IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NASHVILLE COMMUNICATIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:24-CV-01020**
	)	**JURY DEMANDED**
AUTO-OWNERS (MUTUAL) INSURANCE COMPANY,	)	**District Judge Aleta A. Trauger**
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now Defendant, Auto-Owners Mutual Insurance Company ("Auto-Owners"), by and through its undersigned counsel, pursuant to Federal Rule of Civil Procedure 56, the local rules, and the Case Management Order (Doc. 20) entered in this case and submits this Memorandum of Law in Support of its Motion for Partial Summary Judgment.

INTRODUCTION

This case arose out of an insurance dispute concerning an appraisal award. In 2023, a storm damaged commercial property located at 330 Plus Park Boulevard, Nashville, Tennessee 37217 ("the Property").[1] The Property was owned by the Plaintiff, Nashville Communications, Inc. ("NashComm") and insured by Auto-Owners. Appraisal was initiated to resolve the amount of loss pursuant to the insurance policy. In the process, the party appraisers agreed that the only storm damage to the Property was a small portion of the parapet wall surrounding the roof. The umpire also agreed that only the parapet wall was

[1] Nashville Communications, Inc. initially made two claims for two separate properties damaged in the March 3, 2023, storm. One claim was for property at 330 Plus Park Boulevard, which is the subject of the instant lawsuit. The other claim was for property at 216 West Spring Street, Cookeville, Tennessee 38501. This claim for 216 West Spring Street has already been resolved and is not relevant to the instant case.

damaged in the storm. Nonetheless, the umpire believed that the entire roof needed to be replaced to repair the parapet wall. Thus, he entered an award for the full replacement cost of the roof.

Auto-Owners extended coverage for the affected section of the parapet wall but refused to pay the umpire's award. Auto-Owners denied payment because the roof was not covered under the insurance policy, and the umpire exceeded his authority in awarding the replacement cost of a new roof. Nonetheless, this lawsuit was filed against Auto-Owners alleging breach of contract and statutory bad faith under Tenn. Code Ann. § 56-7-105.

There is no genuine issue of material fact that Auto-Owners did not breach its insuring contract by declining to pay for a roof replacement pursuant to the appraisal award. There was no covered roof damage under the terms of the insuring agreement. Additionally, the umpire's award of costs for a full roof replacement is not binding on Auto-Owners because the award constituted an improper scope of repair assessment. The umpire further exceeded the scope of his authority by improperly basing his award on a causation finding, which is not binding on Auto-Owners. Accordingly, Auto-Owners is entitled to partial summary judgment on the issue of whether it owes the full amount of the roof replacement.

Additionally, or in the alternative, there is no genuine dispute of material fact that Auto-Owners handled its claim in good faith, without breaching its contract. Auto-Owners' decision to decline payment for the roof replacement was based on the Policy itself, not any improper motive. Thus, Auto-Owners is entitled to partial summary judgment on the issue of whether it acted in bad faith by refusing to pay the appraisal award.

STATEMENT OF FACTS

Auto-Owners has filed its Statement of Undisputed Material Facts ("SUMF") in

Support of its Motion for Partial Summary Judgment. The contents of said document are incorporated herein by reference. On March 3, 2023, a storm damaged the Property. SUMF ¶ 6. The Property was owned by NashComm and insured by a Policy ("the Policy") (No. 80173260) issued to it by Auto-Owners. SUMF ¶ 1-2. On March 6, 2024, NashComm reported wind damage to the roof and accompanying interior water leakage, allegedly caused by the storm. SUMF ¶ 7.

On March 14, 2023, Auto-Owners inspected the roof and identified wind damage to the parapet wall surrounding the roof. SUMF ¶ 8. The storm caused the wall to pull away from the roofing system in a 12-foot section, leaving a small gap along the junction of the roof and the parapet wall. Id. Elsewhere, Auto-Owners identified a displaced metal joint covering on another segment of the parapet wall. Id.

