IN THE SUPREME COURT OF IOWA

NO. 19-1669
Fayette County Case No. LACV055094

LUIGI'S, INC.,

Plaintiff-Appellee,

v.

UNITED FIRE AND CASUALTY COMPANY,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR FAYETTE COUNTY, THE HONORABLE JOHN BAUERCAMPER, 1st JUDICIAL DISTRICT OF IOWA

FINAL BRIEF OF DEFENDANT-APPELLANT UNITED FIRE AND CASUALTY COMPANY

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CERTIFICATE OF FILING

I certify that on May 22, 2020, I filed the following Final Brief of Defendant-Appellant United Fire and Casualty Company with the Clerk of the Appellate Court by electronically filing the document through the Iowa Appellate Courts Electronic Filing (EDMS) system, pursuant to Iowa R. App. 6.905(1) and Iowa Ct. R. 16.1221(1).

CERTIFICATE OF SERVICE

I hereby certify that I served the following Final Brief of Defendant-Appellant United Fire and Casualty Company upon all other parties to this appeal in full compliance with Iowa R. App. P. 6.13 by electronically serving their counsel through the Iowa Appellate Courts Electronic Filing (EDMS) system, pursuant to Iowa Ct. R. 16.1221(2).

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ROUTING STATEMENT

This case is appropriate for transfer to the Iowa Court of Appeals. There are no substantial or novel legal issues of the type referred to in Iowa Rule of Appellate Procedure 6.1101(2). This case involves application of existing legal principles and is appropriate for transfer to the Iowa Court of Appeals under Rule 6.1101(3).

STATEMENT OF THE CASE

A. Nature of the Case

United Fire & Casualty Company ("United Fire") appeals from a jury verdict in favor of its insured, Luigi's. Luigi's was an Oelwein restaurant destroyed by fire. Dissatisfied with United Fire's valuation of loss, Luigi's exercised its right under the insurance contract to resolve the valuation via the appraisal process contained in the insurance contract. An appraisal award was entered, and United Fire timely paid it.

Despite its voluntary election to use the appraisal process and timely receipt of the award payment, Luigi's thereafter filed suit against United Fire for breach of contract, bad faith and punitive damages on three grounds: 1) United Fire did not at the outset simply pay the policy limits; 2) the day following the appraisal hearing United Fire's appraiser informally requested a new appraisal hearing because he felt he was misled and coerced during the appraisal hearing; and 3) a few days later United Fire's appraisal company sent Luigi's' appraiser an

email again requesting a new appraisal hearing "because this is likely heading towards a lawsuit."

It is undisputed Luigi's did not allege any complaints regarding the appraisal process or hearing and signed a sworn proof of loss for the appraisal award amount. It is also undisputed United Fire paid the full appraisal award less than three weeks after the appraisal hearing.

The district court erred in failing to direct a verdict in favor of United Fire as the evidence was insufficient as a matter of law to support Luigi's' claims. To rule otherwise and allow the jury verdict to stand would obviate Iowa's well-established procedure for resolving insurance valuation disputes via the appraisal process.

B. Course of Proceedings

Luigi's' fire loss occurred on Saturday, November 12, 2016. Luigi's had coverage for fire loss under a commercial insurance policy issued by United Fire[1]. While the policy provided for numerous coverages, the only issue in this case was the building's valuation.

Within three days of the loss, United Fire retained an appraiser to evaluate the building's market value per a policy endorsement providing that if there was a market value for the building, market value be used to determine actual cash

[1] The policy was actually written by United Fire affiliate Addison Insurance Company.

value of the loss. (App. 155; App. 176; App. 177-183; Ex. 101, 7:13–9:16; Tr.III, 36:5–38:13). By December 12, 2016, the appraisal was complete; United Fire's appraiser concluded the building's market value was $242,000. (App. 188; Ex. 101, 1:11-19, 13:1-15). That week, United Fire sent Luigi's a check for $234,500 representing the appraisal value minus Luigi's' deductible. (App. 489-492; Tr.II, 199:22-25). Luigi's disagreed with United Fire's value and refused to accept Luigi's check as full settlement for the building loss. (App. 174-175).

Because of the parties' valuation disagreement, on January 26, 2017, Luigi's invoked the appraisal process provided in the insurance policy. (App. 483; Tr.II, 131:3-20). United Fire and Luigi's each appointed an appraiser and agreed upon an umpire to conduct an appraisal hearing. (App. 483; Tr.II, 131:3-20; Tr.III, 53:3-19; Tr.IV, 8:9-14). The appraisal hearing was held June 22, 2017, at which time the two appraisers and umpire all signed an appraisal award of $502,000. (App. 472). On June 29, 2017, Luigi's provided United Fire a sworn statement and proof of loss for the building of $502,000. (App. 166-167; Tr.II, 121:22–122:20). On July 12, 2017, United Fire paid the appraisal award—despite an initial frustration with the award due to concerns Luigi's' appraiser engaged in deceptive and coercive behavior during the appraisal hearing. (Tr.II, 123:23-124:5).

On March 14, 2018, Luigi's filed a three-count action against United Fire for failure to pay the $550,000 building limits of Luigi's' policy. (App. 21-24).

On April 13, 2018, United Fire filed its Answer and affirmatively stated Luigi's failed to state a claim for which relief could be granted. (App. 25-27).

On July 10, 2019, the matter proceeded to a jury trial. At the close of Luigi's' case and again after the submission of all evidence, United Fire moved for a directed verdict and for dismissal of all claims. (Tr.III, 15:2–26:18; Tr.IV, 44:1–56:25). The Court overruled all aspects of the motion for directed verdict without explanation. (Tr.IV, 58:1-5). United Fire also objected to the Court's proposed instructions and took exceptions to the Court's failure to properly instruct the jury. (Tr.IV, 58:6–66:5).

On July 16, 2019, the jury returned a verdict indicating Luigi's proved its breach of contract claim and awarded damages of $48,000—the difference between the $502,000 appraisal award and the $550,000 building coverage policy limits. (App. 510-511; Tr.IV, 93:12–94:5). The jury also found Luigi's proved its bad faith claim and awarded damages of $40,989.25 for the $40,237.50 in fees incurred by Luigi's in the appraisal process and $751.75 in legal fees it claimed were charged by Luigi's' attorney to send a post-hearing letter asking United Fire to pay the $502,000 appraisal award. (App. 510; Tr.IV, 94:24–95:5; App. 163; App. 164). The jury also awarded punitive damages of $30,000. (App. 511). The Court entered an Order for Judgment on the Verdict and a Corrected Order for Judgment on the Verdict. (App. 512-515).

On July 22, 2019, United Fire filed a Motion for Judgment Notwithstanding the Verdict; Alternative Motion for New Trial. (App. 516-521). On July 30, 2019, Luigi's filed its Resistance. (App. 522-530). A hearing for post-trial motions was held on August 26, 2019. (Tr. 8/26/19). On September 11, 2019, the Court entered a ruling denying United Fire's post-trial motions without explanation except to find everything was "properly submitted." (App. 531-532).

On September 27, 2019, Luigi's filed a timely Notice of Appeal. (App. 533-534).

STATEMENT OF THE FACTS

A. The Luigi's Insurance Policy

The Stasi family operated a restaurant and lounge in Oelwein, Iowa called "Luigi's" since the late 1950's. (Tr.II, 158:16-22). Luigi's, Inc. is owned by Lou Stasi and was managed by his son, Marty Stasi. (Tr.I, 67:1-6; Tr.II, 156:16-22). United Fire, or one of its affiliates, had been the insurer for Luigi's for many years. (Tr, III, 146:20–149:11).

