

No. 2024-1329

IN THE
SUPREME COURT OF OHIO

ONE CHURCH,
Plaintiff-Appellee,

v.

BROTHERHOOD MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

JURISDICTIONAL APPEAL FROM THE
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO
CASE No. 23AP000457

**BRIEF OF *AMICI CURIAE* OHIO INSURANCE INSTITUTE, NATIONAL
ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN
PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF
APPELLANT BROTHERHOOD MUTUAL INSURANCE COMPANY**

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EXPLANATION OF WHY THIS CASE SHOULD BE REVERSED

I.

A nonbinding appraisal is an oxymoron.

While this appeal presents an issue of first impression, it implicates and calls into question legal principles established over a century ago governing the use of appraisals to resolve insurance property disputes. *Graham v. German American Ins. Co.*, 75 Ohio St. 374 (1907); *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258 (1900). By accepting jurisdiction over this case, the Court has recognized the glaring need for Ohio law to be clarified that when an insurance contract provision expressly states that an appraisal award is “binding on all parties,” Ohio courts cannot rewrite the policy to allow for a nonbinding “initial” appraisal award subject to reopening when the insured says it subsequently found “hidden” damages such that the appraisal award is inadequate.

The Tenth Appellate District’s relabeling of the appraisal award here as “initial” subject to reopening does not change the express language of the insurance agreement that the award in this case is “binding on all parties.” Calling an appraisal process **like the one that took place here** “initial,” and therefore nonbinding, is an oxymoron. See, *Schaefer v. Allstate Ins. Co.*, 63 Ohio St. 3d 708, 714 (1992) (calling arbitration “nonbinding” is a “contradiction in terms” and an oxymoron).

If the Tenth Appellate District opinion in *One Church v. Brotherhood Mut. Ins. Co.*, 2024-Ohio-1601 (10th Dist.)¹ is permitted to stand, it will overwhelmingly reach every existing property insurance policy with an appraisal process for resolving disputes. It is not an exaggeration that every

¹ *One Church* is now reported at 242 N.E.3d 164.

binding property appraisal could be challenged, time and time again, on the basis of simple conclusory allegations – as made here – that additional damages were “hidden” or not “discoverable.” The Tenth Appellate District has opened a veritable Pandora’s box of problems. For instance, insureds, knowing that a mere allegation in a complaint that additional damages were “hidden” or not “discoverable” would relieve them of an appraisal award, would encourage them to litigate repeatedly. No parties to an appraisal award would be able to rely on the finality of an appraiser’s determination. Courts will be asked to substitute their judgment for that of the appraisers and to set aside awards for inadequacy or excessiveness. All of this would be a subversion of judicial economy and an opening of the proverbial floodgates, causing Ohio’s courts to drown in a sea of never-ending litigation, over disputes that should have been conclusively resolved by way of the appraisal process.

II.

Courts are not empowered or at liberty to rewrite binding appraisal provisions.

Article I, Section 10, Clause 1 of the Constitution of the United States and Article II, Section 28 of the Ohio Constitution protect contracts from impairment by any branch of government — including the judiciary. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶¶9-10; *Acuity v. Progressive Specialty Ins. Co.*, 2023-Ohio-3780, ¶11. In this case, the Tenth Appellate District did not interpret ambiguous words in the insurance policy. There is no ambiguity. The appraisal provision says that the award is “binding on all parties.” That should have been the end of the story. Instead, the Tenth Appellate District has allowed the insured to ignore and avoid the binding nature of the appraisal award by merely alleging that “hidden damages” were not discovered during the appraisal process. By accepting that allegation as sufficient to state a claim

that a mistake was made, the Tenth Appellate District simply overrode and, consequently, impaired the insurance contract to which Appellant Brotherhood Mutual Insurance Company (“BMIC”) and Appellee One Church (“One Church”) had agreed.

