

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Cannon Falls Area Schools, ISD 252,

Case No.: 24-cv-03383-KMM-DLM

Plaintiff,

vs.

The Hanover American Insurance Company,

Defendant.

PLAINTIFF'S RESPONSE
MEMORANDUM OF LAW IN
OPPOSITION OF DEFENDANTS
MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
EXCLUDE EXPERT OPINIONS

Cannon Falls Area Schools, ISD 252 (The "Schools") respectfully submit this Response in Opposition to Defendant's Motion for Summary Judgment and Motion to Exclude Expert Opinions.

INTRODUCTION

There are two key parts to this dispute. The first is to consider the definition and meaning of the cosmetic damage exclusion. The second is to apply that definition to the facts of this matter to determine if Hanover has carried, or can carry, its burden to prove that the undisputed damage to the Schools' Roofs is only cosmetic. The Parties agree that the claimed hail storm caused damage in the form of indentations to the metal Roofs. Hanover contends that the damage is only cosmetic and is therefore excluded. While attempting to prove the exclusion applies, Hanover misinterprets the exclusion and fails to provide supporting facts to prove that the Roofs do continue "to function as a barrier to the entrance of the elements to the same extent as it did before the damage occurred." (Doc 27-3 at 83).

Hanover attempts to twist the language of the exclusion as well as the Schools' arguments and then use these altered basis to attempt to defeat coverage. Hanover contends that the exclusion applies whenever damage does not cause the Roofs to immediately fail to prevent water intrusion. Hanover then mischaracterizes the Schools' argument to be that the roofs will, at some point later, have a reduced ability to shed water. The Schools' actual argument is that the hail impacts immediately weakened the Roofs' metal. This immediate weakening means that the Roofs cannot resist hail impacts, snow load, and wind forces to the same extent as it did prior to the damage. Just because there has not been a significant hail, wind, or snow storm to cause the Roofs to fail, does not mean that the Roofs can currently resist these forces to the same extent as they did before. Therefore, the Roofs currently do not resist the elements (more than just water, but including hail, wind, and snow) to the same extent as they did before the hail damage.

Hanover also argues that the Schools' expert, Phelps, should be excluded from testifying because he only tested some of the metal roof surfaces as exemplars rather than testing all of the metal roof sections. While Phelps' opinions are properly supported and admissible, Hanover's own argument makes it definitive that Hanover cannot carry its burden to prove that the damage is only cosmetic. Hanover has the burden to prove that an exclusion applies. Yet, Hanover admits that no one can testify regarding the Roofs weakened state — or not weakened state which is Hanover's burden — without performing testing on the specific Roof sections they intend to testify about. Hanover's expert has performed *no* testing on the strength of the roof metals and therefore cannot opine that they

are as strong as they were prior to the hail impacts. Accordingly, Hanover has no support to prove that the cosmetic damage exclusion applies.

In summary, the Parties agree that the hail damage caused indentations to the metal Roofs. This damage is generally covered under the Policy. However, Hanover argues that the cosmetic damage exclusion applies. Therefore, Hanover must prove that the Roofs continue to serve as a barrier to the elements to the same extent they did before the hail damage occurred. Hanover has failed to show that the Roofs have not been weakened by the hail impacts such that the Roofs currently resist wind, hail, and snow to the same extent as they did prior to the hail damage. For these reasons, the Court should deny Hanover's Motion for Summary Judgment and instead grant the Schools' Motion for Declaratory and Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

Plaintiff has stated the relevant facts in its cross Motion for Summary/Declaratory Judgment and incorporates these facts by reference in its opposition to Defendant's Motion for Summary Judgment. (Doc. 23).

