

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' OPENING BRIEF

**Alexander M. Jadin (MN#387219)
Bradley K. Hammond (MN#391611)
7900 Xerxes Avenue, Suite 2020
Bloomington, MN 55431
Telephone: (952) 388-0289
Facsimile: (612) 235-7927
ajadin@sjjlawfirm.com
bhammond@sjjlawfirm.com
*Attorneys for Appellants***

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This appeal is the second appeal arising out of a coverage dispute in an insurance claim after the completion of an appraisal of the loss.¹

On June 20, 2023, after the first appeal, the District Court erred when it determined that the Appraisal Award was ambiguous and remanded the matter to the appraisal panel for clarification. The Appraisal Award Clarification was both inconsistent with the unambiguous Appraisal Award and inconsistent with contemporaneous evidence that the Appraisal Award awarded for repairs to the Cannon Falls Mall roof. This was confirmed in subsequent deposition testimony.

On October 21, 2024, in a decision on a third set of dispositive motions, Judge Tostrud denied Rymer's Motion for Summary Judgment seeking final judgment scope of repairs in the Appraisal Award, Judge Tostrud granted Cincinnati's Motion to Confirm the Appraisal Award by incorporating the 2018 Appraisal Award with the problematic 2023 Appraisal Award Clarification concluding that the Appraisal Award for "Mall roof repair" does not include repairs to the roof of the Cannon Falls Mall. Rymer now appeals.

Rymer requests 20 minutes of oral argument.

¹ *Cincinnati Insurance Company v. Rymer Companies, LLC*, 41 F.4th 1026 (8th Cir. 2022); Rymer App. 001-011 R. Doc. 77.

APPELLANTS' CORPORATE DISCLOSURE

I. Pursuant to Rule 26.1 of the Rules of Appellate Procedure and Local Rule 26.1A, Appellant Rymer Companies, LLC submits this Corporate Disclosure Statement and states as follows:

1. Rymer Companies, LLC does not have a parent company.
2. There are no publicly held corporations that own 10% or more of Rymer Company, LLC's shares.

II. Pursuant to Rule 26.1 of the Rules of Appellate Procedure and Local Rule 26.1A, Appellant Cannon Falls Mall, Inc. submits this Corporate Disclosure Statement and states as follows:

1. Cannon Falls Mall, Inc. does not have a parent company.
2. There are no publicly held corporations that own 10% or more of Cannon Falls Mall, Inc.'s stock.

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JURISDICTIONAL STATEMENT

This appeal arises from the United States District Court for the District of Minnesota (Honorable Eric C. Tostrud). The District Court exercised diversity jurisdiction pursuant to 28 U.S.C. §1332 based on the parties' complete diversity of citizenship and the amount in controversy exceeding \$75,000.

Rymer Companies, LLC is a limited liability company organized and existing under the laws of Florida, with its members residing in Sarasota, Florida.

Cannon Falls Mall, Inc. is a corporation organized and existing under the laws of Minnesota, with its principal place of business in Cannon Falls, Minnesota.

Cincinnati Insurance Company is a corporation organized and existing under the laws of Ohio with its principal place of business in Fairfield, Ohio.

Defendants-Appellants Rymer Companies, LLC a/k/a Rymer Companies, Inc. and Cannon Falls Mall, Inc. timely filed their Notice of Appeal on November 19, 2024. Jurisdiction of this appeal lies in this Court pursuant to 28 U.S.C. §1291 as this appeal is from a final judgment of a District Court of the United States dated October 22, 2024 that disposes of all parties' claims. App. 157, R. Doc. 144, Add. 3.

STATEMENT OF THE ISSUES

1. Whether the District Court erred by denying Rymer’s summary judgment motion(s) seeking coverage for full roof replacement where the unambiguous language of the Appraisal Award was for “Mall roof repair”.

Cincinnati Insurance Company v. Rymer Companies, LLC, 41 F.4th 1026 (8th Cir. 2022);

Herll v. Auto–Owners Insurance Company, 879 F.3d 293 (D. Minn. 2018);

Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73; 220 N.W. 425 (1928).

2. Whether the District Court erred by confirming the Appraisal Award in favor of Cincinnati when it ignored the plain language of the award and the testimony of the panel members who agreed the award included repairs to the property’s roof.

Cincinnati Insurance Company v. Rymer Companies, LLC, 41 F.4th 1026 (8th Cir. 2022);

Creekwood Rental Townhomes, LLC v. Kiln Underwriting Ltd., 11 F.Supp.3d 909 (D. Minn. 2014);

Grudem Bros. Co. v. Great W. Piping Corp., 297 Minn. 313, 213 N.W.2d 920 (1973).

STATEMENT OF THE CASE

I. Statement of Facts

The Property

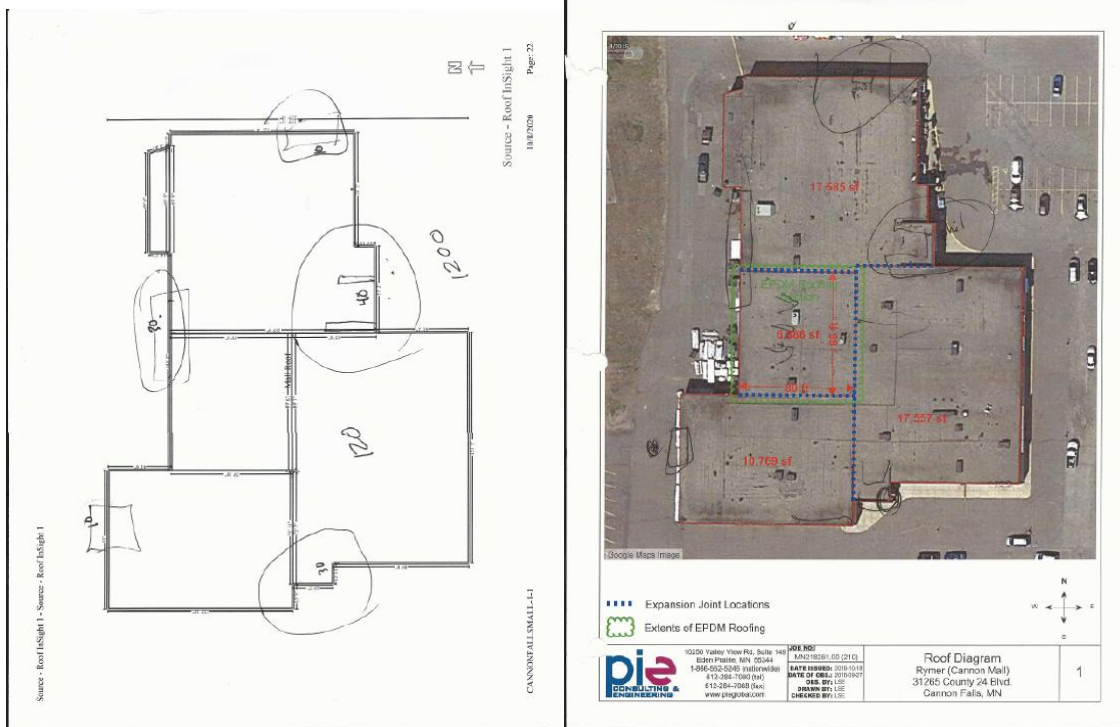
Rymer is the owner/operator of a commercial mall located in Cannon Falls, Minnesota. Rymer App. 002, R. Doc. 77 at 2.

