FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3889

JOSEPH SILVIA,

Appellant,

v.

CASTLE KEY INSURANCE COMPANY,

Appellee.

On appeal from the Circuit Court for Washington County.
Timothy Register, Judge.

June 14, 2023

RAY, J.

Joseph Silvia appeals a nonfinal order granting Castle Key Insurance Company's motion to invoke appraisal and abate litigation. In granting the motion, the trial court determined that Castle Key's conduct did not result in a waiver of its right to invoke the appraisal clause of the insurance contract. Because Castle Key's participation in litigation was inconsistent with its right to appraisal, we vacate the order on review.

I

Castle Key insured Joseph Silvia under a homeowner's policy. In 2018, the home suffered damage from Hurricane Michael, and

Silvia submitted a claim for benefits. In September 2020, he filed a complaint alleging that Castle Key had failed "to timely provide adequate compensation for Plaintiff's covered losses." With the complaint, Silvia filed a request for production and interrogatories.

A month later, Castle Key filed its answer. In response to an allegation in the complaint that damage occurred due to Hurricane Michael, Castle Key admitted that the hurricane made landfall, but it denied the amount of damages Silvia's property suffered. Castle Key also admitted that Silvia gave timely notice of the damages, but it denied that he had submitted his claim for benefits according to the terms of the policy. The answer also denied the allegation that Castle Key failed to timely provide adequate compensation. Castle Key raised three affirmative defenses: setoff, to the extent that any of the losses were payable by a collateral source; that Castle Key "tendered and/or paid all amounts due and owing to plaintiff under his insurance policy with Castle Key Insurance Company"; and failure to mitigate damages. The answer also requested trial by jury.

Next, Castle Key served its answers to the interrogatories. In response to a question about whether a coverage decision had been made and what payments had been provided, Castle Key responded:

> Coverage was afforded the Plaintiff and the Defendant issued payments on 11/27/18 for $12,990.88, a second payment on 2/13/19 for $2,188.43 and $1,574.96 on 1/8/20 and coverage was reviewed by telephone on October 17, 2018, and further evaluation of the damage was delayed/suspended at the request of Plaintiff until he returned to the area after the storm. Inspections were completed and benefits paid accordingly. Coverage letter sent 11/23/18. . . .
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> . . . .
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> Plaintiff requested benefits for damage to fix a fence (per hurricane policy provisions and hurricane deductible, fences are excluded), debris removal and removal of trees down to roots are not covered under the policy as discussed by telephone with Plaintiff on 12/4/2018 by

> Amos Sessions. Further at the time of the inspections, no storm damage was present to warrant a replacement of the garage roof as there was no damage to shingles, and that depreciation was applied until proof of repairs completed at which point the depreciation could be recovered. Plaintiff was also unable to provide photos or any other evidence of damages to the garage roof. Multiple inspections were performed as Plaintiff indicated additional damage/issues. On February 12, 2019, Woodrow Wilson with Castle Key met in person with the Plaintiff, explained the coverages available, and issued payment advising that the limits on the Coverage B had been exhausted. On 6/20/19 Mr. Wilson spoke with Plaintiff and explained the deductible, what was paid, how the depreciation allowance withheld would be paid upon completion of the roof repairs and the limits purchased for other structure coverage. This was followed by additional telephone calls on various dates regarding the requirement for a contractor to report any additional damage before supplemental benefits can be considered. On 10/28/19 James Marthone spoke with Plaintiff advising that he was allowed for a full roof replacement but cannot extend coverage for additional damage because prior repairs were not made resulting in water leaking into insulation. A statement from Terminix was provided by Plaintiff. On 1/3/20 a final invoice from Mike Moody Metal Roofing was reviewed and supplemental benefits were approved in the amount of $1,574.96. Telephone call from James Marthone was made prior to plaintiff advising him of additional benefits at which point Plaintiff had an estimate for windows but replacement was not warranted due to fogging of same and was not the result of sudden accidental damage under the terms of the policy. . . .

Castle Key also responded to some of the requests for production by providing photographs of the damage to the property, statements and copies of canceled checks showing all payments that had been made to Silvia, all documents concerning the inspections of Silvia's property, and statements or receipts from service providers that Silvia had submitted to Castle Key.

But Castle Key objected to many questions because the requests were too broad, implicated protected work product, or implicated attorney-client privilege or confidential proprietary information.

After Silvia challenged certain deficiencies in Castle Key's production, Castle Key filed a supplemental response with a privilege log. According to the response, Castle Key provided correspondence received from Silvia's counsel, communications with its vendors, and correspondence to Silvia and his counsel.

