CASE NO. 25-3315

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CANNON FALLS AREA SCHOOLS, ISD 252,

Plaintiff-Appellant,

vs.

THE HANOVER AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil Action No. 24-cv-03383-KMM

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The issue on appeal is whether the district court erred in its interpretation of the Cosmetic Damage Exclusion of the insurance policy ("Policy") issued by The Hanover American Insurance Company ("Hanover"). Coverage exclusions must be interpreted narrowly and are construed against the insurer. The Hanover Policy provides a Cosmetic Damage Exclusion for damage that is "marring, pitting or other ***superficial damage***" that also "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. 001, App. 020, R. Doc. 27-1 – 27.3 at 324 (emphasis added).). The district court improperly expanded this exclusion to include all damage that does not immediately cause a roof to leak water.

While the expert evidence indisputably shows that the metal roofs of ISD 252's elementary school and high school ("Roofs") were immediately weakened and immediately suffered reduced life expectancies from the hail impacts, the district court did not make a ruling on these issues of fact. Instead, the district court held that even if the Roofs were weakened and their life expectancies reduced, the exclusion bars coverage because the exclusion applies to exclude all damage that does not cause an immediate intrusion of the elements. This interpretation of the Cosmetic Damage Exclusion by the district court was made in error at Hanover's suggestion.

The April 12, 2022 hail and wind storm caused widespread hail indents to the metal Roofs of ISD 252's elementary school and high school (the "Loss"). This hail damage weakened the fully metal dome-shaped sections of the Roofs and reduced their functionality. When damage is only to cap flashing, valley metal, or other thin and soft metal that is supported by an underlaying structure, and the sole purpose of the metal is to shed water, then the metal may still be serving 100% of its intended function and could be excluded by the Cosmetic Damage Exclusion. However, the Roofs at issue in this case are metal dome-shaped structures that shed water ***as well as function to bear snow load and wind load, and provide protection from hail impacts***. The function of the Roofs has been negatively altered by the hail strikes, making this damage fall outside of the Cosmetic Damage Exclusion.

Cannon Falls Area Schools, ISD 252 ("ISD 252") respectfully requests that this Court overturn the ruling of the district court and remand this matter to the district court with direction that if ISD 252 has proven or proves the Roofs have been weakened by the hail impacts or that the life expectancy of the Roofs have been reduced, the Cosmetic Damage Exclusion does not apply and the hail damage is a covered loss. The district court should then perform an analysis of the expert reports, necessary expert testing, and undisputed facts to determine if summary judgment is appropriate based upon the record or if the matter must proceed to a fact-finder for a determination of facts based upon the corrected legal application of the Cosmetic Damage Exclusion that this Court (or the Minnesota Supreme Court if this question is certified to it) will provide.

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I. THE COSMETIC DAMAGE EXCLUSION DOES NOT EXCLUDE THE FUNCTIONAL HAIL DAMAGE TO THE METAL ROOFS OF THE SCHOOLS.

A. Legal Standard for Interpreting the Policy.

The federal courts must consider how the Supreme Court of the particular state would rule on a question of an insurance policy interpretation. *Quade v. Secura Ins.*, 814 N.W.2d 703, 705 (Minn. 2012) ("The interpretation of insurance contracts is a question of law.") Minnesota has insurance law that is different from other states, including those governed under the Sixth Circuit Court of Appeals, Colorado, and Texas, which Hanover cites cases from. The Court should provide an independent analysis of the wording of the Cosmetic Damage Exclusion at issue on appeal through the lens of Minnesota's concept of insurance policy interpretation.

While interpreting a Policy, "[p]rovisions in an insurance policy are to be interpreted according to both plain, ordinary sense and what a reasonable person in the position of the insured would have understood the words to mean." *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637 (Minn. 1983) (internal quotations omitted). The Court must construe a policy exclusion narrowly and in favor of finding coverage. *Nathe Bros. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000). The Court must also consider all language of the Policy and avoid an interpretation that would render any portion meaningless. *Mississippi Welders Supply Co., Inc. v. Flueger Crane, LLC*, No. A19-1590, 2020 WL 2313704, at *3 (Minn. Ct. App. May 11, 2020).

