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District Court of Appeal of Florida, Second District.

PROGRESSIVE AMERICAN INSURANCE COMPANY, Appellant,
v.
HILLSBOROUGH INSURANCE RECOVERY CENTER, LLC, a/a/o Joel Wolf, Ernessa Dennis Johnson, and Juan Gil, Appellee.
Progressive American Insurance Company, Appellant,
v.
Shazam Auto Glass, LLC, a/a/o Amanda Stephens, Christopher Patterson, Gabriel Marchezini, Rolando Rodriguez, and Jerri Lewis, Appellee.

Nos. 2D21-58, 2D21-85
|
November 4, 2022

Appeals pursuant to Fla. R. App. P. 9.130 from the County Court for Hillsborough County; James S. Moody, III, Judge.

Attorneys and Law Firms

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Opinion

SLEET, Judge.

***1** In these consolidated appeals, which involve several county court cases, Progressive American Insurance Company challenges the county court's nonfinal orders denying Progressive's motions to compel appraisal on windshield damage and replacement claims.[1] We have jurisdiction.[2] *See* Fla. R. App. P. 9.130(a)(3)(C)(iv) (permitting appeal of nonfinal order determining entitlement to appraisal under insurance policy). We reverse the orders because the county court erroneously concluded (1) that Progressive failed to make a good faith attempt to resolve the dispute before invoking appraisal, (2) that appraisal was economically unrealistic for these windshield claims due to the de minimis amount at issue, and (3) that the appraisal provision was against the public policy underlying section 627.428, Florida Statutes (2020).

I. FACTS AND PROCEDURAL HISTORY

A. 2D21-58

Joel Wolf, Ernessa Dennis Johnson, and Juan Gil (collectively, insureds) each had a comprehensive automobile policy with Progressive that provided coverage for windshield damage. After the insureds' vehicles each sustained windshield damage, they contracted with Clear Vision Windshield Repair, LLC, to have their windshields repaired. Upon completion of the repairs, the insureds assigned their rights and benefits to recover payment under their policies to Clear Vision. Clear Vision sent its invoices to Progressive for payment in the amount of $90.95 each. Progressive responded by sending letters to Clear Vision and each insured stating that Clear Vision "does not agree with" the amount Progressive had determined to be the reasonable amount necessary to repair the windshield, and it contemporaneously issued checks to Clear Vision each in the amount it had determined was reasonable for repair.[3] The letters further stated that because a dispute existed with respect to the amount of loss, Progressive was invoking its right to appraisal under the policies. The policies' appraisal provisions were all identical and provided:

> If we cannot agree with you on the amount of the loss, then we or you may demand an appraisal of the loss. However, mediation, if desired, must be requested prior to demanding appraisal. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of the loss. If they fail to agree, the disagreement will be submitted to an impartial umpire chosen by the appraisers, who is both competent and a qualified expert in the subject matter. If the two appraisers are unable to agree upon an umpire within 15 days, we or you may request that a judge of a court of record, in the county where you reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. You will pay your appraiser's fee and expenses. We will pay our appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between us and you. Neither we nor you waive any rights under this policy by agreeing to an appraisal.

***2** Clear Vision did not respond to Progressive's invocation of appraisal or seek to resolve the dispute in accordance with policy provisions. Instead, it sold the claims and assigned the rights to collect insurance benefits to Hillsborough Insurance Recovery Center, LLC (HIRC), whose business practice involves purchasing in bulk underpaid insurance claims. HIRC similarly did not respond to Progressive's invocation of appraisal, nor did it demand mediation or seek further negotiations. Rather, HIRC filed actions against Progressive for breach of contract and alleged in its complaints that it and Clear Vision had "performed all conditions precedent to recover benefits" pursuant to the insurance contracts.

In response to the lawsuits, Progressive filed motions to compel HIRC to participate in the appraisal process, arguing that the policies' appraisal provision was a condition precedent to filing a lawsuit and that HIRC should not be allowed to litigate the matter because the appraisal process had not occurred. HIRC replied that the appraisal was not economically feasible due to the de minimis amount of the claim ($90.95) and asserted that the prohibitive cost doctrine rendered the appraisal provisions unenforceable.

