

NO. A09-929

State of Minnesota
In Court of Appeals

QBE Insurance Corporation,

Appellant,

vs.

Twin Homes of French Ridge Homeowners Association,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE APPRAISAL PANEL DID NOT CLEARLY EXCEED ITS AUTHORITY IN AWARDING A TOTAL ROOF REPLACEMENT.

a. The District Court did not err in concluding that the Appraisal Panel did not exceed its authority in awarding total roof replacement.

i. *State v. Minn. Assoc. of Prof. Employees*, 504 N.W.2d 751 (Minn. 1993).

ii. *David A. Brooks Enterprises, Inc. v. First Systems Agencies*, 370 N.W.2d 434 (Minn. Ct. App. 1985).

iii. Minn. Stat. § 572.19.

II. WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT'S REQUEST FOR A CONTINUANCE TO FACILITATE UNNECESSARY DISCOVERY.

a. The District Court did not err in denying Appellant's request for a continuance.

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

STATEMENT OF THE CASE

In May 2007, Respondent Twin Homes of French Ridge Homeowners Association ("French Ridge") submitted a claim to Appellant QBE Insurance Corporation ("QBE") for damage caused by a hail storm during the same month under a QBE Insurance Policy (the "Policy") taken out by French Ridge for these purposes. On October 10, 2007, after QBE and French Ridge were unable to agree as to the amount of loss, an Appraisal Panel – consisting of a representative for QBE, a representative of French Ridge and a neutral umpire – inspected the properties and determined that the extent of the damage

necessitated a total roof replacement, amounting to \$264,154.00, as confirmed by the Appraisal Award.

Thereafter, QBE initiated this suit in an attempt to improperly vacate the Appraisal Award on the dual grounds that (1) the Appraisal Panel made a “coverage decision” in determining the amount of loss, and (2) that the Appraisal Panel considered factors other than “direct physical loss” when determining the amount of loss under the Policy. In its suit, QBE maintained that although the Policy contains an explicit provision negating any deduction for depreciation, it need not cover the necessary removal of deteriorating shingles surrounding the hail-damaged shingles. QBE also argued that it need not replace the hail damaged shingles with matching shingles of the same make, but could replace the damaged shingles with those of “similar” quality and color. According to QBE, the Appraisal Panel clearly exceeded the scope of its authority in rendering such an award.

On May 16, 2008, Hennepin County District Court Judge Deborah Hedlund issued an Order Granting Summary Judgment in favor of Respondent, concluding that the Appraisal Panel did not exceed its authority as alleged by QBE. First, the District Court determined that the Appraisal Panel had not made a “coverage decision,” let alone *clearly exceeded their authority* in making the determination as to the amount of loss. Second, the District Court determined that despite QBE’s arguments under the Policy, French Ridge was entitled to the value of a total roof replacement as awarded by the Appraisal Panel. Finally, the District Court denied QBE’s request for a continuance to allow for additional discovery, reasoning that a review of appraisal awards is simply a matter of

interpreting the contract between the parties. On June 18, 2008, the District Court entered final judgment disposing of all remaining claims. This appeal followed.

STATEMENT OF FACTS

French Ridge is a homeowners association located in Plymouth, Minnesota. (AA00032.) In May 2007, French Ridge fell victim to a severe storm that passed through Plymouth, Minnesota. (AA00032.) As a result of the storm, French Ridge's buildings suffered significant wind and hail damage for which repair work was necessary. (AA00032.) Under the terms of its insurance policy, French Ridge sought to have the costs of the repair or replacement paid by QBE as French Ridge's insurance carrier. (AA00032.)

I. QBE'S INSURANCE POLICY TO FRENCH RIDGE.

Prior to May 2007, French Ridge received the Policy from QBE. (See AA00037 – AA000127.) According to Section I of the Policy, QBE agreed to “pay for direct physical loss of or damage to “covered property” caused by or resulting from any COVERED CAUSE OF LOSS under III.A.” (AA00040.) There is no dispute that the wind and hail damage caused by the storm is “covered property” to which damage resulted from a “covered cause of loss.” The Policy does not define “direct physical loss” for which QBE agreed to pay under Section I.