About a month later, Castle Key moved to invoke appraisal and abate litigation. The motion explained that a provision in the insurance contract stated that if the parties failed to agree upon the amount of loss, either party could make a demand for an appraisal. Each party is then required to obtain its own appraisal of the loss amount. If the appraisers disagree, the appraisers will submit their differences to an umpire. A written award agreed upon by any two will determine the amount of loss.

According to Castle Key, it "had received no written or oral claim or amount being claimed more than [what] had been originally paid after the initial inspection at the time suit was filed or thereafter until requested and tendered by correspondence from Plaintiff's counsel on January 7, 2021." Castle Key asserted that on January 15, 2021, it invoked the appraisal process by letter to Silvia's counsel. It contended that it had acted promptly to invoke the appraisal process upon receiving a demand. For his part, Silvia argued that Castle Key waived its right to appraisal by engaging in litigation.

After conducting a hearing, the trial court denied Castle Key's motion to invoke appraisal and abate litigation. The court concluded that Castle Key had actively participated in litigation in a manner inconsistent with its right to appraisal, and in doing so waived that right. In turn, Silvia filed a notice for trial.

A few months later, Castle Key filed a motion for reconsideration. It argued that after the trial court denied its motion to invoke appraisal, this Court rendered its decision in *Castle Key Insurance Co. v. Wooden Family Trust*, 321 So. 3d 346 (Fla. 1st DCA 2021), holding that an insurer that filed a motion for more definite statement did not actively litigate the case and waive

its right to compel appraisal. While Castle Key did not move for a more definite statement in this case, it argued that it had engaged in informal discovery by sending a letter to Silvia's counsel requesting the amount in dispute. In response, Silvia presented for the first time a demand and estimate of the damages claimed. Eight days later, Castle Key gave notice that it was invoking its right to appraisal. Given these circumstances, Castle Key argued that it did not waive its right to appraisal.

Following a hearing, the trial court granted Castle Key's motion for reconsideration and its motion to invoke appraisal and abate litigation. The court reasoned that the decisions in *Wooden* and *State Farm Florida Insurance Co. v. Nordin*, 312 So. 3d 200 (Fla. 1st DCA 2021), supported Castle Key's position that its conduct did not result in a waiver of its right to invoke appraisal. This appeal follows.

II

We have jurisdiction. Art. V, § 4(b)(1), Fla. Const; Fla. R. App. P. 9.130(a)(3)(C)(iv). An interlocutory order denying the right to appraisal is subject to de novo review. *Nordin*, 312 So. 3d at 203.

As this Court explained in *Nordin*, "[w]aiver is the 'voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right.'" *Id.* (quoting *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So. 2d 707, 711 (Fla. 2005)). "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right . . . ." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).*

* We assume without deciding that waiver is the correct framework to use, which Florida courts have consistently applied when determining whether a party has lost the right to appraisal. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)).

"[A]n appraisal clause may be invoked for the first time after litigation has commenced." *Wooden,* 321 So. 3d at 349 (quoting *Fla. Ins. Guar. Ass'n, Inc. v. Castilla*, 18 So. 3d 703, 705 (Fla. 4th DCA 2009*)).* "But a waiver of that right 'occurs when the party seeking appraisal actively participates in a lawsuit or engages in conduct inconsistent with the right to appraisal.'" *Id.* (quoting *Fla. Ins. Guar. v. Rodriguez,* 153 So. 3d 301, 303 (Fla. 5th DCA 2014)); *see also Fla. Ins. Guar. Ass'n v. Branco,* 148 So. 3d 488, 493 (Fla. 5th DCA 2014). Though waiver is often framed as either active participation in litigation or conduct inconsistent with the right to appraisal, the Fifth District in *Branco* clarified that "[a]ctive participation in a lawsuit is considered a waiver because it is generally presumed to be inconsistent with the right to arbitrate" or to appraisal, which are viewed similarly. *Branco*, 148 So. 3d at 493 (citing *Drs. Assocs., Inc. v. Thomas*, 898 So. 2d 159, 162 (Fla. 4th DCA 2005)). "[T]he question of waiver of appraisal is not solely about the length of time the case is pending or the number of filings the appraisal-seeking party made. Instead, the primary focus is whether the [moving party] acted inconsistently with their appraisal rights." *Id.*

