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Supreme Court of Texas.
State Farm Lloyds, Petitioner,
v.
Becky Ann Johnson, Respondent.
No. 06-1071.

January 15, 2008.

Appearances:

Michael W. Huddleston, Shannon, Gracey, Ratliff & Miller, LLP,
Fort Worth, Texas for petitioner.

Russell J. Bowman, Law Offices of Russell J. Bowman, Dallas, Texas
for respondent.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.
Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

CONTENTS

ORAL ARGUMENT OF MICHAEL W. HUDDLESTON ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF RUSSELL J. BOWMAN ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF MICHAEL W. HUDDLESTON ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. Court is
ready to hear argument in 06-1071, *State Farm Lloyds v. Becky Ann
Johnson* [STATE FARM LLOYDS, Petitioner, v. Becky Ann JOHNSON,
Respondent. 2008 WL 495042, Supreme Court of Texas].

SPEAKER: We'll present argument for the petitioner. Petitioner has
reserved five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL W. HUDDLESTON ON BEHALF OF THE PETITIONER

MR. HUDDLESTON: May it please the Court. The issue that we believe
the Court faces today is whether one party to a Texas homeowner's
policy may use appraisal to estop the other party as to questions of
coverage. The interpretation of the appraisal cause -- clause
[inaudible]--

JUSTICE BRISTER: Why is this a coverage question? There's no
question in cover hail damage.

MR. HUDDLESTON: Hail damage is covered but the question is,
whether or not the other portions of the roof were actually cov--
whether or not they were damaged by hail.

JUSTICE BRISTER: Why is that a coverage question?

MR. HUDDLESTON: It has to be differentiated from other causes.
What the positions that State Farm took in its letter at page 94 in the

record, 95.

JUSTICE BRISTER: But I mean coverage question, it may -- I'm not an expert on coverage questions, I'm a Judge. You're an expert on coverage questions, you're a lawyer. But whether a roof was harmed by hail or it's just old, neither you nor I are experts on it. That precisely what we get appraisers for?

MR. HUDDLESTON: No, your Honor. I -- I think -- I think it is a coverage question. Let me just explain briefly.

JUSTICE MEDINA: Wasn't it a scope of the damage question?

MR. HUDDLESTON: Well, it's not a scope of damage question because it turns upon what -- whether or not a covered cause of loss occurred or whether it was some other type of cause of loss. If you look at how this type of case is submitted and an ordinary coverage case that actually is tried by court, the issues of coverage involved, was there an accidental direct physical loss to property? And that's a question in this case as to whether or not other portions of the roof other than the ridgeline were actually damaged or not. That'd be the first question to the jury.

The second question that would go to the jury is, whether or not there was a covered cause that was actually involved? In this case, we've got hail as a potential covered cause for part of it, but the question is, whether or not the other portion is a covered cause, and would fall within potential and excluded cause, such as the 'wear and tear' exclusion from the covered perils.

Then, the jury on instruction by a judge learned in the law and knowledgeable about coverage, would actually address a comparative or concurrent causation question, in which the jury would be asked to determine what portion based on the burden of proof placed on the insured, what portion of that loss was caused solely by a coverage cause of law. Those are things -- well, an appraiser, certainly has expertise to identify what is or what is not hail damage. If you place the question before them, to determine scope and to differentiate between them these causes, then what you're really doing is asking them to decide coverage issues that are ultimate issues of liability, that would traditionally be decided by the finder of fact on proper instruction by the court.

JUSTICE BRISTER: So, you would limit appraisals and these are widespread in the insurance industry, appraisal clauses.

MR. HUDDLESTON: That is correct, your Honor.

JUSTICE BRISTER: You would -- but -- but your understanding is, then, your argument is, that appraisal remedy is limited to -- we take the appraisers out and only in cases where the homeowner and the insurer agree that this dent, and this dent and this dent are by hail and pay no attention to the rest of those, how much is it's going to cost to fix those three dents. That's all appraisals are for.

MR. HUDDLESTON: I think appraisal can be -- can be more depending on the circumstances, your Honor. For example, one of the things the Court of Appeals sees - -

JUSTICE BRISTER: That's a waste - that's a waste of time to have an appraisal process for that.

MR. HUDDLESTON: Well, what appraisal has intended to do as this Court said in the *Clancy* [Scottish Union & Nat. Ins. Co. v. Clancy, 8 S.W. 630 (Tex. 1888)] case and in *In re Allstate* [In re Allstate County Mutual Insurance Company, 85 S.W.3d 193, 195 (Tex. 2002)], is it is to determine evaluation, and it is to create an estoppel based upon that economic or monetary determination. Here, what you're asking the appraisers to do, without any process, I mean, when you look at whether

or not this clause was intended to submit issue such as concurrent cause --

JUSTICE BRISTER: So --

MR. HUDDLESTON: -- whether or not there's an --

JUSTICE BRISTER: All appraisal for is for monetary evaluation of agreed covered losses.

