STATE OF NEW HAMPSHIRE

SUPREME COURT

Dylan O'Malley-Joyce and Eileen Nash
PLAINTIFFS/APPELLANTS

v.
Travelers Home and Marine Insurance Company
DEFENDANT/APPELLEE

RULE 7 NOTICE OF APPEAL FROM GRAFTON COUNTY SUPERIOR COURT

Docket No. 2021-0068

BRIEF OF DYLAN O'MALLEY-JOYCE AND EILEEN NASH

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R. James Steiner will present oral argument.

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III. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

IV. If affidavits are not filed by the party opposing the summary judgment within 30 days, judgment shall be entered on the next judgment day in accordance with the facts. When a motion for summary judgment is made and supported as provided in this section, the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.

Section Ins 1002.01 - Purpose and Scope**(a)** The purpose of this part, unless otherwise provided by law, is to establish claim settlement standards for all property and casualty insurance, except workers' compensation and policies for

large commercial policyholders as defined in RSA 412:3, XI.**(b)** This part is applicable to all licensed property and casualty insurers.

Ins 1002.16 Willing and Able Contractors and Repairers: Other Than Motor Vehicle.

(d) Any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer shall include a provision for coverage of hidden damage that is determined to be connected with the claim in question.

(a) Every settlement offer that is based upon an appraisal conducted on behalf of the insurer relative to property and liability insurance shall:

(1) Include a written statement that, if the claimant or insured cannot find a contractor or repairer to do the repair or replace the damage property for the price quoted, then the insured or claimant may request that the insurer supply the insured or claimant with the name and address of any known recognized, competent and conveniently located contractor or repairer who is willing and able to repair or replace the damaged property with other property of like kind and quality within a reasonable time for the price quoted in the appraisal or as otherwise provided for in the insurance policy;

Ins 1002.09 Value of Total Losses – Other than Motor Vehicle. When the insured's or claimant's property has been determined to be a total loss, and there is no dispute concerning liability or coverage, and the provisions of RSA 407:11 do not apply, insurers attempting to establish the value of the property shall:

(a) Value the property in the community where the total loss property is located;

(b) Be prohibited from using arbitrary methods to establish the value of the property that do not take into consideration the specific characteristics of the property, however, this shall not preclude the insurer from making an offer of settlement on property based upon the fair market value of like kind and quality property wherever situated.

QUESTIONS PRESENTED

1. Whether the trial court erred as a matter of law in granting summary judgment finding the appraisal process "final," where the issue has not been adjudicated in New Hampshire but other cases, in other jurisdictions, including a decision on point from the United States District Court for the District of Louisiana, courts have held that the identical appraisal clause contained in the policy in issue in this case, stating ***"[an appraisal] decision agreed to by any two will set the amount of loss"*** fails as a matter of law to be binding because the clause lacks the express terms contained in other insurance policies affirmatively stating such an appraisal "will be binding."

2. Whether the trial court erred as a matter of law in granting summary judgment where Travelers Home and Marine Insurance Company ("Travelers") failed to demonstrate affirmatively that it has abided by its obligations under the New Hampshire Administrative Rules for Insurance, as specified under New Hampshire Administrative Rules, Ins 1002.01, requiring that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . " where there exists no evidence submitted to the trial court that the appraisal completed recognized or accounted for "hidden damages," as required under New Hampshire Insurance Rules, Ins 1002.16 (d), which provides as follows:

   > (d) Any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer shall include a provision for coverage of hidden damage that is determined to be connected with the claim in question.

3. Whether the trial court erred as a matter of law in granting summary judgment where Travelers failed to demonstrate affirmatively that it has abided by its obligations under the New Hampshire Administrative Rules for Insurance, as specified under New Hampshire Administrative Rules, Ins 1002.01 requiring that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . " where the insurer failed to contract a conveniently located contractor, as required under New Hampshire Administrative Rules, Ins.1002.16 (a) (1) where they retained a contractor from Hampstead, NH to do work on a home in Campton, NH.

4. Whether the trial court erred as a matter of law in granting summary judgment where Defendant failed to demonstrate that it has abided by its obligations under the New Hampshire Administrative Rules for Insurance, as specified under New Hampshire Administrative Rules, Ins 1002.01, requiring that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . " where Defendant admitted in its Answer that Plaintiffs' home "had many custom features," Complaint, para. 22; Answer, para. 22, but then failed to demonstrate affirmatively, as required, that it had "take[n] into consideration the specific characteristics of the property. . . "as required under New Hampshire Administrative Rules, Ins. 1002.09.