B. The Plain Language of the Cosmetic Damage Exclusion Does Not Exclude the Loss.

The opposition fails to provide a proper in-depth analysis of the meaning of the Cosmetic Damage Exclusion. A proper analysis shows that the district court's ruling that damage is excluded unless it causes an immediate intrusion of the elements was made in error. All words and parts of the exclusion must have meaning. The full meaning of the Cosmetic Damage Exclusion is made clear by considering what each part of the exclusion does.

The Cosmetic Damage Exclusion defines cosmetic damage as follows:

> 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.

(Add. 001, App. 020, R. Doc. 27-1 – 27.3 at 324 (emphasis added).)

The first part of the exclusion defines cosmetic damage as "marring, pitting, or other superficial damage." By this definition, marring and pitting are specific types of "superficial damage" and there are other types of "superficial damage". Accordingly, the first part includes damage that does not penetrate through all layers of the material. *See The Am. Heritage Dictionary of the English Language*

1748 (5th ed. 2011) (defining "superficial" as "[o]f, affecting, or being on or near the surface"; "[a]pparent rather than actual or substantial"; and "minor or insignificant"). Therefore, any damage that causes an immediate water leak or intrusion of the elements avoids this exclusion because it is more than just "superficial damage."

However, the Cosmetic Damage Exclusion goes on to have an additional requirement for damage to qualify as excluded. In addition to being superficial damage, the Cosmetic Damage Exclusion further requires that the superficial 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." This second part of the exclusion must have meaning, and that meaning cannot simply reiterate the first part of the exclusion. The exclusion, therefore, applies to exclude damage that is superficial (including damage that does not penetrate all layers) ***and*** does not affect its ability to ***continue to function*** as a barrier to the elements ***to the same extent***. To reiterate, for damage to be excluded, there must be damage that is superficial (the first requirement), and the superficial damage cannot affect the material's ability to continue to function as a barrier to the elements to the same extent (the second requirement). To hold otherwise, as the district court ruled in error, would render the second half of the exclusion as entirely meaningless and superfluous language, a conclusion that the Court is required to avoid.

The district court erroneously applied the exclusion as a dichotomy: either the roof is leaking or it is not. If the cosmetic damage exclusion simply stated that cosmetic damage is excluded unless is it "results in water leaking through the surface of a metal roof"[1], as is the language of a Texas property insurance policy from a case the district court relied on in its decision, or "results in penetration of water through the 'metal materials'"[2], as is the language of a Texas property insurance policy from another case the district court relied on in its decision, then Hanover and the district court could have been correct. In these examples, it would not matter if hail damage made a roof weaker or reduced the lifetime expectancy of a roof, so long as the roof was not leaking, the hail damage would be excluded. However, these examples of language were not used by Hanover in its Cosmetic Damage Exclusion, and the proper interpretation of the Cosmetic Damage Exclusion requires more than an overly simplified analysis that ignores meaning to the full text of the exclusion. Hanover chose to add into its exclusion the requirement that the Roofs must "continue to function as a barrier to the elements

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[1] *Amphay v. Allstate Vehicle & Prop. Ins. Co.*, No. 2:21-cv-219-Z-BR, 2023 WL 2491285 at 2 (N.D. Tex. Mar. 13, 2023).
[2] *Iyengar v. Liberty Ins. Corp.*, No. SA-21-CV-FB (HJB), 2023 WL 8505692 (W.D. Tex. Oct. 24, 2023) (cleaned up), *R&R adopted by*, 2024 WL 1161321 at 3 (W.D. Tex. Mar. 15, 2024).

to the same extent", therefore requiring that the roof continue to function to the same extent, indicating a magnitude and degree and duration of continued functioning.

ISD 252's metal dome Roofs have the function of supporting a certain amount of wind and snow load, and the function of lasting a certain amount of time, and these functions were reduced by the hail damage. The roofs do not continue to function as a barrier to the elements to the same extent as they did prior to the hail damage. As of the day of the hail damage to the Roofs, they instantly suffered a reduction in their ability to continue to function as a barrier to the elements — wind, snow, and hail – and instantly suffered a reduction in lifetime expectancy. Therefore, the cosmetic damage exclusion does not apply to this Loss.

1. The hail damage to the Roofs is current damage.

The Roofs sustained hail damage and thereby suffered an instant reduction in strength. The day before the storm, the Roofs could withstand snow, wind, and hail to a greater extent than they can since the storm. This is not a prospect of future damage, rather the hail and wind storm under which Hanover insured the property caused damage that instantly affected the Roofs.

