

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Cannon Falls Area Schools, ISD 252,

Plaintiff,

Court File No. 0:24-cv-03383-KMM-
DLM

v.

The Hanover American Insurance
Company,

Defendant.

**DEFENDANT THE HANOVER AMERICAN INSURANCE COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT AND MOTION TO EXCLUDE EXPERT OPINIONS**

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A. Introduction

This case arises from hail damage to Plaintiff Cannon Falls Area Schools, ISD 252's school buildings and a subsequent dispute over the extent of insurance coverage for that damage. The issue facing the Court in this motion is a straightforward question of insurance policy interpretation:

- Defendant Hanover provided property insurance coverage to ISD 252 under a policy that excluded coverage for “cosmetic damage” to a roof surface caused by hail – meaning damage affecting its appearance but not its function to keep out the elements. Hail caused indentations in the metal roofs of ISD 252's schools but did not affect their function to keep out the elements. Is the roof damage excluded by the “cosmetic damage” exclusion?

As explained below, the answer is “yes,” making summary judgment in favor of Hanover appropriate.

B. Statement of Facts

1. ISD 252.

Plaintiff ISD 252 is an independent school district located in Cannon Falls, Minnesota. (ECF No. 9 [Joint Rule 26(f) Report], Stip. Fact No. 4a.) ISD 252 owns the Cannon Falls Elementary School, High School, and Community Center. (*Id.*, Stip. Fact No. 4b.)

A portion of the roofs on the Elementary School and High School are comprised of metal roof panels. (*Id.*, Stip. Fact No. 4c.)

Elementary School



(Johnson Decl., Ex. D.)

High School



(Johnson Decl., Ex. E.)

The metal roof panels were installed in 2009 and were coated with Galvalume® to provide protection against the environment and inhibit corrosion. (Johnson Decl., Ex. F (Matt Phelps Dep. Tr.) at 67:7-10, 68:19 – 69:19.) The manufacturer provided a thirty-year warranty. (Johnson Decl., Ex. G (Jeffrey Sampson Dep. Tr.) at 36:19-25.)

2. The Hanover insurance coverage.

Hanover issued an insurance policy to ISD 252 for the policy term of July 1, 2021 to July 1, 2022 (“the Hanover Policy”). (ECF No. 9, Stip. Fact No. 4d.)¹ The Hanover Policy provided coverage 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.” (*Id.*, Stip. Fact No. 4f.)

The Elementary School, High School, and Community Center are premises described in the Hanover Policy Declarations. (*Id.*, Stip. Fact No. 4g.) And hail is a Covered Cause of Loss. (*Id.*, Stip. Fact No. 4h.)

The Policy included the following Limitations on Coverage for Roof Surfacing Endorsement (hereinafter “Cosmetic Damage Exclusion”):

- B.** The following applies with respect to loss or damage by **wind and/or hail** to a building or structure identified in the Schedule as being subject to this Paragraph **B.**:

¹ Although there is no dispute as to the relevant policy provisions, the entire property insurance section of the Hanover Policy is attached as Exhibit A to the Declaration of Stephen Waskin and available for the Court’s review.

We will not pay for cosmetic damage to roof surfacing caused by wind and/or hail. For the purpose of this endorsement, cosmetic damage means that the wind and/or hail caused marring, pitting or other superficial damage that altered the appearance of the roof surfacing, but such damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred.

(*Id.*, Stip. Fact No. 4i., bold in original) The Elementary School and High School are identified in the Schedule as subject to Paragraph B in the Cosmetic Damage Exclusion. (Johnson Decl., Ex. H (Pl.'s Resp. to Def.'s Req. for Admis.) Nos. 3 & 4.)

3. An April 12, 2022 hailstorm causes indentations to the metal roofs on the Elementary School and High School that Hanover finds to be excluded by the Cosmetic Damage Exclusion.

ISD 252 alleges that its properties sustained damage during a wind and hail event on April 12, 2022. (ECF No. 1 [Compl.] at ¶ 6.) ISD 252 subsequently submitted a claim to Hanover for coverage. (Stephen Waskin Decl., ¶ 4.)

After investigating ISD 252's insurance claim, Hanover paid \$702,906.84 to ISD 252 for hail damage to rooftop HVAC equipment on the Elementary School, High School, and Community Center and to skylights on the Elementary School. (Johnson Decl., Ex. H (Pl.'s Resp. to Def.'s Req. for Admis.) Nos. 5, 6 & 9; Waskin Decl., ¶¶ 5-8.) Hanover denied the remainder of ISD 252's claim—for hail damage to the metal roof panels on the Elementary School and High School—

because it fell within the Cosmetic Damage Exclusion. (Waskin Decl., ¶ 11, Ex. B.)

Hanover's determination that the damage to the metal roof panels fell within the Cosmetic Damage Exclusion was based on reports from its consultant Halliwell Engineering, who was retained to evaluate the damage to the metal roofs. (Waskin Decl., ¶ 9.) Halliwell Engineering concluded that the hail damage to the metal roofs was cosmetic and did not reduce the ability of the roofs to function as a barrier to the elements. (Waskin Decl., ¶ 10; Johnson Decl., Ex. I (Steven Fulmer Dep. Tr.) at 17:7 – 18:6.)

4. The metal roofs at the Elementary School and High School have continued to keep out the elements as they did before the hail event.