Marty's brother-in-law, John Moran, was Luigi's' insurance agent. (Tr.III, 145:17-147:7). In July 2016, United Fire's underwriting department advised Moran the policy would need to be changed due to Luigi's loss history. (App. 171; App. 172; App. 173; Tr.III 147:16-22, 148:1–150:9). Moran was unable to

find any other commercial carrier to insure Luigi's because of its loss history. (Id.) Moran was able to place coverage with United Fire Group's affiliate, Addison Insurance Company, with significant changes required. (Tr.III, 148:24–149:11). In past years, the building was insured with replacement cost coverage. (Tr.III, 147:16:20). In a letter sent by Moran's office to Marty prior to the loss, Marty was advised of "notable changes" to Luigi's' renewal policy, including "Building limit is reduced to $550,000 and is on actual cash value basis." (App. 173; Tr.III 150:3-24, 151:5-17). Moran also discussed these changes with Marty directly. (Tr.III, 152:21–153:2).

Addison Insurance Company issued Luigi's' new policy with the $550,000 building coverage limit for the policy period September 14, 2016 to September 14, 2017. (App. 83). The methodology for determining actual cash value was contained in the following Endorsement:

Notice to Policyholders . . .

> Certain losses on your policy may be settled on an actual cash value basis. The Iowa Insurance Division has asked that we provide you with a notice defining actual cash value.
>
> 1. In the event that there is a regular market for the property where the property can be bought and sold in the ordinary course of dealing, and it is possible to determine the property's market value, then the market value of the property is the Actual Cash Value.
>
> 2. In the event that there is no regular market for the property where the property can be bought and sold in the ordinary

> course of dealing, or it is not possible to determine the property's market value, then:
>
> Actual Cash Value means the amount which it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence.
>
> …

(App. 155). The same Endorsement was in prior policies issued to Luigi's. (Tr.III, 151:18-152:18).

B. Luigi's Burns Down and United Fire Appraises the Building Loss

On November 12, 2016, a fire broke out in the kitchen area resulting in a total loss of the building and contents. The fire loss was reported to United Fire, and Dan Fasse was responsible for adjusting the claim. (Tr.III, 31:17–32:6).

Fasse met with Marty, Lou and Moran five days after the fire and outlined the coverages under the policy. (Tr.II, 174:4-19; 199:1-4; Tr.III 42:14–43:5; 154:18–155:2; App. 488). Fasse informed Marty and Moran he had already retained (1) an Origin and Cause Investigator; (2) a Forensic Accountant; and (3) a Real Estate Appraiser to determine the building's value per the Endorsement's definition of Actual Cash Value. (Tr.III 36:5–38:13). There was confusion at the meeting. (Tr.III, 155:3-23). Moran had not read the Endorsement and assumed the method to determine Actual Cash Value was Replacement Cost less Depreciation, and he had relayed this interpretation to Marty (Tr.III, 155:18–156:1). Moran subsequently understood Actual Cash Value meant the building's

market value, which meant hiring an impartial, third-party appraiser, and communicated this to Marty as well. (Tr.III, 156:24–157:20, 158:15–159:2). Moran understood that for Luigi's to obtain the $550,000 building coverage policy limits, Luigi's would have to prove the building's market value was at least $550,000. (Tr.III, 163:12–164:7).

United Fire's retained appraiser, Rally Appraisal, performed an appraisal under the requirements of the Uniform Standards of Professional Appraisal Practice. (App. 186-255; Ex. 101, 13:7-10). Rally's employees, Certified General Real Property Appraiser Jim Herink and Associate General Real Property Appraiser Dextar Klostermann, inspected the property on November 28, 2016. (App. 200-201). To ascertain the building's market value, Rally used a sales approach to search the market for comparable sales of similar properties in similar markets. (Ex. 101, 9:17–11:19). According to Herink[2], who has performed real estate appraisals for 40-50 restaurants (Ex. 101, 6:10-17, 22:13-19), a cost approach would not generally have been considered for properties as old as Luigi's. (App. 229-230; Ex. 101, 16:15-23).

On December 9, 2016, Rally issued its appraisal report concluding the Actual Cash Value of the building based on market value immediately prior to the fire was $242,000. (App. 188; Ex. 101, 1:11-19, 13:1-15).

[2] Herink testified via video deposition. (Tr.III, 165:12-18, Ex. 101).

C. Luigi's Invokes The Policy's Appraisal Process

On December 13, 2016, Fasse sent Marty a letter enclosing Rally's building appraisal report and a settlement check in the amount of $234,500 representing the $242,000 appraisal value minus the policy's deductible and advance payments. (App. 489-491; Tr.II, 199:22-25). Fasse's letter explained the $242,000 was based on the building's market value as defined in the policy endorsement and requested Marty advise if he had any questions or concerns. (App. 489-491).

On December 19, 2016, Fasse reached out to Marty to confirm he had received the settlement package. (App. 493). Marty confirmed receipt but advised Fasse he was not happy with the appraisal and disagreed with Rally's valuation. (App. 493; Tr.III, 88:20–89:2). Marty did not feel Rally had cherry-picked properties for comparison; he just felt truly comparable properties were not available. (Tr.II, 186:1-4). Fasse offered to meet with Marty to review the settlement and note any grievances. (App. 493). Marty responded he would consult with Moran for further direction and get back to him. (App. 493).

On December 22, 2016, Fasse sent Marty a letter acknowledging Luigi's' rejection of Rally's value and disagreement with the methodology employed in the appraisal. (App. 174-175). Fasse's letter informed Marty he could contest

Rally's valuation by hiring his own appraiser to determine the building's market value or invoke the appraisal process as outlined in the policy. (App. 98; App. 174-175; Tr.III, 47:10-25). Marty was already aware of the former option as he had seen it in the policy previously and considered it a viable option. (Tr.II, 184:25–186:14). Marty decided to invoke the policy appraisal process. (Tr.II, 186:15-25; App. 169-170). As he understood it, Luigi's and United Fire would each select an appraiser and then agree on an umpire; the appraisers and umpire would then meet and come up with a binding valuation figure. (Tr.II, 189:15-23).

Luigi's hired Michigan public adjusting firm Globe Midwest Adjustors. (Tr.II, 186:15-25; App. 169-170). Globe Midwest employee Chuck Sorrell acted as Luigi's representative. (App. 169-170; App. 483). On January 26, 2017, Marty sent Fasse a letter requesting the appraisal process to determine the building value and named Sorrell as Luigi's appraiser, even though Sorrell is not a real estate appraiser and did not have any training in real estate sales. (App. 483; Tr.II, 131:3-20). Globe Midwest did not obtain a market value appraisal. (Tr.II, 132:17–134:17). Instead, Globe hired appraiser Keith Westercamp to critique Rally's appraisal. (Tr.II, 132:17-19, 139:16-22).

Sorrell testified the best way to resolve a dispute over market value analysis is through the insurance appraisal process as set out in the United Fire insurance policy. (Tr II, 26:10-19; 43:20–44:2). He also testified in detail as to the appraisal process and explained the process is triggered when the insured and

the insurance company disagree on the amount of the loss and one of the parties makes a written demand for appraisal of the loss. (Tr.II, 45:2–48:21, 45:9-25). He stated, "Either party to the insurance contract, the policyholder or the insurance company, can demand an appraisal when a dispute over the dollar amount of the loss happens." (Tr.II, 19:9-11). Sorrell assisted Luigi's with its written demand for appraisal; he testified: "There was a dispute that existed over how much they should have been paid for the fire, so they chose to demand appraisal per the insurance contract." (Tr.II, 20:15-21).

On January 30, 2017, Fasse and Sorrell exchanged emails, with Fasse asking Sorrell to confirm the scope of Luigi's' appraisal demand—whether it was for multiple coverages, including business personal property, business income, and extra expense, or just the building coverage. (App. 484-485). Fasse also asked that as to the building coverage, whether Luigi's disputed the application of "Market Value" as the proper value or the method at which "Market Value" was calculated. (App. 485). Sorrell replied that the demand was on the building only. (App. 484). He then clarified:

> Regarding the appraisal on the building portion of the claim, a dispute exists as to the Actual Cash Value of the building damages. This dispute exists regardless of the method of calculation of those damages. As the insured does not agree with the amount of the loss calculated by UFG, they have demanded appraisal in response to your letter of December 27, 2016 in which UFG specifically offered that remedy to resolve this difference.

(App. 484).

