25-3315

In The United States Court of Appeals For the Eighth Circuit

Cannon Falls Area Schools, ISD 252,

Appellant,

v.

The Hanover American Insurance Company,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 0:24-cv-03383-KMM-DLM

BRIEF OF APPELLEE THE Hanover American Insurance Company

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Summary and Request for Oral Argument

This insurance coverage dispute arises from a hail event that caused shallow indentations in the metal roofs of Appellant Cannon Falls School District, ISD 252's elementary and high school buildings. Appellee Hanover's insurance policy excluded coverage for "cosmetic damage" to roof surfacing caused by hail. The policy defined "cosmetic damage" as "superficial damage that altered the appearance of the roof surfacing, but such damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred."

The district court correctly determined that the Cosmetic Damage Exclusion precluded coverage for ISD 252's claimed loss because the metal roofs continued to function as a barrier to the elements after the hail event just as they did before. This Court should affirm the judgment on that basis. Alternatively, this Court may affirm the judgment because ISD 252's expert's opinion is unreliable, leaving ISD 252 without admissible evidence to support its policy interpretation.

Oral argument is not necessary.

Corporate Disclosure Statement

Appellee The Hanover American Insurance Company is wholly owned by its parent company, The Hanover Insurance Group, Inc. The Hanover Insurance Group, Inc. is a publicly held corporation.

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Apposite Authorities:

Iyengar v. Liberty Ins. Corp., No. SA-21-CV-1091-FB (HJB), 2023 WL 8505692 (W.D. Tex. Oct. 24, 2023), *report & recommendation adopted,* 2024 WL 1161321 (W.D. Tex. Mar. 15, 2024);

Calfox, Inc. v. Certain Underwriters at Lloyd's, London, No. 20-cv-02443-RM-KMT, 2024 WL 1051948 (D. Colo. Mar. 11, 2024);

Amphay v. Allstate Vehicle & Prop. Ins. Co., No. 2:21-CV-219-Z-BR, 2023 WL 2491285 (N.D. Tex. Mar. 13, 2023), *reconsideration denied*, 2023 WL 3187038 (N.D. Tex. Apr. 25, 2023);

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2. Should this Court reject ISD 252's arguments—raised for the first time on appeal—that the Cosmetic Damage Exclusion is ambiguous and that its expert's opinion creates a fact issue precluding summary judgment?

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Apposite Authorities:

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993);

Tri Invests., Inc. v. United Fire & Cas. Co., No. 5:18-CV-116, 2019 WL 13114345 (S.D. Tex. Nov. 15, 2019).

Statement of the Case

A. Factual Background

1. Hanover provides property insurance coverage to ISD 252 that excludes coverage for cosmetic damage to roofing surfaces caused by wind or hail.

Hanover provided property insurance coverage for ISD 252's properties during the policy period from July 1, 2021 to July 1, 2022 ("the Hanover Policy"). (App. 20-357; R. Doc. 27-1 - 27-3.)[1] The Hanover Policy covered loss caused by hail. (App. 163-72; R. Doc. 27-2, at 24-33.)

The Policy, however, included a Limitations on Coverage for Roof Surfacing Endorsement (hereinafter "Cosmetic Damage Exclusion"). (Add. 1; App. 343; R. Doc. 27-3, at 83.) The Cosmetic Damage Exclusion precluded coverage for superficial damage to roof surfacing caused by wind or hail provided that the roof continued to function as a barrier to the elements as it did before:

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[1] "App." refers to the Appellant's appendix. "S.App." refers to Appellee's separate appendix. "Add." refers to Appellant's addendum. "S.Add." refers to Appellee's supplemental addendum. "R. Doc." citations refer to the ECF number.

> **B.** The following applies with respect to loss or damage by **wind and/or hail** to a building or structure identified in the Schedule as being subject to this Paragraph **B.**:
>
> We will not pay for cosmetic damage to roof surfacing caused by wind and/or hail. For the purpose of this endorsement, cosmetic damage means that the wind and/or hail caused marring, pitting or other superficial damage that altered the appearance of the roof surfacing, but such damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred.

(*Id*.)

2. The hail event and subsequent insurance claim.

On April 12, 2022, ISD 252's Elementary School, High School, and Community Center sustained damage during a hail event. (App. 2; R. Doc. 1, at ¶¶ 5, 6; S.App. 9; R. Doc. 31, at ¶ 4.) Hail damaged the rooftop HVAC equipment on all three buildings and skylights on the Elementary School. (S.App. 9; R. Doc. 31, at ¶ 6.) Hail also caused shallow indentations to the metal roofs on the Elementary School and High School. (App. 539; R. Doc. 27-5, at 126:10-13; App. 758; R. Doc. 27-7, at 15:11-18.)

ISD 252 subsequently submitted a claim to Hanover for coverage. (S.App. 9; R. Doc. 31, at ¶ 4.) After investigating ISD 252's claim, Hanover paid $702,906.84 to ISD 252 for hail damage to rooftop HVAC equipment on the Elementary School, High School, and Community Center and to the skylights on the Elementary School. (S.App. 213-14; R. Doc. 32-5, Pl.'s Resp. to Def.'s Req. for Admis., Nos. 5, 6 & 9; S.App. 9-10; R. Doc. 31, at ¶¶ 5-8.) Hanover denied coverage for ISD 252's remaining claim—hail indentations to the Elementary School and High School metal roofs—based on the Cosmetic Damage Exclusion. (S.App. 10; R. Doc. 31, at ¶ 11; S.App. 68-69; R. Doc. 31-2, at 4-5.)[2]

Hanover's coverage determination relied in part on the findings of its engineering consultant Dr. Steven Fulmer. (S.App. 10; R. Doc. 31, at ¶ 9.) Dr. Fulmer concluded that the shallow hail indentations were cosmetic because they neither impaired the roofs' ability to function as a barrier to the elements nor shortened the roof materials' lifespan. (App. 759; R. Doc. 27-7, at 17:7 – 18:6; S.App. 10; R. Doc. 31, at ¶ 10.)

[2] The Schedule identifies the Elementary School and High School as subject to Paragraph B in the Cosmetic Damage Exclusion. (S.App. 213; R. Doc. 32-5, Pl.'s Resp. to Def.'s Req. for Admis., Nos. 3 & 4.)

