Opinion issued October 20, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00164-CV

IN RE QBE SPECIALTY INSURANCE COMPANY, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relator, QBE Specialty Insurance Company ("QBE"), has filed a petition for a writ of mandamus contending that respondent, the Honorable Steven Kirkland, abused his discretion in granting a motion to reconsider, vacating an order that granted QBE's motion to compel an insurance appraisal, and denying QBE's motion

to compel appraisal.[1] QBE requests issuance of a writ of mandamus directing respondent to grant QBE's motion to compel the appraisal.[2]

We conditionally grant the petition.

Background

QBE issued a homeowners' insurance policy, effective January 8, 2017, to real party in interest Luca Cicalese for his residence in El Lago, Texas ("the Policy"). Among other provisions, the Policy included the following appraisal clause:

> **E. Appraisal**
>
> If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent 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 differences to the umpire. A decision agreed to by any two will set the amount of loss.
>
> Each party will:

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1 The underlying lawsuit is *Luca Cicalese v. QBE Specialty Insurance Company*, Cause No. 2018–33648, pending in the 334th District Court of Harris County, Texas.

2 QBE asserts that it is seeking a writ of mandamus "ordering the trial court to grant [QBE's] Motion to Compel Appraisal." The February 20, 2019 order of which QBE complains "grants Plaintiff's Motion to Reconsider, vacates the Order of January 18[, 2019] and denies [QBE's] Motion to Compel [Appraisal]." The January 18, 2019, order, which granted QBE's motion to compel appraisal, was signed by a visiting judge, the Honorable Sylvia Matthews.

1. Pay its own appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

The Policy also included a provision stating, "A waiver or change of a provision of this policy must be in writing by us to be valid."[3]

On August 31, 2017, Cicalese made a claim to QBE for water damage to his property caused by Hurricane Harvey. An independent adjuster twice inspected the property and concluded that it would cost $21,144.28 to replace damaged roof tiles and repair interior damage. A contractor whom Cicalese hired inspected the property and asserted that the entire roof needed to be replaced, and that the total cost to replace the roof and repair the interior would be $180,357.10. An engineer hired by QBE then inspected the property and estimated the replacement and repair cost would be $19,421.94.

On January 25, 2018, QBE sent a letter advising Cicalese it was closing the claim without payment because the $19,421.94 estimate was less than his $38,758 deductible. The letter did not deny the claim. The letter advised Cicalese when limitations would run, should he opt to file a lawsuit in connection with the claim and included the following statement: "Please contact the undersigned if there are

[3] Neither party contends there was a written waiver of the policy's appraisal provision. Cicalese contends QBE waived the provision by its conduct. For the reasons stated herein, we disagree.

any questions *or additional information you wish for us to consider*." (Emphasis added).

On February 5, 2018, Cicalese's counsel sent a letter of representation to QBE, and on March 5, 2018, Cicalese's counsel sent a demand letter to QBE. The demand letter quantified Cicalese's actual damages as at least $146,599.10, which included $5,000 in attorney fees. QBE sent a request for additional information about the claim to Cicalese's counsel on April 18, 2018, but the record does not reflect any response before suit was filed.

On May 18, 2018, Cicalese sued QBE for breach of contract, breach of the duty of good faith and fair dealing, and violations of the chapters 541 (unfair settlement practices) and 542 (prompt payment of claims) of the Texas Insurance Code.[4] On September 17, 2018, QBE removed the case to federal court. QBE filed an agreed motion to remand on October 16, 2018.[5]

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[4] Cicalese also sued QBE and adjuster David Nguyen Dao for civil conspiracy and sued Dao individually for violations of chapters 541 and 542 of the Texas Insurance Code. QBE filed an election of legal responsibility pursuant to section 542A.006 of the Texas Insurance Code, which states: "If a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes an election . . . with respect to the agent, the court *shall dismiss* the action against the agent with prejudice." TEX. INS. CODE § 542A.006(c). (Emphasis added). Accordingly, Dao was dismissed from this proceeding.

