Case No. 24-3356

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CINCINNATI INSURANCE COMPANY,

Appellee,

v.

RYMER COMPANIES, LLC, ALSO KNOWN AS RYMER COMPANIES, INC.; CANNON FALLS MALL, INC.,

Appellants.

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

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The District Court erred by finding ambiguity in the unambiguous Appraisal Award for "Mall roof repair" and ordering an impermissible clarification. After that, the District Court disregarded unanimous corroborating evidence from the appraisal panel confirming that "Mall roof repair" awarded by the panel included "Mall roof repair." Obviously, "roof repair" means is repair to the roof.

Every decision of the District Court after the December 16, 2022 Order (i.e. Rymer App. 012-014, R. Doc. 86) deviated from the Law of the Case set forth in this Court's first decision. *See* Rymer App. 001-011, R. Doc. 77. The Appraisal Award was plain, clear, and unambiguous awarding for "Mall roof repair" and the parties agreed that no clarification was needed. This Court has already determined that the repair detailed in the Appraisal Award invoked the Ordinance and Law coverage provision in the Policy, meaning it includes "Mall roof repair." After the first appeal, the only remaining issues to be resolved related to the application of Minn. Bldg. Code § 1511.3.1.1 and Rymer's requested repairs.

Cincinnati never addressed the application of the building code to Rymer's requested repair ignoring this Court's first decision. In its ongoing efforts to evade its payment obligations, Cincinnati fabricated affidavits for certain appraisal panel members creating the illusion of ambiguity in the Appraisal Award and misled the District Court into ordering a clarification.

ARGUMENT

I. Standard of Review.

The Court of Appeals should review the District Court's summary judgment ruling *de novo* and apply the Law of the Case from the previous appellate decision. *Grinnell Mut. Reinsurance Co. v. Schwieger,* 685 F.3d 697, 700 (8th Cir. 2012); *Marshall v. Anderson Excavating & Wrecking Company,* 8 F.4th 700, 711 (8th Cir. 2021).

The cases relied on by Cincinnati are inapplicable here, because those decisions apply only after a trial has been completed. There has been no trial in this matter, and the District Court's decisions after the first appeal are reviewable by this Court. Consequently, Rymer seeks a reversal of the District Court's June 20, 2023 and October 21, 2024 Orders denying summary judgment in favor of Rymer.

II. The Appraisal Award is unambiguous, and the District Court erred when it ordered a clarification from the appraisal panel.

An appraisal is intended to provide "the plain, speedy, inexpensive and just determination of the extent of the loss." *Kavli v. Eagle Star Ins. Co.*, 288 N.W. 723, 725 (Minn. 1939). The decision of an appraisal panel as to the amount of loss is final and conclusive on the parties. *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 175 Minn. 73, 78 (1928). Appraisal awards cannot be lightly set aside, and they are attended with "every presumption of validity." *Mork v. Eureka-Security Fire & Marine Ins. Co.*, 230 Minn. 382, 391 (1950). An appraisal award is ambiguous when it is

reasonably susceptible to more than one interpretation. [emphasis added]. *Herll v. Auto–Owners Insurance Company*, 879 F.3d 293 (8th Cir. 2018); *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).

In *Herll*, both parties agreed that the appraisal award was ambiguous, because certain window damage may have been caused by a different storm. The parties were unable to differentiate or even decipher whether the appraisal award awarded for those damages without clarification, because that appraisal award stated, "we question the # of losses here" without clarity as to the amount of loss. *Herll* at 296. In *Herll*, this Court remanded the appraisal award to the appraisal panel for clarification.

In *Fenske*, the appraisal award included the language, "if matching is considered" and awarded an amount for matching materials after both parties requested that the appraisal panel consider matching as part of the appraisal. The *Fenske* court determined that it was reasonable to interpret that language to mean that the appraisal panel considered and awarded for matching and also did not consider matching, but if it did, there was an amount awarded for it. *Fenske* at *4. The *Fenske* appraisal award was remanded to the appraisal panel for clarification.