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

More than three years have passed since the April 12, 2022 hail event. The Elementary School and High School metal roofs have not leaked and have continued to function as a barrier to entrance of the elements into the schools' interiors. (S.App. 213; R. Doc. 32-5, Pl.'s Resp. to Def.'s Req. for Admis., Nos. 1 & 2; S.App. 199-200; R. Doc. 32-4, at 81:23 – 82:3.) In fact, the roofs have since experienced many days of significant rainfall without leaking:

- Twenty-one days with at least one-inch rainfall;
- Twelve days with at least one and a half inches rainfall; and
- One day with 3.35 inches rainfall.

(S.App. 3-4; R. Doc. 28, at ¶¶ 8-10.)

And ISD 252 has not replaced the metal roofs and has no concerns about their structural integrity. (S.App. 196-97; R. Doc. 32-4, at 78:6-19, 79:18-21.) Moreover, the manufacturer did not revoke its thirty-year warranty on the metal roofs after the hail event, and that warranty remains in place today. (S.App. 186, 188, 198; R. Doc. 32-4, at 36:19-25, 38:12-14, 80:22-24.)

4. The expert witness testimony.

As noted above, Hanover's expert, Dr. Fulmer, concluded that the shallow hail indentations constituted cosmetic damage because the indentations did not diminish the roofs' ability to function as a barrier to the elements or shorten the roofing materials' lifespan. (App. 759; R. Doc. 27-7, at 17:7 – 18:6.)

ISD 252's retained engineering expert Dr. Matt Phelps conceded that:

- There was *no* "compelling" or "significant" hail damage to the High School metal roof. (App. 522; R. Doc. 27-5, at 57:12 – 58:13.)

- The hail event caused no punctures or disengaged seams in either metal roof that would permit water intrusion. (App. 539; R. Doc. 27-5, at 126:14 – 127:4.)

- Dr. Phelps had no knowledge of any leaks where water penetrated through the metal roofs and into the schools' interiors after the hail event. (App. 526; R. Doc. 27-5, at 76:13-15.)

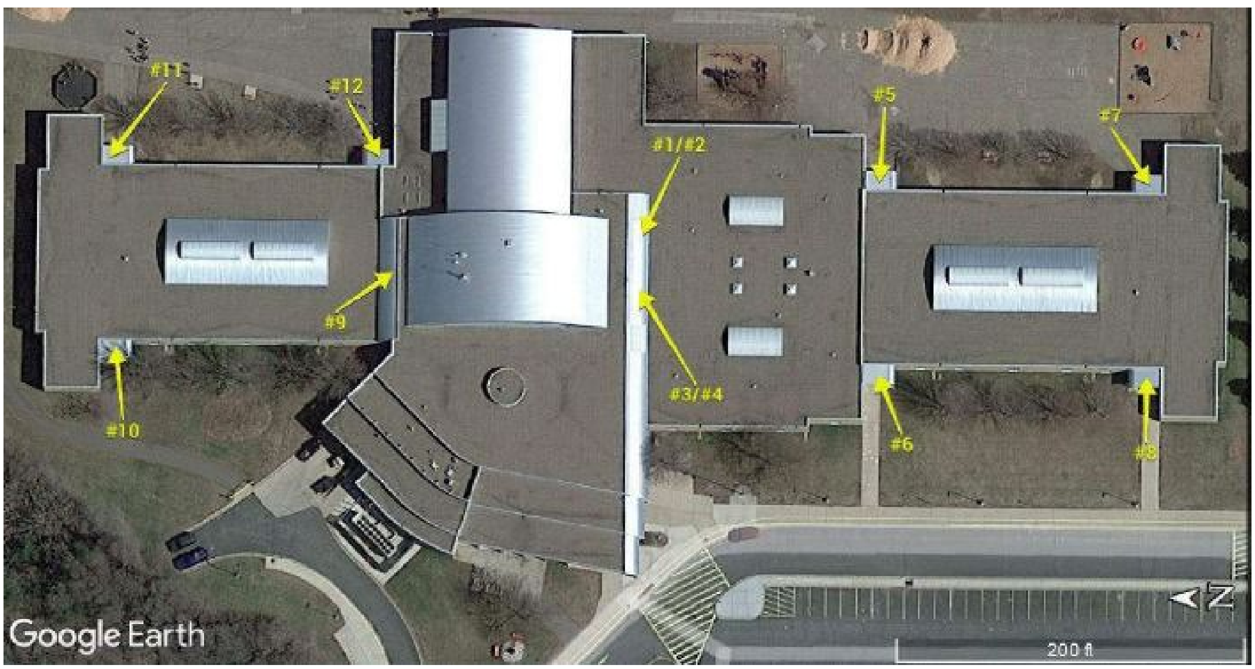
• Hail did not functionally damage the protective Galvalume® coating on the metal roofs. (App. 532; R. Doc. 27-5, at 97:8-20.)

Dr. Phelps, however, opined that the hail dents made the metal roofs weaker and, thus, more susceptible to failure at some undetermined time in the future. (App. 527, 536, 558-59; R. Doc. 27-5, at 79:11-22, 115:1-14, 204:12-25, 207:22 – 208:15.) In other words, he could not identify the date, month, or year that the roofs will fail, *if ever*. (App. 533, 536, 560; R. Doc. 27-5, at 102:11-18, 104:5-14, 115:1-19, 209:12-25.)

Critically, Dr. Phelps did not cut *any* samples or conduct *any* tests of the High School metal roof (shown below) to determine whether hail weakened the roof. (App. 521-22; R. Doc. 27-5, at 55:7-19, 57:12 – 58:8.)

(S.Add. 2; S.App. 82; R. Doc. 32-2, at 2.) He chose not to take samples, determining that there was "not enough hail damage on that . . . roof to warrant taking samples for the investigation." (App. 522; R. Doc. 27-5, 58:1-8.)

Instead, Dr. Phelps bases his opinion on testing conducted for only *some* portions of the Elementary School roof. (App. 422; R. Doc. 27-4, at 25; App. 531; R. Doc. 27-5, at 93:14 – 94:6.) The arrows in the photograph below show the sample and test locations:



(App. 422; R. Doc. 27-4, at 25; S.Add. 3; S.App. 264; R. Doc. 32-10, at 2.)

