

Case No. 24-3356

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Cincinnati Insurance Company,

Plaintiff – Appellee,

v.

Rymer Companies, LLC a/k/a Rymer Companies, Inc.; Cannon Falls Mall, Inc.,

Defendants – Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 19-cv-01025 (ECT/TNL)**

APPELLEE’S BRIEF

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APPELLEE'S CORPORATE DISCLOSURE

I. Pursuant to Rule 26.1 of the Rules of Appellate Procedure and Local Rule 26.1A, Appellee The Cincinnati Insurance Company ("Cincinnati") hereby submits this Corporate Disclosure Statement and states as follows:

1. Cincinnati does not have a parent company.
2. The Vanguard Group, Inc. owns 11.29% of Plaintiff Cincinnati Insurance Company, Inc., as of December 31, 2018.

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RESPONSIVE STATEMENT OF THE ISSUES

1. Is the 2023 Summary Judgment Order denying Rymer's Motion appealable?

Apposite Cases:

Lopez v. Tyson Foods, Inc., 690 F.3d 869 (8th Cir. 2012).

Metro. Life Ins. Co. v. Golden Triangle, 121 F.3d 351 (8th Cir. 1997).

N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC, 761 F.3d 830 (8th Cir. 2014)

2. Did the district court err when it granted Cincinnati's 2024 Summary Judgment Motion to confirm the appraisal award?

Apposite Cases:

Grudem Bros. Co. v. Great W. Piping Corp., 213 N.W.2d 920 (Minn. 1973).

St. Paul Fire & Marine Ins. Co. v. Eldracher, 33 F.2d 675 (8th Cir. 1929).

Fenske v. Integrity Prop. & Cas. Ins. Co., No. 22-cv-679 (JRT/DJF), 2023 WL 186595 (D. Minn. Jan. 13, 2023).

RESPONSIVE STATEMENT OF THE CASE

As this Court is aware, this case centers on a dispute about the amount of damage to Rymer's Mall's roof that was caused by a 2018 storm. The procedural history is extensive but summed up as concisely as possible. After suit was filed, an appraisal panel awarded \$23,266 for "Mall roof repair." [CIC App. at p. 1; R. Doc. 33-3 at p. 1; CIC Add. at p. 1.] After appraisal, Rymer applied for a building permit proposing the following repairs:

Tornado damage repair – remove metal gravel stop metal. Install new hot asphalt SBS modified at leading-edge under gravel stop, remove 100 SQ FT of existing roof (built-up roof with ballast, insulation) at gravel stop junction and flash new materials into existing saturated roof system.

[CIC App. at p. 4; R. Doc. 34-1 at p. 6; CIC Add. at p. 4.] The County (building official) denied Rymer's permit application because the Mall's roof's generalized "wet" or "saturated" condition meant the localized repair of the storm-damaged metal edge cap flashing authorized by the Panel could not be done under the building code without replacing the entire roof. [CIC App. at p. 4; R. Doc. 34-1 at p. 6; CIC Add. at p. 4.] According to Rymer, the County's denial of its permit application entitled it to additional

coverage under the Cincinnati policy's Ordinance or Law Endorsement. [R. Doc. 32 at p. 1.] Cincinnati disagreed. [R. Doc. 55 at p. 8.]

Dissatisfied with this small award, Rymer sought clarification of it from the Appraisal Panel. [R. Doc. 33-1 at p. 162.] And not happy with the Panel's response, or Cincinnati's disagreement about additional coverage, Rymer sought judicial relief. The parties brought cross-motions for summary judgment in 2021. [R. Doc. 31 at p. 1; R. Doc. 48 at p. 1.] On May 13, 2021, the district denied Rymer's Motion and granted Cincinnati's finding that Rymer did not meet its burden to show that the storm caused damage that triggered enforcement of the code. [R. Doc. 64 at p. 2.]

Not happy with that result, Rymer appealed. [R. Doc. 66 at p. 1.] On July 28, 2022, this Court reversed entry of judgment for Cincinnati and remanded the case to the district court. [Rymer App. at p. 2; R. Doc 77 at p. 2.] On remand, the parties exchanged written discovery to resolve remaining fact issues about whether the storm caused damage that resulted in enforcement of the building code. [Rymer App. at p. 13-14; R. Doc. 86 at p. 2-3.] After

discovery on remand, the parties filed renewed cross-motions for summary judgment. [R. Doc. 91 at p. 1; R. Doc. 96 at p. 1.]

On June 20, 2023, the district court denied the parties' 2023 Motions, found the Appraisal Award ambiguous, and ordered the parties to resubmit the matter to the Panel to clarify the Award. [Rymer App. at p. 146-47; R. Doc. 114 at p. 8-9; Rymer Add. at p. 10-11.] Specifically, the Panel was to clarify if: 1) the loss included any repair or involvement of the roof itself; 2) repairing the flashing necessitated some intrusion onto the surface of the roof; and 3) if so, the cost to replace the entire Mall roof. [Rymer App. at p. 146-47; R. Doc. 114 at p. 8-9; Rymer Add. at p. 10-11.]

