IN THE SUPREME COURT OF IOWA

No. 16-0121

WALNUT CREEK TOWNHOMES ASSOCIATION

Plaintiff-Appellant,

v.

DEPOSITORS INSURANCE COMPANY,

Defendant-Appellee.

PLAINTIFF-APPELLANT'S RESISTANCE TO DEFENDANT-APPELLEE'S APPLICATION FOR FURTHER REVIEW OF IOWA COURT OF APPEALS DECISION DATED

July 19, 2017

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STATEMENT OPPOSING FURTHER REVIEW

The Supreme Court should not grant further review under the circumstances of this case. "Review by the Supreme Court is not a matter of right, but of judicial discretion. An application for review will **not** be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b) (emphasis added). Of the four factors which may compel the Supreme Court to grant review, none are present in this case because the question posed for review has been answered repeatedly and uniformly by both levels of the Iowa appellate courts. *Id.* at (b)(1)–(4).

Depositors' Insurance Company ("Depositors") petition asks the Supreme Court to review whether the Court of Appeals "incorrectly determined the district court did not have authority to decide coverage matters." Depositors' application for further review misconstrues the issues in the underlying action in an attempt to manufacture a basis for review. The Court of Appeals did not issue such a holding and neither party argued the District Court did not have authority to decide coverage matters. In fact, the Court of Appeals specifically reviewed the District Court's coverage findings and upheld a part of its coverage determinations.[1]

[1] The Court of Appeals reversed a portion of the District Court's coverage determinations, not based upon a finding that the District Court lacked authority to render such determinations, but rather that it **expressly had the**

Like so many cases before it, the Court of Appeals correctly held that appraisal panels must make factual determinations incidental to determining the amount of loss and the court must not overturn those determinations unless the panel commits some extraordinary misconduct. The court's role is to apply the law to those factual findings, including whether the loss is covered. Under the change in law Depositors seeks, appraisal would become an exercise in futility because anytime a party receives an unfavorable appraisal result, it could simply ignore it and re-try the case entirely before a district court. That result is so absurd it hardly merits discussion, and surely does not require Supreme Court review.

The Supreme Court's role is not to provide litigants additional opportunity to appeal settled case law just because the application of the law does not fall in their favor. Its role is to decide important unresolved questions of statewide concern. None are present here and this request for review must be denied.

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authority to make coverage determinations and misconstrued the policy. *See* Order at pp. 12–18.

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This case arises from a disputed insurance claim between Plaintiff/Appellant Walnut Creek Townhome Association ("Walnut Creek") and Defendant/Appellee Depositors Insurance Company ("Depositors"). The parties resolved their dispute in an insurance appraisal, leaving all legal issues as to whether the loss was covered to the District Court. The panel found that Walnut Creek's property sustained roughly $1.4 million in damage from a 2012 hail and wind storm.

Subsequent to the insurance appraisal, the District Court held a bench trial where it reconsidered the panel's factual findings. The District Court overstepped its authority and overturned and replaced the appraisal panel's factual findings with its own, even though Depositors did not allege, nor did the District Court find, any fraud or misfeasance on the part of the panel. Walnut Creek appealed and the Court of Appeals correctly held that 1) the appraisal panel's factual findings are binding in the absence of fraud or misfeasance; 2) the appraisal panel's role is to determine fact questions incidental to the amount of loss; and 3) all legal issues of coverage or enforceability of the award are reserved for the Court.

This has been the standard for over a century in Iowa and it is consistent with the Court of Appeals' recent decisions in *North Glenn I and II*. This

issue does not require Supreme Court review merely because insurance carriers continue to use the appellate system in an attempt to overturn every appraisal award that does not go their way.