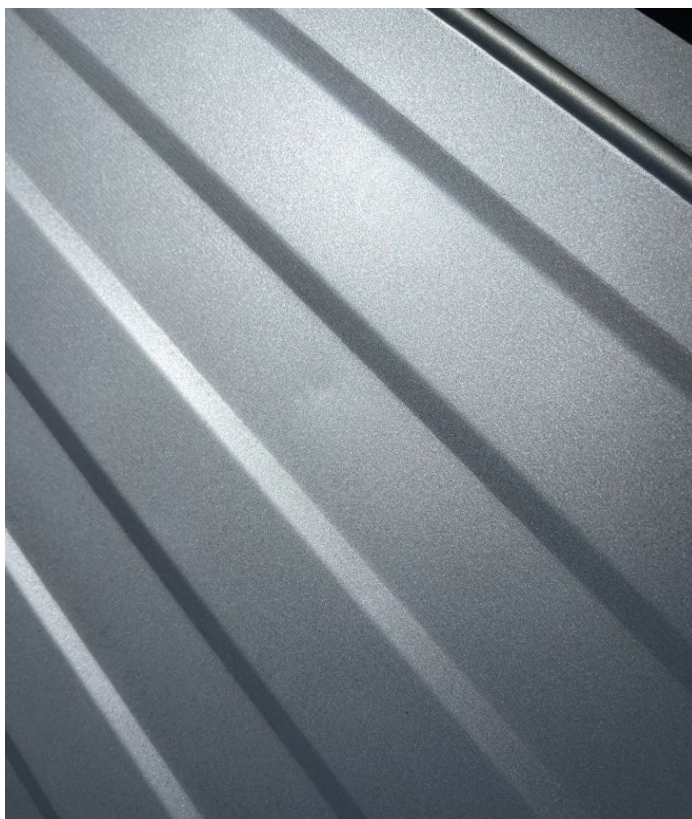
The only form of damage to the metal roofs from the April 12, 2022 hail event were indentations. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 73:17-22, 126:10-13; Johnson Decl., Ex. I (Fulmer Dep. Tr.) at 13:8-24, 14:17 – 15:1, 15:6-18.) Exemplary photographs are included below:



(Johnson Decl., Ex. J.)



(Johnson Decl., Ex. K.)



(Johnson Decl., Ex. L.)

In the three-plus years since the April 12, 2022 hail event, the Elementary School and High School metal roofs have not leaked and have continued to function as a barrier to entrance of the elements into the interior of the schools. (Johnson Decl., Ex. H (Pl.'s Resp. to Def.'s Req. for Admis.) Nos. 1 & 2; Johnson Decl., Ex. G (Sampson Dep. Tr.) at 81:23 – 82:3.) In fact, they have held out the elements despite twenty-one days with at least one-inch of rainfall, twelve days with at least one and a half inch of rainfall, and one day with 3.35 inches of rain since the April 12, 2022 hail event. (Jason Webster Decl., ¶¶ 8-10.) Furthermore, the thirty-year manufacturer's warranty on the metal roofs has remained intact and is still in place today. (Johnson Decl., Ex. G (Sampson Dep. Tr.) at 38:12-14, 80:22-24.)

5. ISD 252's expert witness testimony.

ISD 252's expert, Dr. Matt Phelps, testified that there was no "compelling" or "significant" hail damage to the High School metal roof. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 57:12 – 58:13.) Dr. Phelps further testified that the April 12, 2022 hailstorm did not create any punctures in, or disengaged seams on, the metal roofs through which water could leak. (*Id.* at 126:10 – 127:4.) Dr. Phelps also testified that he was not aware of any leaks where water penetrated through the metal roofing system and into the interior of the schools in the three-plus years since April 12, 2022. (*Id.* at 76:13-15.) Similarly, Dr. Phelps concluded that

the Galvalume® and corrosion resistance on the metal roofs was not functionally damaged by the hail. (*Id.* at 97:8-20.)

Dr. Phelps, however, opines that the April 12, 2022 hail event made the Elementary School metal roofs more susceptible to future failure and a reduced service life. (*Id.* at 79:11-22, 115:1-14, 204:12-17, 207:22 – 208:15.) Yet he cannot identify the date, month, or year that the roofs will fail, if ever. (*Id.* at 102:11-18, 104:5-14, 115:1-19, 209:12-25.)

C. Argument

1. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Under Rule 56(a), summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Insurance coverage cases are “particularly amenable to summary judgment” because “the interpretation and construction of insurance policies is a matter of law.” *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413, 417 (8th Cir. 1991). Where, as here, the facts are undisputed and “the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.” *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996).

As explained below, there are no genuine issues of material fact, and Hanover is entitled to judgment as a matter of law because the Cosmetic Damage Exclusion precludes coverage.

2. Insurance contract language must be interpreted according to its plain and ordinary meaning.

Insurance policies in Minnesota are interpreted in accordance with general principles of contract interpretation. *Wesser v. State Farm Fire & Cas. Co.*, 989 N.W.2d 294, 299 (Minn. 2023).² Where the policy language is clear and unambiguous, the court is to apply that language according to its “plain and ordinary meaning.” *Id.* Courts must “guard against invitations to find ambiguity where none exists.” *Metro. Prop. & Cas. Ins. Co. v. Jablonske*, 722 N.W.2d 319, 324 (Minn. Ct. App. 2006) (quotation omitted).

As demonstrated below, Hanover has met its burden to establish that the Cosmetic Damage Exclusion applies here as a matter of law.³

² Because this insurance contract dispute is before the Court on diversity jurisdiction, the Court applies state law in its substantive analysis of the policy. *See, e.g., Babinski v. Am. Fam. Ins. Grp.*, 569 F.3d 349, 351–52 (8th Cir. 2009). There is no dispute that Minnesota is the relevant state law.