Dr. Phelps did not cut *any* samples on or conduct *any* tests of the two largest sections of metal roofs on the Elementary School to determine whether hail made them weaker. (App. 531; R. Doc. 27-5, at 94:12-21.) As he explained, he cut no samples because the curved roof sections made it "very difficult for the roofer to fabricate a repair to cover that." (App. 521; R. Doc. 27-5, at 55:20 – 56:8.) In fact, Dr. Phelps testified that "the repair would be difficult, if not impossible, to do." (*Id*.)[3]

ISD 252 persists in asserting that Hanover's expert, Dr. Fulmer, agreed that the hail event made the metal roofs weaker. (Appellant's Br. at 11, 18-20, 36.) Yet even ISD 252 concedes that Dr. Fulmer did not agree that hail made the metal roofs weaker with respect to wind or snow loads. (*Id*. at 10, 22.) Regarding future hail events, Dr. Fulmer testified that if hail "hit in the precise exact same dent, it would cause further indentation" not a rupture or failure. (App. 762; R. Doc. 27-7, at 29:20 – 30:4.)

[3] The curved roofs on the Elementary School can more easily be seen in the photograph at S.Add. 1, S.App. 80, and R. Doc. 32-1, at 2.

B. Proceedings Below

The sole dispute in this case is whether the Cosmetic Damage Exclusion precludes coverage for the shallow hail indentations in the metal roofs of ISD 252's two schools. After completion of discovery, both parties moved for summary judgment on that issue. (R. Docs. 23, 25.) Hanover also moved to exclude Dr. Phelps's expert opinion testimony. (R. Doc. 25.)

On October 21, 2025, the district court granted Hanover's motion for summary judgment and denied ISD 252's, holding that the Cosmetic Damage Exclusion barred coverage. (Add. 2-11; App. 816-25; R. Doc. 43.) The court reasoned that the cosmetic damage definition "focuses on the roof's functional capabilities in the present, rather than in the future." (Add. 8; App. 822; R. Doc. 43, at 7.) The court found that the "inclusion of the phrase 'to the same extent as it did before the . . . damage occurred' does not change this focus on the roof's present ability to act as a barrier to the elements." (*Id.*, ellipsis in original.)

Considering its own analysis together with decisions from other jurisdictions, the court predicted that the Minnesota Supreme Court would interpret the exclusion to focus on the roof's present ability to exclude the elements. (Add. 9; App. 823; R. Doc. 43, at 8.) Because the undisputed facts showed the metal roofs have continued to function as a barrier to the elements in the three years since the April 2022 hail event, the court granted summary judgment for Hanover. (Add. 8-11; App. 822-25; R. Doc. 43, at 7-10.)

What's more, the court rejected ISD 252's argument that the hail impact weakened the roofs' metal, such that the roofs could not resist future hypothetical hail impacts, snow loads, and wind forces to the same extent as before. (Add. 9-11; App. 823-25; R. Doc. 43, at 8-10.) The court reasoned that the Cosmetic Damage Exclusion "does not ask, as ISD 252 contends, whether the hail or wind damage weakened the roofing materials such that they may be less capable of acting as a barrier to the elements at some uncertain point in the future." (Add. 8; App. 822; R. Doc. 43, at 7.) Thus, the court found that the "exclusion does not mean, as ISD 252 argues, that hail or wind damage falls outside the exclusion whenever the roofing materials are weakened or the long-term prospects of the roof's ability to keep the elements out is diminished." (Add. 11, App. 825; R. Doc. 43, at 10.)

The court also noted that ISD 252 did not cite any authority to support its interpretation before concluding that "its argument overlooks the plain and ordinary meaning of the language in the Cosmetic Damage Exclusion." (Add. 9-10; App. 823-24; R. Doc. 43, at 8-9.) The court further determined that ISD's reading of the Exclusion "would rewrite the policy." (Add. 11; App. 825; R. Doc. 43, at 10.)

Finally, the court dismissed Hanover's motion to exclude Dr. Phelps's expert opinion testimony as moot because summary judgment was appropriate even considering his opinion. (Add. 11; App. 825; R. Doc. 43, at 10 n.4.). Exclusion of Dr. Phelps's unreliable opinion remains an alternative independent ground to affirm the judgment below, because absent Dr. Phelps's testimony there is no basis to find coverage—even under ISD 252's unsupported reading of the policy.

On October 21, 2025, the court entered judgment dismissing ISD 252's lawsuit with prejudice. (Add. 12; App. 826; R. Doc. 44.) ISD 252 subsequently appealed.

Summary of Argument

This dispute turns on whether the Cosmetic Damage Exclusion precludes coverage for shallow hail indentations to a metal roof that continued to function as a barrier to the elements, despite the insured's claim that hail weakened the roof and *possibly may* cause a future failure.

The district court correctly determined that the Cosmetic Damage Exclusion applied to preclude coverage. As the court found, the "cosmetic damage" definition "focuses on the roof's functional capabilities in the present, rather than in the future." (Add. 8; App. 822; R. Doc. 43, at 7.) Indeed, the Exclusion expressly applies to cosmetic damage that "*does not prevent* the roof from continuing to function as a barrier to entrance of the elements…." (Add. 1; App. 343; R. Doc. 27-3, at 83, emphasis added.) By using the present tense "does"—rather than the future tense "will"—the Exclusion confirms that loss of function must reflect a presently existing condition, not speculation or conjecture about what might occur in the future after another wind, snow, or hail event.

All available authorities support the district court's conclusion. Like the district court, courts elsewhere have observed that the same and similar cosmetic damage exclusions use the present tense rather than the future tense, and that conjecture about what might occur at some unknown point in the future does not preclude the exclusion's application. ISD 252 does not and cannot cite authority to the contrary.

ISD 252's proffered interpretation also improperly rewrites the Cosmetic Damage Exclusion by including a requirement that a roof must continue to function as a barrier to the elements in the future and for its remaining service life. While some cosmetic damage exclusions include that requirement, Hanover's does not.

At bottom, ISD 252's interpretation renders the Cosmetic Damage Exclusion meaningless. If an insured can circumvent the Exclusion with no more than an expert's speculation and conjecture that hail indentations in a metal roof—which undeniably do not impact its present ability to function as a barrier to the elements—*may* lead to a future failure, then the Exclusion would never apply and would serve no purpose. And ISD 252's related claim that every hail dent weakens a roof and therefore impairs its ability to function as a barrier to the elements similarly nullifies the Exclusion.

Finally, this Court should affirm the district court's judgment on the independent ground that ISD 252's expert opinion—that the hail event rendered the roofs weaker and more susceptible to future failure—warrants exclusion as speculative and unreliable, leaving ISD 252 without any admissible evidence to support its own interpretation of the Cosmetic Damage Exclusion.