This Court’s decisions already make clear that Ohio’s courts are not empowered to rewrite contracts to relieve a party from what that party may perceive as a hardship or unfair result, or to achieve “more equitable results”. See e.g. *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Authority*, 78 Ohio St.3d 353, 362, 1997-Ohio-202; *Dugan & Meyers Constr. Co., Inc. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶29; *Bunta v. Superior VacuPress, LLC*, 171 Ohio St.3d 464, 2022-Ohio-4363, ¶¶30-42; *Ullmann v. May*, 147 Ohio St. 468 (1947). As former Chief Justice Moyer expressed in *Aultman Hospital Ass’n v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 55 (1989), “[w]here a contract is plain and unambiguous as herein, it does not become ambiguous by reason of the fact that in its operation it may work a hardship upon one of the parties.” But that is precisely what the Tenth Appellate District has done here.

III.

Conclusiveness and finality are integral to a policy’s appraisal provision.

Appraisal provisions in insurance policies are “an integral part of the policy” and are not revocable by either the insurer or the insured. *Saba v. Homeland Ins. Co. of America*, 159 Ohio St. 237 (1953), paragraph two of the syllabus. The appraisal process does not affect questions of whether the insured’s loss is covered under the terms of the insurance policy; rather, it fixes the amount of the insured’s loss or damage:

In the insurance context, appraisal is often sought to fix the amount of the loss, or

replacement cost of real property. The determination of the amount of loss sustained by the insured is, of course, to be distinguished from the insured's right, if any, to recover on the policy.

Couch on Insurance 3d, §209:8 at 209-17 (footnotes omitted); see also, id., §212:13 at 212-23–212-24 (“Under the typical appraisal clause, the only issue to be determined by the appraiser is the amount of the loss. Consequently, questions concerning policy defenses or coverages are not to be addressed by the appraisers.” (Footnotes omitted)).

The purpose of a policy's appraisal process “is to provide a plain, speedy, inexpensive and just determination of the extent of the loss”. *Saba* at 240-241. See also, Couch on Insurance 3d, §209:8 at 207-17 (“[A]ppraisal is designed to be consistent with the public policy of discouraging litigation. Accordingly, every reasonable presumption will support the validity of a loss appraisal.”) That is why an appraisal award's challenger bears the burden to establish a manifest mistake. *Terranova v. Safeco Ins. Co. of Am.*, 2024 U.S. Dist. LEXIS 159925, *18 (D. Col. Sept. 5, 2024); *Walnut Creek Townhome Assoc. v. Depositors Ins. Co.*, 913 N.W.2d 80, 89 (Iowa 2018).

An Ohio court's review of an insurance appraisal is extremely limited. Ohio law sets a high bar that requires more than merely alleging a mistake exists in some respect in the appraisal award in order to vacate or reopen that award. For this reason, “a court will not interfere with an appraisal award but, to the contrary, will indulge in every reasonable presumption to sustain it in the absence of fraud, mistake, or misfeasance.” *Lakewood Mfg. Co. v. Home Ins. Co. of New York*, 422 F.2d 796, 798 (6th Cir. 1970). Consequently, a court will not substitute its judgment for that of the appraisers or set aside an award for inadequacy or excessiveness unless it is so palpably wrong as to indicate corruption or bias on the part of the appraisers. *Id.*

And why is it that judges (or jurors for that matter) should not substitute their judgment for that of more experienced appraisers chosen by the parties? Perhaps the most obvious reason is that,

in selecting an appraiser, the parties will usually identify an individual more experienced in and knowledgeable about the property or item that has been damaged or is in need of repair. See, Couch on Insurance 3d, §209:9 at 209-18 (“In selecting an appraiser, the parties should consider individuals with an expertise covering the item in dispute.”) Typically, judges and jurors will not have that expertise or insight. Moreover, rarely do judges and juries have the ability to conduct on-site inspections and investigations frequently needed during an appraisal process. As such, an appraiser is far better able to ascertain and determine the amount of the appraised loss. Presumably, the parties then will have more confidence in the correctness of the appraisal award. Here, both One Church and BMIC hired experienced appraisers. One Church selected Land Claims Services, L.L.C. to serve as its appraiser; BMIC selected Engle Martin & Associates to serve as its appraiser. After jointly inspecting the church’s property, the **appraisers jointly agreed** to the scope of necessary repairs and issued an appraisal award in the amount of \$313,271.98. *One Church*, ¶6. “In signing the appraisal award, the appraisers certified that they ‘have conscientiously performed the duties assigned to us, agreeably to the foregoing stipulations, and have appraised and determined, and do hereby award as the amount of loss * * * \$313,271.98.’” *Id.*, footnote 2.