³ Hanover acknowledges that it has the burden of proving that a policy exclusion applies. *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006) (“While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions.”).

3. The Cosmetic Damage Exclusion applies to preclude coverage.

The Hanover Policy excludes coverage for the exact type of damage ISD 252 claims here. Specifically, the Hanover Policy excludes coverage for “cosmetic damage to roof surfacing caused by wind or hail.” (ECF No. 9, Stip. Fact No. 4i.) The Policy defines “cosmetic damage” as:

marring, pitting or other superficial damage that altered the appearance of the roof surfacing, but such damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred.

(*Id.*)

While no Minnesota court has interpreted this Cosmetic Damage Exclusion, courts elsewhere have found the same or similar exclusion to be clear and unambiguous. See *J&S Welding, Inc. v. Liberty Mut. Ins. Co.*, No. 23-5942, 2024 WL 3495073, at *3 (6th Cir. July 22, 2024) (“The district court correctly determined that the cosmetic-loss exclusion was clear and unambiguous.”); *Calfox, Inc. v. Certain Underwriters at Lloyd’s*, No. 20-cv-02443-RM-KMT, 2024 WL 1051948, at *6 (D. Colo. Mar. 11, 2024) (finding substantially similar exclusion to be clear and unambiguous).⁴

⁴ The Court’s task is to “predict how the Supreme Court of Minnesota would rule if the issue came before it.” *Jerry’s Enters, Inc. v. U.S. Specialty Ins. Co.*, 845 F.3d 883, 887 (8th Cir. 2017) (quotation marks omitted).

As one court observed, the Cosmetic Damage Exclusion has four elements: it “exclude[s] from coverage any loss or damage (1) consisting of marring, pitting, or other superficial damage, (2) caused by wind and/or hail, (3) that alters the physical appearance of the roof, (4) but without preventing the roof from continuing to function as a barrier to entrance of the elements to the extent it did before the loss or damage occurred.” *J&S Welding, Inc. v. Liberty Mut. Ins. Co.*, 693 F. Supp. 3d 823, 834 (W.D. Tenn. 2023), *aff’d*, No. 23-5942, 2024 WL 3495073 (6th Cir. July 22, 2024).

Each of these elements is satisfied here. To be sure, it is undisputed that ISD 252’s metal roofs suffered shallow indentations caused by hail that altered their physical appearance. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 73:17-22, 126:10-13; Johnson Decl., Ex. I (Fulmer Dep. Tr.) at 13:8-24, 14:17 – 15:1, 15:6-18.) It is also undisputed that the metal roofs do not leak and, thus, they have not failed to perform their intended function of keeping water and other elements out of the interior of the two schools since the April 12, 2022 hail event. (Johnson Decl., Ex. H (Pl.’s Resp. to Def.’s Req. for Admis.) Nos. 1 & 2; Johnson Decl., Ex. G (Sampson Dep. Tr.) at 81:23 – 82:3.)

Hanover’s expert concluded the hail damage to the metal roofs was cosmetic and did not reduce the water-shedding capabilities of the metal roofs. (Johnson Decl., Ex. I (Fulmer Dep. Tr.) at 17:7 – 18:6.) ISD 252’s own expert agrees

that there was no “compelling” or “significant” damage to the High School metal roof. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 57:12 – 58:13.)

ISD 252’s expert also agrees that the April 12, 2022 hailstorm did not create any punctures in, or disengaged seams on, the Elementary School and High School metal roofs through which water could leak. (*Id.* at 126:10 – 127:4.)

Additionally, the thirty-year warranty on the metal roofs was not revoked by the manufacturer and is still in place today. (Johnson Decl., Ex. G (Sampson Dep. Tr.) at 38:12-14, 80:22-24.)

Thus, the roof damage is limited to the roofs’ physical appearance, that is, indentations. This damage falls within the clear and unambiguous language of the Cosmetic Damage Exclusion. Summary judgment is appropriate.

4. ISD 252’s expert’s opinion that the hail event made the roofs more susceptible to future failure and reduced their service life should be excluded as speculative and unreliable.

a. ISD 252’s expert’s “maybe someday” theory.

Because the roofs on ISD 252’s two schools do not leak and continue to function as a barrier to the elements, ISD 252 attempts to circumvent the Cosmetic Damage Exclusion by claiming that the roofs may leak someday in the future. The crux of ISD 252’s argument is that hail damage to a metal roof may be more than “cosmetic” – even if the roof does not presently leak – because it may

fail to function as a barrier to the elements at some unascertained date in the future.

ISD 252's expert Dr. Matt Phelps proffers two opinions for why the metal roofs may fail someday in the future. First, Dr. Phelps testified that the "bottom line" is that the metal roofs are "more susceptible" to future wind damage than before the hail event:

Q. . . . You say they are susceptible to, I guess, further damage from wind, but they've been through wind for three years and nothing has happened to them. They're still there, no leaks. They haven't lifted off the building. Aren't they performing their intended function?

A. Well, it doesn't mean that it's still performing as it was prior to the hail damage.

And the bottom line is this, is that they are more susceptible to wind damage than they were prior to the hail event. And that is the issue. . . .

(Johnson Decl., Ex. F (Phelps Dep. Tr.) at 79:11-22.)

Second, Dr. Phelps claims that dirt can accumulate in hail indentations, which could lead to corrosion and in turn reduce the service life of the metal roofs:

Q. So let me move on to the second part of that, the reduction in the lifespan of the materials. What do you mean by "reduction in the lifespan of materials"?

