STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
[Fort Hood, P.J., and K. F. Kelly and Donofrio, JJ.]

ACORN INVESTMENT CO,

Plaintiff/Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, an unincorporated Association,

Defendant/Appellee.

SC No. 146452
COA No. 306361
LC No. 07-726774 CZ

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DEFENDANT/APPELLEE'S BRIEF IN OPPOSITION TO PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY FIND THAT THERE WAS NO "VERDICT" UNDER MCR 2.403(O)(2), SUCH THAT THE PLAINTIFF IS NOT ENTITLED TO CASE EVALUATION COSTS?

The Plaintiff/Appellant answers, "No."

The Defendant/Appellee answers, "Yes."

The Lower Courts answered, "Yes."

II. DID THE COURT OF APPEALS CORRECTLY FIND THAT THE APPRAISAL PANEL'S DETERMINATION OF LOSS AND DAMAGE BINDING AND NOT REVIEWABLE BY THE LOWER COURT, INCLUDING THE PANEL'S DECISION NOT TO AWARD DAMAGES FOR DEBRIS REMOVAL?

The Plaintiff/Appellant answers, "No."

The Defendant/Appellee answers, "Yes."

The Lower Courts answered, "Yes."

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COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Standard of Review

Pursuant to MCR 7.302(B), the Plaintiff's Application for Leave to Appeal must set forth one or more reasons why the questions presented should be reviewed by this Court. However, the Plaintiff fails to do so. Rather, on page v of its Application, the Plaintiff simply submits that the issues involve legal principles of major significance to the state's jurisprudence, without any explanation of what those legal principles are or why they carry major significance.

In fact, this dispute involves a straightforward analysis of the term "verdict" in the case evaluation rule, MCR 2.403(O)(2)(c). The Lower Courts applied the correct standards in interpreting the rule. As such, this Court may reasonably conclude that, whether or not the issue is one of first impression, the dispute does not involve legal principles of major significance to the state's jurisprudence; the decision of the Court of Appeals was not erroneous; does not conflict with a decision of this Court or another decision of the Court of Appeals, and will not cause material injustice. Its ruling should stand.

The same is true regarding the second issue raised by the Plaintiff in its Application, baselessly seeking payment of insurance proceeds for claimed damage not awarded by the panel of appraisers, who carried out their duties under the policy of insurance and MCL 500.2833(1)(m), to assess and determine loss and damage. The Plaintiff has failed to explain how the Court of Appeals' decision, consistent with settled Michigan law, not to go behind the appraisers' award, raises legal principles of major significance to the state's jurisprudence, requiring this Court's involvement.

Introduction

This matter arises out of a claim for insurance proceeds under a dwelling policy issued by the Defendant/Appellee, Michigan Basic Property Insurance Association ("the Association") to the Plaintiff/Appellant, Acorn Investment Company ("the Plaintiff"), for rental property at 12826 Marlowe, Detroit. A fire damaged the Marlowe property on May 27, 2007. Thereafter, the Plaintiff filed a claim seeking proceeds under the policy. The Defendant subsequently denied the claim, based

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on the policy having been cancelled on May 16, 2007.

The Plaintiff then initiated suit in the Wayne County Circuit Court. The Association asserted defenses, including that the subject policy was cancelled prior to the fire, such that there was no policy in force on the day the fire occurred. It also raised a defense that, assuming the existence of coverage, the Plaintiff's claim was barred by its misrepresentation of material facts in the application for insurance.

The issues in this appeal concern: (1) the Plaintiff's entitlement to case evaluation costs, where, following case evaluation, the issue of damages was resolved through appraisal under a property insurance policy, and, (2) whether the Lower Court should have awarded the Plaintiff additional insurance proceeds for debris removal, where the parties' appraisers chose not to do so.

Procedural History

On September 25, 2008, the Lower Court heard the parties' opposing dispositive motions regarding the Association's cancellation defense. It found issues of fact, and so denied both motions. On November 4, 2008, the matter proceeded to case evaluation. The Plaintiff accepted the $11,000.00 award, while the Association rejected it.

On June 19, 2009, over the Association's objections, the Lower Court granted the Plaintiff's motion in limine to bar the Association from introducing evidence at trial concerning the actual cash value of the Marlowe property other than replacement cost less depreciation; that evidence of market value would not be permitted.