Accordingly, Auto-Owners extended coverage for the damaged wall. SUMF ¶ 9. NashComm, however, demanded appraisal. SUMF ¶ 10. It stated that "I/we disagree with this amount of loss estimated by the Carrier and its representatives." Id. The Policy provided for appraisal as follows:

> **E. LOSS CONDITIONS**
>
> The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.
>
> *****
>
> **2. Appraisal**
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:
>
> **a.** Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

SUMF ¶ 11. Auto-Owners accepted NashComm's demand: "We are only agreeing to appraise the amount of loss to the roof of your structure due to the loss on March 3rd, 2023, storm. These are the only items that will be considered as part of the covered loss..." SUMF ¶ 12.

In the ensuing appraisal, each party appraiser (Zach Baker for NashComm and Paul Vitolins for Auto-Owners) agreed that the only damage to the premises was to the previously identified parapet wall damage. SUMF ¶ 13-4. Vitolin's estimated costs to repair the wall at $2,204.75. SUMF ¶ 14. While NashComm's appraiser recommended a full roof replacement, he nonetheless accepted Auto-Owners' determination that the storm damage was limited to the parapet wall. Id. Because the party appraisers could not agree on the amount of loss, they activated their umpire. SUMF ¶ 15.

The umpire entered an appraisal award of $187,469.10 on April 30, 2024. SUMF ¶ 16. He agreed with the party appraisers that the storm damage was limited to the parapet wall. SUMF ¶ 15. But, he concluded that attempted repairs to the wall "would lead to a domino effect of damaging the surrounding materials." Id. Thus, his award reflected the cost to replace the full roof. Id. In response to the umpire's award, Auto-Owners restated its position that the roof was not covered under the Policy, asserted that the umpire exceeded his authority in issuing his award, and declined to pay. SUMF ¶ 18. NashComm retained counsel and formally demanded payment in a June 11, 2024, letter, along with a notice of intent to file a bad faith action. SUMF ¶ 19. On August 21, 2024, NashComm filed a complaint against Auto-Owners, alleging breach of contract and a statutory bad faith claim for failing to settle. SUMF ¶ 20.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At the outset, the moving party on summary judgment has the burden to show the basis for its motion and to identify portions of the record that demonstrate the absence of a genuine dispute over material facts. See Rodgers v. Banks, 344 F.3d 587, 595 (6th Cir. 2003). The moving party may satisfy this burden by presenting affirmative evidence that negates an element of the non-moving party's claim or by demonstrating a lack of evidence to support the nonmovant's case. Id.

The reviewing court must view the facts in the light most favorable for the nonmoving party and draw all reasonable inferences in its favor. See Bible Believers v. Wayne Cty., Mich., 805 F.3d 228, 242 (6th Cir. 2015). But, the Court does not weigh the evidence, judge witness credibility, or determine the truth of the matter. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Rather, the Court determines whether the non-moving party has provided sufficient evidence to make the issue of material fact a proper jury question. Id. A mere "scintilla" of evidence in support of the nonmoving party's position is not enough to defeat summary judgment: Instead, there must be evidence from which the jury could reasonably find for the nonmoving party. Id. at 252. Likewise, mere speculation "is insufficient to create a genuine issue of material fact and falls short of what is required to survive summary judgment." Am. Rd. Serv. Co. v. Conrail, 348 F.3d 565, 569 (6th Cir. 2003). Finally, "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial" and "mandates the entry of summary judgment" for the moving party. Celotex Corp. v Catrett,

477 U.S. 317, 322–23 (1986).

This is a diversity action. Therefore, the choice of law rule of the forum state applies. Montgomery v. Wyeth, 580 F.3d 455, 459 (6th Cir. 2009). Tennessee follows the rule of *lex loci contractus*, where a contract is presumed to be governed by the law of the state in which it was executed. Williams v. Smith, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014). The Policy was issued to NashComm in Davidson County, Tennessee. See SUMF ¶ 1; First Amended Complaint ("FAC") ¶ 4-5, Doc. 8, Page ID 27. Therefore, Tennessee law governs the substantive matters of policy interpretation.

