A26-0131

State of Minnesota
In Court of Appeals

CLAIMS, INC.

RESPONDENT,

VS.

LIONEL NJITOR, YVONNE NJITOR

APPELLANTS.

REPLY BRIEF OF APPELLANTS LIONEL NJITOR AND YVONNE NJITOR

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INTRODUCTION

Respondent's attempt to collect a fee on insurance proceeds that Allstate had determined were owed to the Njitors because their home was a total loss should not be condoned by this Court. A public adjuster, like respondent, is not entitled to a fee on a building that was deemed a total loss by the insurance carrier before the public adjuster getting involved in the claim. Allstate had already valued the dwelling damage above the applicable policy limits, reduced the payable amount to the dwelling policy limit, informed the Njitors that policy limit payment would be made, and then paid those proceeds accordingly. That respondent worked on ancillary coverage issues, did not independently value the dwelling loss, and instead repeated the values Allstate had already prepared for the dwelling, does not entitle respondent to a fee. Therefore, the district court erred when it granted summary judgment for respondent. The district court's order should be reversed.

ARGUMENT

The Njitors identify several areas where the district court erred. Each of these is addressed below, and when viewed together, when the evidence is viewed in in a light favorable to the Njitors, a complete picture is painted that shows that respondent on a factual and legal basis, respondent's public adjusting contract, and its conduct related to the services it provided under the contract does not entitle it to a fee of the total loss proceeds for the Njitors' dwelling payment and associated debris removal payment.[1] *Abdallah, Inc. v. Martin*, 242 Minn. 416, 424 65 N.W.2d 641, 646 (Minn. 1954) ("[i]n cases involving summary judgment we must take a view of the evidence most favorable to the one against whom the motion was granted").

8. RESPONDENT IS ENTITLED TO NO FEE FOR THE DWELLING BECAUSE ALLSTATE DEEMED THE NJITORS' HOME A TOTAL LOSS.

Respondent cites no authority holding that a loss cannot be deemed a total loss unless there has first been some formal legal determination to that effect, and the Njitors have found none either. In any event, respondent's attempt to distinguish between a "total loss" and a "constructive total loss" misses the point. The evidence clearly establishes that Allstate determined that the fire caused a total loss to the Njitors' home, Doc. 26 at Ex. 4; Add.25.

Allstate's insurance policy follows the Minnesota Standard Fire Insurance Policy providing, "[t]he amount of said loss or damage, except in case of total loss on buildings, to be estimated according to the actual value of the insured property at the time when such loss or damage. Doc. 25, Ex. 1 at 2 of 2 (CLAIMS000262); compare with Minn. Stat. §65A.01, subd. 3; accord Minn. Stat. §65A.08 subd. 2 ("the insurer shall pay the whole amount mentioned in the policy or renewal upon which it receives a premium, in case of total loss, and in case of partial loss, the full amount thereof"). The law is clear. Allstate was clear, and the Njitors understood they would receive the policy limit for

[1] Regarding respondent's calculations on page 4-5 n1 of his response brief, the Njitors agree that there was a mathematical error.

their home. Respondent is the only party arguing that a total loss does not necessarily mean the policy limit will be paid, despite direct evidence to the contrary that Allstate promised and paid the policy limit here.

Allstate treated the dwelling as a total loss, and paid accordingly. Doc. 26, Ex. 4 (Njitor000322). Even if this Court rejects the "total loss" label, the undisputed facts show that before the Njitors signed the public adjusting contract, Allstate had already prepared an estimate valuing the dwelling loss at nearly twice the home's value, reduced dwelling loss to the policy limit, informed the Njitors they would receive the policy limit, and then paid the policy limit. Respondent, by contrast, prepared no estimate of the dwelling loss at all and simply copied Allstate's valuation on a proof of loss. From the Njitors' perspective at the time it signed the public adjusting contract, Allstate had already committed to paying the full dwelling policy limits. The Njitors' understanding matters because it bears directly on what the parties understood respondent's fee would be based on.

Respondent's unsupported assertions, stated as facts, at page 19 of its brief are directly contradicted by Lionel Njitor's affidavits. Although respondent contends that when the Njitors executed the public adjusting contract both parties understood that additional work was necessary to secure payment on the dwelling and that respondent would therefore be entitled to a 10% fee on the dwelling proceeds, Mr. Njitor averred otherwise. Before the contract was executed, Mr. Njitor informed respondent's president that Allstate had already determined the home was a total loss and would pay the policy limit. Doc. 24 at

¶21; Add.18. He further averred before signing the public adjusting contract that he had already received Allstate's estimate valuing the loss above the policy limits and he never received any other estimate from Allstate. *Id.*; Doc. 32 at ¶2; Add. 23. Mr. Njitor also averred that respondent did not prepare an independent estimate for the dwelling and the dwelling in respondent's proof of loss matched Allstate's estimate. Doc. 24 at ¶¶32, 36; Add.20.