Section VI, paragraph L, entitled “Valuation,” sets forth the manner to be used in determining the amount to be paid by QBE for direct physical loss to covered property resulting from a covered cause of loss. (AA00054.) According to the Policy, QBE will

pay “no more than the least of the following,” when coverage is to be provided on a “replacement cost basis”:

1. 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:
 - a. With comparable material;
 - b. With property of the same height, floor area and style; and
 - c. With property intended for the same purpose;
2. The amount actually and necessarily expended in repairing or replacing the property at the same site; or
3. The limit of insurance.

(AA00054) (emphasis added). “The value of all property will be determined at the time of loss.” (AA00054.) Under the plain language of Section VI, Paragraph L, QBE agrees that it will pay the cost of repairing or replacing the damaged property, so long as the replacements are comparable material; the same height, floor area and style; and intended for the same purpose.

In the event QBE and French Ridge disagree on the value of the property damaged and costs of repair or replacement, Section VI, Paragraph N (entitled “Appraisal”) of the Policy sets forth a method of resolving such dispute. (AA00056.) Specifically, Paragraph N provides that “[i]f you [French Ridge] and we [QBE] disagree on the amount of loss or value of property, either may make written demand for an appraisal of the loss.” (AA00056.) In the event a dispute is submitted to appraisal, QBE reserves the right to deny the claim; QBE does not, however, reserve the right to deny the valuation determined under the appraisal procedure according to the Policy. (AA00056.)

In the event QBE or French Ridge make a written demand for appraisal of the loss, each party shall do, in part, the following:

1. Select its own appraiser: You [French Ridge] and we [QBE] must notify the other of the appraiser selected within 20 days of the written demand for appraisal.
 - a. The appraisers will state separately and independently the amount of the loss or damage.
 - b. 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 of a court having jurisdiction.
 - c. An agreement by any two [either of the appraisers and the umpire] **will be binding as to the amount of loss.**

(AA00056.) (emphasis added). Under the Policy, therefore, QBE and French Ridge agreed that in the event of a written demand for appraiser, they would be bound by the determination of the amount of loss in the event at least one appraiser and the umpire agree on said amount. The only option available to QBE following the appraisal is to reject the claim made by French Ridge in the event it there is no “direct physical loss of or damage to ‘covered property’ caused by or resulting from any COVERED CAUSE OF LOSS under III.A.”

II. FRENCH RIDGE DEMANDS AN APPRAISAL UNDER THE POLICY.

After May 23, 2007, but prior to October 10, 2007, French Ridge made a written demand to submit its claim to an appraisal under Section VI, Paragraph N of the Policy. (AA00033.) Pursuant to the Policy, QBE selected Brad Langerman as its appraiser; French Ridge selected Jason Biddle as its appraiser. (AA00033.) Since Messrs. Langerman and Biddle were unable to agree upon the cost of replacement for the

damaged caused by the storm, they agreed upon the selection of Galen Luedtke as an umpire. (AA00033.)

In October 2007, Messrs. Langerman, Biddle and Luedtke (the “Appraisal Panel”), visited the subject-property to inspect the damage caused by the storm. Thereafter, Mr. Langerman filled out a proposed appraisal award form that was created by QBE for its appraisal procedures. (AA00033; AA0006.) The appraisal award form asked the Appraisal Panel to make two determinations—the cost of replacing the loss caused by the storm (identified on the form as “Loss Replacement Cost”); and the cash value of the loss in the event French Ridge elected not to make replacements (identified on the form as “Loss Actual Cash Value”). (AA0006.)

III. THE APPRAISAL AWARD.

On October 10, 2007, the Appraisal Panel issued an appraisal award pursuant to the Policy (the “Appraisal Award”). (AA0006.) Although the Appraisal Award was signed by Messrs. Biddle and Luedtke, it was filled out by Mr. Langerman. (AA00033.) According to the Appraisal Award, the cost of replacing the loss caused by the storm would be \$264,154.00. (AA0006.) According to the Appraisal Award, the cash value of the loss, in the event French Ridge elected not to make the necessary replacements, was \$158,492.40, representing forty-percent (40%) of the awarded “Loss Replacement Cost.” (AA0006.)

