In the Court of Appeals
for the
Fifteenth District of Texas,
Toyahville, Texas

Dan A. Herbster and Dixie B. Herbster,
Appellants

versus

State Ranch Insurance Company,
Appellee

On Appeal from the 83rd District Court
Luna County, Texas
The Honorable Brock Goulett

BEFORE KELLY, J., RUDNICKI, J., AND VOGELSANG, CJ.

VOGELSANG, Chief Justice, in which KELLY, J. joins.

Dan and Dixie Herbster purchased a homeowner's insurance policy from State Ranch Insurance Company ("State Ranch"). After their home was damaged during Hurricane Ike, the Herbsters filed a claim under the policy. The Herbsters disagreed with State Ranch's determination of the amount of property damage that was covered and requested an appraisal. Following the appraisal, State Ranch refused to pay the appraisal award. The Herbsters then filed suit in district court for breach of contract. State Ranch counterclaimed, seeking a declaration that the appraisal award was invalid. Both parties filed motions for summary judgment. The district court denied the Herbsters' motion for summary judgment and granted summary judgment in favor of State Ranch. We reverse and render judgment in favor of the Herbsters.

BACKGROUND

Several years ago, the Herbsters were happily married law students anticipating a bright future. Their lives took a dark turn when Dixie was severely injured from a slip-and-fall accident on ice during a winter storm at the law school. Dixie sued the law school for damages resulting from her injuries. She lost the suit, and Dan divorced her shortly thereafter.

Dan took a job working for a prestigious law firm in Houston, while Dixie turned to a life of drugs and crime. One night, she broke into Dan's home, stole all of his possessions, and attempted to flee the country. However, she was apprehended before she left the state and was charged with burglary. She was subsequently convicted, and this Court affirmed her conviction.

However, the court of criminal appeals threw out Dixie's conviction, finding that all the evidence used to convict her was obtained pursuant to an unlawful search and seizure.

Dixie returned to Dan upon her release from prison and begged for his forgiveness. Dan still loved Dixie so he took her back, and the two remarried. They bought a new home in Luna County and took out a homeowner's insurance policy from State Ranch.

State Ranch's policy is a "comprehensive," or "all-risk," policy which covers all damage to dwellings and personal property unless otherwise excluded. Like almost all homeowner's policies, State Ranch's policy covers only damage caused by certain instrumentalities -- or "perils" -- and excludes damage caused by others. Relevant to this appeal are the policy provisions that define the scope of coverage for damage caused by (1) wind; (2) water; and (3) concurrent action of wind and water.

The policy covers property loss due to windstorm or hail and "direct loss" caused by rain, i.e., rain driven through roof or wall openings made by direct action of wind or hail. The policy thus covers losses caused by rain blown through a hole in a roof, wall, or window. Exclusively wind-related damage, like a blown-off roof, or a window damaged by a wind-propelled projectile, is also covered.

Property loss caused by water in the form of flooding, however, is excluded from the policy. The policy states: "Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly, to cause the loss. Water and water-borne material damage means: flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind."

The policy also contained the following provision: "Damage caused by the concurrent action of wind and water is covered, **unless** it is determined that water was the predominant force in the damage, in which case it is excluded." The policy defines "predominant force" as "the primary cause of damage when both wind and water are responsible for a loss."

On September 13, 2008, Hurricane Ike approached the Texas coast. The Herbsters learned that their home was in the hurricane's storm path and wisely decided to evacuate. When they returned several days later, they discovered that their home had suffered severe damage. According to Dixie, their roof had been blown away, windows throughout the house were cracked or destroyed completely, and a significant portion of their home was flooded.

The Herbsters filed a claim with State Ranch shortly thereafter. The claim was assigned to State Ranch agent Robert Schumer, who inspected the property on October 6, 2008. Schumer estimated the property damage as follows:

Damage from wind & rain	$ 4,985.56
Damage from flooding	$26,768.67
Damage from concurrent action of wind & water	
(water predominant)	$24,334.33
(wind predominant)	$ 1,252.44

Based on the above figures, State Ranch determined that the total amount due under the policy was $6,238.00.