United Fire retained Herink as its appraiser. (Tr.III, 53:3-19). Sorrell and Herink agreed to retain Joe Paxson to serve as the neutral umpire. (App. 460-461; Tr.IV, 8:9-14).

Sorrell further testified as to the binding nature of an appraisal award and that each party pays its own costs incurred in the appraisal process:

> Q. Now, it says, "A decision agreed to by any two will be binding."
>
> **A. Yes.**
>
> Q. That just means exactly what it says; correct?
>
> **A. Absolutely. Any two of the three parties, if they sign the award, it's binding on every party.**
>
> Q. So if Mr. Paxson and Mr. Herink agreed to 242, then Luigi's is stuck with 242?
>
> **A. That would have been it, yes.**
>
> Q. If you and Mr. Paxson agreed to $1,039,000, then United Fire is stuck; correct?
>
> **A. Yes, correct.**
>
> Q. And then it indicates that each party has to bear its or pay its chosen appraiser?
>
> **A. Yes**.
>
> Q. So that means that Marty had to pay you?
>
> **A. Yes.**
>
> Q. Or Luigi's had to pay you?
>
> **A. Luigi's had to pay Globe Midwest, yes.**
>
> Q. And United Fire had to pay Rally?

A. Yes.

Q. And then the cost of the umpire gets split equally; is that correct?

A. Yes, it is.

(Tr.II, 47:20–48:18).

On May 1, 2017, Herink emailed Sorrell, noting it had been three months since the appraisal process had started and that he had not yet received Sorrell's appraisal. (App. 460-462). He also requested confirmation of the scope of the appraisal hearing: "I want to ensure that the only thing we are taking to appraisal is the issue of valuing the involved structure." (App. 460).

On May 8, 2017, Sorrell provided his appraisal to Herink and umpire Paxson. (Tr.II, 124:10-17; 188:19–189:8; App. 461). Sorrell's appraisal was based on the replacement cost for rebuilding Luigi's, minus depreciation. (Tr.II: 93:6–96:2). A replacement cost approach determines the cost to build the building new. (Tr.II, 88:2-5). Sorrell's valuation of the property was just over $1,030,000. (Tr.II: 93:6–96:2; App. 256). This figure included $907,309.10 for the structure and $122,767.62 for Furniture, Fixtures and Equipment. (App. 256, 396-397).

Sorrell disagreed with Herink's appraisal on two grounds: that Herink used only a sales comparison approach to determine market value; and the properties used by Herink for his sales comparisons were not, in his opinion, similar or like properties. (Tr.II, 82:12–83:2, 85:3–87:2). In Sorrell's opinion, a sales comparison approach could not be used to value Luigi's' building loss due

to the lack of highly similar properties, and thus a replacement cost approach was necessary. (Tr.II, 85:22–88:1) Sorrell himself did not have any experience in determining whether there is a regular market for the property in Iowa. (Tr.II, 134:18-21). Sorrell admitted Westercamp[3] was qualified to determine if there was a regular market value for the property and in fact Westercamp told him he could come up with a market value. (Tr.II, 133:19–134:17; 144:14–145:4). However, Sorrell did not ask Westercamp for a market value. (Tr.II, 132:20–134:17; 144:14–145:4).

On June 9, 2017, Herink sent Paxson a written response to Sorrell's appraisal. (App. 464-471). Herink described the comparable properties he had used for his sales comparison to determine market value and noted it was clear there was a regular market for the building. (App. 470-471). Herink further noted Sorrell was not a licensed real estate appraiser and that his cost approach was a very subjective measure due to depreciation. (App. 465).

D. The Appraisal Hearing

The appraisal hearing was held Thursday, June 22, 2017. (Tr.II, 101:15-23). In attendance were umpire Paxson, Herink, Sorrell and Westercamp. (Id.) It was Herink's first time participating in an appraisal hearing. (Ex. 101, 26:18-25). Sorrell brought Westercamp to the hearing because he was a real estate appraiser and Sorrell was not. (Tr.II, 101:24–102:5). At the hearing, Westercamp

[3] Westercamp died prior to trial. (Tr.I, 18:12-16).

stated Luigi's' building had a value of $380,000. (Tr.II, 101:15–102:14) Following negotiations, the parties agreed to the building valuation of $380,000. (Tr.IV, 11:20–12:5). Paxson felt a $380,000 fair market value for the building was too high (Tr.IV, 12:13-18), but he signed off on the amount since his objective was to get the parties to an agreement. (Tr.IV, 12:6-25).

Having arrived at an agreed building valuation, Herink and Paxson both believed the appraisal was concluded. (Tr.IV, 13:20–14:5; Ex. 101 25:23–26:14). Sorrell then argued the policy required payment of an additional $122,000 for "Furniture, Fixtures and Equipment" ("FFE"). (Tr.II, 104:24–105:3; Tr.IV, 13:23–14:16; Ex. 101, 26:6–27:14). Herink responded the FFE should not be part of the appraisal and he was not qualified to discuss those items. (Tr.II, 104:4-12; Ex. 101, 29:19–30:5). He was a real estate appraiser only and did not take into account specific fixtures as part of his appraisal. (Ex. 101, 88:25–90:21). Herink had thought the appraisal hearing was only to determine the value of the real estate, not the building's contents. (Ex. 101, 25:23–26:14, 71:3-10). However, Herink, a novice at appraisal hearings, went along with the FFE being added based on Sorrell's representation that it should be included. (Ex. 101, 26:18-27:8).

The appraisal award was therefore $502,000, and Sorrell, Herink and Paxson all signed it. (App. 472; Tr.II, 104:13-24). Paxson's takeaway was the

$502,000 award was "quite high compared to what it should have been". (Tr.IV, 16:13-17).

E. After The Appraisal Hearing: Concerns Over Sorrell's Misrepresentations

Over the next week, a whirlwind of activity occurred—stemming from Herink's belief Sorrell had misled him at the appraisal hearing.

Right after the hearing, Herink called Fasse and sent him a scan of the $502,000 written appraisal award and a two page excerpt from Sorrell's appraisal containing a listing of the $122,000 FFE inventory (Ex. 101, 72:22–74:3; App. 396-398). Fasse was taken aback; he was prepared for an award in the $300,000s, but did not expect an award more than twice Rally's $242,000 appraisal. (Tr.III, 56:22–59:2). Fasse was upset Herink had allowed the FEE figure's inclusion in the award as many of the items listed in the FFE were either duplicative of amounts included in the building valuation or included items United Fire had already compensated Luigi's for under its Business Personal Property coverage. (Tr.III, 56:22–59:2; App. 487).

At 3:42 pm, Herink emailed his supervisor, David Passmore, to alert him Fasse was displeased. (App. 473). That evening, Herink and his supervisors discussed Herink withdrawing his signature from the award based on Sorrell's coercion and misleads. (App. 474-475).

The next day Fasse advised Passmore it looked like a professional error for Rally to have agreed to a figure more than twice Rally's appraisal amount, which Fasse had relied on in making his original settlement offer to Luigi's. (Tr.III, 59:16–60:20). Fasse requested Passmore provide Rally's errors and omission policy information. (Tr.III, 60:16-20). A series of emails between Rally personnel and a letter from Rally to umpire Paxson followed. (App. 160; App. 474-475; App. 476-478). Herink called Paxson and sent him a letter advising he was withdrawing his signature to the appraisal award for Furniture, Fixtures and Equipment because he felt it had been a mistake for the award to include the building's contents. (Ex. 101, 33:4-12; App. 160). He advised he felt he had been "coerced" to sign the award and "misled" by Sorrell stating furniture, fixtures and equipment needed to be added to the valuation as part of the building coverage. (App. 160; Ex. 101, 30:19–31:7). Herink noted he was not a personal property appraiser and neither he nor the other real estate appraiser, Westercamp, had expertise in personal property appraisals. (Id.)

The following Tuesday, June 27, 2017, Paxson called Sorrell and advised him Herink and Passmore had requested the appraisal award be vacated and the appraisal panel reconvene. (Tr.II, 109:1-15). The next morning, Sorrell emailed a response to Paxson and Herink:

> Hi all. Last night I received a call from Mr. Paxson stating that Mr. Herink would like to change the award that we all agreed upon and signed last week after discussion between himself and UFG. The

> building appraisal has been completed, the building appraisal panel has concluded and an award has been signed by all three members. I have been instructed by Luigi's counsel to do nothing further on this matter.