ARGUMENT

I. LEGAL STANDARD FOR POLICY INTERPRETATION

"The interpretation of an insurance policy is one of law." *Metro. Prop. & Cas. Ins. Co. & Affiliates v. Miller*, 589 N.W.2d 297, 299 (Minn. 1999). "When interpreting an insurance contract, we give words their natural and ordinary meaning, and we resolve ambiguities in favor of the insured." *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 397 (Minn. Ct. App. 2010) (citing *Am. Family Ins.*

Co. v. Walser, 628 N.W.2d 605, 609 (Minn. 2001)). The Court must perform the legal interpretation of the insurance policy and apply it to the facts of the case to determine if summary judgment is appropriate. *Jensen v. United Fire & Cas. Co.*, 524 N.W.2d 536, 538 (Minn. Ct. App. 1994). Additionally, Minn. Stat. § 555 permits the Court to declare the rights of the parties under a written instrument, even if immediate and final relief may not be granted.

While interpreting an insurance policy the court must construe any ambiguous language against the drafter and in favor of the insured. *See QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass’n*, 778 N.W.2d 393, 397 (Minn. Ct. App. 2010) (ambiguous language is resolved in favor of the policyholder); *see also Sterling State Bank v. Virginia Surety Co.*, 285 Minn. 348, 353-54, 173 N.W.2d 342, 346 (1969) (holding that courts are to avoid an interpretation of an insurance policy that will forfeit the rights of the policyholder unless such intent is manifest in “clear and unambiguous” language). Further, the Minnesota Supreme Court has held that it “will avoid an interpretation that will forfeit the rights of the insured under the policy, unless such an intent is manifest in ‘clear and unambiguous’ language.” *Nathe Bros. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000).

While the insured bears the burden of proof to establish a prima facie case for coverage, the insurance company has the burden “to prove the applicability of an exclusion under the policy as an affirmative defense.” *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 617 (Minn. 2012); *See also, Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989) (“An insurer has the burden of proving a policy exclusion

applies.”) Further, the application of insurance policy language must comport with the reasonable expectations of a reasonable insured in the same situation. *Atwater Creamery Co. v. W. Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985) (“We have used the reasonable-expectations-of-the-insured analysis to provide coverage where the actual language interpreted as the insurance company intended would have proscribed coverage.”)

II. REDUCTION OF THE ROOFS’ ABILITY TO RESIST HAIL, SNOW LOAD, AND WIND FORCE IS NOT COSMETIC DAMAGE.

The central issue to this case is the application of the Cosmetic damage exclusion. The Policy covers damage caused by hail but excludes hail damage if “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.” (Doc 27-3 at 83). The outcome of this case rests primarily on the Court’s interpretation of this exclusion. Accordingly, the Court must apply the Policy interpretation rules identified above and determine if the exclusion applies to this case. Hanover argues that the cosmetic damage exclusion applies so long as the Roofs do not have an immediate water leak. The Schools argue that the exclusion does not apply when the roofs suffer an immediate weakening such that they cannot resist wind, snow, or hail to the same extent as they did before the Roofs sustained the hail damage.

The policy interpretation rules require the Court interpret the Policy exclusion narrowly to exclude only the damage expressly stated in the exclusion. The Policy does not state that cosmetic damage is all damage that does not immediately affect a roof’s ability

to shed water. Rather, cosmetic damage is only damage that does not reduce a roof's ability to serve as a barrier to "the elements to the same extent as it did before the" damage. Hail, wind, and snow are within the definition of "the elements." Further, the term, "to the same extent" means that it must function to the same degree as it did before, rather than that it must immediately fail. Therefore, if the Roofs could previously withstand impacts from 2" hail, 3' of snow, and winds up to 90 mph but will now fail due to these same events, then the Roofs currently fail to protect against "the elements to the same extent." Said another way, the Roofs now will fail with smaller size hail, lower wind speeds, and less snow load than the Roofs withstood prior to the hail damage.

Hanover's reliance upon court cases from other states that address a theory of building up dirt in the hail dimples to someday weaken the structure are unhelpful to assessing the current issues. The Schools' argument is not that the roof will deteriorate but that the Roofs have been instantly weakened by the hail impacts. Further, the interpretation of Policy language is a state issue and Minnesota has a well-established precedent of interpreting policy exclusions narrowing and against the drafter.