MR. HUDDLESTON: What the Court has stated is it is to determine the issue of damages and estop on the issue of damages. And we would submit that where you asked an appraiser --

JUSTICE BRISTER: Of course, damage usually includes what was caused by or not. I mean you're -- you're position is, it's only how much is it gonna cost to fix this, this and this.

MR. HUDDLESTON: What is the value, yes, Sir. And that indeed --

JUSTICE BRISTER: And I don't understand why that matters. I mean -- when my house has been damaged, what the insurance company -- you know I call a Guy up and he says it's going to cost X, and the insurance company says, 'Oh, we can get it done for half X.' And the bottom line is if the insurance company can get it done for half X because they've got a guy who is there inhouse guy that does it, then it's -- as long as it's done, who cares? Why would you ever want to fight about that?

MR. HUDDLESTON: Well, the classic example of when an appraisal is used is when you have an individual item, such as a piece of jewelry that is burned up in a fire and there's a disagreement about what the value is. When it becomes problematic, your Honor, is when you step into an area where the scope obviously has something to do with the value.

JUSTICE WAINWRIGHT: Well, it sounds to me like it becomes problematic in every case, where there is more than one potential cause of the damage --

MR. HUDDLESTON: That is correct, your Honor.

JUSTICE WAINWRIGHT: -- which makes it almost -- well, it makes it -- the usefulness, very limited. Someone might argue, it makes it -- the appraisal remedy nearly useless, especially when you're dealing with -- wind damage to roofs, or damage caused by the elements to buildings, it makes appraisal almost useless if it's that limited, doesn't it?

MR. HUDDLESTON: Well, it certainly gives it a limited purpose and we believe that's entirely consistent with the word appraisal, which is what's used in the contract.

JUSTICE WAINWRIGHT: Any -- to kind of piggyback on the other questions, when there is damage to a roof, and there's hail, and it's -- there's wind, and perhaps the wind tore off part of the roof, it rained in there, was that related to the hail, or was it the wind or was it the rain. When less than all three of those are covered, and you have an appraisal provision that sends appraiser out there to say, 'Fix the amount of the covered loss.' In order to do that, if that's what you really want the appraiser to do, he or she is going to have to determine what was caused by the covered hail. But you're saying their appraiser can't do that.

MR. HUDDLESTON: The appraiser can't differentiate between causes and make that decision, because if they do that, then what they're doing is they are making the concurrent cause coverage determination. They are making the determination as to whether or not the key ingredient under the ensuring agreement that there'd be an accidental direct physical loss, they are deciding those issues. And -- and if I -- if I can just emphasize one point from *Clancy* and that is, 'Appraisal is not meant to be broad. It is intended to be narrow. It has been intended to be narrow since at least 1888 in this jurisdiction.' The

reason is --

JUSTICE WAINWRIGHT: I understand that. Let -- Let me ask you then -- in what circumstances is appraisal useful. You mentioned in a element, this case where there's a natural element causing damages to buildings. You -- Justice Brister pointed out where the parties agree. This was caused by hail, fix the cost, other than the situation where the parties agree. In other words, there's no litigation. In litigation, when is appraisal useful then? In a circumstance, where there's elements causing damages to buildings?

MR. HUDDLESTON: Well, of course, appraisal was intended to be something that occurs, depending on the circumstances before litigation. It's not something that's done in the context of litigation.

JUSTICE WAINWRIGHT: Let's call it disputes then.

MR. HUDDLESTON: Disputes. Another area where it would be practical and one that we saw that it was very helpful then, was in a lot of the mold cases where the question was not whether or not there was mold in the house, but what the appropriate reasonable and necessary expenses would be to go in and to remediate the mold. How many air scrubbers do you have? What is the reasonable price for the air scrubbers? Whether or not containment barriers would be required, whether or not the situation was such, that you would require uniforms which are very expensive, and of course, we had a lot of variants in terms of what contractors were charging is the crisis generated and got worse.

JUSTICE WAINWRIGHT: That sounds like a situation that -- where the parties agreed that mold caused this damage then.

MR. HUDDLESTON: That's correct, your Honor.

JUSTICE WAINWRIGHT: I'm asking about where there is concurrent or potentially concurrent more than one cause of the damage, when is appraisal useful?

MR. HUDDLESTON: Well, again, to the extent that the appraisers have to determine a scope question that requires them to resolve between different causes. Resolving whether something is a covered cause or not and then estopping a party, whether -- and -- and it's not always going to be a State Farm, because what this Court does is going to -- the shoe is going to be on the other foot. In -- it already is, based upon the decision of the Court of Appeals, insured thousands and hundreds of thousands of insureds are going to be hauled in to Court, or hauled in to appraisals, forced to go through the expense out of the lay homeowners pocket of paying for the appraisal. Also, forced to pay for portion of the empire and the net result is that they have given up their right to have a court and a jury decide the question. I write which this Court in *Clancy*, and *In Re Allstate* said, 'The ultimate question of liability, which coverage is --

JUSTICE WAINWRIGHT: So --

MR. HUDDLESTON: -- has to be decided by a court.'