Standard of Review and Applicable Legal Standards

A. Standard of Review

This Court reviews "a grant of summary judgment on an insurance policy interpretation de novo, applying the same summary judgment standard as the district court and using state law to determine coverage issues." *BITCO Gen. Ins. Corp. v. Smith*, 89 F.4th 643, 645 (8th Cir. 2023). The Court "will affirm a grant of summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *GEICO Gen. Ins. Co. v. M.O.*, 109 F.4th 1125, 1128 (8th Cir. 2024) (citing Fed. R. Civ. P. 56(a)).

B. Minnesota insurance policy interpretative rules

"[T]he interpretation and construction of insurance policies is a matter of law." *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413, 417 (8th Cir. 1991). Minnesota courts interpret insurance policies in accordance with general contract interpretation principles. *Wesser v. State Farm Fire & Cas. Co.*, 989 N.W.2d 294, 299 (Minn. 2023).[4] Insurance policy language

[4] Because this insurance contract dispute is before this Court on diversity jurisdiction, the Court applies state law in its substantive analysis

"must be given its plain and ordinary meaning." *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986).

"The extent of an insurer's liability is governed by the language of the insurance policy." *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co., Inc.*, 825 N.W.2d 695, 704 (Minn. 2013). "Exclusions contained in an insurance policy are as much a part of the insurance contract as any other part, and must be given the same consideration in determining what the policy covers." *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002). "Where the [insurance policy] language is unambiguous, [the Minnesota Supreme Court] will not render a construction which is more favorable to finding coverage but will apply the phrase to the facts of the case in order to give effect to the plain meaning of the language." *Firemen's Ins. Co. of Newark, N.J. v. Viktora*, 318 N.W.2d 704, 706 (Minn. 1982). A court has "no right to thrust upon the insurer a risk that it did not accept and for which it was not paid a premium." *Simon v. Milwaukee Auto. Mut. Ins. Co.*, 115 N.W.2d 40, 49 (Minn. 1962).

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of the policy. *See, e.g.*, *Babinski v. Am. Fam. Ins. Grp.*, 569 F.3d 349, 351–52 (8th Cir. 2009). The parties agree that Minnesota is the applicable state law.

Argument

I. The district court correctly concluded that the Cosmetic Damage Exclusion precluded coverage for ISD 252's claimed damages.

A. The Cosmetic Damage Exclusion precludes coverage for shallow hail indentations on roof surfacing where the roof continued to function as a barrier to the elements.

The Cosmetic Damage Exclusion precludes coverage for "cosmetic damage to roof surfacing caused by wind or hail." (Add. 1; App. 343; R. Doc. 27-3, at 83.) The Policy defines "cosmetic damage" as:

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

(*Id.*)

Courts hold that this exact "cosmetic damage" definition is clear and unambiguous. *J&S Welding, Inc. v. Liberty Mut. Ins. Co.*, No. 23-5942, 2024 WL 3495073, at *3 (6th Cir. July 22, 2024) ("The district court correctly determined that the cosmetic-loss exclusion was clear and unambiguous."); *Calfox, Inc. v. Certain Underwriters at Lloyd's*, *London*, No. 20-cv-02443-RM-

KMT, 2024 WL 1051948, at *6 (D. Colo. Mar. 11, 2024) (finding identical "cosmetic damage" definition clear and unambiguous).

As the district court correctly found, the Cosmetic Damage Exclusion plainly refers to the surface damage at issue here—shallow indentations in metal roofs. (Add. 8; App. 822; R. Doc. 43, at 7.) Shallow hail indentations undisputedly fall within the excluded "marring, pitting or other superficial damage that altered the appearance of the roof surfacing." Indeed, as the district court properly concluded, "'marring' and 'pitting' of roofing panels are surface-level forms of damage that are not meaningfully distinguishable from the indentations at issue in this case, and all fall directly within the exclusion." (*Id.*)

The Cosmetic Damage Exclusion contemplates "functional," as opposed to "cosmetic," damage only where a roof no longer performs its intended function of keeping out the elements like it did before the cosmetic damage occurred. In other words, if the roof still performs its intended purpose (*e.g.*, a roof prevents water intrusion) after the superficial damage occurred, then the damage qualifies as cosmetic and coverage is excluded.

Here, the metal roofs on ISD 252's two school buildings continued to perform their intended function just as they did before the hail event. To be sure, it is undisputed that the metal roofs kept out the elements immediately after the April 12, 2022 hail event *and* every day in the three-plus years since, just as they did before. (S.App. 213; R. Doc. 32-5, Pl.'s Resp. to Def.'s Req. for Admis., Nos. 1 & 2; S.App. 199-200; R. Doc. 32-4, at 81:23 – 82:3.)

ISD 252's own expert, Dr. Phelps, agreed that the hail event caused no punctures or disengaged seams in either metal roof that would permit water intrusion. (App. 539; R. Doc. 27-5, at 126:14 – 127:4.) ISD 252's expert also agreed that the protective coating on the metal roof panels was not functionally damaged by the hail. (App. 532; R. Doc. 27-5, at 97:8-20.) In fact, Dr. Phelps admitted that he found *no* "compelling" or "significant" hail damage to the High School metal roof at all. (App. 522; R. Doc. 27-5, at 57:12 – 58:13.) Further, confirming the absence of functional damage, the manufacturer did not revoke the thirty-year warranty on the metal roofs, and the warranty remains in place today. (S.App. 186, 188, 198; R. Doc. 32-4, at 36:19-25, 38:12-14, 80:22-24.)

In short, the roof damage is limited to the roofs' physical appearance, that is, shallow indentations. This damage falls cleanly within the clear and unambiguous Cosmetic Damage Exclusion. The district court correctly concluded that the Exclusion applied, and this Court should affirm the judgment.

B. ISD 252 cannot avoid the Cosmetic Damage Exclusion by claiming that hail made the metal roofs weaker and, thus, more susceptible to future failure or a reduced service life.

Because the roofs on ISD 252's two schools continued to function as a barrier to the elements after the hail event, ISD 252 attempts to circumvent the Cosmetic Damage Exclusion by claiming that hail made the roofs weaker and, as a result, they *may* leak someday in the future and experience a reduced service life. (Appellant's Br. at 17-18.) ISD 252's argument rests on the premise that hail damage to a metal roof cannot qualify as "cosmetic"—even absent any present leakage—because the roof *might* fail to function as a barrier to the elements at some unknown future date.

