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NO. A09-929

State of Minnesota  
**In Court of Appeals**

QBE Insurance Corporation,

*Appellant,*

vs.

Twin Homes of French Ridge Homeowners Association,

*Respondent.*

**APPELLANT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

**I. DID THE DISTRICT COURT ERR IN DISMISSING APPELLANT'S COMPLAINT AND CONFIRMING THE APPRAISAL AWARD BECAUSE THE APPRAISAL PANEL EXCEEDED ITS SCOPE OF AUTHORITY BY MAKING AN IMPROPER COVERAGE DETERMINATION?**

The District Court determined that the Appraisal Panel did not make a coverage determination in awarding total roof replacement for the insured.

**Apposite Authorities**

*Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340 (Minn. Ct. App. 2007)

*Mork v. Eureka-Security Fire & Marine Ins. Co.*, 42 N.W.2d 33 (Minn. 1950)

*Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001)

*Greene v. United Services Auto. Assoc.*, 936 A.2d 1178 (Pa. Super. Ct. 2007)

**II. DID THE DISTRICT COURT ERR IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL TIME TO COMPLETE DISCOVERY?**

The District Court denied QBE Insurance Corporation's request for a continuance to conduct necessary discovery.

**Apposite Authorities**

*Cargill, Inc. v. Jorgenson Farms*, 719 N.W.2d 226 (Minn. Ct. App. 2006)

*Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982)

## STATEMENT OF CASE

This matter involves an action commenced by QBE Insurance Corporation (“QBE”) against Twin Homes of French Ridge Homeowners Association (“French Ridge”) to have an insurance appraisal award vacated, or in the alternative modified or corrected to accurately reflect the amount of physical damage to French Ridge’s property resulting from a hail storm that occurred in May, 2007.

QBE issued a homeowners association insurance policy (the “Policy”) to French Ridge that provided coverage for property damage from certain losses to sixteen residential structures located in Plymouth, Minnesota. In May, 2007, French Ridge submitted a claim to QBE, pursuant to the Policy, alleging that it sustained a loss resulting from hail damage to the roofs of its residential buildings. QBE and French Ridge were unable to agree upon the amount of loss and an Appraisal Panel was assembled to inspect the properties and determine the amount of loss. On October 10, 2007, the Appraisal Panel inspected the properties and identified eight to twelve hail-damaged shingles on each roof. Following the inspection, two of the three appraisers awarded a replacement cost value equal to total roof replacement for each of the sixteen buildings.

Given that only a small number of shingles were damaged, counsel for QBE requested formal clarification of the basis for awarding total roof replacement. In his response, the appraisal umpire indicated that the award was based on the fact that the existing shingles on the French Ridge roofs were no longer manufactured. The umpire’s deposition further clarified that the appraisal award was also based on the need to replace

the non-hail damaged shingles due to their deteriorated condition resulting from wear and tear.

On November 11, 2007, QBE filed suit seeking to vacate the appraisal award or in the alternative, correct the award to reflect the cost of the actual loss of eight to twelve shingles per roof because the Appraisal Panel exceeded its authority by making a coverage determination. QBE also sought a declaration that the Policy only provided coverage for repair or replacement of damaged property with “comparable material,” not identical material. French Ridge filed a counterclaim for breach of contract and sought confirmation of the appraisal award.

On January 22, 2008, French Ridge filed its Motion for Summary Judgment or in the alternative a Motion to Dismiss on the grounds that QBE would not be able to present any evidence that the Appraisal Panel clearly exceeded its authority. QBE opposed French Ridge’s Motion based upon Mr. Luedtke’s deposition testimony, which provides indisputable evidence that the Appraisal Panel awarded total roof replacement based on something other than the actual physical damage caused by hail.

On February 19, 2008, French Ridge’s Motion was heard by the Honorable Deborah Hedlund, Judge of Hennepin County District Court. On May 16, 2008, the District Court issued an Order granting summary judgment in favor of French Ridge. The District Court concluded that the appraisers did not make a coverage determination. However, in its findings, the District Court relied upon a portion of the Policy that is not applicable, not at issue, and was never raised or addressed by either party.