JUSTICE WAINWRIGHT: -- you said appraisal is limited to our -- is appraisal, from your point of view, only useful when there's no dispute about the cause of the damages?

MR. HUDDLESTON: I think that's one -- one area where we can agree. I've also seen, your Honor --

JUSTICE WAINWRIGHT: Give me another opportunity. Give me another situation where it applies? Mold, I don't think works because as you acknowledged, parties agreed that mold caused the damage so there's no potential concurrent causes, no potential situation that there's more than one cause. Give me another situation where appraisal works when there are potentially more than one cause for the damage.

MR. HUDDLESTON: Well again, your Honor, what -what I would submit is that if there is a causal question of whether or not there is a covered cause or not, that simply cannot be determined by appraisal because that is the ultimate issue of liability.

CHIEF JUSTICE JEFFERSON: Let - let -- let's assume just on -- for purposes of argument this morning that we disagree with you and we say that the plaintiffs under these circumstances have a right to an appraisal, does that completely end the inquiry? Or would your client have an avenue for re-dress with the trial court or an appellate court to say that -- to-- to preserve your coverage contention? In other words, the appraiser comes back with a figure of \$6,400 dollars, which I guess is what the potential value for pricing the roof is. And you say, 'No, your Honor, as a matter of law, only \$500 dollars was damaged in -- in the hailstorm and -- and we therefore seek, you know, a reduction in the amount or reversal or rendition.' Is that a possibility or not?

MR. HUDDLESTON: Well, we certainly believe that -- that if this -- even if this Court were to allow what I would call what's essentially an advisory appraisal to be done pending these other issues, the Court would have to make very clear, that that appraisal does not estop on issues of coverage and causation.

JUSTICE HECHT: But you think it does, though, don't you? I mean, it does - it does say it shall set the amount of the loss.

MR. HUDDLESTON: Your Honor, I believe that that is exactly what is being attempted by the respondents in this case. They want to estop State Farm from being able to contest coverage. And State Farm says, 'This Court has told it, as well as the millions of homeowners in this state, that you have a right with -- constitutional right to access to the courts, a right to trial by a jury and we're not going to interpret--'

JUSTICE BRISTER: Unless you waive it - unless you waive it in the contract.

MR. HUDDLESTON: Unless you waive it in the contract.

JUSTICE BRISTER: -- which people do everyday in arbitration.

MR. HUDDLESTON: Right, but this is a contract that is prescribed by a state agency, which I might add the TDI recently and the homeowners, their instructions to consumers regarding the homeowners policy which was cited in the amicus brief at page 4, they state that appraisal governs only disputes over the amount to be paid, it is not for settling disputes about coverage or causes of loss. And so we believe their interpretation, at least as reflected there, is certainly consistent with the interpretation we're suggesting because in the court of law, let's think about what appraisal, and I think there is one commentator J. Levin had in demystifying the appraisal in 2007 in an insurance Risk Management institute wrote that the process of appraisal when you think about what is being given up and we interpret whether or not policyholders and carriers are giving up the right to access to the court by using an appraisal clause, you have to look at what it's being replaced with, what is appraisal like? It is an extremely informal process with very few rules. In fact and in words of Mr. Levin, it is something akin to the old political process of selecting candidates for political office where all of the negotiations are occurring outside and free of scrutiny and interference. Some--

JUSTICE O'NEILL: But you're going to an appraiser, I presume, for their expertise in determining cost to prepare.

MR. HUDDLESTON: That would certainly be the intent of certainly State Farm in selecting who they would want to be the appraiser. We're

not selecting for coverage expertise, we're selecting --

JUSTICE O'NEILL: That -- that's my point. I mean you're -- you're asking them what is it going to take -- take to fix X?

MR. HUDDLESTON: That's correct.

JUSTICE O'NEILL: And in order to make that determination in this case, you're going to have to go beyond that to determine what caused X. In other words, how are they going to know what cost to put on it unless they know how much of the roof are gonna be fixed.

MR. HUDDLESTON: That's correct, your Honor. And I think there may be some circumstances, where the parties or some type of memoranda of appraisal could actually set forth and -- and -- and stipulate how is it to -- to be decided, and to actually work around some of these problems, holding off the coverage issue to be decided later.

This case, though, because of concurrent causation and the fact that -- that you would have percentage of cause potentially found by the jury in that determination, this one doesn't lend itself to being a situation where appraisers could give you an advisory opinion, in what -- what we would submit again as this sort of theoretical appraisal that occurs before coverage is resolved. And then, when you try the coverage case, you actually find out that the result reached by the jury is contrary, that they came up with a different causation number than the damages were based on, then you had wasted the appraisal, the insured has wasted their money as has the carrier. And again, when we think about whatever happens with appraisal, that is an exponential impact and increase, particularly. All you have to have is one hailstorm, one Rio, one Katrina and then you got a massive problem. But the parties sought trial by jury, they sought trial on the ultimate issue from a court to not trial by roofing contractor. Thank you.