On July 14, 2009, the Court granted the Plaintiff's motion to strike the Association's cancellation defense, finding that the May 16, 2007 Cancellation Notice it sent to the Plaintiff did not contain required verbiage advising the insured that unused premium would be refunded on demand. Despite the fact that unused premium was timely refunded to the Plaintiff, the Court nevertheless ruled that the cancellation was ineffective.

On December 7, 2009, the Court granted the Plaintiff's motion to strike the Association's defense based on misrepresentation in the application, finding that the Plaintiff was under no duty to advise the Association of changes in occupancy of the rental dwelling, where the Plaintiff

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represented in the application that the house was "tenant occupied," despite having initiated eviction proceedings against its tenant.

Thereafter, the parties agreed to submit the remaining issue of damages to appraisal, in accordance with the policy's provisions. However, the Plaintiff filed a motion, asking the Court to bar the appraisers from considering market value in their determination of actual cash value, but to limit them instead to considering only replacement cost less depreciation. The Association opposed that portion of the Plaintiff's motion, which the Court granted. On May 20, 2010, it entered an Order granting the motion for appointment of umpire, while also barring the appraisers from considering market value in their determination of loss and damage.

The parties agreed on the appointment of a neutral umpire. Working within the limitation set by the Court, on September 17, 2010, two of the three appraisers signed an appraisal award setting the actual cash value, loss and damage in the amount of $20,877.00.

Thereafter, on November 16, 2010, the Plaintiff filed a motion for entry of judgment in the appraisal amount, together with interest under the Uniform Trade Practices Act, MCL 500. 2001, *et seq*. In addition, the Plaintiff sought an award of case evaluation costs, as well as additional proceeds under the policy, for debris removal expenses allegedly incurred and which it claimed were due, but which the appraisers did not include in their award. The Association responded, indicating that it did not contest the Plaintiff's request for entry of a judgment in the amount of the appraisal award; nor that the Plaintiff was entitled to UTPA interest. However, it objected to the Plaintiff's request for case evaluation costs, and for policy proceeds for debris removal expenses which could have been, but were not, a part of the appraisal award.

On December 3, 2010, the Lower Court heard arguments on the motion for entry of judgment. Judgment was entered in the amount of $20,877.00 together with UTPA interest, which the Association paid. The Court denied the Plaintiff's motion for case evaluation costs, as well as its request for debris removal damages. Orders to that effect were entered on December 16, 2010. On September 23, 2011, it denied the Plaintiff's motion for reconsideration.

On October 3, 2011, the Plaintiff filed a Claim of Appeal with the Michigan Court of

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Appeals, seeking review of the Lower Court's December 16, 2010 Orders. Oral arguments were held on November 15, 2012. On November 27, 2012, the Court issued its Opinion affirming the rulings below. On January 3, 2013, the Plaintiff filed its Application for Leave to Appeal to this Court.

Material Facts

Through various corporate entities, including Acorn Investment Company, Ernest Karr owns several hundred dwellings in the City of Detroit, for rental to tenants. Mr. Karr testified that, in 1985, and under the name Bell Management, he acquired the subject Marlowe property from HUD. (Karr Dep at T 158; 175; **Exhibit A.**) The purchase price was $3,011.00. (Title search; **Exhibit B.**) He said that Bell later deeded the property to Acorn for no consideration. T 160.

Mr. Karr insures only a small handful of his rental properties at any given time. T 157; **Exhibit A.** On April 10, 2007, he applied to the Association for a dwelling policy for the Marlowe property. He said that he did so because he had begun eviction proceedings against his alleged tenant, having issued him a Notice to Quit. T 164; 182. Prior to the May 27, 2007 fire, he became aware that the tenant had moved, and that the property was vacant. T 166. He said that, thereafter, and before the fire, he had the property padlocked. T 166.

Mr. Karr's application for insurance requested coverage in the amount of $35,000.00 on the structure. (Application for insurance; **Exhibit C.**) The application described the property as tenant-occupied, but made no mention of the fact that Mr. Karr was in the process of evicting the tenant, or that the property would soon be vacant. In addition, and contrary to Mr. Karr's testimony, his Application represented that Acorn had purchased the property in 1997 for $35,000.00, which it said was also its current market value.

