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 REPLY 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 Reply 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 Reply 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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INTRODUCTION

United Fire's initial brief demonstrated why reversal of the district court's denial of its directed verdict motion is necessary. By allowing Luigi's' claims to proceed to jury, the district court erroneously allowed Luigi's to relitigate the value of a loss that had already been determined and paid in accordance with the appraisal process in the insurance contract.

Luigi's brief wholly disregards the extensive authority cited by United Fire regarding the application and binding nature of insurance policy appraisal provisions or the remedy available when the appraisal process has been tainted. Luigi's did not complain about how the appraisal process was conducted or dispute that United Fire timely paid the appraisal award pursuant to the policy terms.

Luigi's instead devotes much of its brief to misrepresentations of the record seemingly designed to suggest a nefarious scheme by United Fire to not pay Luigi's claim. Such unsupported statements fail to overcome the central problem with Luigi's' argument: the law simply does not support its claims.

I. UNITED FIRE PRESERVED ERROR FOR ITS APPEAL

Luigi's erroneously argues United Fire did not preserve error. Luigi's states "nowhere in its motions [for directed verdict] did United Fire argue that because Luigi's involved the appraisal process and United Fire eventually paid the appraisal award, that Luigi's was precluded from bringing claims for breach of contract, bad faith occurring after the appraisal hearing, or punitive damages." (Pl. Brief at 44).

The motion for directed verdict made by United Fire at the close of plaintiff's case was detailed and comprehensive. A central component of the motion was the use of the appraisal process and timely payment of the award precluding any of Luigi's claims as a matter of law:

> First of all, even considering all of the evidence in favor of the plaintiff, there is no fact issue for the jury to determine any type of breach of contract. There is simply no evidence of breach of contract. The construction of a contract is a matter of law. In this case there was an award made by appraisers that was paid in full. It was paid in full under the terms of the policy.

(Tr.III, 15:3-15).

> Again, the construction of that policy is an issue for the Court as a matter of law. The mere fact that the appraisal process was invoked does not serve as grounds for cause of action. The policy provision for the appraisal process is consistent with Iowa Code section 515.109(6)(a). The provision is something that has been interpreted by the Iowa courts. The provision states that it is accepted by the courts as a preferred method of dispute resolution. That process went through. The policy provides for payment within 30 days of the proof of loss and the appraisal award, and there's no dispute that that was done. The fact that it may have been questioned prior to the proof of loss does not constitute any type of cause of action. Under Iowa law any party has a right to question an award based on the amount of the award if there's a mistake, malfeasance, or some type of fraud.
>
> And the facts in the light most in favor of the plaintiff show that there was absolutely no effort by United Fire to do anything about this award, to set it aside or anything like that, after the proof of loss was submitted.

(Tr.III, 16:15-17:12).

> Furthermore, with regard to the facts in this case there's never been a claim that was denied. The value of the building was questioned, and the parties always have a right to question the value. The *Walnut Creek* case, the *Central Life vs. Aetna* case cited in my brief say that, that the parties -- both parties have a right to question those values. And an initial element of a first-party

> bad faith claim here is that the insurer somehow lacked an objectively reasonable basis for denying the claim. And that's *Wilson vs. Farm Bureau*, 714 N.W.2d 250 at 262. It's a 2006 Iowa Supreme Court case. That objective standard is something for the Court to determine as a matter of law that -- was there an objective, reasonable basis. In all the cases they talk about either denying the claim or an unreasonable denial of the claim. I have not -- I'm not aware of any Iowa authority to suggest that questioning the value of a claim in an appraisal process is a cause of action.
>
> When Iowa law specifically says we favor the appraisal process, we think that is the proper way for the parties to determine value. Therefore, it's the Court's obligation to look at that objective reasonable basis standard. There is no denial of the claim. There is no unreasonable delay. There's no reckless disregard. And therefore, the standards for first-party bad faith have not been established.

(Tr.III, 20:7-21:8).

> With regard to the breach of contract, I heard the arguments of, No. 1, that some understanding of the parties occurred during e-mails prior to the issuance of the policy. Whatever that means, whatever that is, that doesn't change the contract terms. It's the contract that is at issue here. It's not a claim by Luigi's against its insurance agent if somehow they believe the agent didn't explain things to them. The fact that the building value limit is $550,000 doesn't mean anything other than that that's what the limits are.
>
> With regard to the policy interpretation, why did we have an appraisal hearing? If it's $550,000, why do we have an appraisal hearing? And that's where I'm stuck is what's the breach? The appraisal hearing was held. The obligation to pay came upon the proof of loss and the appraisal award, and the award was paid within the time frame set in the policy.

(Tr.III, 25:18-24).