STATEMENT OF FACTS

Depositors' Statement of Facts as to the timeline of events is generally accurate, but it omits certain important details. On August 8, 2012, Walnut Creek—a residential common interest community comprised of 36 buildings—sustained damage in a wind and hail storm. (App. 7). Walnut Creek submitted a claim to Depositors for the loss, but the parties were unable to agree upon the amount of loss. (App. 231). Depositors alleged the loss was limited to some soft metals on buildings, and Walnut Creek alleged the damage was more widespread. Unable to resolve the dispute through the adjustment process, Walnut Creek exercised its right under the Policy to an insurance appraisal to resolve the disputed amount of loss. *Id.*

At the appraisal, the appraisal 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 general contractor were present and gave

testimony on behalf of Depositors.[2] (App. 140–41, 184, 204). Both parties gave competing testimony over how much of the loss was attributable to 2012 hail damage. (App. 40, 71, 140–41, 184–85). After hearing evidence from both parties and their experts regarding the scope and cause of the loss, and reviewing the loss in person at Walnut Creek, 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).

The panel made no finding or determination that any amount of the award was owed by Depositors. Depositors agreed that the 2012 storm was a covered loss, but chose to ignore the appraisal panel's findings regarding damage from that event. Instead, Depositors argued that panel's findings were irrelevant and the District Court allowed the entire matter to be "re-tried" at a bench trial. At the trial, all of the same experts who gave their opinions at the appraisal hearing provided virtually the same testimony before the District

[2] Even Depositors knew the panel must consider causation when resolving the disputed amount of loss. Depositors produced witnesses at the appraisal to testify that there was not damage from the 2012 hail storm in question. (App. 40, 71, 140–41, 184–85). If Depositors' position is that panels cannot make determinations about what caused the loss, then it defies all reason that Depositors would pay its experts to argue the cause of the loss to the panel. This highlights the frivolity of this argument. Depositors wants it both ways. It wants to argue and prevail in appraisal, but if it does not, then it wants the court to view appraisal as a meaningless exhibition so it can re-try all the same facts in front of a court in the hopes the court will reach a different conclusion than the panel.

Court; however, the District Court nullified and replaced the panel's factual findings with that of its own. (App. 40, 71, 140–41, 184, 343–52).

The underlying appeal followed and the Court of Appeals held that the District Court erred by replacing the appraisal panel's factual findings with its own.

ARGUMENT

I. THERE IS NO BASIS FOR DEPOSITORS' PETITION FOR FURTHER REVIEW.

"Review by the Supreme Court is not a matter of right, but of judicial discretion. An application for review will **not** be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b) (emphasis added). Of the four factors which may compel the Supreme Court to grant review, none are present in this case because the question posed for review has been answered repeatedly and uniformly by both levels of the Iowa appellate courts. *Id.* at (b)(1)–(4).

Depositors' position illustrates a fundamental flaw in the basic understanding of the difference between legal coverage determinations and factual causation determinations. When resolving the disputed amount of loss, the appraisal panel must necessarily consider the *cause* of the loss when arriving at its award. Once the award is issued, the legal questions of whether any part of that loss is *covered* by the applicable policy is a legal question for

the court. That has long been the rule in Iowa, and the Court of Appeals correctly applied it in this case.

a. The Court of Appeals' decision is consistent with a long line of Iowa case law and does not require further review.

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 (1897). The appraisal process is even codified in Iowa's Standard Fire Policy. *See* Iowa Code § 515.109(6) (2016). 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 Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991). 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 (1942) (internal citations omitted).

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 (emphasis added). 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. *Id.* "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).

Depositors did not argue at the District Court that the panel committed mistake, fraud, or malfeasance. The District Court made no such finding. The Court of Appeals noted there was nothing on the record to support such a finding even if Depositors had presented the argument. There being no basis to overturn the award, the Court of Appeals correctly held the award must not be vacated. *Id.; Central Life*, 466 N.W.2d at 260 (Iowa 1991).

