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STATE OF MINNESOTA
IN COURT OF APPEALS

David and Melynda Quade,

Appellants,

v.

Secura Insurance,

Respondent.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES*

I. Whether the District Court erred by ordering the parties to appraise an insurance coverage dispute.

Authority:

- *Johnson v. Mutual Service Cas. Ins. Co*, 732 N.W.2d 340 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007)
- *Mork v. Eureka-Security Fire & Marine Ins. Co.,* 230 Minn. 382, 384, 42 N.W.2d 33 (1950)
- *Glidden Co. v. Retail Hardware Mutual Fire Ins. Co. of Minn.*, 233 N.W. 310 (Minn. 1930)

II. Whether the District Court erred by dismissing the Complaint with prejudice.

Authority:

- *Unbank Co., Inc. v. Merwin Drug Co., Inc.*, 677 N.W.2d 105 (Minn. Ct. App. 2004)
- *SkyTech, Inc. v. Scientific Learning Corp.*, 2006 WL 3490908 (Minn. Ct. App. Dec. 5, 2006)
- Minn. R. Civ. P. 41.02(c)

III. Whether the District Court erred by concluding that an appraisal would be governed by the Uniform Arbitration Act.

Authority:

- *Johnson v. Mutual Service Casualty Ins. Co.*, 732 N.W.2d 340 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007)

STATEMENT OF THE CASE

Appellants commenced a breach of contract action against Respondent on June 26, 2009. (A. App. 12.) On November 2, 2009, Respondent filed a motion seeking to

* All issues were raised in the trial court in connection with the briefing of Respondent's motion for summary judgment.

dismiss the Complaint under Minn. R. Civ. P. 56, and seeking an order compelling Appellants to participate in an appraisal proceeding. The motion was heard by the Hon. Martha Simonett on December 3, 2009, and the district court issued its order dismissing the Complaint "with prejudice" on February 22, 2010. (A. App. 2.) Judgment was entered on February 23, 2010. (A. App. 1.) Appellants timely filed their notice of appeal on April 20, 2010. (A. App. 125.)

Prior to the dismissal, on November 3, 2009, Respondent filed a petition for writ of prohibition. *In re Secura Insurance*, No. A09-2002. On December 15, 2009, this Court issued an Order denying the petition. (A. App. 9.)

STATEMENT OF THE FACTS

A. A Storm Causes Extensive Damage to Appellants' Farm.

On July 10, 2008, a major storm hit the farm owned by Appellants David and Melynda Quade in Hastings, Minnesota. (A. App. 12-13.) The storm's high winds were strong enough to push the feed silo five feet off its base and push another structure four inches off its foundation. (A. App. 53.) The winds tore the sliding door off the cow barn and tore off a large section off the feeding structure and other structures. (A. App. 49-50.) The winds were strong enough to overturn loaded semitrailers that were parked on the property, and completely leveled buildings on a neighbor's farm. (A. App. 42, 51-52.)

In addition to other damage, the high winds caused extensive damage to metal roofs on three of the structures on the farm.[1] (A. App. 13.) On the horse barn, the winds lifted and pushed the roof, tore the roof off of its fasteners, pulled purlins off of the trusses to which they were attached, broke A-frame truss supports, damaged other trusses, and caused the metal roof itself to be significantly deformed. (*Id.*, ¶ 8; A. App. 43, 45, 46, 48.) On the warehouse building on the farm, the high winds separated the seams of the roof, separated the roof from its fasteners, deformed the roof, and allowed substantial water intrusion. (A. App. 13, ¶8, A. App. 44, 47.) Similar damage and deformation was caused to the roof of the cow barn. (*Id.*)

B. <u>The Insurance Policy</u>.

Appellants were insured under a "Special Farm Owners Protector Policy" that they purchased from Respondent Secura Insurance. (A. App. 64.) "Coverage D" of the policy insures "farm barns, buildings and structures" against direct physical loss caused by "windstorm or hail" among other listed perils. (A. App. 105-06.) The policy also includes certain coverage exclusions. The "maintenance" exclusion at issue in this case provides: "We do not insure for loss to property caused by . . . faulty, inadequate or defective . . . maintenance of part or all of any property . . .." (A. App. 112-13.)

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[1] *See* A. App. 43 (showing the holes in one of the roofs created by the roof fasteners when the wind lifted the roof up); A. App. 44 (showing deformation of the roof line); A. App. 45 (showing that the purlins supporting the roof were ripped away from the roof joists); A. App. 46 (showing that the force of the winds broke interior roof supports); A. App. 47 (showing deformation in the seams of the roof caused by the wind); A. App. 48 (showing further deformation in one of the roofs). Secura's assertion that the winds caused no damage whatsoever to the roofs of the buildings is completely unsupported.