On July 9, 2008, QBE filed its Notice of Appeal of the District Court's May 21, 2008 Order. However, because the May 21, 2008 Order did not determine the amount of French Ridge's damages, the above-entitled matter was not appealable. By Order dated December 30, 2008, this Court dismissed QBE's appeal and remanded the matter to the District Court for further proceedings on the issue of French Ridge's damages. On April 3, 2009, pursuant to the parties' stipulation, the District Court awarded French Ridge damages in the amount of \$97,383.56. Judgment was entered on April 6, 2009. This subsequent appeal followed.

### **STATEMENT OF FACTS**

Respondent Twin Homes of French Ridge Homeowners Association ("French Ridge") was the named insured under a homeowners association insurance policy ("policy") issued by Appellant QBE Insurance Corporation ("QBE"). ADD23; AA99. QBE's Policy provided coverage to French Ridge for certain losses from property damage to the residential structures located at Xenium Court and 39th Avenue in Plymouth, Minnesota. ADD24; AA100.

Section I of the Policy, the PROPERTY DIRECT COVERAGES SECTION,  
provides as follows:

We will pay for the direct physical loss of or damage to 'covered property' caused by or resulting from any COVERED CAUSE OF LOSS under III.A. COVERED CAUSES OF LOSS.

...

Coverage is also provided for 'covered property' which is not damaged but which must be removed and replaced in order to repair 'covered property' which is damaged by a COVERED CAUSE OF LOSS under III.A. COVERED CAUSES OF LOSS.

ADD19; AA40.

Section III.B of the Policy provides for exclusions to coverage. AA46. Section III.B.2.b. states that QBE “will not pay for loss or damage caused by or resulting from ... wear and tear.” ADD20; AA46.

Pursuant to the Declarations of the Policy, coverage for damage to French Ridge’s buildings was on a guaranteed replacement cost basis. ADD25; AA101. According to Section VI, paragraph L.1.,

QBE will pay no more than the least of the following:

- a. The cost to repair or replace the property at the same site, regardless if repaired or replaced at the same site or another, without deduction for depreciation:
  - (1) With comparable material;
  - (2) With property of the same height, floor area and style;  
and
  - (3) With property intended for the same purpose;
- b. The amount actually and necessarily expended in repairing or replacing the property at the same site; or,
- c. The limit of insurance.

ADD21; AA54.

In May, 2007, a hailstorm passed through Plymouth. French Ridge submitted a claim to QBE pursuant to the Policy alleging that it sustained a loss resulting from hail damage to the roofs of its residential buildings. ADD2; 4. At the time of the storm, the existing roofs on French Ridge’s buildings were comprised of Certain Teed Hearthstead shingles. ADD2. Subsequent to its initial claim, French Ridge made a written demand

for appraisal pursuant to the Policy because the parties could not agree on the amount of loss. AA33.

As required by Minnesota Statutes section 65A.26, the Policy contained an appraisal provision, which stated as follows:

1. If you and we disagree on the amount of loss or value of property, either may make written demand for an appraisal of the loss. In this event, each party will do the following:
  - a. Select its own appraiser: You and we must notify the other of the appraiser selected within 20 days of the written demand for appraisal.
    - (1) The appraisers will state separately and independently the amount of the loss or damage.
    - (2) If the two appraisers fail to agree they will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge or a court having jurisdiction.
    - (3) An agreement by any two will be binding as to the amount of the loss.
2. If we submit to an appraisal, we still retain our right to deny the claim.

ADD22; AA56.

QBE selected Brad Langerman as its appraiser and French Ridge chose Jason Biddle. ADD4. Mr. Langerman and Mr. Biddle were unable to agree on the amount of loss and pursuant to the process identified in QBE's policy selected Galen Luedtke as the neutral umpire. *Id.*

On October 10, 2007, Mr. Langerman, Mr. Biddle, and Mr. Luedtke (the "Appraisal Panel") inspected the French Ridge properties to determine the amount of loss

resulting from the May, 2007 storm. *Id.* The Appraisal Panel inspected only five or six of the French Ridge's sixteen buildings. AA156. The Appraisal Panel identified approximately eight to 12 hail hits on each of the five or six buildings inspected. AA156; 157. Each of the French Ridge buildings has approximately 3,360 shingles on it. AA157. Based on its inspection, the Appraisal Panel determined that all sixteen buildings suffered similar damage. *Id.* During the inspection, Mr. Luedtke noticed that the existing shingles that had been untouched by hail damage were in an extremely deteriorated, fragile, and brittle condition resulting from normal aging and wear and tear. AA157; 158.