To constitute manifest mistake, the mistake must be of such character that the appraiser would have corrected it had it been called to his or her attention; but, a mistake of judgment is not a manifest mistake. *Lakewood Mfg. Co.* at 798, citing *Pfleger v. Renner*, 13 Ohio App. 96 (1920); see also, Couch on Insurance 3d, §213:66 at 213-79. Even if the appraisal award is against the manifest weight of the evidence, a court cannot vacate the appraiser’s valuation based upon mistake. *Ruggles v. Ruggles Family L.P.*, 2016-Ohio-1479, ¶ 20 (6th Dist.).

With this backdrop, it is abundantly clear that the Tenth Appellate District’s flawed legal reasoning not only ignored Ohio precedent but undertook to rewrite the insurance policy to favor

the insured by declaring that the appraisal award – which the insurance policy expressly states was “binding on all parties” – could be reopened merely because of the insured’s alleged unilateral “mistake.” Compounding this legal error was the Tenth Appellate District’s mischaracterization that the appraisal process that led to the appraisal award was nothing more than an “initial” determination. *One Church*, at ¶¶ 21, 22, 24. In so doing, the Tenth Appellate District held that a mere conclusory assertion that the insured found additional hidden damages after accepting the appraisal award was sufficient to set aside a binding appraisal award and allow the insured to commence litigation against the insurer.

The Tenth Appellate District’s opinion in this case sets a dangerous precedent and is at cross-purposes with the public policy goals that alternative dispute resolution mechanisms – like appraisal – are designed to promote: **conclusiveness and finality**. See, *Farmers Auto. Ins. Ass’n v. Union Pac. Ry.*, 2009 WI 73, 319 Wis. 2d 52, 768 N.W.2d 596:

{¶42} The appraisal process is usually conducted pursuant to a contract, here a contract for insurance. A court’s review of an appraisal award is therefore grounded in principles of contract interpretation. An appraisal process is an agreement by parties to a contract to allow third party experts to determine the value of an item. The court’s role is not to determine whether the third party experts accurately valued the item (as if the court itself could do better job), but whether the third party experts understood and carried out the contractually assigned task. The obvious point of contracting for an appraisal process is to keep a jury or court out of that decision. Courts have an obligation to enforce this aspect of an agreement between parties by asserting only limited power to review appraisal awards.

{¶43} Appraisals also deserve a more deferential review because the appraisal process is a fair and efficient tool for resolving disputes. First and foremost, the process is fair to both parties. It allows each to appoint an appraiser of their own liking, with a neutral umpire as the deciding vote. Appraisals also promote finality, are time and cost efficient, and place a difficult factual question – the replacement value of an item – into the hands of those best-equipped to answer that question. As a form of alternative dispute resolution, the appraisal process is favored and encouraged. See generally, *State v. P.G. Miron Constr. Co.*, 181 Wis. 2d 1045, 1055, 512 N.W.2d 499 (1994) (“It has been the policy of this state and this court to foster arbitration as an alternative to litigation. The advantage of such a process lies in the avoidance of the formalities, delay, and expense of litigation.” (citations

omitted)).

{¶44} Appraisals, then, are presumptively valid. They should not be lightly set aside, even if the court disagrees with the award. *Dechant v. Globe & Rutgers Fire Ins. Co.*, 194 Wis. 579, 581, 217 N.W. 322 (1928). An appraisal may be set aside only upon the showing of fraud, bad faith, a material mistake, or a lack of understanding or completion of the contractually assigned task. *Id.*; see also 44A Am. Jur. 2d Insurance § 1665 (2009); *Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 466 N.W.2d 257, 260 (Iowa 1991); *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. App. 1996). Unhappiness with the amount of an appraisal award is not enough to set it aside. *Dechant*, 194 Wis. at 581 (holding that even a substantial difference between the appraisal award and the loss as determined by the jury was not sufficient to set aside an award).