Under the district court's ruling, even if the convex roof domes were completely caved inward, which would lead to concentration of snow and inevitable collapse, the damage would be excluded because there was not an immediate intrusion of the elements. According to the district court, the storm that caused the roofs to be weakened and cave in would not be considered to have caused the collapsed roofs, rather the subsequent snowfall would be the cause of the collapsed roofs.

While the Roofs at issue in this matter have not been damaged to the example above, they have been weakened such that they cannot withstand the same amount of wind and snow as they did before the storm. And the plain text of the exclusion requires that there be ***no change at all*** in the ability of the Roofs to continue to function. The April 12, 2022 storm damage caused an immediate functional change to the Roofs that is not excluded by the cosmetic damage exclusion.

When the function of a damaged roof component is only to shed water, then its continued ability to shed water is the only consideration to measure. Something either sheds water or it does not. It does not matter if it rains 1” or 3”, the metal will shed the water. However, if the function of the damaged part of the roof is to withstand a specific amount of wind and snow load, then its function is reduced if it withstands less wind and snow load. This is not a dichotomy as the district court and Hanover contend. Structural components of a roof are not measured simply in terms whether the roof will withstand snow or not, or whether the roof collapses or not. The functions of structural components are measured by how much force they can withstand. If a roof is rated to withstand four feet of snow load but will only withstand three feet and eleven inches of snow after hail damage, the roof was functionally diminished by the hail damage. If the function can be measured (the amount of force it can withstand), and that function is reduced, the change is more than just cosmetic. This is exactly the testing that ISD 252's expert performed and concluded that the force the Roofs can withstand has been diminished.

Hanover contends that an insured cannot avoid the cosmetic damage exclusion by showing that the roofs are weakened by the event. However, Hanover is wrong; that is exactly the case here and that fits within the plain reading of the exclusion. For parts of the roof that need to be strong to resist wind and snow, if they are weakened, they function to a lesser degree, not to the same extent as they did before the damage occurred. The exclusion does not exclude all denting and superficial damage, as the district court determined in error. The exclusion applies to denting and superficial damage that also does not have an impact on the function of the damaged property. The district court and Hanover rewrite the Policy to exclude all denting, so long as it does not cause an immediate water intrusion, which is already excluded by the definition of superficial damage. The district court's rewriting of the Policy would render everything in the exclusion after "marring, pitting, and superficial damage" superfluous and meaningless, a conclusion that the Court must avoid.

2. A reduction in useful life expectancy is not just cosmetic change.

A reduction in the useful life expectancy of the Roofs from the hail damage means the Roofs do not serve as a barrier to the elements to the same extent as they did before the hail damage. A reduction in the useful life expectancy is certainly not a cosmetic change or a change in appearance only. Rather, the function of a roof is to provide protection from the elements for a specific anticipated duration, that is, its useful life expectancy. If the useful life expectancy is reduced, that is a functional change that means a roof no longer protects against the elements to the same extent as it did before.

Hanover contends that a reduction in useful life expectancy would be a future damage when the roof fails at some other time that is sooner than it would have failed before the damage. However, the life expectancy is a current measure of the function of material. For example, the same manufacturer makes shingles rated for 20 years and shingles rated for 30 years. It is no surprise that the 30-year shingles cost more and are worth more. The 30-year shingles have the function of protecting the roof for 30 years. If the 30-year shingle suffers damage such that it now has a reduced useful life expectancy down to 20 years, it only serves the lesser function of protecting the roof for 20 years. The reduced useful life expectancy is a functional change that can be observed now, as ISD 252's expert observed.

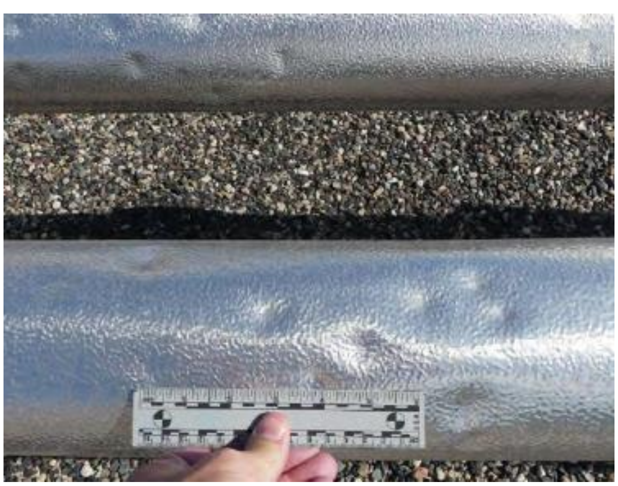
In the current matter, the denting and damage to the roof components that must support snow and wind load impact the current useful life expectancy of the Roofs. The reduced life expectancy is a current loss that is not simply a cosmetic change. A reduction in useful life expectancy does not simply change the way the Roofs look, it changes how they function, in that they do not serve as a barrier to entrance of the elements to the same extent as they did prior to the hail damage.