STATEMENT OF FACTS

Primarily at issue is the failure by Travelers in its motion, to demonstrate, or prove, as required, that it has abided by its obligations under the New Hampshire Administrative laws for insurance governing claim processes, and the nonbinding nature of the clause in the "Appraisal" section of this specific homeowners' policy, which states as follows:

> 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 and impartial 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 or 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 difference to the umpire. ***A decision agreed to by any two will set the amount of loss.***

App. at 36 (emphasis supplied). *See also* Court Order adopting Defendant's Memorandum of Law in Support of Travelers Motion for Summary Judgment ("Memorandum"), App. at 112.

On January 2, 2017, Travelers issued a homeowners' policy, Travelers Policy No. 9969987606331 (the "Policy"), to plaintiff Dylan O'Malley-Joyce. App. at 1. The Policy is effective January 15, 2017 to January 15, 2018. App. at 83). The Policy provides that "[t]he Residence premises is located at 141 ELLSWORTH HILL RD, CAMPTON NH 03223-4113." *Id.*

On or about November 27, 2017, 141 Ellsworth Hill Road, Campton, New Hampshire (the "Property") was damaged by a leak that occurred when an ice maker line parted (the "November Water Damage"). App. at 97. The November Water Damage resulted in a claim against the Policy. *Id.* In early January 2018, a frozen pipe in the Property's master loft caused a

second water leak at the Property, resulting in damage (the "January Water Damage"). App. at 98. The January Water Damage resulted in a second claim against the Policy. *Id.* The claims resulting from the November Water Damage and the January Water Damage occurred during the Policy's policy period. *Id.* Travelers did not deny the claims. App. at 93 and 119.

Plaintiffs Dylan O'Malley-Joyce and Eileen Nash ("Appellants" or "Plaintiffs") had a number of disagreements with Travelers regarding the cost and scope of the repairs to the Property. App. at 98-99. Pursuant to the Policy's "Appraisal" provision, Travelers made a written demand to initiate the appraisal process. App. at 93.

Plaintiffs and Travelers engaged in the appraisal process with respect to the value of the loss resulting from the November Water Damage and the January Water Damage. App. at 100. Appellants disagreed that Travelers paid what it owed or that the damages included all the damages resulting from the water leaks.

STATEMENT OF THE CASE

Plaintiffs filed their complaint on November 19, 2019. App. at 96. They alleged, "Travelers has refused to pay the total actual value of the claims." *Id. at* 101. Plaintiffs alleged further that "[t]here are ongoing disputes as to the value of the claim and the balance owed to the Plaintiffs." *Id.* In the Complaint, Plaintiffs allege a claim for "breach of contract, bad faith, statutory violations" and a declaratory judgment claim. App. at 101-05. Among the allegations by Plaintiff is the allegation that Travelers failed "to provide contractors who could properly perform the work required on the Plaintiffs' property. . . ." App. at 104.

Plaintiffs also complained as follows:

> The Defendant has not denied coverage under the policy, but, has undervalued the loss, has recommended inappropriate contractors, has manipulated the loss so as to be able to

> deny renewal of the Plaintiffs' policy, and has failed to comply with the Policy of Insurance thereby limiting the Defendant Travelers' liability to the Plaintiff.

App. at 105.

Plaintiffs allege damages including "the difference between the amount paid for repairs to the Property and the actual costs for those repairs, alleged missed items not included as part of the costs to repair the Property [hidden damages], mortgage cost increases, inflation, and damages that allegedly occurred during the repair of the Property after the November Water Damage and the January Water Damage. App. at 122.

Travelers moved for summary judgment, to which defendants filed no objection. The court entered judgment for Travelers.

Appellants do not contest the facts. Appellants contest that Travelers is not entitled to judgment as a matter of law both because Travelers failed to comply with the New Hampshire Insurance laws governing its treatment of the claim and improperly claimed that the appraisal in this case could be deemed final and akin to an arbitration decision where the clause relied on in the Travelers' policy fails to provide such broad interpretation.

From the judgment entered Appellants filed their appeal for *de novo* review of the summary judgment order.

SUMMARY OF THE ARGUMENT

To be entitled to summary judgment, Travelers Home and Marine Insurance Company ("Travelers") had to be entitled "as a matter of law" to judgment in its favor. RSA 419:8-a, III. Travelers was not entitled to judgment as a matter of law because the insurance clause in question relative to the appraisal process is not binding or equivalent to an arbitration award, as Traveler's argued.

The clause from the insurance policy in question states that "[a] decision agreed to by any two [appraisers] will set the amount of loss." As the United States District Court for the Western District, Louisiana, in *Lewis v. Republic Fire & Casualty Insurance Co.*, Civil Action 15-0035 (United States District Court for the Western District, Louisiana, 2016) concluded, in evaluating the identical appraisal clause, the lack of any reference to the term "binding" makes the clause nonbinding and denied the insurer summary judgment:

> With respect to the issue of whether an appraisal award is "binding, " this Court notes the majority of Louisiana cases that hold an appraisal award is binding reference cases wherein the policy contains language to the effect that "a decision agreed to by any two (umpire or appraisers) will be binding." ***Importantly, no such language appears in the subject policy. Rather, the subject policy merely states that "[a] decision agreed to by any two will set the amount of loss." Thus, there is no language in the policy between the plaintiff and Republic addressing the "binding" nature of the appraisal award.***

Id. (emphasis supplied).

