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IN THE SUPREME COURT OF IOWA
NO.16-0121/ LACL128361

WALNUT CREEK TOWNHOMES ASSOCIATION,

Plaintiff-Appellant, *

vs. *

DEPOSITORS INSURANCE COMPANY, *

Defendant-Appellee *

Polk County No.16-0121/LACL128361
Appeal from the Polk County District Court
The Honorable Robert B. Hanson

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This case does not present an issue of the Iowa Constitution nor does it arise from any Statute granting exclusive jurisdiction to the Iowa Supreme Court. This case presents the application of existing legal principles as set forth in the *North Glenn Homeowners Ass'n v. State Farm Fire and Cas. Co.*, 854 N.W.2d 67 (Iowa Ct. App. 2014) and should, therefore, be transferred to the Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

I. Nature of the Case

This case arises from a disputed insurance claim between Appellant Walnut Creek Townhome Association ("Walnut Creek") and Depositors Insurance Company ("Depositors"). The parties resolved their dispute in an insurance appraisal. Walnut Creek now appeals the District Court's error of law that the appraisal was not conclusive or binding on the parties. In the alternative, Walnut Creek challenges the District Court's errors of law with respect to the construction of the applicable insurance policy and its findings that damage to siding, gutters, and fascia do not represent a covered loss under the Policy.

II. Procedural History

Walnut Creek made an insurance claim to Depositors for storm damage arising from an August 8, 2012 wind and hail storm (the "Loss"). The parties were unable agree upon the amount of loss and Walnut Creek commenced legal action against Depositors for Declaratory Judgment and Breach of Contract in the Polk County District Court on or about August 7, 2013. The parties submitted their dispute to an insurance appraisal panel which heard testimony and reviewed evidence from the parties and issued a formal appraisal award on May 5, 2015 (the "Appraisal Award"). (App. 231). The appraisal panel found that as a result of the August 8, 2012 hailstorm, Walnut Creek sustained approximately $1.4 million in damage. *Id.*

Depositors disputed whether there was coverage for the Loss, and this matter was tried on May 27–28, 2015 in Polk County District Court. The District Court ignored the appraisal panel's findings, made its own conclusions of fact with respect to the cause of the Loss, and held that Walnut Creek was not entitled to any insurance proceeds for the Loss. Walnut Creek made a Post-Trial Motion to Reconsider pursuant to Iowa R. Civ. P. 1.904(2) and 1.1004. The District Court denied Walnut Creek's Motion to Reconsider and this appeal followed.

III. Factual Background

Walnut Creek is a residential common interest community located in Urbandale, Iowa comprised of 36 buildings. (App. 22). Walnut Creek is insured by Depositors under Policy Number 5605180237 against damage from wind and hail (the "Policy"). (App. 252). On or about August 8, 2012, a severe wind and hailstorm caused damage to the exterior of the buildings at Walnut Creek (the "Loss"). (App. 231). Walnut Creek submitted a claim to Depositors for the Loss, but the parties were unable to agree upon the amount of Loss. *Id.*

Walnut Creek exercised its right under the Policy to an insurance appraisal to resolve the disputed Loss. *Id.* The appraisal took place on May 5, 2015. *Id.* At the appraisal, the panel heard evidence and testimony from both

parties regarding the scope of damage, price to repair, and cause of the Loss. (App. 40, 71, 140–41, 184–85). Tim Barthelemy, a public insurance adjuster, and a representative from Walnut Creek's general contractor were present and gave testimony on behalf of Walnut Creek. *Id.* Professional Engineer, Robert Danielson, and a representative from Hedberg & Son Roofing were present and gave testimony on behalf of Depositors. (App. 140–41, 184, 204). After hearing evidence from both parties and their experts regarding the scope and cause of the Loss, the panel rendered the factual finding that damage to Walnut Creek from the August 8, 2012 storm resulted in damage totaling roughly $1.4 million (the "Appraisal Award"). (App. 231).