Mr. Karr paid $215.50 toward a total annual premium of $862.00 for the dwelling coverage. Consistent with its underwriting rules, the Association issued policy number 4587875 effective April 11, 2007. (Policy of insurance; **Exhibit D.**)

The next day, on April 12, 2007, the Association's inspector visited the Marlowe property, finding a lack of maintenance throughout, including rotting facia boards and trim, and missing gutters and down spouts, and a hole in the roof His efforts to contact the insured so to as to gain

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access to the interior were unsuccessful, such that he was unable to determine occupancy. (Inspection report, **Exhibit E.**) Mr. Karr denied knowing anything about the inspection, or the inspector's efforts to contact him for that purpose. T 186.

On April 16, 2007, the Association mailed a cancellation notice to the Plaintiff, advising that the property was ineligible for coverage, and cancelling the policy effective May 16, 2007 (Cancellation Notice; **Exhibit F.**)[1] Mr. Karr agreed that the Notice contained his correct Post Office box mailing address. T 178; 191.

On May 16, 2007, the Association mailed a second cancellation notice to the Plaintiff, confirming that coverage was cancelled effective that day. (Confirmation; **Exhibit G.**) On May 29, 2007, the Association issued the Plaintiff a pro-rata premium refund check in the amount of $133.50. (Affidavit of Gwen Hudson; **Exhibit H.**)

Mr. Karr admitted that he typically received several pieces of mail every day from the Association, sent to his Post Office box address. T 178. However, he claimed that he never received the Association's April 16, 2007 cancellation notice, despite the fact that the notice contained the correct mailing address. T 178; 191. He denied being able to recall whether he received the May 16, 2007 notice confirming the cancellation. T 193. Instead, he claimed only to have received a subsequent May 11, 2007 premium installment payment notice, also sent to his P. O. box, indicating that if payment was not received by June 1, 2007, the policy would cancel on that date. (Premium Installment Notice; **Exhibit I.**)

Mr. Karr acknowledged that he paid no portion of the overdue premium after receiving the

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[1] The policy contained a cancellation provision, stating:

> During the first 55 days this policy is in effect, "we" may cancel for any reason.
>
> * * *
>
> If "we" cancel this policy for nonpayment of premium, "we" will give "you" notice at least ten days before cancellation is effective. Otherwise, "we" will give "you" notice at least 30 days in advance of cancellation or nonrenewal. (FL-401 Ed 3.0 Michigan Amendatory Endorsement; **Exhibit D**, at 1.)

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Association's installment payment notice. In fact, he said that, had he received the first cancellation notice, he would have done nothing to keep coverage in force past the May 16, 2007 date. T 220.

On July 31, 2007, Mr. Karr submitted a Sworn Statement in Proof of Loss to the Association, seeking proceeds under policy number 4587875 by reason of the May 27, 2007 fire, in the amount of the policy limits of $35,000.00, less the $250.00 deductible. (Proof of Loss; **Exhibit J**.)

LAW AND ARGUMENT

I. The Court of Appeals Correctly Found that There Was No "Verdict" Under MCR 2.403(O)(2), such that the Plaintiff Is Not Entitled to Case Evaluation Costs.

MCR 2.403(O) provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

In *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001), this Court set forth the proper method for interpreting court rules:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning.

Applying this rule, the Court in *Jerico Const, Inc v Quadrants, Inc*, 257 Mich App 22, 30-32; 666 NW2d 310 (2003), stated:

> In applying MCR 2.403(O)(2), this Court has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated. . . In construing a statute, the Court presumes that every word has some meaning and should avoid a construction that renders any part of it surplusage or nugatory. *St George Greek*

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Orthodox Church v Laupmanis Assoc, PC, 204 Mich App 278, 284; 514 NW2d 516 (1994).

None of the rule's three definitions of "verdict" apply here. There was no jury, and no trial, such that sub-rules 2(a) and (b) have no application. Moreover, contrary to the Plaintiff's assertions, sub-rule 2(c) does not apply either. Rather, the Plaintiff's interpretation would expand the rule so as to read meaning into it that is not expressly stated therein.