In *Nordin* and *Wooden*, this Court concluded that an insurer's actions, which included filing a motion for more definite statement to determine whether appraisal was appropriate, did not conflict with the right to appraisal. In *Nordin*, State Farm moved for a more definite statement, explaining that it could not tell from the complaint whether the insured was disputing the denial of coverage, the amount of loss, or both. 312 So. 3d at 202. Without this information, State Farm contended that it could not determine whether the dispute was appropriate for an appraisal, which was only available to resolve the amount of loss. *Id.* When the insured filed an amended complaint clarifying that the dispute was over the amount of loss, State Farm invoked its right to appraisal. *Id.* Rather than waive its right to appraisal, we found that State Farm took "deliberate action to evaluate the nature of the claims and then invoke appraisal at the first reasonable opportunity." *Id.* at 205. And we concluded that State Farm did not waive the right to appraisal with several other filings. *Id.* at 204. We reasoned that filing a notice of appearance and a copy of the policy was arguably necessary to assert the right to appraisal and filing a motion for

more definite statement was hardly inconsistent with that right. *Id.*

Similarly in *Wooden*, this Court determined that an insurer did not waive its right to appraisal by filing a motion for more definite statement seeking to determine whether appraisal was appropriate. 321 So. 3d at 347. Because of significant ambiguities in the complaint, we found that the insurer, Castle Key, could not have reasonably been required to answer the complaint. *Id.* at 354. Thus, the motion for more definite statement "did not signal a shift in the procedural posture of the case—to full litigation." *Id.* Just as in *Nordin*, "the record reflect[ed] deliberate action to evaluate the nature of the claims and then invoke appraisal at the first reasonable opportunity." *Id.* (quoting *Nordin*, 312 So. 3d at 205).

By contrast, here, Castle Key does not claim that the complaint was ambiguous about whether the dispute was over coverage, which could not be resolved through appraisal, or the amount of loss, which could be resolved through appraisal. Instead, Castle Key concedes—as it must—that there was never a dispute over coverage in this case. The complaint alleged a failure "to timely provide adequate compensation." And Castle Key's answer, affirmative defenses, and responses to discovery requests show that Castle Key understood that the dispute was over the amount of loss.

Despite that concession, Castle Key argues that it did not know whether there was an "actual" dispute over the amount of loss until it requested and received a demand for a specific dollar amount. Castle Key contends that it should not have been required to seek that information through a motion for more definite statement since it did so through an informal discovery request. But Castle Key acknowledges that Silvia was not required to allege a specific amount of loss in the complaint and that a specific demand is unnecessary for a matter to be ripe for appraisal. Instead, "when the insurer admits that there is a covered loss, any dispute on the amount of loss suffered is appropriate for appraisal." *Villagio at Estero Condo. Ass'n, Inc. v. Am. Cap. Assurance Corp.*, 46 Fla. L. Weekly D879, 2021 WL 1432160, at *2 (Fla. 2d DCA Apr. 16, 2021) (quoting *Cincinnati Ins. Co. v. Cannon Ranch Partners, Inc.*, 162 So. 3d 140, 143 (Fla. 2d DCA 2014)).

In response to the complaint, Castle Key filed an answer, raised affirmative defenses that did not invoke the right to appraisal, responded to discovery requests, and requested a jury trial. Courts have found that those actions are inconsistent with the right to appraisal or arbitration. *See, e.g.*, *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973) (concluding that a respondent that counterclaimed and sought a jury trial after moving to compel arbitration acted inconsistently with the right to arbitration and waived that right); *Fla. Ins. Guar. Ass'n v. Waters*, 157 So. 3d 437, 440 (Fla. 2d DCA 2015) (finding waiver of the right to appraisal when the plaintiff did not invoke appraisal until after suing and then litigating for two years, including propounding discovery and filing a notice that the case was ready for jury trial); *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 694 (Fla. 2d DCA 2009) ("[A] party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration."); *cf. People's Tr. Ins. Co. v. Vidal*, 305 So. 3d 710, 715 (Fla. 3d DCA 2020) (holding that an insurer that failed to raise appraisal as an affirmative defense did not waive that right when it invoked appraisal in counterclaims filed with its answer); *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288, 290–91 (Fla. 4th DCA 2002) (explaining that waiver occurs when a party to arbitration responds to a complaint attacking the merits, but there was no waiver when the first substantive filing was a motion to stay invoking the right to arbitration); *Gonzalez v. State Farm Fire & Cas. Co.*, 805 So. 2d 814, 817 (Fla. 3d DCA 2000), *approved and remanded sub nom. Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021 (Fla. 2002) (holding that an insurer did not waive the right to appraisal by demanding it in its answer).