CHIEF JUSTICE KEFFERSON: Thank you, Mr. Huddleston. The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Bowman will present argument for the respondent.

ORAL ARGUMENT OF RUSSELL J. BOWMAN ON BEHALF OF THE RESPONDENT

MR. BOWMAN: Thank you. May it please the Court. I'm Russell Bowman. I'm here on behalf of the respondent, Becky Johnson.

Before I get into argument, a couple of issues I know just came up there that I'd like to address. And one, the question that was raised about how can appraisal help when a lawsuit is filed? The perfect example is that *Vanguard v. Smith* [Vanguard Underwriters Insurance Company v. Smith, 999 S.W.2d 448, 452 (Tex.App. - Amarillo 1999 orig. proceeding)] case that I had cited in my brief. That was a case wherein a lawsuit was filed, the insurance company moved to abate the lawsuit to have the insured comply with the appraisal, and it was a dispute just like this case. It was a dispute over the amount of hail damage to a roof, is one that Justice Johnson and I should be, pretty familiar with, since we worked it from opposite ends of the bench. But it-- it was just like this situation in that case once the appraisal was done, it eliminated lawsuit. In another example --

JUSTICE HECHT: It eliminated the lawsuit?

MR. BOWMAN: Yes, your Honor. Yeah. And another example, Justice Wainwright, you brought up, where appraisal could be helpful in a case where there's concurrent causation. One that I've had a lot of

experience in is we used to get a lot of foundation cases, and -- and the issue there was always, 'Was the foundation movement caused by a settlement or was it caused by a plumbing leak?'

JUSTICE WAINWRIGHT: Like *Wells* [*Wells v. American States Preferred Insurance Company*, 919 S.W.2d 679, 687 (Tex.App. -Dallas 1996, writ denied)].

MR. BOWMAN: Exactly. And you'd also have the dispute in those type of cases over whether the foundation would need to be peered or whether you would just need to patch the correct sheetrock walls. So in those, you'd have a dispute over the amount of loss and I had countless cases where appraisal was used to resolve that amount of loss dispute. And I've had them where the appraisal work came back, that the foundation did need to be peered, whatever the appraisal work was paid, it resolved it. Then I also had some where the appraisal award found that the foundation did need to be peered and it didn't determine any coverage at that point, we just litigated the issue of how much the damage was due to settlement versus how much was due to [Inaudible].

CHIEF JUSTICE JEFFERSON: Mr. Bowman, let -- let's assume that the case goes to -- to an appraiser, but also assume that the facts are conclusive that the hail damaged only the rim to the tune of \$500 dollars, but the appraiser assessed damages at \$6,400 dollars. Would State Farm have any ability to contest the appraiser's finding or would you say that they are estopped by their contract from challenging that -- that finding?

MR. BOWMAN: I'd say from -- no, I'd say they don't wouldn't be a estopped from -- they'd be estopped from contesting the amount of the loss, but as far as --

CHIEF JUSTICE JEFFERSON: So they would -- under my hypothetical, it's conclusively established that the only damage that this covered was \$500 dollars worth to the rim of the roof and you're saying that they would be estopped from contesting the total replacement of the roof?

MR. BOWMAN: Just as far as the amount, but as far as whether they owe that under the contract, I -- whether that additional damage was due to hail or some excluded peril, under that scenario, they wouldn't be estopped from doing that because one, you can't, an insurer can't be estopped from a coverage defense by its actions or inactions.

CHIEF JUSTICE JEFFERSON: So you would say there'd be -- then after the appraisal there would be a jury trial on coverage?

MR. BOWMAN: Yes. Assume that State Farm didn't want to pay it and the insured wasn't happy with their denial then she would have her option to file a suit and if we had to go to a trial, you -- just like in some of the concurrent causation issues I've had in trial, you would have the first question 'where do you find -- or state the percentage of each cause you find cause of damage, wind or hail, wear and tear, deterioration and the jury would assign their percentage to each one and say under that scenario, they assign 50 percent to hail then 50 percent of appraisal award would be what the judgement would be for.' So no, your Honor. I don't think they'd be estopped from asserting any, any coverage defense.

JUSTICE BRISTER: So what is 'shall set the amount of the loss' mean?

MR. BOWMAN: Basically, I equate it to if we had a trial insurance case, we got the liability and the damage issues. Liability deals with the coverage where the jury would be asked questions about, you know, which of these perils do you find play a part, and all the appraisal does is deal with the -- what in effect would be the damage question

that would be submitted to a jury. What is the amount of damage you find?

JUSTICE BRISTER: So you agree with State Farm?

MR. BOWMAN: Actually from what I heard, I would say no, your Honor.

JUSTICE O'NEILL: But then --

JUSTICE BRISTER: Sounds like you agree.

JUSTICE O'NEILL: If you're going to get a trial anyway over the coverage question then what's the benefit of the appraisal process?