Language drafted by Rymer, and agreed to by Cincinnati, was incorporated into an "Appraisal Award Clarification Form." [CIC App. at p. 2-3; R. Doc. 116 at p. 4-5; CIC Add. at p. 2-3.] The Panel issued its Clarification on October 20, 2023. [CIC App. at p. 3; R. Doc. 116 at p. 5; CIC Add. at p. 3.] Not surprisingly, Rymer was not satisfied with the Clarification and sought leave to depose the Panel members. [R. Doc. 120 at p. 1-2.] Leave was granted based on implicit suspicions of nefarious actions of the Panel.

[Rymer App. at p. 91, 94; R. Doc. 123 at p. 5, 8.] The parties deposed Kevin Baker, Rymer's appraiser, Jeff Nonhof, Cincinnati's appraiser, and Kurt Ehlers, the umpire. [Rymer App. at p. 151; R. Doc. 143 at p. 4; Rymer Add. at p. 15.]

Following the unprecedented opportunity afforded Rymer to question and second-guess the Panel's Award, not to mention the appraisal process itself, in 2024, Cincinnati moved to confirm the Appraisal Award via Summary Judgment Motion. Rymer did the same. [R. Doc. 135 at p. 1; R. Doc. 137 at p. 1.]

On October 21, 2024, the district court granted Cincinnati's Motion to Confirm the Appraisal Award. [Rymer App. at p. 149, 156; R. Doc. 143 at p. 2, 9; Rymer Add. at p. 13, 20.] In so doing, the district court determined that the Clarification rendered unambiguous the Appraisal Award. [Rymer App. at p. 153; R. Doc. 143 at p. 6; Rymer Add. at p. 17.] Therefore, it was undisputed that the Award did not cover the scope of repairs in Rymer's building permit application and, as a result, Rymer could not meet its burden to prove that the storm caused damage that triggered enforcement of the building code. [Rymer App. at p. 153; R. Doc.

143 at p. 6; Rymer Add. at p. 17.] Absent a motion to vacate, the district court confirmed the Award and granted Cincinnati's Motion. [Rymer App. at p. 153-55; R. Doc. 143 at p. 6-8; Rymer Add. at p. 17-19.] Judgment was entered on October 22, 2024. [Rymer App. at p. 144; R. Doc. 144 at p. 1; Rymer Add. at p. 51.] Again, Rymer was not happy with the result. This appeal followed.

SUMMARY OF THE ARGUMENT

It is time that the Appraisal Award be given the presumption of validity it deserves under Minnesota law. Rymer has been given every possible opportunity to question its validity, and this Appeal does not afford another one. Rymer's appeal fails to set forth legal bases, analysis or other persuasive legal reasoning upon which this Court can continue to allow Rymer to re-litigate, add-to, change, second-guess or otherwise call into question the meaning of Award, the Clarification, the amount of loss, or the intent of the members of the Appraisal Panel. More importantly, it is now undisputed that Rymer failed to meet its burden to show that the storm caused damage which triggered the enforcement of the building code. Indeed, it is undisputed that the repairs requested in Rymer's permit application misstated the scope of damage contemplated in the Award. Rymer's 2024 Summary Judgment was its remedy for the denial of its 2023 Summary Judgment Motion. This appeal is not. Regardless, the district court correctly denied Rymer's 2024 Motion and granted Cincinnati's and the October 21 and 22, 2024 order and judgment should be affirmed.

ARGUMENT

I. Standard of Review

The district court's order denying Rymer's 2023 Summary Judgment Motion is not appealable. Generally, denial of a summary judgment motion is interlocutory and not appealable after trial and judgment. *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 837-38 (8th Cir. 2014) (citing *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994)). After trial, "[t]he question of whether a party has met its burden must be answered with reference to the evidence and the record as a whole, rather than by looking to the pretrial submissions alone." *Johnson Int'l*, 19 F.3d at 434. Thus, the proper redress for an argument denied at summary judgment is not through appeal of that denial, but "through subsequent motions for judgment as a matter of law and appellate review of those motions, if they were denied." *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1189 (8th Cir. 1999).

II. The district court's denial of Rymer's 2023 Summary Judgment Motion is not appealable because final judgment was entered in 2024.

Rymer seeks reversal of the district court's decision denying its 2023 Summary Judgment Motion. [Rymer App. at p. 139-47; R. Doc. 114 at p. 1-9; Rymer Add. at p. 3-11.] However, final judgment, on the merits, was entered on June 22, 2024, when the district court entered judgment as a matter of law. [Rymer App. at p. 157; R. Doc. 144 at p. 1; Rymer Add. at p. 21.] Therefore, the denial of Rymer's 2023 Summary Judgment Motion is not reviewable by this Court.

Denial of summary judgment is not appealable after a final judgment. *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 875 (8th Cir. 2012); *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997) (citing *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992) ("Even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law and review of those motions if they were denied.")).