The Loss

On September 20, 2018, a tornado caused wind damage to the Property causing damage to the Cannon Falls Mall roof. R. Doc. 33-3 at 1; R. Doc. 64 at 1.

The Appraisal

An appraisal of the Loss took place on November 9, 2020. R. Doc. 33-3 at 1. The three-person appraisal panel unanimously awarded Rymer \$23,226.00 for “Mall roof repair”. Rymer App. 002, R. Doc. 77 at 2; R. Doc. 33-3 at 1. In response to communications with counsel for the parties, the appraisal umpire forwarded diagrams of the Cannon Falls Mall roof that identified areas where 1,200 square feet of roof was to be repaired:



See R. Doc. 106 at 9, 15-16.

Denial of Building Permit

On December 16, 2020, the Goodhue County Building Inspector denied Rymer’s Building Permit application for mall roof repairs and required a full roof recover pursuant to the Building Code. Rymer App. 003, R. Doc. 77 at 3; R. Doc. 64 at 8-9.

The Appraisers’ Affidavits

On April 21, 2023, Cincinnati filed two nearly identical affidavits. R. Doc. 98; R. Doc. 99. One affidavit was signed by Cincinnati’s appraiser. R. Doc. 99. A second affidavit was signed by the appraisal panel umpire. R. Doc. 98. Both affidavits were drafted by counsel for Cincinnati without their input and contradicted

the plain language of the Appraisal Award, the evidence, and the decision of the Court of Appeals. Compare R. Doc. 33-3 at 1 with R. Doc. 98 and R. Doc. 99.

On May 12, 2023, Rymer filed an affidavit from its appraiser, which was consistent with the plain language of the Appraisal Award and evidence including email statements contemporaneous with the Appraisal Award. Compare R. Doc. 33-2 at 1 with Rymer App. 083-086, R. Doc. 108 at 1-4.

The Appraisal Award “Clarification”

After the District Court remanded the matter to the appraisal panel for clarification, the parties agreed to a form that requested an answer to the following questions:

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: _____ NO: _____

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: _____ NO: _____

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.

\$ _____

See R. Doc. 133-2 at 18-19

On October 20, 2023, pursuant to the District Court's order, the appraisal panel issued a written "Appraisal Award Clarification" agreed upon by only two members despite the Appraisal Award being a unanimous three-member decision.

It also set forth a legal impossibility by stating that the Appraisal Award was for repair to flashing instead of "Mall roof repair" contradicting the November 9, 2020 Appraisal Award. Compare R. Doc. 133-2 at 18-19 with R. Doc. 133-2 at 1.

The primary issues with the clarification identified by Rymer include:

- (1) Conflicts between the "clarification" and evidence contemporaneous with the Appraisal Award;
- (2) An Appraisal Award that far exceeds the price dispute for flashing addressed at the appraisal hearing; and
- (3) Lack of unanimity in the "clarification" and the Appraisal Award.

See R. Doc. 120.

II. Procedural History

On April 15, 2019, Cincinnati filed a Complaint for declaratory judgment seeking a declaration of the parties' rights and duties under the Policy. R. Doc. 2.

On May 14, 2019, Rymer answered Cincinnati's Complaint, denied all substantive allegations, and raised a counterclaim for Cincinnati's breach of the insurance contract. R. Doc. 6.

On October 1, 2019, the District Court ordered the matter stayed pursuant to the parties' stipulation to stay the proceedings in anticipation of the completion of an insurance appraisal. R. Doc. 18; R. Doc. 26. The appraisal was completed on November 9, 2020. R. Doc. 33-3.

On February 1, 2021, Rymer moved for summary judgment seeking an order requiring Cincinnati to pay for the increased costs of construction for full roof replacement at the Property as a consequence of the enforcement of the Minnesota Building Code by Goodhue County, as well as damages for breach of contract. R. Doc. 30; R. Doc. 32.

On March 1, 2021, Cincinnati moved for summary judgment, seeking an order that the appraisal resolved the issues between the parties and dismissal of the litigation. R. Doc. 48; R. Doc. 50.

On May 13, 2021, the District Court entered an order denying Rymer's Motion for Summary Judgment and granting Cincinnati's Motion for Summary Judgment. R. Doc. 64.

On May 15, 2021, Rymer filed a Notice of Appeal. R. Doc. 66.

On July 28, 2022, the United States Court of Appeals for the Eighth Circuit reversed the District Court's May 13, 2021 Order and remanded this matter to the District Court for further proceedings. Rymer App. 002-011, R. Doc. 77 at 2-11; R. Doc. 78.

On December 16, 2022, the District Court identified three issues to be resolved and ordered the parties to meet and confer regarding the scope of discovery. Rymer App. 012-015, R. Doc. 86.

On March 22, 2023, the District Court ordered each party to file a brief in support of its position as to how the unresolved issues should be resolved. R. Doc. 89.

On April 21, 2023, Rymer filed a Motion of Partial Summary Judgment seeking a remand to the appraisal panel on the issue of the cost for full roof replacement at the Cannon Falls Mall. R. Doc. 91; R. Doc. 92.