(Tr.II, 109:16–110:25; App. 161)

Passmore was concerned United Fire would sue Rally Appraisals because of the appraisal hearing result. (Tr.III, 137:21-24). He testified he could tell United Fire was "unhappy with us. And because of that, I felt like we could be heading to a lawsuit with the insurance company, which was our client." (Tr.III, 137:9-20). He made a final outreach to Sorrell, replying to Sorrell's email that afternoon:

> Mr. Sorrell,
>
> Thanks for the information, but we would like you to reconsider because this is likely heading towards a lawsuit.
>
> Please rethink and advise.
>
> Sincerely,
> David O. Passmore

(App. 162). Passmore copied Paxson, Herink and his supervisor on the email. (Id.)

F. Luigi's Signs a Proof of Loss and United Fire Pays The Appraisal Award

Two days later, on June 29, 2017, Luigi's signed a sworn proof of loss making a claim for $502,000 for the actual cash value of the building per the appraisal award. (App. 166-167; Tr.II, 121:22–122:20). Marty mailed the proof of loss to United Fire. (Tr.II, 201:11-23). Marty testified he signed the proof of loss to reaffirm Luigi's wanted the $502,000 appraisal award paid. (Tr.II, 192:10-18).

It is undisputed United Fire was not required to make payment until 30 days after a) receiving the signed sworn proof of loss and b) an appraisal award had been made. (App. 99; Tr.II, 123:9-22). On July 12, 2017, United Fire paid Luigi's the $502,000 minus the amounts paid the previous December. (Tr.II, 123:23–124:5).

At no time did Luigi's complain about the appraisal process or move to set aside the appraisal award. Sorrell testified the appraisal hearing was "extremely professional", noting no voices were raised, no verbal threats made and there was no profanity. (Tr.II, 107:18–108:1). Marty was pleased with the outcome of the appraisal hearing. He acknowledged the $502,000 appraisal award was a much larger figure than Luigi's had started with. (Tr.II, 190:5-9). He testified, **"I knew it was binding, and I was satisfied."** (Id.)

The $502,000 figure was what Sorrell felt United Fire was required to pay and concluded the timely payment of Luigi's' building loss claim. (Tr.II, 138:17-24; 145:5-12). As testified to by Sorrell:

> Q. And there has been no further request beyond the $502,000 on behalf of Luigi's for the building that you're aware of?
>
> **A. Not that I'm aware of, no.**
>
> Q. When the proof of loss was submitted, it was timely paid, and that was the end of the building loss claim; is that correct?
>
> **A. Correct.**

(Tr.II, 138:17-24).

ARGUMENT

I. BECAUSE THE LOSS WAS RESOLVED IN THE APPRAISAL PROCESS, THE DISTRICT COURT ERRED IN DENYING UNITED FIRE'S MOTION FOR DIRECTED VERDICT ON LUIGI'S CLAIMS FOR FAILURE TO TIMELY PAY ITS FIRE LOSS

A. Preservation of Error

United Fire preserved error for appellate review on the issue of whether the District Court erred in denying United Fire's motion for directed verdict. The Motion was made at the close of Luigi's' case and renewed at the close of all evidence. The Court, without explanation, overruled "all aspects of the Motion

for Directed Verdict." (Tr.IV, 58:1-5). United Fire filed a timely Motion for Judgment Notwithstanding the Verdict on the grounds raised in the directed verdict motion. A timely Notice of Appeal was filed after the Court denied the Motion for Judgment Notwithstanding the Verdict.

B. Scope and Standard of Review

A district court's denial of a motion for directed verdict or for judgment notwithstanding the verdict is reviewed for correction of errors at law. Iowa R. App. P. 6.907. In addressing the denial of a directed verdict or motion for JNOV, the facts are reviewed in the light most favorable to the party against whom the motion was made. Iowa R.App. P. 6.904(3)(b); *Royal Indem. Co. v. Factory Mut. Ins. Co.,* 786 N.W.2d 839, 847 (Iowa 2010). The court's role on appeal is to decide whether there was sufficient evidence to submit the issue to the jury. *Dorshkind v. Oak Park Place of Dubuque II, L.L.C.*, 835 N.W.2d 293, 300 (Iowa 2013); *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). In reviewing rulings on a motion for judgment notwithstanding the verdict, the issue is whether a fact question is generated. *Royal Indem. Co.,* 786 N.W.2d at 847.

A district court's interpretation of an insurance policy is also reviewed for correction of errors at law. *Boelman v. Grinnell Mut. Reins. Co.,* 826 N.W.2d 494, 500 (Iowa 2013).

C. Argument

1. Summary of the Argument

The District Court erred in failing to grant a directed verdict to United Fire on all counts. The uncontradicted evidence showed a) the United Fire policy contained an appraisal process for disputes over valuation of a loss; b) Luigi's invoked the policy's appraisal process; c) the parties participated in an appraisal award hearing; d) Luigi's submitted a sworn proof of loss as required by the policy; e) United Fire timely paid the appraisal award; and f) Luigi's had no complaint with the appraisal process. The full and timely payment of the appraisal award precludes as a matter of law any award for breach of contract, bad faith or punitive damages. Further, Iowa specifically recognizes a post-appraisal remedy of judicial review of appraisal awards, and as such, there is no cause of action as a matter of law arising from United Fire's appraisers' handful of requests asking Luigi's to agree to a new appraisal hearing.

2. An Understanding of Luigi's' Claims

Luigi's' Petition alleged three claims: (1) breach of contract "for failure to timely pay Luigi's fire loss claim", (2) bad faith "for the manner in which [United Fire] handled Plaintiff's fire loss (including the offer made and threatened litigation)", and punitive damages for United Fire's willful and wanton disregard

of Luigi's' rights under its insurance policy. The Petition[4] specifies the basis for Luigi's claims as follows:

> 8. On or about December 13, 2016, Defendant United Fire offered Plaintiff Luigi's $242,000 for the total loss suffered under the building portion of the commercial property coverage part of the policy. This offer was less than half of the amount provided for in the insurance policy for a total loss.
>
> 9. Because of Defendant's lowball offer, Plaintiff Luigi's was required to hire professional representatives of its own to represent their interests and in order to obtain fair compensation for the total loss suffered.
>
> 10. On June 22, 2017, and pursuant to the terms of the commercial lines policy, an arbitration award of $502,000 was awarded to Plaintiff Luigi's for the building loss coverage at issue.
>
> 11. On June 28, 2017, Defendant United Fire threatened Plaintiff Luigi's with litigation if Luigi's did not reconsider and agree to accept less than the arbitration award.
>
> 12. Plaintiff Luigi's refused to bow to Defendant United Fire's threatened legal action.
>
> 13. Thereafter, on or about July 12, 2017, Defendant United Fire paid the arbitration award.

[4] Luigi's Petition was drafted vaguely enough that prior to trial it was not clear if Luigi's was actually claiming the policy limits should have been paid regardless of any actual valuation of loss, i.e. a "value stated" policy where the limits are the value of loss as a matter of law. See App. 22 at ¶ 8; *see also Woodward v. Security Ins. Co. of New Haven, Conn.,* 207 N.W. 351 (Iowa 1926) (explaining "value stated" policy). Luigi's later clarified it was actually arguing the policy limits should have been paid because its appraiser opined the actual loss value exceeded the limits. Luigi's conceded the policy provides the loss is the market value of the property unless market value cannot be established, in which case the loss is the replacement value less depreciation. (App. 523-524).

(App. 22).