But ISD 252 cites no authority to support its argument. And as the district court found, ISD 252's "argument overlooks the plain and ordinary meaning of the language in the Cosmetic Damage Exclusion" and its reading of the Exclusion "would rewrite the policy." (Add. 10-11; App. 824-25; R. Doc. 43, at 9-10.) ISD 252's proffered interpretation would also render the Exclusion meaningless.

1. The Cosmetic Damage Exclusion uses the present tense, not the future tense.

Nothing in the plain text of the Cosmetic Damage Exclusion supports ISD 252's interpretation. Indeed, as the district court correctly found, the "cosmetic damage" definition "focuses on the roof's functional capabilities in the present, rather than in the future." (Add. 8; App. 822; R. Doc. 43, at 7.)

In particular, the Cosmetic Damage Exclusion expressly applies to cosmetic damage that "*does not prevent* the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred." (Add. 1; App. 343; R. Doc. 27-3, at 83, emphasis added.) The Exclusion uses the present-tense verb "does" rather than the future-tense "will." This verb choice establishes that the provision contemplates a presently existing impairment of the roof's function, not speculation or conjecture about what might occur in the future.

Like the district court here, other courts have observed that the Cosmetic Damage Exclusion uses the present tense, rather than the future tense. As one court reviewing a similarly worded cosmetic damage exclusion explained:

> The policy's plain language unequivocally speaks in the present tense—excepting hail damage from the cosmetic exclusion only if it '*does*. . . result in the failure of the 'metal materials' to perform their intended function of keeping out the elements.' Conjecture regarding what might happen at some unknown point in the future is not evidence that the metal materials are presently unable to perform their intended function of keeping out the elements.

Iyengar v. Liberty Ins. Corp., No. SA-21-CV-1091-FB (HJB), 2023 WL 8505692, at *5 (W.D. Tex. Oct. 24, 2023) (internal citation omitted; italics and ellipsis in original), *report & recommendation adopted*, 2024 WL 1161321 (W.D. Tex. Mar. 15, 2024).[5]

[5] The substantially similar cosmetic damage exclusion in *Iyengar* required that the cosmetic damage "*does not* result in the failure of the 'metal materials' to perform their intended function of keeping out the elements." *Iyengar*, 2023 WL 8505692, at *3.

ISD 252 ignores the present-tense verb "does" in the Cosmetic Damage Exclusion and instead focuses on the language "*to the same extent as it did before*." ISD 252 argues that this language requires a roof to withstand *future* hail, wind, or snow events to the same degree as it did before the hail event. (Appellant's Br. at 17.) In other words, ISD 252 claims that *any* reduction in the roof's ability to withstand the same snow load, the same wind force, and the same size hail as the roof did prior to the hail event places the loss outside the Exclusion.

But as the district court found, the "inclusion of the phrase 'to the same extent as it did before the . . . damage occurred' does not change this focus on the roof's present ability to act as a barrier to the elements." (Add. 8; App. 822; R. Doc. 43, at 7, ellipsis in original.) As the court observed, the Cosmetic Damage Exclusion "does not ask, as ISD 252 contends, whether the hail or wind damage weakened the roofing materials such that they may be less capable of acting as a barrier to the elements at some uncertain point in the future." (*Id.*)

Without exception, other courts have rejected the exact same argument advanced by ISD 252 and, instead, have focused on the roof's present ability to keep out the elements. For example, in *Calfox, Inc. v. Certain Underwriters at Lloyd's, London*, the insured, like ISD 252 here, argued that the "to the same extent as it did before" language in the very same Cosmetic Damage Exclusion meant "that if there is *any* decrease or reduction in the ability of the *roof coverings* to act as a barrier to the elements, the damage falls outside the Endorsement." No. 20-cv-02443-RM-KMT, 2024 WL 1051948, at *5 (D. Colo. Mar. 11, 2024) (italics in original). But the court rejected this interpretation as "overly broad" and concluded that "[i]f the damage is cosmetic but will ultimately result in a shorter lifespan for the roof, as long as the elements cannot penetrate, the damage is excluded." *Id*. at *6.

The court in *Amphay v. Allstate Vehicle & Prop. Ins. Co.*, No. 2:21-CV-219-Z-BR, 2023 WL 3187038 (N.D. Tex. Apr. 25, 2023) reached the same conclusion. In denying reconsideration of a grant of summary judgment based on a cosmetic damage exclusion, the court rejected the insured's argument that "functional damage"—as opposed to "cosmetic damage"—encompassed anything that would allow the roof covering "to be nonfunctional at some point in time or to lessen its lifespan." *Id*. at *2. The court reasoned that "it is doubtful that Defendant's policy intended to cover dents that have a '0.00001 percent' chance of causing a 'direct physical loss' or might shave 5 days off a roof's 100-year lifespan." *Id*.

By contrast, ISD 252 does not—and cannot—cite a single case supporting its strained interpretation of the Cosmetic Damage Exclusion. Lacking in authority, ISD 252 resorts to arguing that the cases cited by Hanover and the district court do not apply because "Minnesota insurance law is specific and unique." (Appellant's Br. at 24.) But there is nothing unique about Minnesota insurance law as it applies to the interpretation of a policy exclusion like the Cosmetic Damage Exclusion. This Court can reach the same conclusion as the district court and courts elsewhere by applying general contract interpretation principles. *See*, *e.g.*, *Henning Nelson*, 383 N.W.2d at 652 (insurance policy language "must be given its plain and ordinary meaning"). Applying the plain and ordinary meaning of the verb "does" in the Cosmetic Damage Exclusion, the Exclusion unequivocally requires presently existing impairment of the roof's function, not speculative future harm.

Here, it undisputed that the Elementary School and High School metal roofs continued to perform their intended function of keeping the elements out of the buildings, just as they did before the hail event. Therefore, the Cosmetic Damage Exclusion applies. The district court correctly granted Hanover's summary judgment motion. [6]

2. ISD 252's interpretation invites the Court to improperly rewrite the Cosmetic Damage Exclusion to cover the speculative future risk of failure.

Coverage is "determined by the specific terms of the insurance contract." *Wanzek Constr., Inc. v. Emps. Ins. of Wausau*, 679 N.W.2d 322, 327 (Minn. 2004). A court cannot rewrite a policy provision's specific terms to read differently. *See*, *e.g.*, *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004) ("We have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction."); *see also Simon*, 115

[6] ISD 252 repeatedly argues that Hanover must perform actual testing to prove that the roofs will still resist the elements in the future to the same extent as they did before the damage. (Appellant's Br. at 35-40.) As discussed above, the plain language of the Cosmetic Damage Exclusion does not support ISD 252's argument.

