

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 2015-CA-002272
L.T. NO: 2014-SC-003554

PROGRESSIVE AMERICAN
INSURANCE COMPANY,
Petitioner,

v.

COLLISION CONCEPTS OF DELRAY, LLC
a/a/o ROBERT FILIPSKI,
Respondent.

Opinion filed: **SEP 28 2015**

Petition for Writ of Certiorari from the County Court in and for Palm Beach County,
Judge Reginald R. Corlew.

For Petitioner: Trenton M. Swan, Esq. and Joseph T. Kissane, Esq.
Cole, Scott & Kissane, P.A.
4686 Sunbeam Road
Jacksonville, FL 32257
Joseph.kissane@csklegal.com
Trenton.swan@csklegal.com

For Respondent: Michael Fischetti, Esq.
Gonzalez & Associates, P.A.
3600 Red Road, Suite 603
Miramar, FL 33025
Mfischetti@gonzalezlegal.com

PER CURIAM.

Petitioner, Progressive American Insurance Company ("Progressive"), filed a Petition for Writ of Certiorari seeking review of the county court's non-final order denying Progressive's "Motion to Dismiss or Alternatively, Motion to Stay, Enforce Appraisal and Strike Claim for Attorney's Fees." The Court finds that the county court departed from the essential requirements of law by denying Progressive's motion, effectively leaving Progressive no adequate remedy on

appeal. Therefore, the Court grants Progressive's Petition for Writ of Certiorari.

A non-final order for which no appeal is provided by Florida Rule of Appellate Procedure 9.130 is reviewable by petition for writ of certiorari "only in limited circumstances." *Nader v. DHSMV*, 87 So. 3d 712 (Fla. 2012) (citing *Martin-Johnson, Inc. v. Savage*, 509 So. 3d 1097, 1099 (Fla. 1987)). The order must "depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal." *Id.* (noting that "both the requirements of irreparable harm and a departure from the essential requirements of law must be met").

Progressive seeks review of an order denying its motion to dismiss or, alternatively, to stay the case and compel appraisal. Permitting parties to litigate in court where there is a legal or contractual obligation to proceed through alternative dispute resolution constitutes a departure from the essential requirements of law. *See Lapidus v. Arlen Beach Condo. Ass'n, Inc.*, 394 So. 2d 1102 (Fla. 3d DCA 1981). In *Lapidus*, the Third District Court of Appeal considered a challenge to a trial court's order denying a motion to compel arbitration as a petition for common-law certiorari because (a) there is a strong public policy in favor of arbitration, (b) "denial of a right to arbitration may not be adequately remedied on appeal" because the purpose of arbitration is to avoid litigation, and (c) "permitting parties to litigate the dispute in court instead of proceeding to arbitration, if there is a right to arbitration, constitutes a departure from the essential requirements of law." *Id.* at 1103. Appraisal is similar to arbitration in that the purpose of appraisal is to avoid or reduce the need for litigation.¹ Public policy also supports

¹ There are also significant differences between arbitration and appraisal. "First and foremost, while an agreement to arbitrate ordinarily encompasses the disposition of the entire controversy between the parties, an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and 'amount of loss.'" *Citizens Prop. Ins. Corp. v. Mango Hill #6 Condo. Ass'n, Inc.*, 117 So. 3d 1226, 1229 (Fla. 3d DCA 2013) (internal citations and quotations omitted). Here, the only dispute between the parties was as to the amount of loss. Accordingly, in the instant case, compelling appraisal—which would have resulted in a binding determination as to the amount of loss—could have avoided the parties' need to resort to litigation.

appraisal clauses “as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits.” *Florida Ins. Guar. Ass’n, Inc. v. Olympus Ass’n, Inc.*, 34 So. 3d 791, 794 (Fla. 4th DCA 2010). Accordingly, the denial of the right to appraisal, where the right to appraisal exists, cannot be remedied on appeal. Therefore, Progressive has demonstrated irreparable harm, and this Court has jurisdiction to review the Petition for Writ of Certiorari.

If the reviewing court determines that the petitioner has made a prima facie showing of irreparable harm, then the court must determine whether the contested order departs from the essential requirements of law. *Citizens Property Ins. Corp. v. San Perdido Ass’n*, 104 So. 3d 344, 351 (Fla. 2012). Collision Concepts contends that the trial court’s order should be affirmed primarily because (1) appraisal² is not mandatory in the instant case because the issues involved are not appraisable and are not a pure “amount of loss” question and (2) Progressive has waived its right to appraisal. The Court rejects each of Collision Concepts’ arguments.