The district court informally denied United Fire's Motion, stating it would reconsider its ruling after the defense closed. (Tr.III, 26:9-16). At the close of its case, United Fire renewed its Motion and again made an extensive record as to the issues

upon which directed verdict was appropriate (Tr.IV, 44:2–51:9), and again specifically identifying compliance with the appraisal process, payment of the appraisal award, and the right to challenge an award as precluding Luigi's' claims. (Tr.IV, 44:11-45:3, 46:3-18, 47:20-49:12). United Fire concluded its Motion:

> Again, I don't understand through the long response of plaintiff what is the breach of contract. Why did we go through an appraisal process? That's part of the contract. We went through the appraisal process and the award was paid. If it had not been paid, then there might be a reason to be here.
>
> Furthermore, under Iowa law, the parties have a right to question the value of the award. That's the Walnut Creek case. It says that a party does have the right to question an award if they think a mistake was made.
>
> But the undisputed testimony is that the award was paid in the amount requested by the proof of loss in accordance with the policy.

(Tr.IV, 56:4-16).

The district court denied United Fire's Motion. (Tr.IV, 58:4-5). "On appeal, an appellate court's review is limited to those grounds raised in the defendant's motion for a directed verdict." *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 844 (Iowa 2010). All the grounds raised in this appeal regarding whether Luigi's had a submissible claim for breach of contract, bad faith or punitive damages were comprehensively raised in United Fire's motion and renewed motion for directed verdict. Error has been preserved.

II. UNITED FIRE FULLY PERFORMED THE TERMS OF THE INSURANCE CONTRACT AND THUS CANNOT BE LIABLE FOR BREACH OF CONTRACT

Luigi's fails to address the first and foremost reason the district court erred in failing to grant United Fire's directed verdict motion: United Fire fully performed the terms of the insurance contract in compliance with Iowa contract and appraisal law.

The express terms of the contract provide: (1) the claim is to be valued on actual cash basis; (2) applying the Iowa mandated appraisal provision where there is a dispute over loss value; (3) each party is responsible for its own appraisal fees and splitting the umpire's fees; and (4) United Fire had 30 days to pay the appraisal award. The loss payment provision is especially important. It provides:

> E. Loss Conditions …
>
> 4. Loss Payment …
>
> g. We will pay for your covered loss or damage within 30 days after we receive the sworn proof of loss, if you have complied with all of the terms of this Coverage Part, and
>
> (1) We have reached agreement with you on the amount of loss;
>
> or
>
> (2) An appraisal award has been made.

(App. 99).

It is undisputed the appraisal award for $502,000 was made June 22, 2017. (App. 472). Luigi's submitted its sworn proof of loss June 29, 2017 (thereby making the payment deadline July 29, 2017). (App. 166-167). United Fire timely paid the full award on July 12, 2017. (Tr.II, 123:9-22).

By paying the timely, full appraisal award, United Fire performed the terms and conditions of the insurance contract. *See Royal Indem. Co. v. Factory Mut. Ins. Co.,* 786 N.W. 2d 839, 847 (Iowa 2010) (citation omitted) (listing elements of breach of contract: 1) contract existence; 2) contract terms and conditions; 3) plaintiff's performance of terms and conditions; 4) defendant's breach; 5) plaintiff's damages from breach). Construction of an insurance policy "is the process of giving legal effect to a contract" and "is always a matter of law for the court." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). "The appraisal process…is not legal work arising from an insurance company's denial of coverage or breach of contract; it is simply work done within the terms of the contract to resolve the claim." *Hill v. State Farm Fla. Ins. Co.*, 35 So. 3d 956, 961 (Fla. Ct. App. 2010). Under the circumstances, Luigi's has no contract damages. Indeed, Luigi's admits that with the payment of the appraisal award, no further amounts are claimed or owing under the policy terms. (Tr.II, 138:17-24; 145:5-12; 190:5-9).

While Iowa contract and appraisal law controls and forecloses Luigi's' breach of contract claim as a matter of law, several other jurisdictions have addressed similar fact scenarios and held no breach of contract is allowed. *See United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F. Supp. 3d 584, 619 (S.D. Tex.), aff'd, 624 F. App'x 225 (5th Cir. 2015) (under Texas law, affirming summary judgment on breach of contract claim where appraisal award reached per the insurance policy terms and the insurer has time paid the appraisal award); *Neff v. Allstate Vehicle & Prop. Ins. Co.*, No. 5:17-CV-191-DAE,