In *Haliw v City of Sterling Hts*, 471 Mich 700, 708; 691 NW2d 753 (2005), this Court indicated that the term "motion" in sub-rule 2(c) refers to a dispositive motion, stating:

> Until this Court amended MCR 2.403(O) in 1997, it was sufficiently unclear whether a judgment that entered as a result of a dispositive motion instead of a trial would engender sanctions. By amending the court rule, this Court clarified that case evaluation sanctions may indeed be available when a case is resolved after case evaluation by a *dispositive motion*. (Emphasis added.)

The Plaintiff recognizes the limited interpretation of "motion," citing *Haliw* in its brief to the Court of Appeals for the proposition that case evaluation sanctions may be available "when a case is resolved after case evaluation by a **dispositive motion** instead of a trial." (Plaintiff's Brief to the Court of Appeals, at 5 (emphasis added).)

However, this case was **not** resolved by a dispositive motion, as *Haliw* and the court rule require. Instead, after the Lower Court had ruled in the Plaintiff's favor on the Association's coverage defenses, the parties agreed to resolve the remaining issue of damages through appraisal. An award signed by two of the three appraisers was entered on September 17, 2010. (Appraisal award; **Exhibit K**.)

Moreover, the Association did not contest entry of judgment following after the appraisers signed their award. As it stated in its response to the Plaintiff's motion:

> The Defendant does not contest that, in light of the Court's rulings in the matter, to which the Defendant objected and continues to object, the Plaintiff is entitled to a judgment of $20,877.00, the amount of the appraisal award entered in the matter. Nor does the Defendant contest the Plaintiff's request for UTPA interest. (Brief in response to the Plaintiff's motion for entry of judgment, at 1.)

In fact, the Association only opposed that portion of the Plaintiff's motion seeking imposition of case evaluation costs, and its request for additional contract damages for debris removal, which

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the appraisers could have, but did not, include in their award. The parties settled on the amount of interest that should be added to the appraisal award; judgment was entered in that amount, and the Association paid it.

The Plaintiff argues to this Court that it filed its motion for entry of judgment because the Association delayed payment of the appraisal amount. However, that misstates the facts. Even if the Association had issued immediate payment, a final order dismissing the case or rendering judgment in the awarded amount would have been required, for purposes of removing the matter from the Court's docket.

Moreover, the Plaintiff's motion also sought assessment of case evaluation costs, along with additional proceeds under the policy, as contract damages, which issues were totally separate from the alleged "delay" in making payment. As the Association objected to those, there could be no simple dismissal, and the Trial Court's involvement was necessary to resolve all remaining issues. That does not turn the Court's entry of judgment into a "verdict" under the rule.

The Plaintiff did not seek summary disposition. Nor was the entry of judgment a "finding" as it suggests. Again, the Association did not oppose entry of a judgment in the appraisal amount, and the parties agreed on the calculation of penalty interest. The Court made no ruling on those. Rather, it approved a judgment incorporating the parties' agreement.

A judgment entered as a result of a settlement between the parties is not a "verdict." *Jerico Const, Inc, supra.* The Plaintiff concedes that it filed its motion "to give the award effect, enforce the appraisal agreement." Brief at 9. Accordingly, the judgment merely confirmed the appraisal award, to which the Association had no objection. There was no "judgment entered as a result of a ruling on a motion," under sub-rule (2)(c).

The Plaintiff argued to the Court of Appeals that appraisal is a "substitute" for a judicial determination of the amount of loss, citing *Thermo-Plastics R&D, Inc v Gen'l Acc Fire & Life Ass Corp,* 42 Mich App 418; 202 NW2d 703 (1972). The Association did not then, and does not now disagree with that characterization. However, the Plaintiff argued that, as a "substitute" for a jury verdict, the appraisal award should be treated as identical to it, for purposes of Rule 2.403(O).

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The common definition of "substitute" is something that stands in the place of or for something else. *See, e.g.*, Black's Law Dictionary 1598 (rev 4th ed 1968). As but one example, while oleo is often called a "substitute" for butter, and may (to some) taste like butter, it is, inevitably, not butter.

The same is true regarding appraisal under an insurance policy. While the award rendered by the appraisers may have the same effect as a jury verdict or judicial determination on the question of loss and damage, the award is clearly neither. It cannot constitute a "verdict" under Rule 2.403(O), where nothing in the rule so provides. As stated in *Jerico Const, supra,* to conclude otherwise:

> would impermissibly expand, by judicial fiat, the specific and precisely worded definition of 'verdict' to include any order ending any part of a case by whatever method, thereby rendering the limiting language of MCR 2.403(O)(2)(a) - (c) nugatory.