The United States District Court for the District of Maine entered a similar order just six months ago addressing the identical clause in issue in the insurance policy pending before this court. *Musto v. Liberty Insurance Corporation, D/B/A Liberty Mutual*, No. 1:20-cv-00188-GZS (D. Maine December 7, 2020). Likewise, the United States District Court for Tennessee, also just six months ago, ruled against an insurer's effort to dismiss an insured's claim challenging the appraisal as binding. The insurance clause is identical to the clause in issue in this case. *Hill v. Auto-owners (Mutual) Insurance Company*, No. 4:19-cv-78 (United States District Court, E.D. Tennessee, November 30, 2020).

An insurer took the role of challenging the binding nature of an appraisal, when it did not like the result, in *Merrimack Mutual Fire Insurance v. Batts* 59 S.W.3d 142 (Tn Ct. Aps 2001). The *Merrimack Mutual Fire Insurance* case likewise interpreted an appraisal clause identical to

the clause in issue in this case. As the *Hill* court noted, addressing extensively the decision in *Merrimack Mutual Fire Insurance*:

> Appraisal is the act of estimating or evaluating something; it usually means the placing of a value on property by some authorized person. . . . Specifically, the object of appraisal in cases of casualty insurance is to quantify the monetary value of a property loss[,] . . . not to decide questions of liability." *Id.* at 149 (citations omitted). The appellate court found it "unnecessary and even inappropriate to abandon the [ ] distinction between the two . . . ." *Id.* The appeals court concluded that, when the insurance company drafted its policy, "it did so relying on the generally prevailing understanding that an appraisal was just that-an appraisal, not binding arbitration."

Hill, slip op. at 4.

While the Wisconsin Supreme Court did uphold as binding an appraisal based on the same terms found in the policy in issue before this court, it did so expressly stating it was upholding the decision of the Circuit Court under an abuse of discretion standard to make the appraisal binding. *The Farmers Automobile Insurance Association v. Union Pacific Railway Company*, 768 N.W.2d 596, 606 (Wis. 2009). This unique application by the court distinguishes it from the present situation. Relevant to this court's *de novo* review, *Moore v. Grau*, 171 N.H. 190, 193 (2018) *quoting Pike v. Deutsche Bank Nat'l Trust Co.*, 168 N.H. 40, 42, 121 A.3d 279 (2015), the dissenting opinion of Justice Bradley made clear that this identical clause for appraisal process to the clause in issue before this court could not be considered binding:

> The contract provides:
>
> 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.... 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.***
>
> It is particularly noteworthy that the words "binding," "bind," or "bound" appear nowhere in this appraisal clause. Such words, or a variation thereon, are completely absent from the text. Yet both the majority and the circuit court read the word "binding" into the clause where it does not exist.

The Farmers Automobile Insurance Association, 768 N.W.2d at 611 (Bradley, J., dissenting opinion) (emphasis supplied).

Travelers argued, by analogy, that the appraisal should be considered binding of its own accord, App. at 108. Travelers offered no support from cases with identical appraisal clause provisions that demonstrate such a clause must be considered nonbinding where the language in the policy fails to direct otherwise.

Similarly, Travelers failed to argue or demonstrate that it had complied with its obligations under the New Hampshire Administrative Rules for Insurance. Those rules, as specified under New Hampshire Administrative Rules, Ins 1002.01, require that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . ." Travelers provided no proof of compliance with at least its obligation to show hidden damages had been covered, New Hampshire Insurance Rules, Ins 1002.16 (d). Travelers failed to demonstrate, as required, that it had selected a conveniently located contractor, New Hampshire Administrative Rules, Ins.1002.16 (a) (1). Travelers failed to demonstrate that it had complied with its obligation to "take into consideration the specific characteristics of the property. . . " as required under New Hampshire Administrative Rules, Ins. 1002.09.

While the court granted the motion for summary judgment the key portion of the statute, that "the moving party is entitled to judgment as a matter of law" has not been met.

This court will review the motion *de novo*. *Moore*, 171 N.H. at 193 *quoting Pike*, 168 N.H. at 42. The Vermont Supreme Court, among many others, has defined *de novo* review:

> However, because plaintiff's motion for summary judgment and Poulin's cross-motion for summary judgment are part of the record and our review is *de novo*, we consider the combined issues afresh. *See In re Poole*, 136 Vt. 242, 245, 388 A.2d

> 422, 424 (1978) (*de novo* review means that "the case is heard as though no action whatever had been held prior thereto").