2019 WL 1560473, at *3-4 (W.D. Tex. Feb. 28, 2019) (same); *Caiati of Westchester, Inc. v. Glens Falls Ins. Co.*, 265 A.D.2d 286, 286, 696 N.Y.S.2d 474, 475 (1999) (same); *Goldman v. United Servs. Auto. Ass'n*, 244 So. 3d 310, 311 (Fla. Ct. App. 2018) (affirming summary judgment to insurer on breach of insurance policy where insurance company timely paid appraisal award); *Hometown Cmty. Ass'n, Inc. v. Philadelphia Indem. Ins. Co.*, No. 17-CV-00777-RBJ, 2017 WL 6335656, at *3–4 (D. Colo. Dec. 12, 2017), on reconsideration in part, No. 17-CV-00777-RBJ, 2018 WL 2008853 (D. Colo. Apr. 30, 2018) (though insured disagreed with insurer's initial actual cash value amount, such a disagreement is contemplated in the insurance policy, and the appraisal process exists to address just such disagreements; granting motion to dismiss breach of contract claim). *See also Appalachian Ins. Co. v. Rivcom Corp.*, 130 Cal. App. 3d 818, 825, 182 Cal. Rptr. 11, 14 (Cal. Ct. App. 1982) (no jury right to set amount of loss under policy where Legislature has established standard policy form providing for appraisal and appraisal process invoked).

Because United Fire complied with the express terms of Luigi's policy, including the appraisal demand clause, United Fire was entitled to directed verdict on Luigi's' claim for breach of contract as a matter of law[1].

[1] Luigi's' brief also alleges breach of contract based on Iowa's Unfair Claims Settlement Practices Act, Iowa Code § 507B.4(3)(j). Luigi's did not allege this claim at trial and thus error was not preserved. Moreover, this statute does not create a private cause of action for damages by an insured alleging an insurance carrier has violated the statute. *Bates v. Allied Ins. Co.,* 467 N.W.2d 255, 259 (Iowa 1991). Nor does Luigi's cite any authority for application of the provisions listed in Iowa Code § 507B.4(3)(j) in the

III. LUIGI'S BREACH OF CONTRACT CLAIM IS NOT SUPPORTED BY THE DOCTRINE OF REASONABLE EXPECTATIONS OR UNITED FIRE'S ALLEGEDLY INSUFFICIENT EVALUATION OF LUIGI'S' BUILDING LOSS

Luigi's does not assert any violation of the express terms of the contract.[2] Instead, Luigi's states:

> It is clear the jury in this case reached the conclusion that United Fire breached its contract of insurance with Luigi's, either as a result of United Fire's failure to recognize Luigi's reasonable expectations or, United Fire's failure to critically analyze the Herink report and pay Luigi's under paragraph 2 of the endorsement. The $48,000 awarded by the jury is the exact difference between the $550,000 provided in the policy and the $502,000 awarded at the appraisal hearing. Additionally, the jury awarded the exact amount charged to Luigi's by Midwest for Chuck's work in the appraisal process.

(Pl. Brief at 53).

In any event, the evidence was insufficient as a matter of law to support breach of contract under either theory identified for the first time in its brief.

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context of a fire insurance policy which incorporates a statutorily mandated appraisal process for resolving valuation disputes.

[2]The jury was not instructed on any terms in the contract but simply allowed to determine whether "defendant did not pay the plaintiff for the full amount of the loss as agreed to in the insurance policy." (Inst. 12: App. 500-501).

A. The Jury Verdict Cannot Be Affirmed Based on Breach of Contract Based on the Doctrine of Reasonable Expectations

(1) Luigi's Did Not Preserve Error on Doctrine of Reasonable Expectations as a Theory of Recovery

Luigi's did not raise the doctrine of reasonable expectations as theory of recovery at the district court. It was not alleged in its Petition, any proposed jury instructions or its resistance to United Fire's post-trial motion. (App. 21-24; Supp. App. 4-15; App. 28-62; App. 522-530). The jury also was not instructed on this theory. (App. 496-509). Error has not been preserved on this issue. *See Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 904 (Iowa 2014) (appellee cannot raise issue as ground for affirmance issue not raised in district court); *Unification Church v. Clay Cent. Sch. Dist.*, 253 N.W.2d 579, 582 (Iowa 1977) (error not preserved on issue raised first time in appellate brief and not raised or decided in trial court).

(2) The Doctrine of Reasonable Expectations Does Not Apply

Plaintiff's argument for application of this theory fails on the merits as well.

> [T]he doctrine [of reasonable expectations] does not contemplate the expansion of insurance coverage on a general equitable basis. **The doctrine is carefully circumscribed**; it can only be invoked where an exclusion (1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction.
>
> Before the doctrine can be considered, a preliminary criterion must be satisfied. Either the policy must be such that an ordinary layperson would misunderstand its coverage, or there must be circumstances attributable to the insurer which would foster coverage expectations.

Clark-Peterson Co. v. Indep. Ins. Assocs., Ltd., 492 N.W.2d 675, 677 (Iowa 1992) (citations omitted) (emphasis added).

The dominant purpose of the transaction, coverage for its building loss, was not excluded or otherwise eliminated. Luigi's was paid for the damage to its building. This is the purpose of the insurance policy. Nor was there evidence the policy contained any terms an ordinary layperson would misunderstand, let alone that there was a bizarre or oppressive exclusion or one that eviscerated terms the parties to which the parties explicitly agreed.