C. Secura Denies Coverage for Damage to the Roofs.

Appellants submitted an insurance claim for the roof damage.[2] They included in their claim repair estimates for the three roofs that were damaged by the storm. (A. App. 58-63.) Secura paid for part of the damage to other structures on the farm, but refused to pay *anything* for the damage that the storm caused to the roofs of the three buildings. In its denial letter dated May 11, 2009, Secura stated that the claim for roof damage was not covered because of an exclusion in the policy:

> Your farm policy excludes "loss to property caused by any of the following . . . (4) Maintenance". This is stated in your policy on page 14 (copy enclosed). I am sorry but we are unable to honor your claim for damage to the roof of the buildings.

(A. App. 57.)

This exclusion was the *sole* basis for Secura's denial of the claim. Secura did not dispute that the roofs were, in fact, damaged. Its denial letter admits the existence of damage, but contends the damage allegedly was caused by an excluded peril. Importantly, Secura also never challenged, rejected or disagreed with Appellants' estimates for the *cost* of repairing the three roofs. Secura never said that the repair estimates were inaccurate, never said they were unreasonable, and never said the estimates were anything other than the actual cost to repair the roofs. Significantly, Secura never offered its own, different estimate for the cost of repairing the roofs.

Simply stated, Secura has never disagreed with Appellants' valuation of the damage -- the amount of money it will take to repair the roofs. Instead, Secura's sole

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[2] Appellants also submitted claims for damage to other structures. Those claims are not at issue in this case.

reason for refusing to pay anything for the roof damage is that the loss is allegedly not covered by the insurance policy.

After denying the claim based on an exclusion in the policy, and *not* based on any difference of opinion about the amount of loss, Secura stated that if Appellants disagreed with its coverage denial, they could request an appraisal pursuant to the appraisal clause in the policy. (A. App. 39, 37.) The appraisal clause provides:

> **Appraisal.** If you and we fail to agree on *the amount* of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you and we may request that the choice be made by a judge of a court of record in the state where the residence premises is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss. Each party will:
>
> a. pay its own appraiser; and
>
> b. bear the other expense of the appraisal and umpire equally.

(A. App. 115.) (Emphasis added.) However, because no disagreement existed as to the "amount" of loss to the roofs, and instead, the only disagreement was whether the "maintenance" exclusion in the policy applied to the admitted damage to the roofs, there was nothing to appraise, so Appellants commenced the present breach of contract action. (A. App. 12.)

D. <u>This Court Agrees That No Dispute Exists to Appraise</u>.

A discovery dispute thereafter arose in the district court proceedings. When Secura served its Answer, it raised various defenses, including coverage defenses. For

example, Secura asserted in its Answer that Appellants' claim is "excluded" under the terms of Secura's policy. (A. App. 18, ¶18.) Secura asserted a total of 13 affirmative defenses.[3] (A. App. 17-18.) To explore the purported bases for Secura's coverage defenses, Appellants served requests for production of documents and interrogatories. (A. App. 23-34.) The discovery specifically requested the factual basis for the coverage defense that Secura relied upon in denying Appellants' claim. (A. App. 33, Interrogatory No. 22.)

Secura refused to respond to discovery about its coverage defenses (or anything else), so Appellants filed a motion to compel discovery which was heard by the Dakota County District Court, Hon. Michael J. Mayer on October 12, 2009. Secura argued in opposition to the motion that the appraisal clause in the policy divested the district court of jurisdiction. In an order dated October 13, 2009, the district court ordered Secura to answer the discovery and expressly rejected Secura's argument that its coverage defense could be resolved by appraisers instead of by the court. (A. App. 6.) The court found that "Defendant has clearly asserted exclusions to the insurance policy as a defense against the Plaintiffs' claim. This necessitates the interpretation of the insurance policy contract, which is the province of the Court not the appraisal process." (A. App. 7.) The court directed Secura to answer the discovery requests.

Secura failed to comply with the district court's order. On November 3, 2009, after it was already in violation of the order, Secura filed a petition for a writ of

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[3] Secura has not expressly waived any of its defenses in this case, and continues to assert the applicability of policy exclusions and other defenses.

prohibition in the Court of Appeals, making the exact same argument it made, and lost, in the district court -- that the appraisal clause in the policy divested the district court of jurisdiction to hear Appellants' breach of contract claim. As the district court had done, this Court rejected Secura's argument:

> But petitioner [Secura] denied coverage on respondents' claim based on an exclusion in the policy and has not genuinely challenged the amount of the claimed loss. "It is well settled that appraisal does not determine liability under a policy. Liability depends on a judicial determination." *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007) *rev. denied* (Minn. Aug. 21, 2007). The district court had jurisdiction over the lawsuit.