Neither of those situations is present here. The Appraisal Award in this matter needed no clarification because "**Mall roof repair**" unambiguously, plainly and

obviously **means repairs to the Cannon Falls Mall roof.** While not addressing this issue at the time, this Court tacitly acknowledged as much when in its first Order because it did not remand for clarification but rather to assess whether the unambiguous award triggered applicable building codes.

Cincinnati's interpretation of the Appraisal Award that "Mall roof repair" does not include repairs to the Cannon Falls Mall roof is objectively and obviously unreasonable, because it improperly narrows and limits the plain meaning of "Mall roof repair" to something less than the mall roof repair.[1]

The only subject of the first appeal was whether the Ordinance and Law coverage in the Policy was triggered by the unambiguous and undisputed partial roof repair described in the Appraisal Award. Rymer App. 004, R. Doc. 77 at 4; R. Doc. 33-2. There was no dispute as to the Appraisal Award's meaning at all. Since the first appeal, Cincinnati repeatedly misstates the issue as *whether the 2019 storm caused damage that triggered the enforcement of the building code*. *See* e.g. Cincinnati Brief, p. 5. In doing so, Cincinnati has inexcusably failed to acknowledge that the Appraisal Award called for partial roof replacement repairs that violated § 1551.3.1.1 of the Building Code and brazenly misled the District Court into reopening the appraisal for an improper and unnecessary clarification.

[1] Cincinnati's claim position has evolved from a denial of coverage for a preexisting wet roof before the first appeal to a denial that the scope of repair detailed in the Appraisal Award (i.e. "Mall roof repair") requires roof repairs.

In an effort to evade its obligation to pay for full roof replacement, Cincinnati effectively ignored this Court's July 28, 2022 decision identifying the remaining unresolved issues and convinced the Court to do the same. Instead, Cincinnati intentionally redirected the District Court to a self-serving reinterpretation of the Appraisal Award by filing suspiciously specific and substantively identical affidavits of its own appraiser and the umpire drafted by Cincinnati's attorneys. The statements in those affidavits were later retracted and clarified when the parties deposed members of the appraisal panel. *See* R. Doc. 133-7 at 7. (pp. 25-26), R. Doc. 133-4 at 8 (p. 29), R. Doc. 133-4 at 8-9 (pp. 32-33), R. Doc. 133-4 at 12 (p. 47). That deposition testimony confirms the plain meaning of the Appraisal Award.

Evidence detailing the partial roof repair contemporaneous with the Appraisal Award was undisputed until this Court determined that partial roof repair triggered Ordinance and Law coverage. *See* Rymer App. 086, R. Doc. 108 at 4; R. Doc. 33-2 at 29. It was only then that Cincinnati attempted to convince the District Court that somehow that panel awarded nearly ten times the amount either party estimated for "cap flashing."[2] The $23,226 awarded for "Mall roof repair" far exceeded the

[2] This is an actual impossibility. Every panel member confirmed that the "mall roof repair" included "mall roof repair" of cap flashing plus repairs to the roof. *See* R. R. Doc. 133-1 at 6 (pp. 21-22), R. Doc. 133-7 at 7 (pp. 25-26), R. Doc. 133-4 at 8 (p. 29), R. Doc. 133-4 at 8-9 (pp. 32-33), R. Doc. 133-4 at 12 (p. 47). Additionally, an appraisal panel legally cannot render a determination outside of the parties' dispute, so the award is both legally and factually impossible. *See* R. Doc. 33-1 at 52.

amount that either party estimated for simple cap flashing replacement, but was far below the amount necessary for full roof replacement. The amount awarded for "Mall roof repair" does match the costs to replace 120 linear feet of cap flashing and 1,200 square feet of mall roof surface adjacent to the cap flashing. Rymer App. 041-042; R. Doc. 133-7 at 7 (pp. 25-26); R. Doc. 133-4 at 8 (p. 29); R. Doc. 133-4 at 8-9, 12 (pp. 32-33, 47). This was not in dispute at all when the parties moved for summary judgment and this Court agreed.