The Herbsters were not satisfied with this amount. They hired Rebecca Riding, of Red Riding Co., Inc., an engineering firm, to inspect their property. Riding came up with the following estimates:

Damage from wind & rain	$10,885.66
Damage from flooding	$20,020.34
Damage from concurrent action of wind & water	
(water predominant)	$ 1,110.33
(wind predominant)	$ 20,555.34

Based on Riding's figures, the Herbsters believed they were entitled to recover $31,441.00.

State Ranch and the Herbsters were unable to reach an agreement on the amount of loss. Accordingly, the Herbsters formally requested an appraisal under the following provision in the insurance policy:

> Appraisal. (a). If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable amount of time they shall submit their differences to the umpire. Written agreement signed by any two of these three people shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.
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> (b). The appraisal shall have the same binding effect as an arbitration award. In fact, the parties to this contract agree that, for all intents and purposes, the appraisal process is arbitration. Accordingly, any judicial review of the appraisal shall not exceed the scope of review permitted in arbitration cases pursuant to the Federal Arbitration Act.
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> (c). Failure to abide by the terms of the appraisal constitutes a breach of contract.

Under the terms of the policy, the Herbsters selected Willy Redbeard, also of Red Riding Co., Inc., to serve as its appraiser. State Ranch selected David Best of Best Engineering Company to serve as its appraiser. The two appraisers selected Jennifer Simpson of Tex State Home Inspections to serve as the umpire.

Best inspected the home first. Best found that the figures Schumer had calculated were mostly accurate, although Best added approximately $800 to the "wind predominant" concurrent damage amount, thereby adding approximately $800 to the amount covered under the policy.

In Redbeard's inspection, he found damages in an amount identical to Riding's figures. Thus, there remained a difference of more than $24,000 between the parties' calculations.

The dispute was submitted to the umpire. The umpire did not agree with either amount. She believed that all of the damages could be segregated into either damage from flooding or damage from wind & rain. Her calculations were as follows:

Damage from wind & rain	$25,885.66
Damage from flooding	$21,020.34

Therefore, according to the umpire, the Herbsters were entitled to recover $25,885.66 under the policy. Best refused to sign off on this amount. Redbeard also initially refused but eventually agreed with Simpson and signed off on the amount.

State Ranch refused to pay the amount agreed upon by Redbeard and Simpson. The Herbsters subsequently filed suit against State Ranch for breach of contract. State Ranch counterclaimed for declaratory relief, alleging that the appraisal award was improper as a matter of law because the appraisal was the result of fraud and was not in substantial compliance with the terms of the policy.

Both parties filed cross-motions for summary judgment. In support of its motion, State Ranch submitted three affidavits. The first affidavit was by Rebecca Riding, who claimed that Redbeard had an inappropriate sexual relationship with the umpire and that the umpire, due to this relationship, was biased in favor of the Herbsters:

> My name is Rebecca Riding, of Red Riding Co., Inc. I am partners with Willy Redbeard. I have reason to believe that the appraisal in this case was fraudulent. There is a security camera in our office. One week before Redbeard was scheduled to inspect the Herbsters' property, the camera recorded Redbeard in the office after hours engaging in sexual intercourse with the umpire, Jennifer Simpson. After they were done, the camera recorded a conversation between Redbeard and Simpson in which Redbeard can be heard telling Simpson, "It is very important that this appraisal go according to plan. Make sure the amount is favorable to the Herbsters." Simpson can be heard saying in response, "Whatever you want, my red-bearded hunk of love."