On April 21, 2023, Cincinnati filed a Motion for Summary Judgment effectively ignoring the July 28, 2022 appellate decision as to resolved fact issues. R. Doc. 96; R. Doc. 97. Cincinnati included affidavits of certain members of the appraisal panel authored by Cincinnati's attorneys that contradicted the plain language of the Appraisal Award. R. Doc. 98; R. Doc. 99.

On June 20, 2023, the District Court denied Cincinnati's and Rymer's motions for summary judgment and remanded the matter to the appraisal panel for

clarification of the Appraisal Award regarding whether it included repairs to the Cannon Fall Mall roof. The District Court ordered the remand despite the fact that the Appraisal Award clearly awarded for “Mall roof repair” and the parties never disputed the plain language of the Appraisal Award for “Mall roof repair.” Rymer App. 140-141, R. Doc. 114 at 2-3, Add. 1.

In a futile attempt to comply with the remand, the appraisal panel issued the Appraisal Award Clarification that was not unanimous, contrary to the evidence contemporaneous with the appraisal, contrary to the Appraisal Award that failed to clarify the Appraisal Award at all.

On December 12, 2023, Rymer filed a Motion for an Evidentiary Hearing or Depositions to address novel and suspicious inconsistencies introduced by the clarification including:

- (1) Conflicts between the “clarification” and evidence contemporaneous with the Appraisal Award;
- (2) An Appraisal Award that would be impossible because it far exceeds the price dispute for flashing addressed at the appraisal hearing; and
- (3) Lack of unanimity in the “clarification” and the Appraisal Award.

See R. Doc. 120.

On January 30, 2024, the District Court granted Rymer’s motion, in part authorizing the depositions of members of the appraisal panel. R. Doc. 123.

Depositions of each of the members of the appraisal panel were taken on February 21, 2024, February 27, 2024, and March 1, 2024. All testified that the

Appraisal Award included repairs to the Cannon Falls Mall roof. *See* R. Doc. 133-1 to R. Doc. 133-9. That testimony is consistent with the Appraisal Award for “Mall roof repair,” again something that was not in dispute between the parties until the this Court’s first decision.²

On April 30, 2024, the District Court authorized additional briefing in an effort to resolve the claim with the Court serving as a fact finder. R. Doc. 132.

On May 30, 2024, Rymer filed a Motion for Summary Judgment seeking judgment that “Mall roof repair” included repairs to the surface of the Cannon Falls Mall roof, ordering Cincinnati to pay for full roof replacement and for prejudgment interest. R. Doc. 134; R. Doc. 135.

On May 30, 2024, Cincinnati filed a Motion to Confirm the Appraisal Award. R. Doc. 137; R. Doc. 138.

On October 21, 2024, the District Court denied Rymer’s Motion for Summary Judgment and granted Cincinnati’s Motion to Confirm the Appraisal, accepting Cincinnati’s position that “Mall roof repair” means flashing, despite that being a

² It is notable that in its first summary judgment motion Cincinnati argued fervently that the **roof repairs** did not trigger the Building Code and referenced the roof’s wet condition dozens of times to justify its refusal to pay for roof repairs. Cincinnati did not object when the appraisal panel informed the parties which part of the roof was to be repaired. After the first appeal when this Court overturned the District Court’s erroneous coverage decision, Cincinnati changed its position asserting that the Appraisal Award did not include repairs to the roof contrary to the plain language of the Appraisal Award (i.e. “Mall roof repair”).

legal impossibility when the amount awarded at appraisal exceeds the cost of flashing by a factor of more than ten. *See* Rymer App. 146, R. Doc. 114 at 8, Add. 2; Rymer App. 150-151, R. Doc. 143 at 3-4, Add. 3.

On November 19, 2024, Rymer filed a Notice of Appeal. R. Doc. 145.

Based upon the record on appeal and all applicable law, the June 20, 2023 and October 21, 2024 Orders should be reversed. Cincinnati should be ordered to pay for the increased costs of construction caused by Goodhue County's enforcement of the Minnesota Building Code, which mandates roof replacement at the Cannon Falls Mall under the "Ordinance or Law" coverage provision of the Policy and prejudgment interest pursuant to Minn. Stat. §549.09, Subd. 1.

SUMMARY OF THE ARGUMENT

The District Court erred by denying Rymer's Motion for Summary Judgment seeking an order ordering Cincinnati to pay the full cost of roof replacement at the Cannon Falls Mall after this Court's initial remand. The District Court ignored the law of the case, and misinterpreted and misapplied the directions of the Court of Appeals by inventing ambiguity in the Appraisal Award where none existed and remanding the matter to the appraisal panel to resolve factual issues that were not in dispute. The only factual issue that was in dispute after the appeal was the amount of loss for full roof replacement.

ARGUMENT

I. Standard of Review

Federal Courts of Appeal review the District Court's decision on summary judgment and its interpretation of state insurance law *de novo*, applying the same standards as the District Court and viewing the evidence in the light most favorable to the nonmoving party. *Grinnell Mut. Reinsurance Co. v. Schwieger*, 685 F.3d 697, 700 (8th Cir. 2012). The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a).

Under the Law of the Case Doctrine, the District Court must follow the decisions of earlier proceedings to prevent relitigating settled issues in a case, to

protect the settled expectations of parties, ensure uniformity of decisions, and promote judicial efficiency. The Court of Appeals retains authority to decide whether the District Court scrupulously and fully carried out the mandates of the appellate court. *Marshall v. Anderson Excavating & Wrecking Company*, 8 F.4th 700, 711 (8th Cir. 2021); *Karsjens v. Harpstead*, 74 F.4th 561, 567 (8th Cir. 2021). The Federal Courts of Appeal reviewed the District Court’s decision on summary judgment and its interpretation of state insurance law *de novo*. *Id.* at 567.