N.W.2d at 49 ("The contract rights of the parties must be determined from the language used in the contract where it is unambiguous, not from language the courts would like to read into the policy.").

The Cosmetic Damage Exclusion includes only one requirement: that the "damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred." (Add. 1; App. 343; R. Doc. 27-3, at 83.) As the district court pointed out, the Exclusion "does not ask, as ISD 252 contends, whether the hail or wind damage weakened the roofing materials such that they may be less capable of acting as a barrier to the elements at some uncertain point in the future." (Add. 8; App. 822; R. Doc. 43, at 7.)

To be sure, nothing in the plain text of the Cosmetic Damage Exclusion excepts hail or wind damage merely because the roofing materials are weakened or the roof's long-term ability to keep out the elements is diminished. ISD 252 simply reads additional terms into the Exclusion and improperly attempts to rewrite the policy to impose a risk on Hanover that it did not accept and for which no premium was paid.

First, applying firmly established insurance contract interpretation principles, the specified requirement that the "damage does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred" excludes other requirements not expressed. *Weber v. Sentry Ins.*, 442 N.W.2d 164, 167 (Minn. Ct. App. 1989) ("The well-recognized rule of 'expressio unius est exclusio alterius' provides that the expression of specific things in a contract implies the exclusion of all not expressed."); *see also Maher v. All Nation Ins. Co.*, 340 N.W.2d 675, 680 (Minn. Ct. App. 1983) ("The well-recognized rule of 'expressio unius est exclusio alterius' is also applicable. Under this maxim, the expression of specific things in a contract implies the exclusion of all not expressed."). Under this rule, the Cosmetic Damage Exclusion cannot silently require a roof to remain equally strong, pose no increased risk for future failure, or retain its full remaining service life for the Exclusion to apply.

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

For example, a Hartford policy's nearly identical "cosmetic damage" definition expressly includes an additional requirement that the roof continue to function as a barrier to the elements as it did before the damage "*and for the anticipated useful service life of the roof*":

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

(S.Add. 4; S.App. 266; R. Doc. 32-11, at 2, emphasis added.)

Unlike the Hartford policy, the Hanover Policy's "cosmetic damage" definition does not require that the roof also continue to function as a barrier to entrance of the elements "*for the useful service life of the roof*." ISD 252 now seeks to have this Court add those words by interpretation.

In short, construing the term "cosmetic damage" to except hail or wind damage merely because the roofing materials are weakened or the roof's long-term ability to keep out the elements is diminished reads additional terms into the Cosmetic Damage Exclusion. This Court should reject ISD 252's attempt to rewrite the Exclusion.

3. ISD 252's interpretation improperly renders the Cosmetic Damage Exclusion meaningless.

Under Minnesota law, a court must "attempt to avoid an interpretation of the contract that would render a provision meaningless." *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990); *see also Cachet Fin. Sols., Inc. v. Hartford Fin. Servs. Grp., Inc.*, 162 F. Supp. 3d 858, 862 (D. Minn. 2016) ("If possible, policies should be interpreted to give effect to all of their provisions, and interpretations that would render any provision meaningless should be avoided."). ISD 252's proffered interpretation of the Cosmetic Damage Exclusion runs afoul of this maxim: permitting an insured to avoid the Cosmetic Damage Exclusion based on speculative expert testimony about potential future failure—despite no present functional impact—would render the Exclusion meaningless.

ISD 252's claim that *any* hail indentation, however minor, weakens a metal roof and therefore impairs its ability to function as a barrier to the elements faces the same problem. *See* Appellant's Br. at 19-20 ("while [an] undented roof surface would have incurred 0% of its plastic strain capacity, the hail dented metal roofs of the High School and Elementary School have incurred something more than 0% such that the metal roofs have less than 100% of their ability to defend from the elements"). Thus if, as ISD 252 contends, every instance of hail indentations weakens a metal roof, then the Cosmetic Damage Exclusion would *never* apply in a hail loss claim, again rendering it meaningless.

4. Even if relevant, speculative future failure cannot defeat summary judgment.

Even if ISD 252's claim—that hail rendered the roofs weaker and more susceptible to future failure—had any relevance to application of the Cosmetic Damage Exclusion, that claim rests entirely on speculation and conjecture, which cannot defeat summary judgment.

Dr. Phelps's opinion that hail rendered the metal roofs weaker, more susceptible to future failure, and prone to reduced service life rests entirely on speculation because he failed to test any portion of the High School roof and most of the Elementary School roof, despite asserting that testing was necessary. *See supra* at 8-10; *see also* Appellant's Br. at 38 ("an expert cannot provide an opinion on whether or not the roof structure has been weakened without performing testing").[7]

Moreover, Dr. Phelps does not opine with certainty that the metal roofs *will* fail in the future; he only speculates that failure "may" occur. Nor does he quantify the amount of time — days, months, or even years — that it would take for the roofs to fail, if they ever failed at all. (App. 533, 536, 560; R. Doc. 27-5, at 102:11-18, 104:5-14, 115:1-19, 209:12-25.)

Indeed, Dr. Phelps repeatedly testified that he did not know when the roofs would fail, if ever:

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

[7] While ISD 252 claims that the limited testing that Dr. Phelps conducted on the Elementary School roof allowed him to opine that "the other metal parts of the same roof and of the neighboring roof . . . suffered the same damaging effects" (Appellant's Br. at 41-42), Dr. Phelps did not offer that opinion. As discussed previously, Dr. Phelps testified that he did not test the High School roof because there was "not enough hail damage on that . . . roof" and did not test the largest portions of the Elementary School roof because of their curved shape. *See supra* at 8-10.

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

(App. 533; R. Doc. 27-5, at 102:11-18, italics added.)

> Q. Are you going to give -- give the opinion that these roofs have failed since this April 12th, 2022 hail event?
>
> A. I think that they have been damaged from the hail event. I think that I have tried to make that very clear.
>
> *But will they have a failure from a wind event or a snow event? I think it's very likely. When that would happen, I do not know*.

(App. 533; R. Doc. 27-5, at 104:6-14, italics added.)

> Q. And we -- we talked about this before, like when is this additional damage from wind, snow, rain and other environmental elements going to occur, and you don't know; right?
>
> A. No, I don't -- *I don't know*.