The Appraisal Panel (including Mr. Langerman) concluded that as a result of the storm, a “Total Roof Replacement” was necessary. (AA0006.) Under the terms of the Policy, therefore, French Ridge and QBE are bound by the Appraisal Award’s

determination that \$264,154.00 was the cost of replacing the loss resulting from the storm. (See AA00037 – AA000127.) At no time prior thereto had QBE indicated any basis for rejecting French Ridge’s claim, despite forcing French Ridge to pay for its share of the costs of the appraisal process.

IV. QBE IMPROPERLY CHALLENGES THE APPRAISAL AWARD.

On October 19, 2007, after the appraisal process had run its course and the Appraisal Award had been issued, QBE’s counsel submitted correspondence to Mr. Luedtke, demanding clarification of the Appraisal Award. (AA00033.) Thereafter, in November 2007, in attempt to circumvent the terms of the Policy and in breach of the same, QBE initiated the above-captioned action in attempt to challenge the Appraisal Award. According to its Complaint, QBE should not have been bound by the Appraisal Award for the following reasons:

1. The Appraisal Panel exceeded its authority by:
 - a. Ruling on issues not before them;
 - b. Making legal and coverage determinations; and
 - c. Applying incorrect law;
2. The damages stated in the appraisal are not “direct physical loss” damages;
3. The Appraisal Award provides for repair and replacement of the property without materials other than “comparable material”; and
4. The amount of direct physical loss, in the event QBE is not bound by the Appraisal Award, does not exceed French Ridge’s deductible.

(AA0003 – AA0004.) QBE’s Complaint did not, however, identify any specific facts that support the vague allegations contained therein.

V. THE DISTRICT COURT CONFIRMS THE APPRAISAL AWARD.

On May 18, 2008, Judge Hedlund granted Respondent's Motion for Summary Judgment, finding that the Appraisal Panel did not make a "coverage determination," much less clearly exceed its authority in awarding Respondent a total roof replacement. Furthermore, the District Court determined that a continuance for discovery, as requested by QBE, was unnecessary as QBE had not identified any possible facts that could change the outcome of the motion, and that French Ridge had provided more than 70 days' notice of its Motion for Summary Judgment. For the reasons set forth below, this Court should affirm the District Court's ruling confirming the Appraisal Award and dismissing QBE's Complaint pursuant to Rule 56 of the Minnesota Rules of Civil Procedure.

ARGUMENT

A. STANDARD OF REVIEW.

A. Summary judgment standard of review.

The District Court correctly entered summary judgment in favor of Respondent.

Rule 56 provides:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.

Minn. R. Civ. P. 56.03. A party opposing a summary judgment motion must present specific facts showing genuine issues of material fact. *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985). Summary judgment is appropriate if a party opposing summary judgment "fails to make a showing sufficient to establish the existence of an

element essential to that party's case." *Iacona v. Schrupp*, 521 N.W.2d 70, 72 (Minn. Ct. App. 1994). On appeal, the Court of Appeals must determine whether any genuine issues of material fact exist and whether the District Court erred in its application of the law. *Reese v. Brookdale Motors, Inc.*, 576 N.W.2d 83, 86 (Minn. Ct. App. 1997).

B. Standard of review for appraisal awards.

Under Minnesota's arbitration statute, an Appraisal Award may only be vacated if the appraisers exceeded their authority. Minn. Stat. § 572.19, subd. 1(3). Appraisers "must clearly exceed their powers before the trial court will overturn the award." *Id.* (citing *Hilltop Constr., Inc. v. Lou Park Apts.*, 324 N.W.2d 236 (Minn. 1982)). In evaluating whether an appraiser exceeded the scope of his authority, the scope of the District Court's review is very limited:

The scope of the [appraiser's] power is a matter of contract to be determined from a reading of the parties [agreement], and an [appraiser's] award will be set aside by the courts only when the objecting party meets its burden of proof that the [appraisers] have clearly exceeded the powers granted to them in the [agreement]; courts will not overturn an award merely because they may disagree with the [appraiser's] decision on the merits.

State v. Minn. Assoc. of Prof. Employees, 504 N.W.2d 751, 755 (Minn. 1993) (citing *Children's Hosp., Inc. v. Minn. Nurses Ass'n*, 265 N.W.2d 649, 652 (Minn. 1978)).