In re Secura Insurance, No. A09-2002 (Minn. Ct. App. Dec. 15, 2009). (A. App. 10.)

E. The District Court Dismisses the Action and Orders the Parties to Appraise the Coverage Dispute.

While its petition for a writ of prohibition was pending in this Court, Secura filed a motion in the district court seeking summary judgment dismissing the Complaint. The motion was heard by the Hon. Martha Simonett. The district court granted the motion and dismissed the Complaint "with prejudice." (A. App. 2.) This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING THE PARTIES TO APPRAISE A COVERAGE DISPUTE.

A. This Appeal Is Reviewable Under a *De Novo* Standard of Review.

Respondent brought its motion as a summary judgment motion under Minn. R. Civ. P. 56. Review of a summary judgment under Rule 56 is *de novo*. The role of the appellate court is to "review two determinations: whether a genuine issue of material fact

exists, and whether an error in the application of the law occurred." *Fairview Hosp. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995).

Here, the facts concerning the cause of the damage to the roofs are highly disputed. Secura contends that the roofs were damaged by lack of maintenance, and Appellants contend the roofs were damaged by the storm. The district court held that the disputed causation issue must be resolved in an appraisal process. Because that decision was based on the court's interpretation of the policy, it presents a question of law for this Court to review *de novo*. *Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud*, 649 N.W.2d 867, 871 (Minn. Ct. App. 2002) (citing *Nathe Bros., Inc. v. American Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000)).

B. The Issue of Whether an Insurer Is Liable for a Loss Must Be Resolved by the Court, Not by Appraisers.

An appraisal is "a valuation or an estimation of value of property by disinterested persons of suitable qualifications." BLACK'S LAW DICTIONARY 92 (5th Ed.). It is a "determination of what constitutes a fair price, valuation or estimation of worth." Law and Starinovich, *What is it Worth? A Critical Analysis of Insurance Appraisal*, 13:2 CONN. INS. LAW J. 291 (2007). An appraisal is *not* designed for or suitable for resolving issues of liability, such as whether a particular loss falls within the coverage of an insurance policy. Instead:

> [a]ppraisal is designed to provide an inexpensive determination of the amount of loss *where coverage is conceded*. Allowing, or even requiring, parties to appraise a loss that involves other issues, such as *liability or causation,* can create multiple proceedings and inefficiencies.

Id. at 296-97. (Emphasis added.) Language in an appraisal clause authorizing appraisers to determine the "amount of loss" is construed by courts "as a limitation on the appraiser's authority which precludes her from resolving issues of law such as those pertaining to coverage, liability, causation, and exclusions." Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program,* 37 UNIV. OF TOLEDO L. REV. 931, 946 (2006). Thus, an appraisal "only determines the *amount* of an *acknowledged liability* which has not been agreed upon by the parties." *Id.* at 933. It does not determine liability issues such as coverage, causation or the applicability of exclusions.

The rule that appraisals are intended to determine only the amount of an "acknowledged" or "conceded" liability, not whether liability exists, is the majority rule followed by nearly all courts.[4] The rationale for the rule is sound. Appraisers are not trained in the law. They are not trained or experienced in resolving contact interpretation issues or applying legal principles to determine the liability of a party to a contract. Typically they are building contractors. They are experienced in valuation issues -- how much something is worth, or how much it would cost to repair or replace it. Also,

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[4] *See e.g. Johnson v. Nationwide Mutual Ins. Co.*, 828 So.2d 1021 (Fla. 2002); *Auto-Owners Ins. Co. v. Kwaiser*, 476 N.W.2d 467 (Mich. Ct. App. 1991) ("Matters of an insurance policy's coverage are generally for a court and not for appraisers"); *HHS Associates v. Assurance Co. of America*, 256 F.Supp.2d 505, 511 (E.D. Va., 2003); *Wausau Ins. v. H. Halperin Distribution Corp.*, 664 F.Supp. 987 (D. Md., 1987); *Munn v. National Fire Ins. Co. of Hartford,* 115 So.2d 54, 55, 58 (1959); *Rogers v. State Farm Fire and Cas. Co.*, 984 So.2d 382 (Ala. 2007); *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess & Surplus Lines Ins. Co.,* 916 So.2d 12, 15 (Fla. Dist. Ct. App. 2005); *Jefferson Ins. Co. v. Superior Court of Alameda County*, 3 Cal.3d 398, 90 Cal. Rptr. 608, 475 P.2d 880, 883 (1970); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009); 1 DOMKE ON COMMERCIAL ARBITRATION (3rd Ed.) § 1.3 at p. 1-10; 15 COUCH ON INSURANCE § 209:8; 17 COUCH ON INSURANCE § 245:13.