Gregory v. Poulin Auto Sales, Inc., 44 A.3d 788, 791 (Vt. 2012); *accord Federal Energy Regulatory Commission v. Maxim Power Corp.*, 196 F.Supp.3d 181, 190 (D.Mass. 2016) ("It is clear, as all parties point out, that *de novo* review means "a fresh, independent determination" that gives "no deference" to FERC's decision. *FERC v. MacDonald*, 862 F.Supp. 667, 672 (D.N.H. 1994).

Based on the review standard applicable, Appellants ask this court to reverse the summary judgment order that entered against them.

ARGUMENT

The trial court granted summary judgment stating in pertinent part as follows:

> Granted, without objection, for the reasons set forth in the motion and supporting memorandum of law. *See* RSA 491:8-a, III, IV.

App. at 108. RSA 491:8-a, III provides that to be entitled to summary judgment, after review by the court of the "pleadings, depositions, answers to interrogatories and admissions on file," along with any affidavits, the court must conclude that "the moving party is entitled to judgment as a matter of law." The crux of the reason for reversal is that, as a matter of law, Travelers is not entitled to judgment as a matter of law. *See infra.*

This court's review of a summary judgment order is well settled:

> In reviewing the trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment. We review the trial court's application of the law to the facts *de novo*.

Moore, 171 N.H. at 193 *quoting Pike.*, 168 N.H. at 42. The Vermont Supreme Court, among many others, has defined *de novo* review:

> However, because plaintiff's motion for summary judgment and Poulin's cross-motion for summary judgment are part of the record and our review is *de novo*, we consider the combined issues afresh. *See In re Poole*, 136 Vt. 242, 245, 388 A.2d 422, 424 (1978) (*de novo* review means that "the case is heard as though no action whatever had been held prior thereto").

Gregory, 44 A.3d at 791; *accord Federal Energy Regulatory Commission*, 196 F.Supp.3d at 190 ("It is clear, as all parties point out, that *de novo* review means "a fresh, independent determination" that gives "no deference" to FERC's decision. *FERC*, 862 F.Supp. at 672.

Based on the review standard applicable, Appellants ask this court to reverse the summary judgment order that entered against them.

I. The trial court erred as a matter of law in granting summary judgment by concluding the appraisal process could be deemed "final," and akin to arbitration, where other courts, including the United States District Court for the Western District of Louisiana, have interpreted the identical clause found in the Appellants' insurance policy and concluded that the language, stating "[an appraisal] decision agreed to by any two will set the amount of loss" fails as a matter of law to be binding given the absence of language confirming that ***"a decision agreed to by any two (umpire or appraisers) will be binding"*** **is missing from the insurance clause.**

At paragraph 1 of its Motion for Summary Judgment, Travelers baldly asserts "The appraisal is binding on Plaintiffs, and their participation in the appraisal process and acceptance of an appraisal award preclude them from seeking additional damages through a breach of contract claim." App. at 108. The trial court accepted this analogy in concluding to grant summary judgment for the insurer.

The clause in question reads that "A decision agreed to by any two will set the amount of loss." App. at 36. The United States District Court for the Western District, Louisiana, in *Lewis*, Civil Action 15-0035, analyzed the very issue before this court arising from fire damage to a home.

The *Lewis* court concluded the insurer could not prevail on summary judgment, addressing the issue as follows:

> With respect to the issue of whether an appraisal award is "binding, " this Court notes the majority of Louisiana cases that hold an appraisal award is binding reference cases wherein the policy contains language to the effect that "a decision agreed to by any two (umpire or appraisers) will be binding." ***Importantly, no such language appears in the subject policy. Rather, the subject policy merely states that "[a] decision agreed to by any two will set the amount of loss." Thus, there is no language in the policy between the plaintiff and Republic addressing the "binding" nature of the appraisal award.***

Id. (emphasis supplied). The *Lewis* court denied summary judgment for the insurer.

The United States District Court for the District of Maine recently denied an insurer's effort, challenging an identical appraisal clause to the one in issue before this court, to dismiss the case moving for judgment on the pleadings. *Musto*, No. 1:20-cv-00188-GZS. Liberty Mutual claimed the appraisal clause made the clause binding. The court disagreed.