II. The District Court Erred when it denied Rymer’s Summary Judgment Motion(s) Seeking Coverage For “Mall Roof Repair”.

Prior to the November 9, 2020 appraisal, Cincinnati’s argument was that it need not cover the costs to repair the Cannon Falls Mall roof, because the roof was in need of replacement long prior to the 2018 loss. *See* R. Doc. 50 at 6; R. Doc. 55 at 9-12. On November 9, 2020, the Appraisal Award unanimously and unambiguously awarded Rymer \$23,226.00 for “Mall roof repair”. Rymer App. 001-011, R. Doc. 77; R. Doc. 33-3 at 1. When asked immediately after the Appraisal Award was issued, the panel even provided instruction of which portions of the roof required repair, something neither of the parties disputed.

An appraisal is generally understood as “[t]he determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value, or condition of something.” *Oliver v. State Farm Fire and Cas. Co.*, 939 N.W.2d 749, 753 (Minn. 2020) citing *Appraisal*, *Black’s Law*

Dictionary (11th ed. 2019). 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). An appraisal award is provided with every reasonable presumption of validity. *St. Paul Fire & Marine Ins. Co. v. Eldracher*, 33 F.2d 675, 678 (8th Cir. 1929).

On December 16, 2022 following the publication of the appellate decision, the District Court identified three unresolved issues which were all administrative in nature:

1. Whether “the requested repairs were a roof recover under the Building Code,” *Cincinnati Insurance Company v. Rymer Companies, LLC*, 41 F.4th at 1028 n. 4.
2. Whether there are any disputed facts relevant to “causation or the application of §1511.3.1.1,” *id.* at 1032 n. 11.
3. What is “the amount of additional costs imposed by §1511.3.1.1,” *id.* at 1032 n. 9.

See Rymer App. 012-014, R. Doc. 86.

These unresolved issues expressly identified by the District Court make no reference to the unambiguous Appraisal Award, and neither party asserted that it misunderstood those issues or sought to challenge the Appraisal Award.

These issues were not ripe for review by the Eighth Circuit at the time of the first appeal, because the District Court misapplied the law controlling the application of the Ordinance and Law coverage. Resolution of these issues simply required a review of the repairs requested by Rymer and the Building Code governing those

scope of those repairs. These issues were briefed extensively and argued before the District Court in conjunction with Rymer’s Motion for Partial Summary Judgment and Cincinnati’s Motion for Summary Judgment. Rymer App. 015-078, R. Doc. 92; R. Doc. 101.

Neither party sought to challenge the unambiguous Appraisal Award or sought any clarification, because both parties understood that “Mall roof repair” meant repairs to the Cannon Falls Mall roof. The Appraisal Award is not susceptible to any different determination.

A. The requested repairs meet the legal definition of a “roof recover” under the Building Code.

The discovery authorized by the District Court on December 16, 2022 was intended to determine whether the repairs requested by Rymer for approval from the Building Official were a roof recover under §1511.3.1.1 of the Building Code subject to the “exceptions” which arguably presents a mixed question of fact and law that the District Court did not consider. The relevant statutory language is stated below:

1511.3.1 Roof recover.

The installation of a new roof covering over an existing roof covering shall be permitted where any of the following conditions occur:

1. Where the new roof covering is installed in accordance with the roof covering manufacturer’s approved instructions.
2. Complete and separate roofing systems, such as standing-seam metal roof panel systems, that are designed to transmit the roof loads

directly to the building's structural system and that do not rely on existing roofs and roof coverings for support, shall not require the removal of existing roof coverings.

3. Metal panel, metal shingle and concrete and clay tile roof coverings shall be permitted to be installed over existing wood shake roofs when applied in accordance with Section 1511.4.
4. The application of a new protective roof coating over an existing protective roof coating, metal roof panel, built-up roof, spray polyurethane foam roofing system, metal roof shingles, mineral-surfaced roll roofing, modified bitumen roofing or thermoset and thermoplastic single-ply roofing shall be permitted without tear off of existing roof coverings.

1511.3.1.1 Exceptions.

A *roof recover* shall not be permitted where any of the following conditions occur:

1. Where the existing roof or roof covering is water soaked or has deteriorated to the point that the existing roof or roof covering is not adequate as a base for additional roofing.
2. Where the existing roof covering is slate, clay, cement or asbestos-cement tile.
3. Where the existing roof has two or more applications of any type of roof covering.

Minn. Bldg. Code §1511.3.

The only evidence submitted by either party on this issue is an affidavit from

Rymer's contractor, which stated in relevant part:

8. That based on my experience and education as a contractor and based on my inspection of the roof at the Cannon Falls Mall, it is my opinion that the Minnesota Building Code requires full replacement of the roof due to its water-soaked condition and offered that opinion at the appraisal and is a roof recover as defined by §1511.3.1 of the Minnesota Building Code.

9. That even the limited repair to damaged metal flashing requires repairs into the field of the roof because the existing build-up roof's structure is a singular system involving interconnected overlapping saturated asphalt felts. The roof system extends under the metal flashing. Areas of this roofing system were exposed and damaged by the tornado. The metal flashing repair performed prior to the appraisal was temporary and incomplete.
10. That the repair requested by Rymer Companies, LLC, a/k/a Rymer Companies, Inc. and Cannon Falls Mall, Inc. to Goodhue County after the November 9, 2020 appraisal is a roof recover under Section 1511.3 of the Minnesota Building Code, because the requested repair involved the installation of a new roof covering over an existing roof covering down to the roof substrate, and did not require the complete removal of all existing layers of roof coverings down to the roof deck.
11. The repair requested by Rymer Companies, LLC, a/k/a Rymer Companies, Inc. and Cannon Falls Mall, Inc. to Goodhue County after the November 9, 2020 appraisal was not permitted, because the requested repair did not meet the manufacturer's requirements or the Minnesota Building Code requirements, neither of which permit installation of new roof materials to recover a water-soaked roof system.
12. In my opinion, the requested repair was consistent with the scope of repair determined by the appraisal panel, but that repair does not comply with the Minnesota Building Code or manufacturer's instructions.

Rymer App. 079-082, R. Doc. 107.

In addition, it is undisputed that the Building Official (the arbiter of the Building Code in Minnesota) did in fact order full roof replacement. *See* R. Doc. 34-1. In its pleadings and at the hearing, Cincinnati never addressed the issue of whether the requested repairs were a roof recover under the Building Code. Cincinnati never sought to depose Rymer's contractor, Phil Simon, who actually requested the repairs

from the Building Official or the Building Official who rejected Rymer’s permit application and required a full roof recover. Cincinnati has never disputed the fact that the requested repairs were a roof recover under the Building Code or offered any alternative repair. In fact, Cincinnati never presented any evidence on this issue.