Ohio should stand with these other jurisdictions which honor and uphold the principles that appraisal awards are to be binding, conclusive, and final. See, e.g., *Buffalo-Water 1, LLC v. Fidelity Real Estate Company, LLC*, 481 Mass. 13, 17, 111 N.E.3d 266, 276 (2018) (Massachusetts common law “has recognized that, when parties enter into a contract providing that the valuation established by an independent appraiser shall determine the value of a property or business, they express their ‘shared desire for finality’ through a means other than adjudication by a court or an arbitrator.” (Citations omitted.)); *Walnut Creek Townhome Ass’n v. Depositors Ins. Co.*, 913 N.W.2d 80, 88-89 (Iowa 2018)(citing cases from several jurisdictions); *Meier v. Wadena Ins. Co.*, 95 F.4th 514, 517 (7th Cir. 2024) (applying Wisconsin law, district court properly dismissed the insured’s complaint seeking to avoid appraisal award noting that “appraisal awards should be treated as ‘presumptively valid’”); *Esser v. Hawkeye Security Ins. Co.*, 2018 WI App 39, 382 Wis. 2d 831, 917 N.W.2d 233, ¶18 (trial court properly determined plaintiffs’ complaint failed to sufficiently state a claim for breach of insurance contract because plaintiffs’ interpretation that the appraisal clause should be interpreted in a manner that would allow the invocation of the appraisal process multiple times “would defeat the purpose of appraisal clauses as lack of finality and increased time, expense and stress would result.”); see also, *Fla. Ins. Guar. Ass’n v. Olympus Ass’n*,

34 So. 3d 791, 794 (Fla. Dist. Ct. App. 2010)(“Appraisal clauses are preferred, as they provide a mechanism for prompt resolution of claims and discourage the filing of needless lawsuits.”)

As noted by the *Esser* court at ¶18:

In *Farmers Automobile Insurance Ass'n v. Union Pacific Railway Co.*, 2009 WI 73, 319 Wis. 2d 52, 768 N.W.2d 596, our supreme court noted that appraisals are “favored and encouraged” in part because they “promote finality” and are “time and cost-efficient.” *Id.*, ¶43. The court repeated that the purpose of the binding appraisal process “is to help litigants resolve their disputes relatively quickly and inexpensively.” *Id.*, ¶45 n.17. The *Farmers* court frowned upon approaches that “would defeat this purpose by expanding and protracting expensive and stressful litigation—the exact opposite purpose such clauses were intended to have.” *Id.*

Despite the clear and unambiguous language in the BMIC policy that appraisal is “binding,” the Tenth Appellate District found that the appraisal award was not binding because of One Church’s unilateral “mistake” assertion. In so doing, the Tenth Appellate District held that One Church’s conclusory assertion that it found additional “hidden damages” months after accepting BMIC’s payment in full of the appraisal award was sufficient to set aside a binding appraisal award and afford One Church an escape hatch to obtain a larger recovery. The Tenth Appellate District does nothing to explain or clarify what damages will be considered “hidden” or not discoverable during the appraisal. The litigation floodgates will be opened because everyone will be litigating what it means for damages to be “hidden” or undiscoverable. This approach threatens to undermine binding appraisal as an effective ADR process and to substantially increase the amount of insurance litigation in Ohio.

The Court should not just correct a blatant error of law which happened in this case but should take this opportunity to chart a course for the future by determining what rule of law applies in the first instance to insurance policy provisions allowing for property loss claims to be resolved by way of binding appraisals. *Amici curiae*, Ohio Insurance Institute,

National Association of Mutual Insurance Companies, and American Property Casualty Insurance Association urge this Court to adopt both propositions of law which will remedy the mischief that will be brought about by the appellate court’s flawed holding and reasoning in *One Church*.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici curiae, Ohio Insurance Institute (“OII”), National Association of Mutual Insurance Companies (“NAMIC”), and American Property Casualty Insurance Association (“APCIA”) are uniquely qualified to provide this Court with a broad perspective on the principles of insurance law relevant to this appeal. OII, NAMIC and APCIA are also well positioned to offer practical insight into the issue of whether a **binding** appraisal in a property insurance case, which has been fully paid by the insurer and such payment was accepted by the insured, can be reopened on the mere allegation by the insured that “additional hidden damages were discovered.” The determination of this issue — as presented in this case in particular — will have a significant impact on *amici*’s members, their policyholders, and the insurance marketplace as a whole.