"A mere ambiguity in the opinion accompanying an award which permits an inference that the [appraisers] have exceeded their authority is no reason for refusing to enforce the award." *Hilltop Constr.*, 324 N.W.2d at 239 (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960)). Furthermore, "[a]

court will not set aside an [appraisal] award because it thinks the [appraisers] erred as to the law or the facts.” *David A. Brooks Enterprises, Inc. v. First Systems Agencies*, 370 N.W.2d 434, 436 (Minn. Ct. App. 1985) (citing *Cournoyer v. Am. Television & Radio Co.*, 83 N.W.2d 409, 411 (Minn. 1957)).

B. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

QBE alleges that the District Court erred in granting Respondent’s summary judgment motion. Specifically, QBE argues that the District Court erred in not concluding that the Appraisal Panel clearly exceeded the scope of its authority in awarding \$264,154.00 for a total roof replacement. Furthermore, QBE argues that the District Court erred in not granting QBE a continuance to engage in further, unnecessary discovery prior to granting summary judgment. For the reasons set forth below, the District Court did not err in granting summary judgment in favor of Respondent without a continuance for further, unnecessary discovery.

A. The District Court did not err in granting summary judgment in favor of Respondent on QBE’s First Cause of Action.

Appellant’s First Cause of Action asked the District Court to declare that QBE was not bound by the Appraisal Award because the Appraisal Panel exceeded its authority by: (1) ruling on issues not before them; (2) making legal conclusions and coverage determinations; and (3) applying incorrect law. Under Minnesota law, the arbitration statute (Minn. Stat. §§ 572.01 – 572.30) governs the decision of appraisers. *David A. Brooks Enterprises, Inc. v. First Systems Agencies*, 370 N.W.2d 434, 435 (Minn. Ct. App. 1985). Since appraisal awards are to be treated as arbitration awards

under Minnesota law, the same standard of review applies to whether the request for vacation arises from an appraisal or arbitration award. *Id.* Furthermore, the power of the appraisal panel to make decisions, final and binding on the parties, is extensive and provides that the decision of any two of three appraisers determines the amount of loss. Minn. Stat. § 65A.26.

QBE has failed to identify any evidence that clearly demonstrates that the Appraisal Panel exceeded, let alone clearly exceeded the scope of their authority. According to the Appraisal Award, for example, the Appraisal Panel was charged with determining the cost of replacing the lost property as a result of the storm damage. In doing so, the Appraisal Panel determined that replacing the property loss required a “total roof replacement,” which would cost \$264,154.00. QBE argues that this is beyond the scope of the Appraisal Panel’s authority even though the Policy provides that QBE will pay the cost “to repair or replace the property.” Such a determination was clearly within the scope of the Appraisal Panel’s authority.

Furthermore, QBE’s argument that the Appraisal Panel exceeded the scope of its authority by making legal conclusions and applying incorrect law is without merit given that under Minnesota law, the courts may not set aside the Appraisal Award even if it thinks the Appraisal Panel “erred as to the law or the facts.” *See David A. Brooks Enterprises*, 370 N.W.2d at 436. The Appraisal Panel did not exceed, let alone clearly exceed the scope of its authority and QBE has failed to present any evidence to the contrary. The District Court rightly granted summary judgment on the First Cause of Action.

B. The District Court did not err in granting summary judgment in favor of Respondent on QBE's Second Cause of Action.

QBE also argues that the Appraisal Award should not be upheld because: (1) the Policy only provides coverage for "direct physical loss," and the Appraisal Award provides damages that are not "direct physical loss"; (2) the Appraisal Award provides for replacement with material that is not "comparable material"; and (3) the Arbitration Award does not exceed the amount of the deductible. Based upon these arguments, QBE alleges that the Appraisal Award should be vacated by way of a declaratory judgment. These arguments are also without merit as addressed separately below.

The first argument, that the Appraisal Award provides for damages beyond "direct physical loss" is without merit. As stated in the Policy, "[a]n agreement by any two [either of the appraisers and the umpire] will be binding as to the amount of the loss." This argument constitutes a challenge to the "amount of the loss," which is improper under the Policy unless evidence is presented to demonstrate that the Appraisal Panel *clearly exceeded* the scope of its authority by awarding damages beyond "direct physical loss." There is no such indication in the Arbitration Award and QBE was unable to present any evidence to support such a claim before the District Court, and its argument on appeal falls flat in a similar fashion. As such, summary judgment was appropriate on this allegation.