At trial, all of the same experts who provided testimony at the appraisal hearing provided virtually the same testimony before the District Court; however, the District Court nullified and replaced the panel's factual findings for that of its own. (App. 40, 71, 140–41, 184; App. 343–52). Specifically, the Court found that a defective "applique" portion of certain shingles, and not the August 8, 2012 storm, was the primary cause of the Loss. (App. 343–52). The Court made this finding despite the fact that it was provided no testimony to that effect and despite the fact that the panel reviewed the damage on-site and made a factual finding to the contrary. (App. 231; App. 343–52).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THE APPRAISAL AWARD WAS NOT BINDING UPON THE PARTIES.

This issue was preserved for appeal pursuant to Plaintiff's Notice of Appeal filed with Polk County District Court on January 20, 2016. This action in contract is subject to appellate review for errors of law. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010).

An appraisal award may not be set aside unless the complaining party shows fraud, mistake, or misfeasance on the part of an appraiser or umpire. *Central Life Ins. Co. v. Aetna Casualty & Surety Company*, 466 N.W.2d 257, 260 (Iowa 1991). "In order to justify a court in setting aside an award, the misconduct or other ground of impeachment must be made out by clear and satisfactory evidence." *Vincent v. German Ins. Co.*, 120 Iowa 272, 273, 94 N.W. 458, 460 (1903) (internal citations omitted).

Insurance appraisals have been a favored dispute resolution mechanism in Iowa for over a century. *See e.g., George Dee & Sons Co. v. Key Fire Ins. Co.*, 104 Iowa 167, 73 N.W. 594 (Iowa 1897). The appraisal process is also codified in Iowa's Standard Fire Policy. *See* Iowa Code § 515.109(6) (2015). Appraisal "serves as an inexpensive and speedy means of settling disputes over matters such as amount of loss and value of the property in question."

Central Life, 466 N.W.2d at 260. Iowa Courts view alternative dispute resolution forums like appraisal as "legally favored contractual proceedings whose object is to speedily determine the matter by a tribunal chosen by themselves, and thereby avoid the formalities, delay and expense of litigation in Court." *First Nat'l Bank v. Clay*, 231 Iowa 703, 713, 2 N.W.2d 85, 91 (Iowa 1942) (internal citations omitted). Recently, the Iowa Court of Appeals distinguished the duties of an appraisal panel and the court:

> During the appraisal process, appraisers ***must*** determine what the amount of "loss" is, which often requires consideration of causation . . . Causation is an integral part of the definition of loss, ***without the consideration of which the appraisers cannot perform their assigned function.*** During the appraisal process, the appraisers must consider what damage was caused by hail, and what damage was not, or damage with which they are unconcerned, such as normal wear and tear.

North Glenn, 854 N. W2d 67 at 71 (emphasis added). When a Court reviews an appraisal award, it must grant every reasonable presumption in favor of its validity, and the appraisal award may not be set aside "even if the Court disagrees with the result." *Central Life*, 466 N.W.2d at 260.

The District Court erred when it held the "Association has not shown by a preponderance of the evidence that the Appraisal Award is binding and conclusive on the parties, the Court holds that the parties are not bound by the Appraisal Award and its conclusions." (App. 351).

A. Appraisal awards are binding and conclusive as a matter of law.

The Association bears no burden to prove the Appraisal Award is binding and conclusive. The Appraisal Award is binding and conclusive *as a matter of law* unless the complaining party proves by clear and satisfactory evidence that the panel committed fraud, mistake, or misfeasance. *Central Life*, 466 N.W.2d at 260. The District Court made no conclusion of any panel misconduct, Depositors certainly did not allege it, nor is there evidence on record that the panel committed any misconduct that could support vacating the Appraisal Award. The District Court unilaterally and improperly replaced its judgment with that of the appraisal panel without any legal authority to do so. When a court reviews an appraisal award, it must grant every reasonable presumption in favor of its validity, and the appraisal award may not be set aside "**even if the Court disagrees with the result**." *Central Life*, 466 N.W.2 at 260 (emphasis added). The District Court erred as a matter of law when it did not adhere to this highly deferential standard of review.