The trial court held an evidentiary hearing, denied Progressive's motions to compel appraisal, and struck the mandatory component of the appraisal provisions set forth in the insurance policies. The court found that Progressive failed to negotiate "in good faith," and it therefore deemed the claims to be unripe for appraisal. Although HIRC did not raise the issue of bad faith negotiation, the court concluded that Progressive's use of the phrase "does not agree" in its letters to Clear Vision implied that Progressive failed to make a good faith effort to resolve the disputes but instead unilaterally determined the amount it wanted to pay and demanded that either Clear Vision accept the amount offered or be forced into an expensive appraisal process.

The court also found that the "prohibitive cost doctrine does not apply because the filing fee alone costs more than the appraisal process." Nonetheless, it struck the mandatory nature of the appraisal provisions for "small claims" because it determined that requiring appraisal when the disputed amount is small "makes it economically unrealistic for an insured to seek redress." Lastly, the court found that the mandatory nature of the appraisal provisions defeated the purpose of section 627.428 by prohibiting a "prevailing insured from recovering his expended appraisal costs." As such, the court struck the mandatory component of the appraisal provisions "on this very small claim" but deemed the provisions valid for claims "where a larger amount is involved so that the insured is not economically prohibited from seeking redress."

B. 2D21-85

Like the insureds in the HIRC case, Amanda Stephens, Christopher Patterson, Gabriel Marchezini, Rolando Rodriguez, and Jerri Lewis each obtained a comprehensive automobile policy from Progressive that included coverage for windshield damage. After their vehicles sustained windshield damage, they contracted with Shazam to replace their windshields and executed an assignment of benefits. Shazam sent invoices to Progressive in amounts ranging from $593.42 to $1,073.42. In response, Progressive sent letters stating its disagreement with the invoiced

amounts and invoking its right to appraisal under the policies.[4] At the same time, Progressive tendered payment to Shazam in the amounts Progressive deemed reasonable for each windshield replacement.

***3** Shazam did not respond to Progressive's appraisal demands and eventually filed actions against Progressive for breach of contract, claiming that it had "performed all conditions precedent and necessary" to recover benefits for the windshield replacements. In response to the lawsuits, Progressive filed motions to compel appraisal and stay discovery based on the same arguments it raised in the HIRC case. After a nonevidentiary hearing, the trial court, relying upon the analysis from its order in the HIRC case, rendered an order denying Progressive's motion to compel appraisal and striking the mandatory component of the appraisal clause.

II. ANALYSIS

"When reviewing a trial court's ruling on a motion to compel appraisal, the trial court's factual findings are reviewed for competent, substantial evidence, while the trial court's application of the law to the facts is reviewed de novo." *Heritage Prop. & Cas. Ins. Co. v. Superior Contracting & Envtl. Specialties, LLC*, 314 So. 3d 743, 745 (Fla. 2d DCA 2021) (citing *Fla. Ins. Guar. Ass'n v. Waters*, 157 So. 3d 437, 439-40 (Fla. 2d DCA 2015)). Because the trial court's ruling on Progressive's motions to compel appraisal in the Shazam case effectively hinged on its prior ruling in the HIRC case, our discussion focuses on the court's findings in that case.

A. Legal Obligations of an Assignee

As an initial matter, we note that HIRC, as a postloss assignee, has a legal obligation to comply with the contractually mandated appraisal provisions in the insurance policies. An assignment of an insured's right to payment by the insured does not eliminate the duty of compliance with the contract conditions, including appraisal. *See Webb Roofing & Constr., LLC v. FedNat Ins. Co.*, 320 So. 3d 803, 805 (Fla. 2d DCA 2021) (citing *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010), disapproved on other grounds by *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388 (Fla. 2013)). Thus, because Progressive and Clear Vision had a dispute over the amount of the loss and Progressive invoked appraisal, HIRC, as the postloss assignee, was contractually obligated to participate in appraisal.