At most, the record evidence shows a misunderstanding by Luigi's insurance agent, John Moran, who was Marty Stasi's brother-in-law. Prior to the policy renewal, Luigi's had replacement cost coverage with United Fire. (Tr.III, 147:16-20). United Fire advised Moran that due to Luigi's' poor loss history, the renewal policy would have to be changed to Actual Cash Value (ACV). (App. 171). Moran understood and discussed with Marty that the building limit was being moved to $550,000 on ACV basis. (Tr.III, 148:21–150:9, 151:5-13, 152:21–153:2). Stasi understood the policy was being changed to ACV. (Tr.II, 198:11-14).

The renewal policy as well as Luigi's' prior policies contained an endorsement defining ACV as market value unless a market value could not be determined, in which case the ACV was replacement cost less depreciation. (Tr.III, 151:18-152:18, 158:15–

159:2). This endorsement was also in other insurance carriers' policies. (Tr.III, 156:20-23).

A month before the fire, Moran's office communicated incorrect information to Luigi's, advising Luigi's the building "value" would be changed under the new policy rather than the building "limits".[3] (App. 172). Moran's office later corrected this statement, sending a letter to Luigi's—on what happened to be the day before the fire—advising Luigi's notable changes to the renewal policy were "building **limit** is reduced to $550,000 and is on actual cash basis". (App. 173; Tr.III 150:3-24, 151:5-17).

Moran had never read the ACV endorsement and he and Marty believed ACV meant replacement cost minus depreciation. United Fire did not learn of Stasi and Moran's misunderstanding until meeting with them *after* the loss occurred. (Tr.II, 174:4-19; 199:1-4; Tr.III 42:14–43:5; 154:18–156:1; App. 488). After the meeting and then investigating the policy language himself, Moran agreed ACV meant the building's market value and communicated this to Stasi. (Tr.III, 154:18–157:17). Moran and Stasi understood that for Luigi's to obtain the $550,000 building coverage policy limits,

[3] As part of Luigi's theme of hyperbole, Luigi's posits the question why United Fire wrote a policy with $550,000 in building coverage if its appraiser, post-loss, valued the building at $242,000. (Pl. brief at 24). Moran, with input by Marty and Luigi, calculated and communicated to United Fire the $550,000 figure for the new policy. (Tr.III, 160:16-161:17, 163:6-15). There is no evidence an appraisal of the building's value prior to the new policy going into effect was performed or that United Fire had a duty to obtain one.

Luigi's would have to prove the building's market value was at least $550,000. (Tr.III, 156:24–157:20, 158:15–159:2; 163:12–164:7).

This is not a situation where an exclusion was applied to deny coverage. The only dispute was building loss. Luigi's does not argue the contract language was ambiguous. At most, Luigi's argues to apply the reasonable expectations doctrine based on its insurance agent's misstatement. An insurance agent's general statements regarding coverage are insufficient to foster coverage expectations. *See LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 307 (1998). This is particularly so "when the parties have not discussed the exclusion which could have created any misunderstanding as to coverage." *Id.*

Luigi's' argument premised on the doctrine of reasonable expectations fails as a matter of law.

B. There was No Breach of Contract Due to United Fire's Reliance on Its Expert's Appraisal

Second, Luigi's unpersuasively argues United Fire failed to "critically analyze" its independent expert's appraisal report, which was based on valuation conclusions Luigi's expert later criticized. Luigi's simply argues this was a total loss and not paying the $550,000 limits at the outset constituted breach of contract.

Luigi's concedes the insurance contract provides that if it is possible to determine the property's market value, then market value is the property's ACV. If market value cannot be established, the ACV is replacement cost value less depreciation. Luigi's then

posits if Fasse had spent "even a minimal amount of time reviewing [Rally Appraisals'] report…Fasse would have come to the "inescapable conclusion" the four comparable properties Rally used out of the 20-30 properties it examined for market valuation were not truly comparable. (Pl. Brief at 51). This, Luigi's asserts, proves market value could not be determined and that replacement value minus depreciation was required. (Pl. Brief at 51-53).

Luigi's postulation a market value could not be determined is not only illogical but completely contrary to the record. It is undisputed Luigi's appraisal representative, Chuck Sorrell, specifically asked Luigi's real estate appraiser, Keith Westercamp, if there was a regular market value for the property and Westercamp responded there was. (Tr.II, 134:4-13, 144:15-23). Therefore, Sorrell did not ask Westercamp to determine such value. (Tr.II, 132:20–133:7, 134:4-13, 145:1-4). Westercamp did not search for other or better comparable properties—or even perform his own appraisal for that matter. (App. 271). He simply reviewed Rally's appraisal report (App. 267-307) and disagreed Rally relied on comparable sales data (App. 275).