Whether a roof's useful life expectancy is reduced by 1% or 99%, the Cosmetic Damage Exclusion does not apply to exclude coverage. Serving as a barrier to the elements with a reduced life expectancy means that the material does not serve as a barrier to the same extent as it did before.

C. The Cosmetic Damage Exclusion Does Not Exclude the Loss but Does Still Have a Purpose.

The Hanover Cosmetic Damage Exclusion applies to bar coverage for damage that does not cause a functional change to the property. This comports with the reasonable expectations of the insured along with the technical analysis provided herein. Yet, the opposition erroneously argues that if its Cosmetic Damage Exclusion does not apply to the metal roofs in this matter, the exclusion would never apply. As a threshold matter, Hanover could have incompetently written its exclusion to never apply. However, that is not the case here, as the Hanover exclusion could apply to exclude hail damage, but not the hail damage that occurred to ISD 252's metal Roofs.

The metal dome-shaped portions of the school Roofs serve the function of keeping out the elements, including supporting a certain amount of snow load and wind forces and doing so for a certain duration of time. Not all metal on a roof has this purpose. The school Roofs have several thin and soft metal components that are not intended to support significant snow and wind forces. This includes but is not limited to vents (App. 456, R. Doc. 27-4 at 59), vent caps (App. 457, R. Doc. 27-4 at 60), cap flashing (*Id.*), aluminum jacketed pipe insulation (App. 639, R. Doc. 27-6 at 24), aluminum ductwork (App. 640, R. Doc. 27-6 at 25), parapet flashing (*Id.*), and perimeter flashing (App. 652, R. Doc. 27-6 at 37).




These thin and soft metal components are supported underneath by other, more stable roof parts that bare the snow load and wind load. Pitting and other superficial damage to thin and soft metal material that is not intended to and does not provide support for wind and snow load, is excluded by the Cosmetic Damage Exclusion. The purpose of these thin and soft metal components is to protect from water at a transition or to protect from water entering the HVAC system. Accordingly, so long as these parts continue to shed water, they function to the same extent and are excluded.

The purpose of the Cosmetic Damage Exclusion is for the insurance company to avoid having to pay for extensive repairs only to replace small component parts that have not impacted the function of the roof. The best example of the reasonable intent of this exclusion is considering valley metals on roofs.

In these photos of valley metals, the metal components serve only the function of shedding water from the intersections of two slopes of a roof. The metal is affixed to the roof decking, and it is the decking that functions as structural resistance to snow and wind load. Without a cosmetic damage exclusion, dents to these metals would likely require the insurer to pay to replace the entire roof. That is because to replace the valley metals, the surrounding material must be removed. If the shingles are too old and brittle, or if the design of the roof prohibits partial replacement, all shingles may need to be replaced in order to replace the valley metals. Hanover implemented its Cosmetic Damage Exclusion, so that as long as these valley metals are still shedding water, their only purpose, Hanover is not required to pay for full roof replacement only to replace components that serve no other function than to repel water.

On the school Roofs, the hail dents to the parapet flashing or perimeter flashing could similarly trigger the need to replace a large section of roof in order to repair the flashing, absent Hanover's Cosmetic Damage Exclusion. The roof underlayment is tucked up under these flashings and the metal flashings prevent water from entering at the ends of the underlayment. If the metal flashings need to be replaced and the underlayment is not stable enough to survive the replacement, it could trigger replacement of entire sections of the Roofs that function as structural resistance to snow and wind load. The same would be true when replacing hail dented vents on the school Roofs.

Contrary to the contentions of the opposition, the Hanover Cosmetic Damage Exclusion serves a purpose, even while the hail damage to the metal Roofs in this case now on appeal is covered damage that is not excluded. The purpose of the exclusion is to avoid having to replace large sections a roof when only the flashing, vents or other metal components are dented and the roof's ability to serve as a barrier to snow and wind load and the expected lifetime of the roof are not reduced.