B. Good Faith Negotiation

The trial court first found that Progressive's demand for appraisal was not ripe because it failed to negotiate "in good faith." Progressive argues this was error, and we agree.

Before compelling appraisal, a trial court must determine whether the demand for appraisal is ripe. *Am. Capital Assurance Corp. v. Leeward Bay at Tarpon Bay Condo. Ass'n*, 306 So. 3d 1238, 1240 (Fla. 2d DCA 2020), *review granted*, SC20-1766, 2021 WL 416684 (Fla. Feb. 8, 2021). "A demand [for appraisal] is ripe where postloss conditions are met, 'the insurer has a reasonable opportunity to investigate and adjust the claim,' and there is a disagreement regarding the value of the property or the amount of loss." *Id.* (*Citizens Prop. Ins. Corp. v. Admiralty House, Inc.*, 66 So. 3d 342, 344 (Fla. 2d DCA 2011)). Once the trial court makes the preliminary ripeness determination, motions to compel appraisal "should be granted whenever the parties have agreed to [appraisal] and the court entertains no doubts that such an agreement was made." *People's Tr. Ins. Co. v. Marzouka*, 320 So. 3d 945, 947-48 (Fla. 3d DCA 2021) (alteration in original) (emphasis omitted) (quoting *Preferred Mut. Ins. Co. v. Martinez*, 643 So. 2d 1101, 1103 (Fla. 3d DCA 1994)).

Case law does not require Progressive to engage in good faith negotiations for its demand for appraisal to be ripe. However, the trial court determined that the appraisal provision included such a requirement before Progressive could demand appraisal. We disagree.

***4** "Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005). But "courts may not 'rewrite contracts, add meaning that is not present, or otherwise

reach results contrary to the intentions of the parties.' " *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Pridgen*, 498 So. 2d 1245, 1248 (Fla. 1986)). Nor can they "rewrite a contract to relieve a party from an 'apparent hardship of an improvident bargain' " or "use equity to remedy a situation the court perceives to be unfair." *Oreal v. Steven Kwartin, P.A.*, 189 So. 3d 964, 966 (Fla. 4th DCA 2016) (quoting *Dickerson Fla., Inc. v. McPeek*, 651 So. 2d 186, 187 (Fla. 4th DCA 1995)).

The appraisal provision at issue in the underlying cases, as written, does not require good faith negotiation, as the trial court suggests. In fact, nowhere in the three insurance policies is there a provision concerning the nature of negotiations between the parties before either the insured or the insurer invokes appraisal based upon a dispute as to the amount of the loss. Rather, the appraisal provisions simply state that "[i]f we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss." Once Progressive disagreed with Clear Vision on the amount of loss, it could demand appraisal. And HIRC took the assignment with the full knowledge of the terms of the appraisal process. However, in making its ruling, the trial court impermissibly rewrote the policies' appraisal provision to require Progressive to demonstrate a good faith negotiation before the invocation of appraisal.

Furthermore, to conclude that Progressive's notice of a disagreement between it and Clear Vision is indicative of bad faith is wholly without support in the record. Progressive investigated the claim, acknowledged coverage, reviewed Clear Vision's invoice, and tendered an offer to settle pursuant to its contractual duties. The record clearly demonstrates a disagreement between Clear Vision and Progressive over the value of the claim. Once appraisal was properly invoked, this dispute was ripe for appraisal—a process wherein any errors in valuation of the loss which the trial court mistook for bad faith would be resolved by selected appraisers.

While the insurance contracts do not include a requirement to negotiate in good faith, Progressive does "have a statutory duty to act reasonably and in good faith in evaluating the claim." *Williams v. State Farm Fla. Ins. Co.*, 346 So.3d 79, 81 (Fla. 2d DCA 2022); *see also* § 624.155(1)(b)1, Fla. Stat. (2020). However, this statutory duty is entirely distinct from Progressive's contractual duty to "timely evaluate and pay benefits owed on the insurance policy." *See Williams*, 346 So.3d at 81 (quoting *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000)). And when an insurer violates that statutory duty and fails to attempt to negotiate or settle claims in good faith, an appropriate course of action is to file a bad faith lawsuit against the insurer pursuant to section 624.155.

