vogel*, “when the arbitrators do not, as here, explain their decision-making process, judicial vacatur of that unsubstantiated award is virtually impossible.” *Id.* at 1009.

Further, the few courts in other jurisdictions that have seen the need to address the same issue have reached the same result. As the Supreme Court of Wisconsin observed “[r]eview of an appraisal award should usually be limited to the face of the award.” *Farmers Auto. Ins. Ass’n v. Union Pacific Ry. Co.*, 768 N.W.2d 596, 607 (Wis. 2009). Similarly, a New York court held that the law does not permit testimony from members of an appraisal panel as to the basis of their award precisely because “[a]n appraiser is in practically the same situation as a juror.” *Williams v. Hamilton Fire Ins. Co.*, 194 N.Y.S. 798, 804 (N.Y. App. Term 1922); *see also William H. Low Estate Co. v. Lederer Realty Corp.*, 86 A. 881, 882 (R.I. 1913) (agreeing that, as a general proposition of law, “the court cannot consider any error or mistake on the part of the appraisers in making the appraisal

which does not appear upon the face of the award, and that the testimony of the appraisers is inadmissible to impeach their own award”).

Fourth, the First District decision does not create an unfair or unworkable rule. A court is still permitted to consider policy defenses and to reduce awards by policy limitations and deductibles so long as the reductions can be determined from the face of the policy. Plus, contrary to First Protective’s argument, the First District decision is not “internally inconsistent,” *Petitioner’s brief at 9*, by holding that a trial court may reduce an award to account for prior payments. Prior payments, unlike the situation presented here, can be determined from sources *other* than the members of the appraisal panel.

Moreover, lost in First Protective’s argument is that First Protective could have avoided the problem altogether simply by asking the panel to clarify its award or asking the trial court to remand the matter back to the appraisal panel for clarification. *See Sunshine State Ins. Co. v. Davide*, 15 So. 3d 749, 750 (Fla. 3d DCA 2009) (noting that the insurer “made multiple inquiries of the umpire for clarification” of the award); *Citizen’s Property Ins. Co. v. Cuban-Hebrew Congregation of Miami, Inc.*, 5 So. 3d 709, 712 (Fla. 3rd DCA 2009) (noting that “if there should be a case in which it is not clear whether the appraisers took into account prior payments or the deductible, then the trial court has the authority to

require the appraisers to clarify the basis for the award”). Having done neither, First Protective is in no position to complain.

Finally, and perhaps most important, the rule announced by the First District applies equally to insurers and insureds, and favors neither. While, in this case, an insurance company asked the trial court to conduct an evidentiary hearing on the basis for the appraisal award, in other cases, the same request might come from an insured. (Indeed, one wonders if First Protective would be taking the same position had Ms. Hess requested a hearing to prove a mistake in the panel’s award). Thus, if this Court accepted jurisdiction and quashed the First District’s opinion, it might help First Protective in this one case, but would hardly improve “the stability of Florida insurance law” as First Protective suggests. *Petitioner’s brief at 4*. Instead, this Court would simply be substituting one neutral rule for another, which is hardly the best use of this Court’s limited time and resources.

**II. The district court’s decision does not expressly and directly conflict with a decision from this Court or any other district court**

First Protective also argues that this Court should accept jurisdiction because the First District’s opinion expressly and directly conflicts with a decision from this Court and three decisions from other district courts of appeal. This Court has held that it may exercise its discretion to review cases for express and direct conflict whenever the lower court announced “a rule of law which conflicts with a rule previously announced” by another court or when the lower court applies “a rule of

law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of” by another court. *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960); *see also Wallace v. Dean*, 3 So. 3d 1035, 1039 (Fla. 2009) (applying *Nielsen* test in accepting conflict jurisdiction). Even a cursory review of the four cases cited by First Protective demonstrates that no conflict whatsoever exists under either prong of the *Nielsen* test.

First, the “rule of law” announced by the First District below—that “a trial court may not look beyond the face of an appraisal award and consider extrinsic evidence to determine the basis for the award”—does not conflict with any rule of law announced by any Florida court. Tellingly, First Protective does not argue otherwise in its brief or cite any Florida case holding that a circuit court is *permitted* to consider extrinsic evidence to determine the basis for the appraisal award.

Second, a review of the four cases confirms that they did not involve “substantially the same controlling facts.” Indeed, none raised the same question presented by this case, much less applied a different rule of law to answer the question.

For example, in *Meade v. Lumbermens Mut. Cas. Co.*, 423 So. 2d 908, 910 (Fla. 1982), this Court held that an insurer may assert policy limits as a defense in circuit court when the policy limits were not submitted to the appraisal panel, but never suggested (much less held) that the circuit court could consider extrinsic

evidence in determining whether the award exceeded the policy limits. To the contrary, it was apparent from the face of the arbitration award in *Meade* that the award (\$16,709.50) exceeded the insured's \$10,000 policy limits, *id.* at 909, so there was no need for the Court to consider extrinsic evidence.

The three district court opinions cited by First Protective are no different. For example, in *Fla. Ins. Guar. Ass'n v. Olympus Ass'n, Inc.*, 34 So. 3d 791, 793-94 (Fla. 4th DCA 2010), the court was able to apply the policy limitations without resorting to extrinsic evidence because the award contained "line-item appraisal amounts for each building, which in part indicated that of the total amount, \$3,785,000 was allotted for Waterproofing/Painting." In *Cuban-Hebrew Congregation*, 5 So. 3d at 710-12, the district court expressly noted that the reductions could be applied without resorting to extrinsic evidence because "[t]he award *on its face* reflects that no reduction was made for the policy deductible or prior payments." *Id.* at 710 (emphasis added). And in *Fisher v. Certain Interested Underwriters at Lloyds Subscribing to Contract # 242/99*, 930 So. 2d 756, 759 (Fla. 4th DCA 2006), the district court addressed an entirely different question and held only that an insurer could recover payments made on an appraisal award after the coverage issues were later resolved in its favor.

In short, in the cases cited by First Protective, there was no need for the trial court to resort to extrinsic evidence to address the insurer's policy defenses because

the applicability of the defenses was apparent on the face of the award. In this case, the award could *only* be reduced by resorting to extrinsic evidence, because the face of the award did not explain the basis for the total amount awarded. Thus, no conflicts exist.

### **CONCLUSION**

For the foregoing reasons, the Court should exercise its discretion to decline jurisdiction in this matter.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing ANSWER BRIEF ON JURISDICTION OF RESPONDENT, ERIKA HESS has been furnished to **PHILLIP J. SHEEHE, ESQUIRE**, SHEEHE & ASSOCIATES, P.A., One Biscayne Tower, Suite 1910, 2 South Biscayne Boulevard, Miami, Florida 33131 and to **CARYN BELLUS, ESQUIRE**, KUBICKI DRAPER, P.A., 22 West Flagler Street, Penthouse, Miami, FL 33130 by United States mail this 21st day of May, 2012.

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CHARLES F. BEALL, JR.

### **CERTIFICATE OF COMPLYING WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that the foregoing ANSWER BRIEF ON JURISDICTION OF RESPONDENT, ERIKA HESS has been prepared in Times New Roman 14-point font as required by the Florida Rules of Appellate Procedure.

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CHARLES F. BEALL, JR.