[5] QBE removed the case after the dismissal of Dao, the only non-diverse defendant. QBE concedes it agreed to the remand after Cicalese's counsel provided caselaw that showed a dismissal through an election of responsibility cannot create federal diversity jurisdiction.

On October 17, 2018, QBE sent Cicalese's counsel a letter invoking the Policy's appraisal provision. In an email dated November 8, 2018, Cicalese's counsel said QBE had waived the right to invoke the appraisal policy by (1) failing to respond to Cicalese's pre-suit demand letter for "over 61 days," and (2) because Cicalese had incurred significant costs "with being forced to file the lawsuit because we couldn't get any response" from QBE.

Three days later, on November 21, 2018, QBE filed a motion to compel Cicalese to participate in the appraisal process. Cicalese filed a response in opposition to the motion to compel. The Honorable Sylvia Matthews signed an order granting the motion to compel appraisal on January 18, 2019, as a visiting judge.[6] Cicalese filed a motion to reconsider the order and QBE filed a response.[7] On February 20, 1019, Judge Kirkland, the presiding judge of the 334th District Court, signed an order that granted Cicalese's motion to reconsider, vacated the January 18, 2019 order, and denied QBE's motion to compel appraisal. QBE asserts Judge Kirkland abused his discretion by denying the motion to compel appraisal.

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[6] Although the clerk's record includes a notice of hearing on QBE's motion to compel, no reporter's record has been filed.

[7] The clerk's record includes a notice of submission on Cicalese's motion to reconsider.

Discussion

A. Standard of review

Mandamus will issue to correct a clear abuse of discretion for which there is no adequate remedy by appeal. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding); *see also Patton Boggs LLP v. Moseley*, 394 S.W.3d 565, 569 (Tex. App.—Dallas 2011, orig. proceeding). "A trial court abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law' or if it clearly fails to correctly analyze or apply the law." *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (citations omitted). A trial court lacks discretion in determining what the law is and in applying the law to the facts. *Prudential Ins.*, 148 S.W.3d at 135. Therefore, a "clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *In re Liberty Ins. Corp.*, 496 S.W.3d 229, 232 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (citing *In re Allstate Cnty. Mut. Ins. Co.*, 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding)).

Texas courts have held an order denying a motion to enforce an appraisal clause may be set aside by mandamus. A court's refusal to enforce an appraisal clause

> may "prevent the defendants from obtaining the independent valuations that could counter at least the plaintiffs' breach of contract claim" and

> thus an appellate remedy for denying a demand for appraisal is not adequate.

Liberty Ins., 496 S.W.3d at 232 (quoting *Allstate Cnty.*, 85 S.W.3d at 196). *See also In re Universal Underwriters of Texas Ins. Co.*, 345 S.W.3d 404, 412 (Tex. 2011) ("[M]andamus relief is appropriate to enforce an appraisal clause because denying the appraisal would vitiate the insurer's right to defend its breach of contract claim.") (citing *Allstate Cnty.*, 85 S.W.3d at 196).

B. Right to Appraisal

Appraisal clauses provide a means for homeowners and their insurers "to resolve disputes about the amount of loss for a covered claim." *Liberty Ins.*, 496 S.W.3d at 232 (quoting *Universal Underwriters*, 345 S.W.3d at 406–07). Virtually all property insurance policies contain a provision that identifies "appraisal" as the mechanism for resolving disputes about "the amount of loss" in a covered claim. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 888–89 (Tex. 2009). *See Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court.") (citing *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 683–85 (Tex. App.—Dallas 1996, writ denied)).

Appraisal clauses are generally enforceable absent illegality or waiver. *Liberty Ins.*, 496 S.W.3d at 232 (citing *Universal Underwriters*, 345 S.W.3d at 407);

see also In re Slavonic Mut. Fire Ins. Ass'n, 308 S.W.3d 556, 559 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) ("Where an insurance contract mandates appraisal to resolve the parties' dispute regarding the value of a loss, and the appraisal provision has not been waived, a trial court abuses its discretion and misapplies the law by refusing to enforce the appraisal provision."); *Universal Underwriters*, 345 S.W.3d at 407 ("Appraisals can provide a less expensive, more efficient alternative to litigation, and . . . they 'should generally go forward without preemptive intervention by the courts.'") (quoting *Johnson*, 290 S.W.3d at 895).