For example, the Minnesota Court of Appeals recently reiterated that time deadlines in a Policy cannot be applied to bar coverage for an insured unless the Policy explicitly states the intent to serve as a bar to coverage. *LaPalme v. Auto-Owners Ins. Co.*, No. A24-1511, 2025 WL 1638250, at *5 (Minn. Ct. App. June 9, 2025) ("despite stating that 'notice of the loss or damage must be given to [Auto-Owners] or [its] agency within one year after the date the loss or damage occurred,' the notice provision in Auto-Owners' insurance policy does not contain specific language stating that a failure to give timely notice will be

fatal to the LaPalmes' rights or that providing notice within a year was a condition precedent to coverage.") While not directly addressing the issues in the current matter, the recent Court of Appeals decision shows the overall intent of Minnesota Courts to apply Policy restrictions narrowly and interpret the Policy in favor of coverage.

Hanover applies the inverse of the well-established policy interpretation principles to read the policy language in a light most favorable to itself and injects meanings and words that do not appear in the Policy. Hanover argues that the cosmetic damage exclusion does not include language that says the damage could affect the Roofs' ability to shed water in the future and therefore the Policy must mean that water would need to enter the building immediately after the damaging event to be more than cosmetic damage. This is backwards. The Policy does not state that the failure to protect from the elements means there must be an immediate water intrusion. Since the Policy is construed against the drafter and the language is contained in an exclusion which must expressly state an intent to remove coverage that would otherwise be afforded, the Policy exclusion cannot be artificially expanded as Hanover prays for.

The reasonable interpretation — and reasonable expectations of the insured — is that damage that weakens a roof system such that it will now fail due to weather events that the roof previously would have withstood is not considered merely cosmetic damage. This reduction in a roof's ability to withstand the elements is a current and real effect on the roof that is not simply visual and cosmetic.

For example, if a tire gets a nail in it, the nail may still plug the hole for a while and the tire would not immediately go flat. However, the nail must be addressed and fixed

because the tire will inevitable go flat. No one can predict exactly when the tire will go flat but it is known that the tire is compromised and will fail sooner than a tire without a nail in it. Just because the tire is not immediately flat does not mean that the nail is simply cosmetic damage.

In the current matter, the Roofs have been weakened and they will fail from weather events that would not have caused a the Roofs to fail prior to them being hail dented. It is not certain when the next significant wind storm, hail storm, or snowfall will occur. Additionally, the exact amount of wind, snow, or hail size that will cause a failure to these Roofs is unknown, as it is for even a new roof. Accordingly, no one can know exactly what amount of these elements will cause the Roofs to fail now. But what is known is that whatever the hail, wind, or snow amount that will cause the Roofs to fail is less now because of the hail damage the Roofs sustained.

Inevitably, and rightfully so, when the Roofs fail in the future from wind, snow, or hail that would not have caused a failure but for the Roofs being weakened by the current hail impact damage, the insurer at the time of the next event will deny the claim as being the result of this prior claim. The next insurance company should not be required to pay for a roof failure that was ultimately the result of the damage that occurred under the Hanover Policy. This is why the damage caused under the current claim must be addressed now and cannot be shifted to the next unsuspecting insurer.

Ultimately, the only reasonable way to interpret the exclusion is that damage that weaken the Roofs metal is more than merely cosmetic damage. Because the Roofs' have been weakened by the hail damage, the hail damage has caused damage to the Roofs that

does not fall under the cosmetic damage exclusion. Therefore, the Court should grant the Schools' Motion for Summary and Declaratory Judgment.

III. HANOVER HAS FAILED TO PROVE THAT THE DAMAGE TO THE ROOFS IS COSMETIC.

Hanover's entire argument for application of the cosmetic damage exclusion is misplaced because it is based upon an assumption that so long as the Roofs do not instantly leak water, the damage is classified as cosmetic. Hanover makes no effort to prove that the Roofs are not weakened and less able to resist the elements. Quite the opposite, Hanover states that it is not possible to opine on the strength of the Roofs without performing testing on the metal, which Hanover did not do.

