

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 REPLY BRIEF

Douglas R. Archibald (#138759)
Megan D. Hafner (#293751)
Jessica C. Kunz (#386843)
TERHAAR, ARCHIBALD, PFEFFERLE
& GRIEBEL, LLP
100 North Sixth Street
600A Butler Square
Minneapolis, Minnesota 55403
(612) 573-3000

Attorneys for Appellant

Ryan P. Myers (#0389211)
Christopher P. Parrington (#034090X)
Benjamin R. Skjold (#292217)
SKJOLD • BARTHEL, P.A.
Campbell Mithun Tower
222 South Ninth Street, Suite 3220
Minneapolis, Minnesota 55402
(612) 746-2560

Attorneys for Respondent

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ARGUMENT

I. QUESTIONS OF COVERAGE ARE QUESTIONS OF LAW REVIEWED DE NOVO.

QBE commenced this lawsuit requesting that the District Court vacate the appraisal award on the basis that the Appraisal Panel made a coverage determination. AA2. However, the District Court determined that “[t]he appraisers did not make a coverage determination.” ADD7. It is this decision from which QBE appeals.

When appraisers decide questions of coverage, their decision is not final. *Mork v. Eureka-Security Fire & Marine Ins. Co.*, 42 N.W.2d 33, 35 (Minn. 1950) (citing *Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N.W. 425 (Minn. 1928)). Coverage determinations are questions of law, reviewed *de novo*. *Id.*; *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002); *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000).

French Ridge argues that QBE must show that the Appraisal Panel “clearly exceeded its powers.” However, the issue on appeal is not whether the Appraisal Panel made a mistake as to a law or fact such that it “clearly exceeded its powers.” The issue on appeal is whether the Appraisal Panel made a coverage determination. If it did, the appraisal award cannot be final and QBE is entitled to have it vacated.

Appraisal is a limited procedure “where parties refer some ministerial duty or some matter involving only the ascertainment of facts to selected persons for disposition.” 15 Couch on Insurance 3d § 209:8 (1999). The cases relied upon by French Ridge present the issue of whether the appraisers or arbitrators made a mistake in executing their ministerial duties, not whether the appraisers or arbitrators took it upon

themselves to carry out duties that the parties had never even referred to them. *See State v. Minn. Assoc. of Prof. Employees*, 504 N.W.2d 751 (Minn. 1993); *Hilltop Constr., Inc. v. Lou Park Apt.*, 324 N.W.2d 236 (Minn. 1982); *Cournoyer v. Am. Television & Radio Co.*, 83 N.W.2d 409 (Minn. 1957); *David A. Brooks Enterprises, Inc. v. First Sys. Agencies*, 370 N.W.2d 434 (Minn. Ct. App. 1985) . Here, the Appraisal Panel made coverage determinations by interpreting Policy terms and exclusions. It is well established in Minnesota that appraisers cannot make coverage determinations. *Mork*, 42 N.W.2d at 35; *Itasca*, 220 N.W. at 427; *Johnson v. Mut. Serv. Cas. Ins. Co.*, 732 N.W.2d 340, 344 (Minn. Ct. App. 2007).

In this case, QBE and French Ridge referred to the Appraisal Panel only the duty of determining the amount of loss caused by the May 2007 storm, thus limiting the Appraisal Panel's duty to deciding a single question of fact, that is, how much damage occurred to French Ridge's property as a result of hail, nothing more. The issue is not whether the appraisers erred as to the law or the facts in carrying out this ministerial duty. The issue is whether the Appraisal Panel made coverage determinations, which it was not and would never have been asked to do given that questions of coverage are outside the limited scope of appraisal and are appropriately reserved for insurers, or if necessary, the court.

As stated in Appellant's Brief, according to Mr. Luedtke, the Appraisal Panel awarded total roof replacement for one, or both, of two reasons: either because the wear and tear damage to the non-hail damaged shingles was extensive or because the hail-damaged shingles could not be replaced with the exact same type of shingle. Either

reason is an improper coverage determination. Thus, the appraisers' reasoning for awarding total roof replacement makes clear that the Appraisal Panel interpreted the Policy and applied it to the facts, therefore resolving questions of liability, a determination outside the scope of its authority.

A. The Appraisal Panel exceeded the scope of its authority when it made a coverage determination by awarding total roof replacement based on wear and tear.

If the Appraisal Panel based its decision to replace French Ridge's roof on the extensive damage caused by wear and tear, then it improperly imposed liability on QBE for covering damage resulting from wear and tear. Damage caused by or resulting from wear and tear is explicitly excluded from coverage under the Policy. AA46. Given this explicit Policy exclusion, whether QBE is liable under the Policy for damage resulting from wear and tear is a question of coverage reserved for judicial determination, not an issue to be resolved by appraisal. QBE is entitled to have the appraisal award vacated because the Appraisal Panel clearly resolved a question of liability, a question outside the scope of an appraisal.

B. The Appraisal Panel exceeded the scope of its authority when it made a coverage determination by awarding total roof replacement simply because the identical shingle was no longer manufactured.