OII is the professional trade association for property and casualty insurance companies in the State of Ohio. Its members include twenty-seven domestic property and casualty insurers, twelve foreign property and casualty insurers and reinsurers, seven insurance trade associations, and four insurance-related organizations. OII’s member companies represent 87% of Ohio’s private passenger auto insurance market, 81% of the homeowner’s market and 50% of the commercial market. OII strives for stability, predictability and consistency in Ohio’s case law and jurisprudence governing insurance coverage and policy interpretation. On issues of importance to its members, OII has filed *amicus* briefs in significant cases before federal and state courts in Ohio

to promote and advocate for sound public policy and to share its perspective with the judiciary on matters that will shape Ohio insurance law.

NAMIC consists of nearly 1,500 member companies, including seven of the top 10 property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write \$391 billion in annual premiums and represent 68 percent of homeowners, 56 percent of automobile, and 31 percent of the business insurance markets. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

APCIA is the primary national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA's member companies represent 65 percent of the overall U.S. property-casualty insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

The appearance of OII, NAMIC and APCIA as *amici* in this case and submission of this merit brief in support of BMIC emphasizes that there is a glaring need for the Court to provide clear, consistent and reasoned guidance on the issues presented by this case which are of great interest to OII, NAMIC and APCIA and their members. This Court should adopt the two propositions of law advanced by BMIC and confirm that, under Ohio law, an insured's unilateral

assertion of the finding of additional “hidden damages” supposedly discovered after issuance of a binding appraisal award – months after the insured accepted the insurer’s payment – does not constitute a manifest mistake that permits the appraisal to be set aside and reopened.

STATEMENT OF THE CASE AND FACTS

OII, NAMIC and APCIA adopt the Statement of the Case and Facts from the Merit Brief filed by BMIC.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of Law No. 1: Binding appraisal in property insurance cases is intended to: (a) require each party to fully investigate and determine the amount of loss; and (b) have the practical effect of claim and issue preclusion with respect to the amount of the appraised loss.

Appraisal is favored because it provides the parties with an expeditious and economical means of resolving an insurance dispute and has the additional advantage of unburdening crowded court dockets. Binding appraisal compels the parties to thoroughly investigate and conclusively determine the scope of the loss such that each party bears the burden of doing so, and, absent exceptional circumstances not present here, one of the parties cannot claim mistake based upon their failure to adequately investigate the loss. *Motorist Mut. Ins. Co. v. Columbus Fin., Inc.*, 2006-Ohio-5090 (10th Dist.), ¶¶ 9, 11, 17. For a dispute resolution procedure like appraisal to be effective, the decision rendered by the appraisers must be final, binding and without any qualification or condition as to the finality of the award as to the amount of the loss, save for those extremely narrow and unique circumstances where fraud, manifest mistake, or misfeasance has tainted the process and can be proven. Otherwise, the parties have no motivation or obligation to

see that the outcome is correct, thorough, and conclusive. To afford parties an easy means to circumvent and ignore the appraisal award under the guise that the award somehow is not binding creates an inherent contradiction.

The concerns and problems created by the Tenth Appellate District's opinion reopening the appraisal award is not limited to appraisals conducted in the property insurance setting. For example, in the *Buffalo-Water I, LLC* case, the appraisal was conducted in connection with a real property lease agreement with a purchase option. The purchase option agreement contained terms for determining the fair market value which included an appraisal process should the parties and their selected appraisers fail to agree on the purchase price. 481 Mass. at 14-16, 111 N.E.3d at 269-270. When the seller of the property disagreed with the third appraiser's valuation which, according to the option agreement, would be binding on the parties, the seller filed suit seeking a declaratory judgment declaring that the appraisal was invalid and nonbinding because of the appearance of bias on the part of the entity that employed the individual appraiser but not on the part of the third appraiser himself.

The Massachusetts Supreme Court refused to modify the state's common law rule that an appraiser's award cannot be inquired into by the courts in the absence of fraud, corruption, dishonesty or bad faith, to allow a judge to invalidate an appraisal intended by the parties to provide a final, binding valuation of a property where there is an allegation of the appearance of bias. Because the allegations in the complaint, even if proved, could not warrant a finding of any violation of the option agreement setting forth the terms of the appraisal, or a finding of fraud, corruption, dishonesty, or bad faith by the individual appraiser, or a finding of breach of the implied covenant of good faith and fair dealing by the defendant, the Court affirmed dismissal of

the complaint at the pleading stage under Mass. R.Civ. P. 12 (b) (6). 481 Mass. at 14, 111 N.E.3d at 269.