The *Walnut Creek* Court did not announce a new rule of law, but rather confirmed the well-established rule regarding the separation of duties between appraisal panels and the court. This distinction is rooted in over 100 years of legal history. In *George Dee & Sons*, a policyholder and insurance carrier disagreed over whether certain damaged property was covered under the applicable policy. *George Dee & Sons Co. v. Key Fire Ins. Co.*, 104 Iowa 167, 168 73 N.W. 594, 595 (1897). The Iowa Supreme Court held that the policyholder had a right to present all damaged property to the panel for determination, leaving "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.* Every decision since this case has followed the simple rule that panels have a duty to answer factual questions incidental to the amount of loss while all legal issues of coverage are reserved for the courts.

Recently, the Iowa Court of Appeals reaffirmed the roles of an appraisal panel and the court in a disputed insurance claim:

> 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 I, 854 N.W.2d at 71 (emphasis added). Naturally, an appraiser must make some finding of whether damage is caused by hail or something else when resolving the disputed "amount of loss." *See e.g. Phil. Indem. Ins. Co. v. We Pebble Point*, 44 F. Supp. 3d 813 (S.D. Ind. 2014) ("[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'").

The Iowa Court of Appeals spoke on this issue again in *North Glenn II*. *North Glenn Homeowners Ass'n v. State Farm Fire and Cas. Co.*, __ N.W.2d __, No. 16-0912 (Iowa Ct. App. July 6, 2017) (hereinafter "*North Glenn II*"). After the appraisal award was issued in *North Glenn I*, State Farm appealed and re-challenged the appraisal panel's authority to make findings on issues related to what caused the loss. Again, the Court of Appeals found that issues of causation were within the purview of the appraisal panel and the insurance carrier was not entitled to re-litigate those issues before the court (absent a finding of some type of panel misconduct). *Id.* at p. 10.

Yet again, in this case an insurance carrier appealed the same issue, and the *Walnut Creek* Court reached the exact same conclusion. The only substantive difference between this case and *North Glenn* was that the District Court in *North Glenn I* and *II* correctly delineated the role between court and appraisal panel while the District Court here allowed the factual findings of the panel to be re-tried at a bench trial. How the cases arrived at the Court of Appeals is irrelevant, because its decisions on this subject have been uniform and consistent with *George Dee*, *Central Life*, *North Glenn I*, and *North Glenn II*.

There is an important theme that runs through each of these cases. In each one, the Court of Appeals and Supreme Court enunciate the same

longstanding principle: Appraisal panels make factual determinations on issues of value, scope, and cause of loss and the court must not overturn those determinations unless the panel commits some extraordinary misconduct. The Court's role is to apply the law to those factual findings, including whether the loss is covered. This model is virtually identical to judge and jury. Any other construction of the law would render appraisal futile because damages could always be re-litigated in court if the panel's findings were not binding on the parties.

Public policy strongly favors non-judicial dispute resolution. The appraisal process has served that policy goal for over a century and the law surrounding the procedure is well-established. There is no basis for the Supreme Court to review this longstanding settled legal precedent just because Depositors was wrong about the amount of damage at Walnut Creek.

b. Depositors' position demonstrates a fundamental misunderstanding between coverage and causation.

In the world of property insurance, the issues of coverage and causation are intertwined, but they are not indivisible. Depositors' petition for review complains that when a panel considers competing viewpoints over what caused a loss, then it impermissibly makes a coverage determination. Nothing could be further from the truth. The very example Depositors' sets forth in support of this argument regarding the award for damaged air conditioning

units actually defeats it. This misunderstanding and misapplication of the law serves to highlight that further review is not merited in this instance.

The appraisal award sets forth the amount of damage the panel found from the 2012 hailstorm. (App. 231). In the appraisal award, the panel made separate line item findings for damages as follows: roof, "soft metals" (siding, gutters, and fascia), and air conditioning units. *Id.* Depositors' cites the panel's award for damage to air conditioning units as an example of the injustice of the appraisal process because "[Depositors] never agreed to be bound by the appraisal award for an uncovered item." *See* Petition for Review, p. 17 n. 4 ("[a]n excellent example is the air condition units. The Appraisal award provided an amount **owed** by Depositors for those units. However, those units were not owned by the Association and therefore not covered under the policy. Thus, the appraisal award is inherently flawed") (emphasis added).