appraisals are informal proceedings, not governed by procedural or evidentiary rules. Appraisers are not required to hold hearings and are not required to base their decisions on record evidence. Indeed, appraisers are expected to resolve valuation issues based on their own knowledge and experience, and on information available to them from a variety of outside sources. An informal appraisal is not the proper place to resolve liability issues.

These factors all justify the majority rule that important liability issues should be resolved by judges trained in the law, not by appraisers in an informal appraisal processes. Most importantly however, the majority rule is justified by the fact that the *contract* does not say that liability, coverage or causation issues are to be resolved by appraisers -- just the "amount" of loss. Nothing in the language of an appraisal clause even remotely suggests that the parties have agreed to relinquish their right to have liability disputes resolved by a court.

The majority rule -- that courts, not appraisers, must resolve liability issues -- is strictly followed in Minnesota. *Mork v. Eureka-Security Fire & Marine Ins. Co.*, 42 N.W.2d 33, 35 (Minn. 1950); *Glidden Co. v. Retail Hardware Mutual Fire Ins. Co. of Minn.*, 233 N.W. 310 (Minn. 1930). As this Court held in *Johnson v. Mutual Service Casualty Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007) "It is well settled that appraisal does not determine liability under a policy." "Liability depends on a judicial determination." *Id.* An appraisal process "does not determine liability but only the amount of the loss." *Id.* Thus, if there is a coverage dispute (i.e. a dispute about whether the insurer is liable for the loss), it is an issue for a court to resolve.

If a dispute exists as to the "amount" of the loss, only *that* issue may be subject to appraisal.

C. The Only Dispute in This Case Concerns Liability, Not the "Amount" of the Loss.

The "amount" of the loss is not in dispute in this case and, therefore, nothing exists to appraise. Appellants submitted to Secura repair estimates from their roofing contractor setting forth the amount of the loss. (A. App. 58-63.) Secura has never disputed the amount of the claimed loss. It has never stated that the claimed charges for labor and materials are excessive. It has never said that the damage could be repaired in a less costly way.[5] It has never submitted its own estimate of the cost of repairing the roof. Having never submitted an alternative repair estimate, there is no dispute about the "amount" of the loss to appraise.

Instead, what Secura is contesting, and what it wants to appraise, is a *liability* issue -- whether the damage to the roofs (damage that Secura admits is present) is excluded by the "maintenance" exclusion in the insurance policy. The maintenance exclusion was the *only* reason given by Secura for its refusal to pay the claim:

> Your farm policy excludes "loss to property caused by any of the following . . . (4) Maintenance". This is stated in your policy on page 14 (copy

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[5] That was the issue in dispute in *Sampson v. Horace Mann Ins. Co.*, 2003 WL 22234692 (Minn. Ct. App. Sept. 30, 2003), a decision that Secura heavily relies upon. Both the insurer and the insured in that case acknowledged that a hail storm had, in fact, damaged the siding of the insured's house, and both agreed that the insurer was liable. The parties merely disputed the method (and therefore the cost) of fixing the damage. This Court held that how much it would cost to fix the admittedly covered damage was an issue for appraisal since the insurer had admitted liability.

enclosed). I am sorry but we are unable to honor your claim for damage to the roof of the buildings.

(A. App. 57.) This exclusion was the sole basis for Secura's denial of the claim.[6] Secura did not dispute that the roofs were, in fact, damaged. It simply stated that the damage was from an excluded cause. That is a liability issue which is not subject to appraisal. Thus, the parties have not "fail[ed] not to agree on the amount of loss." Instead, they have failed to agree only on whether the loss is covered. The district court erred in dismissing Appellants' Complaint and ordering them to participate in an appraisal of their coverage dispute.