A. As you've seen in evidence of some of the photos that we've included, there is dirt that has accumulated, windblown dirt that has accumulated in the -- the dents from the hail hits. So when you have soil particles that accumulate on the panel and you have repeated

wetting and drying events, it can set into motion a chain reaction that can cause those areas to corrode faster than other areas than it would -- would have normally have corroded. And that would -- would be essentially the reduction in life expectancy because of that.

(*Id.* at 123:23 – 124:13.)

But ISD 252's expert does not opine with certainty that the metal roofs will prematurely corrode or prematurely fail, he only speculates that this "may" occur. Nor does he quantify the amount of time — days, months, or even years — that it would take for the roofs to fail. To the contrary, Dr. Phelps repeatedly testified that he did not know when the roofs would fail, if ever:

Q. Can you tell us, can you put some timing on it, when are these roofs going to fail?

A. Well, obviously, nobody knows that, including me. It could be with the next wind event. It could be with the next snow event. It could be, you know, next week or it could be next fall or it could be next year. *We don't know when that will occur.*

(*Id.* at 102:11-18, italics added.)

Q. Are you going to give -- give the opinion that these roofs have failed since this April 12th, 2022 hail event?

A. I think that they have been damaged from the hail event. I think that I have tried to make that very clear.

But will they have a failure from a wind event or a snow event? I think it's very likely. When that would happen, I do not know.

(*Id.* at 104:5-14, italics added.)

Q. And we -- we talked about this before, like when is this additional damage from wind, snow, rain and other environmental elements going to occur, and you don't know; right?

A. No, I don't -- *I don't know.*

(*Id.* at 115:15-19, italics added.)

Q. Okay. And this buckling that you mentioned and potential to wear a hole and cause a leak, as you said, you don't know when that will happen; right?

A. *None of us know.* If -- if we knew, we would be wealthy enough we wouldn't have to be here today.

Q. And you can't even say that it will happen; right?

A. *I can't say for certainty that it will happen or within a given period of time.* I think, yes, it will happen. And I think it is just a matter of time. But when that will be, I do not know.

(*Id.* at 209:12-25, italics added.)

ISD 252's "maybe someday" theory cannot avoid the plainly applicable Cosmetic Damage Exclusion or defeat summary judgment.

b. Speculative and unreliable expert testimony is inadmissible.

"The admissibility of expert testimony is an issue of law for the district court to decide and is governed by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)." *Willis Elec. Co. v. Polygroup Macau Ltd. (BVI)*, 649 F. Supp. 3d 780, 795 (D. Minn. 2023) (*Daubert* cite cleaned up). Under Rule 702, proposed expert testimony must satisfy three prerequisites to be admitted. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

"First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact." *Id.*

“Second, the proposed witness must be qualified to assist the finder of fact.” *Id.*

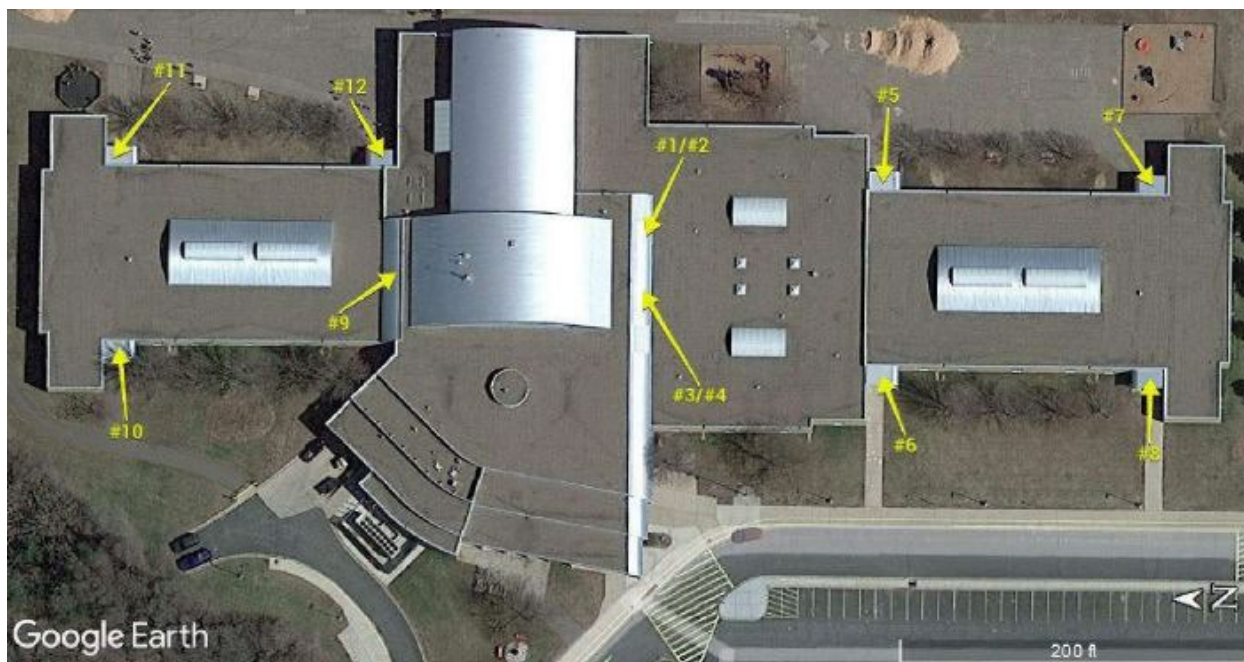
“Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires.” *Id.* (internal quotation marks and citation omitted).