Thus, unlike *Nordin* and *Wooden*, the record does not show that Castle Key deliberately evaluated the nature of the claims and then invoked appraisal at the first reasonable opportunity. Instead, Castle Key actively participated in litigation, which conflicted with and thus waived its right to appraisal.

III

For these reasons, the order granting Castle Key's motion to invoke appraisal and abate litigation is VACATED and the cause is REMANDED for further proceedings consistent with this opinion.

M.K. THOMAS, J., concurs; TANENBAUM, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., concurring.

The trial court erred in granting Castle Key's motion to abate because it failed to submit any evidence to support the request, not even the policy pages containing the appraisal provision on which it relied. Castle Key, as the movant seeking relief, bore the burden of proving to the trial court its entitlement to the significant relief that it sought: abating the plaintiff's exercise of his constitutional right to sue in court and forcing him to submit his claim to the appraisal process. It did not meet this burden.

It is well-established in Florida that the proponent of a proposition has the burden of establishing the truth of it. *See In re Ziy's Estate*, 223 So. 2d 42, 43 (Fla. 1969); *cf. Bourne v. State Bank of Orlando & Tr. Co.*, 142 So. 810, 816 (Fla. 1932) ("When an affirmative or pure plea is interposed to a bill of complaint, the burden of proof is on him who files it."); *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 934 (Fla. 1996) (agreeing that "[t]he general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue" (quoting *Osborne Stern & Co., Inc. v. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot.*, 647 So. 2d 245, 250 (Fla. 1st DCA 1994) (Booth, J., concurring and dissenting))); *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So. 2d 1262, 1264 n.1 (Fla. 1996) (quoting approvingly "the general rule that the burden of proof on any point is upon the party asserting it" (internal quotations and citation omitted); *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("The

general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."); *Martyn v. Amold*, 18 So. 791, 794 (Fla. 1895) ("The burden of proof, however, is upon the party impeaching the account stated to exhibit such fraud, mistake, or error.").

By filing its motion, Castle Key raised with the trial court an assertion that the plaintiff's suit in fact raised a dispute limited to a loss amount regarding an insurance claim and that a provision in the underlying insurance policy issued to the plaintiff entitled it to the appraisal process to resolve the dispute. Castle Key also effectively asserted that it diligently pursued this entitlement. Indeed, while this court's decisions in *State Farm Florida Insurance Co. v. Nordin*, 312 So. 3d 200 (Fla. 1st DCA 2021) and *Castle Key Insurance Co. v. Wooden Family Trust*, 321 So. 3d 346, 347 (Fla. 1st DCA 2021), both focused on whether there was a waiver of the right to an appraisal, they are premised on the insurance company—which in both cases sought to abate and compel appraisal—having first established a record that "reflect[ed] deliberate action to evaluate the nature of the claims and then invoke appraisal at the first reasonable opportunity." *Nordin*, 321 So. 3d at 205; *see also Wooden Fam. Tr.*, 321 So. 3d at 354 ("So, for all of the foregoing reasons, we hold that Castle Key was entirely justified in seeking a more definite statement before filing its answer. Such use of the motion for more definite statement did not signal a shift in the procedural posture of the case—to full litigation—that would warrant a finding that Castle Key had waived its right under the insurance contract to compel an appraisal.").

There will be cases where the object of the suit is obvious from the allegations—a dispute solely over the insurer's assessment of the loss amount after coverage of the claim has been accepted. In those cases, the trial court easily can dispose of a motion to abate and compel as a matter of law. Where, as in this case, though, the object of the suit is not so obvious on the face of the complaint and a party defends against the suit by injecting further non-loss-amount questions, fact questions arise that must be resolved by the trial court upon the presentation of sufficient proof from the movant. And where it is readily apparent from the record that the

movant did not immediately invoke the appraisal process with the court, the movant has the added burden of presenting evidence demonstrating that it has not forfeited that process.