D. Secura Cannot Artificially Recharacterize the Coverage Dispute as Being a Dispute Over the "Amount" of the Loss.

The district court erroneously concluded that the "causation" question -- i.e. whether the damage was caused by a peril that is covered by the insurance policy or excluded from coverage -- is a question about the "amount" of loss that is subject to appraisal. (A. App. 4-5.) That conclusion is incorrect. Causation questions of this type -- whether damage was caused by a covered peril or an excluded peril -- are inherently questions of liability. Causation questions of this kind go to the heart of the insurer's liability, not to the "amount" of damage. An appraiser with knowledge about the costs of building or repairing property is not equipped to resolve coverage issues that depend on causation, and an insured should not be forced to have important insurance coverage and

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[6] When denying an insurance claim, insurers are required by law to provide a full explanation of the reasons for the denial, and to identify all provisions of the insurance policy that the insurer is relying upon. Minn. Stat. §72A.201, subd. 8. The "maintenance" exclusion is all that Secura identified when it denied the claim.

liability issues resolved by the type of people who typically serve as appraisers -- building contractors who have no legal training.

The district court cited no Minnesota cases to support its holding that a "causation" issue which bears upon ultimate coverage for a loss must be determined by appraisers. None exist. In fact, in *Mork v. Eureka-Security Fire & Marine Ins. Co.,* 230 Minn. 382, 384, 42 N.W.2d 33, 35 (1950), the Minnesota Supreme Court determined that appraisers were *not* qualified to resolve a causation issue. The coverage issue in that case was whether the property damage to the insured's home (frozen pipes) was caused by a covered peril (explosion in the boiler) or by an uncovered peril (temperature change). The Court vacated the appraisers' ruling that there was no coverage for the loss, and held that the question of whether the loss was caused by a covered peril was properly submitted to the jury for determination.

The result in *Mork* is consistent with the approach taken by courts in other jurisdictions that causation questions are, in fact, liability questions that must be resolved by courts, not by appraisers.[7] For example, in *Johnson v. Nationwide Mutual Ins. Co.*,

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[7] *See e.g. Kawa v. Nationwide Mut. Ins. Co.*, 664 N.Y.S.2d 430 (N.Y. Sup. Ct. 1997) (holding that an insurer was contesting its own liability rather than just the "amount" of the loss when it contended that damage to siding was "the result of age, wear and tear and/or poor or improper maintenance" rather than the result of a windstorm, and therefore the issue was for the court to resolve, not the appraisers); *HHS Associates v. Assurance Co. of America*, 256 F.Supp.2d 505, 511 (E.D. Va., 2003) ("courts have found consistently that whether coverage was properly denied is a legal issue reserved for the court alone" including "questions of fact regarding the cause of the damage to the [insured's] building"); *Wausau Ins. v. H. Halperin Distribution Corp.*, 664 F.Supp. 987 (D. Md., 1987) (appraisers could not decide whether the damage to roof was from an excluded cause); *Munn v. National Fire Ins. Co. of Hartford,* 115 So.2d 54, 55, 58 (1959) ("The chancellor should have judicially determined what force caused the walls to

828 So.2d 1021 (Fla. 2002), the Florida Supreme Court reviewed two cases in which the cause of damage to the insureds' property was disputed. In one case, the insureds contended that cracks in the foundation of their home were caused by nearby blasting (a covered peril), but the insurer denied all liability, contending that the cracks were caused by settling (an excluded peril). In the other case, the insurer claimed that damage was caused by earth movement (an excluded peril) and the insured claimed the damage was caused by a sinkhole (a covered peril). The court concluded that these causation issues were, in fact, liability issues that had to be resolved by a court, not by appraisers, because if the insurer prevailed, it would be absolved of all liability. This is what Secura claims here -- that the resolution of the causation will absolve it of all liability.

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lean and twist[;][t]hat was not a question for the appraisers to decide. If that damage was the result of the storm, then the appraisers should have been directed to estimate the value of the loss occasioned by the walls being damaged."); *Rogers v. State Farm Fire and Cas. Co.*, 984 So.2d 382 (Ala., 2007) ("the parties . . . were not in agreement as to the cause of the damage to the brick veneer or to the foundation. The determination of the causation of these matters is within the exclusive purview of the courts, not the appraisers."); *Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess & Surplus Lines Ins. Co.*, 916 So.2d 12, 15 (Fla. Dist. Ct. App. 2005) ("because the insurer has not wholly denied that there is a covered loss, causation is an amount-of-loss question for the appraisal panel, not a coverage question that can only be decided by the trial court"); *Erickson v. Farmers Mut. Ins. Co.*, 311 N.W.2d 579 (N. Dak. 1981) (appraisers cannot determine whether damage was caused by an insured peril, and insurer's act of invoking appraisal served to concede that causation was present): *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142 (Tenn. Ct. App. 2001) *rev. denied* (Tenn. 2001) (appraisers "did not have the prerogative to determine whether any particular loss claimed by [the insured] was caused by the tornado"); *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 892 (Tex. 2009) ("when different causes are alleged for a single injury to property, causation is a liability question for the courts"); *Wells v. American States Preferred Insurance Co.*, 919 S.W.2d 679 (Tex. App. 1996) *writ denied* (appraisers' causation determinations impermissibly decided coverage issue when the award stated that foundation damage due to plumbing leaks (a covered peril) was "0" but damage due to settling (an excluded peril) was $22,875).