LAW AND ARGUMENT

Auto-Owners is entitled to partial summary judgment because there is no genuine issue of material fact regarding its duty to pay to replace the NashComm roof. Under Tennessee law, appraisal is generally limited to resolving the amount of loss, unless otherwise agreed upon by the parties. Merrimack Mut. Fire. Ins. Co. v. Batts, 59 S.W. 3d 142, 152 (Tenn. Ct. App. 2001). Recent caselaw has announced several exceptions that allow appraisers to address issues beyond the general limitation to amount of loss determinations. An appraiser can make "scope of loss" determinations, too, when at issue. Kush Enters., LLC v. Mass. Bay Ins. Co., 2019 U.S. Dist. LEXIS 241191, at *4 (E.D. Tenn. Nov. 7, 2019). Additionally, when the sole dispute is what type of repairs are necessary to restore a property to its pre-loss condition, an appraiser can make "scope of work" determinations. State Farm Fire & Cas. Co. v. Harper, 596 F. Supp. 3d 1032, 1038 (M.D. Tenn. 2022). But neither exception applies in this case. The scope of loss is not at issue, and neither is scope of work the sole issue. Thus, the umpire exceeded his authority under the Policy by making a scope of work determination and resting upon a causation-based

analysis when he was only authorized to address the narrow "amount of loss" issue. Auto-Owners is, therefore, not bound by his award.

Additionally, Auto-Owners is entitled to partial summary judgment because there is no genuine issue of material fact regarding its good faith handling of NashComm's claim. Auto-Owners made a good-faith denial of damages not covered under the Policy. Further, its refusal to pay for the roof replacement was not based on any improper motive, but rather its prerogative to pay only for damages covered under the Policy and costs assessed by the umpire within the scope of his authority as limited by the Policy. Thus, Auto-Owners is not liable for breach of contract or bad faith and should be granted partial summary judgment on this issue.

I. THE UMPIRE'S AWARD IS NOT BINDING ON AUTO-OWNERS BECAUSE THE UMPIRE'S SCOPE OF REPAIRS EVALUATION EXCEEDED THE SCOPE OF HIS APPRAISAL AUTHORITY

Insurance policies are contracts. Batts, 59 S.W. 3d at 147. Thus, the same general rules of contract interpretation apply to interpreting insurance policies. Am. Justice Ins. Reciprocal v. Hutchison, 15 S.W.3d 811, 814 (Tenn. 2000). The terms of an insurance policy should, like other contracts, "be given their plain and ordinary meaning…to ascertain and give effect to the intent of the parties." U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co., 277 S.W.3d 381, 386-87 (Tenn. 2009). The policy should be construed "as a whole in a reasonable and logical manner." Standard Fire Ins. Co. V. Chester-O'Donley & Assocs., 972 S.W.2d 1,7 (Tenn. Ct. App. 1998). Additionally, the language in dispute should be examined in the context of the entire agreement. Cocke Cty. Bd. Of Highway Comm'rs v. Newport Utils. Bd., 690 S.W.2d 231, 237 (Tenn. 1985). Appraisal provisions in insurance contracts are thus analyzed using all of these interpretive tools.

Appraisal, when provided for in an insuring agreement, is not arbitration. Batts, 59 S.W.3d at 150. While arbitration is used "to decide issues of both law and fact," appraisal is narrower in application. Thomas v. Standard Fire Ins. Co., 2016 Tenn. App. LEXIS 117, at *19 (Ct. App. Feb. 17, 2016). An appraiser's authority is confined to "the authority granted in the insurance policy." Batts at 152. Courts strictly enforce appraisal to the scope expressly intended by the parties, as defined by the policy in question. Thomas at *18 (defendant was not permitted to "disregard the policy's expressed intent"); See also Artist Bldg. Partners v. Auto-Owners Mut. Ins. Co., 435 S.W.3d 202, 218-19 (Tenn. Ct. App. 2013) (strictly enforcing the scope of appraisal as explicitly defined by their agreement). The term "amount of loss" in an appraisal provision means "the monetary value of the property damage." Batts at 152. "Amount of loss" provisions do not give the appraiser any authority to determine coverage, or liability issues. Id. Rather, an appraiser's authority based on such a provision is narrowly confined to addressing the monetary value of a loss. Id. Even so, when ruling on motions to compel appraisal, courts have addressed several exceptions that allow appraisers to evaluate the scope of a loss or the scope of repairs.