The District Court erred when it remanded this matter to the appraisal panel for clarification even though neither party ever asserted that the Appraisal Award was ambiguous or sought any clarification. *See* e.g. Cincinnati Brief, p. 21, n. 3 (affirming that Cincinnati asked the "district court to find that the Award was conclusive as to the cause and amount of loss…") The District Court has no authority order a clarification of an unambiguous appraisal award. Even when the parties clarified the award, the panel members all agreed that "Mall roof repair" included repairs to the mall's roof, so the District Court's decision is especially troubling.

Simply stated "Mall roof repair" indisputably means repairs to the Cannon Falls Mall roof. Cincinnati never challenged Rymer's requested repairs or addressed the application of § 1551.3.1.1 of the Building Code to those requested repairs. The District Court's order remanding the matter to the appraisal panel for clarification must be reversed, because no clarification was necessary or even requested after the

panel issued a clarifying diagram showing *which parts of the mall roof were to be repaired*. Rymer Add. 1.

III. The District Court erred when it failed to find that the requested repairs were a roof recover under the Building Code.

In the prior appellate decision, this Court stated that a violation of "Bldg. Code § 1511.3.1.1, requires both, (1) a water-soaked roof and (2) a 'roof recover'" (i.e. partial roof repairs). Rymer App. 006, R. Doc. 77 at 6. Neither party has ever disputed that the Cannon Falls Mall roof experienced leaks and water intrusion over its lifespan.[3] The District Court agreed with Cincinnati that the Cannon Falls Mall roof was "wet". R. Doc. 64 at 1.

As to the second element, this Court objectively determined that the requested repair is a "roof recover" or partial repair of the roof. *See* Rymer App. 006-7, R. Doc. 77 at 6-7. This Court specifically stated that Rymer requested partial repairs:

> Without the tornado, there would have been no application for the County to deny under § 1511.3.1.1 – Rymer's roof would not have been damaged and Rymer would not have filed its application for **partial repairs**. [emphasis added]. Rymer App. 006, R. Doc. 77 at 6.
>
> Significantly, § 1511.3.1.1 does not prohibit nor require immediate replacement of water-soaked roofs; instead, it prohibits **partial repair of such roofs**. [emphasis added]. Rymer App. 007, R. Doc. 77 at 7.

[3] Cincinnati provided the appraisal panel and the District Court with a detailed summary of the Cannon Falls Mall roof's history with water damage. R. Doc. 50 at 4-7; R. Doc. 51-1.
Rymer submitted a Moisture Map to the appraisal panel identifying areas of the Cannon Falls Mall roof that were water-soaked.[3] R. Doc. 51-3 at 53.

> The tornado caused damage to the roof covered by the Policy. When Rymer requested to repair that damage, the ordinance was triggered. The tornado left the roof in need of the very thing prohibited by the ordinance – **partial repairs**. And it was not until Rymer attempted to make such repairs that the County had grounds to enforce the ordinance. [emphasis added]. Rymer App. 007, R. Doc. 77 at 7.

After the first appeal, the District Court initially correctly stated the unresolved issues identified by this Court. Rymer App. at 012-13, R. Doc. 86 at 1-2. However, Cincinnati either failed to understand that the unresolved fact issues related to the Rymer's requested repairs (not the Appraisal Award) or intentionally misled the Court into reopening the appraisal.