(App. 536; R. Doc. 27-5, at 115:15-19, italics added.)

> Q. Okay. And this buckling that you mentioned and potential to wear a hole and cause a leak, as you said, you don't know when that will happen; right?
>
> A. *None of us know*. If -- if we knew, we would be wealthy enough we wouldn't have to be here today.
>
> Q. And you can't even say that it will happen; right?
>
> A. *I can't say for certainty that it will happen or within a given period of time*. I think, yes, it will happen. And I think it is just a matter of time. But when that will be, I do not know.

(App. 560; R. Doc. 27-5, at 209:12-25, italics added.)[8]

Dr. Phelps's opinions amount to no more than speculation and conjecture that the roofs may fail to keep out the elements at some unknown time in the future. But "speculation and conjecture are insufficient to defeat summary judgment." *Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012) (quoting *Bloom v. Metro Heart Grp. of St. Louis, Inc.*, 440 F.3d 1025, 1028 (8th Cir. 2006); *see also Turner v. XTO Energy, Inc.*, 989 F.3d 625, 627 (8th Cir. 2021) (non-moving party "must substantiate [its] allegations with sufficient probative evidence that would permit a finding in [its] favor based on more than mere speculation, conjecture, or fantasy." (citation omitted)).

Courts interpreting similar cosmetic damage exclusions have found similar opinion evidence of speculative future roof leaks or failures insufficient to defeat summary judgment. For example, in *Amphay v. Allstate Vehicle & Prop. Ins. Co.*, the insured's expert, like ISD 252's expert here, speculated that the hail-damaged roof *could* leak sometime in the

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[8] ISD 252 admits that "the exact amount of wind, snow, or hail size that will cause a failure to these roofs is unknown, as it would be for even a new roof." (Appellant's Br. at 33.)

future. No. 2:21-CV-219-Z-BR, 2023 WL 2491285, at *2 (N.D. Tex. Mar. 13, 2023). Much like ISD 252's expert, the insured's expert could not quantify the amount of time — days, months, or even years — that it would take for the roof to fail. *Id*. Instead, he argued that damage is not cosmetic if a roof's service life is "100 years and you take away 5 days," because "it's still 5 days." *Id*. The court found that "[t]his type of speculation is insufficient to create a fact issue" and granted summary judgment to the insurer based on the cosmetic damage exclusion. *Id*.

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

Here, as established, the metal roofs have undisputedly kept the elements out of the ISD 252's schools since the April 12, 2022 hail event. ISD 252's speculation and conjecture that the roofs *may* fail as a barrier to the entrance of elements at some unknown future time does not defeat summary judgment.

5. ISD 252's fears of a future coverage denial are speculative and unfounded.

ISD 252 argues that if the weakened roofs fail from a future wind, snow, or hail event, "the insurer at the time of the event will deny the claim as being the result of this prior claim." (Appellant's Br. at 33.) Whether the roofs might fail in a future wind, snow, or hail event—and how the insurer then on the risk would respond to a claim—is purely speculative. In any event, ISD 252's fears are unfounded. An insured is entitled to recover from an insurer when a cause of the loss is covered by the policy (*e.g.*, wind, snow, or hail), even though an excluded cause may also have contributed to the loss. *Henning Nelson*, 383 N.W.2d at 653 (finding coverage when both included and excluded causes contributed to the loss).

II. This Court should not consider ISD 252's newly raised ambiguity and fact issue arguments.

For the first time on appeal, ISD 252 argues that (1) the Cosmetic Damage Exclusion is ambiguous and (2) its expert's opinions create a genuine issue of fact precluding summary judgment. (Appellant's Br. at 30, 41-43.) ISD 252 did not raise these arguments below. (R. Doc. 24; R. Doc. 36) It cannot now do so on appeal.

This Court will not address arguments that parties raise for the first time on appeal. *E.g.*, *E&I Global Energy Servs., Inc. v. Liberty Mut. Ins. Co.*, 134 F.4th 504, 516 (8th Cir. 2025) ("Because Plaintiffs did not raise this argument below, we decline to address it."); *Boston v. TrialCard, Inc.*, 75 F.4th 861, 868 (8th Cir. 2023) ("First, this argument was not raised below, and we do not consider arguments raised for the first time on appeal.").

"As such, a party cannot assert arguments that were not presented to the district court in opposing summary judgment in an appeal contesting an adverse grant of summary judgment." *Cole v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 533 F.3d 932, 936 (8th Cir. 2008); *see also Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1014 (8th Cir. 2006) ("We do not reverse the grant of summary judgment on the basis of an argument not presented below.").

Because ISD 252 did not argue in the district court that the Cosmetic Damage Exclusion is ambiguous or that its expert's opinions created a fact issue, this Court should not consider those arguments here.

Even if ISD 252 had properly raised these two arguments, both lack merit. As discussed above, courts have rejected ISD 252's ambiguity argument, finding the identical "cosmetic damage" definition to be clear and unambiguous. *See supra* at 19-20. ISD 252 cites no contrary authority.

And ISD 252 is wrong in claiming that the district court improperly weighed the credibility of "dueling experts" and accepted Hanover's "scientific theory as fact." (Appellant's Br. at 40.) The district court did not cite Hanover's expert witness testimony at all in its analysis or interpretation of the Cosmetic Damage Exclusion. (Add. 6-11; App. 820-25; R. Doc. 43, at 5-10.) Moreover, the district court found summary judgment appropriate "even considering the evidence from ISD 252's expert, Dr. Phelps." (Add. 11; App. 825; R. Doc. 43, at 10 n.1.)

In short, this Court should reject ISD 252 newly raised arguments that the Cosmetic Damage Exclusion is ambiguous and that its expert's opinions create a fact issue.

III. This Court should also affirm the judgment because ISD 252's expert's "weaker roof" opinion is speculative and unreliable.

Even if ISD 252's claim that hail weakened the roofs and increased the risk of future failure were relevant to the Cosmetic Damage Exclusion (which it is not), the claim rests entirely on Dr. Phelps's expert opinion. Although the district court denied Hanover's motion to exclude that opinion testimony as moot, this Court may affirm on any ground supported by the record. *McDonald v. St. Louis Univ.*, 109 F.4th 1068, 1070 (8th Cir. 2024). Affirmance is appropriate because the issue was fully briefed below and presents a purely legal question. ISD 252's expert's opinion is speculative and lacks a reliable methodology or factual foundation, so it fails *Daubert*'s reliability requirements.