If the Appraisal Panel based its decision to replace French Ridge's roof on the fact that the identical shingle was no longer manufactured, then it improperly interpreted the Policy language allowing for replacement of damaged property with "comparable material" to mean that QBE is liable for replacement with "identical" material. What

constitutes comparable material under the terms of the Policy is a question of coverage which cannot be resolved by appraisal. *See Am. Family Ins. Co. v. Walser*, 628 N.W.2d 605, 609 (Minn. 2001) (interpretation of an insurance policy and application of the policy to the facts are reserved for the courts); *Mork*, 42 N.W.2d at 35; *Johnson*, 732 N.W.2d at 344; *FTI Int'l, Inc. v. Cincinnati Ins. Co.*, 790 N.E.2d 908, 911 (Ill. App. Ct. 2003) (appraisers have the authority to ascertain the value of property, but whether the insurer should pay for the sales value rather than the repair or replacement value under the terms of a policy requires application of principles of contractual interpretation, a task that is reserved for the courts and does not take place during an appraisal); *Lundy v. Farmers Group, Inc.*, 750 N.E.2d 314, 319 (Ill. App. Ct. 2001) (where an issue requires an interpretation of the policy language “like kind and quality,” the issue cannot be resolved through the appraisal process).

Even in *Brooks*, a case French Ridge relies heavily upon in its argument, the appraisers properly limited themselves to ascertaining only questions of fact, the value of the damaged property. 370 N.W.2d at 435 (appraisers made separate cash value and replacement cost determinations, leaving to the court the decision of which value to apply under the terms of the insurance policy). Similarly here, the Appraisal Panel was charged with determining the amount of loss only, leaving any subsequent coverage determination for the insurer, or now, for the Court.

Under the Policy, QBE agrees to replace damaged property with “comparable material, property of the same height, floor area, and style and property intended for the same purpose.” AA54. Nowhere does the Policy state that damaged property will be

replaced with the identical, undamaged material. The Appraisal Panel's determination that the Policy required total roof replacement because the exact material was no longer being manufactured amounted to an improper interpretation of the terms of the Policy and an improper coverage determination. As a question of coverage, this Court reviews the issue *de novo*.

As argued in Appellant's Brief, the term "comparable material" should not be interpreted to mean identical material. Other jurisdictions have held similarly. *See e.g. Greene v. United Serv. Auto. Assoc.*, 936 A.2d 1178, 1186 (Pa. Super. Ct. 2007); *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 425 (Tex. 2004). Even if comparable material could somehow be reasonably interpreted to mean identical material, it is still an issue that cannot be resolved through an appraisal. It is a matter of policy interpretation properly reserved for the courts. The appraisal award should be vacated, or in the alternative, QBE is entitled to have it corrected to reflect the actual amount of physical loss, which is the value of the small number of shingles actually damaged by hail.

In the alternative, if the Court does not find that the award of total roof replacement based on wear and tear or on the fact that the identical shingle is no longer manufactured amounted to a coverage determination, then the determination was a mistake of law or fact such that the Appraisal Panel clearly exceeded its powers. French Ridge argues that the court may not set aside an appraisal award even if the appraisers "erred as to the law or the facts." (Respondent's Br. 11) However, where the "mistake brings about a result not in accord with the appraisers' own reasoning and judgment," the

appraisal award should be set aside. *Cournoyer*, 83 N.W.2d at 412; *See also e.g. Jefferson Ins. Co. of New York v. Super. Ct. of Alameda*, 475 P.2d 880 (Cal. 1970) (where a misinterpretation of law is such that it results in the appraisers failing to decide the actual factual issue submitted to them, the appraisal award is properly vacated).

The Appraisal Panel determined that the amount of loss was the physical damage to between only eight and twelve shingles per building. AA156. In light of this minimal damage, the replacement cost and the actual cost values calculated by the Appraisal Panel are grossly inconsistent with the small amount of physical damage caused by hail. These values are simply not in accord with the Appraisal Panel's judgment that only eight to twelve shingles per building were damaged. Therefore, the Appraisal Panel made a mistake in applying its own theory that the amount of loss was only eight to twelve shingles per roof, and that mistake resulted in an appraisal award in gross excess of the actual physical damage to French Ridge's property. As such, the appraisal award should be vacated.

II. QBE HAS PRESENTED EVIDENCE SUFFICIENT TO SHOW THAT ADDITIONAL TIME FOR DISCOVERY IS WARRANTED.

French Ridge argues that QBE has failed to provide any basis for its request for additional time for discovery as "QBE has not made any showing, actual or possible, that the Appraisal Panel made a 'coverage determination.'" To the contrary, QBE has made an adequate showing that additional time for discovery is necessary. First, QBE was diligent in seeking discovery. *See Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982). Careful to quickly and efficiently seek discovery necessary to adequately ascertain the

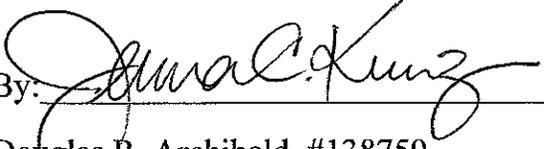
facts, QBE served a subpoena and notice of deposition on Mr. Luedtke just three weeks after service of the Summons and Complaint. AA133. Second, QBE has shown that it seeks to depose Mr. Biddle based upon the good faith belief that this deposition is necessary to clarify the basis for the Appraisal Panel's award. *Rice*, 329 N.W.2d at 412. Therefore, the District Court erred in granting summary judgment in favor of French Ridge without allowing further discovery by QBE.

CONCLUSION

The issue in this case is whether the Appraisal Panel deviated from its limited authority and made a coverage determination. It is not an issue of whether the Appraisal Panel made a mistake as to a law or fact such that it "clearly exceeded its powers." For these reasons, 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. Alternatively, 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: July 28, 2009

TERHAAR, ARCHIBALD, PFEFFERLE
& GRIEBEL, LLP

By: 

Douglas R. Archibald, #138759

Megan D. Hafner, #293751

Jessica C. Kunz, #386843

100 North Sixth Street

600A Butler Square Building

Minneapolis, Minnesota 55403

ATTORNEYS FOR APPELLANT QBE
INSURANCE CORPORATION