When a dispute is primarily about the scope of loss, courts compel appraisal under an insuring agreement providing for appraisal in "amount of loss" disputes. Kush 2019 U.S. Dist. LEXIS 241191 at *5. In Kush, the parties contested whether there was an "additional covered loss." The plaintiff moved to compel appraisal pursuant to an "amount of loss" appraisal provision, but the defendant insurer argued that the disagreement about the scope of covered loss was not subject to appraisal. Id. at *1-2. The court found that in disputing whether there was an additional loss, the insurer necessarily disputed the total amount of loss. Id. at *4. Thus, appraisal was proper under the provision providing for appraisal on the

"amount of loss". Id. Other courts after Kush was decided in 2019 have relied on the exception to compel appraisal in similar fact patterns. See Smith v. State Farm Fire & Cas. Co., 2021 U.S. Dist. LEXIS 239469, at *8-9 (W.D. Tenn. Dec. 15, 2021); See also Morrow v. State Farm Fire & Cas. Co., 592 F. Supp. 3d 672, 676 (E.D. Tenn. 2022); Ingram v. State Farm Fire & Cas. Co., 2021 U.S. Dist. LEXIS 245457, at *5-6 (E.D. Tenn. Dec. 14, 2021).

Even when "scope of loss" is not at issue, appraisers may evaluate what "scope of work" is needed to restore the property to its pre-loss condition in certain narrow circumstances. Harper, 596 F. Supp. 3d at 1038. Alongside the Kush exception, Harper constitutes another exception to the general rule that appraisers only have the authority to resolve the "amount of loss" issue as agreed upon in the Policy. Batts at 152. In Harper, there were competing estimates concerning what work was necessary to restore a storm-damaged home to pre-loss condition. Id. at 1034-35. One estimate recommended demolition, while the other estimated repair costs. Id. But, there were no underlying coverage, causation, or liability issues. Id. at 1038. Additionally, there were no scope of loss issues as in Kush. The only dispute was whether the property should be demolished or repaired. Id. The court compelled appraisal: the appraiser's "scope of work" evaluation was permissible because that was the very dispute that triggered the appraisal demand in the first place. The court stated that "[u]nder *these* circumstances, defining the 'scope of work' is inherent in determining the value of the property damages – *i.e.,* the cost to return the property to its pre-loss condition." Id. (emphasis added). The Harper decision, by allowing a means and methods appraisal under "these circumstances," acknowledged that means and methods determinations are not proper in *every* circumstance, but rather when they are the very reason that appraisal was initiated. Id. Thus, the Harper exception is not applicable to

a circumstance in which the amount of loss, rather than the scope of repairs, predominates.

The Kush and Harper exceptions were decided on motions to compel appraisal. After appraisal has been completed, though, there is a different set of rules at play. Insurers remain free to challenge decisions made outside of an appraiser's authority. E.g., Thomas, 2016 Tenn. App. LEXIS at *10 ("any question outside that scope remains subject to judicial challenge"); See e.g., Batts at 153. Specifically, an insurer may "alter" an umpire's findings to the extent that they were made on "issues of liability, causation, or other valid reasons of denied coverage." Thomas at *9. Thus, appraisal is not final on these issues.

Certainly, as this Court has noted, appraisers will sometimes naturally consider causation as a preliminary matter. Khushi P'ship v. Berkshire Hathaway Homestate Ins. Co., 2023 U.S. Dist. LEXIS 6602, at *9 (M.D. Tenn. Jan. 13, 2023). And the fact that an appraiser will consider some causal factors does not defeat a motion to compel appraisal. Id. at *13-4. Nonetheless, after appraisal is finished, an insurer may attack causation, coverage, and/or liability determinations made by the umpire. Thomas at *9. This makes intuitive sense because appraisal serves to streamline litigation rather than to eliminate it by giving the parties "a target at which to direct their arguments either in support or opposition." Glob. Aero., Inc. v. Phillips & Jordan, Inc., 2015 U.S. Dist. LEXIS 124911, at *7 (E.D. Tenn. Sep. 17, 2015); See also Kush at *5 (reflecting that appraisal would not resolve the whole case but allow the parties to "fine tune their arguments"). If an insurer could never contest the result of an appraisal award, the process would simply be arbitration in disguise.