> The next day, I confronted Redbeard with the recording. He confessed that he was in cahoots with Simpson to rig the appraisal. When I asked him why he was doing this, he told me that he and the Herbsters went "way back" and that they had serious "dirt" on him. The only way they would keep silent, Redbeard told me, was if he figured out a way to get them the appraisal amount they wanted. When I asked Redbeard what "dirt" the Herbsters had on him, he refused to say. However, he claimed that it was so bad that it would destroy not just him, but also our company.
>
> I then decided to approach the Herbsters with this information. Dan appeared nervous and refused to answer any of my questions. Dixie told me the following, "You know, Rebecca, I really don't like Willy Redbeard. You should not believe a word he says. In fact, if you know what's best for you, you'll not breathe a word of this to anyone. We're in a fight against a big, bad insurance company. We're the good guys. Even if we were to use dirty methods to get the appraisal amount we wanted (and I'm not saying we did), what's it to you? Just keep your mouth shut."
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> Faced with the possible end of my business, I decided to remain silent and let the appraisal go forward. However, my conscience demands that I keep quiet no longer. The truth must be told. Unfortunately, I have somehow lost the videotape of the liaison between Redbeard and Simpson. I suspect that it has been stolen.

The Herbsters objected via special exception to the above affidavit on the basis of hearsay. They obtained no written ruling on the objection from the district court.

The second affidavit was by the umpire, Jennifer Simpson. In her affidavit, Simpson explained how she conducted her appraisal of the property damage.

> My name is Jennifer Simpson of Tex State Home Inspections. I am a licensed attorney and have extensive experience as an umpire in insurance appraisals. In fact, in the ten years that I have worked for Tex State, I have served as an umpire in nearly 100 such appraisals.
>
> Using my own independent judgment, I concluded that the damage from the concurrent action of wind and water could and should be segregated entirely into either damage from flooding or damage from wind and rain. Doing so avoided any controversy about what constituted a "predominant force," as that term is ambiguous. I believe that the "predominant force" language in the policy is confusing and should not have been included in the policy. In fact, to the best of my knowledge, such language does not appear in any standard homeowner's insurance policy.

State Ranch argued that the above affidavit was evidence that the appraisal award was not in "substantial compliance" with the terms of the policy. The Herbsters did not object to this affidavit in the court below.

State Ranch's third affidavit was by Hank Hill, the insurance agent who had sold the insurance policy to the Herbsters. In his affidavit, Hill discussed the meaning of the "predominant force" language in the policy:

> When I sold the Herbsters the insurance policy, they had questions about what was covered under the policy specifically in relation to the "concurrent action of wind and water" provision. I explained to them that the provision was referring primarily to hurricanes in which both wind and water are responsible for the damage. I made it clear to the Herbsters that as far as hurricanes were concerned, water is almost always considered the "predominant force." Therefore, I advised the Herbsters that if they were concerned about hurricanes, it would be in their best interest to obtain additional insurance that covered flooding. Apparently, the Herbsters did not listen to me.

The Herbsters did not object to this affidavit in the court below.

The Herbsters' summary judgment evidence consisted of an affidavit from the umpire indicating the amount of the appraisal award; a copy of a letter from State Ranch refusing to pay the award; and a copy of the insurance policy, highlighting the provision specifying that failure to abide by the terms of the appraisal constitutes a breach of contract. Also, in response to Riding's affidavit, the Herbsters attached the following affidavit from Redbeard:

> My name is Willy Redbeard, of Red Riding Co., Inc. My business partner, Rebecca Riding, is a liar. There is no sexual relationship between myself and the umpire, Jennifer Simpson. Moreover, I am an ethical businessman and would never conspire with anyone to "rig" an appraisal. It is true that I have known the Herbsters for years, but they have no "dirt" on me. Admittedly, my history with the Herbsters has some "bad blood" in it (as has been documented in past court cases involving the Herbsters), but we are currently good friends. I do not know why Rebecca is lying, although I suspect that it might be because she wants to dissolve our partnership and is looking for an excuse to do so.
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> I also aver that I approve of the umpire's appraisal award. I signed off on the award because I believe the methods and standards she used in calculating the amount of damages were fair, accurate, and reliable. She has years of experience in the insurance industry, and she knows what she is doing. I believe her award was in "substantial compliance" with the terms of the policy and should not be disregarded.

State Ranch objected via special exception to the above affidavit on the basis that it contained conclusions and unsubstantiated opinions and that Redbeard was not competent to testify to matters set out in the affidavit. State Ranch, like the Herbsters, obtained no written ruling on its objections from the district court.