Likewise, the United States District Court for Tennessee, just six months ago, concluded that an insurer's motion to dismiss an insured's challenge to an appraisal award had to be denied on similar grounds to the *Lewis* decision. *Hill*, No. 4:19-cv-78.
The insurer sought to rely on an identical clause to the insurance clause in issue in this case. The court concluded the same limitation identified in the *Lewis* case prohibited dismissal of the case on behalf of the insurer. *Id.*

The *Hill* case quoted from and stated it relied on the 2001 decision of the Tennessee Court of Appeals analyzing the identical clause in issue in this case regarding appraisals as not being binding. *Merrimack Mutual Fire Insurance,* 59 S.W.3d at 146. In the *Merrimack Mutual Fire Insurance* case it was the insurer that balked at the ultimate appraisal and refused to honor it as binding.

The court, in *Hill* stated as follows, providing reasoning identical to the *Lewis* case:

The Tennessee Court of Appeals' decision in *Merrimack Mutual Fire Insurance v. Batts* provides guidance as to the acceptable scope of an umpire's findings. Like the present case, *Merrimack* involved a dispute between a homeowner and an insurer after a tornado damaged the homeowner's house. *Id.* at 145. When the homeowner and insurer could not come to a resolution as to the amount of loss, "both parties invoked the insurance policy's provision for the appointment of appraisers." *Id.* at 145. Notably, the insurer's appraisal clause is identical to the appraisal clause here:

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 or 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.***

Compare Id. at 145-46 with [Doc. 16 at PageID #: 492-93].

Consistent with the policy, "[a]fter the parties' two appraisers [in *Merrimack*] could not agree on the amount of the loss, the two appraisers selected a third appraiser [i.e., "umpire"] who eventually agreed with the homeowner's appraiser regarding the amount of the loss." *Id.* The homeowner's appraiser agreed with the umpire's finding, setting the amount of loss.

The insurer balked at paying the new, higher amount of loss. Instead, it forwarded the homeowner a check for less than half of the amount as a settlement offer. The insurer explained that it was not paying the full amount of the umpire's finding because the umpire was "limited to determining the amount of the loss and did not extend to deciding coverage questions." *Id.* at 146. The homeowner declined the settlement offer, and the insurer sued.

Both sides moved for summary judgment: the homeowner argued that the umpire's finding constituted binding arbitration; the insurer argued that it did not. The trial court, siding with the insurer, found that the "appraisal clause was not an agreement for binding arbitration and that the appraisers had not been empowered to determine whether parts of the claimed damages had been caused by a peril covered by the policy." *Id.* at 145. The homeowner appealed.

On appeal, the Tennessee Court of Appeals affirmed the trial court's decision. Id. Noting the difference between an arbitration agreement and appraisal, the appeals court found that "[a]rbitration is a consensual proceeding in which the parties select decision-makers of their own choice and then voluntarily submit their disagreement to those decision-makers for resolution in lieu of adjudicating the dispute in court. . . .

> ***Appraisal is something narrower. Appraisal is the act of estimating or evaluating something; it usually means the placing of a value on property by some authorized person. . . . Specifically, the object of appraisal in cases of casualty insurance is to quantify the monetary value of a property loss[,] . . . not to decide questions of liability." Id. at 149 (citations omitted). The appellate court found it "unnecessary and even inappropriate to abandon the [ ] distinction between the two . . . ." Id. The appeals court concluded that, when the insurance company drafted its policy, "it did so relying on the generally prevailing understanding that an appraisal was just that-an appraisal, not binding arbitration." Id.***

Hill, slip op. at 4 (emphasis supplied).

The Wisconsin Supreme Court, in *The Farmers Automobile Insurance Association,* 768 N.W.2d at 610-12 (Bradley, J., dissenting) upheld as binding an appraisal imposed by the lower court as within that court's discretion. This distinction is unique. The dissent by Justice Bradley, however, addresses independently of the circuit court holding why the appraisal could not be considered binding, evaluating the same identical clause found in the policy in issue in this case:

> Although both arbitration and appraisal are contractual methods for alternative dispute resolution, there are significant differences. One difference lies in the statutory formality established to define the parties' responsibilities and protect their rights." Arbitration in Wisconsin is a formal procedure, and the parties' rights and responsibilities are defined by statute.... Appraisal in Wisconsin, on the other hand, is a mechanism of dispute resolution that is not regulated by statute and, depending on the parties' agreement subjecting themselves to an appraisal process, may or may not be formal." *Lynch v. Am. Fam. Mut. Ins. Co.,* 163 Wis.2d 1003, 1010-11, 473 N.W.2d 515 ([Wis.]Ct.App.1991).
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> * * *
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> I examine first whether Donaubauer is bound by the amount determined in the appraisal process and is thus foreclosed from pursuing an action in a court of law. The right to access courts in order to file a lawsuit for damages is an important right for all citizens. "[A]ny waiver of the right must be clear and unambiguous." *DeGroot v. Farmers Mut. Hail Ins. Co. of Iowa,* 267 Ill.App.3d 723, 205 Ill.Dec. 584, 643 N.E.2d 875, 876 (1994) (determining that an appraisal clause similar to clause before us today did "not operate as a final and binding resolution of the party's dispute" and did " not foreclose either party from maintaining an action in a court of law").