QBE asserts Judge Kirkland abused his discretion in denying the motion to compel appraisal because (1) QBE did not waive its right to invoke the appraisal process, and, in any event, (2) Cicalese has not established he would be prejudiced by the appraisal process.

C. Waiver and impasse[8]

The Texas Supreme Court, addressing the potential waiver of the right to invoke appraisal, has held:

> [To] constitute waiver the acts relied on must be such as are reasonably calculated to induce the assured to believe that a compliance by him with the terms and requirements of the policy is not desired, or would

[8] Because we find that QBE has not waived its right to appraisal by its conduct, we do not address the efficacy of the policy's non-waiver provision. *See generally Shields Ltd. P'ship v. Bradberry,* 526 S.W.3d 471, 484 (Tex. 2017) ("[A] nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective.").

> be of no effect if performed. The acts relied on must amount to a denial of liability, or a refusal to pay the loss.

Liberty Ins., 496 S.W.3d at 232 (quoting *Universal Underwriters*, 345 S.W.3d at 407). "Waiver requires intent: either the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Liberty Ins.*, 496 S.W.3d at 232-33 (citing *Universal Underwriters*, 345 S.W.3d at 407). The mere denial of a claim does not constitute a waiver of the right to invoke the appraisal process. *Pounds v. Liberty Lloyds of Texas Ins. Co.*, 528 S.W.3d 222, 226 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Liberty Ins.*, 496 S.W.3d at 235 ("[D]enial of a homeowner's claim for damages does not, by itself, constitute an 'intentional relinquishment of a known right' or conduct 'inconsistent with claiming' the right of appraisal.") (citing *Universal Underwriters*, 345 S.W.3d at 407).

The party that challenges the appraisal based on the doctrine of waiver "must show the parties reached an impasse, that is, 'a mutual understanding that neither will negotiate further.'" *In re Acceptance Indem. Ins. Co.*, 562 S.W.3d 655, 660 (Tex. App.—San Antonio 2018) (orig. proceeding) (quoting *Universal Underwriters*, 345 S.W.3d at 410.) Impasse "is that point at which the parties have exhausted any prospect of reaching an agreement and further discussion would be fruitless." *Id.* at 660. Impasse arises only if *both* parties "believe additional negotiations would be futile." *Id.* at 660. Knowledge that the insured disagrees with the insurer's position as to the claim is not sufficient to establish impasse:

> An impasse is not the same as a disagreement about the amount of loss. Ongoing negotiations, even when the parties disagree, do not trigger a party's obligation to demand appraisal. Nor does an insurer's offer of money to cover damages necessarily indicate a refusal to negotiate further, or to recognize additional damages upon reinspection.

Universal Underwriters, 345 S.W.3d at 408. Nor does a demand letter establish an impasse, "because sending such a letter is intended to encourage settlement, which implies further negotiation." *Acceptance Indem.*, 562 S.W.3d at 651.

QBE asserts the parties never reached an impasse because it did not affirmatively indicate in its January 25, 2018 letter that it would not consider additional requests for resolution and because Cicalese was invited to provide additional information for QBE to consider. QBE's April 18, 2018 correspondence to Cicalese's counsel after receipt of the demand letter also requested additional information about his property damage claim:

> We have received the list of personal property the insured is claiming was damaged. We will need a more detailed description of each item, model numbers if applicable, age of each item, where purchased, proof of purchase, and documentation of the damages. This is not an all-inclusive list, additional information may be requested in our review of this part of the claim.

QBE's repeated statements that it would consider additional information is determinative insofar as the issue of impasse is concerned. *See Pounds*, 528 S.W.3d at 226–27 (insurer's invitation to insured to contact claims representative with "questions or concerns" about a claim" "indicate[d] an impasse had not been reached, as [the insurer] was not foreclosing further negotiation on [the] claim.");

see also Universal Underwriters, 345 S.W.3d at 410–11 (insurer's statement that it "would leave the file open" in case insured wanted to pursue "further discussions" weighed against finding of waiver). Significantly, as QBE observes in its petition, Cicalese conceded in his response to QBE's motion to compel appraisal that he did not believe the parties had been at an impasse, stating, "How could Mr. Cicalese or his attorney have 'sensed that impasse had been reached. . .?'"