After taking the matter under advisement, and without a hearing, the district court entered the following order: "After considering all pleadings, special exceptions, and competent

summary judgment evidence, the Court is of the opinion that State Ranch's motion for summary judgment should be granted and the Herbsters' motion for summary judgment should be denied." This appeal followed.

DISCUSSION

Evidentiary issues

In their first issue, the Herbsters contend that the district court erred in considering the affidavits of Riding, Simpson, and Hill. They re-urge their hearsay objection to Riding's affidavit. Also, for the first time on appeal, the Herbsters contend that Simpson's affidavit was not relevant and that Hill's affidavit was not relevant and violated the parol evidence rule. State Ranch contends that the Herbsters did not preserve their objections for appellate review and that, even if error was preserved, the affidavits are admissible.

This Court has never considered what is required to preserve evidentiary objections in summary judgment proceedings. Some courts of appeals have held that a trial court may, in certain circumstances, impliedly rule on evidentiary objections when it grants the motion for summary judgment. *See, e.g.*, *Trusty v. Strayhorn*, 87 S.W.3d 756, 759-60 (Tex. App.—Texarkana 2002, no pet.); *Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App.—Fort Worth 1998, no pet.). However, other appeals courts have held that a party must obtain an express ruling on its objections in order to preserve error. *See, e.g.*, *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 752-53 (Tex. App.—Corpus Christi 2001), *pet. denied*, 92 S.W.3d 530 (Tex. 2002) (per curiam); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313 (Tex. App.—San Antonio 2000, pet. denied); *Dolcefino v. Randolph*, 19 S.W.3d 906 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

We think the rule of *Blum* and its progeny is more consistent with the relaxed preservation requirements embodied in Texas Rule of Appellate Procedure 33.1. Accordingly, we hold that the district court impliedly overruled the Herbsters' objection to Riding's affidavit and that error has been preserved.

State Ranch also argues that the Herbsters may not raise their objections to Simpson's and Hill's affidavits for the first time on appeal. We disagree. State Ranch overlooks the important distinction between form and substance objections. *See Mathis v. Bocell*, 982 S.W.2d 52, 59-60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Form defects must be objected to and ruled upon. Substance objections, on the other hand, are not waived either by lack of objection or ruling. Evidence that violates the parol evidence rule is incompetent evidence, as is evidence that is not relevant. *See Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (Tex. 1958) ("The parol evidence rule is not a rule of evidence at all, but a rule of substantive law."); *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that relevance is objection to substance of testimony). Thus, the Herbsters did not need to object to Simpson's and Hill's affidavits in order to preserve error.

We review a trial court's rulings concerning the admission of summary judgment evidence under an abuse of discretion standard. *Wolfe v. C.S.P.H., Inc.*, 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.). Affidavits in support of summary judgment motions must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated. TEX. R. CIV. P. 166a(f).

The statements in Riding's affidavit concerning what Redbeard told her are hearsay. Additionally, the statements about what Riding heard Redbeard tell Simpson are hearsay within hearsay. Accordingly, the affidavit should not have been considered by the district court.

As for Simpson's affidavit, we agree with the Herbsters that it is not relevant to this proceeding. As we explain in more detail below, appraisal awards should be reviewed with the utmost deference. There are only limited situations in which they should be overturned. None of those situations are implicated by anything said in Simpson's affidavit. Finally, Hill's affidavit is similarly irrelevant. This is a dispute about damages, not liability or causation. Furthermore, even if the affidavit was somehow relevant, there is nothing ambiguous about the term "predominant force" as the term is defined in the policy. Therefore, the affidavit would not have been admissible under the parol evidence rule. *See Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).

We conclude that the district court abused its discretion in admitting the affidavits of Riding, Simpson, and Hill. Accordingly, we sustain the Herbsters' first issue.

Appraisal award

In their second issue, the Herbsters contend that the district court erred in granting State Ranch's motion for summary judgment and in denying their motion. We agree.