These requirements reflect the Supreme Court’s analysis in *Daubert*, in which the Court emphasized the district court’s gatekeeping obligation to make certain that all testimony admitted under Rule 702 “is not only relevant, but reliable.” 509 U.S. 579, 589 (1993). While courts generally favor admissibility over exclusion, *Lauzon*, 270 F.3d at 686, courts must not overlook their gatekeeping role. *In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1001 (8th Cir. 2019) (citing *Daubert*, 509 U.S. at 589). The court must “ensure that any an all scientific testimony or evidence admitted is not only relevant, but reliable.” *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009). Thus, even under *Daubert*’s “liberal admission” standard, “[e]xpert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case.” *In re Wholesale Grocery Prods.*, 946 F.3d at 1001.

- c. **Dr. Phelps’s opinion that the High School metal roof and the two largest sections of the Elementary School metal roofs are susceptible to an increased risk of future failure lacks foundation, is speculative and is unreliable because Dr. Phelps did not conduct any physical testing of the metal roofs.**

Dr. Phelps’s opinion that the April 12, 2022 hail event made the metal roofs more susceptible to failure from a future wind or snow event is based solely on testing he conducted of portions of the Elementary School roof. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 102:1-108.) Specifically, Dr. Phelps took samples of portions of the Elementary School metal roof and then performed a Rockwell Hardness test on the samples, comparing the hardness of the metal in the undamaged portion with the hardness of the metal at and near a hail impact. (*Id.* at 93:14 – 94:6, 98:13 – 99:17.) Based on this testing, Dr. Phelps concluded that the hail-impacted areas were softer, and therefore weaker, than the unimpacted areas. (*Id.* at 102:1-6.) As a result, Dr. Phelps opines that metal roofs are now more susceptible to failure from a future wind or snow load. (*Id.* at 102:7-10.)

But Dr. Phelps took no samples and conducted no testing of the two largest metal roof sections at the Elementary School. (*Id.* at 93:14 – 94:21.) Nor did he take any samples or conduct any tests of the High School metal roof at all (because he found no “compelling damage” to the roof). (*Id.* at 55:7-19, 57:12 – 58:8.) The photograph below from Dr. Phelps’s expert report shows the sample locations:



(Johnson Decl., Ex. M.)

Because Dr. Phelps took no samples and conducted no testing of the largest metal roof sections at the Elementary School or the High School metal roof, there is no foundation for his opinion that these roofs are more susceptible to failure from a future wind or snow event. To be sure, Dr. Phelps's opinion is based on Rockwell Hardness testing that he claims shows that the hail-impacted areas were softer, and therefore weaker, than the unimpacted areas. But since he took no samples and conducted no testing of the largest metal roof sections at the Elementary School or the High School metal roof, any claim that the hail impacted areas on these roofs were softer, and therefore weaker, than the unimpacted areas is based on pure speculation. So too is his opinion that the

largest metal roof sections at the Elementary School or the High School metal roof are more susceptible to failure from a future wind or snow event.

Courts routinely exclude expert opinions based on the lack of testing to verify the expert's opinions. *See, e.g., Pro Serv. Auto., LLC v. Lenan Corp.*, 469 F.3d 1210, 1215-16 (8th Cir. 2006) (affirming district court's exclusion of expert's opinion where expert provided no testing or other engineering analysis to support his causation opinion); *Solheim Farms, Inc. v. CNH Am., LLC*, 503 F. Supp. 2d 1146, 1150 (D. Minn. 2007) (excluding expert testimony as unreliable because expert failed to conduct any tests to verify his causation theory and as irrelevant because the facts did not support the expert's theory).

In sum, Dr. Phelps's opinion that the High School metal roofs and the two largest metal roof sections at the Elementary School are more susceptible to future failure is speculative, unreliable and entirely lacking in foundation. His opinion should be excluded.

d. Dr. Phelps's opinions are unreliable because they are improperly speculative.

Dr. Phelps's opinion that the metal roofs *may* at some unknown date in the future not function as a barrier to the elements is based on pure speculation and conjecture. While Dr. Phelps opines that the April 12, 2022 hail event made the metal roofs "more susceptible" to future failure and reduced their remaining service life, he could not opine with certainty that the roofs will prematurely fail

nor could he quantify the amount of time — days, months, or even years — that it would take for the roofs to fail, if ever. *See supra* at 15-16. “Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case.” *In re Wholesale Grocery Prods.*, 946 F.3d at 995, 1001.

Courts have excluded similar opinions in other cases involving a cosmetic damage exclusion. For instance, the court in *Tri Investments, Inc. v. United Fire & Casualty Co.* excluded an expert’s opinion that hail indentations would collect dirt and water causing premature corrosion to occur at the impact locations on reliability grounds. No. 5:18-CV-116, 2019 WL 13114345, at *7 (S.D. Tex. Nov. 15, 2019). The *Tri Investments* court found this sort of speculation unreliable and inadmissible, commenting that it “has concerns about these opinions — that indentations to a metal roof, no matter how minor, will cause some corrosion to the roof material at some time undetermined time in the future.” *Id.* The court observed that “[t]here is no explanation of how long the water would need to sit in a hail-made indentation or the effect of the size of an indentation” and noted that the plaintiff’s expert did “not address whether a particular indentation would cause roof failure in twenty, fifty, or one hundred years, regardless of whether the metal roof has a twenty-five-year life expectancy.” *Id.*

Here, as in *Tri Investments*, Dr. Phelps opines that hail indentations would collect dirt and water causing premature corrosion to occur at the impact

locations or would otherwise prematurely fail. (Johnson Decl., Ex. F (Phelps Dep. Tr.) at 79:11-22, 123:23 – 124:13.) He also could not opine with certainty that the roofs will prematurely fail and could not quantify the amount of time – days, months, or even years – that it would take for the roofs to fail, if ever. Therefore, as in *Tri Investments*, Dr. Phelps’s speculative opinion that that the April 12, 2022 hail event made the metal roofs “more susceptible” to future failure and reduced their remaining service life should be excluded as unreliable.

