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 REPLY BRIEF

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INTRODUCTION

Depositors' opposition to this appeal does not cite, because it cannot cite, any law in support of its position that the District Court had authority to usurp the appraisal panel's factual determination of the cause and scope of the Loss. There is over a century of case law in Iowa favoring appraisals as the preferred alternative dispute resolution mechanism for insurance disputes, and the District Court failed to apply it. As a result, the District Court rendered the appraisal meaningless and stripped the appraisal process of its essential purpose. By design, appraisal provides both insured and insurer a fair and meaningful venue to resolve a scope and cause of loss dispute outside of the court system. In order to serve its purpose, appraisal awards must be final and binding. That is precisely why appraisal panels' factual determinations are given the utmost deference by the court, akin to the factual findings of a jury.

In the present matter, this Court has been asked to correct an inapposite decision from the District Court. The District Court's decision represents a complete departure from the law set forth in *North Glenn* and the absurd outcome it produced is further evidence of *North Glenn*'s necessity. Without a binding causation finding, parties like Depositors and Walnut Creek would be stuck in a quagmire of conflicting results rather than receiving a speedy and inexpensive determination of the amount of loss. If parties could simply

re-litigate appraisal panels' damage findings, the appraisal process would complicate insurance disputes, not resolve them. Insurance companies can afford that level of uncertainty in dispute resolution—they may even benefit from it—but policyholders cannot.

The crux of the *North Glenn* holding is simple and its necessity is obvious. Appraisal panels are in the best position to determine the scope and cause of disputed losses and their decision must be final if the process is to serve its dispute resolution purpose. The District Court had no authority to usurp the appraisal panel's factual findings, and this Court must reverse its decision and remand with instructions to enter judgment on the Appraisal Award.

ARGUMENT

I. WALNUT CREEK'S APPEAL WAS TIMELY.

On a motion filed "within the time allowed for a motion for a new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted." Iowa R. Civ. P. 1.904(2). A rule 1.904 motion is required when a trial court fails to resolve an issue, claim, defense, or legal theory. *State Farm Mut. Auto Ins. Co. v. Plfibsen*, 350 N.W.2d 202, 206–07 (Iowa 1984). When the trial court does not rule on an issue, a party must file a Rule 1.904 motion. *Tetzlaff*

v. Camp, 715 N.W.2d 256, 259 (Iowa 2006). A Rule 1.904 motion tolls the deadline for appeal. *Hedlund v. State*, 875 N.W.2d 720, 725 (Iowa 2016).

Depositors unconvincingly argues that Walnut Creek's Rule 1.904 motion touched upon previously addressed issues, and therefore it was not a "proper" 1.904 motion that tolls the timeline for appeal. Naturally, a bench trial complicates this analysis because so many of the issues are inextricably woven together where there is no clear separation between fact findings from the jury and legal conclusions from the court. Nonetheless, Walnut Creek's Rule 1.904 motion properly raised several issues the District Court missed altogether and where its decision was ambiguous. Walnut Creek raised the District Court's (1) erroneous legal conclusion that the appraisal award was not binding; (2) erroneous legal conclusion that Walnut Creek bore the burden to disprove any other form of potential loss; (3) erroneous legal conclusion of the insurance policy's construction; (4) unsupported factual findings with respect to the cause of loss; and (5) unsupported factual findings with respect to the amount of loss. The District Court disagreed with Walnut Creek in part, but it also agreed in part and enlarged its holding.

While some of the issues may have been tangentially alluded to at the bench trial, virtually none of the issues were a "rehash of the legal issues" already argued. For example, the District Court's finding that prior storms

caused the Loss or that Walnut Creek had a burden to disprove those prior storms were not even positions advanced by Depositors. The District Court also invalidated the "siding, gutters, and fascia" portion of the Appraisal Award based upon an anti-concurrent causation exclusion for product defect when no evidence was presented that damage to these components was caused by anything but the August 8, 2012 storm. The Court made legal and factual errors on issues the parties did argue and on issues they did not. As a matter of judicial efficiency, Walnut Creek was required to raise them before the District Court. *Tetzlaff*, 715 N.W.2d at 259. The District Court agreed with Walnut Creek in part and enlarged the Order, but still failed to reach the correct result. It was not until the District Court ruled on the Rule 1.904 motion, however, that Walnut Creek was able to ascertain the basis for this appeal. Walnut Creek initiated the present appeal within 30 days from the District Court's Order on the Rule 1.904 motion and thus this appeal was timely.