After the District Court reopened discovery, it was Cincinnati's burden to disprove that Rymer's requested repair would not violate § 1551.3.1.1 of the Building Code, propose an alternative repair or show that the Building Official's denial of Rymer's building permit was somehow improper. [4]

In response, Cincinnati plainly states that Rymer's permit application was denied, "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." Cincinnati Brief, p. 2. Cincinnati further complains about Rymer's building permit application asserting that it "was designed to invite denial" echoing the District

[4] *See* Minnesota's Building Code. Minn. Admin. R. 1300.0110, subp.1 ("the building official has the authority to render interpretations of the code…").

Court's now reversed 2021 Order. *Compare* R. Doc. 64, p. 8 with Cincinnati Brief, p. 15. Cincinnati also admits that Rymer's requested repairs are a roof recover of the saturated roof. Cincinnati Brief, p. 30. But Cincinnati has never disclosed any alternative repair option that would not violate § 1551.3.1.1 of the Building Code.

Instead of reviewing Rymer's requested repairs, Cincinnati falsely and unreasonably asserted that the Appraisal Award for "Mall roof repair" included only "cap flashing" but did not include repairs to the Cannon Falls Mall roof. Cincinnati's repair scope was rejected by the appraisal panel, and Cincinnati's indirect challenge of the Appraisal Award for "Mall roof repair" ignored the plain language of the Appraisal Award, ignored this Court's previous decision, and failed to accept the finality of the Appraisal Award.

But the Appraisal Award itself was never in dispute, and neither party ever asserted that it was ambiguous. *See* e.g. Rymer App. 062 and 075, R. Doc. 152 at 48 and 61. (Cincinnati affirming that the Appraisal Award should be upheld). Moreover, this Court already addressed Cincinnati's assertions regarding the scope of the Appraisal Award when it stated:

> Cincinnati suggests the appraisal award was solely for damages to cap flashing and argues Rymer already repaired the damaged cap flashing legally without a permit. But Rymer presented evidence that the award also covered repairs to "the field of the roof" and that the County rejected such repairs. Thus, when view in the light most favorable to Rymer, **the appraisal award covered the repairs that triggered the County's enforcement of the Building Code**. [emphasis added]. Rymer App. 007, R. Doc. 77 at 7, n. 6.

Counsel for Cincinnati admitted that the Appraisal Award contemplates "extra work" beyond the cap flashing at the July 18, 2024 hearing referring to it as a "compromise". *See* Rymer App. 119-121, R. Doc. 154 at 23-25.

At deposition, all three members of the appraisal panel testified that the award for "Mall Roof Repair" in the amount of $23,226 included 120 linear feet of cap flashing and 1,200 square feet of the roof surface (i.e. the field of the roof). *See* R. Doc. 133-1 at 6; R. Doc. 133-4 at 8-9; R. Doc. 133-7 at 7. This repair is plainly apparent in the unambiguous Appraisal Award. R. Doc. 33-3 at 1; R. Doc. 64 at 1.

Cincinnati was provided with every opportunity to subpoena and depose the Building Official who denied Rymer's requested repairs and Rymer's contractor who actually requested the repairs, but Cincinnati never did so. Instead, Cincinnati has improperly motioned this Court to strike the Supplemental Affidavit of Phillip Simon (Rymer App. 079-082, R. Doc. 107) from the record. That has no effect on the unambiguous Appraisal Award and the building permit is a public record so practically this not only lacks legal foundation but has no effect on the issue before this Court either way.

In its Brief, Cincinnati only passingly references the applicable Building Code § 1511.3.1.1 and Rymer's "requested repairs" without any analysis. Obviously, Cincinnati does not want to pay for full roof replacement at the Cannon Falls Mall,

but it has produced no explanation as to why it is not legally required to do so under this Court's prior Order and its own Policy.

Having met both elements of § 1511.3.1.1 of the Building Code, there is simply no argument available to dispute that the repairs requested by Rymer were a roof recover. The District Court plainly erred when it failed to rule that the requested repairs were a roof recover under the Building Code.