As detailed in Mr. Simon’s affidavit, the requested repairs were indisputably a “roof recover” under the Building Code but were not permitted due to the existing roof’s water-soaked condition³. Since it is undisputed that the repairs requested by Rymer for approval from the Building Official were a roof recover under §1511.3.1.1 of the Building Code, full roof replacement is required at the Cannon Falls Mall.

B. There are no disputed facts relevant to “causation or the application of §1511.3.1.1”.

The appraisal panel’s determination of the cause of the loss for “Mall roof repair” is final and binding on the parties and the courts. *See Axis Surplus Ins. Co. v. Condor Corp.*, 19 F.4th 1062, 1064 (8th Cir. 2021). This Court’s first decision gave Cincinnati a limited opportunity to challenge Rymer’s requested repairs that relate to enforcement of the Building Code, not whether the tornado caused damage to the Cannon Falls Mall roof, an issue resolved at the appraisal.

³ At the appraisal, Cincinnati’s primary argument was that there was no coverage for the roof at the Cannon Falls Mall, because the roof was water-soaked prior to the September 20, 2018 loss. *See generally* R. Doc. 50.

After the first appeal, the resolution of the underlying insurance claim required consideration of whether the requested repairs complied with repairs mandated by Building Code §1511.3.1.1. At that point, the issue was not whether the Appraisal Award awarded for repairs to the roof of the mall, which it plainly did.

It was Cincinnati's burden to dispute that Rymer's requested repairs resulted in the enforcement or the application of §1511.3.1.1 of the Building Code. Cincinnati failed to meet this burden, because it never proposed any alternative to the repairs requested by Rymer or otherwise disputed the cause of the enforcement of the Building Code.

This Court has effectively confirmed the Appraisal Award's findings on the issue of causation and the application of the Building Code through the following express holdings:

1. 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. 005-007, R. Doc. 77 at 5.
2. We hold Rymer satisfies both the "arising out of" and "resulting from" standard. Rymer App. 007, R. Doc. 77 at 7.
3. Rymer presented evidence that the award also covered repairs to "the field of the roof" and that the County rejected such repairs. Rymer App. 007, R. Doc. 77 at 5.

At that point in the case, the District Court should have granted Rymer's Summary Judgment Motion and remanded the matter to the appraisal panel on the sole issue of the cost of full roof replacement at the Cannon Falls Mall. Instead, the

District Court denied both parties' motions; and remanded to the appraisal panel for an unnecessary clarification of the unambiguous and unanimous Appraisal Award. Rymer App. 147, R. Doc. at 9 Add. 1.

III. The plain language “Mall roof repair” cannot be arbitrarily limited in scope to metal cap flashing due to any alleged ambiguity.

An appraisal award is ambiguous only if it is susceptible to more than one interpretation. *Herll v. Auto–Owners Insurance Company*, 879 F.3d 293, 296 (D. Minn. 2018). No reasonable person could read “Mall roof repair” in the Appraisal Award to mean “flashing, but not roof” by asserting ambiguity. In other words, “Mall roof repair” is not susceptible to any reasonable interpretation limited to flashing only.

After the first appeal, Cincinnati misstated the actual issue and misdirected the District Court back to the Appraisal Award. At the 2023 dispositive motion hearing, Cincinnati continued to dispute the scope of damage that was caused by the tornado, asserting the same claim position it argued at the appraisal two and half years earlier. Rymer App. 015-078, R. Doc. 97; R. Doc. 101; R. Doc. 102.

The District Court's decision after the hearing defied more than a century of law on the panel's authority to determine the cause of the loss. *Quade v. Secura Ins.*, 814 N.W.2d 703, 707 (Minn. 2012).

First, the District Court erred when it inexplicably found ambiguity nearly three years after the appraisal was complete. Rymer App. 146, R. Doc. 114 at 8,

Add. 1. The District Court’s decision effectively reopened the appraisal by finding that “Mall roof repair” does not mean repairs to the roof of the Cannon Falls Mall. The District Court’s decision was contrary to the parties’ requests, and contradicted the undisputed Appraisal Award and this Court’s first decision.

Second, the District Court’s findings are inherently contradictory, because the District Court both affirms that the Cannon Falls Mall roof was damaged by the 2018 storm and finds ambiguity as to whether “Mall roof repair” includes repairs to the Cannon Falls Mall roof. *See* Rymer App. 140-141, R. Doc. 114 at 2-3, Add. 1; Rymer App. 002, R. Doc. 77 at 2.

The District Court’s finding that “Mall roof repair” is ambiguous is plain error and should be reversed.

A. Neither party has ever challenged the unambiguous Appraisal Award.

Neither the parties nor the District Court can ignore the plain language of the Appraisal Award. Under Minnesota law, an appraisal panel is deemed “a quasi-court, governed by the rules applicable to common-law arbitration.” *Christianson v. Norwich Union Fire Ins. Soc.*, 84 Minn. 526, 88 N.W. 16 (1901). Thus, the courts treat appraisals as they would an arbitration proceedings and subject them to the same legal standards.” *Oliver v. State Farm Fire and Cas. Ins. Co.*, 923 N.W.2d 680, 687 (Minn. Ct. App. 2019), *aff’d*, 939 N.W.2d 749 (Minn. 2020); *Kavli v. Eagle Star Ins. Co.*, 206 Minn. 360, 288 N.W. 723 (1939) (“an appraiser or referee is not the

representative or agent of the party appointing him”); *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 175 Minn. 73, 77, 220 N.W. 425, 426 (1928) (“The duties of the board of appraisal are in the nature of common-law arbitration.”)

After the appraisal, the parties did not dispute that the appraisal panel awarded damage from the covered event and that it included “Mall roof repair.” *See* R. Doc. 55 at 2. When Rymer sought a permit for repairs to the Cannon Falls Mall roof, the Building Official denied repairs and required full replacement of the roof. R. Doc. 34-1 at 4-6. When presented with the Building Official’s denial of repairs and requirement that the entire roof needed replacement, Cincinnati denied Ordinance and Law coverage for full roof repair necessitating the first appeal.