The record before us, however, is devoid of any allegation of, let alone a cause of action for, bad faith against Progressive.[5] Yet the trial court sua sponte raised the issue and, based on the testimony of Steven Schaet, HIRC's owner, concluded that Progressive, as a matter of course, failed to engage in good faith negotiations. However, Schaet's speculation that "Progressive will more than likely invoke their appraisal provision" with windshield claims is insufficient to demonstrate bad faith on the part of Progressive, especially given the absence of any cause of action for bad faith. Thus, to conclude that Progressive acted in bad faith because it tends to invoke appraisal in windshield claims ignores both parties' contractual right to invoke appraisal.

***5** Accordingly, the trial court erred when it intervened to rescue HIRC from the burden of its calculated financial risk of buying in bulk the rights to claims to insurance benefits payments for windshield claims.

C. "Economically Unreasonable" Doctrine

Although the trial court correctly rejected HIRC's argument that the prohibitive cost doctrine barred appraisal, by striking the appraisal provision as "economically unreasonable" the trial court erroneously created a similarly inapplicable doctrine.

An appraisal provision that requires the insurer and the insured to equally bear the costs of appraisal is "a cost of doing business." *Progressive Am. Ins. Co. v. Glassmetics*, LLC, 343 So. 3d 613, 620 (Fla. 2d DCA 2022) ("The cost of appraisal is 'a cost of doing business, i.e., a fee paid to a neutral third party who is hired to help resolve a dispute about the amount of

the total loss.' " (quoting *Progressive Am. Ins. v. SHL Enters., LLC*, 264 So. 3d 1013, 1017-18 (Fla. 2d DCA 2018))). Insurance companies are heavily regulated by Florida statutes, and unless the legislature intercedes to place the financial burden solely upon the insurers for the total cost of appraisal, the insurance policies dictate each party's liability for the costs. *See SHL Enters.*, 264 So. 3d at 1018; *Glassmetics*, 343 So. 3d at 621 ("We recognize the concern that the cost of the appraisal process appears to far exceed the [amount] at issue, and no economical solution exists for windshield shops if insurance companies underpay claims. But as noted in *SHL Enterprises*, '[i]f the legislature intends for insurers to solely bear the costs of appraisal in windshield damage claims, it knows how to express that intention.' " (alteration in original) (quoting *SHL Enters.*, 264 So. 3d at 1018)). As such, the prohibitive cost doctrine and any other judicially created doctrine that deem sharing the costs of contractually mandated appraisals to be economically unreasonable do not apply to relieve an insured and his or her assignee from liability for their share of the cost of appraisal. And "[a]bsent a directive from the Florida Supreme Court, this [c]ourt should not rewrite the contract by imposing a judge-crafted doctrine to bypass the contractual remedy." *Progressive Am. Ins. Co. v. Broward Ins. Recovery Ctr., LLC*, 322 So. 3d 103, 105 (Fla. 4th DCA 2021).

The plain language of Progressive's appraisal provisions indicates that all claims for damages shall be subject to appraisal if there is a dispute between the insurer and insured over the amount of the loss and either party properly invokes appraisal. The policies do not carve out any exceptions or exemptions to appraisal for windshield damage or loss, and courts do not have authority to excise contractually mandated policy provisions from an insurance policy. The legislature is well-versed in insurance law, and we defer to the legislature to decide whether windshield claims will continue to be subject to appraisal.

Accordingly, the trial court had no authority to deny the motions to compel appraisal because the expense to participate in the appraisal may have equaled or exceeded the amount in dispute.

D. Public Policy and Section 627.428

Lastly, Progressive argues that the trial court erred in concluding that the appraisal provisions were void against public policy in section 627.428, which provides insureds with an award of attorney fees when they obtain a judgment against an insurance company that underpaid a claim. We agree.