Hanover's expert, Fulmer, acknowledges that the hail impacts causes the metal to be weaker. (Doc. 27-7 at 8 – Fulmer Dep. 31:15-18). Fulmer identifies that both Roofs exhibited “[w]idespread sporadic indentations.” (Doc. 27-6). Fulmer also states that if the Roofs are hit by hail again in one of these numerous indentations that the Roofs are more likely to rupture. (Fulmer Dep. 31:15-18). Fulmer states that the metal only has a certain amount of plasticity and since the metal is dented, some of that plasticity is already used such that the dented Roofs can absorb less force now than the non-dented portions of the Roofs. (*Id.* 29:20-31:18). This is consistent with Phelps' laboratory testing which also found the dented metal to be weaker than the non-damaged portions of the metal Roofs.

Fulmer avoided acknowledging that the weakening of metal at each of the numerous indentations would reduce the Roofs' ability to withstand wind and snow load. However, he acknowledged that there is testing he could perform to determine the Roofs' strength

and resistance to wind, snow load, and hail impacts, but he did not do that testing. Ultimately, Hanover cannot prove that the Roofs are able to serve as a barrier to the elements to the same extent as it did prior to the hail damage. Hanover fails to show that the cosmetic damage exclusion applies.

A. Hanover Acknowledges That Testing Is Required To Prove The Roofs' Current Ability To Resist The Elements To the Same Extent As It Did Prior To The Hail Damage And That Hanover Did Not Do The Required Testing.

Hanover argues that Phelps should be excluded from testifying regarding the weakened state of the Roofs because Phelps only tested some metal parts from the Elementary School Roof. Hanover argues that Phelps cannot use this information to apply it to the large metal portions of the Elementary School Roof or to the High School Roof. In making this argument, Hanover inadvertently admits that its own expert, Fulmer, cannot testify to the strength of Roofs because Hanover did *no* testing on the Roofs at all.

Hanover states “[b]ecause 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.” (Doc 26 at 19). Hanover acknowledges that an expert cannot provide an opinion on whether or not the roof structure has been weakened without performing testing. Phelps did perform testing on samples of the roof metals and used those findings as examples for the other nearby metal portions of the Roofs, reasoning that the damage from the test section is indicative of the other portions. (Doc. 27-5 at 25 – Phelps

Dep. 94:3-95:14). However, Fulmer, performed no testing and therefore cannot carry Hanover's burden of proving the exclusion applies by proving the damage is only cosmetic.

Fulmer stated "[w]e did not do any form of laboratory testing. Our observations were visual in nature" and reiterated "[w]e did not do any form of laboratory testing." (Fulmer Dep. 29:13-14, 19). Accordingly, by Hanover's own logic, Fulmer cannot testify that the metal on the Roofs have not been significantly weakened. Hanover has the burden to prove that the damage to the Roofs is only cosmetic. Without testing the Roofs, Hanover cannot carry its burden. Fulmer simply looked at the Roofs and stated that the Roofs' ability to serve as a barrier to the elements was not affected. Fulmer makes this blind assertion without support and which logically contradicts Fulmer's admission that the dents weaken the metals at the impact points.

Phelps testifies that "a visual inspection of [the Roofs] was not a suitable way to proceed and that you really needed to collect samples and do some analysis of those samples, which is what led me to – to adopt three different ASTM standard test methods." (Doc. 27-5 at 7 – Phelps Dep. 23:10-24). Phelps went on to state that "the big issues here, is that we've done an extended amount of testing on this, and we are being compared to an engineering firm that not only have they done zero testing, they didn't even bother to collect a sample." (*Id.* 28:9-14). Hanover now agrees with Phelps that in order to opine on the strength of the metal Roofs, you must do testing. However, Fulmer did not do any testing and therefore Hanover cannot carry its burden to prove the exclusion applies.