Also unavailing are Luigi's' allegations Fasse should not have relied on Rally's appraisal because Fasse did not hire a "competent, experienced appraiser" and "was unaware that [Rally's Senior Appraiser Jim] Herink had never appraised a total fire loss of a restaurant". [4] (Pl. Brief at 50). Herink had previously appraised 40-50 restaurants

[4] Luigi's also maligns United Fire for retaining a fire investigator to determine cause and origin and determine if faulty equipment caused the fire thereby providing subrogation

and half a dozen fire losses. (Ex. 101, 6:2-15, 36:22–37:3; App. 205; App. 251). Sorrell himself agreed Herink was qualified to determine whether there was a regular market value for the property. (Tr.II, 144:14-19). Further, Rally's 70-page report was the result of collaborative work of two professional, certified appraisers, Herink and Dextar Klostermann, who both met with Marty and inspected the site before performing sales and market analysis. (Ex. 101, 9:17-10:4, 11:14-16, 14:20-15:8; App. 186-255; App. 464).

As for bias, Luigi's offers no evidence other than conjecture. Herink testified his appraisal methodology does not depend on who retains him (Ex 101, 6:22–24; 87:5-18). And Fasse purposely did not provide a copy of the policy to Herink, so that his valuation would not be influenced by knowing the policy limits. (Tr.III, 41:21–42:13).

Fasse is an insurance adjustor, not a real estate appraiser. (Tr.III, 40:10-15, 41: 12-20, 116:14-24). Luigi's offers no authority suggesting an insurer breaches the insurance contract because the insurer relies on an independent professional real estate appraiser for valuation. Even Luigi's relied on a professional real estate appraiser for its

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rights. (App. 488, Tr.III, 35:13–37:25; 115:23–116:13). Luigi's states "Unfortunately for United Fire, there was absolutely no evidence the fire at Luigi's was intentionally set". (Pl. Brief at 19, citing Tr.III, 68:7-11, 69:1–70:14). Luigi's' motives for using the word "unfortunately" are suspect, as United Fire **never** suggested Luigi's committed arson. (Tr.III, 115:23–116:13).

critique of Rally's appraisal, since Sorrell admittedly is not a real estate appraiser. (Tr.II, 82:7-8).

Luigi's' breach of contract claim based on United Fire's reliance on its expert fails as a matter of law.[5]

IV. LUIGI'S BAD FAITH CLAIMS FAIL AS LUIGI'S HAS NOT NEGATED ANY REASONABLE BASIS FOR UNITED FIRE'S ALLEGED BAD FAITH CONDUCT AND THERE WAS NO DELAY IN PAYMENT

A. Pre-Appraisal Conduct

Luigi's asserts in its brief United Fire's reliance on its expert also constitutes bad faith.[6] Even if Fasse's actions could conceivably been thought to be insufficient, "an insurer's 'subpar' investigation cannot in and of itself sustain a tort action for bad faith." *Reuter v. State Farm Mut. Auto. Ins. Co., Inc.,* 469 N.W.2d 250, 254 (1991). To establish first-party bad faith, it is not enough to show "the investigation was not as thorough or all-encompassing as the [insured] would have desired." *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 347 (Iowa 1999). *See also Mirarchi v. Seneca Specialty Ins. Co.,* 564 Fed.Appx. 652 (3rd Cir. 2014) (property insurer did not act in bad faith by standing on its adjuster's initial estimate of actual cash value pending conclusion of appraisal process or due to the initial estimate being lower than the appraisal award). Further, "[a]n

[5] Compare the arguments raised by Luigi's for the first time in its brief to the jury instruction on breach of contract (Inst. 12: App. 500-501).
[6] Compare the arguments raised by Luigi's for the first time in its brief to the jury instruction on bad faith (Inst. 13: App. 501-502).

insurance company is not obligated to disregard the opinion of its own expert in favor of the insured's expert's opinion." *Morgan v. Am. Family Mut. Ins. Co.*, 534 N.W.2d 92, 97 (Iowa 1995).

Reuter is instructive. An insured claimed bad faith based on improper investigation and evaluation of his medical payments claim after the claim superintendent relied on the opinions of a professional service he had retained to independently review the insured's medical records. 469 N.W.2d at 255. The insured alleged the professional service's reports were incomplete and made without proper records examination. *Id.* The court concluded the claim superintendent sending the records for professional evaluation was reasonable, as was his reliance on the service's professional opinions, and thereby affirmed a directed verdict to the insurer on the insured's bad faith claim. *Id.*

The district court's denial of directed verdict to United Fire on all claims for its pre-appraisal investigation of the loss must be reversed as a matter of law.

B. Post-Appraisal Conduct

Luigi's' bad faith claim premised on the letter and email sent by Rally appraisers—independent contractors—during the five days immediately following the appraisal hearing is equally meritless. For reasons discussed below, as a matter of law the post-appraisal conduct does not present a submissible bad faith claim.