IV. There are no disputed facts relevant to causation or the application of § 1511.3.1.1 of the Building Code.

This issue parallels the issue discussed above. The Appraisal Award clearly states that the loss was caused by a September 20, 2018 tornado/windstorm, a covered cause of loss. *See* Rymer App. 085, R. Doc. 108 at 3. This Court and the appraisal panel have already adjudicated that the tornado caused the application of § 1511.3.1.1 of the Building Code.[5]

> [T]he causal link between the tornado and the enforcement of § 1511.3.1.1 is clear – the ordinance would not have been enforced "but for" the tornado. Rymer App. 006, R. Doc. 77 at 6.
>
> Without the tornado, there would have been no application for the County to deny under § 1511.3.1.1 – Rymer's roof would not have been damaged and Rymer would not have filed its application for partial repairs. In other words, without the tornado, the County would not have enforced § 1511.3.1.1 against Rymer. Rymer App. 006, R. Doc. 77 at 6.

[5] Contrary to the undisputed facts, the procedural history and the Law of the Case, Cincinnati audaciously argues that Rymer has not shown that the tornado caused damage that triggered the enforcement of the Building Code. Cincinnati Brief, p. 17.

> Rymer has also shown the County's enforcement of § 1511.3.1.1 was a "natural and reasonable incident or consequence" of and had a "reasonably close causal relationship" with the tornado. Rymer App. 006-7, R. Doc. 77 at 6-7.
>
> The tornado caused damage to the roof covered by the Policy. When Rymer requested to repair that damage, the ordinance was triggered. Rymer App. 007, R. Doc. 77 at 7.

Left with no reasonable options to evade its duty to pay for full roof repair at the Cannon Falls Mall, Cincinnati pursued the impossible claim that the plain language of the Appraisal Award for "Mall roof repair" means something other than "mall roof repair."

The District Court erred when it unilaterally determined that the Appraisal Award was ambiguous nearly five years after the Loss occurred and almost three years after the Appraisal Award was published when neither party asserted the award was ambiguous. For the first time in the history of this case, Cincinnati now asserts that the Appraisal Award is ambiguous. ("Obviously, the Award was susceptible to more than one interpretation…) Cincinnati Brief, pp. 23-24.

CONCLUSION

The only unresolved issues after the first appeal were: (1) how much does Cincinnati have to pay to Rymer for full roof replacement and (2) how much prejudgment interest is owed to Rymer for this matter. These questions have still not been answered.

Instead, the District Court refused to find that "Mall roof repair" as stated in the Appraisal Award unambiguously means mall roof repair to the Cannon Falls Mall and order the appraisal panel to determine that amount. Cincinnati has consistently failed to acknowledge the Law of the Case that there is Ordinance and Law coverage for full roof replacement for this Loss.

Rymer respectfully requests that this Court reverse the District Court's June 20, 2023 Order and the District Court's October 21, 2024 Order and remand this matter to the District Court with instructions to determine the cost full roof replacement at the Cannon Falls Mall and statutory interest.

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Dated: March 21, 2025

By: */s/ Bradley K. Hammond*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(g) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portion identified in Fed. R. App. P. 32(a)(7)(f), the brief contains 3,769 words. (The undersigned is relying on the word-count utility in Microsoft Word 365, the word-processing system used to prepare the brief.)

2. The brief was produced with Microsoft Word 365 software in Times New Roman 14-point typeface consistent with Fed. R. App. P. 32(a)(5).

Dated: March 21, 2025

By: */s/ Bradley K. Hammond*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellants' Reply Brief was filed electronically with the Clerk of the United State Court of Appeal for the Eighth Circuit to be served via the court's electronic filing system on this 21st day of March 2025 upon the parties listed below:

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VIRUS CERTIFICATION

The undersigned hereby certifies that a digital copy of Appellants' Opening Brief submitted herewith has been scanned for viruses and that it is virus-free in compliance with 8th Cir. R. 28A(h).

Dated: March 21, 2025

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