At trial, in response to United Fire's directed verdict motion, Luigi's specified United Fire's $242,000 offer was not valid because Luigi's' witnesses provided evidence the offer was based on a faulty valuation, i.e. calculating an actual cash value of Luigi's building using market values of dissimilar properties; according to Luigi's' witnesses, there *were* no similar properties sufficient for a market valuation. (Tr.IV, 52:1–53:7). Therefore, argued Luigi's, United Fire should have at the outset paid the replacement value of the building, which evidence showed exceeded the $550,000 policy limits. (Tr.IV, 53:1-7; 54:2-7). Luigi's' counsel explained: "when [United Fire] didn't pay what they should have under the contract, it was in breach of contract, [and Luigi's] then had no alternative but to elect the appraisal method and [were] fortunate to get basically 90 percent of the limits in that proceeding. So there is substantial evidence, Your Honor, of breach of contract." United Fire further breached the contract, Luigi's argued, by its appraiser "trying to back out" of the appraisal award and "threatening litigation". (Tr.IV, 53:17-24). With respect to the bad faith claim, Luigi's again cited lack of any market value for the building and the appraiser's attempt to "back out" of the appraisal award and "the threat of litigation". (Tr.IV, 54:12-17).

But then, Luigi's noted: "The fact that Luigi's then mitigated its damages by going through the appraisal process and got almost everything it was entitled

to under its limits does not take away from that prior breach of the contract." (Tr.IV, 54:8-11). However, Luigi's is wrong. Not only was United Fire's original offer insufficient to prove breach of contract or bad faith, but neither was the fact the parties' resolved the loss amount via the appraisal process. In fact, the appraisal process is the "favored method" for resolving disputes over the amount of loss. And this is where the district court's denial of United Fire's directed verdict motion and Motion for Judgment Notwithstanding the Verdict was in error.

3. Iowa Law on the Appraisal Process

Iowa law provides for a standard form of policy for fire insurance contracts. Iowa Code § 515.109. In fact, it is unlawful for a fire insurance contract to *not* include the provisions in Iowa's "standard policy" form. Iowa Code § 515.109(2) ("[i]t shall be unlawful for any insurance company to issue any policy of fire insurance ... other or different from the standard form of fire insurance policy herein set forth."); *see also Terra Industries, Inc. v. Commonwealth Ins. Co. of America*, 981 F.Supp. 581, 588 (N.D. Iowa 1997) (noting the "terms of a fire insurance policy are dictated by statute" as set forth at Iowa Code § 515.109(2)). "Iowa property insurers must use policy language that is the 'substantial equivalent' to the standard form's terms." *Walnut Creek Townhome Assoc. v. Depositors Ins. Co.,* 913 N.W.2d 80, 88 (Iowa 2018); *see* Iowa Code §

515.109(5). Included in the standard policy is an appraisal provision. Iowa Code § 515.109(6)(a). The United Fire policy contains an appraisal provision that is the "substantial equivalent" to the standard form's terms:

2. Appraisal If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will: **a.** Pay its chosen appraiser; and **b.** Bear the other expenses of the appraisal and umpire equally. (App. 98)	Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser …. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting the appraiser and the expenses of appraisal and umpire shall be paid by the parties equally. Iowa Code § 515.109(6)(a)

See also Walnut Creek Townhome at 88 (comparing similar appraisal policy language and finding it the "substantial equivalent" of the standard form).

This policy provision "contemplates appraisal in the first instance if the parties fail to agree on amount of loss." *Terra Industries, Inc.*, 981 F.Supp. at 605. "[T]he plain meaning of the appraisal provision … is that the appraisal process determines 'amount of actual cash value and loss'." *Id.* at 607.

The Iowa Supreme Court, in its 2018 decision in *Walnut Creek Townhome Assoc.,* provided a comprehensive overview of the appraisal process, its purpose, and the "efficacy" of appraisal clauses. 913 N.W.2d at 88-89. The Court stated:

> We last addressed the insurance appraisal provision in 1991. We observed the "appraisal is a supplementary arrangement to arrive at a resolution of a dispute without a formal lawsuit." *Cent. Life Ins. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). We emphasized that the appraisal "serves as an inexpensive and speedy means of settling disputes over matters such as the amount of loss and value of the property in question." *Id.* A federal district court aptly noted the appraisal is "favored by both the Iowa legislature and the Iowa Supreme Court as a means for narrowing disputes that may ultimately have to be resolved in litigation." *Terra Indus., Inc. v. Commw. Ins. Co. of Am.*, 981 F.Supp. 581, 605 (N.D. Iowa 1997).
>
> Other courts have noted the efficacy of these insurance appraisal provisions. The Minnesota Supreme Court stated,
>
> > Minnesota has mandated appraisal clauses in fire insurance policies since 1895. [Appraisal] provisions have been included in property casualty policies for over 100 years as a means to provide "the plain, speedy, inexpensive and just determination of the extent of the loss." Appraisal clauses are also required for insurance policies that protect against damage caused by hail. Accordingly, there is a strong public policy in Minnesota favoring appraisals ....

Quade, 814 N.W.2d at 707 (citations omitted) (quoting *Kavli v. Eagle Star Ins.*, 206 Minn. 360, 288 N.W. 723, 725 (1939)). The Wisconsin Supreme Court similarly observed,

> [T]he appraisal process is a fair and efficient tool for resolving disputes. First and foremost, the process is fair to both parties. It allows each to appoint an appraiser of their own liking, with a neutral umpire as the deciding vote. Appraisals also promote finality, are time and cost-efficient, and place a difficult factual question-the replacement value of an item-into the hands of those best-equipped to answer that question. As a form of alternative dispute resolution, the appraisal process is favored and encouraged.

Farmers Auto. Ins. v. Union Pac. Ry., 319 Wis.2d 52, 768 N.W.2d 596, 607 (2009); see also *Fla. Ins. Guar. Ass'n v. Olympus Ass'n*, 34 So.3d 791, 794 (Fla. Dist. Ct. App. 2010) ("Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits.").

Id.

4. The Use of the Appraisal Process to Set the Amount of the Loss is No Basis for Breach of Contract, Bad Faith or Punitive Damages

In this case, the appraisal process worked exactly as it was designed to do to resolve United Fire and Luigi's' disagreement on the amount of Luigi's' fire loss. It is undisputed:

- Luigi's and United Fire contractually agreed that in the event of a disagreement as to the amount of a loss under the policy, either party can invoke the appraisal process to set that amount.

- November 2016: Luigi's suffers a loss under the policy.

- December 2016: United Fire values Luigi's' building loss at $242,000 and issues payment to Luigi's; Luigi's disagrees with the valuation.
- January 2017: Luigi's invokes the appraisal process contained in the insurance policy.
- February–May 2017: The parties each appoint an appraiser and jointly choose an umpire, and Luigi's offers its appraisal report.
- June 22, 2017: An appraisal hearing is held and an appraisal award is made.
- July 12, 2017: United Fire timely pays the appraisal award.

Luigi's alleged "because of [United Fire's] lowball offer, Plaintiff Luigi's was required to hire professional representatives of its own to represent their interests and in order to obtain fair compensation for the total loss suffered", and that this gives rise to a cause of action for breach of contract. (App. 22 at ¶¶ 9, 18-20).[5]

Luigi's' argument simply has no basis under the insurance contract and Iowa law. As the court for the Northern District of Iowa stated in analyzing

[5] At trial, Luigi's counsel put it even more bluntly, requesting a punitive damage award *simply due to United Fire hiring an appraiser to value the building right after the loss*: "They didn't pay what was obviously due at the outset when the fire loss was staring them in the face and they instead got this Rally Appraisal." (Tr.IV, 96:2-5).

Iowa's appraisal process, "even if litigation was inevitable, this is no ground finding that appraisal would be unduly burdensome." *Terra Indus., Inc.,* 981 F.Supp. at 605; *see also Mapleton Processing, Inc. v. Society Ins. Co.,* 2013 WL 3467190, at *23 (N.D. Iowa 2013) (noting appraisal provision is clear and simple and compelled by express language of the policy where parties disagree as to actual cash value or amount of loss and party makes written appraisal demand). Similarly, from the 3rd U.S. Circuit Court of Appeals: "That is, after all, what the appraisal process is for—settling disputes about the value of a claim." *Mirarchi v. Seneca Specialty Co.,* 564 Fed.Appx. 652 (3rd Cir. 2014)[6].