5. Even if the Court considers ISD 252’s expert’s opinion that the hail event made the roofs more susceptible to future failure and reduced their service life, that opinion does not defeat summary judgment.

a. The Cosmetic Damage Exclusion is phrased in the present tense, not the future tense.

The Cosmetic Damage Exclusion expressly applies to cosmetic damage that “*does not prevent* the roof from continuing to function as a barrier to entrance of the elements...” (ECF No. 9, Stip. Fact No. 4i, emphasis added.) Significantly, and as other courts have observed, the Cosmetic Damage Exclusion is phrased in the present tense, rather than the future tense. *See Iyengar v. Liberty Ins. Corp.*, No. SA-21-CV-1091-FB (HJB), 2023 WL 8505692, at *5 (W.D. Tex. Oct. 24, 2023) (“The policy’s plain language unequivocally speaks in the present tense – excepting hail damage from the cosmetic exclusion only if it ‘*does ... result in the failure of*

the ‘metal materials’ to perform their intended function of keeping out the elements.” (italics in original)).

The present tense of the verb “does” (instead of the future tense “will”) in the Cosmetic Damage Exclusion establishes that the prevention of the roof’s functioning is contemplated to be a presently-existing condition, not speculation or conjecture about what might happen in the future. In other words, the Exclusion is not inapplicable just because the damage could, at some unknown or uncertain future date, prevent the roof from functioning to keep out the elements.

Accordingly, other courts have expressly rejected ISD 252’s “maybe someday” argument. In *Iyengar v. Liberty Insurance*, for example, the insured’s expert Dr. Fei opined--like ISD 252’s expert here -- that water and dirt will accumulate in the hail indentations for extended periods of time and eventually cause corrosion and the failure of the roof to keep out the elements. *Id.* at *3. Based on the present tense used in the cosmetic damage exclusion, the court found that Dr. Fei’s conjecture about what might happen in the future did not support the insured’s claim that the exclusion was inapplicable:

Dr. Fei predicts that the corrosion-induced reduction in the lifespan of the zinc coating eventually *will* result in a failure of the metal materials to perform their intended function of keeping out the elements. Such future predictions cannot support Plaintiffs’ claim. The policy’s plain language unequivocally speaks in the present tense -- excepting hail damage from the cosmetic

exclusion only if it “*does ... result in the failure of the ‘metal materials’ to perform their intended function of keeping out the elements.*” (citation.) Conjecture regarding what might happen at some unknown point in the future is not evidence that the metal materials are presently unable to perform their intended function of keeping out the elements.

Id. at *5 (italics in original).⁵

The court in *Calfox, Inc. v. Certain Underwriters at Lloyd’s* reached a similar conclusion. No. 20-cv-02443-RM-KMT, 2024 WL 1051948 (D. Colo. Mar. 11, 2024). There, the court was called upon to interpret a cosmetic damage endorsement (“Endorsement”) that, like Hanover’s, excluded cosmetic damage to a roof covering caused by hail or wind. *Id.* at *1. The Endorsement included the identical “cosmetic damage” definition found in Hanover’s Cosmetic Damage Exclusion. *Id.*

The insured Calfox asked the court to rule “that the Endorsement does not apply to damage that reduces or impacts the functionality, performance, or lifespan of the roof surface.” *Id.* at *4. But the *Calfox* court rejected this as an overly broad interpretation of the cosmetic damage exclusion and concluded that exclusion applied as long as the roof currently kept out the elements:

Finally, *Calfox* asks the Court to find that the Endorsement does not apply to conditions of damage that reduce or impact the

⁵ The *Iyengar* court found that the insured submitted other evidence besides its experts’ opinions to raise a genuine dispute as to whether the roof continued to act as a barrier to the elements, which precluded summary judgment. *Id.* at *5. Such is not the case here where it is undisputed that no leaks have occurred.

functionality, performance, or lifespan of the roof surfacing. On this, the Court must agree with Defendants. Calfox's interpretation is overly broad, and the plain language of the Endorsement is clear. The Endorsement applies to any damage that is cosmetic in nature and which does not prevent the roof from continuing to function to keep out the elements. *If the damage is cosmetic but will ultimately result in a shorter lifespan for the roof, as long as the elements cannot penetrate, the damage is excluded.*

Id. at *6 (emphasis added).⁶

In this case, it undisputed that the Elementary School and High School metal roofs do not leak and continue to perform their intended function of keeping the elements out of the buildings, just as they did before the hailstorm. Because the roofs functioned as intended after the hailstorm, the Cosmetic Damage Exclusion applies. Under the terms of the Cosmetic Damage Exclusion, an alleged reduction in service life or increased risk of future failure without a change in the ability of the roof to presently function as a barrier to the elements does not preclude application of the Exclusion under a plain reading of the policy language. Hanover is therefore entitled to summary judgment.

⁶ Like *Iyengar*, the *Calfox* court found that the evidence was conflicting regarding whether the roof continued to act as a barrier to the elements, which precluded summary judgment. *Id.* at *7. Again, such is not the case here.