Depositors incorrectly posits that Walnut Creek's Rule 1.904 motion should not toll the timeline for this appeal since the District Court only enlarged a portion of its decision, but that is not the applicable legal standard. Rule 1.904 is a "tool for correction of factual error or preservation of legal error." *Id.* at 726. There is no case law supporting the idea that a Rule 1.904

motion does not toll the appeal deadline if the District Court does not grant it in full. The very purpose of Rule 1.904 is judicial economy. It allows the District Court to correct errors brought to its attention without the necessity for filing an appeal every time a decision is deficient. If the District Court had enlarged its findings pursuant to Walnut Creek's 1.904 motion, then Depositors' right to appeal would not have been foreclosed because the 30-day deadline had passed when the Order was issued. That would be ridiculous. Likewise, Walnut Creek's right to appeal was not extinguished merely because the District Court only enlarged one portion of its findings.

Under Depositors' construction of the law, Walnut Creek should have initiated a Rule 1.904 motion to correct the District Court's errors while simultaneously commencing this appeal. The irrationality of that position is self-evident. The District Court had not yet addressed the errors in its findings, and yet Walnut Creek would have had to commence this appeal without even knowing which issues to appeal. It would place tremendous burden on litigants and the court system if the Court adopted this rule, and it would certainly prevent justiciable cases from being heard on the merits. *See e.g.* Iowa R. Civ. P. 1.042(1) ("all pleadings shall be determined by these rules, construed and enforced to secure a just, speedy, and inexpensive determination of all controversies *on their merits*") (emphasis added). It

would also create an administrative nightmare for the Iowa Supreme Court dealing with withdrawn appeals, amended appeals, and parties appealing partial findings while awaiting rulings on 1.904 motions.

It would be a gross injustice if Walnut Creek was barred from having this case heard on the merits because the District Court only enlarged a portion of its holding. Rule 1.904 is a procedural gatekeeping mechanism that allows trial courts to correct errors without the expense and time of a formal appeal. It is not a blunt instrument to prevent parties from having their appeals heard if the trial court upholds most, or even all, of its findings. The District Court erred in its conclusions of facts and law. Walnut Creek moved to correct its errors, but the District Court only enlarged a portion of its decision and still reached an incorrect result. This appeal is now the proper venue to address the merits of Walnut Creek's argument.

II. THE DISTRICT COURT ERRED WHEN IT HELD THE APPRAISAL AWARD WAS NOT DETERMINATIVE ON THE SCOPE AND CAUSE OF THE LOSS.

Depositors argues that the Appraisal Award is not binding because of its unilateral determination that the August 8, 2012 storm did not damage the Property. It argues that this somehow transforms the "amount of loss" question reserved for the appraisal panel into a coverage question for the court. This highlights Depositors' fundamental misunderstanding between

the concepts of causation and coverage. The *cause* of loss (i.e. a hail storm, wind, a product defect) is a factual question reserved for the appraisal panel. *North Glenn Homeowners Ass'n v. State Farm Fire and Cas. Co.*, 854 N.W.2d 67, 71 (Iowa Ct. App. 2014). Whether the cause of loss is *covered* under the applicable policy of insurance is a legal question for court. *Id.* The panel made a factual determination that the August 8, 2012 hailstorm caused the Loss and fixed the amount to repair it. It made no legal determination whether the Loss was covered under the Policy.[1]

There is simply no basis for Depositors' position that the amount of loss represents a legal coverage question. That flawed premise is directly contrary to *North Glenn* and contrary to virtually every jurisdiction that has considered the interplay between "causation" and "coverage." In *Quade v. Secura Ins.* (the basis for *North Glenn*), the Minnesota Supreme Court held that a panel's duty to determine the amount of loss "necessarily includes a determination of causation. Coverage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the Court." 814 N.W.2d 703, 706–07 (Minn. 2012); *see also St. Croix Trading Co./Direct Logistics*,

[1] An excellent example of how the delineation of duties between court and panel functions in practice is evident on the Appraisal Award itself. The panel awarded $14,689 for air conditioner units, which Depositors asserts is not covered under the Policy. The appraisal panel issued a factual finding with respect to scope and cause of loss, and the Court's role is to determine whether it is covered under the Policy.