Appraisal clauses, like arbitration clauses, may be binding or nonbinding. In order to determine whether the appraisal clause here was binding or nonbinding, we must examine the words of the insurance contract.

This examination has double import here because of [the insured's] subsequent agreement to "fulfill his contractual obligations." *See* majority op., ¶ 17. Donaubauer's subsequent agreement is nothing more or less than an agreement to fulfill the obligations set forth in his insurance contract.

The contract provides:

> 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.... 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.***

It is particularly noteworthy that the words "binding," "bind," or "bound" appear nowhere in this appraisal clause. Such words, or a variation thereon, are completely absent from the text. Yet both the majority and the circuit court read the word "binding" into the clause where it does not exist.

The majority and the circuit court commit the same error: they conflate the agreement to participate in an appraisal process (which appears in the text of the clause) with an agreement to be bound by the amount determined in the process (which does not appear in the text). See majority op., ¶ 3 (" We hold that the circuit court did not erroneously exercise its discretion in enforcing the agreement between the parties to participate in the binding appraisal process.").

I instead follow the basic principle of insurance contract interpretation that any ambiguity is construed against the drafter of the policy. If Farmers wanted the contract to provide for a binding appraisal process, it should have heeded the advice offered to those who draft contractual appraisal clauses: when drafting a binding appraisal clause you should expressly state that it is binding in order to avoid any ambiguity. *See* Thomas J. Stipanowich, *Contract and Conflict Management,* 2001 Wis. L.Rev. 831, 871 (discussing the nature and process of decision making, including whether appraisals are binding or nonbinding, and stating: "[I]t behooves drafters to make explicit the parties' expectations[.]"); *see also* Neil S. Hecht, *Variable Rental Provisions in Long Term Ground Leases,* 72 Colum. L.Rev. 625, 685 (1972) ("To anticipate [the] possibility [that one of the parties is unwilling to accept the appraisers' determination], it is wise to add a clause providing that the decision of the appraisers shall bind the parties[.]").

Insurance policies around the country follow that advice and expressly state in the appraisal clause whether it is binding. See, for example, the clause set forth in another Wisconsin case, *Bowman v. Farmers Insurance Group of Companies*:

> You or we may demand appraisal of the loss. Each will appoint and pay a competent and disinterested appraiser.... Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by any two appraisers will determine the amount payable, *which shall be binding on the parties.*

No. 1994AP661, unpublished slip op., 1995 WL 242245 (Wis.Ct.App. Apr. 27, 1995) (emphasis added); *see also Canfield v. Watertown Fire Ins. Co.,* 55 Wis. 419, 13 N.W. 252 (1882), *infra,* ¶ 79 n. 2 (" [T]heir award in writing *shall be binding on the parties hereto* [.]") By contrast, the words in the insurance contract before us simply fail to make binding the acceptance of the appraisal amount.

> The same wording-verbatim to Donaubauer's policy-was examined in *Merrimack Mutual Fire Insurance Company v. Batts,* 59 S.W.3d 142 (Tenn.Ct.App.2001). In that case, an insured wanted to enforce the appraisal clause against the insurance company. She argued that the appraisal clause in her homeowners policy was in essence a binding arbitration agreement requiring the insurance company to pay the full amount of the appraisers' calculation of her loss.
>
> The court set forth the rules of construction for insurance policies. It stated that " [t]he respective rights of an insured and an insurance company are governed by their contract of insurance." *Id.* at 148. " As with any other contract, the courts must give effect to the parties' intentions as reflected in their written contract of insurance." *Id.* Examining the exact words that are now before us, the court concluded that the appraisal clause did not bind the insurance company to pay the amount set by the appraisers. *Id.* at 150.

Id. at 610-12 (Bradley, J., dissenting opinion) (emphasis supplied).

Travelers argued, by analogy, that the appraisal should be considered binding of its own accord. App. at 108. The court accepted that argument. While the trial court did not have the contrary cases to review, this court's review is *de novo. Moore*, 171 N.H. at 193. Based on the express language of the insurance clause, and the interpretive case law from other jurisdictions, summary judgment for Travelers must be reversed. The appraisal process is not, as Traveler's argued, binding. It is not final.

The trial court concluded erroneously that the appraisal process described in the Travelers policy may be considered final, and similar in finality to an arbitration. Based on the

above case law, and the limits in the very language of the policy, summary judgment entered by error and must be reversed.

