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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SAFEPOINT INSURANCE COMPANY,

Appellant,

v. Case No. 5D20-206

GARY HALLET AND FRANCESCA HALLET,

Appellees.
_____/

Opinion filed June 25, 2021

Appeal from the Circuit Court
for Hernando County,
George G. Angeliadis, Judge.

Elizabeth K. Russo, of Russo Appellate Firm, P.A., Miami, for Appellant.

Matthew G. Struble, of Struble, P.A., Fort Lauderdale, for Appellees.

TRAVER, J.

SafePoint Insurance Company appeals summary judgment entered in favor of its insureds, Gary and Francesca Hallet. The trial court ruled that SafePoint waived the Hallets' compliance with their property insurance policy's post-loss obligations when SafePoint initiated appraisal

proceedings, thus eliminating SafePoint's coverage defense. Because we cannot conclude that SafePoint waived unambiguous policy language, we reverse for further proceedings.

This case arises from a burst kitchen pipe. The Hallets lodged a claim with SafePoint, who inspected and helped repair the property. SafePoint acknowledged coverage and later issued a series of payments. The Hallets and SafePoint exchanged correspondence and information, first directly and then later through the Hallets' public adjustor and attorney. During this process, the Hallets produced almost five hundred documents that they claimed supported their loss. Following issuance of a civil remedy notice by the Hallets' attorney, who demanded payment of approximately $100,000, SafePoint reaffirmed coverage and initiated the contractual appraisal process. The Hallets' insurance policy outlined the parties' respective appraisal rights:

> If you and we fail to agree on the amount of loss, either may request an appraisal of the loss. However, both parties must agree to the appraisal. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a request from the other. The two appraisers will choose an umpire . . . . The appraisers will separately set the amount of loss. If the appraisers submit a written report of agreement to us, the amount agreed upon will be the amount of the loss. If they fail to agree, they will submit their differences to the umpire.

> A decision agreed to by any two will set the amount of the loss.

The Hallets agreed to appraisal, the parties each selected an appraiser, and the appraisal began. The appraisers selected an umpire, and no of-record issues arose with the process.

Months after appraisal commenced, SafePoint retained counsel, who sought to gather information from the Hallets. Via letter, he demanded twenty-four categories of documents, sworn proofs of loss, and examinations under oath of, among others, the Hallets, their children, their public adjustor, and their plumber across twenty-five areas of inquiry. The Hallets' insurance policy obligates them to provide post-loss information "as often as [SafePoint] reasonably require[s]." SafePoint's lawyer set the examinations unilaterally. The Hallets' lawyer responded via his own letter, inquiring whether SafePoint's lawyer received the documents the Hallets had already provided. He also inquired why SafePoint was asking for post-loss information over a year after the loss and after it had already triggered the appraisal process.

Nevertheless, the Hallets provided a sworn proof of loss, quantifying their damages at nearly $140,000. They and their public adjustor then appeared at the examinations. SafePoint's lawyer sent Mrs. Hallet and the public adjustor home and examined Mr. Hallet for eight hours. Only a small

fraction of this examination concerned the increase in the Hallets' claim from their civil remedy notice to their sworn proof of loss. Unable or unwilling to conclude, SafePoint's lawyer unilaterally reset both Hallets and their public adjustor for examinations. He then examined Mr. Hallet for another four hours and questioned Mrs. Hallet for two-and-a-half hours.[1] The public

[1] Curt Allen represented SafePoint at the pre-trial and trial proceedings. The purpose of an examination under oath is "to enable the insurer to possess itself of all knowledge and all information as to other sources and means of knowledge, in regards to the facts, material to its rights, to enable it to decide upon its obligations and to protect it against false claims." *Goldman v. State Farm Fire Gen. Ins.*, 660 So. 2d 300, 305 n.9 (Fla. 4th DCA 1995) (citing *Clafin v. Commonwealth Ins.*, 110 U.S. 81, 94–95 (1884)). Very little of Allen's work effectuated this purpose. While one must read the entire examinations to appreciate his behavior fully, the first thirty pages of Mr. Hallet's first examination alone contain multiple instances of unprofessional conduct. Allen repeatedly lectured and questioned Mr. Hallet—a mechanic with a high school education—on the policy's legal implications. He called Mr. Hallet "rude," "disrespectful," "confrontational," and "defensive." He referenced how long he had been practicing law and repeatedly highlighted his past career as a homicide prosecutor.

Throughout all three examinations, his behavior towards opposing counsel was also unprofessional. He called opposing counsel "irritating," "offensive," "belligerent," "snarky," "a jerk," "a very nasty person," "a setup artist," and an "ass." He informed opposing counsel he "was not in South Florida," was "not in Miami," and that Hernando County judges "are really going to be interested in your style." He encouraged opposing counsel to "file a Bar complaint, Sport" and described his objections as "grievable." Taken as a whole, Allen's repetitive and argumentative examinations illustrate he was more interested in making the process as long and painful as possible, rather than gathering information about the Hallets' claim.