1. No Denial or Delay in Payment

There is no question United Fire paid the full $502,000 award less than three weeks after the hearing. The insurance contract provides a payment deadline of 30 days after the insurance company receives the sworn proof of loss and "an appraisal award has been made." (App. 99). The award was made June 22, 2017. (App. 472). The sworn proof of loss was sent June 29, 2017. (App. 166-167). United Fire paid the award July 12, 2017. (App. 165).

As Luigi's notes, Iowa recognizes a cause of action against an insurer for "bad-faith denial or delay of insurance benefits." *Rodda v. Vermeer Mfg.,* 734 N.W.2d 480, 483 (Iowa 2007) (citing *Dolan v. Aid. Ins. Co.,* 431 N.W.2d 790, 794 (Iowa 1988)). United Fire paid the award before it was even due. Regardless of what Luigi's alleges United Fire or its independent contractor appraisers did in the five days following the appraisal hearing, there was no **denial** or **delay** in United Fire paying the award.

Where there is no "substantial evidence [the insurer] knowingly or recklessly disregarded its obligation to [provide benefits] in a timely manner," a bad faith claim is not established. *Thornton v. American Interstate Ins. Co.,* 940 N.W.2d 1 (2020). *See also Penford Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 662 F.3d 497, 504 (8th Cir. (Iowa) 2011) (affirming judgment as a matter of law for insurer on bad faith claim of unreasonable delay of payment where policy required that insurer pay within 30 days of receiving sworn statement of proof of loss and insurer complied with this provision.)

2. No Absence of a Reasonable Basis for the Post-Appraisal Conduct

Luigi's also argues its bad faith claim was properly submitted because "there was absolutely no fraud, deceit or misfeasance on Luigi's part in the entry of the award" (PL. Brief at 63) and thus it was unreasonable for United Fire to make any attempt, prior to timely paying the award, to set it aside.

To establish a bad faith claim "it is not enough for [Luigi's] to make a showing of unreasonableness." *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468, 481 (Iowa 2005). It is "incumbent upon [Luigi's] to negate any reasonable basis" for the denial or delay of its claim. *Id.*

> A reasonable basis for denying insurance benefits exists if the claim is "fairly debatable" as to either a matter of fact or law. A claim is 'fairly debatable' when it is open to dispute on any logical basis. Whether a claim is "fairly debatable" can generally be determined by the court as a matter of law. "That is because '[w]here an objectively reasonable basis for denial of a claim *actually exists,* the insurer cannot be held liable for bad faith as a matter of law.

Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007) (citations omitted). Luigi's bears the burden of proof to negate any reasonable basis. *Dolan v. Aid Ins. Co.,* 431 N.W.2d 790, 794 (Iowa 1988). Luigi's did not meet its burden to "negate any reasonable basis" for any perceived delay in United Fire paying the award.

When Luigi's invoked the appraisal process after receiving United Fire's $242,000 building loss offer, Luigi's' other coverage claims had not yet been settled. Four days after receiving the appraisal process request, Fasse emailed Sorrell, asking (1)

if appraisal was sought for "only the building coverage" or all coverages including business personal property (BPP), business income or extra expense matters. (App. 484-485).

Luigi's states Sorrell's email response "make[s] it clear that Luigi's was demanding appraisal on all coverages", citing from the email: *"It is my understanding the appraisal is sought for all coverages involved with the claim."* (App. 484; Pl. Brief at 31). Luigi's purposely omits the rest of the email, which makes "clear" Luigi's did just the opposite: specifically limit the appraisal request to the building value. Sorrell's email states:

From: Chuck S. Sorrell
Sent: Monday, January 30, 2017 1:55 PM
To: 'Fasse, Daniel'
Cc: 'MARTY STASI'
Subject: RE: Luigis - Globe Information

Hi Daniel:

Please understand that I have not been involved in this claim other than discussions as to the appraisal. While I am a Public Adjuster, my services have not been sought under those terms. I am serving as the Insured's appraiser. It is my understanding that appraisal is being sought for all coverages involved with the claim.

That being said, I can understand your point regarding the BPP, BI, and Extra Expense portions of the claim. I will review with the Insured the need for those claims being submitted. If a dispute still exists at that time, then they will have the option to demand appraisal on those differences, should some exist.

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 22, 2016 in which UFG specifically offered that remedy to resolve this difference.

(App. 484) (emphasis added).