Although a party generally cannot appeal the denial of a motion for summary judgment, when both sides move for summary judgment and the trial court grants one motion and denies the other, the unsuccessful party may appeal both the granting of the prevailing party's motion and the denial of its own. *Texas Mun. Power Agency v. PUC of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). "In a motion for summary judgment, the movant has the burden to show there is no genuine issue of material fact" and must establish that it is "entitled to judgment as a matter of law." *Corpus Christi Indep. Sch. Dist. v. Padilla*, 709 S.W.2d 700, 708 (Tex. App.—Corpus Christi 1986, no writ). The appellate court should review both sides' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

In this case, the propriety of the summary judgment depends entirely on the validity of the appraisal award. Quite simply, if the appraisal award was valid as a matter of law, the Herbsters were entitled to summary judgment. If it was invalid as a matter of law, State Ranch was entitled to summary judgment.

An appraisal award made pursuant to an insurance policy is binding and enforceable unless the party seeking to prevent enforcement proves that the award was (1) unauthorized or (2) the result of fraud, accident, or mistake. *See Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 940 (Tex. App.—San Antonio 1996, no writ); *Barnes v. W. Alliance Ins. Co.*, 844 S.W.2d 264, 267 (Tex. App.—Fort Worth 1992, writ dism'd by agr.). These are essentially affirmative defenses to the enforcement of the appraisal award. *See Toonen*, 935 S.W.2d at 940. The burden of proof is on the party asserting the defense. *See id*. Here, State Ranch has failed to provide admissible evidence raising a material fact issue on either defense. Therefore, it was not entitled to summary judgment.

The dissent asserts that there is a third defense to the enforcement of an appraisal award—namely, that it was not made in "substantial compliance" with the terms of the policy. While some courts have concluded that this defense is applicable to appraisal awards, *see, e.g.*, *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 142 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 683 (Tex. App.—Dallas 1996, writ denied), we decline to do so, for at least two reasons.

First, it appears to be a vague, unworkable standard. How are courts to determine whether an appraisal constitutes "substantial compliance" with an insurance policy? Courts that have adopted this standard have not done a good job of explaining what "substantial compliance" means. Applying such an imprecise standard to an appraisal award seems highly problematic, and could result in many appraisal awards being disregarded for seemingly arbitrary reasons.

Second, and perhaps more importantly, such a standard is contrary to the longstanding rule that courts are to afford a high degree of deference to appraisal awards. This deference is comparable to the deference afforded arbitration.[1] In fact, in this case, the insurance policy specifies that the appraisal process is, for all intents and purposes, arbitration and that the scope of a court's review shall not exceed the scope of review permitted in arbitration cases pursuant to the Federal Arbitration Act.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides for expedited judicial review to confirm, vacate, or modify arbitration awards. *See id*. §§ 10-11. Under the FAA, an arbitration award may be vacated for the following reasons only:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

[1] For an informative discussion of the differences and similarities between appraisal and arbitration, see Timothy P. Law & Jillian L. Starinovich, *What Is It Worth? A Critical Analysis of Insurance Appraisal*, 13 CONN. INS. L.J. 291 (2006-07); Johnny C. Parker, *Understanding the Insurance Policy Appraisal Clause: A Four-Step Program*, 37 U. TOL. L. REV. 931 (2006).

> pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. § 10. State Ranch has not provided competent summary judgment evidence supporting any of the above statutory grounds.

Recently, the United States Supreme Court held that the statutory grounds providing for prompt vacatur and modification of arbitration awards are exclusive and may not be supplemented. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1400 (2008). In that case, the parties contracted for "expanded" judicial review of arbitration awards. The Supreme Court concluded that this was not permissible under the FAA. Reviewing appraisal awards for "substantial compliance," as the dissent would have us do, is outside the scope of the FAA and, therefore, is impermissible in this case.

The dissent cites two cases for its position that an appraisal is not like arbitration. *See Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061-62 (5th Cir. 1990); *In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193 (Tex. 2002). Both cases are distinguishable. First, in *Allstate*, a mandamus case, the Texas Supreme Court held that an appraisal clause was not an unenforceable arbitration agreement. *See* 85 S.W.3d at 195. However, in this case, there is no contention by either party that the appraisal clause is unenforceable. As for *Hartford*, in holding that an appraisal was not arbitration under Texas law, the Fifth Circuit relied on older Texas cases that distinguished appraisals from arbitrations in order to avoid rules which invalidated pre-dispute agreements to arbitrate. *See* 898 F.2d at 1063. Because policies hostile to arbitration have largely been preempted, *see State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 889 (Tex. 2009) (citing *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 484 (Tex. 2001)), we question the continued validity of the cases on which the *Hartford* court relied. Furthermore, the appraisal clause in *Hartford* did not include a provision like the one in this case, which expressly equates appraisal with arbitration. The parties in this case were bound by the terms of the contract.