Rymer's redress was its subsequent summary judgment motion. The scope of the Award was briefed extensively as a part of the 2024 cross-motions for summary judgment. [See R. Doc.

135, 138, 139 and 140.] As was the scope and meaning of the Clarification. By and large, Rymer continued to make the same arguments in its 2024 Motion as it made in its 2021 and 2023 Motions. That is, its building permit application was consistent with the Appraisal Award. The Award covered repairs into the field of the roof, which the County rejected, so it was entitled to additional coverage under the Ordinance or Law Endorsement.

Consequently, this Court is not the place for Rymer to seek yet another try for coverage. Rymer's redress was the discovery ordered by the district court, the subsequent motions, and the opportunity to take the panel members' depositions, which the district court granted at Rymer's request. It can easily be said that the issues presented in Rymer's 2023 Summary Judgment Motion have been answered with reference to the evidence and the record as a whole. *White Consol.*, 165 F.3d at 1189. It is the appeal of the district court's decision to grant Cincinnati's 2024 Summary Judgment Motion from which Rymer is entitled to seek relief from this Court since Rymer's arguments were properly addressed in the resolution of Rymer's 2024 Summary Judgment Motion.

Therefore, Cincinnati requests that this Court decline to review the district court's denial of Rymer's 2023 Summary Judgment Motion, and accordingly, affirm the judgment entered. *Metro. Life Ins. Co.*, 121 F.3d at 356.

A. The district court did not misinterpret this Court's remand.¹

The foundation of Rymer's appeal is an assumption about this Court's holding in *Cincinnati Insurance Co. v. Rymer*. According to Rymer, this Court ruled, as a matter of law, that Rymer met its burden to prove that the storm caused damage to the Mall's roof, which triggered the County to enforce the building code, requiring Cincinnati to pay for the cost to replace the Mall's roof under the policy's Ordinance or Law Endorsement. Rymer's assumption lacks legal bases, authority and analysis, and is therefore, wrong.

"An appellate court may remand with directions to enter summary judgment on an appellant's unsuccessful cross-motion for summary judgment where there is no dispute as to the facts,

¹ These arguments are included only to the extent necessary should this Court decide to consider Rymer's appeal of the district court's denial of Rymer's 2023 Summary Judgment Motion.

which would justify judgment for the appellant.” *First Nat’l Bank v. Lincoln Nat’l Life Ins. Co.*, 824 F.2d 277, 281-82 (3d Cir. 1987) (appellate courts are free to enter an order directing summary judgment in favor of the appellant when the facts are undisputed) (quoting 28 U.S.C. §2106). However, usually, when an appellate court reverses a grant of summary judgment, it does so because there is a genuine issue of material fact that precludes such a judgment. *First Nat’l Bank*, 824 F.2d at 281; *see also Herll v. Auto-Owners Ins. Co.*, 879 F.3d 293, 296 (8th Cir. 2018) (“we vacate the judgment and remand the case with directions to resubmit the award to the appraisal panel.”).

The district court concluded that this Court did what is done in most cases, reversed summary judgment for Cincinnati because there were unresolved fact issues about whether the storm caused the building code to apply.² In *First National Bank of Pennsylvania*

² The distinction between a general and a limited remand has been well-recognized in the federal courts. *U.S. v. Campbell*, 168 F.3d 168 F.3d 263, 265 (6th Cir. 1999). “A limited remand explicitly outlines the issues to be addressed by the district court and creates a narrow framework within which the district court must operate.” *Id.* A general remand lacks explicit limitation, and does not limit

v. Lincoln National Life Insurance Co., the bank was the beneficiary of a life insurance policy issued by the insurer. The bank submitted a claim following the death of the policy holder. 824 F.2d at 278. The insurer refused to pay claiming that coverage had lapsed for failure to pay the premiums. *Id.* After discovery, the parties filed cross-motions for summary judgment. The district court granted summary judgment for the bank. The insurer appealed. *Id.* at 280.

On appeal, the dispositive issue was whether the policy provision requiring the premium to be paid monthly had been modified. *Id.* The Third Circuit analyzed the factual record, which it determined to be “uncontroverted.” *Id.* at 281. Based on the “uncontroverted” and “substantial” evidence, the court concluded that the insurer was entitled to “judgment as a matter of law,” because the policy had been modified, reversed summary judgment for the bank, and remanded with directions to the district court to enter judgment for the insurer. *Id.* at 281-82.

the district court’s review, instead allowing a *de novo* review of the matter. *U.S. v. Cornelius*, 968 F.2d 703, 705-06 (8th Cir. 1992).