Yet Cicalese contends in his response to the petition for writ of mandamus that impasse occurred because of lengthy delays caused by insurer conduct either when QBE received but did not pay the estimate from Cicalese's contractor, who believed the entire roof needed replacement, or when QBE purportedly ignored the demand letter. The Texas Supreme Court has held the time between the claim and the insurer's invocation of the appraisal process is not, by itself, determinative with regard to waiver:

> The fact that thirty-nine or seventy-two days had passed during their negotiations was not determinative of the waiver issue. Instead, the expression of the parties' unwillingness to negotiate further indicated that the clause should have been invoked. In other words, while the time period may be instructive in interpreting the parties' intentions, it alone is not the standard by which courts determine the reasonableness of a delay.

Universal Underwriters, 345 S.W.3d at 408.[9] In the alternative, Cicalese contends waiver resulted from QBE's (1) failure to invoke appraisal after receipt of Cicalese's counsel's representation letter, which was "obviously evidence of a dispute;"[10] (2) removal of the case to federal court; and (3) "ignoring its policyholder and then its policyholder's attorney."[11]

Cicalese does not cite any authority that identifies any of these specific acts as a waiver of the appraisal process, and we have not found any. Moreover, QBE responded on April 18, 2018, to the March 5, 2018 demand letter with a request for

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9 *See In re Acceptance Indem. Ins. Co.*, 562 S.W.3d 655, 660 (Tex. App.—San Antonio 2018) (orig. proceeding) ("[E]ven if the appraisal is invoked after suit is filed, this might not constitute an unreasonable amount of time between the impasse and the invocation."). *See also In re GuideOne Mut. Ins. Co.*, No. 09-12-00581-CV, 2013 WL 257371, at *1 (Tex. App.—Beaumont Jan. 24, 2013, orig. proceeding) (insurer did not waive right to appraisal even though it invoked right more than four years after suit was filed and after mediation occurred).

10 "The existence of a dispute and the development of an impasse are two different things.") *Id.* (citing *Universal Underwriters*, 345 S.W.3d at 408).

11 Cicalese cites a 1981 Amarillo Court of Appeals case for the proposition that "silence or inaction for so long a period as to show an intention to yield the known right, is enough to prove waiver." *See Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). That case involved the waiver of a partnership's right to enforce a penalty provision against a former partner who became a competitor and took clients from the partnership when he left. *Alford* is distinguishable: the waiver issue did not apply to an appraisal clause; there was no contractual non-waiver provision; the same provision had not been previously enforced against leaving partners; and the leaving partner specifically said in his resignation letter that his leaving was contingent upon the firm's decision not to enforce the provision against him. *Id.* at 212, 214. The court found the partnership waived its right to enforce the provision by failing to reject or counter the leaving partner's resignation letter. *Id* at 215.

additional information about Cicalese's property damage claim. Further, even if QBE did not respond as quickly as Cicalese would have liked throughout the litigation, the record does not support the allegation that QBE ignored its policyholder or his counsel. "We will not infer waiver where neither explicit language nor conduct indicates that such was the party's intent." *Universal Underwriters*, 345 S.W.3d at 410.

The authorities relied on by Cicalese do not support his contention that the parties reached an impasse. Cicalese's citation of cases regarding the denial of claims are inapposite, as his claim has not been denied. *See Sanchez v. Prop. & Cas., Ins. Co. of Hartford*, No. H-09-1736, 2010 WL 413687, at *5 (S.D. Tex. Jan. 27, 2010) (dispute that arose from insurer's refusal to pay claim for amount less than the policy's deductible was dispute over amount of damages, not dispute regarding the denial of claim) (applying Texas law). In *Sanchez*, the record showed the insurer did not deny liability:

> Hartford accepted coverage for repairs to the back door costing $150. Hartford declined any payment to Sanchez because the amount of damage it found to have been caused by hurricane winds, a covered occurrence, was below Sanchez's deductible of $5,850. *Thus the authorities cited by Sanchez for the proposition that an insurer's unconditional denial of liability waives the right to invoke appraisal are inapplicable here.* This is a dispute over the amount of damages.