B. The determination of the cause of loss is a question for the appraisal panel.

The District Court erred by disregarding the appraisal panel's findings with respect to the cause of Loss. This error runs contrary to over 100 years of Iowa case law. It has long been the rule in Iowa that the "amount of loss" falls within the purview of the appraisal panel and matters of coverage are reserved for the court. *See George Dee & Sons*, 73 N.W. at 594. In 1897, the

Iowa Supreme Court held that parties to a property insurance claim have a right to have the entire amount of their disputed loss appraised, but that the panel must "leave to be determined by the parties, or by litigation, the question as to whether or not these articles of property were really embraced within the provisions of the policy." *Id.* at 595.

This familiar distinction between factfinder and the court was revisited in 2008. In a similar case, parties to an insurance dispute did not agree on the value of the loss and submitted their differences to appraisal. *Taylor v. Farm Bureau Mut. Ins. Co.*, 759 N.W.2d 2 (Iowa Ct. App. 2008). The Plaintiff disputed the panel's factual findings with respect to the amount of loss, but the District Court refused to allow the Plaintiff to present evidence contrary to the amount of loss set forth in the appraisal award. *Id.* at 6. The Plaintiff appealed, and based upon the same underlying legal principles present in *George Dee* a century before it, the court held that:

> pursuant to the terms of the appraisal provision, the umpire's ensuing appraisal award 'set the amount of loss.' [Defendant] was then free to litigate, as it did, the general question of its liability for that loss in the district court proceedings.

Id. The *Taylor* Court reaffirmed the longstanding tenet of insurance appraisal that the appraisal panel determines the amount of loss, while issues of coverage are reserved for the court.

In 2014, the Court of Appeals again revisited the scope of an appraisal panel's duties to ascertain the "amount of loss" and upheld the respective roles of the appraisal panel and the court. *North Glenn*, 854 N.W.2d at 67. In *North Glenn*, the Court of Appeals addressed whether factual disputes arising from potential causes of loss represent fact issues appropriate for determination by an appraisal panel, or whether those disputes represented coverage issues that should be reserved for the courts. *Id.* After engaging in a multi-state analysis, the Court of Appeals maintained Iowa's longstanding distinction between the appraisal panel and Court by adopting the Minnesota Supreme Court's analysis of loss causation questions in *Quade v. Secura*. *Id.* at 71; 814 N.W.2d 703 (Minn. 2012).

The facts in *Quade* were virtually identical to the issue before this Court now. In *Quade*, a policyholder made a claim for storm damage and the insurance company claimed that damage was excluded because it alleged the loss was caused by premature deterioration rather than by covered storm damage. *Id.* The parties disputed whether the appraisal panel could determine this *cause* of loss question. *Id.* Recognizing that appraisal panels—and not courts of law—are in the best position to make factual damage determinations, the *Quade* Court held that appraisal panels "*must necessarily determine the cause of loss*," but that "liability determinations" such as whether the

determined cause of loss is covered, are reserved for the Court. *Id.* (emphasis added). This is the legal standard adopted by the Iowa Court of Appeals in *North Glenn.* 854 N.W.2d at 72.

Applying that standard to the present set of facts, the appraisal panel considered evidence from both parties about various causes of the Loss at the appraisal. The panel rendered its decision that the Loss was limited to the amount of damage arising from a hail and windstorm on August 8, 2012. (App. 231). The only issue that remained before the District Court was whether hail and wind damage from the August 8, 2012 storm was covered under the Policy. The parties do not dispute that damage from the August 8, 2012 hailstorm represents a covered loss under the Policy, so there were no coverage determinations to be made by the District Court. The District Court's disregard for the panel's findings is a clear error of law under the *North Glenn* standard.