As to the parties' understanding of the fee arrangement, Mr. Njitor averred that respondent's president "guaranteed" he could obtain additional payment for items such as the solar panels and remodeling loan, and that he and his wife understood respondent's 10% fee to apply only to amounts Allstate had not already agreed to pay, including "contents, the solar panels, and the remodeling loan," rather than the already promised dwelling proceeds. Doc. 24 at ¶¶24–25, 30; Add.19-20. He further averred that he and his wife did not think respondent would to be entitled to any fee on the dwelling proceeds because Allstate had agreed to pay the policy limit before respondent became involved with their claim. Doc. 24 at ¶39; Add.20.

Because Respondent's argument depends on a version of the parties' understanding that is unsupported by the record and expressly contradicted by Mr. Njitor's sworn statements, its claim for fee on the dwelling proceeds cannot be supported. As a result, the district court erred when it granted respondents' summary judgment motion.

9. **THE PUBLIC ADJUSTING CONTRACT IS SEVERABLE AND NOT SUPPORTED BY CONSIDERATION.**

Allstate's total loss determination shows that neither the Njitors nor respondent supplied sufficient consideration under the public adjusting contract for the dwelling coverage. Put another way, once the dwelling policy limit and the applicable debris removal increase were reached, the Njitors could not promise to pay a fee on that amount, and respondent could not promise to obtain proceeds that had already been secured.[2] The district court therefore erred in concluding that sufficient consideration supported respondent's claim for a fee on the dwelling payment.

C. **RESPONDENT'S SPECULATION THAT ITS ACTION SAVED THE NJITORS FROM A SPECIAL INVESTIGATION UNIT INVESTIGATION IS NOT VALID CONSIDERATION.**

Rather than focusing on the language of its public adjusting contract, respondent tries to reframe the severability argument to focus on a purely hypothetical scenario: that the respondent saved the Njitors from a denial of their entire claim because respondent claimed the Njitors may misrepresent their personal property loss. Respondent then uses that conjecture justify collecting a fee on the dwelling claim. The evidence does not support this. Doc. 32 at ¶¶7-9; Add. 24.

Respondent cited no authority that addresses the actual issue before the Court: whether its public adjusting contract is severable. Respondent's reliance

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[2] Which is why it was reasonable for the Njitors to agree to pay a fee to respondent if it could obtain additional funds on the dwelling coverage beyond the policy limit.

on *Collins v. USAA Prop. & Cas. Ins. Co.*, 580 N.W.2d 55 (Minn. Ct. App. 1998) and *Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645 (Minn. 1986), is misplaced because both cases concern alleged misrepresentations made to the insurance company, not the interpretation of a public adjusting service contract. Even then, *Henning*, legally supports the Njitors' position because it recognizes that whether a statement made in the process of an insurance claim is a willful, intentional misrepresentation is a question of fact, which here, should not have been decided on summary judgment. *Henning,* 383 N.W.2d at 654. Even if the Court considered respondent's speculation as substantive evidence and assumed the Njitors' high value personal property were included in the Njitors' inventory, at most, that would create an issue of fact, not fraud as a matter of law. *Henning*, 383 N.W.2d at 654 ("whether a statement is a willful intentional misstatement is a question of fact"). At worst, the proper remedy would be to reverse and remand for fact finding. The better result, though, is complete reversal on this issue. Lionel Njitor averred that the Njitors owned the disputed property. Doc. 32 at ¶¶7-9; Add.24. On this record, respondent has not shown any willful or intentional misrepresentation.

Respondent's argument rests on speculation, not evidence. There is simply no support in the record for respondent's contention that on certain, high value personal property items it believed were fraudulent. Lionel Njitor averred that the Njitors, in fact, owned those items. Doc. 32 at ¶¶7-9; Add.24. Respondent likewise offers no evidence for its assertion that listing those items would have “surely raised flags” and triggered “a Special Investigations Unit…inquiry with Examinations Under Oath…and potential claim denial.” Resp. Brief. p. 13. Respondent’s conjecture neither allows for nor defeats summary judgment, and does it show that this public adjusting contract was indivisible. At most, respondent speculates about a possible dispute over personal property; it does not establish that dwelling coverage would have been denied or that the public adjusting contract must therefore be treated as entire.

As to severability, the Supreme Court observed that “[i]f the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such contract will generally be held to be severable.” *McGrath v. Cannon*, 57 N.W. 150, 151, 55 Minn. 457, 460, (Minn. 1893) quoting 2 Parsons Cont. 648 (quotation marks omitted). That is the structure of respondent’s public adjusting contract here. Respondent divided the Njitors’ insurance claim into separate coverage categories. Each coverage required different work. Under *McGrath*, that is a touchstone of a severable contract.