In 2020, the Second District twice noted Allen's unprofessional behavior. *See Avatar Prop. & Cas. Ins. v. Jones*, 291 So. 3d 663, 668 n.1

adjustor did not appear due to a conflict, so SafePoint's lawyer unilaterally noticed him again for the next day. When the public adjustor again did not appear, SafePoint's lawyer denied the Hallets' entire claim, citing their failure to comply with their policy's obligation to produce post-loss information.

The Hallets filed a declaratory judgment action seeking completion of the appraisal process. They also requested a declaration that they suffered a covered loss, that they had complied with their post-loss policy obligations, and that SafePoint had waived its rights to collect post-loss information by initiating the appraisal process. SafePoint declined to answer the complaint, instead moving for summary judgment solely based on the Hallets' "undeniable" failure to comply with their post-loss obligations. The Hallets responded, contending that whether they had materially complied with their post-loss obligations was a factual question unsuitable for summary judgment. *See, e.g.*, *Himmel v. Avatar Prop. & Cas. Ins.*, 257 So. 3d 488, 491–93 (Fla. 4th DCA 2018). The Hallets also moved for summary

(Fla. 2d DCA 2020) (citing *Rodriguez v. Avatar Prop. & Cas. Ins.*, 290 So. 3d 560, 564–65 (Fla. 2d DCA 2020)). In 2021, the Florida Supreme Court reprimanded Allen for, among other things, the unprofessional questioning of witnesses and treatment of opposing counsel. *Florida Bar v. Allen*, No. SC20-1470, 2021 WL 401950, at *1 (Fla. Feb. 4, 2021). We have recently noted misrepresentations he made to the trial court in another case. *See Lopez v. Avatar Prop. & Ins.*, 313 So. 3d 230 (Fla. 5th DCA 2021). We believe Allen's conduct throughout this case warrants independent review, and we therefore refer this matter to The Florida Bar for further proceedings.

judgment, contending that SafePoint waived its right to collect post-loss information when it initiated the appraisal process. The Hallets relied exclusively on a Third District case supporting this proposition. *See SafePoint Ins. v. Gomez*, 263 So. 3d 222 (Fla. 3d DCA 2019).

Based on *Gomez*, the trial court granted the Hallets' motion and denied SafePoint's motion:

> [A]fter corresponding and communication with [the Hallets], exchanging documents, and otherwise investigating the claim, [SafePoint] was satisfied that it had sufficient information necessary to initiate the appraisal process. At that point, [SafePoint] initiated the appraisal process and [the Hallets] agreed, as required by the Policy. In doing so, the Court finds that [SafePoint] waived the post-loss obligations contained within the Policy.

We review de novo the trial court's final summary judgment. *See Gonzalez v. People's Tr. Ins.*, 307 So. 3d 956, 958 (Fla. 3d DCA 2020) (citing *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)).[2] Although we must necessarily evaluate *Gomez*, we first outline some general propositions relating to contract interpretation and the

[2] We have considered the dissent's position that we lack jurisdiction because the appeal is untimely. This presents a close question. We conclude, however, that the appeal is timely because the first judgment did not contain sufficient language of finality. *See Monticello Ins. v. Thompson*, 743 So. 2d 1215, 1216 (Fla. 1st DCA 1999) (reiterating that final judgment must contain "language in the order which 'hereby enters' a judgment, or similar unequivocal language of finality").

appraisal process. We construe insurance contracts based on the plain language of the policy, and we cannot rewrite policy terms. *Allstate Ins. v. Suarez*, 833 So. 2d 762, 765 (Fla. 2002); *Arguello v. People's Tr. Ins.*, 315 So. 3d 35, 38, 40 (Fla. 4th DCA 2021). When a policy is unambiguous, we must give it effect as written. *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 491 (Fla. 5th DCA 2014). "Appraisals are creatures of contract and the subject or scope of appraisal depends on the contract provisions." *Id*.

While the goal of the appraisal process is to resolve disputes without litigation, numerous cases address the tension between the right to an appraisal and an insured's obligation to provide post-loss information. *See Federated Nat'l Ins. v. Esposito*, 937 So. 2d 199, 201 (Fla. 4th DCA 2006). A party seeking appraisal must first comply with their post-loss obligations. *U.S. Fidelity & Guar. Co. v. Romay*, 744 So. 2d 467, 471 (Fla. 3d DCA 1999) (en banc). When appraisal is demanded, an insurer may assert lack of coverage or violation of policy conditions—such as failure to cooperate—as a defense to the process. *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285, 1288 (Fla. 1996). All issues other than those assigned to the contractual appraisal process are reserved for judicial determination. *See id*. at 1287; *Liberty Am. Ins. v. Kennedy*, 890 So. 2d 539, 541 (Fla. 2d DCA 2005) (concluding that "submission of a claim to appraisal does not foreclose

an insurer's subsequent challenge on an issue of coverage"); *Gonzalez v. State Farm & Cas. Co.*, 805 So. 2d 814, 817 (Fla. 3d DCA 2000) ("Whether the claim is covered by the policy is a judicial question, not a question for the appraisers."). Even an agreed-on appraisal value does not foreclose an insurer's ability to challenge coverage, in whole or in part. *Kennedy*, 890 So. 2d at 541. Parties must address coverage defenses via summary judgment or trial. *Citizens Prop. Ins. v. Mango Hill #6 Condo. Ass'n,* 117 So. 3d 1226, 1230 (Fla. 3d DCA 2013).