This case presents a cautionary example of the exact type of undue burden and conflicting outcomes *North Glenn* and *Quade* are intended to prevent. The public policy and judicial efficiency goals that underlie *North Glenn, Quade, Central Life, Taylor,* and *George Dee* are negated if the parties to every appraisal are forced to argue the amount of loss and causation once before the panel and a second time before the court. If an appraisal award

could be overturned without a heavy burden to prove some type of panel misconduct, then appraisal would have no value as a dispute resolution mechanism. It would instead be a wasteful exercise in futility and create unreasonable financial burden to all parties involved. Rather than taking disputes to appraisal and risk a non-binding result, parties would litigate lest they risk the "losing" party simply retrying its case before the court if the panel's findings were unfavorable. This is exactly outcome that led to this appeal and what the Iowa Court of Appeals sought to prevent in *North Glenn*.

The appraisal panel is simply in a better position than judge or jury to decide factual damage questions because it must be comprised of three disinterested parties with relevant technical expertise. *See* Iowa Code § 515.109(6) (2015) (requiring that all panel members be "competent and disinterested"). It has a tremendous advantage over the court to arrive at accurate factual conclusions. It has the logistical advantage of being on site to see damage firsthand, it has technical advantage of construction knowledge, and it has the practical advantage of its own collective technical expertise.

Here, a panel of competent construction experts inspected damaged roofs on-site and considered evidence from the parties' experts with respect to the cause and cost to repair the Loss. The record is clear that causation was presented, considered, and decided by the appraisal panel. (App. 40–41, 71,

142, 184–85). Depositors' own expert even concedes that his observations and opinions were considered and rejected by the appraisal panel. (App. 142). The panel weighed evidence of possible causes, and did not find that deteriorating shingles caused the Loss. It did not find that multiple causes of loss were present, nor did it find that the Loss was caused by prior storms. The panel found that the Loss was caused by the August 8, 2012 storm. The panel acted within the scope of its authority and the District Court erred when it refused to defer to the panel's findings—especially in light of the fact there was no evidence presented of any panel misconduct. The absurdity of this dual outcome scenario is further highlighted by the fact that the Court heard from the same construction witnesses present at the appraisal hearing and reached a different conclusion.[1]

A Federal Court in the District of Minnesota recently decided a virtually identical dispute in *Creekwood Rental Townhomes, LLC v. Kiln Underwriting, LLC*. 11 F.Supp.3d 909 (D. Minn. 2015). While not controlling, the case is instructive on the application of the law and public policy underlying *Quade* and *North Glenn* when an insurance dispute involves

[1] Richard Herzog of Haag Engineering was *not* present at the appraisal hearing by his own choice, but was present at trial. (App. 166–167). His associate, Robert Danielson, was present at both and gave virtually identical testimony. This further supports Walnut Creek's argument that this case embodies the absurd outcome *North Glenn* is intended to prevent. Depositors had the opportunity to present more witnesses and evidence in support of its cause of loss theories at appraisal, but made the strategic decision not to do so. Rather than reap the results of its strategic decisions, Depositors was able to use the appraisal as a mock trial run for its arguments in District Court in the event it found the appraisal results unfavorable.

multiple potential causes of loss. In *Creekwood*, the insurer denied a claim for hail damage based upon a policy exclusion for deteriorated/defective shingles. *Id.* The parties went to appraisal where the panel issued an award less than the amount sought by the insured and limited to the claimed hail damage. *Id.* The insurer then sought to exclude the entire loss based upon almost identical reasoning set forth by the District Court here for defective shingles. *Id.* The court applied the standards set forth in *Quade* and held that "because Kiln has not identified any part of the policy that would exclude coverage for losses caused by hail damage, it has not identified any reviewable portion of the appraisal panel's award. *Id.* at 927. The Court also noted that Kiln's request, much like Depositors' here, "would require the district court to revisit every causation determination of an appraisal panel . . . such a practice would undermine the court's determination in *Quade* that an appraiser's determination of the amount of loss is binding on the parties." *Id.*

The District Court erred in its application of *North Glenn* by refusing to defer to the appraisal panels factual findings. Under the District Court's analysis, parties would stop using appraisal and instead turn their disputes to the courthouse. That is not the law as set forth in *North Glenn*, nor should it be the law in Iowa as a matter of public policy.