The Court of Appeals correctly found that nothing in sub-rule 2.403(O)(2) or Michigan law allows it to expand the meaning of "verdict" to include an appraisal award, as the Plaintiff seeks. The Court of Appeals correctly refused to do so, and its ruling should be affirmed.

The Plaintiff also argued below that appraisal under a property insurance policy constitutes a "common law arbitration." The Association does not dispute that characterization, either, but finds it to be of little assistance to the Plaintiff. Contrary to the Plaintiff's position, entry of an order confirming an arbitration award does not, in and of itself, entitle a party to case evaluation costs. *Cusumano v Velger*, 264 Mich App 234, 238; 690 NW2d 309 (2004). While an award of costs following entry of an arbitration award was upheld there, the Court did so **not** under MCR 2.403, but because, and only because, the parties' arbitration agreement expressly provided that such sanctions could be sought. The Court stated that, otherwise, where the merits of a case are resolved by arbitration, there is no direct right to case evaluation costs under Rule 2.403.

The *Cusumano* Court thus found that the case before it was factually distinguishable from that in *St George Greek Orthodox Church v Laupmanis Assoc, PC*, 204 Mich App 278; 514 NW2d 516 (1994). The Court there refused to allow imposition of case evaluation costs following entry of an arbitration award, stating, "Allowing a party to seek sanctions after the arbitrator has balanced the equities simply because the court has confirmed the award by court order encourages protracted

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litigation." The *Cusumano* Court explained:

> *St. George, supra* involved a dispute related to a contract that required disputes to be resolved through arbitration proceedings and an eventual court order submitting the matter to arbitration. At issue on appeal was whether mediation sanctions were available under MCR 2.403. . . This Court concluded that there was no right to mediation sanctions under MCR 2.403 (at least as then in effect) **when a matter is resolved by arbitration and a court merely enters an order confirming the award**. . . However, unlike in the present case, there is no indication from *St George* that there was any contractual agreement between the parties that mediation or case evaluation sanctions would apply to the arbitrators' award. Accordingly, the *St George* panel did not address whether such a contractual provision would be enforceable. **Thus, at most, *St. George, supra* supports that there may not be a direct right to mediation or case evaluation sanctions under MCR 2.403 where the merits of a case are resolved by arbitration. But, in the present case, the availability of such sanctions is derived from the arbitration agreement, not directly from MCR 2.403 itself.** Nothing in *St. George, supra* can reasonably be read as precluding such a contractual agreement to make mediation or case evaluation sanctions available **where otherwise they might not be.** 264 Mich App at 238. (Emphasis added; citations and footnote omitted.)

The Plaintiff vainly struggles to avoid the clear holding of *Cusumano*, spending considerable effort attempting to draw comparisons between this case and arbitration under MCL 600.5001, *et seq*, and MCR 3.602. Its labors are unavailing, for the obvious reason that the statute and rule have no application here. For the same reasons, the issues discussed in the Plaintiff's cited case of *Tokar v Estate of Tokar*, 258 Mich App 350; 671 NW2d 139 (2003) do not apply here either. While appraisal under a property insurance policy is termed a "common law arbitration," it is governed by the Michigan Insurance Code, MCL 500.2833(1)(m), and not by Chapter 50 of the Revised Judicature Act.

Moreover, the Plaintiff's argument that appraisals are "not intended to resolve entire disputes," such that "courts necessarily have a role in reviewing appraisers' determinations to ensure that they are consistent with legal principles controlling the parties' insurance relationship" is completely unsupported, and contrary to Michigan law. Rather, as correctly understood by the Court of Appeals, appraisal is recognized in Michigan as "'a simple and inexpensive method for the prompt adjustment and settlement of claims' and effectively constitutes arbitration." Slip Op at 3 (*citing Auto-Owners Ins Co v Kwaiser,* 190 Mich App 482, 486; 476 NW2d 467 (1991),

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and *Thermo Plastics R & D, Inc v Gen Acc Fire & Life Assur Corp, Ltd,* 42 Mich App 418, 422; 202 NW2d 703 (1972).)