To highlight this, *Spear v. Snider*, 29 Minn. 463, 13 N.W. 910 (Minn. 1882) is analogous to the facts here. In *Spear,* the contract called for drilling five wells at separate prices. Because each well was a distinct unit of performance with its own price, the Court concluded the contract was severable, and the driller was entitled to payment for the wells it completed. The same reasoning applies here. Each coverage category is like a separate well: a distinct unit of work with separate compensation attached to it. So, if respondent performed services on some coverages but not on the dwelling, it is entitled to a fee only for the coverages it actually prepared, presented, and adjusted, not for every category listed in the contract. Doc. 26 at Ex. 5; Add.31-32. That some issues may overlap across coverages does not make the contract entire. Just like *Spear* where even though all five wells were part of one overall project, the contract was still severable.

Likewise, in this case, that all coverages arose from the same insurance loss does not overcome respondent's decision to include distinct coverage categories in its public adjusting contract. If Respondent intended to earn a fee on the entire insurance claim regardless of which coverages it actually worked on, it could have included that language. It did not. It cannot now recast its public adjusting contract as entire, not severable, because doing so would increase its fee.

That the Njitors paid respondent's fee on some coverages, but not on the dwelling, further confirms the parties treated the public adjusting contract as severable. Other structures, and the associated five percent increase for debris removal, are separate coverage items from the dwelling. Resp. Brief at 14; Doc. 25 at Ex. 1 at 13 of 22 (CLAIMS000244). That is consistent with the plain language of the contract and reflects that the Njitors paid for the services respondent actually performed. Valuing other structures, and the increased debris removal, which is a function of the policy, was part of the public adjusting contract. Doc. 25 at Ex. 1 at 13 of 22 (CLAIMS000244). When the parties entered into the public adjusting contract, Allstate had not made any determination on those coverages, unlike the dwelling.

This is consistent with *Edward Thompson Company v. Schroeder*, 154 N.W. 792, 792-93, 131 Minn. 125, 127 (Minn. 1915), where the Supreme Court considered a contract to purchase two sets of law books as severable even though the defendant paid for one set but not the other.[3] The same principle applies here: payment for some parts of the contract does not transform the entire agreement into an indivisible one. The manner in which respondent submitted the proofs of loss does not change that result. That some amounts may have appeared on the same proof of loss says nothing about whether the public adjusting contract was severable; it reflects only how respondent chose to present the claims. If anything, respondent's submission of four separate proofs of loss shows that respondent itself treated the claim as divisible by coverage, rather than one indivisible claim. Doc. 21 at Ex. 2. Regardless, respondent is entitled to no fee for the dwelling.

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[3] The Court in *Edward Thompson Company,* not only concluded the contract severable; it also concluded the buyer could refuse payment for one set of books because he was fraudulently induced to purchase that set, even when he paid for the other set. 154 N.W. at 793, 131 Minn.127-29. That is important here; it demonstrates where one agreement covers multiple items, fraudulent inducement affecting one part does not necessarily contaminate the whole agreement. Like the Njitors' position that because they agreed to paid respondent's fee on one item, does not mean the Njitors agreed to pay respondent's fee on other items.

D. **NEITHER THE NJITORS NOR RESPONDENT ASSUMED ANY OBLIGATIONS RELATED TO THE TOTAL LOSS OF THE DWELLING.**

There was no consideration for any fee based on the dwelling portion of the public adjusting contract because respondent did not undertake services capable of obtaining the proceeds already promised by Allstate. At best, respondent's services were incidental to the dwelling claim, and not the bargained for basis for a fee under the dwelling coverage. Under Minnesota law, consideration means "a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other." *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 531, 117 N.W.2d 213, 220 (1962); *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 539, 104 N.W.2d 661, 655 (Minn. 1960) ("Consideration requires that a contractual promise be the product of a bargain"). The bargain requirement is not met here. Respondent could not be compensated for public adjusting services that would increase the Njitors' dwelling recovery, regardless of how it frames its services. The Njitors' home was a total loss, and, therefore, Allstate was obligated to pay the applicable policy limit for the dwelling. Minn. Stat. §§ 65A.08(a), 65A.01, subd. 5; *Auto–Owners Ins. Co. v. Second Chance Invs. LLC,* 827 N.W.2d 776 770 (Minn. 2013). Accordingly, respondent is not entitled to a fee.

Likewise, the Njitors did not, and could not, agree to pay respondent a fee for preparing, presenting, and adjusting the dwelling claim where the dwelling claim had already been adjusted to the policy limit and no further dwelling recovery was available. In those circumstances, there was no bargained for exchange because respondent did not undertake any act that could alter the amount owed on the dwelling, and the Njitors did not promise payment for services for funds it was already receiving. Respondent's position relies on ancillary services that did not affect the dwelling payment. Consideration must be something the parties adopted and treated as the basis for the promise, not incidental activity removed from additional contractual benefits. *Carlson v. Krantz*, 172 Minn. 242, 246, 214 N.W. 928, 929 (Minn. 1927) ("it should be observed that the fact that services are rendered, even on request, does not create liability where the circumstances repel the inference that compensation was intended.")