The undisputed evidence is that United Fire retained an independent and competent appraiser who was required to perform an appraisal in accordance with professional standards. There was no evidence United Fire attempted to influence the initial appraisal or the eventual appraisal award. Nor is there evidence—and Luigi's did not argue otherwise at trial—Luigi's had any

[6] Disparate valuations, with the insurance company making a "lowball" offer to the insured and the insured returning with a substantially higher valuation, are hardly unusual. In fact, it is this common scenario that is the reason for the appraisal process's existence. *See e.g. Cent. Life Ins. Co.,* 466 N.W.2d at 258 (appraisal process invoked when insurance company valued fire loss at $132,344 vs. insured's $767,619 valuation); *Walnut Creek,* 913 N.W.2d at 83 (appraisal process invoked when insurance company valued hailstorm loss at $124,656, which insured disputed; eventual appraisal award exceeded $1 million); *Terra Industries, Inc.,* 981 F.Supp. at 585 (appraisal process invoked after insurance company paid $200 million on fertilizer plant explosion loss and insured alleged loss of amount at least $360 million).

complaint about the appraisal award process (other than that it had to engage in it due to disagreeing with United Fire's valuation). Neither did Luigi's argue the appraisal award was the product of fraud or impartiality. Sorrell praised the conduct at the appraisal hearing (Tr.II, 107:18–108:1), and Luigi's was pleased with the appraisal award. (Tr.II, 190:5-9).

Luigi's simply argued breach of contract was established because its appraiser disagreed with United Fire's appraiser's valuation, and according to Luigi's, its appraiser had the correct value. (Tr.IV, 92:16–93:10). Luigi's made this clear during post-trial motions as it defended the district court's erroneous decision to allow the issue of breach of contract based upon improper valuation to go to the jury:

> As shown by the verdict form, the jury clearly accepted the testimony that the Rally report was not reliable. Under the endorsement, if a market value cannot be determined, an actual cash value is determined by replacement cost less depreciation. The uncontradicted testimony adduced at trial showed the replacement cost less depreciation substantially exceeded the policy limit of $550,000. The jury relied upon this testimony and awarded breach of contract damages in the amount of $48,000, the difference between the uncontradicted replacement cost less depreciation as limited by the $550,000 policy limit and the amount awarded at the appraisal hearing of $502,000 which was ultimately paid by Defendant.

(App. 523).

For this reason, the district court's denial of directed verdict must be reversed. In the absence of allegations of fraud or other improper conduct

during the appraisal, Iowa law prohibits a jury—or a court for that matter—from ignoring an appraisal award and performing its own valuation analysis. "[T]he appraisers' determination of the factual cause and monetary amount of the insured loss is binding on the parties absent fraud or other grounds to overcome a presumption of validity." *Walnut Creek Townhome Assoc. v. Depositors Ins. Co.,* 913 N.W.2d 80, 88 (Iowa 2018). Where a party has not "alleged or established any fraud or disqualifying conflict of interest on the part of an appraiser or umpire to set aside the award," the district court is not "free to disregard the appraisal award." *Id.* at 90-91. "The appraisal award is presumptively binding on the parties and court." *Id.* at 91.[7]

As a matter of law, Luigi's does not have a valid claim for breach of contract arising from either the fact the appraisal process was utilized to determine the amount of its loss or that United Fire paid the appraisal award rather than Luigi's appraiser's valuation figure.

Luigi's' bad faith claim must similarly fail. Setting aside the fact that the appraisal process dictates the proper valuation, there can be no bad faith claim

[7] The Texas Court of Appeals recently provided an instructive explanation of the well-accepted holding an appraisal award is binding: "The reason an insured is estopped from maintaining a breach of contract claim against the insurer after receiving full payment of an appraisal award is that the very object of the binding appraisal process is to avoid litigation on the issue of damages and not to facilitate liability. This reasoning applies with special force where the parties agreed to provide for a binding appraisal process in their contract." *Nat'l Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 844-45 (Tex. App. 2017)

arising from Luigi's being "forced" to invoke the appraisal process due to what it perceived as United Fire's unreasonably "lowball offer" on the loss. (App. 22 at ¶ 9). To establish bad faith, Luigi's was required to prove United Fire had no reasonable basis for denying Luigi's' claim under the policy; and United Fire knew or had reason to know its denial was without reasonable basis. *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468, 473 (Iowa 2005). The first element is an objective one; the second element is subjective. *Id.* "A reasonable basis exists for the denial of policy benefits if the insured's claim is fairly debatable on a matter of fact of law. *Id.* A claim is 'fairly debatable' when it is open to dispute on any logical basis." *Id.* Further, "it is not enough for [the plaintiff] to make a showing of unreasonableness." *Id.* at 481. "**It [is] incumbent upon [plaintiff] to negate any reasonable basis for the insurance company's valuation of [the] claim**." *Id.* (emphasis added).

Dueling valuation testimony is not sufficient to meet these high standards. In *Bellville,* the court was confronted with a bad faith claim over the valuation of underinsured motorist benefits arising from a wrongful death and consortium claim. The insurance company's expert valued the claim at less than $300,000, while the plaintiff's experts opined the claim had a value from $600,000 to $1.5 million. *Id.* at 475. The court stated, "Of course the fact that experts disagreed with Farm Bureau's valuation of its insured's claim is insufficient to establish bad faith. Similarly, testimony by these experts that Farm Bureau's valuation was, in

their judgment, 'unreasonable' is also inadequate to permit recovery of extracontractual damages." *Id.* "The discrepancy among the expert opinions simply illustrates the obvious: it is difficult, if not impossible, to determine with any precision how the jury will value such a claim." *Id.* at 481. Further, "an insurance company is not obligated to disregard the opinion of its own expert in favor of the insured's expert's opinion." *Id.* at 478.

The Northern District of Iowa's application of these principles in a similar case of "dueling expert valuations" is instructive. *See Mapleton Processing, Inc. v. Society Ins. Co.,* 2013 WL 3467190, at *23 (N.D. Iowa 2013). In that case, property owner Mapleton brought a bad faith claim on its tornado loss claim on the basis insurance company Society refused to pay the amount Mapleton contended was due under the policy. The court held Mapleton failed to state a bad faith claim as a matter of law:

> Mapleton does little more than argue that Society has acted in bad faith by retaining and relying on its own experts rather than agreeing to "what Mapleton contends is fair value of its loss." Mapleton asserts that if the jury finds the value of the loss to be closer to its number than to Society's, then the jury should also be allowed to determine whether Society had a reasonable basis to dispute Mapleton's number.
>
> That is not how it works.
>
> ***
>
> The premises have been inspected multiple times by numerous experts. Society has been provided with opinions that the actual value of the loss is either at, or below, the amount Society has paid.

> Society is not obligated to disregard its own expert in favor of Mapleton's. Nor has Mapleton offered any evidence suggesting that Society's experts are unqualified or otherwise unreliable to such an extent that it could not be objectively reasonable to rely on their opinions.
>
> There is a clearly factual dispute concerning the amount of the loss. Society believes much of the claimed damages pre-existed the tornado. Mapleton disagrees. Each side has evidence, including expert opinions, supporting its contention. That is the essence of this case. Mapleton's contention that the amount it claims is not even fairly debatable, and that Society thereby has acted in bad faith by disagreeing, is baseless. As a matter of law, the amount of Mapleton's claim is fairly debatable.

Id. at *17-18.

In the case of Luigi's' valuation, the valuations were across the board. While Sorrell's valuation of the building was $907,309 (App. 256), Sorrell's retained real estate appraiser suggested a building value of $380,000 (Tr.II, 101:15–102:14), umpire Paxson thought even that amount was too high (Tr.IV, 12:13-18), and Herink's valuation was $242,000. Competing valuation testimony is not enough to make a submissible claim of bad faith as a matter of law. If it was, every valuation dispute would present a bad faith jury issue. Which takes us back to the insurance *appraisal process* and why such a process exists: to promptly and inexpensively resolve disputes over amounts of loss and value of property and discourage the filing of needless lawsuits. *Walnut Creek Townhome Assoc. v. Depositors Ins. Co.,* 913 N.W.2d 80, 88-89 (Iowa 2018); *Cent. Life Ins. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991).