2010 WL 413687 at *5 (emphasis added).[12] Further, given QBE's multiple requests for additional information from Cicalese and his counsel before suit was filed, we hold an impasse was not reached because at no point did both parties manifest the belief that further negotiations would be futile.

D. Proof of prejudice

Even if an unreasonable time passes between impasse and the invocation of appraisal, waiver requires the insured to establish he was prejudiced by the delay. *In re Century Sur. Co.*, No. 07-15-00386-CV, 2015 WL 6689532, *4 (Tex. App.—Amarillo 2015) (orig. proceeding). "[M]ere delay is not enough to find waiver; a party must show that it has been prejudiced." *Universal Underwriters*, 345 S.W.3d at 411. "If the insured has suffered no prejudice due to delay, it makes little sense to prohibit appraisal when it can provide a more efficient and cost-effective alternative to litigation." *Id.*[13] *See Acceptance Indem.*, 562 S.W.3d at 650 ("[E]ven after an

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[12] Cicalese's reliance on cases involving waivers of arbitration clauses after adverse trial court decisions is unavailing. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 790, 796 (Tex. App.—El Paso 2015, no pet.) (arbitration waived when party participated in litigation "only up until the point that she received an adverse ruling from the district court and was faced with the possibility of having the court impose case-crippling sanctions."); *Tuscan Builders, LP v. 1437 SH6 L.L.C.*, 438 S.W.3d 717, 722-23 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (arbitration waived when builder did not reveal arbitration agreement to plaintiff until after builder joined third parties and the parties conducted a property inspection and completed written discovery and expert designations). *Hogg* and *Tuscan* are distinguishable given, *inter alia*, the nature of the trial court proceedings in those cases before any party sought to compel arbitration.

[13] *See In re Ooida Risk Retention Grp., Inc.*, 475 S.W.3d 905, 912 (Tex. App.—Fort Worth 2015, orig. proceeding) ("The prejudice required [] is prejudice *following*

impasse and the passage of an unreasonable amount of time, the appraisal challenger must also show any failure to demand the appraisal within a reasonable time after the impasse prejudiced it.") (citing *Universal Underwriters*, 345 S.W.3d at 411). When, as here, the policy entitles either party to invoke the appraisal process, demonstrating prejudice can be especially arduous:

> [I]t is difficult to see how prejudice could ever be shown when the policy, like the one here, gives both sides the same opportunity to demand appraisal. If a party senses that impasse has been reached, it can avoid prejudice by demanding an appraisal itself. This could short-circuit potential litigation and should be pursued before resorting to the courts.

Universal Underwriters, 345 S.W.3d at 411–12.

Cicalese says in his response to the petition for writ of mandamus that he was "forced to hire counsel," "forced to file a lawsuit" and that he "had no reason to suspect that QBE would agree to appraisal pre-suit." However, Cicalese had the right to invoke the appraisal process and never did so. His contention that the benefits of appraisal evaporated as soon as he filed suit is without merit, given that an appraisal can provide a means to curtail the discovery process once suit has been filed. *See In re Cypress Tex. Lloyds*, 419 S.W.3d 443, 445 (Tex. App.—Beaumont 2012, orig. proceeding) (per curiam) ("When a party knows of its right to request an appraisal

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> impasse and prior to invocation of the appraisal process, *i.e.*, prejudice caused by the insurer's unreasonable delay in invoking the process.") (emphasis in original).

and does not make that request, it is difficult to attribute the costs incurred to the opponent."); *Century Sur.*, 2015 WL 6689532 at *4 (holding no showing of prejudice when insured initiated litigation rather than pursuing appraisal, participated in discovery, and prepared for trial).