A few cases have held that where the insurer admits to *some* liability for the damage claimed by the insured, therefore making an appraisal appropriate, the appraisers can also sort through the damage to determine what parts are from covered perils and which parts are not. The case relied upon by the district court appears to be one of those cases. *See Cigna Ins. Co. v. Didimoi Property Holdings*, 110 F.Supp.2d 259 (D. Del. 2000). Because the insurer in that case admitted liability for *some* damage, the court concluded that the "extent" of the damage was something the appraisers could determine. *Id.* at 263 ("Cigna does not contest that the policy covers fire *and that a fire damaged the building*. What Cigna contests is the extent of the damage to the building from the fire. According to Cigna, the extent of the fire damage is a question concerning the amount of the loss, and therefore . . . appropriately determined in the appraisal process") (emphasis added).

While the *Cigna* case, allowing appraisers on a limited basis to determine causation, appears to be the minority view, there is at least some rationale for it. A difference exists between an insurer who admits to *some* liability for the damage to the insured's property and seeks to use the appraisal process to determine the *extent* of the damage, and an insurer, like Secura, who disclaims *all* liability, and seeks to use the appraisal process to obtain a finding that would absolve it of any liability. The district court erred in relying on the *Cigna* case because, even if it fairly represented the law in Minnesota (which it does not), the case is distinguishable because Secura has *not* admitted to at least some liability. It has denied all liability. Neither Secura's briefing below, nor the district court's order, identified any cases holding that a causation question

is subject to appraisal where the resolution of the question could *completely* relieve the insurer of liability. That proposition is inconsistent with the entire premise of an appraisal, which is a process to value a "conceded" liability.

Secura's approach in this case was to recharacterize the dispute over liability as a dispute over the "amount" of covered loss. Secura argued that because it valued the "covered" damage to the roof at $0, the dispute really is about the "amount" of the loss. Secura's novel argument, if accepted (as it was by the district court), would eviscerate the rights of insureds to have liability issues resolved by courts. Any coverage or liability issue could be recharacterized as a dispute about the "amount" of covered loss, as Secura has attempted to recharacterize the coverage issue in this case. For example, a dispute about whether loss occurred within the coverage territory of a policy could be recharacterized as a dispute about the "amount" of damage that occurred within the coverage territory and could be submitted to the appraisers to determine that amount. A coverage dispute about whether a pollution exclusion applied to certain damage could be submitted to the appraisers to determine the "amount" of non-pollution damages (with the insurer arguing that $0 in covered damage exists, as Secura is arguing here). The coverage issue in the present case is whether the damage to the roofs of the farm structures -- damage that Secura admits exists -- is excluded from coverage under the "maintenance" exclusion. Secura cannot escape having that coverage issue resolved in court by simply recharacterizing the coverage dispute as a dispute about the "amount" of covered damage.

II. THE DISTRICT COURT ERRED BY DISMISSING THE COMPLAINT.

A. Standard of Review.

A district court's decision to dismiss a complaint is reviewable *de novo*. *Barton v. Moore*, 558 N.W.2d 746 (Minn. 1997).

B. The District Court Erred in Dismissing the Complaint Because Disputes Between the Parties Which Are Not Subject to Appraisal Remain for Resolution by the Court.

The legal basis for the district court's decision to dismiss the Complaint was not made express in the court's order. The court never explained whether the dismissal was for failure to state a claim upon which relief may be granted pursuant to Minn. R. Civ. P. 12.02(e) or some other reason.

In any event, dismissal of the entire action was improper. Regardless of whether an appraisal occurs, there are many disputes between the parties that remain for judicial resolution. Appellants have asserted a breach of contract claim in their Complaint. They seek damages for Secura's breach, seek costs and prejudgment interest, and will seek the statutory costs permitted for a violation of Minn. Stat. § 604.18. Secura has raised coverage defenses, including its claim that the loss is excluded by the "maintenance" exclusion, and has also asserted 13 affirmative defenses in its Answer to the Complaint. None of the liability issues in this case can be resolved in an appraisal. As this Court held in *Johnson*, "It is well settled that appraisal does not determine liability under a policy." 732 N.W.2d at 346. "Liability depends on a judicial determination." *Id.* Secura has not waived any of its defenses, and apparently will continue asserting its defenses even after an appraisal. Issues and defenses raised by both parties remain to be resolved

by the court, irrespective of an appraisal about the "amount" of loss (assuming that such a dispute about the "amount" actually existed).