We conclude that State Ranch has provided no competent summary judgment evidence that the appraisal award was invalid. Accordingly, the district court erred in granting summary judgment in favor of State Ranch.

Moreover, it is clear from the record that State Ranch, by refusing to pay the appraisal amount, breached the insurance policy as a matter of law. Therefore, the district court erred in not granting summary judgment in favor of the Herbsters.

We sustain the Herbsters' second issue.

CONCLUSION

We reverse the district court's judgment and render judgment in favor of appellants.

RUDNICKI, Justice (Dissenting in part and concurring in part)

This case concerns two perplexing issues that the Texas Supreme Court has yet to resolve: (1) how does a party properly preserve error for evidentiary objections in summary judgment proceedings; and (2) what is the proper standard for reviewing a pretrial appraisal in property damage cases. In my opinion, the majority answers both questions incorrectly.

First, I think the majority is incorrect in holding that a trial court's order on summary judgment impliedly rules on any evidentiary objections. I would adopt the rule that a party must obtain an express ruling on its objections to summary judgment evidence. There are many reasons for adopting this rule, as the courts that have done so have previously explained. *See, e.g.*, *Stewart v. Sanmina*, 156 S.W.3d 198, 206-07 (Tex. App.—Dallas 2005, no pet.); *Eads v. Am. Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App.—Waco 1992, no writ); *see also* Hon. Randy Wilson, *Why Can't Lawyers Preserve Objections?*, 69 TEX. B.J. 316, 319-320 (2006) (noting split of authority among courts of appeals concerning viability of "implicit" rulings). I need not repeat their reasoning here.

I will point out, however, one particular problem with the majority's approach. What happens when the *prevailing* party in the summary judgment proceeding fails to obtain a written ruling on its objections, so that it is not a matter of preserving *error*? *See Allen ex. Rel. B.A. v. Albin*, 97 S.W.3d 655, 662-63 (Tex. App.—Waco 2002, no pet.) (noting conflicting authority). How are reviewing courts to consider that evidence? In this case, for example, State Ranch objected to Redbeard's affidavit but did not obtain a ruling on its objections. Neither side has addressed this evidence on appeal. Does this mean that the Herbsters are simply assuming State Ranch's objections were sustained by the district court, and they are not contesting the exclusion of the evidence? Or does it mean that State Ranch, as the prevailing party below, is assuming that the district court sustained its objections and does not need to address the admissibility of the evidence? I do not think we can answer these questions in the absence of an express ruling on State Ranch's objections. That is unfortunate, because if the objections were overruled, I would think that Redbeard's affidavit creates a genuine issue of material fact on whether the appraisal award was valid, thus precluding summary judgment. If this case is eventually reviewed by the Texas Supreme Court, I would expect the court will want the parties to address this particular issue in their briefing.

Additionally, I would hold that the Herbsters waived their objections to Simpson's and Hill's affidavits by not raising them in the trial court. I think objections based on relevance, like objections based on hearsay, are objections to the form of the evidence, as both are based on violations of the rules of evidence. See TEX. R. EVID. 401 (relevance), 801 (hearsay). Also, I think parol evidence violations must also be brought to the trial court's attention before the appeals court may address them. *See Dallas Bldg. & Repair v. Butler*, 589 S.W.2d 794, 796

(Tex. App.—Dallas 1979, writ dism'd w.o.j.) (holding that parol evidence objection was not preserved for review).