The five items respondent identifies on page 17 of its brief do not establish that it added value to the dwelling claim, let alone prepared, adjusted and presented it. First, there is no evidence in the record that respondent submitted the Matterport scan or its "measurements of the damaged home" to Allstate. Resp. Br. at 17; Doc. 21 at Ex. 11-2.

Second, respondent referring the Njitors to an attorney for a possible underinsured or errors and omissions claim did not add value to the dwelling insurance claim. *Carlson*, 172 Minn. at 246, 214 N.W. at 929 ("when services are performed or acts done, even on request, merely from kind or charitable motives, the law will not imply a promise to pay for them"). Regardless, that would have been a separate claim, was outside the scope of the public adjusting contract, and unnecessary to prepare, adjust, and present the Njitors' dwelling claim.

Third, Allstate's inquiry about the lien did not affect the value of the dwelling claim, especially where the Njitors had already resolved the issue. Doc. 21 at Ex. 11-3 ("Lionel sent the release of the lien and a letter from the attorney showing he paid the HOA fine"). In that respect, this lien issue exposes the corresponding flaw in respondent's dwelling fee claim: respondent seeks compensation for addressing an issue the Njitors had already handled.

Finally, the mortgage information proves little. Exhibit 11 itself suggests the information may have related to other structures as well, noting that "the mortgage interest was well below the amount of the dwelling and other structure settlements."[4] Doc. 21 at Ex. 11-5.

Respondent's causation argument is flawed because it rests on timing, not evidence. Respondent asserts that Allstate paid the dwelling claim "directly in response to Respondent submitting the Proof of Loss forms," Resp. Br. 14, but it identifies no record evidence establishing that submission of the proof of loss caused the payment. To the contrary, Allstate's claim representative wrote "Allstate did determine your dwelling was a total loss and we paid out the policy limits based on our assessment of the damages and the fact that we deemed the dwelling a total loss. Your public adjuster did not make this decision." Doc. 26 at Ex. 4.

[4] By citing to this sentence, the Njitors do not agree that the dwelling payment was a settlement of the loss or that respondent is entitled to any fee for the dwelling.

Viewing the facts in the light most favorable to the Njitors, the record shows respondent submitted the proof of loss before Allstate issued payment, not that the submission caused the payment. *Abdallah,* 242 Minn. at 424, 65 N.W.2d at 646. That sequence of events does not eliminate a genuine issue of material fact as to why Allstate paid the policy limit for the Njitors dwelling loss. Instead, the record supports the contrary inference that Allstate had already determined the dwelling loss exceeded the policy limits and had already committed to paying those limits before Respondent became involved. *Id.* Doc. 26 at Ex. 2; Add. 25. Respondent's argument therefore does not establish an undisputed fact; it merely advances one interpretation of disputed facts, which is insufficient to support summary judgment in its favor.

Respondent's causation theory fails for the same reason when applied to debris removal. The fact that debris removal amounts were included with the dwelling payment does not show that respondent adjusted or secured the dwelling claim. That additional payment flowed from the policy's debris removal provision once Allstate determined the dwelling loss exceeded the policy limit; it was not the result of any independent dwelling estimate or adjustment by respondent. That addition was a function of the policy, not the product of any independent valuation or adjustment by respondent. The debris removal provision in the Njitors' Allstate policy provides:

> We [Allstate] will pay reasonable expenses you [The Njitors] incur to remove debris of covered property damaged by a loss we cover. If the loss to the covered property and the cost of debris removal are more than the Limit of Liability shown on the Policy Declarations for the covered property, we will pay up to an additional 5% of that limit for debris removal.

Doc. 25, Ex. 1 at 13 of 22, CLAIM000244.[5] Thus, when respondent submitted its estimate at the policy limit for other structures, the additional five percent for debris removal was triggered for that coverage. But respondent submitted no estimate to Allstate placing the dwelling loss over the dwelling policy limit. Allstate, not respondent, made that determination. Doc. 26 at Ex. 4. So any debris removal payment on the dwelling was not the result of respondent adjusting, preparing, or presenting Njitors' dwelling claim.

10. ALTERNATIVELY, RESPONDENT DID NOT PERFORM ITS OBLIGATIONS UNDER THE PUBLIC ADJUSTING CONTRACT AND IS NOT ENTITLED TO A FEE.