Here, NashComm was issued a Policy by Auto-Owners that contained an appraisal provision. SUMF ¶ 1-2, 11. Auto-Owners extended coverage for the parapet wall, but not the roof or the interior water intrusion pursuant to the following provisions of the Policy:

BUILDING AND PERSONAL PROPERTY

COVERAGE FORM

*****

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

*****

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. Water

(1) Flood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge);

(2) Mudslide or mudflow;

(3) Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings; or

*****

C. LIMITATIONS

The following limitations apply to all Policy forms and endorsements, unless otherwise stated.

1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.

> c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
>
> > (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or
> >
> > (2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure.

SUMF ¶ 3-5, 9. Under the Policy, there was no qualifying property damage to the roof. Id. Additionally, under 5C(1), the damage to the personal property inside the building by water intrusion was not caused by an opening in the roof created by a "Covered Cause of Loss". Id. Auto-Owners did, however, extend coverage for the parapet wall, which sustained agreed-upon covered damage. SUMF ¶ 9.

After receiving Auto-Owners' coverage determination letter, NashComm demanded appraisal based on the "amount of the loss" pursuant to the Policy's appraisal provision. SUMF ¶ 10-11. As the court explained in Batts, "amount of loss" means the "monetary value of the property damage." Batts at 152. Additionally, just as the insurer in Batts, Auto-Owners would have drafted this provision "relying on the generally prevailing understanding that an appraisal was just that - an appraisal, not binding arbitration." Id. at 150. The appraisal provision states that "[i]f we and you disagree on the *value of the property* or the *amount of loss*, either may make written demand for an appraisal of the loss." SUMF ¶ 11. When it accepted the NashComm's demand to decide the monetary value of the property damage, Auto-Owners clarified: "[w]e are only agreeing to appraise the amount of loss to the roof of your structure due to the loss on March 3rd, 2023 storm." SUMF ¶ 12. NashComm never challenged or disputed this characterization.

The plain language of the appraisal provision frames the appraiser's authority narrowly, as confined to determining value and amount of loss. Thus, NashComm's appraisal demand based on the "amount of loss" was consistent with the Policy. Under the Policy, then, the umpire was only permitted to evaluate the monetary value of the property damage, which the panel agreed was limited to the parapet wall. SUMF ¶ 14-5. The umpire exceeded his authority under the Policy, though, by awarding the cost of a full roof replacement, which the appraisal panel agreed did not sustain covered damage in the storm. It is true that, in deciding motions to compel appraisal, courts have recognized that scope of loss and scope of repair issues do not always preclude appraisal. Appraisers may evaluate both the scope of loss and scope of repairs at times. Kush, 2019 U.S. Dist. LEXIS 241191, at *5; Harper, 596 F. Supp. 3d at 1038. But neither the Kush nor the Harper exceptions extend to this case because the sole issue was the cost to repair the area of agreed-upon, covered damage to the parapet wall.

There was not a disagreement in this case about the "scope of loss" as there was in Kush. Kush at *4. To the contrary, the scope of loss in this case was clear to the appraisal panel. SUMF ¶ 14-5. By the time that the appraisal demand had been made by NashComm, Auto-Owners had already outlined its coverage position, denying coverage for all damages except for the parapet wall. SUMF ¶ 9. Still, the appraisal demand itself did not raise any issue with the scope of coverage, causation, or liability, and instead stated that NashComm simply disagreed with the "amount of loss estimated by the Carrier and its representatives." SUMF ¶ 10. NashComm reiterated this position in its Complaint. SUMF ¶ 20.

NashComm's own appraiser, Zach Baker, explicitly relied solely on "what the carrier has determined is direct physical loss," which was the parapet wall, during appraisal. SUMF

¶ 14. The Auto-Owners appraiser, Vitolins, agreed. Id. Similarly, the umpire based his award not on storm-related roof damage, but damage to the parapet wall segments "which had agreed wind damage." SUMF ¶ 15-6. Accordingly, appraisal was never about the "scope of loss" as it was in Kush or its progeny. Kush at *4; Smith 2021 U.S. Dist. LEXIS 239469 at *8-9; Morrow, 592 F. Supp. 3d at 676; Ingram, 2021 U.S. Dist. LEXIS 245457 at *5-6. The panel agreed about the scope of the loss. SUMF ¶ 14-5. NashComm's disagreement was about the monetary value of the parapet wall damage, and not the nature or extent of other storm-related damage. SUMF ¶ 10. Thus, the umpire had no authority to go beyond an "amount of loss" determination to reach "scope of loss" matters under the Kush exception.