Unlike the Third Circuit in *First National v. Lincoln Insurance*, this Court made no mention of the facts being “uncontroverted” or “undisputed.” [See Rymer App. at p. 1-11; R. Doc. 77 at p. 1-11.] This Court did not find that the facts were in any way definitively resolved. Indeed, this Court specifically noted that facts as to causation and the application of the building code needed further development. [Rymer App. at p. 3 n. 4, p. 10-11 n. 11; R. Doc. 77 at p. 3 n. 4, p. 10-11 n. 11.] Also, unlike the Third Circuit in *First National*, this Court’s limited factual analysis was not done within the framework of the summary judgment standard.³ Without

³ The legal relief sought in 2021 cross-motions was not reciprocal. Cincinnati’s Motion asked the district court to find that the Award was conclusive as to the cause and amount of loss resulting from the storm and requested that Rymer’s counterclaims be dismissed as a matter of law. That was the Motion granted by the district court and appealed by Rymer. On the other hand, Rymer’s Motion sought coverage, as a matter of law under the Ordinance or Law Endorsement. Rymer argued that the appraisal panel’s award triggered the enforcement of the building code, as a matter of law. Applying the proper legal standard required this Court to consider which of the parties’ cross-motions was being analyzed and then review the evidence in favor of the non-moving party. This Court did not do that, instead broadly affording evidentiary favor to Rymer, overlooking that it was not only Rymer’s Motion that requested coverage, but it is Rymer’s burden to prove coverage under the Endorsement. *Eng’g Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 705 (Minn. 2013).

findings of fact based on undisputed evidence, there was no basis to resolve the coverage issue in Rymer's favor. No doubt, this was acknowledged in footnote 11:

We hold only that Cincinnati is not entitled to summary judgment at this stage on the basis that the damage from the tornado did not result in enforcement of the Building Code § 1511.3.1.1 and that it was improper to deny summary judgment to Rymer based on this same reasoning. We do not address what facts may or may not be prove on remand and what effect, if any, those findings may have on causation or the application of § 1511.3.1.1.

Cinci. Ins. Co. v. Rymer Cos. LLC, 41 F.4th 1026, 1032 n. 11 (8th Cir. 2022); [Rymer App. at p. 11 n. 11; R. Doc. 77 at p. 11 n. 11.].

Considering the remand in total, this Court treated Rymer's first appeal like most when it reversed summary judgment for Cincinnati, holding only that fact issues precluded a finding as a matter of law that the storm did not result in enforcement of the code. Instead, remanding, generally, for "further proceedings, including any necessary fact finding, consistent with this opinion." *Id.* at 1032; [Rymer App. at p. 11; R. Doc. 77 at p. 11.]

Accordingly, the district court's interpretation of this Court's remand was logical and appropriate. Its decision about whether the

storm caused damage, which triggered enforcement of the building code, was consistent with this Court's opinion. For these reasons, the district court's denial of Rymer's 2023 Summary Judgment Motion should be affirmed (assuming it is considered).

B. Whether the storm caused damage that triggered enforcement of the building code is moot.

On remand, the parties conducted limited discovery to address three issues:

- (1) whether the requested repairs were a roof recover under the building code;

Cincinnati Ins. Co., 41 F.4th at 1028 n. 4; [Rymer App. at p. 3 n. 4; R. Doc. 77 at p. 3 n. 4.]

- (2) any other facts relevant to "causation or the application of §1511.3.1.1; and

Cincinnati Ins. Co., 41 F.4th at 1032 n. 11; [Rymer App. at p. 11 n. 11; R. Doc. 77 at p. 11 n. 11.]

- (3) the amount of additional costs imposed by §1511.3.1.1.

Cincinnati Ins. Co., 41 F.4th at 1032 n. 9; [Rymer App. at p. 10 n. 9; R. Doc. 77 at p. 10 n. 9.] Rymer did not produce any new evidence or information. Cincinnati produced Affidavits from

Umpire Kurt Ehlers and Appraiser Jeff Nonhof. The 2023 cross-motions for Summary Judgment followed.

1. The district court correctly determined that Rymer failed to meet its burden after remand discovery.

It is Rymer's burden to prove it is entitled to additional coverage under the policy's Ordinance or Law Endorsement. *Eng'g Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 705 (Minn. 2013). Rymer did not produce facts sufficient to prove, as a matter of law, that the storm caused damage that triggered enforcement of the building code. Rather, Rymer's appeal lacks legal authority, analysis, and bases.

The repairs "requested" on Rymer's building permit application were designed to invite denial to manufacture additional coverage. According to Rymer, its mall's roof must be fully replaced (and Cincinnati must pay for it) because it is undisputed that the permit application requested a roof recover. However, Rymer improperly conflates the Award with what its contractor (Phil Simon) wrote in the permit application. Plainly, the County did not order a roof recover. The County denied Rymer's permit application, as written.

These issues were briefed extensively and argued before the district court, further showing that this Court is not the proper venue for their review. [Rymer App. at p. [1-63] 15-78; R. Doc. 152; *see also generally* R. Doc. 92; R. Doc 101.] Nor is it Cincinnati's burden to prove that Rymer is entitled to coverage or that the storm caused damage that triggered code enforcement. That is Rymer's burden under Minnesota law. *Bolduc*, 825 N.W.2d at 705.

With no new evidence and no legal support, the district court's decision should be affirmed (if it is considered).