As Luigi's notes, the insurance contract provided separate coverages for "Building" and "Business Personal Property" (BPP). (App. 89). "Building" means "the building or structure" and BPP means "property located "in", "on", "or within 100 feet of the building or structure". (*Id.*). The policy defines furniture as BPP. (*Id.)* Some

items, including fixtures, machinery or equipment, fall under either coverage. (*Id.*) Herink, Fasse, Sorrell, and Luigi's "building expert", Dante Damiani[7], all agreed items permanently attached to the building are Building while mobile items are BPP. (Tr.II, 76:17–77:21; Ex. 101, 25:7-22; Tr.III, 82:4-7; Ex. 103, 10:4-5). Damiani, who prepared Luigi's Appraisal Report building and FFE estimates (Ex. 103, 7:3-24, 19:6-9), explained:

> Q: At Globe Midwest, is there any kind of general approach to how to determine something is part of the building as opposed to part of the contents?
>
> A: I have just always been taught if you flip the building upside down, whatever stays on, I put it in the building. If it falls to the ground, it's part of contents.
>
> Q: Okay.
>
> A: That's kind of just the industry rule of thumb that insurance adjusters use."

(Ex. 103, 21:8-14)

> Q: If you flip it over and it's not bolted and it falls out, that would fall into business personal property?
>
> A: Yes.

(Ex. 103, 24:11-13).

Damiani readily admitted his FFE estimate was for Luigi's business personal property. (Ex. 103, 19:6–21:2). The estimate included many mobile items, including a keg dispenser, bar storage cooler, a gas fryer, a gas range, and pizza prep table—with

[7] Damiani testified via deposition. (Tr.III, 165:21-23; Ex. 103).

photos showing them on wheels. (App. 402, 406, 414, 421). The FFE estimate also included $16,978 for "installation costs", which Damiani also admitted had nothing to do with the building's market value. (App. 396-398; Ex. 103, 19:16–21:7). Damiani testified he did not compile the estimate with an eye to determining what was building versus contents and left that to the adjusters to figure out[8]. (Ex. 103, 24:22–25:2)

After receiving Luigi's Appraisal Report, Herink sent the hearing umpire, Joe Paxson, an eight-page detailed response to the Report, understandably with no mention of the FFE. (App. 464-471). Herink was a real estate appraiser and thus expected the hearing to only cover the building value. (Ex. 101, 90:2-21). Meanwhile, Fasse paid little attention to the FFE estimate as United Fire had already paid Luigi's BPP claim a month prior and Sorrell had specifically confirmed the appraisal hearing would be for the building only. (App. 168-169; Supp. App. 16; Tr.III, 55:15–56:1).

For Luigi's to suggest there was no reason for United Fire, then, to feel the award exceeded the "building portion only" scope of the appraisal hearing and support Rally's post-hearing effort to dispute the award is untenable**.** This is particularly so since (1) United Fire had already paid numerous items on the list under BPP; (2) the list contained many items United Fire did not consider part of the building; (3) furniture by

[8] To further suggest a course of bad faith conduct, Luigi's alleges Fasse tried to mislead Marty Stasi during their first meeting by coaching him to claim under BPP certain large items like broasters and fryers that "clearly" belonged under Building coverage. (Pl. Brief 26). Damiani testified a broiler and gas fryer included in his FFE estimate were business personal property. (Ex.103, 20:20-25).

policy definition is BPP, and (4) the list contained many items that were already considered in the comparable properties Herink relied on to determine market value and to negotiate the $380,000 building award, thus a duplication of payment to receive as FFE as well. (Tr.III, 56:20–59:15; App. 486; App. 487).

That Herink agreed without dispute to the FFE add-on at hearing does not negate the reasonableness of Herink's actions the next day. He sent a letter to the umpire asking that his name be removed from the award. (App. 160). Herink, an experienced commercial real estate appraiser but novice appraisal hearing participant, relied at hearing on Sorrell's expertise regarding the policy's Building coverage and thus did not challenge Sorrell at hearing when he insisted FFE be added. (Ex. 101, 26:5–27:8). Herink had never seen the policy and did not know what it included. (Ex. 101, 84:20-21). When he learned from Fasse following the hearing that the FFE should not have been added, he felt he had been misled by Sorrell (Ex. 101, 30:19–31: 84:6-24). It was also reasonable for United Fire to allow Herink to question the FFE addition.

Nor does it aid Luigi's' argument that Fasse testified he never considered not paying the award. Fasse knew the full award was still binding with only two signatures (Tr.III, 61:3-13). It is not mutually exclusive that Fasse would a) support Rally's efforts to dispute the matter yet (b) intend to timely pay the full award.

Finally, it must be remembered what conduct is actually at issue in Luigi's' bad faith claim: Herink's letter to the umpire, and Passmore's two sentence email to Sorrell a few days later (sent without United Fire's knowledge or direction) vaguely stating the

matter was "likely heading to a lawsuit". (App. 160; App. 162). Luigi's speculations regarding United Fire's intentions are immaterial.