MR. BOWMAN: Well I -- I think like in this case, your Honor, if that appraisal were to come back at \$5,000 dollars, State Farm's going to spend a lot more than \$5,000 dollars defending a trial on a case like that by the time they're through with experts.

JUSTICE BRISTER: So this is an advisory mediation?

MR. BOWMAN: It may have that effect but it's --that's not the intent or the purpose.

JUSTICE BRISTER: You're telling me, you know, the problem is, we got to do what the policy says, not what people normally do, that maybe the normal practice in the insurance industry, but that -- isn't what this says? This says, it says, it shall set the amount.

MR. BOWMAN: The amount of loss.

JUSTICE BRISTER: We could draft this so it said and if either party disagrees, they can appeal in de novo jury trial but that's not what this says.

MR. BOWMAN: And I think the key words there are the amount of loss, your Honor. Typical example, if a car hits my house or a tree falls on my house. The amount of my loss is going to be determined by two things, scope of the damage and the price to fix that scope. In -- in that example would be how much square footage of brick and sheetrock and -- and studs, I'm going to have to replace. How much is going to have to be paid and what's the price per square foot to do all that. In this case, the facts are undisputed, that the dispute that exists here is over that extent, i.e. the scope of the hail damage --

JUSTICE HECHT: All right, and after the appraisal process comes back and says \$500 dollars was the loss because only the ridge was damaged. You're not bound by that. You can still go to court and say the damage was more extensive and yes, that's all the damage was to the ridge, I'm stuck with that but there were \$6,000 dollars damage to the rest of the roof.

MR. BOWMAN: Yeah, actually it goes back in the appraisal worth came back with \$500 dollars, that's my lady and State Farm, they'd both be bound as that being the amount of loss, so at that point under that scenario it would end this dispute because there would be nothing to compare it on.

JUSTICE HECHT: I'm very confused because there is two pieces, the ridge and the rest. And the appraisal process comes back and says \$6,500 dollars. You just now said, I thought, that the insurance company can go in there and say -- and the jury and say, 'No, the \$6,000 dollars was not the result of this hail, we only owe the \$500', and that could happen.

MR. BOWMAN: Correct.

JUSTICE HECHT: Okay. Now, the other way around, the appraisal process finds 500 but you cannot go back in the court and say, 'No, the whole roof was damaged then I get the \$6,500. I only get the \$500 for the ridge, but I get the \$6,000 for the roof.'

MR. BOWMAN: And the difference between the two is-- is in one, the amount of loss was set at \$6,500, the other the amount of loss was set

at \$500 dollars, so the only remaining issue if there was a coverage issue would be how much if the amount of loss in that scenario was due to the covered peril and each one the amount of loss would be set by the appraisal award.

CHIEF JUSTICE JEFFERSON: Even if again, it was --there was conclusive evidence that the hail damaged the entire house, the entire roof.

MR. BOWMAN: Under that scenario, your Honor, if -- if that's -- that appraisal awards can be vacated for fraud, accidents, mistakes or under that scenario, you know, possibly you have an issue there. If there was conclusive evidence, the entire roof was damaged by hail and the appraisers or the appraising the empire just refused to consider it, then you have a situation where the appraisal worth probably could be vacated on that ground.

JUSTICE O'NEILL: Let me help out the poor appraiser here. I'm the appraiser, what am I supposed to do? Am I supposed --what are my -- what's my direction? Tell me what it's going to cost to fix the whole roof. Tell me what it's going to cost to fix the ridgeline. Tell me what am I supposed to tell you. What do you want from me?

MR. BOWMAN: I think just common sense dictates that if you're dealing, say, with the water loss and the appraiser is going out there to determine what is the amount of loss from that, if you go out there and you know--

JUSTICE O'NEILL: Well, but you're going to tell me, 'Give me a figure that is going to cost to fix the roof', and the other side is going to tell me, 'Give me a figure to fix what's caused by hail.' And what am I to do? I mean I, it seems to me that the appraisers when you got a vehicle say, that's damaged, and there's no question that it's covered but you got to two different costs to repair it, then I know what to do. But you've got a car that is damaged because a drunk driver is driving through a hailstorm and you're saying it's not covered to the extent that collision was caused by the driver being drunk but the hail damage is covered. What are you asking me to do as the appraiser? I would think that would be hopelessly confusing.

MR. BOWMAN: No, I think under that scenario, your Honor, that just common sense dictates if say, you're loss there is hail damage to a car, I think the appraiser and part of the -- the phrase 'the amount of loss necessary' implies some causation requirement to determine what the loss is due to the peril that's involved. Say, if your car, for example, if you had hail damage to your car but you and your insurer could not agree on the amount of the hail damage, the appraiser comes out, and you can see hail dents and dings on the car but there's also, you could tell where you got rear-ended and this hadn't been fixed yet, well obviously the hail didn't damage that -- that part so the appraiser, I think, could necessarily not include that in his appraisal in determining what was the amount of loss from the hail damage.

JUSTICE O'NEILL: So then -- then this scenario is more of the extent of loss.