The umpire also did not have the authority to make a scope of repair determination. Unlike in Harper, where scope of repair was the sole dispute, the underlying issues here do not similarly allow the umpire to step outside the usual "amount of loss" confines and determine the scope of repairs that Auto-Owners is liable for. Harper at 1038. In Harper, the court enforced the appraisal provision because both the insurer and the insured agreed about the damage and coverage before appraisal, as the entire residential premises was damaged in the storm. Id. at 1034-35. This case presents a different set of circumstances. While the covered storm damages were agreed upon, they were isolated to a small section of the parapet wall. SUMF ¶ 8, 14-5. The dispute was not about the means and methods of repairing the wall. Id. Rather, as acknowledged by NashComm in its appraisal demand and First Amended Complaint, the dispute was the "amount of loss," meaning the monetary value of the property damage. SUMF ¶ 11; FAC ¶ 14, Doc. 8, Page ID 28. Thus, the Harper exception to the general rule (that the appraisal process is limited to resolving the amount of loss) does not apply. Accordingly, the umpire in this case was limited to evaluating the

value of the damaged parapet wall only and exceeded his authority by awarding a roof replacement.

Although NashComm has cited numerous cases in its Complaint and its Payment Demand, none of them support the proposition that Auto-Owners owes to replace the roof. SUMF ¶ 19-20. Plaintiff cited Harper and Kush, which do not apply, as addressed above. Id; FAC ¶ 28 n.1, Doc. 8, Page ID 30. Plaintiff also cited several cases applying Kush, also mentioned above, such as Morrow, Ingram, and Smith. Id. Since the Kush exception does not apply, none of these related cases apply by extension. Plaintiff further cites Global Aero, a case standing for the proposition that disagreement about policy interpretation is not sufficient to deny an appraisal demand. 2015 U.S. Dist. LEXIS 124911 at *9; Id. This case is also inapplicable because appraisal was accepted by Auto-Owners. SUMF ¶ 12.

Additionally, all these cases cited by NashComm are all factually distinct from the one at bar insofar as each one was decided on a motion to compel appraisal. Harper, 596 F. Supp. 3d at 1036; Kush at *1; Smith 2021 U.S. Dist. LEXIS 239469 at *1; Morrow, 592 F. Supp. 3d at 673; Ingram, 2021 U.S. Dist. LEXIS 245457 at *1; Glob. Aero, 2015 U.S. Dist. LEXIS 124911 at *2. But in this case, appraisal was demanded and accepted by Auto-Owners. SUMF ¶ 12. The rules that apply to compelling appraisal are not congruent with the rules for upholding an umpire award. This Court's Khushi opinion raised that very distinction. Khushi, 2023 U.S. Dist. LEXIS 6602 at *12-14. Khushi, on a motion to compel appraisal, favorably discussed a Texas Supreme Court case concluding that even if the appraisal process may "turn out to involve" coverage, causation, or liability issues, "that factor alone would not dictate prohibiting the appraisal as an *initial* matter." Id. at *13 (emphasis added) (citing State Farm Lloyds v. Johnson, 290 S.W.3d 886, 893 (Tex. 2009)).

The Court quoted limiting language from the Johnson decision, though, saying that "if an appraisal award is flawed, that can easily be remedied by disregarding it later." Id. at *14 (quoting Johnson at 895). The policy at issue in Khushi, after all, clearly provided that the insurer retained its right to deny a claim "even when an appraisal takes place." Id. The policy in this case has a similar provision: "If there is an appraisal, we will still retain our right to deny the claim." SUMF ¶ 11. Thus, even if Harper or Kush applied to this set of facts when appraisal was demanded, they would not apply to enforce the appraisal award at this stage of litigation. Auto-Owners has retained its right to deny the claim and may contest the appraisal award.