The appraisal award does not establish liability under the policy. It does not and cannot establish that Depositors **owes** anything. It merely establishes the amount of loss from the 2012 hailstorm, but does not address whether that is covered under the policy. Depositors conveniently omits that the District Court correctly decided this issue in its favor. The District Court found that "because the air conditioning units were not the Association's property, the

Policy does not cover them." (App. 350). Thus, the appraisal panel determined the 2012 storm *caused* damaged to the air conditioner units, and the District Court correctly made the legal determination that this part of the loss was not *covered*. Because the appraisal panel did not and could not determine Depositors' liability under the policy, Depositors avoids the exact purported injustice it wrongly assumes to exist.

In sum, insurance carriers' stubborn persistence in appealing the same issue over and over again does not make this a unique issue that requires Supreme Court review. The Supreme Court and Court of Appeals have answered this question and consistently upheld the same standard. This petition for further review must be denied for the same reasons the Supreme Court denied review in *North Glenn I*.

II. DEPOSITORS DID NOT PRESERVE ANY CONSTITUTIONAL ISSUES FOR APPEAL.

For the first time in the history of this case, Depositors asks the Supreme Court to consider whether the appraisal provision contained in the very policy that Depositors itself drafted violates Depositors' due process rights. This argument is waived because it was never presented before the District Court or the Court of Appeals. Furthermore, it does not merit review even if the issue was preserved because the appraisal process does not violate due process rights.

A Supreme Court is a "court of review, not of first view." *Plowman v. Fort Madison Comm. Hosp.*, 896 N.W.2d 393, 414 (Iowa 2017) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). The appellate courts will not decide an issue unless it was presented to the district court. *In re Detention of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). "In order for error to be preserved, the issue must be both raised and decided by the district court." *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 883 (Iowa 2014).

In addition to improperly raising this issue for the first time before the Supreme Court, there are no due process violations in the appraisal process. "Due process has two fundamental requirements: notice and opportunity to be heard." *In re Estate of Adams*, 599 N.W.2d 707, 710 (Iowa 1999). Depositors was on notice of the appraisal, it presented witnesses and evidence to the panel, and its own appraiser admits that the process was fair. (App. 203 at ¶ 18). It was then entitled to have the entire process reviewed by the District Court, including having its liability judicially determined. *Central Life*, 466 N.W.2d at 260 (Iowa 1991). Even the United States Supreme Court has spoken *directly* on this issue and held contractual appraisal provisions do not constitute a denial of due process. *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159 (1931).

Despite having numerous opportunities to do so, Depositors has never raised this issue and it may not be presented for the first time to the Supreme Court. Even it had been properly preserved for appeal, the notion that the appraisal process Depositors itself drafted into its own policy deprives it of due process is ridiculous. Depositors was on notice of the appraisal, it attended the appraisal and offered witnesses and evidence, its liability under the policy was subject to judicial determination, and the award itself was subject to judicial review. To the extent due process concerns are even implicated, there is no question Depositors had notice and opportunity to be heard.

There is no appealable constitutional question for the Supreme Court to review, but if there was, that issue is already well settled and this petition for further review must be denied.

CONCLUSION

The Supreme Court's role is not to revisit settled areas of law merely because insurance carriers desire a system that makes it more difficult for policyholders to challenge an undervalued claim. The fact that insurance carriers repeatedly challenge the validity of the appraisal process in the minority of claims where they do not prevail at appraisal does not mean there is a new question of legal significance. This is an old question that has been

correctly answered the same way time and time again. The Supreme Court was right to deny review in *North Glenn I*, it is right to deny review in this case, and it will continue to be right when denying subsequent attempts to challenge this settled and well-reasoned area of law.

Date: August 17, 2017

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CERTIFCATE OF SERVICE AND FILING

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