The Court must reverse the District Court's decision and remand with instructions to direct a verdict that (1) the Appraisal Award is binding and conclusive as to the amount and cause of Loss; (2) pursuant to the terms of the Policy, Walnut Creek is entitled to recover the ACV portion of the Appraisal Award; and (3) that upon completion of the repairs to the property, Walnut Creek is entitled to recover the remaining recoverable depreciation set forth in the Appraisal Award not to exceed the listed RCV amounts.

II. IN THE ALTERNATIVE, THE DISTRICT COURT'S FINDINGS ARE NOT SUPPORTED BY FACT OR LAW.

This issue was preserved for appeal pursuant to Plaintiff's Notice of Appeal filed with Polk County District Court on January 20, 2016. This action in contract is subject to appellate review for errors of law. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 178 (Iowa 2010).

The District Court ignored the panel's factual determination that the August 8, 2012 wind and hail storm caused the Loss. As discussed *supra* Section I, the District Court exceeded its authority by overturning the panel's factual findings. For that reason, this Court need not reach any questions relating to the District Court's other improper findings. However, even if this Court accepts the District Court's conclusion that the Appraisal Award is not binding upon the parties, the District Court's findings are unsupported by facts and law and must be overturned.

The District Court found that the Policy did not cover the Loss based upon three flawed premises: (1) that Walnut Creek did not eliminate other potential storms that may have caused damage; (2) that the Appraisal Award was not signed by all panel members; and (3) that "defective and deteriorating shingles are at the core of the Association's roof damage." (App. 351). Each finding constitutes a reversible error of law.

A. Depositors did not establish that other storms caused the Loss.

The burden to prove a claim is covered by the terms of an insurance policy rests upon the insured. *Messer v. Wash. Nat. Ins. Co.*, 233 Iowa 1372, 1376, 11 N.W.2d 727, 730 (Iowa 1943). Once the policyholder meets this burden, the burden shifts to the insurer to prove "the applicability of any exclusion which allegedly precludes coverage." *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988, 996 (S.D. Iowa 2010). The burden of establishing an exclusion rests exclusively upon the insurance company seeking to deny coverage. *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 598 (Iowa 1993).

The District Court erred when it held that the "Association has not eliminated [other] weather events as *potential* causes of roof damage." (App. 349) (emphasis added). The District Court applied the wrong legal standard by shifting the burden of disproving hypothetical alternate weather events

upon Walnut Creek. Walnut Creek's experts both concluded that the August 8, 2012 weather event caused the Loss, the appraisal panel confirmed the same; and even Depositors' experts concurred. Walnut Creek met its burden to prove a covered loss occurred, thus shifting the burden to Depositors to prove the Loss was caused by some other excluded event. *Iowa Iron Works*, 503 N.W.2d at 598.

Depositors produced three experts at trial. Two different engineers from Haag Engineering opined there was no hail damage to the shingles,[2] that hail damage to siding *was consistent with the August 8, 2012 storm*, and that some siding fractures "potentially" occurred in prior hail events. (App. 247). Depositors' other expert, Mr. Harbert, concluded that *he found evidence of hail damage from the August 8, 2012 storm on the roofs*. (App. 180). In terms of Walnut Creek's burden to prove a covered loss occurred, every single witness for both parties and the appraisal panel *all* found that the Subject Property was damaged by the August 8, 2012 storm. The mere fact that other prior storms may have blown through the area in prior years cannot possibly overcome (1) the panel's findings that these alleged prior storms did not cause