II. The trial court erred as a matter of law in granting summary judgment where Defendant failed to abide by its obligations under the New Hampshire Administrative Rules for Insurance as specified under New Hampshire Administrative Rules, Ins 1002.01 requiring that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . " where there existed no evidence that the appraisal recognized or accounted for "hidden damages," as required under New Hampshire Insurance Rules, Ins 1002.16 (d), which provides as follows:

> **(d) Any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer shall include a provision for coverage of hidden damage that is determined to be connected with the claim in question.**

The New Hampshire Administrative Rules governing insurance policies applicable in this state, provide, in pertinent part, as follows:

Ins 1002.01 Purpose and Scope.

(a) ***The purpose of this part, unless otherwise provided by law, is to establish claim settlement standards for all property and casualty insurance***, except workers' compensation and policies for large commercial policyholders as defined in RSA 412:3, XI.

(b) ***This part is applicable to all licensed property and casualty insurers.***

New Hampshire Administrative Rules, Ins 1002.01 (emphasis supplied). Hidden damages are specifically addressed under New Hampshire Insurance Rules, Ins 1002.16 (d), which provides as follows:

> (d) Any settlement made based upon an agreement negotiated by an adjuster on behalf of the insurer with a contractor or repairer shall include a provision for coverage of hidden damage that is determined to be connected with the claim in question.

As the supreme court has interpreted it, use of the term "shall" as part of statutes or rules "requires mandatory enforcement." *Town of Nottingham v. Harvey*, 120 N.H. 889, 896 (1980); *accord, Silva v. Botsch*, 120 N.H. 600 (1980); *In Re Russell C.*, 120 N.H. 260 (1980); *North*

Hampton &c. Ass'n v. Commission, 94 N.H. 156 (1946). *See generally* 1A C. Sands, *Sutherland Statutory Construction* ss 25.03-04 (3d ed. rev. 1972).

Traveler's motion for summary judgment failed to address the absence of the required obligation it has to cover "hidden damages." *Id.* Again, similar to the dispute in the *Lewis* case, *supra*, the *Lewis* court noted the insured claimed "hidden damages" not addressed in the appraisals completed and such failure supported denial of summary judgment for the insurer:

> Sometime around April 15, 2014, the plaintiffs contractor, who was at that time repairing the plaintiffs home, uncovered what the plaintiff identifies as "hidden damage and missing items, " which the plaintiff avers were not known to the appraisers at the time the Appraisal Award was submitted and which total $39, 006.49. This supplemental estimate was sent by the plaintiffs contractor to the plaintiff s appraiser, who signed the supplemental award and then forwarded it to Mr. Brown.
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> * * *
>
> The plaintiff contends Mr. Brown refused to consider the amounts contained in her contractor's supplemental estimate and that she, therefore, has not been paid the full amount she is owed under the policy. Plaintiff filed suit against Republic, Keith Brown, and Crawford and Co. in the Fifteenth Judicial District Court for the Parish of Lafayette on November 10, 2014. The lawsuit was removed to this Court, and all claims against Keith Brown and Crawford have been dismissed [Docs. 21 & 22], and the only claims remaining in the matter before this Court are the plaintiffs claims against Republic for failure to pay all damages due under the Policy; breach of contract; negligence; and bad faith arbitrary and capricious failure to pay the plaintiffs claim.

Lewis, slip op. at 2-3.

Travelers failed to address, as required under New Hampshire law, hidden damages. That failure likewise requires reversal of summary judgment. The United States District Court for New Jersey concluded similarly regarding an insurance clause identical to the appraisal clause in this case. *Scipio v. Philadelphia Contributorship Insurance Co.*, No 12-7722 (D.N.J., March 16, 2017) (policy containing identical clause as contained in Travelers policy in this case precludes

summary judgment from entering because "[a]dditional work is necessary to fully evaluate the potential hidden damage to the wood structure of the front wall of the residence . . . .").

Summary judgment must be reversed where Travelers failed to abide by its obligations under the governing New Hampshire Administrative Rules for Insurance. Traveler's failed to account for and address completion of its claim settlement and appraisal, as required. The summary judgment order must be reversed. *Clark v. New Hampshire Department of Employment Security*, 171 N.H. 639, 650 (2019).

Appellants raised hidden damages in their complaint and in their R. 22 statement of damages. App. at 103-05; 123. These damages are part of the unresolved overall dispute between the parties requiring reversal of summary judgment.

Moreover, in another case in which Travelers was a named defendant, the court summarized the obligation Travelers admitted it had regarding "hidden damage," as follows:

> It has been our experience that there is always the possibility of missed or hidden damage to be found once demolition is complete, and restoration is started. However, any supplemental costs, or missed damages, must be submitted to Travelers Casualty Insurance Company of America (hereafter Travelers) for our review and approval prior to any additional costs being incurred. We reserve the right to decline consideration for any supplemental costs that we have not reviewed and approved prior to their obligation and/or submission. When, or if, a supplement item or cost is identified, travelers requests that we be given immediate notice of the supplement (within 3 business days), so that we may visit the site, if necessary, and/or communicate with the contractor.