However, the Cosmetic Damage Exclusion is not intended to, and does not, exclude damage that reduces the roof's ability to serve as a barrier to snow and wind load or reduces the lifetime expectancy of the roof. Unlike the thin and soft metals in the photos above which are affixed to a substrate and intended only to shed water, the metal dome Roofs of the schools are the barrier to wind and snow load. In order for the cosmetic damage exclusion to apply, the Roofs' function of withstanding wind and snow load and the lifetime expectancy of the Roofs ***must not be negatively affected to any extent***.

In this case, ISD 252's engineer showed through testing of the load bearing roof metals that the Roofs have been weakened, they do not protect against the same amount of wind and snow force as they did prior to the hail-caused indentations, and they will not last as long as they would have prior to the hail-caused indentations. ISD 252 had Roofs that it selected, installed, and paid for that were to withstand a certain amount of wind and snow load and were to last for a certain amount of time. Now that the Roofs have been weakened such that they will not withstand the same amount of wind and snow load and will not last for the same amount of time, the Roofs no longer serve the function to the same extent as they did before the storm. Put plainly, the function of these metal roofs is to be strong, and they are now less strong because of the damage from the April 12, 2022 hailstorm.

D. If the Court Determines the Cosmetic Damage Exclusion Is Ambiguous, the Exclusion Must Be Read in ISD 252's favor.

The Cosmetic Damage Exclusion clearly does not apply to exclude coverage when hail damage reduces the Roofs' ability to serve as a barrier to snow and wind load or reduces the lifetime expectancy of the Roofs. ISD 252 does not contend that the exclusion is ambiguous when read properly. However, Hanover and the district court contend the exclusion is clear with no ambiguity in the exact opposite way, that it excludes all damage that does not cause an instant intrusion of the elements. Yet the words of the exclusion do not require an immediate leak but rather require that Hanover prove that a hail damaged roof has the exact same ability to serve as a barrier to snow and wind load and the exact same lifetime expectancy. Accordingly, it is unclear where Hanover or the district court believe an immediate leak requirement comes from.

ISD 252 does not raise ambiguity as an argument but instead guides the Court to the proper procedure and ruling in the event the Court considers both interpretations reasonable. In the event that the Court determines that the insured and the insurer have reached reasonable and different conclusions as to the meaning of the Policy language, the Policy language is then ambiguous. If both the insured and the insurer's reading of the policy are reasonable, then the law requires that the Policy must be interpreted in favor of coverage and against the insurer.

II. FACT ISSUES AND EXPERT TESTIMONY ADMISSIBILITY ARE NOT ISSUES ON APPEAL.

The district court did not rule on the admissibility of either expert and instead held that the Cosmetic Damage Exclusion applies even if the Roofs are weakened. Accordingly, the validity of opinions of the dueling experts are not issues on appeal. Although, if the Court would venture down this path, it need only consider Hanover's summary judgment briefing to see that Hanover's argument contradicts itself and supports coverage in this case. Hanover argues that ISD 252's expert did some testing but not enough testing to the roof metals to know whether or not the damage to the roofs is functional damage. What Hanover misses here is it is Hanover's burden to show that the cosmetic damage exclusion applies. Hanover performed no testing on the metal Roofs. If Hanover is correct that testing is needed to know whether or not the damage to the roofs is functional damage, Hanover cannot meet its burden to prove the Cosmetic Damage Exclusion applies to the hail damage to the metal Roofs, because Hanover admittedly did no testing at all.

III. THE COURT MAY CERTIFY THE QUESTION TO THE MINNESOTA SUPREME COURT.

The Eight Circuit has the power to *sua sponte* certify interpretation of the Cosmetic Damage Exclusion to the Minnesota Supreme Court. *See Knowles v. United States*, 29 F.3d 1261, 1265 n.8 (8th Cir. 1994); *see also Godfrey v. State Farm Fire & Cas. Co.*, 11 F.4th 601, 603 (8th Cir. 2021). The Minnesota Supreme Court may answer a "question of law certified … by a court of the United States…if the answer may be determinative of an issue in pending litigation in the certifying court, and there is no controlling appellate decision, constitutional provision, or statue of this state." Minn. Stat. § 480.065, subd.3 (2008). The interpretation of the Cosmetic Damage Exclusion is a case of first impression in Minnesota. While Hanover attempts to impute law from other states as persuasive to this Court, interpretation of insurance policy provisions is unique to each state.