For these reasons, judicial review of appraisal awards is restricted, such that they may only be set aside on the grounds of bad faith, fraud, partiality on the part of the appraisal panel, or a manifest mistake of law. *Union Lake Assoc, Inc v Comm and Ind Ins Co*, 89 Mich App 151, 158-159; 280 NW2d 469 (1979); *Davis v Nat'l American Ins Co*, 78 Mich App 225, 232, 235-236; 259 NW2d 433 (1977). As this Court aptly recognized in *Port Huron NR Co v Callahan*, 61 Mich 22, 26; 34 NW678 (1886), there are "great objections to any general interference by courts" with appraisal awards:

> They are made by a tribunal of the parties' own selection, who are, usually at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duty laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed.

Accordingly, there exists no basis for the Plaintiff's contention that, unlike arbitration awards, courts "necessarily have a role" in reviewing appraisal awards, and that "questions of law must ultimately be reviewed and resolved in court." Plaintiff's Brief at 7. Rather, the opposite is true. In any event, the primary reason the Plaintiff involved the Trial Court here was because it sought an award of case evaluation costs, and to ask for additional policy proceeds beyond the appraisers' determination of loss and damage. Prior thereto, the parties had been discussing calculation of interest to be added to the award, for entry of a final order.

The Plaintiff complains that it is being "punished" for agreeing to have the damages issue determined through appraisal; that, had it known what the Trial Court would do, it would have forced a trial on that issue. Its argument perfectly exemplifies the point made in *Cusumano*: it would have required the kind of protracted litigation the appraisal remedy, and the public policy of this state, is designed to prevent.

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In the absence of an express agreement between the parties, no Michigan case has ordered imposition of case evaluation costs following an arbitration award. Nor is there any authority for such an award being made following appraisal under an insurance policy. Unlike *Cusumano*, no agreement for imposition of such costs was entered into here. For that reason, regardless of whether appraisal is termed a "substitute for judicial determination," a "common law arbitration" or otherwise, there exists no authority for imposition of costs following entry of an appraisal award.

Contrary to the Plaintiff's cynical arguments, the Court of Appeals has not expanded the meaning of "verdict" under Rule 2.403(O). In fact, it properly refused to do so. Instead, it is the Plaintiff who now asks this Court to expand the meaning of the term. However, as with its effort in the Court of Appeals, it has provided the Court with no basis on which to reverse the ruling below.

The Court of Appeals correctly found that there was no "verdict" as set forth in Rule 2.403(O), and thus no support for awarding case evaluation costs to the Plaintiff. The Plaintiff's Application for Leave to Appeal should be denied.

II. The Court of Appeals Correctly Found that the Appraisal Panel's Determination of Loss and Damage is Binding, and Was Not Reviewable by the Trial Court, Including the Panel's Decision Not to Award Damages for Debris Removal.

The Plaintiff also seeks to overturn the Court of Appeals ruling, affirming the Trial Court's refusal to provide the Plaintiff with an additional award of some $7,288.60 for debris removal, not awarded to it in appraisal. The Plaintiff initially claimed that the appraisers should have addressed the issue, but failed to do so. It now argues that entitlement to such benefits is a coverage issue, outside the appraisers' purview, and which the Court should have decided.

On appeal below, the Plaintiff relied for the first time on a purported hearsay e-mail from the umpire, Richard Guider, not a part of the record, in response to a letter from the Plaintiff's attorney. (Exhibit 12 of the Plaintiff's Brief on Appeal.)

Per MCR 7.311(A), appeals to the Supreme Court are heard on the original record. *People v Taylor*, 383 Mich 338, 363; 175 NW2d 715 (1970) As stated in *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989), "This Court's review is limited to the record developed by the trial

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court and we will not consider references to facts outside the record." As the umpire's purported e-mail was not a part of the record below, it should therefore not be considered.

On the other hand, the document does nothing to advance the Plaintiff's position. The September 17, 2010 appraisal award in this matter came over three years after the fire of May 27, 2007. As recognized by the Court of Appeals, the Plaintiff obviously knew that the matter was proceeding to appraisal. The umpire's e-mail implicitly indicates that the Plaintiff, although it could have, made no showing that it had incurred any debris removal expense during those three years, so as to support an award. For that reason, the panel awarded nothing for that aspect of the claim.