Further, even if the umpire were permitted to make a means and methods evaluation in this case, his award is not binding because the umpire exceeded the scope of his authority to do so by improperly relying on causation elements. In his award explanation letter, the umpire stated the following:

> Attached you will find the Umpire estimate prepared along with the award letter… While the roof is certainly in poor condition and much of the moisture to the roof is likely due to maintenance issues, I could not ignore the 2 areas which had agreed wind damage and were allowing water intrusion to the interior. With that, the moisture has to pass through the roofing system to get to the inside of the building. After the thermography report, it was very clear that the areas at the agreed wind damage were indeed wet and with the current condition of the roof, attempted repairs would lead to a domino effect of damaging the surrounding materials while attempting to manipulate. The other option would have been a partial replacement of the roof, but that would have left migrating moisture to seep back into the new materials and certainly would not be pre-loss condition…

SUMF ¶ 15. Of course, this Court has noted in the past that appraisers may need to make preliminary causation observations. Khushi, 2023 U.S. Dist. LEXIS 6602 at *9. Nonetheless, courts have consistently held that appraisal awards that are improperly based on causal elements do not ultimately bind insurers. E.g., Thomas, 2016 Tenn. App. LEXIS 117 at *10 (finding that only umpire determinations made within the scope of their authority are binding).

The umpire's determination in this case went beyond the scope of his authority because he based his scope of repairs analysis (which, as explained above, was improper from the start) entirely on a causation determination. SUMF ¶ 15. He indicated that "the moisture has to pass through the roofing system to get to the inside of the building." Id. But as Vitolins pointed out in his letter, water could flow into the building through the gap left between the parapet wall and the roof itself without passing through the roof at all. SUMF ¶ 17. The roof leaks were due, in his opinion, to the old age of the roof, which had outlived its serviceable life. Id. Additionally, the leaks inside the building were largely not coincident with the gap in the parapet wall. Id. Thus, the umpire based his award on his own determination about causation. In doing so, he went beyond mere observations of causal elements, which have sometimes been permitted. See Khushi at *9. Thus, the umpire improperly transformed the appraisal process into a vehicle to resolve causal issues that were not in dispute. Accordingly, Auto-Owners is not bound by the umpire's award.

In sum, while the Kush and Harper exceptions allow an appraiser to make "scope of work" and "scope of loss" determinations, neither exception applies in this case. The appraisal panel agreed on the scope of damage, and appraisal was initiated to resolve the "amount of loss," not the means and methods of repairs. SUMF ¶ 10, 12, 14-5. Thus, this Court should strictly construe the appraisal process in this case to the resolution of the amount of loss determination, in keeping with prior decisions. Thomas, 2016 Tenn. App. LEXIS 117 at *18; Batts, 59 S.W.3d at 152; See also Artist Bldg. Partners, 435 S.W.3d at 218-19 (noting that appraisal was limited to the parties' express agreement). Rather than directly contest the insurer's coverage and scope of loss determination directly, NashComm is seeking the same result indirectly by enforcing an appraisal award that requires a full roof

replacement. To find that the umpire's determination is binding in this case would constitute an inconsistent expansion of Batts by morphing appraisal into arbitration without changing the name. Such a ruling would allow umpires to resolve fact and law questions (of coverage and causation). Further, expanding appraisal into a process more akin to arbitration would topple the expectations of the parties to an insurance agreement who contract for binding appraisal only on amount of loss issues.

Even if the umpire were permitted to make a finding on means and methods in this case, he exceeded his authority by basing his award on his own causation opinion, thus placing himself in the shoes of Auto-Owners and/or a judicial factfinder. Since the umpire exceeded the scope of his authority under the appraisal provision, the award for a roof replacement is not binding on Auto-Owners. Auto-Owners is thus entitled to partial summary judgment on this issue.

II. PLAINTIFF'S BAD FAITH AND BREACH OF CONTRACT CLAIMS FAIL AS A MATTER OF LAW BECAUSE AUTO-OWNERS ACTED REASONABLY UNDER THE CIRCUMSTANCES UNDER THE INSURING AGREEMENT

In addition, or in the alternative, Auto-Owners is entitled to summary judgment because there is no genuine dispute of material fact as to its good faith handling of the claim and compliance with the Policy. The refusal to pay for the entire roof was not based on bad faith and did not constitute a breach of contract because it was based on a good faith, non-frivolous assessment of coverage.