- b. It is improper to rewrite the Cosmetic Damage Exclusion to require that there be no increased risk of future failure or reduction in the roof's remaining service life.**

The Cosmetic Damage Exclusion does not require that there be no increased risk of future failure or no reduction in the roofs' remaining service life for the Exclusion to be applicable. The only requirement is that the "damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred." ISD 252's argument that an increased risk of future failure or a reduction in the roofs' remaining service life serves to avoid the Cosmetic Damage Exclusion is simply reading additional terms into the Exclusion. At bottom, it is an improper attempt to rewrite the Exclusion.

First, under well-settled contract interpretation principles, the specified requirement that the "damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred" excludes other requirements not expressed: "The well-recognized rule of '*expressio unius est exclusio alterius*' provides that the expression of specific things in a contract implies the exclusion of all not expressed." *Weber v. Sentry Ins.*, 442 N.W.2d 164, 167 (Minn. Ct. App. 1989) (citing *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 599 (Minn. 1957)); see also *Maier v. All Nation Ins. Co.*, 340 N.W.2d 675, 680 (Minn. Ct. App.

1983) (“The well-recognized rule of ‘*expressio unius est exclusio alterius*’ is also applicable. Under this maxim, the expression of specific things in a contract implies the exclusion of all not expressed.”) Under this rule, the Policy does not cover indentations that change the appearance of the roof but may cause an increased risk of future failure or a reduction in the roofs’ remaining service life.

Second, if the parties intended for the Cosmetic Damage Exclusion to apply only where the hail or wind damage caused no increased risk of future failure or no reduction in the roof’s remaining service life, the parties would have included words to that effect in the Exclusion. In fact, some cosmetic damage exclusions expressly include a requirement that a roof continue to function as a barrier to the elements for the roof’s anticipated service life.

For example, a Hartford policy’s “cosmetic damage” definition expressly required that the roof continue to function as a barrier to the elements as it did before the damage “*and for the anticipated useful service life of the roof*”:

B. For the purpose of this endorsement:

1. Cosmetic damage means marring, pitting, denting or other superficial damage that alters the physical appearance of the metal roof surfacing, but such damage does not result in the failure of the roof to continue to function as a barrier to entrance of water to the same extent as it did immediately before the cosmetic damage occurred *and for the anticipated useful service life of the roof*.

(Johnson Decl., Ex. N (Hartford Cosmetic Damage Exclusion) (emphasis added).)

Another example of a cosmetic damage exclusion that expressly included a time-period for the roof to continue to function as a barrier to the elements can be seen in *Tri Investments, Inc. v. United Fire & Casualty Co.*, 553 F. Supp. 3d 400, 403 (S.D. Tex. 2020). There, the cosmetic damage exclusion applied if the damage did not result in the failure of the roof to perform its intended function to keep out elements “over an extended period of time”:

5. Cosmetic or Appearance Loss or Damage

We will not pay for loss or damage caused by the peril of hail that alters the physical appearance of any part of any roof covering made of metal but does not result in damage that allows the penetration of water through the roof covering **or does not result in the failure of the roof covering to perform its intended function** to keep out elements *over an extended period of time*. This exclusion applies to roof coverings including the roofing material exposed to weather, its underlayments applied for moisture protection and all flashings required in application of the roof covering.

Hail damage to roof coverings that results in damage that will allow the penetration of water through the roof covering **or that results in the failure of the roof covering to perform its intended function** to keep out elements *over an extended period of time* is not subject to this exclusion.

Id. at 403 (bold in original; italics added).

But unlike these two policies, the “cosmetic damage” definition in the Hanover Policy does not require that the roof continue to function as a barrier to entrance of the elements “for the useful service life of the roof” or “over an extended

period of time.” Those are the very words that ISD 252 now seeks to have the Court add by interpretation.

ISD 252’s interpretation would require rewriting the Policy. But courts do not rewrite clear and unambiguous contract provisions. *See, e.g., Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004) (“We have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction. “).

To construe the term “cosmetic damage” to require that the roof continue to function as a barrier to the elements in the future or for the expected “service life” of the roof is to improperly insert words into the Policy that are not there and to ignore the Policy’s own explanation that, for purposes of the application of the Cosmetic Damage Exclusion, the only requirement is that the roof continues to function to keep out the elements to the same extent as it did before. ISD 252’s coverage argument fails substantively under a plain reading of the Cosmetic Damage Exclusion.

- c. **Even if an increased risk of future failure or reduced service life were relevant to application of the Cosmetic Damage Exclusion, speculation and conjecture cannot defeat summary judgment.**

As discussed, ISD 252’s expert Dr. Matt Phelps opines that the April 12, 2022 hail event made the metal roofs “more susceptible” to future failure and reduced their remaining service life. But he could not opine with certainty that

the roofs will prematurely fail or quantify the amount of time — days, months, or even years — that it would take for the roofs to fail, if ever. *See supra* at 15-16.

These opinions are no more than conjecture and speculation that the roofs *may* fail to keep out the elements at some unknown time in the future. But it is well settled that “speculation and conjecture are insufficient to defeat summary judgment.” *See Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012); *see also Turner v. XTO Energy, Inc.*, 989 F.3d 625, 627 (8th Cir. 2021) (non-moving party “must substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor based on more than mere speculation, conjecture, or fantasy.” (citation omitted)).