Appellant is simply wrong that the Njitors argue for the first time on appeal that "the contract provides the Respondent will 'assist in the preparation, presentation and adjusting' of the Loss but that Respondent did not need to do that in this case" Resp. Br. at 20. The Njitors opening brief expressly argued that respondent promised to "assist in the preparation, presentation and adjusting" of the claim; yet "the dwelling was not part of the claim plaintiff adjusted;" respondent "did not prepare or adjust a dwelling claim for Allstate," and "performed no adjusting" as to the dwelling. Doc. 23 at 7–8 (emphasis in original). Respondent therefore cannot claim this issue was newly raised on appeal. The argument was presented in the opening brief, cites the

[5] Even if this Court were to agree with the district court, that the respondent is entitled to a fee debris removal for the dwelling, it does not necessarily follow that respondent is entitled to its fee for the dwelling because under the contract, the debris removal is a separate coverage items with separate consideration. Doc. 26 at Ex. 5; Add. 31.

public adjusting contract language, and addresses the main issue in this appeal, that respondent seeks a fee on dwelling proceeds for work it did not perform.

The contract requires respondent to "assist in the preparation, presentation, and adjusting" of the Njitors' insurance claim, and then identifies 12 different coverages that may apply. Doc. 26 at Ex. 5; Add.31. Under the plain language of the contract, respondent did not "assist in the preparation, presentation, and adjusting" of the dwelling claim.

11. PAROL EVIDENCE IS ADMISSIBLE TO ESTABLISH THE PARTIES' AGREEMENT RELATED TO RESPONDENT'S FEE FOR THE DWELLING PAYMENT.

In this case, parol evidence is admissible to demonstrate that the respondent is not entitled to a fee for the dwelling payments because it made statements that were fraudulent or established a condition precedent to payment. In the alternative, parol evidence is admissible to resolve an ambiguity in the contract.

D. PAROLE EVIDENCE IS ADMISSIBLE TO DEMONSTRATE FRAUDULENT INDUCEMENT.

The district court's order should be reversed on this issue because even though it admitted the parole evidence it reached the wrong conclusion. The district court acknowledged that "a factfinder could find the Plaintiff knowingly made false statements with the intent to induce Defendants to rely on the misrepresentation in signing the contract,"[6] yet it nevertheless concluded that

[6] Even if respondent did not know the statement was false, a fraud claim can still survive because:

the Njitors "cannot show that their reliance on any of Plaintiff's purported representations as justifiable." Doc. 44 at 12; Add.13. This simply contrary to Minnesota law and reversible error.

Minnesota law permits admission of parol evidence to show that a party was fraudulently induced to enter into an agreement. *Johnson Bldg. Co. v. River Bluff Dev. Co.* 374 N.W.2d 187, 193 (Minn. App. 1985). Lionel Njitor avvered in this affidavit that respondent said it "would make Allstate pay more for the structure part of the loss, but [respondent's president] needed us [the Njitors] to sign a contract, and that Claims, Inc. would only get paid if it got additional money for the solar panels and remodeling loan." Doc. 25 at ¶25; Add.19. That is what the Njitors understood the checked dwelling box in the agreement to mean. *Id.* ¶27, Add.19.

The Njitors' position is not, as respondent suggests, that they ignored the contract's text. Resp. Br. 24. The Njitors understood respondent's statements to mean respondent's payment, related to the dwelling, was limited to new amounts Allstate paid. They reasonably assumed that respondent would not take a fee on amounts Allstate had already promised to pay prior to respondent's involvement. Doc. 24 at ¶28; Add. 19. Respondent's

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> Fraudulent intent may be proved by showing that the party knew his statements to be false; or that, having no knowledge to their truth or falsity, he did not believe them to be true; or that, having no knowledge of their truth of falsity, he yet represented them to be true of his own knowledge.

Swanson v. Domning, 251 Minn. 110, 115, 86 N.W.2d 716, 721 (Minn. 1957).

misrepresentation goes to inducement and the scope of the promised fee, not to whether dwelling coverage was listed in the agreement. Indeed, such a reliance on the Njitors' part was reasonable because they "had never had a house fire and [they] needed to file a claim for our belongings." Doc. 24 at ¶16; Add.18.

Minnesota case law explains that reasonable reliance for a fraud claim is viewed from the recipient's perspective. Respondent's argument that "if Respondent made a promise to recover more than the policy limits on the Loss, it would be unreasonable for anyone to rely upon that, especially when the Contract says otherwise," not only runs afoul of this case law, it runs afoul of the Allstate policy, what provided for debris removal above and beyond the policy limits in the event of a total loss. Resp. Br. at 26; Doc. 25 at Ex. 1 (CLAIM000244). In *Spiess v. Brandt*, the Minnesota Supreme Court wrote:

> We have repeatedly held that one who deceives another to his prejudice ought not to be heard to say in defense that the other party was negligent in taking him at his word.

230 Minn. 246, 253, 41 N.W.2d 561, 567 (Minn. 1950). This is especially true in a relationship where one party has superior knowledge, like that of a public adjuster, respondent, and an insured who has never had a house fire, the Njitors:

> Because of their ignorance and inexperience in regard to matters concerning which material representations were made, plaintiffs had a right to rely upon the superior knowledge of defendants.