Following the inspection, Mr. Luedtke and Mr. Biddle determined that the amount of loss was \$158,492.40 for all sixteen buildings and awarded a replacement cost value of \$264,154.00. AA157; 164. On the appraisal award form, in an area reserved for clarifications, one of the appraisers wrote "total roof replacement." AA164. It was the decision of Mr. Luedtke and Mr. Biddle, the appraiser for French Ridge, to award total roof replacement for the sixteen buildings. AA157.

Mr. Langerman did not agree that total roof replacement on all sixteen buildings was necessary. *Id.* Instead, Mr. Langerman believed that the roofs on three or four of the buildings could be replaced and the shingles salvaged from those buildings could be used to repair the remaining buildings. *Id.* Given his disagreement with the assessment, Mr. Langerman did not sign the appraisal award form. *Id.*

As a result of the inconsistency between the appraisal award for total roof replacement and the minimal number of hail hits actually identified, counsel for QBE

requested a clarification of the basis for the appraisal award from Mr. Luedtke. *Id.* Mr. Luedtke responded that total roof replacement was awarded because the Certain Teed Hearthstead organic shingles were no longer manufactured. AA157; 165.

In his deposition, Mr. Luedtke testified that the Appraisal Panel awarded total roof replacement due to the damage resulting from wear and tear of the existing non-hail damaged shingles and because the existing Certain Teed Hearthstead organic-based shingle is no longer manufactured. AA153-165. Specifically, he testified that when only a small number of shingles suffer storm damage, it is routine in the roofing industry to replace only those storm damaged shingles. AA159. However, due to the deteriorated condition of the existing roof resulting from wear and tear, Mr. Luedtke believed that it would have been very difficult to remove the hail damaged shingles and slide new ones into the existing roof. AA158. Therefore, total roof replacement was awarded. AA159. Mr. Luedtke also testified that because the Certain Teed Hearthstead organic-based shingle is no longer manufactured, he concluded that all the shingles on the roof needed to be replaced. AA157; 158. Even where Mr. Luedtke's testimony is unclear as to whether his decision was based on wear and tear or on the fact that the shingle was no longer manufactured, it is indisputable that Mr. Luedtke's testimony establishes that the Appraisal Panel based its award on something other than the physical damage to the roofs which resulted from the hail storm.

On January 22, 2008, French Ridge filed its Motion for Summary Judgment or in the alternative Motion to Dismiss. French Ridge argued that QBE would not be able to present any evidence that the Appraisal Panel clearly exceeded its authority. AA28.

QBE opposed French Ridge's Motion arguing that the Appraisal Panel clearly exceeded its authority as evidenced by Mr. Luedtke's deposition testimony, which provides indisputable evidence that the Appraisal Panel awarded total roof replacement based on something other than the actual physical damage caused by hail. AA131; 175; 177.

On February 19, 2008, French Ridge's Motion was heard by the Honorable Deborah Hedlund. ADD2. On May 16, 2008, the District Court issued an Order granting summary judgment in favor of French Ridge. ADD8. The District Court concluded that:

Mr. Luedtke's testimony show[ed] that [the Appraisal Panel] did not order total roof replacement based on wear and tear but rather that wear and tear was a consideration in determining whether some shingles could be replaced.

...

The appraisers did not make a coverage determination.

ADD7.

In support of its findings the District Court stated as follows:

The Policy allows for replacement of damaged property as well as undamaged property that needs to be removed in order to replace damaged property.

ADD7. This particular language in QBE's policy is not applicable, not at issue, and was never raised or addressed by either party in their written submissions to the District Court or during the hearing on French Ridge's Motion.

### **STANDARD OF REVIEW**

This Court reviews the granting of summary judgment *de novo*. Summary judgment is properly granted when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03

(2009); *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Interpretation of an insurance policy and statutory language are questions of law which this Court reviews *de novo*. *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000).