At the 2021 dispositive motion hearing, neither Cincinnati nor Rymer asserted that the Appraisal Award was ambiguous (nor have they ever), because “Mall roof repair” obviously includes repairs to the Cannon Falls Mall roof. Instead, Cincinnati argued it should not have to pay for full roof replacement, because of the roof’s water-soaked condition, while acknowledging that the Appraisal Award included “Mall roof repair.” The District Court denied Rymer’s motion seeking Ordinance and Law Coverage and full roof replacement. R. Doc. 64. Rymer appealed. R. Doc. 65-1.

The clarity of the Appraisal Award was not an issue in this Court’s decision in the first appeal (*see* Rymer App. 001-011, R. Doc. 77 at 1-11), because the

Appraisal Award's language is plain and obvious.⁴ The only issue for this Court in the first was appeal was whether Policy's Ordinance and Law coverage provision provided coverage for full roof replacement based on the unambiguous Appraisal Award. Rymer App. 005, R. Doc. 77 at 5. This Court determined that Rymer was, in fact, entitled to coverage under the Policy's Ordinance and Law coverage provision, but left open the possibility that Rymer's "requested repairs" could be challenged. Rymer App. 142, R. Doc. 114 at 4 Add. 1. Cincinnati never challenged Rymer's requested repairs.

B. The District Court erred by its acceptance and reliance on Cincinnati's affidavits to find that the Appraisal Award was ambiguous.

After the first appeal, the parties could not agree on how to resolve the claim. *See* R. Doc. 80; R. Doc. 81; R. Doc. 88. The District Court ordered and authorized the parties to file dispositive motions. R. Doc. 89. Both parties pursued summary judgment motions. Cincinnati submitted nearly identical affidavits for its appraiser and the appraisal umpire drafted by its attorneys, despite that "testimony" not being available. R. Doc. 98; R. Doc. 99.

⁴ Before and after the first appeal, Cincinnati never addressed how the findings stated in the unambiguous Appraisal Award resulted in coverage under the Policy's Ordinance and Law coverage. Instead, Cincinnati continued and continues to argue for its initial claim decision for limited repairs to the flashing that was rejected by the appraisal panel.

Panel members are protected by absolute privilege as part of an arbitration, judicial, or quasi-judicial proceeding. *Matthis v. Kennedy*, 67 N.W.2d 413, 417 (Minn. 1954); *Bandimere v. Summerville*, 2021 WL 1846548 (Minn. Ct. App. May 10, 2021). Subject to certain exceptions, a panel member cannot be compelled to testify about the proceeding or produce records regarding the proceeding. *Id.* However, an appraiser may testify concerning what matters were submitted for decision and considered, ***but in no case can the testimony of an appraiser be used to vary or add to the terms of an award.*** *Grudem Bros. Co. v. Great W. Piping Corp.*, 297 Minn. 313, 318–19, 213 N.W.2d 920, 924 (1973) (emphasis added); *see also Creekwood Rental Townhomes, LLC v. Kiln Underwriting Ltd.*, 11 F.Supp.3d 909 (D. Minn. 2014) .

In support of its second dispositive motion, the affidavits filed by Cincinnati improperly sought to change or limit the plain language of the Appraisal Award while never addressing the requested repairs. R. Doc. 98; R. Doc. 99. Specifically, those affidavits state, “the Appraisal Award did not provide for the repair or replacement of any portion of the Mall’s roof surface” directly contradicting the Appraisal Award for “Mall roof repair” and the panel’s express (and unchallenged) direction immediately after appraisal about which sections of the roof needed repair. *Compare* R. Doc. 98 R. Doc. 99 with Rymer App. 002, R. Doc. 77 at 2; R. Doc. 33-3 at 1.

Cincinnati's affidavits were improper and should never have been considered by the District Court. These affidavits concocted ambiguity into the Appraisal Award and misdirected the District Court from the issue of whether the requested repairs were a statutory roof recover to a review of the undisputed Appraisal Award.

In its June 20, 2023 Order, the District Court erred when it determined that the Appraisal Award was ambiguous in reliance on Cincinnati's affidavits, even after acknowledging the law governing the testimony of appraisers. Rymer App. 145-146, R. Doc. 114 at 8-9 Add. 1.

By finding that the Appraisal Award was ambiguous, the District Court changed the scope of inquiry from *whether the **requested** repairs were a roof recover under the Building Code* to *whether the **Appraisal Award** for "Mall roof repair" included mall roof repair*. In doing so, the District Court absolved Cincinnati from any obligation to challenge the requested repairs and shifted to Rymer the impossible burden to prove that the plain language of the Appraisal Award for "Mall roof repair" included something more than a simple repair to the cap flashing.⁵ Simply stated, the Court effectively shifted the burden to Rymer to disprove language that was absent from the Appraisal Award.

⁵ The word "flashing" does not appear anywhere in the Appraisal Award. See R. Doc. 33-3 at 1.

The District Court erred by relying on the appraisal panel member affidavits (drafted by counsel and later disaffirmed by the panel members) that contradicted the Appraisal Award, the positions of the parties, and the findings of this Court. Rymer App. 142, 145-146, R. Doc. 114 at 4, 7-8, Add. 1. The District Court's June 20, 2023 Order further contradicted the only evidence presented that the requested repair involved the installation of new roof coverings over the existing roof, which was water-soaked and damaged. *See* Rymer App. 079-082, R. Doc. 107; R. Doc. 34-1; Add. 1; Minn. Bldg. Code §1511.3.

C. The Appraisal Award Clarification was an Exercise in Futility.

On June 20, 2023, the District Court remanded the matter to the appraisal panel to address the alleged ambiguities identified by the District Court. Neither party argued the Appraisal Award was ambiguous, so this should have never happened. Even when it did, it confirmed Rymer's position.

Upon review, the appraisal panel published the October 20, 2023 Appraisal Award Clarification (R. Doc. 133-2 at 18) which was inherently contradictory to the Appraisal Award for the following reasons:

- 1) The amount of loss awarded for cap flashing in the Appraisal Award is excessive and far exceeds the amount estimated for cap flashing by either party at the November 9, 2020 appraisal⁶;

⁶ The Appraisal Award awards \$23,226 for "Mall roof repair" while the parties' estimates for metal flashing were ~\$3,500 (Rymer) and ~\$2,700 (Cincinnati) at appraisal. *See* R. Doc. 107 at 2; R. Doc. 93-1 at 8-9.