The *Gomez* court addressed a similar factual situation to this one, albeit in a different procedural posture. 263 So. 3d at 223. *Gomez* involved the same insurer, the same insurance defense lawyer, and the same appraisal provision. *Id*. at 223 & n.1. Like this case, SafePoint conceded coverage, issued payment, and invoked appraisal. *Id*. at 223. The parties began appraisal, and the appraisers selected an umpire. *Id*. No record evidence showed the appraisers were missing information necessary to complete their work. *Id*. SafePoint's lawyer then issued similar post-loss information demands. *Id*. Unlike this case, the Gomezes did not provide any information or sit for examinations under oath. *Id*. In both cases, SafePoint's lawyer denied coverage for failure to comply with post-loss obligations and terminated the appraisal process. *Id*. The Gomezes filed a breach of

contract case against SafePoint and moved to complete the appraisal process. *Id*. The trial court granted the motion, and the *Gomez* court affirmed this ruling, concluding SafePoint had "waived the requirement of compliance with post-loss obligation as a condition precedent to appraisal." *Id*. at 224.

Although SafePoint argues *Gomez* is factually distinguishable, we are unpersuaded. But *Gomez* is distinguishable on another basis. *Gomez* addressed an appeal of a motion to compel appraisal, not a motion for summary judgment. *Id*. at 223. This is a critical difference. At least in the Second and Third Districts, the *Gomez* court's ruling would not preclude SafePoint from litigating coverage defenses, presuming Safepoint properly raised them. *See, e.g., Sunshine State Ins. v. Rawlins*, 34 So. 3d 753, 754–55 (Fla. 3d DCA 2010) (holding that trial court may allow appraisal to go forward on "dual track" basis while preserving insurer's right to contest coverage); *Am. Cap. Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238, 1243 (Fla. 2d DCA 2020) (same), *review granted*, No. SC20-1766, 2021 WL 416684 (Fla. Feb. 8, 2021). *But see Citizens Prop. Ins. v. Michigan Condo. Ass'n*, 46 So. 3d 177, 178 (Fla. 4th DCA 2010) (certifying conflict with *Rawlins* and holding that finding of liability by trial court necessarily precedes determination of damages in appraisal process).

Here, however, the trial court entered summary judgment rather than an order compelling appraisal, and thus, precluded any consideration of coverage.

Based on the insurance policy's plain language, we cannot agree with the trial court's decision. The Hallets' policy does not condition SafePoint's ability to garner post-loss information on the state or existence of the appraisal process. Instead, it directs that the Hallets may not sue SafePoint unless they have complied with "all of" the policy's terms. Furthermore, the policy's post-loss cooperation provisions are untethered from its appraisal provisions. The policy permits SafePoint to ask for post-loss information "[a]s often as [it] reasonably require[s]." The Hallets tacitly encourage us to add the language, "unless we have begun the appraisal process," to this provision. We cannot accept this invitation. *See Arguello*, 315 So. 3d at 40 ("Courts are not free to rewrite the terms of an insurance policy."). A contrary holding would preclude an insurer from learning from its insureds, for example, why an alleged policy covered increased from $100,000 to $140,000 after the appraisal process began. It would also eliminate far more basic post-loss obligations, such as allowing an insurer access to property for inspection purposes.

For these reasons, we reverse the trial court's entry of summary judgment and remand for further proceedings. We also direct our Clerk of Court to forward a copy of this opinion to The Florida Bar for whatever further action it deems appropriate.

REVERSED and REMANDED.

HARRIS, J., concur.
EISNAUGLE, J., dissents, with opinion.

While I agree with the majority's referral to The Florida Bar,[1] as to the disposition of this case, I would dismiss for lack of jurisdiction. The trial court rendered a judgment and then months later rendered a second judgment from which SafePoint appealed. While it is open to reasonable debate, I conclude that the notice of appeal is untimely because the first judgment was a final, appealable order. *See Holland v. Holland*, 140 So. 3d 1155, 1156 (Fla. 1st DCA 2014) ("While an order must contain 'unequivocal language of finality,' an order or judgment of a court does not need to contain any particular or 'magic' words to make it final." (citations omitted)); *Daytona Migi Corp. v. Daytona Auto. Fiberglass Inc.*, 417 So. 2d 272, 274 (Fla. 5th DCA 1982) ("[T]he amendment or modification of an order in an immaterial way does not delay the time for seeking review." (citation omitted)).

[1] I agree with the majority's footnote 1.