Accordingly, the disputes between the parties which are not subject to appraisal remain for the district court to resolve. While it may have been permissible for the court to stay proceedings pending the outcome of an appraisal (if any disputes subject to appraisal actually existed), it was improper to dismiss the entire action.[8]

The disposition by dismissal was particularly inappropriate because the policy contains a two-year limitation period for commencing suit. (A. App. 115.) If Appellants have to wait until after an appraisal process takes place to commence a suit for damages, interest and statutory costs, Secura may try to argue that those claims are barred by the limitations period. Here, Appellants have a timely-commenced suit against Secura. The dismissal places their rights in jeopardy. At a minimum, this Court should reverse the dismissal of the action.

C. The District Court Erred by Dismissing the Complaint "With Prejudice."

The district court also offered no explanation for why it dismissed the Complaint "with prejudice." A dismissal "with prejudice" is a final resolution of a dispute on the merits. *Firoved v. General Motors Corp.*, 152 N.W.2d 364, 368 (Minn. 1977). It generally precludes any further litigation of the same issue. Here, there has been no final adjudication of the merits of the parties' disputes. The merits have yet to be reached at all. Indeed, the district court even acknowledged in its order that further disputes exist

[8] Even if the Uniform Arbitration Act applied, the remedy is to stay judicial proceedings, not dismiss them, pending the arbitration. Minn. Stat. § 572.09(d).

between the parties, and that the parties may need to "bring[] a declaratory judgment action on any coverage dispute" following an appraisal. (A. App. 2.)

When a party will have the right to reassert claims after a dismissal that is not based on the merits occurs, it is error to dismiss the claims "with prejudice." *Unbank Co., Inc. v. Merwin Drug Co., Inc.*, 677 N.W.2d 105, 109 (Minn. Ct. App. 2004) (dismissal for lack of justiciability does not constitute an adjudication on the merits and should not be "with prejudice"); *Shannon Sales Co., Inc. v. Williams*, 490 N.W.2d 436, 441 (Minn. Ct. App. 1992); *Feltl v. Greenblatt*, 2005 WL 221872 (Minn. Ct. App. Feb. 1, 2005) (claims dismissed for reasons of lack of ripeness and failure to join indispensable parties are not a "dismissal on the merits and therefore not a basis for dismissing the action with prejudice"); *SkyTech, Inc. v. Scientific Learning Corp.*, 2006 WL 3490908 (Minn. Ct. App. Dec. 5, 2006) (dismissal of claim pending outcome of arbitration proceedings should have been "without" prejudice); Minn. R. Civ. P. 41.02(c) (dismissal based on lack of jurisdiction must be without prejudice). The court did not intend to cut off Appellants' right to litigate the remaining issues -- and would have no legal basis to do so. The dismissal "with prejudice" was improper.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT AN APPRAISAL WOULD BE GOVERNED BY MINNESOTA'S UNIFORM ARBITRATION ACT.

A. Standard of Review.

The interpretation of a statute is an issue that the Court reviews *de novo*. *Moriarty v. Minneapolis Employees Retirement Bd.*, 516 N.W.2d 207 (Minn. Ct. App. 1994).

B. An Appraisal Clause Is Not an Agreement to Arbitrate All Disputes.

The district court's order provides that after an appraisal award is made, judicial review of the award will be limited to the grounds for confirming or vacating an award under the Minnesota Uniform Arbitration Act, Minn. Stat. §§572.18 and 572.19. (A. App. 3.) That part of the district court's ruling is also erroneous because appraisals are not arbitrations and are not governed by the Minnesota Uniform Arbitration Act.

As this Court has held, "the statutorily required appraisal provision [in an insurance policy] is ***not*** an agreement to arbitrate governed by the Uniform Arbitration Act." *Johnson v. Mutual Service Cas. Ins. Co.*, 732 N.W.2d 340, 346 (Minn. Ct. App. 2007) *rev. denied* (Minn. 2007) (emphasis added).[9] While older cases sometimes use incorrect terminology in referring to an appraisal process as "arbitration," courts in Minnesota and elsewhere recognize that an appraisal procedure is not an arbitration. *See generally*, 15 COUCH ON INSURANCE § 209:8 ("Although the terms appraisal and arbitration are sometimes used interchangeably, appraisal is distinguished by its more limited role," and therefore the statutes and rules applicable to arbitrations do not apply).