[2] The District Court erred here by overruling Walnut Creek's motion in limine and allowing the expert to apply its own limited definition of damage, rather than the Policy's broad definition of damage. *Compare* Haag Report at. p. 5 (App. 245) (hail damage is limited to fractures, ruptures, or punctures) *with* Policy at p. 2 of 39 (App. 158) (providing coverage for any type of "direct physical loss of or damage to Covered Property"). *See also* (App. 147) (contrary to his own report, Mr. Danielson admits that the term "damage" encompasses "cosmetic damage" in addition to fractures, ruptures, or punctures).

the claimed damage; (2) that Walnut Creek's experts found no damage from prior storms; (3) that one of Depositors' experts found roof damage from the August 8, 2012 storm; and (4) that Depositors other experts opined that no hail storm had ever damaged the roofs.

Depositors bears the burden to prove the "alternate excluded storm" exclusion applies. Since no expert testified that roof damage occurred in prior storms, and Depositors' own expert determined that the roofs *were* damaged by the August 8, 2012 storm, no reasonable factfinder could find that Depositors met its burden to show a prior storm caused the roof damage. The District Court erred as a matter of law, and to the extent its decision relied upon this as a coverage exclusion, it must be reversed.

B. The Appraisal Award is binding upon agreement of any two of the three panel members.

In the context of an appraisal panel, an award in writing **by any two** of the three panel members "shall determine the amount of actual cash value and loss." Iowa Code § 515.109(6) (2015); (App. 252). When reviewing an appraisal award, the award "is supported by every reasonable presumption and will be sustained even if the court disagrees with the result." *Central Life*, 466 N.W.2d at 260. An award shall "not be set aside unless the complaining party shows fraud, mistake, or misfeasance on the part of an appraiser or umpire."

Clay, 713 2 N.W.2d at 91. In *Vincent v. German Ins. Co.*, the Iowa Supreme Court held:

> Mistake of judgment on the part of the arbitrators is not ground for setting aside an award, unless such a mistake be so great as to indicate partisan bias. If this were the rule, arbitration would be a useless ceremony, for we rarely find parties content with the award. In order to justify a court in setting aside an award, the misconduct or other ground of impeachment must be made out by clear and satisfactory evidence.

120 Iowa 272, 273, 94 N.W. 458, 460 (1903) (internal citations omitted).

The District Court erred when it held that the "Appraisal [Award] is not signed by all parties and addresses only one of multiple causes for the roof damage." (App. 351). As discussed *supra* Section I, the Appraisal Award is signed by two of three panel members and is therefore binding, even though the District Court disagrees with its findings. The District Court found no clear and satisfactory of evidence of any fraud, mistake, or misfeasance on the part of the panel, and there is nothing on record which indicates the panel members made a "mistake of judgment so great as to indicate partisan bias." *Vincent*, 94 N.W. at 460.

The Appraisal Award is binding and conclusive upon the parties because it was agreed upon by the requisite number of panel members. The District Court's disagreement with the panel's findings do not constitute a basis upon which the Appraisal Award may be overturned. The District Court

vacated the award with no legal basis to do so, and this Court must reverse its error of law.

C. Defective applique is irrelevant to the Court's determination.

Insurance policies constitute adhesion contracts and should be strictly construed against the insurance company. *First Newton Nat'l Bank v. Gen. Cas. Co.*, 436 N.W.2d 618, 628 (Iowa 1988). Courts must construe policy provisions in a manner most favorable to the insured. *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 778 (Iowa 2000). *Allied Mut. Ins. Co. v. Costello*, 557 N.W.2d 284, 286 (Iowa 1996). The burden of establishing an exclusion rests upon the insurance company. *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 598 (Iowa 1993).