Fulmer's contradictory statements and lack of laboratory testing shows that Hanover has no support for its contention that the damage is only cosmetic. In reality, the damage

did weaken the metal Roofs surfaces, reduced how long the Roofs will last, and reduced the degree to which the Roofs can currently protect from wind, snow, and hail. Hanover cannot prove otherwise, as is its burden, and therefore the cosmetic damage exclusion does not apply.

B. Phelps' Opinions Are Admissible.

Phelps sampled metal components of the Roofs to compare impacted portions to non-impacted portions. Phelps took samples from sections made of the same metal material but were easier to remove and would not risk further compromising the Roofs, especially the large million-dollar sections of the Roofs. (*Id.* 94:1 – 95:14). Phelps took samples from smaller metal roof surfaces, tested them, and reasoned that the other metal parts of the same roof and of the neighboring roof (the high school and elementary schools share a parking lot and are a stone's throw from each other) are of the same material and suffered the same damaging effects.

Phelps is highly qualified, performed standardized testing on the roof materials — the Rockwell Hardness test, using ASTM standards — and provided all of the underlying data for his conclusions. Hanover's primary issue with Phelps' testimony is Hanover's contention that testing on the same type of metal from multiple parts of the roof, all of which were found to be weakened by hail, is not indicative of the other metal on the same or nearby roof also being weakened. Not every square inch of the metal Roofs needs to be tested to determine the state of the Roofs. Sample testing is common and an accepted practice for all sorts of engineering tests. The results of the samples certainly provide

additional reliable information to a factfinder which will aid its determination of the disputed facts.

Hanover's alternative issue with Phelps' opinion is that it does not matter because the opinion is based upon the Roofs failing in the future while the cosmetic damage exclusion language is based in the present. Hanover mischaracterizes the Schools' argument as being that the Roofs are fine now but will deteriorate and fail later. As discussed in the coverage section of the brief, the damage that the Schools claim is current damage and not future damage. The hailstorm caused an instant weakening of the Roofs. Prior to the hail impacts, the Roofs could withstand hail, wind, and snow of a certain amount. Instantly after the hail damage, the Roofs can withstand less of those elemental forces before failing.

Similarly, Hanover takes issue with Phelps' inability to provide a specific day, month, or year the Roofs will fail. It is not a requirement of the Policy to identify when the Roofs will have a catastrophic failure. The Schools have shown that the Roofs are weaker and are less able to defend from the elements. However, the burden is on Hanover to show that the Roofs are currently able to defend from the elements, "to the same extent," meaning that the Roofs currently protect against the same amount of snow load, the same wind force, and the same hail impacts, as the Roofs did before the hail damage. We know from Phelps' testing, Phelps' deposition testimony, and Fulmer's admissions at his deposition that the metal Roofs are weaker and do not protect against the elements, specifically hail, to the same extent as they did before.

Ultimately, Hanover has failed to prove that the Roofs currently resist wind, hail, and snow to the same extent as it did before the Loss. Hanover acknowledges that laboratory testing is necessary to test the Roofs' strength and that Hanover chose not to do this testing. Therefore, Hanover cannot prove that the cosmetic damage exclusion applies. Because the cosmetic damage exclusion does not apply to bar coverage for this matter, the Court should deny Hanover's Motion for Summary Judgment and grant the Schools' Motion for Declaratory and Summary Judgment.

CONCLUSION

The cosmetic damage exclusions does not exclude damage that causes a change to the Roofs' ability to protect from the elements to the same extent as they did prior to the hail damage. The hail damage has weakened the Roofs and made them less able to protect from wind, hail, and snow. Hanover has failed to prove that the damage to the Roofs is only cosmetic and cannot do so without laboratory testing that it did not perform. Hanover has failed to prove that an exclusion applies to bar recovery for the hail Loss. For the reasons stated herein, Cannon Falls Schools respectfully request the Court deny Hanover's Motion for Summary Judgment and grant the Schools' Motion for Declaratory and Summary Judgment.

HELLMUTH & JOHNSON

Dated: July 21, 2025

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