In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00022-CV

IN RE SOUTHERN INSURANCE COMPANY

Original Proceeding

MEMORANDUM OPINION

In litigation between an insurance company and its insured, the trial court denied a motion to compel an appraisal. The homeowner, Michelle Neisen, contends that Southern Insurance Company waived its rights under the policy's appraisal clause by denying all liability on Neisen's hurricane damage claim. The amount of the loss is at issue in this case, the policy provides for an appraisal process to determine the amount of the disputed loss, and that right has not been waived. The trial court abused its discretion by refusing to order the parties to participate in the appraisal process. Accordingly, we conditionally grant mandamus relief.

Neisen asserts Southern breached the insurance contract by failing to pay for the loss. Under the insurance contract, if the parties "fail to agree on the actual cash value, amount of loss, or the cost of repair," either party may make a written demand for

appraisal. The appraisal clause does not provide for a forfeiture of that right, and the policy states that "[n]o provision of this policy may be waived unless the terms of this policy allow the provision to be waived."

Neisen suggests that Southern must agree that the loss is covered by the policy before it may "fail to agree" on the amount of the loss. Nothing in the plain language of the policy requires Southern to acknowledge liability before it may demand an appraisal; the policy refers to a failure to agree on the amount of loss. Neisen contends that case law provides that when an insurer completely and unconditionally denies coverage, there is no dispute over the amount of the loss and the insurer waives its right to demand an appraisal. *See Scottish Union & Nat'l Ins. Co. v. Clancy,* 71 Tex. 5, 8 S.W. 630, 632 (1888). More recent authority clarifies that a dispute over the extent of a loss is a dispute over the amount of the loss. *State Farm Lloyds v. Johnson,* 290 S.W.3d 886 (Tex. 2009). In *Johnson,* the parties disagreed over whether hail damaged only the ridgeline or the entire roof. *Id.* at 887. The homeowner sought declaratory relief compelling an appraisal. *Id.* at 888. The trial court denied relief, but the court of appeals held that the policy required an appraisal. *Id.* The Supreme Court affirmed the judgment of the court of appeals. *Id.* at 895.

Johnson favors the appraisal process even on issues that would not bind the parties. *See id.* at 895. The scope of the appraisal includes damages and excludes liability. *Id.* at 890. "[W]hen different causes are alleged for a single injury to property, causation

is a liability question for the courts." *Id.* at 892. "By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability." *Id.*

The parties dispute causation. Southern contends that the damage to Neisen's home is the result of long term repeated leakage, and Neisen contends the damage was caused by winds during Hurricane Ike. Nevertheless, following the Supreme Court's decision in *Johnson,* we conclude that under the circumstances the appraisal should be determined as an initial matter and the parties may then litigate causation questions. *See id.* at 894. "[W]hen an indivisible injury to property may have several causes, appraisers can assess the amount of damage and leave causation up to the courts. When divisible losses are involved, appraisers can decide the cost to repair each without deciding who must pay for it." *Id.* "When an insurer denies coverage, appraisers can still set the amount of loss in case the insurer turns out to be wrong." *Id.* The appraisal clause "binds the parties to have the extent or amount of the loss determined in a particular way, leaving the question of liability for such loss to be determined, if necessary, by the courts." *Scottish Union & Nat'l Ins. Co.,* 8 S.W.at 631.

Neisen argues this Court is not bound by what Neisen characterizes as "mere dictum" in the *Johnson* opinion. Neisen argues that *Johnson* does not stand for the proposition that an insurer may enforce an appraisal clause after denying liability, and points out that in *Johnson* the insured, not the insurer, sought to enforce the appraisal

clause. Even if some statements in the opinion in *Johnson* may not have been pivotal to the Supreme Court's opinion, a lower court is not free to ignore statements of law "said deliberately" by the Supreme Court. *See Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 870 (Tex. 2007); *R.R. Comm'n of Tex. v. Aluminum Co. of Am.*, 380 S.W.2d 599, 601 (Tex. 1964) ("it was said deliberately"); *see also Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008) ("It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts."); *In the Interest of K.M.S.*, 91 S.W.3d 331, 331 (Tex. 2002) ("[C]ourts of appeals are not free to disregard pronouncements from this Court, as did the court of appeals here.").

Neisen contends that *Johnson* merely holds that an insured may enforce an appraisal clause, and the opinion does not speak to waiver by the insurer. *Johnson* explains that "[l]ike any other contractual provision, appraisal clauses should be enforced." *Johnson*, 290 S.W.3d at 895. Waiver may arise by agreement or by estoppel. *Am. Cent. Ins. Co. v. Bass Bros.*, 90 Tex. 380, 38 S.W. 1119, 1119 (1897). The insurance policy in this case allows either party to invoke the appraisal clause. Under the insurance policy at issue here, no provision of the policy is waived unless the terms of the policy allow it. The policy does not require an admission of liability to invoke the appraisal clause. The record in this case does not establish that Southern induced Neisen to believe that compliance with the terms of the policy was not desired and would be of no effect if

performed. *See Scottish Union & Nat'l Ins. Co.,* 8 S.W. at 632; *Bass Bros.,* 38 S.W. at 1119. Rather, Southern denied Neisen's claim based on its determination that the damage to the covered property was not caused by a covered peril. As was the case in *Johnson,* the appraisers "can still set the amount of loss in case the insurer turns out to be wrong." *Johnson,* 290 S.W.3d at 894.

We conditionally grant the petition for a writ of mandamus. We are confident that the trial court will vacate its order denying Southern's motion to invoke the appraisal clause and will enforce the appraisal provision of the policy. *See In re Allstate County Mut. Ins. Co.,* 85 S.W.3d 193, 196 (Tex. 2002). The writ of mandamus will issue only if the trial court fails to act in accordance with this opinion.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on January 31, 2011
Opinion Delivered March 10, 2011

Before Gaultney, Kreger, and Horton, JJ.