Luigi's fails to show sufficient evidence "negating any reasonable basis" for delay or denial of its building loss claim, or even for the limited conduct at issue, under Iowa's exacting bad faith standards. *Bellville v. Farm Bureau Mut. Ins. Co.,* 702 N.W.2d 468, 481 (Iowa 2005). Fasse had been specifically told the appraisal was being invoked for the building only, not the contents. *Compare Concept Restaurants, Inc. v. Travelers Indem. Co*, No. 16-CV-00450-DME-NYW, 2016 WL 8737773, at *4 (D. Colo. Dec. 2, 2016) (granting insurer summary judgment on breach of contract and bad faith claims where insured claimed it was not bound by appraisal award and could file claim against insurance company to recover amounts allegedly not included in award; court notes insured demanded an appraisal with no restriction on scope). Further, by the time of the hearing, United Fire had already paid Luigi's BPP claim. Herink was unfamiliar with appraisal hearings and was caught off guard when Sorrell insisted the FFE estimate be added. The drafter of the FFE estimate admitted it was for business personal property. Umpire Paxson also felt the FFE included many items he would not consider part of the building's market value. (Tr.IV, 36:8-16).

In light of United Fire's justified concerns of potential claim exaggeration, it had every right to allow Herink to question the appraisal award. This is particularly so when Iowa law provides a mechanism to set aside appraisal awards on the basis of fraud and malfeasance. *Walnut Creek Townhomes Assoc. v. Depositors Ins. Co.*, 913 N.W.2d 80, 90-91

(Iowa 2018). As it is, United Fire did not attempt to set aside the award and instead paid the appraisal award in full and on time.

Reviewing the evidence in the light most favorable to Luigi's, United Fire had a reasonable basis for its post-appraisal conduct as a matter of law. The district court's denial of United Fire's motion for directed verdict was in error and must be reversed.

V. THE TRIAL COURT ERRED BY DENYING UNITED FIRE'S MOTION FOR NEW TRIAL WHERE THE JURY INSTRUCTIONS WERE PREJUDICIAL MISTATEMENTS OF THE LAW

Luigi's resists reversal based on improper jury instructions, arguing the instructions as given were proper because they were accurate statements of the law and there was evidence to support Luigi's' claims. Luigi's misses the point. Even if the given instructions included several uniform instructions, the court's refusal to give United Fire's proposed instructions on appraisal and bad faith require reversal.

> Generally, Iowa law requires that a court give an instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in other instructions. There must be substantial evidence in the record to support the instruction submitted. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion.

Coker v. Abell-Howe Co., 491 N.W.2d 143, 150 (Iowa 1992) (citations omitted). "In weighing the sufficiency of evidence, we give it the most favorable construction it will bear in favor of the party seeking submission." *Id.*

Viewing the evidence with "most favorable construction" to United Fire, there was more than sufficient evidence to instruct the jury regarding the appraisal process and remedy to set aside an appraisal award, and the court's denial of these requested instructions requires reversal. That the award was unanimous is not determinative; misrepresentation could certainly be discovered after the fact, as in this case, where there was evidence United Fire was told prior to hearing only building loss would be covered and learned following hearing Luigi's appraiser exceeded this scope. Further, without instructions on appraisal law, the jury was left without guideposts for determining "reasonableness" in deciding the bad faith claim.

Luigi's fails to address that the inclusion of unsupported specifications also requires reversal. United Fire objected to all three bad faith specifications, which allowed the jury to find bad faith if United Fire refused to pay ACV for the loss, attempted to "back out of the" appraisal award, or "threatened" Luigi's "with litigation" (Inst. 13: App. 501-502). The court failed to identify any basis to suggest these specifications were supported by the record. But if the evidence was insufficient on even just one of the specifications, reversal is required. Where the district court submits to the jury a specification not supported by the evidence and the jury returns a general verdict, reversal is required. *See Nichols v. Westfield Indus., Ltd.,* 380 N.W.2d 392, 396-97 (Iowa 1985) (reversal required on general verdict where evidence insufficient on one of two specifications of negligence); *State v. Tipton,* 897 N.W.2d 653, 681 (Iowa 2017) (when jury returns general verdict on a multi-pronged offense where there is

insubstantial evidence to support some but not all of the alternative theories of liability, the "appropriate remedy is a remand for a new trial on the viable theories remaining"); *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 610-11 (Iowa 2006) (new trial required where answers in special verdict on breach of contract claim were internally consistent); *Gordon v. Noel,* 356 N.W.2d 559, 561 (Iowa 1984) ("when a case is submitted on more than one theory of liability, even one of which is erroneously submitted, and the jury returns only a general verdict for the plaintiff, the case ordinarily must be reversed and remanded for new trial").

The court's inaccurate statements of the law and the absence of the other requested instructions were prejudicial to United Fire and require a new trial.

CONCLUSION

For the above reasons, Defendant-Appellant United Fire respectfully requests the Court reverse the court's denial of its Motion for Directed Verdict on all claims, or, alternatively, remand this case for new trial.

ATTORNEY'S COST CERTIFICATE

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

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