A district court's decision to deny a request for a continuance to conduct discovery is reviewed under an abuse of discretion standard. Minn. R. Civ. P. 56.06; *Cargill, Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. Ct. App. 2006).

## ARGUMENT

### I. THE APPRAISAL PANEL EXCEEDED ITS AUTHORITY BY MAKING A COVERAGE DETERMINATION.

Insurance appraisal is a non-judicial method to resolve disputes between insurer and insured over the amount of loss. *Johnson v. Mut. Service Cas. Ins. Co.*, 732 N.W.2d 340, 342 (Minn. Ct. App. 2007). The Policy contained the appraisal clause required by Minnesota Statute Section 65A.26. This clause, in accordance with the statutory language, limits the issues for appraisal solely to a determination of the "amount of loss." Minn. Stat. § 65A.26.

Several cases establish the well-settled principle that appraisers are limited to determining the amount of the loss and cannot determine liability under an insurance policy. *Johnson*, 732 N.W.2d at 346; *Glidden Co. v. Retail Hardware Mut. Fire Ins. Co. of Minn.*, 233 N.W. 310, 312 (Minn. 1930) (an appraisal "does not determine liability but only the amount of the loss"); *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425, 427 (Minn. 1928) (an appraisal award "does not preclude the insurer from subsequently having its liability on the policy judicially determined).

It has long been held by Minnesota courts, as well as courts in numerous other jurisdictions, that appraisers cannot make coverage determinations. *Johnson*, 732 N.W.2d at 346; *Mork v. Eureka-Security Fire & Marine Ins. Co.*, 42 N.W.2d 33, 35 (Minn. 1950); *Itasca*, 220 N.W. at 427; *Cigna Ins. Co. v. Didimoi Prop. Holdings*, 110 F. Supp.2d 259 (D. Del. 2000); *Auto-Owners Ins. Co. v. Kwaiser*, 476 N.W.2d 467, 469-70 (Mich. Ct. App. 1991). When an appraiser makes a determination that a particular loss is covered or excluded under an insurance policy, that appraiser has gone beyond determining the amount of loss and made a coverage determination. *Mork*, 42 N.W.2d at 35.

In *Mork*, an explosion in the chamber of an oil-burning furnace caused the furnace to fail resulting in damage to the radiators due to the freezing of water within the heating pipes. 42 N.W.2d at 34. As part of their findings, the appraisers determined that the loss and damages caused by the freezing of the water within the radiator was not “direct loss or damage” caused by the explosion and therefore was not covered by the homeowner’s fire insurance policy. *Id.* at 35. The Supreme Court held that a finding that the loss was excluded from the policy was a question of coverage, which would be a decision on a question of law and would not be final. *Id.*

In *Kwaiser*, the roof over the living room of the Kwaisers’ mobile home collapsed because of heavy rain. 476 N.W.2d at 467-68. An engineer hired by the insurance company discovered that the structure of the entire roof was rotted because of long-term trapped moisture and that any repair involved replacement of the entire roof. *Id.* at 468. The insurance company demanded an appraisal under the policy. *Id.* The appraisers

determined that the amount of loss equaled the cost of replacing the entire roof. *Id.* The insurance company filed a declaratory action seeking to resubmit the matter for appraisal after a clarification of the insurer's liability. *Id.* Specifically, the insurer contended that the appraisers should have considered the policy exclusions for neglect and wear and tear in reaching their appraisal award. *Id.* at 469. Concluding that determinations of whether claimed damage falls within a policy exclusion is a coverage question, the court held that the decision was for the court and not the appraisers. *Id.* at 469-70. Thus, it remanded the matter back to the trial court for a determination of the policy's coverage and the insurer's liability. *Id.* See also *Didimoi*, 110 F. Supp.2d at 268 (appraisers could determine whether damage was caused by fire, but whether damage was otherwise limited or excluded by policy was question of ultimate liability reserved only for court's determination).