2. Rymer's 2023 Summary Judgment Motion was not supported by admissible evidence.

Rymer did not produce any admissible evidence to meet to its coverage burden or otherwise prove that the storm caused damage that triggered enforcement of the building code. Rymer simply relied on information already considered, specifically, Kevin Baker's unsworn statements in an email to Rymer's counsel. That email was not admissible evidence then. It is not admissible evidence now. And it cannot support a motion for summary judgment. *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 817 (8th Cir.

2010) (citing *Brooks v. Tri-Systems, Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005)). For this reason, too, Rymer did not meet its burden and the district court's decision should be affirmed.

The Supplemental Affidavit of Phil Simon is not admissible evidence either. It was never considered by the district court and is not part of the record on appeal.⁴ An appellate court can only consider the record and facts before the district court. *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 559-60 (8th Cir. 2008) (citing *Huelsman v. Civic Ctr. Corp.*, 873 F.2d 1171, 1175 (8th Cir.1989)); see also Fed. R. App. P. 10(a). Rymer did not produce Phil Simon's Supplement Affidavit until May 12, 2023, simultaneously with its Memorandum Opposing Cincinnati's 2023 Summary Judgment Motion.⁵ Cincinnati objected to this untimely and prejudicial disclosure on several bases. [CIC App. at p. 6-7; R. Doc. 110 at p. 1-2 (discussing R. Doc. 107 and R. Doc. 108); CIC

⁴ Cincinnati will be filing a Motion to Strike the Supplemental Affidavit of Phil Simon contemporaneously with this Brief.

⁵ The parties agreed to a modified briefing procedure for their competing 2023 summary judgment motions. Neither party was afforded a reply brief.

Add. at p. 6-7.] However, the district court did not rule on them and did not consider any of the information contained in Simon's Supplemental Affidavit. Therefore, Simon's Supplemental Affidavit is not a part of the appellate record and cannot be considered now as a basis to reverse the district court's orders.

Nor may this Court consider Simon's Supplemental Affidavit because it contains information which Rymer could have presented to the district court but did not. *Hill v. Trustees of Ind. Univ.*, 537 F.2d 248, 251 (7th Cir. 1976). Phil Simon testified at the appraisal hearing on November 9, 2020. All the information in his Supplemental Affidavit has been available to Rymer since then, if not before. After all, Phil Simon is Rymer's expert. Despite its obstinance during post-remand discovery, Rymer was certainly aware of the remaining issues on remand, i.e., facts relevant to causation and the application of the building code and could have disclosed the information from Simon then. Rymer didn't. If it had, Cincinnati would have deposed him. That's why he wasn't deposed.

Instead, Rymer submitted Simon's Supplemental Affidavit at a time that prohibited Cincinnati from offering any meaningful

response to it. For this reason, too, Simon's Supplemental Affidavit should not be considered part of the appellate record and cannot be considered by this Court to reverse the district court's orders.

3. This Court cannot weigh evidence or determine credibility.

Most of Rymer's Brief requests appellate relief via an implicit invitation to weigh the evidence in its favor. However, this Court does not make determinations of credibility; nor does it weigh the evidence or draw inferences from it. *Cottrell v. Am. Fam. Mut. Ins. Co., S.I.*, 930 F.3d 969, 971 (8th Cir. 2019). Rymer's Appeal first invites this Court to weigh the evidence in its favor by claiming that the information in Simon's Supplemental Affidavit shows that a full roof replacement is required. Never mind the inadmissibility of that Affidavit. Rymer claims that the information in Simon's Supplemental Affidavit is both credible, probative, and dispositive proof that the "requested repairs were a roof recover," thereby entitling Rymer to have the Mall's roof fully replaced. That type of evidentiary determination is improper, here, and cannot form a basis to reverse the district court's orders.

Next, Rymer directs this Court to the County's denial of its permit application, claiming that the County ordered a full roof replacement when it denied the application. However, Rymer's argument requires this Court to weigh the County's response, based only on the denial, in conjunction with the (inadmissible and improper) information in Simon's Supplemental Affidavit to conclude that Rymer's version of the facts is the truth. This exercise falls far outside the province of this Court. *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008) ("In considering a motion for summary judgment, the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue.").

Additionally, Rymer conflates the Appraisal Award with what Simon requested in the permit application. According to Rymer, the Mall's roof must be fully replaced (and Cincinnati is contractually obligated to pay for it) simply because Rymer's permit application requested it. Rymer's argument just doesn't make sense. It lacks legal support. It also is illogical. Denial of Rymer's permit application does not *ipso facto* mean the roof must be replaced.

Nor does it mean the County ordered the Mall's roof to be recovered. All it means is that the County denied Rymer's permit application, as written, no doubt because the application purported to recover the Mall's "saturated" roofing materials!

Indeed, Rymer so conflated the permit application and the Award because, even with another chance on remand, it still failed to produce requisite evidence to meet its burden of proof that the storm caused damage that triggered the enforcement of the building code. If it is considered, this decision should be affirmed.