In doing so, the Massachusetts Supreme Court cogently noted:

Our common law has recognized that, when parties enter into a contract providing that the valuation established by an independent appraiser shall determine the value of a property or business, they express their “shared desire for finality” through a means other than adjudication by a court or an arbitrator. *State Room, Inc.*, 84 Mass. App. Ct. at 249. See *Eliot*, 322 Mass. at 89 (parties agreed to valuation “that would in the future prevent a resort to the courts or to technical arbitration”).

481 Mass. at 23, 111 N.E.3d at 276.

The purpose of appraisal is to determine a difference or dispute amicably, privately and finally and, in so doing, to exclude a court of law from such determination. But the Tenth Appellate District has jettisoned that goal and, along with it, the benefits of appraisal. By adoption of Proposition of Law No. I, this Court can restore the utility of the appraisal process in property insurance disputes.

Proposition of Law No. II: As a matter of law, an insured’s unilateral assertion of the finding of additional “hidden damages” after the insured’s acceptance of the insurer’s payment of a binding appraisal award does not constitute a mistake that permits the appraisal to be set aside.

An insurance policy is a contract the interpretation of which is a matter of law. *Cincinnati Insurance v. CPS Holdings, Inc.*, 2007-Ohio-4917, ¶7. As such, an insurance policy, like all contracts, is unambiguous if it can be given a definite legal meaning. *Id.* If a reasonable interpretation of the language in an insurance policy exists, courts must give the policy its intended legal effect. *Laboy v. Grange Indem. Ins. Co.*, 2015-Ohio-3308, ¶10.

Courts must examine insurance contracts as a whole and presume that the parties’ intent can be construed based on the language that they used. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-

5849, ¶11; *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. “When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.” *Galatis, supra*, ¶11. “While an insurance policy that is ‘reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy.’” *Id.*, ¶14, quoting *Morfoot v. Stake*, 174 Ohio St. 506 (1963), syllabus.

“The law in this state is well-established with respect to the interpretation of insurance contracts. A court has an obligation to give plain language its ordinary meaning and to refrain from rewriting the contractual agreement of the parties.” *Miller v. Marrocco*, 28 Ohio St.3d 438, 439 (1986). Applying these well-established legal principles, the appraisal provision in the BMIC policy issued to One Church clearly and unambiguously requires that the result of the appraisal be binding on both insurer and insured. The degree to which BMIC and One Church agreed to be bound by the appraisal award flows not from the incantation of the word “appraisal,” but rather from the parties’ intent as expressed through the language that the award is “binding on all parties.”

There is no ambiguity in the language of the appraisal process in the BMIC policy. It says what it says – the written appraisal award is “binding on all parties.” No one, not One Church or the Tenth Appellate District, ever said or claimed that the policy’s language is ambiguous. Ambiguity exists only when a term is subject to more than one reasonable interpretation. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208 (1988); *Buckeye Union Ins. Co. v. Price*, 39 Ohio St.2d 95 (1974). Courts cannot create ambiguity if none exists. *Lager v. MillerGonzalez*, 2008-Ohio-4838, ¶16; *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978). Yet, the ramification – intended or not – of the Tenth Appellate District opinion is to inject confusion, uncertainty, instability, and ambiguity into an otherwise straightforward insurance policy

provision, one that insurers and insureds have relied upon for decades in resolving insurance claims. That reliance has been shattered by the Tenth Appellate District’s opinion.

Here, the trial court correctly dismissed One Church’s complaint pursuant to Civ.R. 12(C)² for failure to allege specific facts with particularity as required by Civ.R. 9(B)³ giving rise to any legal basis to set aside the binding appraisal award. In doing so, the trial court cogently stated “[t]o **do what One Church is asking the Court to do, and allow the reappraisal process to reopen without demonstrating fraud or another compelling reason, would undermine the process as a whole.** The Court is not willing to do that.” (Emphasis added).