MR. BOWMAN: Yes, and I think that's what we're dealing with exactly here. It's just like in the *Peters* [Glen Falls Ins. Co. v. Peters, 386 S.W.2d 529 (Tex. 1965)] case that was decided by this Court where that involved a fire -- a fire loss and you had the initial issue of whether the extent of the damage was such as the constituted total loss, so as to be a liquidated demand and therefore just make the policy limit owed. Once the jury found there was no total loss, the insured and the insurance company still had a dispute over the extent of the fire damage and as this Court noted in its opinion, the lawsuit

was to be abated so that the appraisal could be conducted, which is the same thing we've got here. There's no dispute that a covered event occurred to Ms. Johnson's property, hail hit her roof and did damage to her roof. There's no other assertion or evidence in the record that there is any damage that's due to any excluded peril. And basically, if you take State Farm's position, what they're in effect doing is saying they get to determine, here's the amount of your damage, if you don't agree your only remedy is to go file suit which in cases like this, the cost of an expert is going to be more than what your cost to replace the roof and it makes especially more --

JUSTICE O'NEILL: Aren't you paying the appraiser as well?

MR. BOWMAN: Each side pays their own appraiser but that's going to be a lot cheaper than having an expert to do all the work an expert would have to do and be able to stand up to a Robinson challenge?

JUSTICE HECHT: Yeah. But either side, can actually place.

MR. BOWMAN: Yes.

JUSTICE HECHT: Don't you think that the insurance companies would be better at getting favorable appraisals than individual insureds in the hundreds of thousands of policies that there are?

MR. BOWMAN: I wouldn't think that. plus, your Honor, with what we have here, if you can use -- use appraisal for a situation like this, you know, basically State Farm is going to be able -- and other insureds is going to be -- make a lot of this just go away because it either is not going to be worthwhile to fight their decision or they won't have the money to fight their decision. Either way, basically, It will allow an insurer to --

JUSTICE HECHT: This is --

MR. BOWMAN: -- in effect deny a claim without having to fight it or contest it later.

JUSTICE HECHT: It looks to me like this is enforced arbitration except appraisal is sort of a step below arbitration and if you were telling -- if you were saying that the insurance companies were going to be able to use this to force every case of the arbitration, looks to me like there would be some reaction to that.

MR. BOWMAN: Well, and on that, it basically, the effect of the appraisal clause is just to estop the party that demands it from contesting the amount of damages. So, if the insurance companies want to demand appraisal, if the insurance weren't happy, they would still, I think, be able to contest that but I think at the very least by the way the clause is worded it is something either party can demand and it certainly should apply to the facts of this case since the only dispute is one over the extent of the damage to the property.

JUSTICE WILLETT: How do you -- how do you characterize the two letters that State Farm sent your client?

MR. BOWMAN: The first one, I'd say conveys their decision on the claim, which says we went out. We found 400, I think \$499.50 of hail damage and it's below your deductible, here's the estimate. And then the -- the next letter I kind of describe as just a posturing letter trying to convince poor Ms. Johnson to step into arbitration of State Farm's own choosing, kind of like lamb being led to slaughter.

JUSTICE WILLETT: But you dispute that State Farm was disputing coverage for the non-ridge line portion of the roof?

MR. BOWMAN: I would dispute that because I think their basis is, this is all the damage it's out there to the roof. If there was other damage from some other peril be it defective shingles, wear and tear, deterioration, something like that, it's not been asserted nor is there any evidence.

JUSTICE WILLETT: In your view those letters don't dispute coverage for the rest of the roof outside the ridgeline.

MR. BOWMAN: I don't think they do, your Honor. It just saying, here is the only damage that's out there and now we -- because that's what we have said -- that's the coverage dispute so you can't use appraisal which following Justice Brister's question, if you follow that logic it's -- it's basically you're gonna make the clause meaningless and --

JUSTICE BRISTER: Suppose that you had a policy that doesn't -- we don't cover flood and -- but there is a dispute about whether the house was damaged by the wind, blown, rain or flooding. You send the appraisers out there, and they say \$50,000 dollars. Then here, is that a coverage question that does, that then comes back into Court or is that an 'extent of loss' question.

MR. BOWMAN: I'd say 'extent of loss'. I had one like that down in Houston, your Honor, from tropical storm Allison, had some damage due to flooding from that but the insured also had a-- the wind blew off sections of the roof which got wind-driven rain in there which was covered, and so we had a coverage dispute. But there was also a dispute in that case over what it was going to cost to fix the damage to the house regardless of what caused it, but just what it was going to cost to fix the house. And in that case, since agreement can be reached on that, that one went to appraisal. Appraisal award was rendered so that everybody can live with. It was paid claim over with.

JUSTICE BRISTER: I know. But -- but assume it's our case that -- that appraisal is not acceptable to one side because they think it was all a flood. What happens then?