The District Court's refusal to defer to the panel's findings oversteps its authority in light of the *North Glenn* standard. As set forth *supra* Section I, the Court's analysis should end here. Looking past the District Court's error of law on this point, the District Court's conclusion that a shingle defect caused the Loss is unsupported by the record and misconstrues coverage available under the Policy.

i. Defective applique did not cause or contribute to the Loss.

The District Court found that a known defect in the raised applique[3] portion of the shingles "contributed to the roof damage" and thus triggered policy exclusions for product defects. (App. 349). In relevant part, the Policy states:

EXCLUSIONS

1. We will not pay for loss or damage *caused directly or indirectly* by any of the following . . .

(App. 275) (emphasis added). The Policy goes on to list several exclusions and exceptions, but the Court need look no further than the qualifying language "caused directly or indirectly by" that applies to all exclusions. This qualifying language requires something more than the mere presence of an excluded cause of loss. A separate form of damage can only form the basis of a policy exclusion if it "directly or indirectly" causes the claimed loss.

The panel considered whether the applique caused the Loss and rejected this argument and Walnut Creek did not make a claim for any part of the defective applique. (App. 66). Depositors accepted insurance premiums in exchange for insuring roofs that were no less capable of resisting hail damage

[3] The shingles at Walnut Creek have a decorative enhancement or "applique" portion which serves to create a three-dimensional look. (App. 36, 104; App. 234). It consists of a second layer of granules and asphalt applied to shingles sporadically over the roof to create the applique's three-dimensional appearance. *Id.* The parties do not dispute that the "defect" is limited to this applique portion of the shingle and that Walnut Creek did not make a claim for damage to the applique. *Id.*; (App. 139; App. 234).

than any other roof.[4] Cracked pieces of applique did not contribute in any way to Walnut Creek's hail loss, and that fact is unassailable because 1) Walnut Creek did not make a claim for defective applique; 2) the experts at trial did not testify that defective applique "directly or indirectly" caused hail damage; and 3) the panel considered the condition of the shingles and determined it did not cause the Loss.

Nonetheless, the parties agree that the shingles contain a known manufacturing defect that defect does not affect the structural integrity of the shingles, but merely results in cracking to the aesthetic or decorative "applique" portion of the shingle. (App. 234). In layman's terms, the "applique" is nothing more than a decorative bit of shingle glued atop some portions of the base shingle to add a dimensional look, and this "applique" is present only on a portion of the actual roofing system. (App. 36, 104). Not only do the parties agree that this applique has no function other than aesthetics, Depositors' experts did not allege it contributed to hail damage, and the manufacturer of the shingle itself states that defects to the applique "*do not compromise the long-term performance of the roof system.*" (App. 238).

[4]It is particularly noteworthy that these allegedly defective shingles were on the property from the moment Depositors' insured the property. Depositors' had no issue accepting premiums to insure the roof, but now seeks to avoid liability when a claim was made thereon.

The argument that this defective decorative piece atop some shingles contributed to hail damage is unsupported by the record.

ii. The Policy provides coverage even if the applique contributed to the Loss.

The District Court erred when it misconstrued available coverage under the Policy. The District Court held that two separate coverage exclusions excluded the Loss because of the existence of the defective applique. (App. 351) (holding that the Policy's exclusions for product defect and/or material exclusions apply).

The first exclusion the District Court applied was the "Other Type of Loss" exclusion which excludes damage to property arising from "wear and tear," or "any quality that causes it to damage or destroy itself." (App. 279). Walnut Creek did not submit a claim for wear and tear, nor was there any evidence that the shingles were somehow self-cannibalizing, so this exclusion cannot apply on its face. Nonetheless, this exclusion contains the caveat that:

> If an excluded cause of loss that is listed [under the Other Types of Loss Section] results in a "specified cause of loss", "accident" or building glass breakage, *we will pay for the loss or damage caused by that "specified cause of loss."*

Id. The Policy goes on to define "specified cause of loss" as "windstorm or hail." (App. 295) (emphasis added). Under this provision, the Loss is *not*

excluded because hail and wind is a specified exception to this Policy exclusion.