Pheasantbrook Home Owners Ass'n v. Travelers Indem. Co., 152 F.Supp.3d 1342, 1351 (D. Utah 2016); *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 374 (Ky 2000) *criticized on other grounds in Gale v. Liberty Bell Agency, Inc.*, 911 F.Supp.2d 488 (W.D.Ky. 2012) (although admitting to hidden damage needing to be taken into consideration, the insurer, nonetheless ignored them and merely "restated Farmland's offer . . . ."); *Sibley v. Insured Lloyds*, 442 So.2d

627, 628 (LA Ct. App. 1983) (insurer acknowledged damages did not include potential "unforeseen or hidden damage which would also be covered by the policy.").

Travelers failed to address hidden damages in seeking summary judgment; it is an obligation imposed under New Hampshire law. The summary judgment entered must be reversed. *New Hampshire Administrative Rules, Ins* 1002.16 (d).

III. The trial court erred as a matter of law in granting summary judgment where Defendant failed to abide by its obligations under the New Hampshire Administrative Rules for Insurance, New Hampshire Administrative Rules, Ins 1002.01 requiring that "all licensed property and casualty insurers" follow all the "claim settlement standards for all property and casualty insurance . . . " where the insurer failed to contract a conveniently located contractor, as required under New Hampshire Administrative Rules, Ins.1002.16 (a) (1) by retaining a contractor from Hampstead, NH to do work on a home in Campton, NH.

Under *New Hampshire Administrative Rules, Ins.*1002.16 (Willing and Able Contractors and Repairers; Other Than Motor Vehicle), the rule provides as follows concerning the requirement for a "conveniently located contractor:"

(a) Every settlement offer that is based upon an appraisal conducted on behalf of the insurer relative to property and liability insurance shall:

> (1) Include a written statement that, if the claimant or insured cannot find a contractor or repairer to do the repair or replace the damage property for the price quoted, then the insured or claimant may request that the insurer supply the insured or claimant with the name and address of any known recognized, competent **and conveniently located contractor** or repairer who is willing and able to repair or replace the damaged property with other property of like kind and quality within a reasonable time for the price quoted in the appraisal or as otherwise provided for in the insurance policy;

*New Hampshire Administrative Rules, Ins.*1002.16 (a) (1) (emphasis supplied).

Pursuant to New Hampshire Administrative Rules, Ins.1002.16 (a) (1), Travelers had a duty to contract a "conveniently located contractor" to perform the repair work on the Appellants' home. The Appellants reside in Campton, NH, north of Plymouth, NH and some two

hours from the Massachusetts border. Travelers contracted with a company from Hampstead, NH, in the more southern area of New Hampshire, to travel to Campton to do the contract work.

Travelers overlooks the fact that it failed to provide, as required, a "conveniently located contractor," as required under New Hampshire law. *Id.* It is not entitled to summary judgment where, as a matter of law, it has failed to meet its legal obligation to its insured as required under New Hampshire law.

IV. The trial court erred as a matter of law in granting summary judgment where Defendant admitted in its Answer that Plaintiffs' home "had many custom features," Complaint, para. 22; Answer, para. 22, but then failed to "take into consideration the specific characteristics of the property. . . " as required under New Hampshire Administrative Rules, Ins. 1002.09.

Travelers failed to demonstrate, or argue, that it had complied with its obligation under New Hampshire Administrative Rules, Ins. 1002.09 to "take into consideration the specific characteristics of the property. . . " Travelers had a duty and failed to demonstrate that the appraisal considered the unique custom features of the property. The motion for summary judgment is devoid of any such representation.

In Answer to the complaint, Travelers admitted to paragraph 22 that the insureds' home "had many custom features." Complaint, para. 22; Answer, para. 22.

Under *New Hampshire Administrative Rules, Ins.* 1002.09, Travelers was "prohibited from using arbitrary methods to establish the value of the property ***that do not take into consideration the specific characteristics of the property***. . . ." Travelers ignored this obligation in moving for summary judgment despite its admission in its Answer.

CONCLUSION

The decision of the trial court must be reversed based on a *de novo* review of the applicable law, the applicable limits on the insurance appraisal clause and the insurer's failure to

demonstrate compliance with the New Hampshire Administrative Rules for insurance.

REQUEST FOR ORAL ARGUMENT

Appellants requests 15 minutes for oral argument. Oral argument to be delivered by R. James Steiner, Esq.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and with Rule 18 of the Supplemental Rules of the Supreme Court.

/s/ R. James Steiner
R. James Steiner, Esq.