Cicalese's argument that he would be prejudiced by an appraisal because QBE, "if it does not like the award, can simply deny paying it, standing on its coverage decision," also lacks merit. QBE did not deny coverage and did not "wholly fail[] to make a coverage decision," as Cicalese asserts. On the contrary, QBE concluded Cicalese's claim was covered, but it did not issue payment because the payment that would be owed was less than Cicalese's deductible. The January 25, 2018 letter stated, "Based on our re-inspection, the total amount of storm damage was $19,421.94. This amount is below your $38,758 deductible. Therefore, your claim will be closed without payment." QBE's disagreement as to the amount to which Cicalese was entitled for the damage was neither a denial of the claim nor a failure to make a coverage decision.

E. The trial court's analysis

In denying the motion to compel appraisal, the trial court premised its ruling on *In re Allstate Vehicle & Prop. Ins. Co.*, 549 S.W.3d 881 (Tex. App—Fort Worth 2018, orig. proceeding), in which the Fort Worth Court of Appeals held the trial court did not abuse its discretion in refusing to compel appraisal. In so doing, the

court of appeals held Allstate's right to appraisal had been waived by its conduct during litigation, and that the insured would have been prejudiced by appraisal. *Id.* at 889–94. We find that case to be distinguishable for a number of reasons.

First, the court specifically cited the policy's lack of nonwaiver clause in denying the petition for writ of mandamus. 549 S.W.3d at 894–95 (Allstate policy "[did] not require waivers to be in writing and signed by the waiving party."). Second, the court found Allstate's statements and actions evinced its intent to go to trial. *Id.* at 889. For example, after Allstate conducted six inspections, it filed a motion to compel a seventh inspection "for the express purpose of having the new expert witness . . . testify at the upcoming jury trial," so its testifying witnesses would have jury credibility. *Id.* In addition, Allstate "directly verbally expressed to the trial court Allstate's intent to go to trial despite lack of satisfaction of the appraisal clause condition precedent." *Id.* at 890. The record does not reflect any similar manifestations of intent by QBE to go to trial.

Further, the *Allstate Vehicle* court found impasse was reached when Allstate offered a $4,000 settlement and the insured rejected it and made a demand for $19,350.42 for the third time. *Id.* at 890. There were no such negotiations in the present case. The *Allstate Vehicle* court also found the insured would have been prejudiced because by the time Allstate invoked the appraisal process, the roof damage was more than two and a half years old and storms since then had

exacerbated the roof damage, making it impossible for an appraiser to determine which damage was caused by which storm. *Id.* at 893. In contrast, there is no indication that events since Hurricane Harvey contributed to Cicalese's roof damage.

Finally, the *Allstate Vehicle* court said the insured would be prejudiced if appraisal was invoked because she had already incurred trial expenses and attorney's fees preparing for trial. *Id.* at 893. For example, Allstate had already deposed the homeowner, successfully moved to compel its seventh inspection and obtained an expert designation extension until after the seventh inspection. *Id.* at 884. In contrast, here, although the parties have exchanged written discovery, the record lacks any indication the parties have engaged in expert discovery, depositions or any other pre-trial activities that reflect they are actively getting ready for trial.

We believe this case is more like *Pounds.* The policy in that case had an appraisal clause identical to that in Cicalese's QBE policy. As here, there was no written waiver of the right to appraisal in *Pounds.* The court in *Pounds* concluded that the insurer's invitation for the insured to contact it with questions or concerns indicated an impasse had not been reached. 528 S.W.3d at 226-27. Finally, the *Pounds* court found the insured had not been prejudiced, given that it had the same right as the insurer to demand an appraisal. *Id.* at 227.

We conclude that the trial court abused its discretion by denying QBE's motion to compel appraisal and that QBE has no adequate appellate remedy to

correct this error. *See Liberty Ins.*, 496 S.W.3d at 232 (holding "an appellate remedy for denying a demand for appraisal is not adequate").

We sustain QBE's issue.

Conclusion

Accordingly, we direct the trial court to vacate its ruling denying QBE's motion to compel appraisal. Our writ of mandamus will issue only if the trial court does not comply.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Kelly.