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[9] The discussion of whether an appraisal is subject to Minnesota's Uniform Arbitration Act was critical to the court's resolution of the issue in *Johnson*, and therefore is precedential, not dicta. By contrast, in *Qbe Ins. v. French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 398 (Minn. Ct. App. 2010) the Court stated in dicta that "[a]ppraisal decisions are subject to Minn. Stat. § 572.08-.30 (2008), the arbitration statute." That issue was not essential to the Court's ultimate holding, and therefore is not precedential, and amounts to dicta.

Johnson, 732 N.W.2d at 345 (acknowledging that the terms "appraisal" and "arbitration" have been used interchangeably in some prior decisions, but are not the same thing).[10]

Recognizing the distinction between appraisal and arbitration is important because it affects the authority of the court. *See* 15 COUCH ON INSURANCE § 209:10 ("The distinction between arbitration and appraisal can have ramifications on the authority of the court."). In an arbitration, the parties have specifically contracted to have their disputes fully resolved by a private arbitrator and the court has no jurisdiction to address either the factual or legal merits of the parties dispute, and has only limited authority, after the fact, to vacate the award on limited grounds specified by statute. Minn. Stat. § 572.19. This is deemed to be fair because it is what the parties contracted for when they choose to have all disputes between them resolved through arbitration.

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[10] *See e.g., Minot Town & Country v. Fireman's Fund Ins. Co.*, 587 N.W.2d 189 (N.D., 1998) ("Generally, arbitration is a quasi-judicial proceeding that ordinarily will decide the entire controversy. . .. Conversely, appraisal establishes only the amount of a loss and not liability for the loss under the insurance contract"); *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058 (5th Cir. 1990) ("While both procedures aim to submit a dispute to a third party for speedy and efficient resolution without recourse to the courts, there are significant differences between them. For example, an arbitration agreement may encompass the entire controversy between parties . . .. In contrast, an appraisal determines only the amount of loss, without resolving issues such as whether the insurer is liable under the policy. Additionally, an arbitration is a quasi-judicial proceeding, complete with formal hearings, notice to parties, and testimony of witnesses. Appraisals are informal. Appraisers typically conduct independent investigations and base their decisions on their own knowledge, without holding formal hearings."); *Elberon Bathing Co., Inc. v. Ambassador Ins. Co., Inc.*, 389 A.2d 439 (N.J. 1978) ("The distinctions are significant. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, and judgment may be entered upon the award, whereas an appraisal establishes only the amount of loss and not liability."); *Kawa v. Nationwide Mut. Fire Ins. Co.*, 664 N.Y.S.2d 430 (N.Y.Sup., 1997); *Merrimack Mutual Fire Insurance v. Batts*, 59 S.W.2d 142 (Tenn. App., 2001).

By contrast, an appraisal clause is not an agreement to have all disputes between the parties resolved by a private arbitrator. An appraisal clause is a very limited agreement to have a single issue -- the "amount" of the loss -- resolved through appraisal. An appraisal clause is not intended to address other disputes such as whether the policy covers the loss in the first place, i.e. whether the insurer is liable for the insured's loss. *Johnson*, 732 N.W.2d at 346.

Thus, even assuming that a dispute existed in this case that would be subject to the appraisal process (which is not true for the reasons discussed above), *other* disputes remain in this breach of contract case which are not governed by an appraisal process, and therefore further court proceeding will be necessary. This is not a situation, such as is present in arbitrations, where a full and final award will be issued which will be confirmed or vacated after the fact by the court under the narrow grounds stated in Minn. Stat. §572.19. The district court erred in concluding that an appraisal award would be a final resolution of this case that could be confirmed or vacated under the Uniform Arbitration Act.

CONCLUSION

Had Secura ever disputed the "amount of loss," there would be something to appraise, and an appraisal could go forward. However, Secura is disputing coverage, not the amount of loss, as is evident from its claim denial letter. Secura is not permitted to resolve coverage or liability issues by submitting them to appraisers rather than to the court. This Court reached the correct result in its order denying Secura's petition for a writ of prohibition when the Court recognized that valuation was not in dispute, only

coverage was disputed, and that only the district court had the authority to resolve the coverage dispute. The district court then got it wrong when it dismissed the action with prejudice, and ordered the parties to appraise their coverage dispute. Its order, and the judgment, should be reversed and the case remanded for trial.

Respectfully submitted,

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