While courts in the various jurisdictions disagree as to whether a determination of the cause of a loss is also a "coverage" determination which cannot be made by appraisers,<sup>1</sup> it is undisputed that appraisers cannot determine the scope of coverage. To be clear, QBE is not arguing that the Appraisal Panel should not have determined the cause of the loss. For purposes of this appeal, QBE does not take issue with the appraisers' determination as to causation. Instead, it is QBE's position that the Appraisal

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<sup>1</sup> See *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679 (Tex. App. 1996) (holding that the appraisal section of an insurance policy did not authorize the appraisers to determine that a plumbing leak did not cause the foundation and structural damage); *Kacha v. Allstate Ins. Co.*, 45 Cal.Rptr.3d 92 (Cal. Ct. App. 2006) (holding that the appraisers exceeded their authority when they determined that damage to numerous items of insured's property was not caused by smoke or heat).

Panel improperly determined whether coverage existed under the Policy for different types of damage.

The Appraisal Panel was limited to determining the amount of loss that resulted from the May, 2007 storm. The appraisers determined that this was eight to twelve shingles per roof. In addition, two of the appraisers determined that the remaining roof shingles were damaged by wear and tear. According to Mr. Luedtke, the appraisers determined that the entire roof needed to be replaced for one or two reasons: either because the wear and tear damage to the non-hail damaged shingles was extensive and/or because the hail-damaged shingles could not be replaced with the identical type of shingle. Both of these determinations are improper coverage determinations.

**1. The Appraisal Panel made a coverage determination by awarding total roof replacement based upon wear and tear.**

The Policy specifically excludes coverage for property damage caused by wear and tear. By including replacement of the non-hail damaged shingles in the award, the Appraisal Panel determined that the Policy provided coverage for loss resulting from wear and tear. As such, the Appraisal Panel clearly exceeded its authority by making a coverage determination.

The District Court concluded that the Appraisal Panel did not make a coverage determination but rather that wear and tear was merely a consideration in determining whether some shingles could be replaced. The court stated that “[t]he Policy allows for replacement of damaged property as well as undamaged property that needs to be removed in order to replace damaged property.” The District Court’s application of this

language contained in the coverage portion of the Policy is incorrect because this language relates to "undamaged property." There is no undamaged property at issue in this case. French Ridge's shingles were damaged as a result of either wear and tear or hail. Thus, the District Court's reliance on the above Policy language is misplaced.

The actual physical loss to French Ridge's buildings resulting from the May, 2007 storm was not extensive, and certainly did not necessitate total roof replacement. On each building, only eight to twelve of more than 3,300 shingles actually suffered physical hail damage. Yet, Mr. Luedtke's testimony establishes that the Appraisal Panel awarded total roof replacement based upon the deteriorated condition of the non-hail damaged shingles, a condition that resulted from wear and tear. In doing so, the Appraisal Panel clearly exceeded its authority by making a coverage determination. Accordingly, the appraisal award should be vacated, or in the alternative should be corrected to reflect the actual amount of physical loss to French Ridge's buildings, which is the value of the minimal number of shingles actually damaged by hail.

**2. The Appraisal Panel made a coverage determination by awarding total roof replacement simply because the identical shingle was no longer manufactured.**

Interpretation of an insurance policy and application of the policy to the facts in a case are questions of law. *Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001). Absent ambiguity, the language must be given its usual and accepted meaning. *Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960). As a question of law, interpretation of an insurance policy and its application to a particular situation is outside the scope of authority of appraisal. See Minn. Stat. § 65A.26; *Johnson*, 732 N.W.2d at 346; *Mork*, 42

N.W.2d at 35. Furthermore, courts from several other jurisdictions have reaffirmed that appraisers cannot resolve questions of coverage or interpret provisions of the policy. *See Jefferson Ins. Co. v. Super. Ct. of Alameda*, 475 P.2d 880 (Cal. 1970); *Wausau Ins. Co. v. Herbert Halperin Dist. Corp.*, 664 F.Supp. 987, 989 (D. Md. 1987); *FTI Intern., Inc. v. Cincinnati Ins. Co.*, 790 N.E.2d 908 (Ill. App. Ct. 2003); *Atencio v. U.S. Sec. Ins. Co.*, 676 So.2d 489 (Fla. Dist. Ct. App. 1996).