LLC v. Regent Ins. Co., 2016 WL 2975032 at *4 (Wis. Ct. App. 2016) (holding that panels must determine the cause of loss); *Merrimack Mut. Fire Ins. Co v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001) (holding the same); *Kendall Lakes Townhomes Developers, Inc. v. Agric. Excess and Surplus Lines Ins. Co.*, 916 So.2d 12 (Fla. Ct. App. 2005) (holding the same); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. Ct. App. 2009) (holding the same); *Jefferson Ins. Co. of New York v. Superior Court of Alemeda Cty.*, 475 P.2d 880 (Cal. 1970) (holding the same); *Phil. Indem. Ins. Co. v. We Pebble Point*, 44 F. Supp. 3d 813 (S.D. Ind. 2014) (holding the same); *Auto Owners Ins. Co. v. Summit Park Townhome Ass'n*, 100 F. Supp. 3d 1099 (D. Colo. 2015) (holding the same). As one Federal Court succinctly stated:

> [I]t would be extraordinarily difficult, if not impossible for an appraiser to determine the amount of storm damage without addressing the demarcation between "storm damage" and "non-storm damage." To hold otherwise would be to say that an appraisal is never in order unless there is only one conceivable cause of damage—for example, to insist that "appraisals can never assess hail damage unless a roof is brand new."

We Pebble Point, 44. F. Supp. 3d at 818 (internal citations omitted); *see also Didimoi Prop. Holdings, N.V.*, 110 F. Supp. 2d 259, 263 (D. Del. 2000) (holding that if an appraisal panel's determination of the "amount of loss" did not include a causation determination, then "appraisal would be a useless

exercise because it would not fix the amount of loss and either party could still contest damages").

Even Depositors does not truly believe its argument that panels cannot determine the cause of loss in an appraisal. It sent its own engineer and contractor to the appraisal hearing where they argued that the cause of Loss was not hail related. (App. 203, at ¶ 22). What possible purpose could that serve if the panel was prohibited from making a causation determination? At the appraisal, the panel considered visual evidence of damage, it inspected the Property, it reviewed document submissions from the parties, it heard evidence from witnesses about various causes of the Loss, and it performed its duty as set forth in *North Glenn*. The Appraisal Award reveals that the panel did not make any legal coverage determinations. As required by law, the panel rendered *factual* findings on the cause and scope of damages from the Loss and those findings are binding on the parties and the District Court.

Finally, Depositors states that an appraisal is only binding if the panel members provide testimony in court.[2] (Appellee Br. at p. 28). There is no

[2] Depositors also makes a desperate attempt to state there was sufficient panel malfeasance to overturn the appraisal award because Mr. Roth, the umpire, did not bring an engineer with him to the appraisal. This allegation is without merit and Depositors did not raise it before the District Court. The Policy's appraisal clause calls for three panel members, not three panel members plus each panel member's own experts. Neither Depositors nor its appraiser provided any evidence this was agreed upon, and neither objected when Mr. Roth did not bring an engineer to the appraisal. Depositors also did not seek to have the award vacated on this basis. Furthermore, the parties retained and presented their own experts to

basis in law for this contention, and such a rule would render appraisals unenforceable without litigation and therefore meaningless. Even if this rule existed, every witness at the appraisal for both parties testified at trial that they provided testimony about the scope and cause of Loss to the panel. (App. 40, 71, 140–41, 205). All witnesses gave similar trial testimony that there was "a lot of discussion going on back and forth [at the appraisal] about what was consistent with hail and what wasn't." (App. 40, at ¶¶ 22–24); *see also* (App. 141, at ¶¶ 19-25) (Robert Danielson testified that he presented evidence to the panel that damage was unrelated to hail). Depositors' appraiser confirmed the same and testified at trial that the appraisal hearing consisted of "a number of persons presenting on both sides their opinions about the cause of loss and damage." (App. 203, at ¶ 22).

The law is well established in Iowa that appraisal panels have the authority and duty to determine the factual questions of scope and cause of loss while reserving all legal coverage questions for the court. If the court could merely usurp the panel's findings whenever it disagrees with the results, then the appraisal process is rendered utterly meaningless and futile. Here,

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the panel. The record is clear that these experts provided testimony to the panel, including Depositors' own engineer. Depositors' appraiser even testified at trial that Mr. Roth was "fair and impartial and disinterested." (App. 203, at ¶ 18). There was no finding of any gross malfeasance that supports vacating the Appraisal Award, nor could there be based upon the record. *Central Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991).

the panel made factual findings regarding the scope and cause of the Loss. The panel did not find that prior storms or portions of defective applique caused the Loss. The District Court should have deferred to the panel's factual findings and made the single legal determination before it—that damage from the August 8, 2012 storm constituted a covered loss under the Policy.

Appraisal is not a meaningless exhibition or mock trial. 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.

III. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE POLICY.