Hollerman v. F. H. Peavey & Co., 130 N.W.2d 534, 540, 269 Minn. 221, 229 (Minn. 1964). Doc. 24 at ¶16; Add. 18. Respondent's argument that the declarations page lists the policy limit, does not excuse the fact that a "fact finder could find the Plaintiff knowingly made false statements," Doc. 44 at 12; Add. 13. Especially when it is a:

> well established rule that in a business transaction the recipient of a fraudulent misrepresentation of a material fact is justified in relying upon its truth, although he might have ascertained its falsity had he made an investigation.

Spiess, 230 Minn. at 253, 41 N.W.2d at 566; *accord Berryman v. Riegert*, 286 Minn. 270, 277, 1175 N.W.2d 438, 443 (Minn. 1970). Last, Reasonable reliance is usually a question of fact. *Hoyt Properties v. Prg*, 736 N.W.2d 313, 321 (Minn. 2007) ("[w]hether a party's reliance is reasonable is ordinarily a fact question for the jury unless the record reflects a complete failure of proof").

The Njitors have been damaged because of respondent's misrepresentations. As it directly relates to the public adjusting contract, respondent is seeking over $70,000 for a fee it did not earn. Respondent is incredulous about this argument, Resp. Br. at 28, and tries to refocus the discussion on "submitting the dwelling Proof of Loss." first, as explained above, respondent did not prepare, present or adjust this claim. Moreover, performance on a contract that one fraudulently induced another to enter does not absolve the fraud. Respondent then shifts the focus to the contents claim, which also as explained above was supported by separate consideration and does not form a basis for a fee under the dwelling coverage. Thus, it is incredible for respondent to argue that the Njitors "fail to show they have suffered damages as a result of the alleged fraudulent inducement." Especially when respondent's own brief confirms that it seeks tens of thousand of dollars for its fee under the dwelling coverage. Resp. Br. at 28. That is concrete pecuniary damage.

B. PAROL EVIDENCE IS ADMISSIBLE TO DEMONSTRATE A CONDITION PRECEDENT.

Respondent sidesteps the Njitors' argument to claim that the solar panels and remodeling loan reimbursement it promised to recover, were already part of the public adjusting contract, not special separate items. Doc. 26 at Ex. 5; Add. 31. This is simply not so. The Njitors' evidence is straightforward. Before the contract was signed, Allstate had already determined the home was a total loss and had issued an estimate exceeding the policy limit. Doc. 26 at Ex. 2; Add.25-30; Doc. 26 at Ex. 4. The Njitors did not hire respondent to secure the already promised, and legally owed dwelling proceeds; they retained respondent for assistance with their personal property claim. Doc. 24 at ¶¶14-20; Add.18; Doc. 26 at Ex. 2; Add.25-30. Before signing the contract, Mr. Njitor told respondent that Allstate was already paying the dwelling policy limit but had not paid for certain additional items, including the solar panels and remodeling loan related amounts. Doc. 25 at ¶¶21, 24; Add.18-19. Respondent said it could obtain additional dwelling money and would take its 10% fee only on that additional recovery. Doc. 25 at ¶¶26; Add.19.

Respondent's statement is not peripheral or immaterial. It sets when respondent's right to payment on the dwelling coverage would arise, if at all. In other words, for the dwelling proceeds, the parties' bargain was contingent on recovering funds beyond those Allstate had already promised. That is the classic function of a condition precedent. *Craigmile v. Sorenson*, 58 N.W.2d

865, 871, 239 Minn. 383, 394 (Minn. 1953) ("[t]he rule is clear, however, that a written document, unconditional on its face and fully executed, may be shown by parol testimony to have been subject to a condition precedent"); accord *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). Accordingly, the district court erred by not even addressing whether parol evidence should be admitted to explain a condition precedent to respondent's fee under the public adjusting contract.

E. THE NJITORS' INTERPRETATION OF THE PUBLIC ADJUSTING CONTRACT IS REASONABLE; IF THE COURT WERE TO CONCLUDE THAT RESPONDENT'S INTERPRETATION IS REASONABLE, THEN PAROL EVIDENCE IS ADMISSIBLE TO INTERPRET THE PUBLIC ADJUSTING CONTRACT.

At the outset, the district court erred when it failed to consider whether the public adjusting contract was ambiguous, instead writing that "neither party argues that the terms of the written contract are ambiguous." Doc. 44 at 8; Add.9. Although that statement is technically true, both parties advanced competing interpretations of the public adjusting contract. Doc. 23 at 8 n4. In their reply, the Njitors expressly argued that the parties' interpretations lead to different results. Doc. 36 at 7-9.