While this issue has not been directly addressed by courts in Minnesota, courts in other jurisdictions have held that "comparable material" does not mean replacement with "identical" material. *See e.g. Greene v. United Services Auto. Assoc.*, 936 A.2d 1178, 1186-87 (Pa. Super. Ct. 2007); *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 425 (Tex. 2004) (holding that comparable does not mean identical and the language of the policy neither restricted nor required the insurance company to pay for the cost to replace the roof with an identical one).

In *Greene*, the Pennsylvania Superior Court held that a policy provision allowing for replacement coverage for "like construction and use" only required that damaged shingles be replaced with shingles similar in function, color, and shape. *Greene*, 936 A.2d at 1186-87. The insureds claimed that storms damaged their roof and caused interior water damage. *Id.* at 1182. The insureds sought to recover the entire cost of replacing their roof, which was eighteen years old at the time, even though their own roofer reported that the roof showed evidence of wear and tear and possible storm damage "in the form of three (3) missing shingles." *Id.* at 1183. The insurer denied coverage for that part of the roof damage caused by wear and tear. *Id.* The insureds

subsequently filed suit to recover the entire cost to replace the roof because the type of shingles that were on the house at the time of the storm were no longer available. *Id.* The Court concluded that repair of the roof with shingles similar to the damaged shingles in function, color and shape met the parameters of "like construction" as called for by the policy language and determined that the policy did not require the insurer to pay for the replacement of the insureds' entire roof. *Id.* at 1186. *See also All Saints Catholic Church v. United Nat'l Ins. Co.*, No. 05-07-01515-CV, 2008 WL 2426703, at \*3 (Tex. Ct. App. June 17, 2008) (where policy required insurer to replace damaged property to a condition "equal to... its condition when new," insured only entitled to cost to replace hail-damaged tiles on roof, not non-hail damaged tiles).

In this case, the Appraisal Panel interpreted the Policy to require replacement of damaged property with identical property, thereby exceeding its authority. Mr. Luedtke testified that the Appraisal Panel awarded total roof replacement because the hail damaged shingles could not be replaced by the exact same or identical type of shingle. Under the Policy, QBE is obligated to replace damaged property with "comparable material, property of the same height, floor area, and style, and property intended for the same purpose." Nowhere does the Policy provide that damaged property will be replaced with identical, undamaged material.

The term "comparable material" should not be interpreted to mean identical material. By its definition, "comparable" does not mean "identical." The Appraisal Panel's determination that the Policy required total roof replacement because the exact material was no longer manufactured is an improper interpretation of the terms of the

Policy and an improper coverage determination. The Appraisal Panel's interpretation of the Policy language, and the District Court's confirmation of the award, results in an unreasonable interpretation of the Policy language.

Taken to the extreme, this interpretation would require an insurer to replace an entire roof where only one shingle has been damaged by hail simply because that particular shingle is no longer manufactured. This is not a reasonable interpretation of the Policy. Therefore, QBE seeks a declaration that the Policy provision providing coverage for repair or replacement with "comparable material" does not mean repair or replacement with "identical material." Accordingly, QBE requests that the appraisal award be vacated, or in the alternative, be corrected to reflect the actual amount of physical loss to French Ridge's buildings, which is the value of the small number of shingles that actually sustained hail damage.

**II. AT A MINIMUM, SUMMARY JUDGMENT WAS PREMATURE BECAUSE ADDITIONAL DISCOVERY NEEDED TO BE CONDUCTED.**

The District Court abused its discretion when it failed to grant QBE's request for a continuance to conduct additional discovery, pursuant to Rule 56.06 of the Minnesota Rules of Civil Procedure. QBE was diligent in seeking discovery and has identified that the deposition of Mr. Biddle is necessary to clarify the basis of the Appraisal Panel's award. The basis for the Appraisal Panel's award is a material fact as to whether the Appraisal Panel made a coverage decision.