Despite having the burden in this case, Castle Key did virtually nothing to demonstrate, with evidence, its confusion over what type of relief the plaintiff was seeking in his lawsuit. Moreover, Castle Key made no effort to demonstrate what it had learned about the nature of the suit. Castle Key certainly made no showing as part of its motion that the plaintiff's suit was limited to a dispute over the amount of loss otherwise covered by the policy it issued to the plaintiff. The complaint alleges that the plaintiff submitted a claim under the policy and that the insurer "refused to timely provide adequate compensation for Plaintiff's covered losses." Castle Key's answer initially suggested a defensive position beyond just the question of loss. It admitted that the plaintiff timely notified it of his purported loss but denied that the plaintiff "submitted a claim for benefits in accordance with the terms of the Policy." It also denied that it "refused to timely provide adequate compensation for Plaintiff's covered losses." In its affirmative defenses, Castle Key first asserted that the plaintiff's losses may "have been paid or are payable by collateral or other sources," and "[t]o the extent that" they are, those losses are not recoverable from Castle Key. Moreover, Castle Key asserted that it "paid all amounts due and owing to plaintiff under his insurance policy with Castle Key Insurance Company." Finally, Castle Key asserted that the plaintiff was barred from recovery of any damages by his failure to mitigate. There was no mention in the answer that the plaintiff failed to comply with the appraisal provision in the policy. There still is not, as far as we know.

In this procedural posture, Castle Key obviously indicated that it was not confused by the nature of the plaintiff's claim. It took Castle Key, though, another roughly three months before it advised the plaintiff of its position regarding the appraisal. It took another two weeks after getting a response from the plaintiff for Castle Key to get around to filing its motion to abate and compel an appraisal. That motion, notably, failed to attach the portion of the policy that contains the appraisal provision. Even though the motion argued that Castle Key was entitled to the appraisal process if the parties "fail to agree on the amount of loss," the

motion also did not attach any evidence that clarified that the entire suit in fact did stem only from a controversy between the parties over the amount of loss and not also from some controversy over Castle Key's refusal to pay based on a coverage issue. *Cf. Johnson v. Nationwide Mut. Ins. Co.*, 828 So. 2d 1021, 1025 (Fla. 2002) (holding that coverage issues must "be judicially determined by the court" and are "not subject to a determination by appraisers").

On the limited record before us, Castle Key's lack of diligence in enforcing the appraisal right, even after it filed its motion, further undercut its entitlement to an appraisal. The trial court held a hearing on Castle Key's motion on April 13, 2021, but from what I can tell, no evidence was presented there. The trial court denied that motion on April 23, 2021. This court's decision in *Nordin* came out on February 24, 2021. The decision was not cited by the trial court in its order, and there is no indication in the appendix filed by Castle Key in this appeal that any notice of supplemental authority was filed. Instead, nearly *five months* would pass before Castle Key filed its motion for reconsideration. That, of course, is around four months after Castle Key could have filed a non-final order appeal (but did not), meaning it already had forfeited its right to seek appellate review on the question. *See* Fla. R. App. P. 9.130(a)(3)(C)(iv) (authorizing appeal of an order that determines a party's entitlement "to an appraisal under an insurance policy"); Fla. R. App. P. 9.130(b) (requiring that a notice of appeal be filed within thirty days of rendition).

To make things even more suspect, the motion for reconsideration rested entirely on the issuance of this court's decision in *Wooden*, but still failed to explain the delay between the publication of the opinion and the filing of the motion—*even though Castle Key was the victorious party in that case.* Suspicion increases when we see that *Wooden* simply follows the reasoning in *Nordin*, the February case. *See Wooden*, 321 So. 3d at 347 ("Consequently, for the reasons expressed in *Nordin*, we also reverse the nonfinal order denying Castle Key's motion and remand the case for further proceedings."). At all events, both decisions were based on the insurer's initially filing a motion for a more definite statement and then answering the complaint with an express assertion of the right to an appraisal as a defense.

Neither one, then, had any application to the circumstances of this case.

While it is true that a trial court generally has the inherent authority to reconsider the orders it enters prior to final judgment, the course followed by Castle Key in this matter should have been condemned by the trial court, not condoned. The record before the trial court reflected a lack of diligent inquiry by Castle Key. It demonstrated that Castle Key had no sense of urgency regarding its right to an appraisal, to the point that it did not even appeal the denial of its motion asserting that right. Then it waited four months after the expiration of the appeal period before seeking to circumvent the expiration of that period through a motion for reconsideration. Because Castle Key presented no evidentiary basis for the original granting of its motion to abate and compel, and no credible new basis for the trial court to reconsider its ruling after the time for seeking an appeal had expired, the trial court erred in reconsidering its earlier denial, abating the suit, and compelling the appraisal process. I concur, then, in vacating the order on review.

Stephanie A. Taylor and J. Phillip Warren of Taylor, Warren & Weidner, P.A., Pensacola, for Appellant.

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