Specifically, the Njitors argued before the district court that the payment provision is permissive as to which coverages apply. Doc. 34 at 5; Doc. 26 at Ex. 5; Add. 31. ("the following coverages *may* apply") (emphasis added).[7] The use of "may" indicates that the parties understood that not all 12 coverage

[7] This is another instance where the respondent misstates the Njitors are making an argument for the first time on appeal. Resp. Br. at 11.

categories in the public adjusting contract would necessarily apply to the Njitors' claim. Doc. 34 at 5. Respondent, on the other hand, treated the contract as mandatory, arguing that "[t]he contract clearly includes all aspects of the insurance claim." Doc. 28 at 3. Respondent's reading ignores the contract's use of the word "may."

The Njitors' interpretation gives full meaning to the plain language of the contract. Respondent's interpretation does not. Simply put, because the contract is permissive and because not every one of the 12 coverage items was necessarily intended to be part of the contract, it is reasonable to read the contract as excluding payment to respondent under the dwelling coverage for funds that had already been promised before respondent became involved in the claim. Thus, solely to that extent, the Njitors did argue that the contract was unambiguous.

But the Njitors also argued in the alternative that, if the district court concluded both parties' interpretations were reasonable, then the contract was ambiguous and parol evidence could be admitted to explain that ambiguity. Doc. 23 at 8 n4; Doc. 34 at 7-9; *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018) ("[i]f the district court determines that a contract is ambiguous, it may admit parol, or extrinsic, evidence of the parties' intent."); *Wick v. Murphy*, 237 Minn. 447, 453, 54 N.W.2d 805, 809 (1952) (Court allowed parol evidence where defendants had "advised plaintiffs before the contract was executed that the cost of the proposed improvement could not exceed $5,000, and that this was later increased to $8,500...''). The district court therefore erred by failing to analyze the parties' competing interpretations to determine whether one or both were reasonable, and, if both were reasonable, admitting parol evidence to resolve the ambiguity.

12. **NEITHER A REIMBURSEMENT FOR FUNDS PAID BY THE NJITORS, NOR FUNDS PAID FOR A DEBT INCURRED BY THE NJITORS IS A PAYMENT MADE "IN SETTLEMENT OF LOSS" AND RESPONDENT IS NOT ENTITLED TO A FEE FOR THESE PAYMENTS.**

Respondent is not entitled to a fee for reimbursements or money paid because the Njitors incurred a debt. Reimbursement for withheld depreciation on personal property returns the insured to the position they were in after paying out of pocket to replace or repair covered items. Incurred costs are expenses the insured becomes obligated to pay because of the fire loss. Both of these concepts are different from insurance proceeds paid that attempt to make the insured whole for covered losses, such as dwelling or other structure damage. They are not "paid in settlement of the loss" instead they are paid as reimbursements to the Njitors for money they spent or debts they incurred. Doc. 21 at Ex. 1. In the latter situation, the payment confers a benefit without first requiring the insured to advance its own money to be made whole.

So, here, where the Njitors used their own funds to purchase personal property and Allstate later reimbursed them from the withheld depreciation, Allstate's reimbursement did not create a new economic benefit; it simply repaid the Njitors for money they spent. It is not a new economic benefit because Allstate did not owe this money to the Njitors until they spent their own money. Likewise, Allstate did not need to pay the additional living expense until the Njitors incurred the debt. In that sense, reimbursement is not a new gain, but a restorative payment. This is further highlighted by the Njitors'

Allstate policy which describes the withheld depreciation on personal property as a "reimbursement." Doc. 25 at Ex. 1 at 15 of 22.

Treating reimbursement for withheld depreciation ignores the economic reality of the transaction. That distinction matters because under respondent's interpretation every reimbursement payment under the claim allows respondent to charge a fee on the Njitors' own money. That is not the same as preparing, presenting, and adjusting an insurance claim to obtain new funds to rebuild or replace what was lost in the fire. Accordingly, under the plain language of the public adjusting contract, respondent is not entitled to reimbursements to or payments on debts incurred by the Njitors.

13. THE PROMISE TO PAY IS INVALID BECAUSE IT IS SUPPORTED BY PAST CONSIDERATION.

The respondent is incorrect that if the public adjusting contract fails, then the Promise to Pay is enforceable. This argument is flawed because the consideration is past consideration. *Cityscapes Dev., LLC v. Scheffler*, 866 N.W.2d 66, 71 (Minn. App. 2015) quoting *Sheehy v. Bodin*, 349 N.W.2d 353, 354 (Minn. App. 1984) ("past consideration cannot support a promise to pay and is invalid.") Respondent's attempt to claim that the consideration for the Promise to Pay was that it endorsed a check goes against the plain language of the Promise to Pay. The first sentence of the Promise to Pay encompasses the agreement:

> We [the Njitors] agree to pay Claims, Inc. a partial fee of $71,379.42, (Seventy-one thousand three hundred seventy-nine and 42/100 dollars) for adjusting services for the dwelling, other structures, and debris removal portion of our claim for their adjusting services.