Summary judgment is a "blunt instrument, which should be employed only where it is perfectly clear that no issue of fact is involved in the cause of action." *Donnay v.*

*Boulware*, 144 N.W.2d 711, 716 (Minn. 1996). There is a presumption in favor of granting continuances to conduct discovery. *Cargill, Inc. v. Jorgenson Farms*, 719 N.W.2d 226 (Minn. Ct. App. 2006). When deciding whether a continuance should be granted, the district court must address two issues: “(1) whether the plaintiff has been diligent in obtaining or seeking discovery prior to its Rule 56.06 motion; and (2) whether the plaintiff is seeking further discovery in the good faith belief that material facts will be uncovered.” *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (requests for additional discovery should be liberally granted, particularly if the party seeking a continuance has had insufficient time to complete discovery).

In *Cargill*, the court denied the plaintiff’s motion for a continuance because the plaintiff had seven months to conduct discovery and had failed to serve any discovery requests or notice any depositions. 719 N.W.2d at 231. In *Rice*, the Minnesota Supreme Court upheld a district court’s order denying a continuance because the appellant had ten months to complete discovery on claims that were not overly complicated. 320 N.W.2d at 412.

In this case, QBE has not had anywhere near seven to ten months to conduct discovery. To the contrary, there was only a little over three months to conduct discovery prior to the hearing on French Ridge’s Motion. Furthermore, unlike the plaintiff in *Cargill*, QBE has been diligent in seeking the discovery necessary to adequately ascertain the facts of this case. It initiated discovery by serving a subpoena and notice of deposition on Mr. Luedtke just three weeks after service of the Summons and Complaint.

AA133.

Further, during the time prior to the Motion hearing, QBE diligently attempted to depose Mr. Luedtke. AA133. Despite Mr. Luedtke's failure to comply with the subpoena to appear, QBE was finally able to depose Mr. Luedtke on February 5, 2008, just two days prior to the deadline for QBE to file its opposition memorandum with the District Court. ADD5. As a result of Mr. Luedtke's failure to cooperate, QBE's ability to discover the facts necessary to properly defend against French Ridge's Motion for Summary Judgment was severely handicapped. AA133.

Nonetheless, Mr. Luedtke's deposition testimony revealed the necessity of the testimony of the other two members of the Appraisal Panel. That testimony was essential to clarify the basis for the appraisal award, a fact material to the issue of whether the Appraisal Panel made a coverage determination. AA173-175. With only the deposition transcript of Mr. Luedtke, the District Court lacked the necessary documentary evidence to determine whether the Appraisal Panel made a coverage determination. The deposition testimony of the two other appraisers would have certainly aided the District Court in determining the basis upon which the Appraisal Panel actually issued its award. Moreover, these additional depositions could very likely have changed the result of the summary judgment hearing. Yet, QBE was never given the opportunity to conduct these depositions.

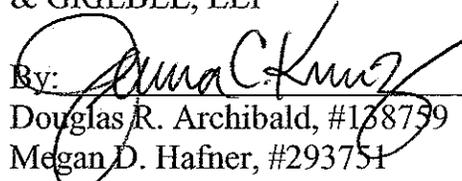
Given the minimal time that QBE had to conduct discovery on this complicated issue, the District Court abused its discretion in granting summary judgment in favor of French Ridge without allowing further discovery.

## CONCLUSION

For the reasons discussed above, Appellant QBE Insurance Corporation respectfully requests that the appraisal award be vacated, or corrected to reflect the actual amount of physical loss caused by hail. In the alternative, Appellant QBE Insurance Corporation respectfully requests that this matter be remanded to the District Court to allow the parties additional time to conduct necessary discovery.

Dated: June 19, 2009

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STATE OF MINNESOTA  
IN  
COURT OF APPEALS

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QBE Insurance Corporation,

Appellant,

vs.

Twin Homes of French Ridge  
Homeowners Association,

Respondent.

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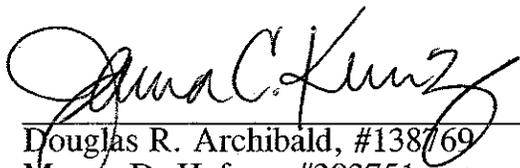
**CERTIFICATION OF BRIEF  
LENGTH**

**APPELLATE COURT CASE  
NUMBER: A09-929**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The length of this brief is 5,761 words. This brief was prepared using Microsoft Word 2007.

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