The Plaintiff has supplied this Court with no support for its position that loss and damage for debris removal is a coverage issue which the appraisers could not consider or determine, as they did for loss and damage to other areas of the claim. It makes the ridiculous and specious argument that the appraisers were not "allowed" to consider loss and damage for debris removal, while offering no authority, in the policy, governing statute or otherwise, supporting this alleged limitation.

The mere fact that debris removal proceeds are payable upon being incurred does not render the appraisers incapable of determining loss and damage. To accept that argument would mean that appraisers considering a homeowner's claim could not determine the value of the insured's loss of use, or additional living expenses, also payable on an incurred-expense basis. As with debris removal, nothing in the policy or elsewhere bars the insured from submitting such costs in appraisal as an element of the covered claim.

Debris removal was obviously included in the coverage provided under the Plaintiff's policy, for which the Plaintiff sought proceeds. Contrary to its argument, the appraisers would have been acting well within their authority in determining loss and damage for debris removal, had proof of the expense been submitted. As it was within their charge, if any two of the three appraisers thought that the debris removal issue had merit, they could have made a determination of loss and damage as to that element of coverage, and included it in their award. Whether the Plaintiff's appraiser did not address the issue, or the panel chose not to do so, is irrelevant, and beyond the Court's purview. The Court of Appeals properly so ruled.

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Instead, the panel's September 17, 2010 award is binding on the parties on the issue of damages. *Thermo-Plastics, supra*, 42 Mich App at 422; *Auto-Owners, supra*, 190 Mich App at 488. As indicated above, judicial review of appraisal proceedings is restricted, *Union Lake, supra*, 89 Mich App at 158, and that, "It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts." *Port Huron, supra*, 61 Mich at 26.

In that respect, the Plaintiff's reliance on *Kaleva–Norman–Dickson School Dist v Kaleva–Norman–Dickson School Teachers' Ass'n,* 393 Mich 583; 27 NW2d 500 (1975) and *Northern Mich Ed Ass'n v Bd of Ed*, 126 Mich App 781; 37 NW2d 923 (1983), is of no assistance to it. Unlike here, the "arbitrability" of the parties' dispute was a central an issue facing those Courts. In any event, when the Plaintiff here moved for an order barring the appraisers from considering market value in determining actual cash value, it could have at the same time requested a ruling on the "appraisability" of its debris removal claim, but for whatever reason did not do so.

Instead, while acknowledging that the parties are bound by the appraisers' award, the Plaintiff pretends that this rule does not apply to it; that the Court should modify the award on an *ex parte* basis in its favor, demanding that it increase or supplement the award so as to give the Plaintiff more money.

The Plaintiff cannot have it both ways. It cannot on the one hand be bound by the appraisers' determination of loss and value, while on the other seek to modify or ignore their award, or to otherwise obtain additional damages the appraisers chose not to include.

Moreover, the Court of Appeals properly concluded that the Plaintiff, although it could have asserted a claim in appraisal for debris removal expenses, for whatever reason did not do so, such that its claim was waived. Slip Op at 4. The Plaintiff argues that it was entitled to wait for entry of an award before incurring the costs. It has provided this Court with no support for that position. Debris removal was a part of its claim, and could have been included as part of the loss and damage sustained by reason of the fire.

The Court of Appeals correctly found that the Lower Court had no authority to "go behind" the appraisers' award in order to determine whether the Plaintiff was entitled to additional proceeds,

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particularly on the basis of nothing more than the Plaintiff's say-so. The Plaintiff has supplied this Court with nothing upon which to base overturning that decision.

Relief Requested

On the basis of the foregoing, the Defendant/Appellee, Michigan Basic Property Insurance Association, respectfully requests this Court to deny the Plaintiff/Appellant's Application for Leave to Appeal; or, in the alternative, to affirm the November 27, 2012 Opinion of the Michigan Court of Appeals.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
[Fort Hood, P.J., and K. F. Kelly and Donofrio, JJ.]

ACORN INVESTMENT CO,

Plaintiff/Appellant,

v

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, an unincorporated Association,

Defendant/Appellee.

SC Case No. 146452
COA No. 306361
LC No. 07-726774 CZ

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PROOF OF SERVICE

The undersigned certifies that on **January 23, 2013**, copies of **Appellee, Michigan Basic's Reply Brief in Opposition to Appellant's Application for Leave to Appeal** and **Proof of Service** were served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective business addresses. I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.

Laura Martinico
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