As the record stands now, I would hold that because the Herbsters did not preserve error, we should consider all of the evidence that was considered by the district court in reviewing the validity of the appraisal award. Moreover, even assuming error was preserved, I would conclude that all of State Ranch's disputed evidence was admissible. I believe Riding's affidavit is admissible under an exception to the hearsay rule, namely that it contained admissions by a party opponent. I believe Simpson's affidavit is relevant because it goes to the issue of whether the appraisal was made in substantial compliance with the policy. Finally, I believe Hill's affidavit is relevant to the issue of what should and should not have been included in calculating the amount of the appraisal, and it is admissible as parol evidence to resolve the ambiguity in the policy about what constitutes a "predominant force."

I would overrule the Herbster's first issue.

I would also overrule the Herbsters' second issue. Despite being a common feature of most property insurance policies, the supreme court has rarely addressed appraisal clauses. In *State Farm v. Johnson*, the supreme court reviewed the history of appraisal clauses and explained the scope of the appraisal process. *See* 290 S.W.3d 886 (Tex. 2009). The parties in that case disputed whether an appraisal could determine issues such as causation. The court concluded that it could and allowed the appraisal to go forward. However, the court said little in *Johnson* about the standard for reviewing an appraisal:

> We do not decide today whether the appraisal conducted on remand will necessarily be binding. The summary judgment record does not, and probably cannot, answer that question until after the appraisal has taken place.

Id. at 895. In this case, however, the appraisal has taken place. Therefore, we can review its validity. But what is the nature and scope of our review?

The majority holds that our review should be limited by the procedures in the Federal Arbitration Act. However, an appraisal is not arbitration, and treating an appraisal like an arbitration makes no sense to me. *See In re Allstate County Mut. Ins. Co.*, 85 S.W.3d 193 (Tex. 2002); *see also Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1061-62 (5th Cir. 1990). Furthermore, I do not believe, like the majority does, that the parties can contract around the distinctions between appraisals and arbitrations. In fact, I would go so far as to hold that the provision in the contract equating an appraisal with arbitration is unenforceable on public policy grounds. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663 (Tex. 2008) (explaining that in determining whether to not enforce a contract based on public policy concerns, courts are to "weigh the interest in enforcing agreements versus the public policy interest against such enforcement").

Instead of looking to the Federal Arbitration Act, I would examine the appraisal in light of the three common-law situations that Texas courts have historically recognized as being grounds to set aside an appraisal award: (1) when the award was made without authority; (2)

when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract. *Wells*, 919 S.W.2d at 683; *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 875-76 (Tex. App—San Antonio 1994, no writ).

In this case, State Ranch provided evidence supporting the second and third situations. The affidavit by Riding provides evidence that the appraisal was the result of fraud. The affidavits by Simpson and Hill provide evidence that the appraisal was not made in substantial compliance with the terms of the policy.

Moreover, even assuming the majority is correct that the common-law reasons for overturning an appraisal no longer apply, I think the evidence in this case would also support vacating the appraisal award under the FAA. In addition to setting aside arbitration awards that are based on fraud, *see* 9 U.S.C. § 10(1), the FAA provides that an award may be vacated where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *See* 9 U.S.C. § 10(4). This provision seems very similar to the "substantial compliance" standard used by some Texas courts in reviewing appraisal awards.

Additionally, even after *Hall Street*, there remains a question of whether the Supreme Court intended to eradicate review of arbitration awards that may have been made in "manifest disregard of the law." *See Citigroup Global Mkts. Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1289-90 (9th Cir. 2009); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 419 (6th Cir. 2008) (citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953)); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *cert. granted*, 129 S.Ct. 2793 (2009). I believe that the "manifest disregard" standard remains viable, and a strong argument could be made that the "substantial compliance" standard in appraisal cases is similar to the "manifest disregard" standard in arbitration cases. After all, an appraisal award that is not in substantial compliance with the terms of an insurance policy is no different than an arbitration award that is made in manifest disregard of the law.

For these reasons, I would affirm the district court's denial of the Herbsters' motion for summary judgment. Therefore, I respectfully dissent from that portion of the Court's judgment. I concur in the portion of the Court's judgment reversing the district court's grant of summary judgment in favor of State Ranch. However, I would do so because I think the evidence admitted in this case creates genuine issues of material fact that preclude judgment as a matter of law for either side.