4. The district court's decision that the Award was ambiguous was appropriate and should be affirmed.

Ultimately, following remand, the parties' dispute came down to the meaning of the Appraisal Award. An appraisal award is ambiguous if it is susceptible to more than one reasonable interpretation. *Herll*, 879 F.3d 296. According to Rymer, the Award meant that the storm caused damage that triggered enforcement of the building code, as a matter of law. According to Cincinnati, the Award was for limited repairs to the Mall's roof, the cost of which was a little more than \$23,000. Rymer failed to meet its burden to prove that the storm caused damage that triggered the

enforcement of the building code. The district court determined that the award was ambiguous based upon the parties' dispute about its meaning and scope. [Rymer App. at p. 146; R. Doc. 114 at p. 8; Rymer Add. at p. 10.] Obviously, the Award was susceptible to more than one interpretation and was therefore ambiguous, so the district court was correct.

The district court also interpreted the Award from the language used in it, not the testimony of appraisers, or their after-the-fact statements as to what they meant to do by the Award. [Rymer App. at p. 145; R. Doc. 114 at p. 7 (citing *Grudem Bros. Co. v. Great W. Piping Corp.*, 213 N.W.2d 920, 924 (Minn. 1973)); Rymer Add. at p. 9.] On its face, the district court concluded the Award was susceptible to more than one reasonable interpretation.

Therefore, following this Court's direction in *Herll*, the district court did not weigh the merits of the Award, but instead resubmitted the award to the appraisal panel to determine "whether the loss they previously found included any repair or involvement of the roof itself." [Rymer App. at p. 146; R. Doc. 114 at p. 8 (citing *Herll*, 879 F.3d at 295-96); Rymer Add. at p. 10.]

See also Menahga Educ. Ass'n v. Menahga Indep. Sch. Dist. No. 821, 568 N.W.2d 863, 869 (Minn. Ct. App. 1997); *Fenske v. Integrity Prop. & Cas. Ins. Co.*, No. 22-cv-679 (JRT/DJF), 2023 WL 186595, at *3 (D. Minn. Jan. 13, 2023) (citations omitted). And, said the district court, if repairs to the Mall's roof required an intrusion into the surface of the roof, then the panel needed to determine the cost to replace the roof, as required by §1511.3.1.1. [Rymer App. at p. 147; R. Doc. 114 at p. 9; Rymer Add. at p. 11.]

Consequently, should this Court revisit the district court's denial of Rymer's 2023 Motion, that decision should be affirmed.

III. The district court's 2024 Order granting Cincinnati's Motion to confirm the Appraisal Award should be affirmed because the Award and Clarification are unambiguous.

Rymer failed to articulate a legal basis on which this Court can reverse the district court's decision granting Cincinnati's 2024 Summary Judgment. Rymer brought a Summary Judgment Motion in 2024 as well, requesting that the district court "confirm the appraisal award." [Rymer. App. at p. [3] 99, [9] 105; R. Doc 152.] Not only did Rymer fail to cite any legal authority, statutes, rules or case law (other than the summary judgment standard) on which

this Court could rule in its favor, Rymer failed to articulate how this Court can simultaneously confirm the Award, ignore the Clarification, and summarily interpret, add, and fundamentally modify the amount of loss awarded by millions of dollars based on testimony from the Panel.

A. The Clarification resolved the ambiguity in the Appraisal Award.

The district court appropriately determined that the Clarification resolved the ambiguity in the Award. Specifically, it clarified that the Award did not cover the scope of repairs in Rymer's permit application. An unambiguous appraisal award must be enforced unless it is the result of fraud, malfeasance or other wrongdoing. *Fenske*, 2023 WL 186595, at *2. Consequently, the Clarification undisputedly resolved all the questions left on remand about whether Rymer was entitled to additional coverage under the Ordinance and Law Endorsement. Rymer just did not like the answers. This appeal followed.

Pursuant to the Clarification, the Panel concluded that the storm damaged 5-areas of cap flashing on the Mall's roof and awarded an amount they considered to be reasonable to effectuate

those repairs. On its face, the two appraisers, Jeff Nonhof and Kevin Baker, and the umpire, Kurt Ehlers, participated in the clarification process, and completed the form.

The first question on the Clarification asked if the Award included repairs to the surface of the Mall's roof or damage requiring some intrusion into the surface of the Mall's roof:

1. Excluding any amounts for replacement of metal edge flashing, did the Appraisal Panel's Award for "Mall Roof Repair" (i.e. \$23,226.00) contained in the November 9, 2021 Appraisal Award include any repairs to the surface of the Mall's roof, or damage requiring some intrusion into the surface of the Mall's roof?

YES: X KA

NO: X JN
X KE

[CIC App. at p. 2; R. Doc. 116 at p. 4; CIC Add. at p. 2.] Kevin Baker was Rymer's appraiser. He answered "yes" to question no. 1. Jeff Nonhof was Cincinnati's appraiser. He answered "no" to question no. 1. Kurt Ehlers, the umpire, resolved the disagreement between the appraisers, initialing his answer "no" to question no. 1. There is only one reasonable interpretation of question no. 1. The Award didn't include repair or involvement of the roof itself.