MR. BOWMAN: I've had some like that. My -- my opinion would be appraisal would -- if the parties are not in agreement over what is going to cost to fix the damage out there regardless of what caused it, but if they're not in agreement with that, appraisal is to resolve that specific type of disagreement so that under that scenario, I think --

JUSTICE BRISTER: Sounds -- sounds to me like you just agreed with the counsel for State Farm.

MR. BOWMAN: No, I wouldn't say that all, your Honor 'cause under State Farm's argument, he is saying under that scenario --

JUSTICE BRISTER: All of my questions to him were, you're saying all appraisal is for is, you know, how much you're going to pay the roof or the repair guy to fix the roof. If there's a dispute at that and that seems a silly thing, just, you know, we're all gonna do it for the cheapest, that's what you pay. Why -- why is it your -- why isn't that what you've just said?

MR. BOWMAN: Mine is different because again, the example I was given was again a dispute over the extent of the damage that's out there. You know, it echoes to how much sheet rocks going to be replaced. You know, there is a difference over that which is going to affect the extent of the loss and directly affect the amount of the loss.

JUSTICE BRISTER: How could you decide that without deciding whether it was harmed by flood or wind-blown rain.

MR. BOWMAN: Because I think over that scenario, the jury -- I mean, not the jury, the appraisal panel will simply determine, to the best of their abilities, what it's going to take to fix the damage out there, then that leaves the issue remaining about as to this damage found by the appraisal panel, and put in the appraisal award. How much of that is due to the wind-driven rain. How much of that is due to the excluded peril flood. [inaudible]

JUSTICE BRISTER: How does the appraiser separate those two amounts?

MR. BOWMAN: They don't. They just render an award for the amount of the loss replacement cost and actual cash value which is replacement cost less depreciation. And under that scenario, they're not doing like what's done in the *Wells* case where the appraiser and one of the empires assigns a specific dollar amount to a specific peril, which in that case they assigned it to an excluded peril, which is why the award was struck in that case. Under the example you've given, your Honor, the appraisal panel is just coming up with an amount of loss figure without --

JUSTICE O'NEILL: The loss, I mean, loss means covered loss, doesn't it? I mean, it has to. Within the policy, when it says they shall determine the amount of the loss doesn't it imply covered loss?

MR. BOWMAN: It should. And I think -- and that's why it should apply here, your Honor. We clearly have a covered loss. State Farm is simply contending there is only \$499 dollars of damage and the only way you can contest our finding on that is to go to court. So we --

JUSTICE WAINWRIGHT: Let me -- let me try another direction and likewise trying to figure out where both of you are on this position. There is damage to a house caused by hail and by wind. Let's assume wind is not covered. Appraisers got there and say there is \$100,000 of total damage, they're not deciding what caused what total damage to the house. That number -- several questions based on that number -- is that number binding on either side after the appraisal?

MR. BOWMAN: Actually, it should be binding on who is the party that demanded the appraisal.

JUSTICE HECHT: Why did you say -- just a question about that -- why do you say that when it says it sets the amount of the loss.

MR. BOWMAN: I say it 'cause in the *Wells* case, your Honor, the Court noted that the effect of the appraisal is to estop the party that demanded it for contesting the amount of damages. And that's, that's consistent with some cases in other jurisdictions that have decided that issue.

JUSTICE WAINWRIGHT: Well, we -- we -- we've not said that. Those are Court of Appeals decision, right?

MR. BOWMAN: Correct, your Honor.

JUSTICE WAINWRIGHT: So, let's --

JUSTICE BRISTER: Does it say that it's all it does? You're saying that's, obviously, if it says the amount for both parties have estopped whoever ask for it. But that's -- saying that does that mean it, why would it not have estopped the other party?

MR. BOWMAN: I think probably it should since it says it is binding on the amount of loss, I was just going by with what the Dallas Court of Appeals said in *Wells*, your Honor.

JUSTICE WAINWRIGHT: Okay. So, we got this \$100,000 dollar figure again set by the appraisers. They didn't make any causation or coverage decisions. So, we take that number and then we go to the fact finder and the fact finder then determines from what I think you're saying, how much of that \$100,000 dollars was caused by hail which is covered and how much was caused by wind, which was not.

MR. BOWMAN: Correct.

JUSTICE WAINWRIGHT: That's how you see this working.

MR. BOWMAN: Correct.

JUSTICE JOHNSON: How is that different from what he says?

MR. BOWMAN: I think it's a lot different, your Honor, because what I heard State Farm's lawyer arguing is that all appraisal deals with is

value, determining what it's going to cost to fix, what is this agreed scope of damage, whereas, under Justice Wainwright scenario you got a situation where the appraisers are determining the amount of damage that's out there, regardless of whether the scope has been agreed to by the parties or not.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Bowman.

REBUTTAL ARGUMENT OF MICHAEL W. HUDDLESTON ON BEHALF OF THE PETITIONER

JUSTICE WAINWRIGHT: Mr. Huddleston, this \$100,000 dollar figure amount, for example, do you agree on how that causation and coverage are determined? Appraisers just set the total amount of the damages, you take that number, go to the fact finder, let say a jury. The jury says, X percent caused by hail covered, Y percent caused by wind, not covered. Do you agree with that?