The second argument is that QBE is only obligated to repair or replace the loss with "comparable materials." There is no indication in the Appraisal Award or elsewhere that the Appraisal Panel is recommending that the repairs or replacements be made with

non-comparable materials. Presumably, the Appraisal Award contemplates a replacement cost with “comparable materials” and QBE has failed to present any evidence to the contrary. As such, this argument is without merit and was ripe for dismissal by way of a summary judgment motion.

The final argument is that the Arbitration Award does not exceed French Ridge’s deductible, which is \$7,500.00 per building, or a total amount of \$120,000.00 for the 16 buildings located in French Ridge. Given that the Arbitration Award was \$264,154.00, the deductible of \$120,000.00 clearly does not exceed the Arbitration Award. As such, this argument is without merit and is not a basis for vacating the Arbitration Award.

C. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT’S REQUEST FOR A CONTINUANCE.

QBE’s final argument is that the District Court erred in not granting a continuance of Respondent’s summary judgment motion for unnecessary, unidentified discovery. “The decision whether to grant or deny a continuance is within the District Court’s sound discretion and will not be reversed absent an abuse of discretion.” *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. Ct. App. 2006). As previously stated, review of an Appraisal Award is a matter of contract and requires a consideration of facts only as to a determination as to whether the appraisal panel *clearly exceeded its authority* in making its appraisal award. *Minn. Assoc. of Prof. Employees*, 504 N.W.2d at 755. Except where this Court believes that the Appraisal Panel *clearly exceeded its authority*, it should not set aside an Appraisal Award even if it thinks that the Appraisal Panel erred as to the law or the facts. *See David A. Brooks Enterprises*, 370 N.W.2d at 436. Not only

must this Court determine that the Appraisal Panel clearly exceeded its authority, it must also determine that QBE has presented evidence or possible evidence that would result in a changed outcome on Respondent's Motion for Summary Judgment. *See e.g., Northern States Power Co. v. Minnesota Metro Council*, 684 N.W.2d 485, 493 (Minn. 2004)

Rather than present any facts – or the possibility of any facts – that would result in a different outcome on Respondent's summary judgment motion, or otherwise suggests that the District Court abused its discretion, QBE simply regurgitates its previous failed arguments and ponders before this Court whether further discovery would result in a finding that the Appraisal Panel made certain "coverage determinations." As the District Court has already noted, French Ridge provided notice of its pending motion for summary judgment more than seventy (70) days prior to the hearing. During that time, QBE had an opportunity to obtain affidavits from those parties they now seek to depose; however, they did not. They now claim they needed to depose Mr. Langerman, but as he is QBE's agent, they give no explanation as to why an affidavit would not serve their purposes. In addition, they failed to serve a timely subpoena on Mr. Biddle and again failed to explain why they could not obtain whatever information they sought from Mr. Biddle through an affidavit. QBE's tactics were merely a fishing expedition aimed at prolonging litigation over an otherwise simple contract matter; an abusive tactic for an insurance carrier with unlimited resources when compared to French Ridge.

QBE failed to provide any basis for its request for a continuance. QBE has not made any showing, actual or possible, that the Appraisal Panel made a "coverage determination" undisputedly outside of its powers under the contract; and even further,

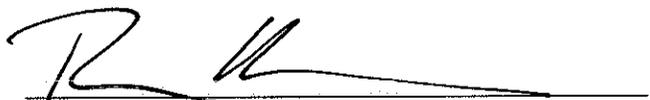
the Court must also find that the Appraisal Panel *clearly exceeded its authority* in doing so. QBE has failed to present any evidence, or the possibility of any evidence, that would make this showing, much less demonstrate that the District Court abused its discretion. In consideration of these principles, this Court should affirm the judgment of the District Court and its decision to deny a continuance on the grounds that Appellant has failed to posit any fact that could change the outcome of the motion.

CONCLUSION

Based upon the foregoing, Twin Homes of French Ridge Homeowners Association respectfully requests that this Court affirm the District Court's grant of summary judgment in favor of the French Ridge.

SKJOLD • BARTHEL, P.A.

Dated: July 20, 2009.



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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Office Word version 2003, which reports that the brief contains 347 lines and 3,921 words.

SKJOLD • BARTHEL, P.A.

Dated: July 20, 2009.



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