***6** In *Glassmetics, LLC*, 343 So. 3d 613, this court addressed the same issue and squarely rejected the arguments HIRC now makes. This court explained that Progressive's appraisal provision, the identical provision at issue in this case, did not contain language concerning attorney fees. And "because there are no attorneys involved in appraisal and there is no final judgment or its equivalent in the appraisal process," there is no right to attorney fees in appraisal under section 627.428. *Id.* at 620. It further stated that "section 627.428 'contains no express prohibition against requiring an insured to pay his or her own appraisal costs where there is a dispute over windshield repair/replacement costs.' " *Id.* (quoting *SHL Enters.*, 264 So. 3d at 1018). Accordingly, it found no merit in the argument that Progressive's appraisal provision violated the public policy of section 627.428.

Furthermore, while the appraisal provisions provide that the determination of the amount of loss will be binding, it also allows the parties to enforce other rights they may have under the policy. "For example, to the extent the appraisal process results in a determination that Progressive underpaid [HIRC], [HIRC] would be entitled to pursue any rights it may have against Progressive due to the underpayment in accordance with the provisions of the polic[ies] and the applicable law." *See id.* at 626.

As this court did in *Glassmetics*, "we conclude that the appraisal provision[s] do[ ] not violate the public policy behind the attorney[ ] fee statute in section 627.428." *Id.* at 620.

E. The Shazam Case

In its order denying Progressive's motion to compel appraisal in the Shazam case, the trial court made the following findings:

> The Court adopts the analysis in its Order on Defendant's Motion to Compel Appraisal and Motion to Abate or Stay in Hillsborough Insurance Recovery Center, LLC a/a/o Juan Gil vs. Progressive American Insurance Company 19-CC-047706 (Aug. 24, 2020), including the finding that the prohibitive cost doctrine does not apply in the appraisal context.
>
> In this matter, given the amount in dispute, the Court finds that the mandatory component of the appraisal provision must be stricken to resolve the conflict between the appraisal provision and the public policy underlying Florida Statutes section 627.428.

Because the denial of the motion to compel was based on the trial court's adoption of the analysis from its order in the HIRC case, the deficiencies explained above similarly afflict the court's ruling in the Shazam case.

III. CONCLUSION

For the foregoing reasons, we conclude that the county court erred in denying Progressive's motions to compel and reverse the orders.

Reversed and remanded for further proceedings.

ATKINSON and STARGEL, JJ., Concur.

All Citations

--- So.3d ----, 2022 WL 16703249

Footnotes

1 We have sua sponte consolidated these appeals for purposes of opinion only.

2 Progressive originally sought certiorari review of the county court's orders in the circuit court. However, the cases were transferred to this court after the change in appellate jurisdiction. “This court has jurisdiction of this appeal from a nonfinal order that determined Progressive's entitlement to appraisal under the insurance policy.” *See* *Progressive Am. Ins. Co. v. Glassmetics, LLC*, 343 So. 3d 613, 618 (Fla. 2d DCA 2022) (citing art. V, § 4(b)(1), Fla. Const.; Fla. R. App. P. 9.030(b)(1)(B); Fla. R. App. P. 9.130(a)(3)(C)(iv); *Progressive Am. Ins. v. Broward Ins. Recovery Ctr., LLC*, 322 So. 3d 103, 104 (Fla. 4th DCA 2021)).

3 The letters do not indicate the amount Progressive determined to be reasonable to repair the windshields. However, at the June 4, 2020, evidentiary hearing on the applicability of the prohibitive cost doctrine, the evidence presented indicated that the amount at issue on each claim was approximately $25. That seems to suggest that Progressive determined that a reasonable cost to repair the windshields was around $65.

4 The appraisal provisions in the policies are identical to the appraisal provisions contained in the policies in the HIRC case except for one sentence requiring that mediation, if desired, must be requested prior to demanding appraisal.

5 Section 624.155(3) sets forth the procedural requirements for bringing a civil action for bad faith against an insurer. *See* *Williams*, 346 So.3d at 81-82 (detailing the procedure for bringing a statutory bad faith claim). However, there is nothing in this record to demonstrate that HIRC followed such procedures and sought a bad faith action against Progressive, and this court expresses no opinion concerning the prospect or viability of a bad faith action in this matter.