Accordingly, the district court erred in denying United Fire's motion for directed verdict regarding Luigi's having to resolve its loss through the appraisal process.[8]

5. The Use of the Appraisal Process Judicial Review Remedy is No Basis for Breach of Contract, Bad Faith or Punitive Damages

Luigi's' other ground for its claim is that United Fire's appraiser tried to "back out" of the appraisal award and "threatened legal action" before United Fire timely paid the appraisal award. (App. 22 at ¶¶ 11-12; Tr.IV, 53:17-24). These allegations are based on a letter sent by appraiser Herink to the umpire the day following the appraisal hearing and a two-sentence email sent by Herink's supervisor to Luigi's' appraiser a few days later, both requesting a new appraisal hearing be held. Neither of these incidents can support Luigi's' claims as a matter of law.

An appraisal award "is a supplementary arrangement to arrive at a resolution of a dispute without a formal lawsuit," for which Iowa law provides a judicial review remedy. *Cent. Life Ins. Co.,* 466 N.W.2d at 260. The review

[8] Because the court erred as a matter of law in denying United Fire's directed verdict motion on the bad faith claim, the punitive damages claim must be dismissed as a matter of law as well. *See Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 29 (Iowa 1997) (when the claim for punitive damages arises out of a contract action, an award of punitive damages is allowed only "when the breach (1) constitutes an intentional tort, and (2) is committed maliciously, in a manner that meets the standards of Iowa Code section 668A.1 (1993)").

process contemplates not only an appraisal award being set aside, but the use of a lawsuit for such purpose. As the court in *Walnut Creek Townhomes* noted:

> We addressed judicial review of appraisal awards in *Central Life*, 466 N.W.2d at 260. We noted, **'Appraisal awards do not provide a formal judgment and may be set aside by a court."** *Id.* But, importantly, we concluded, "Provisions for appraisal of an insurance loss, whether under policy terms or pursuant to independent agreement, are valid and binding on the parties.' Id. (citing 6 J. Appleman & J. Appleman, Insurance Law and Practice §§ 3921, 3924 (rev. 1972)). We made clear 'the award is supported by every reasonable presumption and will be sustained even if the court disagrees with the result.' Id. We specifically held that the appraisal 'award will not be set aside unless the complaining party shows fraud, mistake or misfeasance on the part of an appraiser or umpire.' Id.

Walnut Creek Townhomes, 913 N.W.2d at 89 (emphasis added).

The appraisal judicial review mechanism has been employed for at least 145 years – dating as far back to *Pool v. Hennessy,* 39 Iowa 192, 194 (Iowa 1874), in which the court set aside a leasehold appraisal award on the basis that after the appraisal award was made, plaintiff discovered the defendant's appraiser was defendant's brother. *Id.* Citing *Pool,* the court noted 117 years later in the *Central Life* case, "We have long recognized that the object and purpose of an appraisal is to secure a fair and just evaluation by an impartial tribunal". *Cent. Life,* 466 N.W.2d at 260 (citing *Pool* at 194). The *Central Life* court thus voided an appraisal award where it was discovered the insured's appraiser had a direct financial interest in the appraisal hearing result by means of an arrangement with the insured to receive a contingency fee based on the award amount. *Id.* at 259. The

court concluded, "The appointment of an appraiser with a concealed pecuniary interest in the outcome is a sufficient ground for voiding the award as a matter of law." *Id.* at 262.

Pool and *Central Life* are not outliers. Time and again, parties have employed the common law remedy to set aside an appraisal award on the basis of gross excessiveness of the appraisal award or impartiality, fraud, mistake or misfeasance on the part of an appraiser or umpire. *See e.g. Taylor v. Farm Bureau Mut. Ins. Co.*, 759 N.W.2d 2, 2008 WL 4525496 (Iowa Ct. App. 2008) (Table) (challenge to water damage loss appraisal based on umpire's receipt of evidence at appraisal hearing); *Turner v. Hartford Fire Ins. Co.,* 172 N.W. 166 (Iowa 1919) (challenge to lightning loss appraisal based on mistake and gross inadequacy)*; Sibert Bros. & Co. v. Germania Fire Ins. Co. of New York City,* 106 N.W. 507, 132 Iowa 58 (Iowa 1906) (fire loss appraisal award vacated following plaintiff's allegations of false and fraudulent representations and conduct of defendant's appraiser); *Vincent v. German Ins. Co.,* 94 N.W. 458, 120 Iowa 272 (Iowa 1903) (challenge to fire loss appraisal award based on mistake and misconduct of appraisers). "The court has "the right not only to pass upon the validity of the award, but, in the event it concluded to set it aside, to render judgment for the amount of the loss under the policy." *Vincent,* 94 N.W. at 459.

In this case, the allegation United Fire attempted to "back out" of the award arises from Rally Appraisals contacting the umpire and Luigi's appraiser,

Chuck Sorrell, within 24 hours following the hearing to request that the award be set aside and the appraisal panel be reconvened. (App. 160). Rally made this request due to Herink's feeling misled and coerced by Sorrell's insistence during the appraisal hearing that the building coverage under the policy required payment of an additional $122,000 for furniture, fixtures and equipment. (App. 160; Ex. 101, 30:19–31:7). Prior to the hearing, Sorrell had advised United Fire the appraisal was requested only for valuing the "building portion" of Luigi's' claim. (App. 484).

As for the alleged "threat of litigation", this stems from a single vaguely worded two-sentence email sent by Herink's supervisor, David Passmore, to Sorrell after Fasse asked Passmore for Rally's errors and omissions policy due to Herink's appraisal hearing performance and Sorrell meanwhile refused to agree to vacation of the award:

> Mr. Sorrell,
>
> Thanks for the information, but we would like you to reconsider because this is likely heading towards a lawsuit.
>
> Please rethink and advise.
>
> Sincerely,
> David O. Passmore

(App. 162).

United Fire disputes Luigi's' characterization of its or its appraiser's actions as threatening to sue Luigi's. However, even taking all evidence in a light

favorable to plaintiff Luigi's, the jury verdict for breach of contract and bad faith cannot stand because Iowa law does not recognize a cause of action for using the judicial process (or even threatening to use it) to set aside an appraisal award that is alleged to have been based on fraud, mistake or misfeasance. United Fire would have been within its rights to file suit alleging misconduct by Luigi's' appraiser and requesting the appraisal award be set aside. But the fact is, United Fire did *not* pursue this available remedy and in fact timely **paid** the appraisal award. There was no breach of contract or bad faith as a matter of law and the district court's denial of United Fire's motion for directed verdict on all claims must be reversed.

II. ALTERNATIVELY THE DISTRICT COURT ERRED IN SUBMITTING JURY INSTRUCTIONS WHICH RESULTED IN MATERIAL PREJUDICE TO UNITED FIRE AND REQUIRES A NEW TRIAL BE ORDERED

A. Preservation of Error

United Fire preserved error for appellate review on the issue of jury instructions. An extensive record was made on the court's instructions including the court's failure to give requested instructions. (Tr.IV, 58:6–66:5). The court denied each and every objection and exception without explanation except to say the court was "satisfied that the instructions are appropriate as presented." (Tr.IV, 66:15-16).

B. Scope and Standard of Review

The standard of review for the denial of a motion for new trial must be based on the grounds asserted in the motion. *Rivera v. Woodward Resource Center*, 865 N.W.2d 887,891 (Iowa 2015). When the basis for a motion for a new trial is for alleged errors in jury instructions, the court reviews for legal error. *Id.* Further, a new trial "is required after a general verdict is returned for the Plaintiff if the evidence was insufficient to submit one of several specifications of negligence." *Alcala v. Marriott Intern. Inc.,* 880 N.W.2d 699, 710 (Iowa 2016).

C. Argument

The errors identified in Section I of this brief are sufficiently grievous that reversal and entry of directed verdict is merited as a matter of law. However, in the interest of not waiving any errors on appeal, United Fire includes this brief argument on the district court's error in failing to grant United Fire's Alternative Motion for New Trial based on prejudicial erroneous jury instructions. The instructions failed to properly instruct the jury with the applicable law.