- 2) The Appraisal Award was unanimous, but the October 20, 2023 Appraisal Award Clarification is not, indicating that the Appraisal Award was modified by the Appraisal Award Clarification rather than clarified as ordered by the Court;
- 3) The four sworn witness affidavits submitted to the Court contradict contemporaneous comments and correspondence submitted at the time of the Appraisal Award detailing the scope of the Appraisal Award;
- 4) The four sworn witness affidavits submitted to the Court incorporate factual statements that are impossible to reconcile.

See R. Doc. 117.

After the Appraisal Award Clarification was published, Rymer identified these contradictions. Having already been forced down the road of proving a negative, Rymer requested depositions of the appraisal panel members which was granted. The District Court authorized Rymer to depose members of the appraisal panel to address Rymer's concerns over the Appraisal Award Clarification. Rymer App. 096, R. Doc. 123.

The District Court later disregarded that deposition testimony in favor of the irreconcilable Appraisal Award Clarification which was factually disproven by the panel's deposition testimony. Moreover, the appraisal panel had no authority to issue any award that exceeded the scope of this dispute. Said another way, it is a legal impossibility for the Appraisal Award to award \$23,226 for metal flashing, when the parties valued repair and replacement of metal flashing at far less (~\$3,500 (Rymer))

and ~\$2,700 (Cincinnati)).⁷ See R. Doc. 107 at 2; R. Doc. 93-1 at 8-9. The appraisal panel only has authority to resolve disputes between the parties, so the most it could award for flashing was ~\$3,500. Thus, it is legally impossible and contrary to the evidence for the appraisal panel award nearly 10 times what was in dispute further confirming that the Appraisal Award includes more than flashing.

D. Deposition Testimony from the Appraisal Panel Contradicted the Appraisal Award Clarification but Confirmed the Appraisal Award.

In its October 21, 2024 Order, the District Court stated that the deposition testimony could not be used to interpret the Appraisal Award but could be used to investigate inconsistencies between the Appraisal Award and Appraisal Award Clarification. Rymer App. 145-146, R. Doc. 143 at 7-8, Add. 2. However, the District Court identified no legal authority to confirm the Appraisal Award by incorporating the irreconcilable Appraisal Award Clarification while ignoring deposition testimony from appraisal panel members that expressly contradicts the Appraisal Award Clarification.

As detailed above, the Appraisal Award Clarification is actually impossible (see *infra* section B.), but if this Court accepts that the appraisal panel can weigh in and change the Appraisal Award, it should review the actual live testimony of the

⁷ See R. Doc. 33-1 at 52, FM 101 04 04 at 27 of 35. The appraisal panel cannot award more than the parties' dispute.

⁷ Referencing the Appraisal Award amount award for "Mall roof repair."

appraisal panel members who all confirm that the Appraisal Award means what it says.

At deposition, all three members of the appraisal panel confirmed that the Appraisal Award for “Mall roof repair” in the amount of \$23,226 included 120 linear feet of cap flashing plus 1,200 square feet of the roof surface. *See* R. Doc. 133-1 at 21-22; R. Doc. 133-4 at 32-33; R. Doc. 133-7 at 25-26.

Rymer’s appraiser, Kevin Baker

A. So that was a portion of this 23,226⁸ and the other portion of that was roof repair that I guess I will say I believe was damage on the roof itself.

Q. Why would you need to do roof repairs?

A. The membrane was tor[n].

Q. Do you know how much roof repair has been done?

A. I believe it was 1- -- I think **1,200 square feet of roof repair.**

R. Doc. 133-1 at 6 (pp. 21-22).

Plaintiff’s Appraiser, Jeffrey Nonhof

Q. So based on what you said of the math from Exhibit 2, the appraisal award, and Exhibit 4, Mr. Baker's e-mail, the math on the award is consistent with 120 linear foot of metal cap flashing and 10 feet into the **field of the roof**, making up 1,200 square feet. Is that fair?

A. **Yeah.** That was the process that went in- -- went into estimating the square footage on the hypothetical component of the award. Kevin then used that square footage to dictate what number he

⁸ Referencing the Appraisal Award amount award for “Mall roof repair.”

would feel comfortable signing the award at and I conceded it, from a negotiation perspective.

R. Doc. 133-7 at 7. (pp. 25-26.)

The Appraisal Umpire, Kurt Ehlers

Q. what is that number?

A. That's 1,200, if you times it by 10 feet.

Q. So that 1,200 is a number you wrote on there?

A. Correct.

Q. And it's on there because -- for what reason?

A. A possible repair method.

Q. Is that showing the 120 linear feet of cap flashing multiplied by the 10 feet into the **field of the roof** for the field repairs?

A. Correct.

R. Doc. 133-4 at 8. (p. 29).

Q. And, again, let's look at line item 1, mall roof repair. All right. How much is the line item for the mall roof repair?

A. 23,226.

Q. Now, would you say that number is more consistent with solely repair of 120 linear feet of cap flashing, or more consistent with the 1,200 square feet of cap flashing and roof repair?

A. It would be the cap flashing **and roof repair**.

Q. **It would include the roof --**

A. **Correct.**

Q. repair; correct?· Okay.

R. Doc. 133-4 at 8-9. (pp. 32-33).

Q. Have you now taken a position based on this clarification?

A. I'm – as of today, I haven't taken a position. I just told you what the correct repair method is. No one's asked me to take a position.

Q. What is your position on what the correct [repair] is?

A. Am I asked to give my position as far as the award on this or –

Q. Yeah.

A. Yeah, then I would do a cap flashing and a **ten-foot repair**.

Q. Okay, thank you. And I've been asking that question for five years.

A. Yeah.

R. Doc. 133-4 at 12. (p. 47).

Despite the fact that the deposition testimony was consistent with the Appraisal Award, the District Court refused to consider the deposition testimony to “interpret the award” in its October 21, 2024 Order. Instead, the District Court, applied the Appraisal Award Clarification as a substitute and accepted it as dispositive. Rymer App. 153, R. Doc. 143 at 6 Add. 2. The District Court also failed to address the obvious discrepancies between (1) the Appraisal Award (2) the Appraisal Award Clarification and (3) the deposition testimony of the appraisal panel members. *See* R. Doc. 117.