Depositors did not argue the Appraisal Award should be vacated, nor did the District Court find that the Appraisal Award should be vacated. Therefore, the District Court's decision to construe exclusions under the Policy was improper altogether because the August 8, 2012 storm is a covered loss under the Policy. There are no facts on the Appraisal Award that establish any concurrent causes of the Loss. While the panel did not decide any

coverage issues, its factual findings about the single cause of Loss eliminated the possibility of construing other "excluded causes" under the Policy because the only cause of loss is the August 8, 2012 storm. *See e.g. Creekwood Rental Townhomes, LLC v. Kiln Underwriting, LLC*. 11 F.Supp.3d 909, 927 (D. Minn. 2015) (applying the *Quade* standard to a virtually identical appraisal award, the court found 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 panel's award").

Assuming *arguendo* that Depositors is entitled to re-litigate damages already determined by the appraisal panel, the Policy contains "anti-concurrent" causation clauses that exclude some covered losses in certain situations. Depositors incorrectly states that the law in Iowa is that "no insurance coverage exists if an insurance policy contains an anti-concurrent-cause provision, there are multiple causes for damage to an insured property, and at least one of those causes is in an excluded loss." (Appellee Br. at p. 20). No Iowa case has ever taken such a broad exclusionary position. Instead, Iowa courts have consistently held that "insurance coverage is a contractual matter and is ultimately based on policy provision[s]. *Jones v. State Farm Mut. Ins. Co.*, 760 N.W.2d 186, 188 (Iowa 2008). The burden of establishing

such exclusions rests upon the insurance company. *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 598 (Iowa 1993).

A. The August 8, 2012 hail and windstorm is a covered loss.

The first step in a coverage analysis is merely to determine whether there was a covered loss. The Policy provides coverage for many types of losses, including those from wind and hail. (App. 252). Even if the Appraisal Award is not binding, the panel still found Walnut Creek suffered damage from the August 8, 2012 storm. Additionally, both parties and **all** witnesses agreed this storm damaged the Property. (App. 249). The only dispute was whether it damaged the roofs. Walnut Creek's contractor, a seasoned insurance adjuster, a Walnut Creek homeowner, and the appraisal panel all confirmed damage to the roofs. Depositors' contractor, Marcus Harbert, also confirmed damage to the roofs, but only inspected three buildings and felt that "hail impacts were [not] significant enough to . . . warrant calling for an insurance claim."[3] (App. 175, at ¶¶ 16–18). Just minutes later, he testified that he found hail damage from the storm during the appraisal, including "two to possibly three hail hits per square" on the roofs. (App. 180). On 36 roofs

[3] Depositors construes this statement to mean there was no hail damage on the roofs. The statement in itself is an explicit recognition that there was hail damage on the roofs.

with an average of 84 squares per roof, that is a total of roughly **6,000-9,000** hail hits on the roofs.

Out of the three panel members and of the nine witnesses called at trial, only two people alleged that the roofs did not sustain hail damage from the August 8, 2012 storm: Richard Herzog and Robert Danielson who both work for Haag Engineering and were retained by Depositors. The Haag engineers found hail damage to the Property from the August 8, 2012 storm, but contend that the roofs miraculously escaped any damage. (App. 240). The reason the Haag engineers were able to make such a contradictory finding without impeaching themselves (and most likely the reason the panel's firsthand inspection of the property reached a different conclusion) is that Haag replaced the Policy's expansive definition of "damage" with their own limited definition.

The Haag engineers define "damage" limited only to "functional damage" for physical fractures, rupture, or punctures of shingles, but not cosmetic damage or granular loss. (App. 245). The Policy, however, has a much more expansive definition of damage, providing coverage for any and all "direct physical loss or damage to Covered Property." (App. 258); *see North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987) (if a word is susceptible to different interpretations, "the interpretation favoring the

insured is adopted"); *see also Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015) (construing the ambiguous term "direct physical loss or damage" in favor of the insured to find that hail damage of any nature at all, whether non-functional or cosmetic damage, is covered under a policy of insurance). The Policy does not adopt Haag's limited definition of damage, and Mr. Danielson admitted at trial that roof "damage" includes a broader range of damage than the Haag engineers applied in their report. (App. 147) (Danielson testifies that even "cosmetic damage" constitutes "physical damage").

In short, the Association met its burden to prove a covered loss occurred on August 8, 2012, and that was not in dispute despite the Court's incorrect finding otherwise. As to the roofs, only the Haag engineers testified to a lack of hail damage, but they did so by applying a legally incorrect definition of "damage." Thus, the burden shifts to Depositors to prove an exclusion applies. The District Court incorrectly found that the covered Loss was excluded based upon either (1) an alternate excluded storm theory; or (2) based upon a misconstruction of Policy exclusions for anti-concurrent losses.