The second question of the Clarification asked again, although worded slightly differently, whether the Award for "Mall Roof Repair" included repairs to the surface of the Mall's roof.

2. Including any amounts the Appraisal Panel awarded for repair/replacement of the Mall's metal edge flashing, did the Appraisal Panel's Award for "Mall Roof Repair" include repairs to the surface of the Mall's roof, or damage requiring some intrusion into the surface of the Mall's roof?

YES: X *KA*

NO: X *SN*
FE

[CIC App. at p. 2; R. Doc. 116 at p. 4; CIC Add. at p. 2.] Baker answered "yes." Nonhof and Ehlers answered "no." Here, too, Ehlers resolved the dispute between the parties' appraisers. There is only one reasonable interpretation to this question and answer as well. The Award for "Mall Roof Repair" did not include any repairs to the surface of the Mall's roof.

Question no. 3 of the Clarification asked the Panel members to determine the cost to replace the Mall's roof:

3. If the amount awarded for "Mall Roof Repair" as stated in the November 9, 2021 Appraisal Award includes repairs to the surface of the Mall's roof, or intrusion into the surface of the Mall's roof, please provide the amount necessary to replace the Mall's roof.

\$ 23,226.00 *KA*

[CIC App. at p. 3; R. Doc. 116 at p. 5; CIC Add. at p. 3.] Only Rymer's appraiser answered question no. 3. That makes logical sense. Nonhof and Ehlers clarified that the Award for "Mall Roof Repair" did not include any repair to the roof's surface itself. They

had no reason to answer Question no. 3. Baker did. He answered Question no. 3, clarifying that the cost to replace the Mall's roof was the amount of the original Award, \$23,226.⁶

Plainly, the district court correctly concluded that the Clarification resolved the ambiguity in the Award. The Clarification made clear that "the Award did not cover the scope of repairs in Rymer's [building permit] application to the County." [Rymer App. at p. 153; R. Doc. 143 at p. 6; Rymer Add. at p. 17.] In other words, where the Award left uncertainty about whether "Mall Roof Repair" included any repair or involvement of the roof surface itself, the Clarification rendered it certain. Together, the Award and Clarification are unambiguous. The storm did not cause damage that involved the roof's surface. The storm did not cause damage that triggered the enforcement of the building code, as a matter of law. The district court's order should be affirmed.

B. Cincinnati's 2024 Summary Judgment Motion to Confirm the Award should be affirmed.

⁶ On the face of the Award and Clarification, even Baker thought that the storm damage could be repaired for \$23,266.

Rymer did not bring a motion to vacate the award, so the district court's decision to confirm the unambiguous Appraisal Award (and Clarification) should be affirmed.⁷ Any other outcome would be unprecedented.

A motion to confirm must be reviewed as if it were a motion for summary judgment. *Fenske*, 2023 WL 186595, at *2.⁸ Under Minnesota law, appraisal awards are treated as arbitration awards

⁷ Rymer claimed the Award is a "legal impossibility." Cincinnati has not been able to find how that legal standard is applicable here. In the civil context, the legal certainty standard is met where the "legal impossibility of recovery [is] so certain as to virtually negate the plaintiff's good faith in asserting the claim." *Schubert v. Auto Owners Ins. Co.*, 649 F.3d 817, 822 (8th Cir. 2011) (analyzed in context of the ability to establish the amount in controversy). In the criminal context, legal impossibility refers to those situations in which the intended acts, even if successfully carried out, would not amount to a crime. Thus, attempt is not unlawful where success is not a crime. This is true even though the defendant believes his or her scheme to be criminal. *U.S. v. Frazier*, 560 F.2d 884, 888 (8th Cir. 1977).

⁸ If fraud is alleged, it is the burden of the party attacking the propriety of the award to establish it by clear allegations and proof. *McQuaid Mkt. House Co. v. Home Ins. Co.*, 180 N.W. 97, 98 (Minn. 1920). Regardless, "the award will not be lightly set aside." *Id.* This burden is substantial because "appraisal awards are attended with every presumption of validity." *Maplebrook Est. Homeowners' Ass'n v. Hartford Fire Ins. Co.*, No. 21-cv-1532 (SRN/DJF), 2023 WL 5021164, at *10 (D. Minn. Aug. 8, 2023) (quoting *Mork v. Eureka-Sec. Fire & Marine Ins. Co.*, 42 N.W.2d 33, 38 (Minn. 1950)).

and, as such, an unambiguous award “must be enforced by the court unless it is the result of fraud, malfeasance, or other wrongdoing.” *Id.*; Minn. Stat. §§572B.22-24 (“An appraisal award *shall* be confirmed if it is not vacated, modified or corrected.”). To confirm the Award under the meaning of sections 572B.22-24 requires judgment to be entered on the face of the Award and Clarification, as written, and every reasonable assumption of validity be given to the award. *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 F.2d 675, 678 (8th Cir. 1929).