On October 21, 2024, the District Court erred when it confirmed the Appraisal Award (as “clarified”) by the Appraisal Award Clarification, because the Appraisal Award Clarification was unnecessary, contradictory to the plain language of the Appraisal Award, and provided no clarification to the phrase “Mall roof repair”. Rymer App. 153, R. Doc. 143 at 6 Add. 2. And again, the parties should never have been in a position to seek a clarification of an unambiguous award that neither contested at the outset.

Frankly, this Court need not reach this issue, because the Appraisal Award obviously includes “Mall roof repair.” If this Court chooses to review the deposition testimony it confirms the Appraisal Award necessarily includes “Mall roof repair.”

IV. “The amount of additional costs imposed by §1511.3.1.1” is still in dispute.

This Court has already determined that the amount of additional costs imposed by §1511.3.1.1 is a fact question. Rymer App. 010, R. Doc. 77 at 10. This fact question remains the only unanswered question in this matter related to the Policy’s coverage.

After the appraisal panel failed to determine the amount of loss for full roof replacement and in an effort to finally resolve the underlying insurance claim, the parties both agreed that the District Court should resolve any fact issues. Rymer App. 154, R. Doc. 143 at 7 Add. 2; R. Doc. 131. The District Court erred when it failed to resolve this issue.

Instead of resolving the claim, the District Court ignored the unambiguous and undisputed Appraisal Award and supporting deposition testimony in order to simply accept and incorporate the inconsistencies of the Appraisal Award Clarification into the Appraisal Award to rule that the underlying insurance claim was resolved. Rymer App. 153, R. Doc. 143 at 6 Add. 2.

Considering the totality of the record, the District Court's final decision on this matter contradicts the scope of unresolved issues after the first appeal and the obvious undisputed facts mandating that Cincinnati pay the costs for full roof replacement at the Cannon Falls Mall.

V. Rymer is entitled to prejudgment interest on the amount of loss.

The District Court simply did not comment on Rymer's claim for prejudgment interest pursuant to Minn. Stat. §549.09.

In its memorandum in support of its Motion for Summary Judgment, Rymer sought prejudgment interest in the amount of \$1,283,163.70 pursuant to Minn. Stat. §549.09. *See Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, (Minn. 2017); *Creekview of Hugo Association, Inc. v. Owners Insurance Company*, 386 F.Supp.3d 1059 (D. Minn. 2019); *Housing and Redevelopment Authority of Redwood Falls v. Housing Authority Property Insurance*, 864 F.3d 986 (8th Cir. 2017).

The District Court must determine the statutory interest owed to Rymer based on the Appraisal Award.

CONCLUSION

The District Court erred when it determined that the Appraisal Award was ambiguous, sidestepping the issues identified by this Court. The Appraisal Award has never been ambiguous. Both parties argued the same definition until this Court issued its first Order.

The decision by this Court on July 28, 2022 identified three specific issues to be addressed upon remand. The resolution of the first two issues specifically reference the application of the Building Code §1511.3.1.1 and whether the repairs that were requested by Rymer and rejected by the Building Official after the appraisal were a “roof recover”. For its part, Cincinnati appears to have misunderstood these two issues, because it continued to argue the same position that it put forth at the 2020 appraisal hearing. Cincinnati never directly addressed the first two issues identified by this Court and misled the District Court to focus on the undisputed Appraisal Award.

The law of the case, and all admissible evidence on the first two issues, including the undisputed plain language of the Appraisal Award leads to one conclusion. Building Code §1511.3.1.1 applies, because the requested repairs are a “roof recover” and Building Code, §1511.3.1.1 disallows a roof recover to a water-soaked roof. Therefore, Cincinnati must indemnify Rymer for the cost of full roof replacement pursuant to the Ordinance and Law coverage provisions of the Policy.

The District Court erred by failing to resolve the cost of full roof replacement at the Cannon Falls Mall. The cost of full roof replacement is the final issue identified by this Court and remains unresolved. The appraisal panel failed to determine the cost for full roof replacement and the District Court refused to do so, though the parties agreed to authorize the District Court to do so. This issue should be remanded to the District Court for a determination of the cost for full roof replacement at the Cannon Falls Mall.

The District Court erred by failing to award prejudgment interest pursuant to Minn. Stat. §549.09 to Rymer. The District Court completely ignored Rymer's claim for prejudgment interest; therefore, Rymer's claim for prejudgment interest should be remanded to the District Court for a determination.

For the reasons stated herein, Appellants Rymer Companies, LLC a/k/a Rymer Companies, Inc. and Cannon Falls Mall, Inc. respectfully request that this Honorable Court reverse the District Court's June 20, 2023 and October 21, 2024 Orders denying Rymer Companies, LLC a/k/a Rymer Companies, Inc. and Cannon Falls Mall, Inc.'s Motions for Summary Judgment.

SMITH JADIN JOHNSON, PLLC

Dated: January 16, 2025

By: /s/ Bradley K. Hammond
Alexander M. Jadin (MN#387219)
Bradley K. Hammond (MN#391611)
7900 Xerxes Avenue, Suite 2020
Bloomington, MN 55431
Telephone: (952) 388-0289
Facsimile: (612) 235-7927
ajadin@sjjlawfirm.com
bhammond@sjjlawfirm.com

Attorneys for Appellants

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 8963 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: January 16, 2025

By: /s/ *Bradley K. Hammond*
Bradley K. Hammond
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Opening 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 16th day of January 2025, upon the parties listed below:

Anthony J. Kane, Esq.
Jessica K. Allen, Esq.
Hilary Hannon, Esq.
Pfefferle Kane LLP
100 N Sixth Street
600A Butler Square Building
Minneapolis, MN 55403

Dated: January 16, 2025

By: /s/ Bradley K. Hammond
Bradley K. Hammond
Attorney for Appellants

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: January 16, 2025

By: /s/ Bradley K. Hammond
Bradley K. Hammond, Esq.
Attorney for Appellants