In reversing the trial court, the Tenth Appellate District, in essence, has created legal precedent that “undermine[s] the [appraisal] process as a whole.” The Tenth Appellate District’s ruling will require property insurers to engage in expensive discovery and litigation anytime an insured is dissatisfied with an appraisal and claims that additional “hidden” damages were

² A motion for judgment on the pleadings pursuant to Civ.R. 12(C) applies the same pleading standard as a motion to dismiss for failure to state a claim under Civ. R. 12(B)(6). *Mobley v. Klimas*, 2024-Ohio-2167, ¶12 (8th Dist.). While not directly pertinent here, this Court just recently accepted jurisdiction over a case to address whether Ohio courts should apply the federal plausibility standard for granting a Civ.R. 12(B)(6) motion at the pleading stage – thereby avoiding protracted and costly discovery and motion practice – under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Bethel Oil and Gas, LLC v. Redbird Development, LLC*, OSC Case No. 2024-1696 (jurisdiction accepted March 4, 2025). One Church’s allegations in its complaint – while unquestionably failing to state a claim under the standard set forth in *Peterson v. Teodosio*, 34 Ohio St.2d 161, 165, 297 N.E.2d 113 (1973) as found by the trial court – are even more egregiously deficient under a plausibility standard.

³ Civ.R. 9(B) provides that “[i]n all averments of fraud or **mistake**, the circumstances constituting fraud or mistake **shall be** stated with particularity.” (Emphasis added)

subsequently found.⁴

Under Civ. R. 9(B), mistake must be pled with particularity. Since the purpose of appraisal is to investigate and determine the amount of loss, it should be insufficient, as a matter of law, for the insured to seek to challenge the binding nature of an appraisal award on the basis that additional damages are discovered after an appraisal is complete and the award is signed-off by the parties' hand-picked appraisers. In its Merit Brief, BMIC does an excellent job of explaining precisely why judgment on the pleadings was appropriate in this case.

Someone once asked Abraham Lincoln how many legs a donkey would have if you called its tail a leg. He answered four; "you cannot make a tail into a leg by calling it one." Lloyd Reinhardt, *Warranted Doability*, 63 *Philosophy* 471 (1988). While this appeal is not about donkey tails and legs or Abraham Lincoln's quick wit and wisdom, it is about whether an appraisal process jointly agreed to by the insurer and insured that an award will be "binding on all parties" can be made non-binding by merely calling an award an "initial" determination allowing it to be reopened simply because the insured is unhappy with the amount of the award and determination agreed to by both the insurer's and insured's hand-picked appraisers.

⁴ Particularly aggravating in this case is the fact that One Church accepted the benefits of the contractual appraisal and has kept the \$351,461.50 paid by BMIC in satisfaction of the appraisal award. Typically, it is required that a party seeking to rescind a transaction is required to return the benefits obtained, thus returning the parties to *status quo ante*. *Miller v. Bieghler*, 123 Ohio St. 227, 233 (1931). One Church has not done so, instead, it simply wants more, to the tune of another \$206,663.09. One cannot retain the benefit of one party's performance under an agreement and at the same time attack the validity of that agreement. *Berry v. Javitch, Block & Rathbone, L.L.P.*, 2010-Ohio-5772, ¶ 30. But that is what the Tenth Appellate District is permitting One Church to do here.

CONCLUSION

In support of Appellant Brotherhood Mutual Insurance Company, *amici curiae* Ohio Insurance Institute, National Association of Mutual Insurance Companies, and American Property Casualty Insurance Association respectfully urge this Court to reverse the Tenth Appellate District and to reinstate the decision of the trial court granting judgment on the pleadings to BMIC on all claims.

In doing so, this Court should adopt both propositions of law advanced by Appellant Brotherhood Mutual Insurance Company and clarify Ohio law with regard to the conclusive and final effect of a binding appraisal in a property insurance case, especially when the appraisal award has been fully paid by the insurer and accepted by the insured such that the appraisal cannot and should not be reopened on the mere allegation by the insured that “additional hidden damages were discovered.” Such bare assertions do not amount to the very narrow type of manifest mistake that might give rise to avoiding an appraisal award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing *Brief of Amici Curiae Ohio Insurance Institute, National Association of Mutual Insurance Companies, and American Property Casualty Insurance Association in Support of Appellant Brotherhood Mutual Insurance Company* was sent via e-mail pursuant to S.Ct.Prac.R. 3.11(C) on this 17th day of March 2025 to:

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