To prevail in a bad faith action in Tennessee under T.C.A. 56-7-105, "Plaintiffs must prove "(1) the Policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making demand before filing suit (unless there was a refusal to pay prior to the

expiration of the 60 days), and (4) the refusal to pay must not have been in good faith." Patterson v. Shelter Mut. Ins. Co., 2015 Tenn. App. LEXIS 734, at *21 (Ct. App. Sep. 11, 2015) (quoting Ginn v. Am. Heritage Life Ins. Co., 173 S.W.3d 433, 443 (Tenn. Ct. App. 2004)). Specifically, part of recovering against an insurer for bad faith is showing "an insurer's disregard or demonstrable indifference toward the interests of its insured." Johnson v. Tenn. Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

To recover for a breach of contract claim in conjunction with a bad faith action, "Plaintiffs must show, *inter alia*, that their…Policy required [the insurer] to pay for the damage they sustained." Id. An insurer "is entitled to summary judgment on this issue if it negates an essential element of both these claims, which can be accomplished if Shelter demonstrates that the Policy does not cover the claimed loss." Id.

Mere delays in settling a claim or the raising of coverage disputes do not constitute bad faith**.** E.g., Palmer v. Nationwide Mut. Fire Ins. Co., 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986); Am. Ins. Co. v. Taylor, 367 S.W.2d 300, 306 (Tenn. Ct. App. 1962) (holding that mere refusal to pay a claim is not "sufficient evidence of bad faith" sufficient to justify a statutory bad faith 25 percent penalty). A bad faith claim will fail against an insurer "when there is a genuine dispute as to value, no conscious indifference to the claim, and no proof that the insurer acted from 'any improper motive.'" Palmer at 126 (quoting Johnson v. Tennessee Farmers Mut. Ins. Co., 556 S.W.2d 750 (Tenn. 1977)).

In this case, because NashComm has alleged a bad faith breach of contract claim, it bears the burden of presenting facts sufficient for its allegations. If it cannot present such supporting facts, then Auto-Owners is entitled to summary judgment on NashComm's cause of action for bad faith. Auto-Owners' initial refusal to pay for the whole roof (before appraisal

began) was made in good faith based on the Policy. SUMF ¶ 3-5, 9. Later, in its letter denying payment for the full roof replacement after the umpire's award, Auto-Owners relied on its initial coverage position and averred that the umpire had exceeded his authority under the policy. SUMF ¶ 18. And again, after this lawsuit was filed, Auto-Owners once again reaffirmed its coverage position that "there was no damage related to a covered peril to any portion of the Premises other than approximately 12' of rubberized membrane parapet wall along the north roof edge and one metal joint covering on the east parapet wall…" Answer, Affirmative Defenses ¶ 2, Doc. 12, Page ID 230; SUMF ¶ 9. Because there was a genuine dispute as to coverage, Auto-Owners did not act in bad faith when it initially denied coverage for the roof under the terms of the Policy. SUMF ¶ 3-5. Auto-Owners also did not act in bad faith when it subsequently refused to pay the full amount of the umpire's award, notifying NashComm that it disputed the award since the umpire acted outside of the scope of his authority. SUMF ¶ 18.

Further, the fact that Auto-Owners extended some coverage for the parapet wall demonstrates that it was not indifferent to the claim. SUMF ¶ 9. Auto-Owners performed its due diligence by inspecting the roof both before appraisal and multiple times after, and by agreeing to NashComm's appraisal demand to determine the amount of loss issue. SUMF ¶ 8, 12, 14. Thus, Auto-Owners has not acted in bad faith and did not breach its insurance contract with NashComm. Accordingly, Auto-Owners is entitled to partial summary judgment on this issue.

CONCLUSION

Based on the foregoing, Auto-Owners requests that this Honorable Court grant its Motion for Partial Summary Judgment and enter an Order declaring that NashComm is not

entitled to the full amount of the appraisal award as entered by the umpire. In addition, or in the alternative, Auto-Owners requests that this Honorable Court grant its Motion for Partial Summary Judgment and enter an Order declaring that it did not act in bad faith or breach its insurance contract with NashComm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2025, a true and correct copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via email or by regular U. S. Mail. Parties may access this file through the court's electronic filing system.

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