The other Policy exclusion relied upon by the Court contains a similar exception. The "Negligent Work" exclusion states that:

> We will not pay for loss or damage caused by or resulting from [Negligent Work]. *But if [Negligent Work] results in a Covered Cause of Loss, we will pay for the loss or damaged caused by that Covered Cause of Loss.*

(App. 279) (emphasis added). The Policy defines "Negligent Work" as "faulty, inadequate, or defective . . . materials used in repair, construction, renovation, or remodeling." Even if the shingles met the Negligent Work exception, Walnut Creek is still entitled to coverage because hail and wind is a Covered Cause of Loss under the Policy and thus represents an exception to this exclusion.

The District Court's first error of law was not deferring to the panel's findings regarding the cause of Loss. The District Court's second error was replacing the panel's findings with its own unsubstantiated findings that defective applique contributed to the cause of Loss despite receiving no testimony to that effect. The District Court's further error of law was misapplying its own incorrect factual analysis to the Policy's coverage and reaching the wrong result. For all or any of these reasons, this case must be

remanded to the District Court with instructions to enter Judgment on the Appraisal Award.

III. THE DISTRICT COURT ERRED WHEN IT DID NOT ENTER JUDGMENT UPON DAMAGES TO THE SIDING, GUTTERS, AND FASCIA.

This issue was preserved for appeal pursuant to Plaintiff's Notice of Appeal filed with Polk County District Court on January 20, 2016. This action in contract is subject to appellate review for errors of law. *Van Sloun v. Agans Bros., Inc.,* 778 N.W.2d 174, 178 (Iowa 2010).

The District Court held that Walnut Creek was not entitled to recover any portion of the Appraisal Award based entirely upon its assumptions about defective shingles. However, the parties were not in dispute about the portion of the Appraisal Award relating to "siding, gutters, [and] fascia." (App. 231).

The appraisal panel awarded $159,541 for damage to the siding, gutters, and fascia based upon its review of the damage from the August 8, 2012 storm. There was no evidence presented at the trial to contradict that the damage to siding, gutters, and fascia was caused by something other than the August 8, 2012 storm event. John Westlund, a homeowner at Walnut Creek, confirmed hail damage to the siding, gutters, and fascia from the August 8, 2012 storm. (App. 18). Nick Waterman, a contractor, confirmed hail damage to the siding, gutters, and fascia from the August 8, 2012 storm. (App. 38). Defense witness

Robert Danielson confirmed damage to the siding, gutters, and fascia from the August 8, 2012 storm. (App. 119–20). The District Court heard no evidence that damage to siding, gutters, and fascia were caused by anything other than the August 8, 2012 storm. There is no dispute that defective applique is wholly unrelated to damaged siding, gutters, and fascia. The District Court erred by not awarding damages for the portion of the Loss attributable to siding, gutters, and fascia.

In the event the Court upholds the District Court's decision to disregard the appraisal panel's findings, and upholds its decision to exclude coverage for hail damage, then it should remand with instructions to enter judgment on this undisputed portion of the Appraisal Award.

CONCLUSION

The District Court erred by overturning the factual findings of the appraisal panel without sufficient legal grounds. The *North Glenn* Court recognized the obvious public policy goals served by upholding the appraisal panel's authority to consider all questions incidental to the amount of loss. It would be a monumental regression in law and public policy to overturn *North Glenn* and deprive Walnut Creek and future policyholders the benefits of a final and expeditious resolution to their disputed insurance claims.

Respectfully, Walnut Creek requests that this Court uphold its decision in *North Glenn* and remand this matter to District Court with instructions to enter judgment upon the Appraisal Award.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellant's Final Brief is $0.

CERTIFICATE OF COMPLIANCE

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CERTIFCATE OF SERVICE AND FILING

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