Before the district court and here, too, Rymer argued that deposition testimony of the panel members should be used to interpret the Award.⁹ However, the law in this regard is straightforward and clear. An appraisal award should be interpreted

⁹The district court graciously permitted Rymer to depose the panel members based on its “suspicions.” The district court stated, “[t]o the extent Rymer seeks the testimony of the appraisers to interpret the scope of the appraisal award, it must be repeated that ‘the award should be interpreted from the language used therein rather than the testimony of one of the appraisers as to what they meant to do by the award.’ ” [Rymer App. at p. 92; R. Doc. 123 at p. 6 (quoting *Grudem*, 213 N.W.2d at 924).]; [Rymer App. at p. 146; R. Doc. 114 at p. 8 (quoting *Grudem*, 213 N.W.2d at 924); Rymer Add. at p. 10.]

from the language in it, not testimony from the appraisers about what they meant to do by the award. *Grudem*, 213 N.W.2d at 924. Rymer offered no legal authority suggesting that this Court can “confirm” an appraisal award, essentially changing its meaning, based on the panel members’ deposition testimony as to what they meant to do by the award. There is none.

Through its appeal, Rymer also seeks determination of the Panel’s intent, and confirmation of the Award through entry of judgment for damages exponentially higher than the amount of loss awarded by the Panel. However, under the relevant law, confirming an award does not require a court to make a “determination of intent.” To the contrary, confirming an award means that an award is approved based only on the language used in it, or what is contained on the face of it, not the testimony of the panel members about what they meant to do by the award. *Id.* Thus, Rymer’s appeal fundamentally lacks legal authority and analysis, so the district court’s decision must be affirmed.

In sum, the district court granted Rymer’s request to depose the panel members because of Rymer’s (now baseless) allegations

that there may have been some ground to set the Award aside. The district court was clear. The law is clear. Deposition testimony of appraisal panel members is only relevant to motions to modify, correct or vacate an appraisal award. *Grudem*, 213 N.W.2d at 924.

Pursuant to the well-established division of responsibilities between appraiser and court under Minnesota law, and here, in the absence of allegations of fraud or wrongdoing on the part of the Panel (none of which formed the basis of either Rymer's 2024 Summary Judgment Motion or this Appeal, and are not present in this case), the Award and Clarification are a final and conclusive findings of fact as to the cause and amount of loss to the Mall as a result of the storm that cannot be ignored, as a matter of law. The district court's decision should be affirmed.

IV. The district court's decision resolved all remaining issues.

Rymer's appeal of the denial of its 2024 Summary Judgment Motion seeking judgment as a matter of law for the cost to replace the Mall's roof and for prejudgment interest is moot.¹⁰ The

¹⁰ It is undisputed that Rymer has had several opportunities to present evidence that the storm resulted in damage, the repairs of

Appraisal Award is unambiguous. The amount of loss was determined as a matter of law. These issues are moot assuming the district court's orders are affirmed. In the event they are not, and this Court remands to the district court, they present fact questions that still need to be resolved and are not appropriate for summary disposition.

which required the Mall's roof to be replaced under the building code. The appraisal was Rymer's opportunity to be heard. To continue to allow Rymer to second guess the scope of the Award, or to vary or add to the meaning of the Award, and now the Clarification, in the absence of any allegation that it was denied due process in the first place, or that the Panel committed misconduct, undermines the purpose of the process and conflicts with well-established law. Allowing an insured multiple chances to reinvent an appraisal award, and to change the panel's determination of the amount of loss any time the insured fails to present adequate evidence at the original appraisal hearing of a particular loss suffered undermines the essential purpose of appraisals. That is, "the plain, speedy, inexpensive and just determination of the extent of the loss." *Quade v. Secura Ins. Co.*, 814 N.W.2d 703, 707 (Minn. 2012). This case is well passed speedy and inexpensive. Ominously at risk here, as evidenced by Rymer's arguments, is the real potential that clarification of most appraisal awards will be requested, inevitably fact issues will be discovered, and full-blown trials or evidentiary hearings on the cause and amount of loss will become common place. Running afoul of, and steadfastly undermining, Minnesota's strong public policy in favor appraisals. *Id.*

CONCLUSION

For the reasons set forth herein, Cincinnati respectfully requests that the district court's 2023 and 2024 orders and the October 22, 2024 Judgment be affirmed. [Rymer App. at p. 139-47, 148-57; R. Doc. 114; R. Doc. 143; R. Doc. 144; Rymer Add. at p. 1-21.]

Dated this 18th day of February, 2025.

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Pursuant to 8th Circuit Rule 28A(h), I also herby certify that electronic files of this Brief has been scanned for viruses and are virus free.

Dated: February 18, 2025

s/Jessica K. Allen
Jessica K. Allen

CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of February, 2025, she electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Se certifies that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

The undersigned further certifies that three (3) copies of the Brief will be sent to the Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri.

s/Jessica K. Allen
Jessica K. Allen