Appraisal exists for a singular purpose—the determination of the amount of loss. *Citizens Prop. Ins. Corp. v. Demetrescu*, 137 So. 3d 500, 502 (Fla. 4th DCA 2014). Issues relating to coverage challenges are questions exclusively for the courts. *Olympus*, 34 So. 3d at 794. Therefore, when an insurer admits that there *is* a covered loss, but there is a disagreement

² The appraisal provision at issue in the policy between Progressive and the insured provides as follows:

If we cannot agree with you on the amount of a loss, then we or you may demand an appraisal of the loss. 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 loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. If the 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 fees 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.

(emphasis in original).

on the *amount* of loss, it is for the appraisers to arrive at the amount to be paid. *Id.*

Contrary to Collision Concepts' position, the dispute between Progressive and Collision Concepts is purely a question as to the amount of loss. Collision Concepts itself acknowledges that one of the central issues in the case involves the differences in the labor rates charged by Collision Concepts and the labor rates paid by Progressive, as well as the price of materials. However, a dispute regarding the *amount* charged for labor and parts is a dispute regarding the *amount of loss* rather than a dispute regarding coverage. Here, Progressive has acknowledged coverage but disputes the amount billed by Collision Concepts. Progressive does not allege that Collision Concepts has billed for work that is not covered by the insurance policy but rather disputes the amount charged for necessary parts and labor. Accordingly, the dispute between Progressive and Collision Concepts is appropriate for appraisal.

The insurance policy between Progressive and the insured provides that the insurance company may, at its option, "pay for the loss in money" or "repair or replace the damaged or stolen property." Collision Concepts argues that Progressive waived its right to compel appraisal by electing to repair and authorizing the repair of the subject vehicle. Collision Concepts claims that Progressive elected to repair the car by (1) composing two estimates of the cost to repair the damage to the vehicle and (2) issuing two checks in the amount provided by the estimates.

A waiver of a party's right to seek appraisal occurs when the party seeking appraisal "actively participates in the lawsuit or engages in conduct inconsistent with the right to appraisal." *Florida Ins. Guar. v. Rodriguez*, 153 So. 3d 301, 303 (Fla. 5th DCA 2014); *Raymond James Fin. Servs. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005). Whether a party waived its right to appraisal is "not solely about the length of time the case is pending or the number of filings the appraisal-seeking party made." *Rodriguez*, 153 So. 3d at 300. Instead, the primary focus is

on whether the appraisal-seeking party acted inconsistently with its right to appraisal. *Id.* (quoting *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 494 (Fla. 5th DCA 2014)).

Collision Concepts relies on *Weiss v. The Insurance Company of the State of Pennsylvania*, 497 So. 2d 285 (Fla. 3d DCA 1986), to argue that Progressive rendered it impossible to comply with the appraisal clause by exercising its right to repair the vehicle as authorized by the policy. In a two-paragraph opinion, the *Weiss* court considered a case where an insurance company authorized the repair of the insured's vehicle and then subsequently refused to pay for a large portion of the bill on grounds that damages caused by "wear and tear" were not covered by the policy. 497 So. 2d at 285. The insured appealed an order dismissing the action for failure to comply with the policy's appraisal provision, and the appellate court reversed, holding that the insurance company rendered it impossible to comply with the appraisal clause by exercising its right to repair the vehicle. Hence, the court found that the appraisal "provision became inoperative and was waived as a matter of law." *Id.* at 286. *Weiss* is distinguishable because, here, the insurer did not authorize the repairs and then later refuse to pay due to a dispute in coverage.

Nothing in the record supports Collision Concepts' claim that Progressive elected to repair the subject vehicle. Rather, the underlying facts relied on by Collision Concepts, which are included in the record, indicate that Progressive elected to pay for the loss in money. Progressive composed two estimates of the amount to repair the damage to the subject vehicle and issued two checks to the insured in the amount specified in the estimates. Both estimates contained disclaimers in all capital letters stating that "this is a damage assessment only—not an authorization to repair." Collision Concepts acknowledges that the insured—not Progressive—took the vehicle to Collision Concepts for repairs in March 2014. Nothing in the record

suggests that Progressive “authorized” any repairs on the vehicle. Rather, the record reflects that Progressive assessed the damage to subject vehicle, acknowledged coverage, and issued two checks to the insured to compensate him for the amount of damage caused to the vehicle. The *insured* then elected to repair his vehicle and took it to Collision Concepts, which repaired the vehicle and billed Progressive for the amount in excess of its estimates. Accordingly, Collision Concepts’ argument that Progressive elected to repair the subject vehicle is meritless.

We therefore GRANT the Petition for Writ of Certiorari and QUASH the order denying Progressive’s “Motion to Dismiss or Alternatively, Motion to Stay, Enforce Appraisal and Strike Claim for Attorney’s Fees.” Collision Concepts’ Motion for Costs and Attorney’s Fees on Appeal is DENIED.

HAFELE, BLANC, and CARACUZZO, JJ., concur.