MR. HUDDLESTON: Well, if -- if there is no differentiation then the appraisal will only solve the amount and you still have to litigate the coverage light but that's not what's being ask for in our case.

JUSTICE WAINWRIGHT: This is my hypothetical. So in my hypothetical, you agree with Mr. Bowman about how the appraisal remedy works out or the appraiser just set the amount of damages. The fact finder determines causation and coverage.

MR. HUDDLESTON: Well, No, I don't, in this sense, your Honor. I -- I think if you determine a bulk amount, without differentiating cause then you basically, it's like submitting a damage question to a jury with the wrong question or the wrong standard because you got an answer --

JUSTICE WAINWRIGHT: But you said that appraisers should not determine causation or coverage. So what difference should the appraisers do?

MR. HUDDLESTON: Well, what they have to first and foremost decide and -- and I think it's kind of gotten lost in some of the --some of the discussion is -- the first and foremost has to be a showing that this was an accidental direct physical loss, that that there was in fact the damage.

JUSTICE BRISTER: Such want to include in this case, you send them out and say, how much hail damage was there to the roof? That was what they were sent to decide, right?

MR. HUDDLESTON: That's correct, your Honor.

JUSTICE BRISTER: There -- there is no dispute about that hail is covered.

MR. HUDDLESTON: Well, whether there was damage, we got notice of a potential loss.

JUSTICE BRISTER: So appraisers go out and decide how much, if any, hail damage there was to the roof.

MR. HUDDLESTON: Right.

JUSTICE BRISTER: And they comeback with \$6,500. Why isn't that the amount of the loss?

MR. HUDDLESTON: Well, it's not the amount of the loss because, again, if the condition of the roof. If -- if -- if -- if they if they identified solely as hail damage, you're having them differentiate between hail and other causes.

JUSTICE MEDINA: Who is your adjustor in all this scenario?

Where's your State Farm adjustor?

MR. HUDDLESTON: Well, of course, the adjustor came out twice to look at this roof.

JUSTICE MEDINA: And he says \$500 dollars the amount of the appraisal and they disagree. That's why you have an appraiser. That's why the policy provides for an appraiser, in case the insured doesn't agree, with a low-ball claim that the insurance carrier gives it, right?

MR. HUDDLESTON: Well, if there's a disagreement between the parties about the amount, and -- and if this case in terms of the amount of its total and if the roof has to be completely replaced. State Farm doesn't disagree with the amount that has been presented as the cost of totally replacing the roof. And I don't think there's any dispute about what it would cost to deal with the partial portion. This is a question of causation and it's a question of coverage.

JUSTICE BRISTER: My question is, if you send them out there and say, how much of the roof, what's the damage if any, to the roof by hail? And they come back and tell you the damage, if any, to the roof by hail as 6,500 then say, 'No, no, you weren't supposed to determine which was caused by hail or not?'

MR. HUDDLESTON: Well, because that's the wrong question. The question that would go to the jury in the coverage case and the one that is controlling of ultimate liability, is what percentage was hail, what percentage were some other cause -- I'm sorry.

JUSTICE BRISTER: Back to Justice Medina's question. What question do you send them out, send to them in the first place? You're asking the appraiser --

MR. HUDDLESTON: Well, your Honor, they don't. Frankly what causes --

JUSTICE BRISTER: What question did you ask the appraisers in this case?

MR. HUDDLESTON: We didn't appoint appraisers in this case. There was no appraisal here because State Farm opposed it because from the outset --

JUSTICE BRISTER: If we did, the question to them is going to be --

MR. HUDDLESTON: State Farm denied the claim. They denied the claim from the get-go. And so, if appraisers had been appointed, then you'd ask them -- and that's the problem is, what do you ask them and to say? Because they have to determine scope, how can they determine scope without them determining what is -- what is or is not covered on the policy. And if -- if the appraisal clause gave a mechanism for the top of precise questions to be posed, then we could perhaps consider that maybe it was intended to deal with this type of situation. It provides no such perception.

JUSTICE WILLETT: What do you make up of Mr. Bowman's characterization of the two letters that you sent his client? He disputes that you were disputing whether the non-ridgeline portion was covered or not?

MR. HUDDLESTON: Well, I disagree with his interpretation because I think what the, what the letters specifically --

JUSTICE WILLETT: And they're both in the record, right at 94, 95?

MR. HUDDLESTON: Right. At page 94 and 95, in the second paragraph of the letter, it says that the remaining portion that identifies to the portion that it believes was damaged ridgeline, and it says, the remaining portions of the roof have not been damaged by windstorm, hail or by any other covered peril. I mean, obviously the point was, the only thing that is covered is this portion and anything else is not

covered.

CHIEF JUSTICE JEFFERSON: Are there any further questions?

MR. HUDDLESTON: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you Mr. Huddleston. The cause is submitted and the Court will take a brief recess. All rise.

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