Courts interpreting the same or similar “cosmetic damage” exclusion have found similar evidence of potential future roof leaks or failures insufficient to defeat summary judgment. For example, in *Amphay v. Allstate Vehicle & Prop. Ins. Co.*, the insured’s expert speculated that the hail-damaged roof *could* leak sometime in the future. No. 2:21-CV-219-Z-BR, 2023 WL 2491285, at *2 (N.D. Tex. Mar. 13, 2023). Much like ISD 252’s expert here, he could not quantify the amount of time — days, months, or even years — that it would take for the roof to fail. *Id.* Instead, he argued that damage is not cosmetic if a roof’s service life is “100 years and you take away 5 days,” because “it’s still 5 days.” *Id.* The court, however, found that “[t]his type of speculation is insufficient to create a fact

issue” and granted summary judgment to the insurer based on the cosmetic damage exclusion. *Id.*

Other courts have reached similar conclusions. *See, e.g., Jaquess v. Allstate Vehicle & Prop. Ins. Co.*, No. 5:22-CV-015-C, 2023 WL 10672192, at *1 (N.D. Tex. June 27, 2023) (granting summary judgment to insurer based on cosmetic damage exclusion and finding that “any speculation that the metal roof *may* leak in the future is simply too speculative and not covered under the policy due to the Cosmetic Damage Exclusion Endorsement.” (italics in original)); *Tri Invs., Inc.*, 2019 WL 13114345, at *7 (excluding expert testimony as unreliable and unhelpful to a trier of fact because “the experts provide[d] no timeline or rate for the corrosion and whether it would ultimately result in failure of the roof at any particular indentation.”); *see also Iyengar*, 2023 WL 8505692, at *5 (“Conjecture regarding what might happen at some unknown point in the future is not evidence that the metal materials are presently unable to perform their intended function of keeping out the elements.”).

Here, it is undisputed that the metal roofs on ISD 252’s schools do not leak. And there is no evidence that they have not kept other elements out of the ISD 252’s schools since the April 12, 2022 hail event.

If the Cosmetic Damage Exclusion can be circumvented with no more than speculation and conjecture that hail indentations in the roofs – which undeniably

and to date do not impact their ability to function as a barrier to the elements — may lead to a future failure or reduced service life, then no damage could ever be subject to the Exclusion, rendering it meaningless. Minnesota courts do not interpret insurance policies in a manner that renders policy provisions meaningless. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990) (a court must “attempt to avoid an interpretation of the contract that would render a provision meaningless.”); *see also Cachet Fin. Sols., Inc. v. Hartford Fin. Servs. Grp., Inc.*, 162 F. Supp. 3d 858, 862 (D. Minn. 2016) (“If possible, policies should be interpreted to give effect to all of their provisions, and interpretations that would render any provision meaningless should be avoided.”).

ISD 252’s speculation and conjecture that the roofs on its two schools may fail as a barrier to the entrance of elements at some unknown time in the future does not defeat summary judgment.

6. The Corrosion Exclusion also bars coverage.

As discussed, ISD 252’s expert Dr. Phelps claims that dirt can accumulate in the hail indentations, which could lead to corrosion at some unknown time in the future. *See supra* at 14-15. But “corrosion” is expressly excluded under the Hanover Policy, and this provides the Court with an additional basis to grant summary judgment.

The Hanover Policy expressly exclude coverage for loss or damage caused by corrosion:

2. We will not pay for loss or damage caused by or resulting from any of the following:
- * * *
- d.(1)** Wear and tear;
- (2)** Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself; . . .

(Waskin Decl., Ex. A (Hanover Policy), at HAN0002260.) Minnesota appellate courts have upheld similar corrosion exclusions. *See, e.g., Twin City Hide v. Transamerica Ins. Co.*, 358 N.W.2d 90, 92 (Minn. Ct. App. 1984) (finding that policy’s exclusion for deterioration, rust, and corrosion barred coverage for a roof that leaked due to rust and corrosion).

In a factually similar case, the court in *Iyengar v. Liberty Insurance Corp.* found that an expert's opinion, that water and dirt will accumulate in hail-caused dents for extended periods of time and eventually cause corrosion and reduce the overall life-expectancy of the roof, did not preclude application of a cosmetic damage exclusion because corrosion was also excluded:

Considered in the context of the contractual provisions at issue in this case, the reports and testimony of Plaintiffs' experts do not provide sufficient evidence to enable a jury to find that the hail damage to Plaintiffs' roof falls outside of the Policy's cosmetic exclusion. Dr. Fei opines that the hail damage will cause corrosion and thereby reduce the lifespan of the roof. But "corrosion" is expressly not covered under the Policy. Lackner's report similarly

documents instances of “rusting” on the “metal deck” as a result of “zinc coating damage in the surface areas of the dents.” Like corrosion, rust is expressly not covered under the Policy.

2023 WL 8505692, at *4 (record citations omitted).

Just as in *Iyengar*, ISD 252’s expert Dr. Phelps opines that water and dirt may accumulate in the dents for extended periods of time and may eventually cause corrosion and reduce the overall life-expectancy of the roof. Accordingly, Dr. Phelps’s opinion also does not preclude application of the Cosmetic Damage Exclusion because corrosion is also expressly excluded.

D. Conclusion

As shown above, the undisputed facts demonstrate that the roofs on ISD 252’s Elementary School and High School continue to keep out the elements just as they did before the hail event. Therefore, the Court should find as a matter of law that coverage for the metal roofs is not available based on the Cosmetic Damage Exclusion of the Hanover Policy.

Dated: June 30, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Defendant The Hanover American Insurance Company's Memorandum of Law in Support of its Motion for Summary Judgment and Motion to Exclude Expert Witness Opinion Testimony complies with the word limits of Local Rule 7.1(f) and type-size limit of Local Rule 7.1(h). According to the word count provided by Microsoft Word 365, Hanover's Memorandum contains 7,450 words, inclusive of all headings, footnotes, quotations, and other text.

DATED: JUNE 30, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2025 I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record.

/s/ Scott G. Johnson

Scott G. Johnson