B. Depositors did not prove alternate excluded storms caused the roof damage.

Not a single witness testified that roof damage at the Property occurred in a prior storm, and the panel did not find that a prior storm caused the roof

damage. The District Court's conclusion that Depositors met its burden to prove a separate excluded weather event caused damage to the roofs is wholly unsupported by the record.

C. Depositors did not prove that defective applique caused or contributed to the Loss.

The Policy only excludes damage for "loss or damage **caused directly or indirectly** by . . ." a long list of enumerated causes of loss. (App. 275) (emphasis added). The District Court found that defective shingle applique caused the Loss despite the undisputed fact that not a single witness alleged that the defective shingle applique *directly or indirectly caused* the Loss. Because there was no evidence presented that the shingle applique directly or indirectly caused the Loss,[4] the District Court was wrong to look to the Policy exclusions at all. Even if there was evidence supporting the notion that defective applique contributed to the Loss, the Policy exclusions relied upon by the District Court and Depositors still do not apply.

The first exclusion relied upon by the District Court is the "Other Type of Loss" exclusion for wear and tear, which states:

> If an excluded cause of loss that is listed [under the Other Types of Loss Section] results in a "specified cause of loss", "accident"

[4] The manufacturer itself even states that "for the applique-style shingle . . . cracks that are restricted to the unreinforced decorative applique . . . **do not** compromise the long-term performance of the roof system." (App. 239).

> or building glass breakage, *we will pay for the loss or damage caused by that "specified cause of loss."*

(App. 279) (emphasis added). The Policy defines "specified cause of loss" as "windstorm or hail." (App. 295). Thus, this exclusion does not apply because damage from hail and wind is an exception to the exclusion. Likewise, the "Negligent Work" exclusion also does not apply. It states:

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

Id. (App. 279) (emphasis added). Under the plain reading of either exclusion, Walnut Creek is entitled to coverage because hail and wind is an exception to any possible exclusion.

Depositors looks to the *Amish Connection* case in support of its theory that there are no exceptions to any anti-concurrent causation clauses whatsoever in Iowa. (Appellant Br. at p. 20). Depositors' reliance on *Amish Connection* is misplaced. *Amish Connection* does not stand for such a far-reaching proposition. Instead, it recites the well-known principle that Courts must enforce insurance policies as written. *Amish Connection, Inc. v. State Farm Fire and Cas. Co.*, 861 N.W.2d 230, 241 (Iowa 2015). The central issue in that case was whether there was an exception in the applicable policy's anti-concurrent causation exclusion for "damage caused by rain"

when rainwater in a burst drainpipe damaged an office building. *Id.* The Court did not find that the mere presence of an excluded loss precluded recovery automatically. It looked to the policy and found that the "water system" exception to the policy exclusion against rainwater did not apply and thus there was no coverage. *Id.* at 240. That issue is not present here, nor are the issues here nearly as complex. Unlike the *Amish Connection* case, hail and wind are clear exceptions to any applicable Policy exclusions.

In sum, it is unnecessary to engage in this analysis based upon the Appraisal Award. The August 8, 2012 storm is a covered cause of loss and Walnut Creek is entitled to recover for the damage it caused. Even if the Court discards the Appraisal Award entirely, Walnut Creek is still entitled to recover for damages from the August 8, 2012 storm pursuant to the plain language of the Policy.

IV. THE ASSOCIATION IS ENTITLED TO REPLACEMENT COST FOR SIDING, GUTTERS, AND FASCIA.

Depositors argues that Walnut Creek is not entitled to damages for siding, gutters, and fascia because Walnut Creek did not seek to enlarge the District Court's Order on this issue. (Appellee Br. at p. 29). Walnut Creek moved the District Court to enlarge its judgment to include the total amount of the Appraisal Award which includes an entry awarding damages for the siding, gutters, and fascia. This issue was properly preserved for appeal.

CONCLUSION

The District Court erred when it replaced the factual findings of the appraisal panel with its own factual findings. The record amply supports that the panel considered various causes of loss. After receiving that evidence, the panel determined that the August 8, 2012 storm caused the Loss. For the appraisal process in Iowa to have any meaning, the panel's decision must be final and conclusive absent some extraordinary malfeasance which was not present here. 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.

COST CERTIFICATE

We certify that the cost of printing Appellant's Final Reply Brief is $0 due to electronic filing.

CERTIFICATE OF COMPLIANCE

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CERTIFCATE OF SERVICE AND FILING

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