Minnesota has a particularly different view of insurance policy interpretation than many other states and a different framework regarding having more favorable circumstances for insureds up front while also having notoriously insurance company-friendly bad faith laws. The insurance system in Minnesota is set up to provide rules and clarity to reduce court actions and the litigation or penalty exposure for both sides. Minnesota has the most expansive access to appraisal of any state — permitting the out of court process of appraisal to address the amount of loss even if the insurer denies the claim entirely, permitting appraisal determine causation, and deferring to appraisal to determine if replacement materials reasonably match the exiting material at the property. *See Quade v. Secura Ins.*, 814 N.W.2d 703, 707 (Minn. 2012) (holding that appraisal is required when demanded and holding that appraisal panel determines causation); *see also Axis Surplus Ins. Co. v. Condor Corp.*, Civil No. 20-789 (DSD/KMM), 2020 WL 7974330, October 8, 2020 (aff'd,19 F.4th 1062 (8th Cir. 2021)) (reaffirming appraisal requirement and panel determination of causation); *see also* C*edar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, 857 N.W.2d 290 (Minn. 2014) (holding that appraisal panel determines whether replacement product reasonably matches existing product). The state specific issues and novelty of this interpretation, along with the extensive application of this exclusion, warrants this Court involving the Minnesota Supreme Court for guidance in this case.

IV. INSURANCE INDUSTRY MISCALCULATION OF RISK IS IRRELEVANT TO THIS CONTRACTUAL DISPUTE AND MUST NOT REDUCE COVERAGE.

What the insurance industry attempts to frame as a matter of public policy is its own admitted miscalculation of risk over the last ten plus years. Increased storms and property damage should certainly not garner sympathy for insurance companies or favor reduced coverage. This is contrary to the very purpose of insurance. Insurance is a shared risk pool such that no one insured suffers a devastating loss they cannot afford to repair. Insurance companies collect premiums from a large number of people, spreading that risk and financial burden among many people, and then insurance companies siphon out a large amount of the premiums paid in the form of exorbitant salaries and commissions before later claiming they miscalculated their risks and their profits are not as high as they would prefer. Moreover, if insurance companies were permitted to cover fewer losses because they miscalculated their risk, more individuals already paying insurance premiums would bear the risk of out-of-pocket costs from a significant loss. The insurance industry's own admitted miscalculation of risk is not a basis to reduce ISD 252's coverage, and a public policy argument is irrelevant to a contractual interpretation dispute between two parties, which is the only matter now before the Eighth Circuit. Although, if there were public policy considerations here, the public policy considerations would be whether the children attending the public elementary school and public high school should have safe Roofs over their heads, and whether Hanover should be permitted to avoid its contractual financial obligations and thereby shift the cost of repair of the Roofs of the public schools to taxpayers who have already paid premiums to Hanover to cover the costs of repair to the Roofs due to functional hail damage.

CONCLUSION

The district court committed reversible error in granting summary judgment for Hanover, denying summary judgment for ISD 252, and entering judgment in favor of Hanover and against ISD 252. The district court's Order granting summary judgment for Hanover and denying summary judgment for ISD 252 must be reversed.

ISD 252 respectfully requests that this Court overturn the ruling of the district court and remand this matter to the district court with direction that if ISD 252 proves the Roofs have been weakened by the hail impacts or that the life expectancy of the Roofs have been reduced, the Cosmetic Damage Exclusion does not apply and the hail damage is a covered loss. The district court should then perform an analysis of the expert reports, necessary expert testing, and undisputed facts to determine if summary judgment is appropriate based upon the record or if the matter must proceed to a fact-finder for a determination of facts based upon the corrected legal application of the Cosmetic Damage Exclusion that this Court (or the Minnesota Supreme Court if this question is certified to it) will provide.

Respectfully submitted,

HELLMUTH & JOHNSON

Date: March 3, 2026

By: *<u>/s/ Bryan M. Wiley</u>*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because Appellant's brief and this reply brief together contain 4,996 words, excluding the parts of the briefs exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman font. This brief has been scanned with antivirus software and is virus-free.

Dated: March 3, 2026 By: */s/ Bryan M. Wiley*

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: */s/ Dawa D. Damdul*