A. Speculative and unreliable expert testimony is inadmissible.

The admissibility of expert testimony presents an issue of law governed by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under Rule 702, "expert opinions must be based upon sufficient facts or data and must be the product of reliable principles and methods that have been reliably applied to the facts of the case." *Sprafka v. Med. Device Bus. Servs., Inc.*, 139 F.4th 656, 660 (8th Cir. 2025)."Reliability can be established by showing that the expert's theory or technique can be (or has been) tested, that the theory or technique has been subject to peer review and publication, that there is a known or potential rate of error, and that the theory or technique is generally accepted in the scientific community." *Id.* "[E]xpert testimony that is speculative, unsupported by sufficient facts, or contrary to the facts of the case is inadmissible." *Bliv, Inc. v. Charter Oak Fire Ins. Co.*, 159 F.4th 539, 543 (8th Cir. 2025) (quoting *Lancaster v. BNSF Ry. Co.*, 75 F.4th 967, 970 (8th Cir. 2023)).

These requirements are grounded in the Supreme Court's analysis in *Daubert*, where the Court emphasized the district court's gatekeeping obligation to ensure that all scientific testimony or evidence admitted under Rule 702 "is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. Though *Daubert* reflects a "liberal admission" standard, "[e]xpert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case." *In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1001 (8th Cir. 2020).

B. Dr. Phelps's opinion lacks reliability because it rests on improper speculation.

Dr. Phelps bases his opinion that hail made the metal roofs weaker and that they *may* at some unknown date in the future cease to function as a barrier to the elements on pure speculation and conjecture. As discussed above, he could not opine with certainty that the roofs will in fact fail in the future nor could he quantify the amount of time—days, months, or even years—that it would take for the roofs to fail, if ever. (App. 533, 536, 560; R. Doc. 27-5, at 102:11-18, 104:5-14, 115:1-19, 209:12-25.) Also as noted above, Dr. Phelps did not even bother to test the High School roof or the two largest sections of the Elementary School roof to determine whether hail made them weaker. (App. 521-22; R. Doc. 27-5, at 55:7-19, 57:12 – 58:8; App. 531; R. Doc. 27-5, at 94:12-21.)

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

Here, as in *Tri Investments*, Dr. Phelps opines that hail indentations *may* cause the roofs to fail prematurely. But as in *Tri Investments*, he could not opine with certainty that the roofs *will* in fact fail in the future and could not quantify the amount of time—days, months, or even years—that it would take for the roofs to fail, *if ever*. Therefore, as in *Tri Investments*, this Court should exclude as unreliable Dr. Phelps's speculative opinion that that the April 12, 2022 hail event made the metal roofs more susceptible to future failure and reduced their remaining service life.

In brief, ISD 252's unreliable expert opinion provides the sole basis for ISD 252's assertion that the Cosmetic Damage Exclusion does not apply. Without its expert's opinion, ISD 252 lacks any admissible evidence to support its own interpretation of the Exclusion. Thus, exclusion of Dr. Phelps's unreliable opinion provides a separate basis for affirming the judgment below.

IV. The Court should decline ISD 252's invitation—made for the first time on appeal—to certify the coverage issue to the Minnesota Supreme Court.

As a last resort, ISD 252 suggests that as an alternative to deciding the coverage issue in this case this Court could certify the question to the

Minnesota Supreme Court. (Appellant's Br. at 34-35.) This Court should decline to do so.

First, ISD 252 did not ask the district court to certify the question to the Minnesota Supreme Court. Instead, it raises certification for the first time on appeal after an adverse judgment. This Court discourages the practice of a losing party requesting a second bite at the apple through certification:

> The practice of requesting certification after an adverse judgment has been entered should be discouraged. Otherwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision. Once a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present. Only in limited circumstances should certification be granted after a case has been decided.

Perkins v. Clark Equip. Co., 823 F.2d 207, 210 (8th Cir. 1987).

Accordingly, this Court has declined certification where, as here, parties did not request certification until after the district court rendered summary judgment against them. *See, e.g.*, *Great W. Cas. Co. v. Decker*, 957 F.3d 910, 916 n.2 (8th Cir. 2020) (declining certification where appellant appealing adverse summary judgment ruling did not ask the district court to do so); *Jung v. Gen. Cas. Co. of Wis.*, 651 F.3d 796, 801 (8th Cir. 2011) (same and noting "[w]e generally do not allow certification after a case has been decided.").

Second, ISD 252 filed this action in federal court, knowing full well that a federal court would interpret the policy and decide any coverage issues. This Court has "accept[ed] the basic principle that federal courts 'should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction.'" *Smith v. SEECO, Inc.*, 922 F.3d 406, 412 (8th Cir. 2019) (quoting in part 17A Charles Alan Wright et al., *Fed. Prac. & Proc. Juris*. § 4248 (3d ed. 2017 update)).

Third, "federal courts have a duty to address matters of state law, even when that law is unsettled." *Jung*, 651 F.3d 796, 801. This Court can readily interpret and apply the Cosmetic Damage Exclusion under Minnesota's insurance-policy interpretive rules and by consulting other cases for guidance. *See*, *e.g.*, *Smith*, 922 F.3d at 412 (declining certification, noting that issue before the Court was "an ordinary question of contract interpretation which federal courts are well-equipped to answer").

For these reasons, and consistent with this Court's precedent, ISD 252's request for certification should be declined.

Conclusion

The Cosmetic Damage Exclusion's plain and unambiguous language and instructive legal authority from other jurisdictions demonstrate that the Exclusion applies to preclude coverage for ISD 252's claimed loss. Therefore, this Court should affirm the well-reasoned decision of the district court in all respects.

February 9, 2026

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Certificate of Compliance

The undersigned counsel for Appellee The Hanover American Insurance Company certifies that this document complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in Book Antiqua 14-point, proportionately spaced typeface utilizing Microsoft Word for Office 365 and contains 9,246 words, including headings, footnotes, and quotations.

The undersigned counsel for Appellee The Hanover American Insurance Company hereby certifies under 8th Cir. R. 28A(h)(2) that the Brief and Addendum have been scanned for computer viruses and that the documents are virus free.

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Certificate of Service

The undersigned counsel for Appellee The Hanover American Insurance Company hereby certifies that on February 9, 2026, he electronically filed the Brief and Addendum of Appellee The Hanover American Insurance Company with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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