Jury instructions "must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide." *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 893 (Iowa 2015) (citing *Thompson v. City of Des Moines*, 561 N.W.2d 839, 846 (Iowa 1997)). Errors in court instructions merit reversal when prejudice results. *Id.* (citations omitted). "Prejudice occurs and reversal is required if

jury instructions have misled the jury, or if the district court materially misstates the law." *Id.* (citations omitted).

"Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d at 699 (Iowa 2016) (citations omitted). Further, the verb "require" is mandatory and therefore is not discretionary with the trial court. *Id.*

While there are several deficiencies with the instructions, the primary, overriding error is the material misstatement of law arising from the omission of any instructions regarding the appraisal process. United Fire requested the court give United Fire's proposed Instructions 8, 9, 10, and 15 regarding the use and application of the appraisal process. These instructions advised the jury:

- the insurance contract and Iowa law allow for an appraisal process if the parties cannot agree on the value of the loss;
- the fact the appraisal process is used should not be held against a party;
- the object and purpose of an appraisal hearing is to secure a fair and just evaluation and appraisers must be disinterested and impartial, with definitions of those terms;
- an insurer has the right to debate the excessiveness of an appraisal award as well as move to set it aside for fraud, mistake or misfeasance of an appraiser.

(Defendant's Requested Instructions 8, 9, 10, 15: App. 65-70).

The court refused to give *any* instructions on the appraisal process. Instead, in Instruction 12, *Breach of Contract Claim,* the jury was instructed breach was proven if Luigi's proved it gave United Fire "proof of the fire loss" and that United Fire "did not pay the plaintiff the full amount of the loss as agreed to in the insurance policy". (App. 500-501). In Instruction 13, *Bad Faith Claim,* the jury was instructed bad faith would be proven if United Fire took any of these actions:

> a. Refusing to pay the actual cash value for the total loss of the insured facility; or
> b. Attempting to back out of the agreement reached during insurance appraisal proceedings with the plaintiff's appraiser, the defendant's appraiser, and the umpire; or
> c. Threatening the plaintiff, Luigi's, Inc., with litigation if it did not agree to set aside the insurance appraisal award made by the plaintiff's appraiser, the defendant's appraiser and the umpire in the insurance appraisal proceedings.

The given instructions, in conjunction with the omitted instructions, failed to properly instruct the jury with a proper understanding of the issues it had to decide. Under the terms of the insurance contract—terms mandated by Iowa Code § 515.109(6)(a)—if the parties fail to agree on the amount of the loss and a party invokes the appraisal process, "the appraisal process determines amount of actual cash value and loss." *Terra Industries, Inc. v. Commonwealth Ins. Co. of America*, 981 F.Supp. 581, 607 (N.D. Iowa 1997). "[T]he appraisers' determination of the factual cause and monetary amount of the insured loss is binding on the parties absent fraud or other grounds to overcome a

presumption of validity." *Walnut Creek Townhome Assoc. v. Depositors Ins. Co.,* 913 N.W.2d 80, 88 (Iowa 2018). Where a party has not "alleged or established any fraud or disqualifying conflict of interest on the part of an appraiser or umpire to set aside the award," the district court is not "free to disregard the appraisal award." *Id.* at 90-91. "The appraisal award is presumptively binding on the parties and court." *Id.* at 91.

In this case, Luigi's did not agree with United Fire as to the amount of the loss and thus invoked the appraisal process as contained in the insurance policy. The parties each retained an appraiser, agreed on an umpire, and proceeded to resolve the valuation dispute in an appraisal hearing, following which an appraisal award for $502,000 was entered. The award was binding, as Luigi's did not challenge the appraisal award and in fact submitted to United Fire a sworn proof of loss requesting the $502,000 award be paid. United Fire timely paid the award.

Pursuant to the instructions as given, however, the jury was not informed that under the terms of the insurance contract as well as Iowa law, the court and jury do not have discretion to independently value the amount of Luigi's loss. Instead the jury was given free reign to assess what it considered the proper value of the loss and find breach of contract and bad faith proven (and open the door to punitive damages) if its assessment differed from the $502,000 appraisal award. This material misstatement of the law was prejudicial error requiring a new trial. *See e.g. Higgins v. Blue Cross of Western Iowa and South Dakota,* 319 N.W.2d 232, 237

(Iowa 1982) (in breach of contract and bad faith action against insurer for repudiating medical coverage based on "material misrepresentation" on insurance application, jury was given improper prejudicial instructions; jury was instructed it had to find insured affirmatively lied as to health history rather than being instructed omission of a material fact can also be material misrepresentation).

Similarly, it was prejudicial for the court to erroneously instruct the jury at Instruction No. 16 that attorney fees and appraisal fees incurred by Luigi's during the appraisal process could be "elements of damages." The insurance contract provides each appraiser "will pay its chosen appraiser". (App. 98). It was prejudicial to instruct the jury they could award as damages the $40,989.25 in fees Sorrell charged Luigi's for services in the appraisal process invoked by them pursuant to the insurance contract.

The specifications in the sole bad faith instruction also require a new trial. (Instruction 13: App. 501-502). The instruction any attempt by United Fire to "back out" of the appraisal award or file suit to set it aside would constitute bad faith is a complete misstatement of the law. Iowa courts have long recognized a common law remedy for setting aside an appraisal award on the basis it was grossly excessive or of fraud, mistake or misfeasance on the part of an appraiser or umpire. *See Cent. Life Ins. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991); *Pool v. Hennessy,* 39 Iowa 192, 194 (Iowa 1874); *Taylor v. Farm Bureau Mut. Ins. Co.*, 759 N.W.2d 2, 2008 WL 4525496 (Iowa Ct. App. 2008) (Table); *Turner*

v. Hartford Fire Ins. Co., 172 N.W. 166 (Iowa 1919); *Sibert Bros. & Co. v. Germania Fire Ins. Co. of New York City,* 106 N.W. 507, 132 Iowa 58 (Iowa 1906); *Vincent v. German Ins. Co.,* 94 N.W. 458, 120 Iowa 272 (Iowa 1903). An appraisal award "is a supplementary arrangement to arrive at a resolution of a dispute without a formal lawsuit," and as such, Iowa law provides a judicial review remedy. *Cent. Life Ins. Co.,* 466 N.W.2d at 260. "Appraisal awards do not provide a formal judgment and may be set aside by a court." *Walnut Creek Townhomes,* 913 N.W.2d at 89 (citing *Cent. Life*, 466 N.W.2d at 260). United Fire had the right, if it had so chosen, to file suit to set aside the appraisal award based on Sorrell's alleged fraud, misrepresentations, and coercion in insisting an award for furniture, fixtures and equipment be included in the appraisal award. To instruct the jury otherwise was prejudicial error.

The instructions were also prejudicial by failing to instruct the jury that in order to assert a claim for bad faith, a plaintiff must show "the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988) (citation omitted); and that an insurance company "has the right to challenge claims that are 'fairly debatable' without being subject to a bad faith tort claim." *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 346 (Iowa 1999) (citation omitted).

Under the circumstances, United Fire is entitled to a new trial due to the court's prejudicial errors in jury instructions.

CONCLUSION

For more than 145 years, Iowa courts have relied upon the appraisal process—favored by both the Iowa legislature and Iowa Supreme Court—as an "inexpensive and speedy means of settling disputes over matters such as the amount of loss and value of the property in question." *Cent. Life Ins. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). Luigi's used the appraisal process to resolve its fire loss claim, and United Fire timely paid the appraisal award. The district court committed reversible error under the terms of the insurance contract as well as Iowa law by denying United Fire a directed verdict. This Court should reaffirm Iowa law, reverse the judgment below, and enter judgment in favor of United Fire.

REQUEST FOR ORAL ARGUMENT

Defendant-Appellant requests the opportunity to present oral argument in support of its appeal.

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Brief was $0, and that amount has been paid in full by Defendant-Appellant.

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