Doc. 26 at Ex. 8; Add.35. This sentence clearly states that the $71,379.42 payment is for adjusting services, which by the time this Promise to Pay was signed had already been performed. This is textbook past consideration. The next sentence is where respondent focuses its argument about consideration, "Claims, Inc. will endorse the Allstate Insurance Company claim…in the amount of $713,794.20…made payable to Lionel Njitor, Yvonne Njitor, Amerihome Mortgage Company c/o Loancareits Scrs &/or Assigns Atima and Claims, Inc." Doc. 26 at Ex. 8; Add.35. The endorsement of the check is not conditioned on signing the Promise to Pay. The Promise to Pay does not connect the Njitor's purported agreement to pay with endorsing the check.

14. THE PROMISE TO PAY IS UNENFORCEABLE BECAUSE THE NJITORS SIGNED IT UNDER DURESS.

There is no question that economic duress is a viable claim in Minnesota. *Hoskin v. Krsnak*, 25 N.W.2d 398, 410 (Minn. 2025). With this in mind, the district court erred, as a matter of law, when it concluded "Defendants did not express disagreement with signing the promise to pay or show evidence of undue pressure from Plaintiff." *Id.* This, however, overlooks that silence in the face of coercion does not mean the coerced party agreed:

> Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

Joannin v. Ogilvie, 49 Minn. 564, 571, 52 N.W. 217, 219 (Minn. 1892). The Supreme Court favorably endorsed a similar concept in *Hall-Vesole Co. v. Durkee-Atwood Co.*:

> There is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the account thus rendered; but it is merely competent evidence, subject to be rebutted by circumstances from which counter inferences may be drawn.

227 Minn. 379, 385, 35 N.W.2d 601, 605 (Minn. 1949) favorably quoting *Lockwood v. Thorne*, 18 N.Y. 285, 288 (N.Y. 1858). Thus, at the worst, the Njitors silence at the time they signed the promise to pay, is an issue of fact, and the district court committed reversible by not concluding so. Similarly, the respondent's argument that "any allegation of duress while signing the Promise to Pay is undermined by the Appellants' lack of any objection, discussion or hesitation in executing the agreement" is contrary to the law and does not absolve its actions. Resp. Br. 35.

Mr. Njitor averred that he and his wife did not believe respondent was entitled to any payment from the dwelling-insurance proceeds because respondent had not fulfilled its promise to obtain additional funds from Allstate and because Allstate had already committed to paying the policy limit on the home. Doc. 24 at ¶39, Add.20. He further averred that he and his wife "felt [they] had no other choice but to sign the Promise to Pay" because, if they did not, respondent would not release "the other hundreds of thousands of dollars of [their] insurance proceeds" needed to replace their home. *Id.* ¶40. That is evidence of coercive economic pressure, not voluntary assent.

The evidence in this case is consistent with *Hoskin v. Krsnak*. There, the Minnesota Supreme Court concluded economic duress is not excluded as a defense and that economic pressure may bear directly on whether a party's assent to an agreement was voluntary. *Hoskin*, also forecloses any argument that only physical threats can invalidate assent in a duress defense. If economic pressure can undermine the validity of a release in *Hoskin*, it can likewise undermine the validity of the Promise to Pay here.

In fact, here the pressure respondent placed on the Njitors is more concrete. Respondent withheld access to hundreds of thousands of dollars in insurance proceeds, which the Njitors needed to rebuild their fire damaged home, unless they signed an agreement to pay money they did not believe was owed. Doc. 24 at ¶¶39–40, Add. 20-21. That is not ordinary bargaining leverage because respondent had an interest in only a fraction of the funds. A reasonable factfinder could conclude that conditioning release of urgently needed rebuilding funds on execution of the Promise to Pay left the Njitors with no meaningful choice and constitutes duress.

Under *Hoskin*, that is enough to defeat respondent's claim that the Njitors signed the Promise to Pay voluntary as a matter of law. At a minimum, the Njitors' evidence raises a genuine factual issue as whether the Promise to Pay reflected free assent or assent extracted by economic duress. Accordingly, the district court erred when it concluded that the Njitors were not under economic duress when they signed the Promise to Pay.

CONCLUSION

For the reasons set forth above and in the Njitors' opening memorandum, the district court's order should be reversed.

Dated: April 3, 2026

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<u>CERTIFICATE OF DOCUMENT LENGTH</u>

This reply brief complies with the typeface and word/line limitations of Minn. R. Civ. App. P. 132.01. This brief was prepared using Microsoft Word 365, which reports that the brief, including footnotes, has 7,063 words, exclusive of pages containing the table of contents, table of citations, and addendum.

Dated: April 3, 2026

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