NO. A13-0124

State of Minnesota
In Supreme Court

Cedar Bluff Townhome Condominium Association, Inc.,

Respondent,

vs.

American Family Mutual Insurance Company,

Appellant.

BRIEF AND ADDENDUM OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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STATEMENT OF LEGAL ISSUE

1. Does the Policy's loss payment clause allow American Family to replace damaged siding boards with mismatched siding?

Apposite authority:

Seamon v. Acuity, No. A11-429, 2011 WL 6015355 (Minn. Ct. App. Dec. 5, 2011);
State of Minnesota v. American Family Mut. Ins. Co., No. MC 99-3907, 2000 WL 35566048 (Henn. Cnty Dist. Ct. Oct. 12, 2000);
Trout Brook South Condominium Ass'n v. Harleysville Worcester Ins. Co., --- F.Supp.2d. ---, 2014 WL 460851 (D. Minn. 2014).

INTRODUCTION AND STATEMENT OF AMICUS CURIAE[1]

United Policyholders is a non-profit organization whose mission is to be a trustworthy and useful information resource, and an effective voice for consumers of all types of insurance in all 50 states, including those who live in Minnesota. The organization was founded in 1991. It accepts no financial support from insurance companies. United Policyholders serves Minnesota businesses and individuals who purchase and rely upon property insurance to return their property to its pre-loss condition in the event of a peril. Many Minnesota consumers take personal responsibility to protect and restore property in this state by buying insurance and paying their premiums in full and on time. They have a reasonable expectation that property insurance will perform its advertised function. United Policyholders' interest in this appeal is both public and private. The Court's decision in this case will affect

[1] This brief was drafted in its entirety by United Policyholder's counsel. No party, or counsel for a party, authored any part of this brief. No person or entity, other than United Policyholders, funded the preparation of this brief. The Respondent, Cedar Bluff Townhome Condominium Association, Inc. is not a member of United Policyholders.

Minnesotans' assets, property values, and the appearance of neighborhoods throughout the state, specifically including the homes and buildings of policyholders. United Policyholders' position in this case is most closely aligned with Respondents.

ARGUMENT

I. The State of Minnesota, through its Attorney General, has Already Taken a Position on the Requirement of Matching Replacement Siding Under a Replacement-Cost Policy.

On March 22, 1999, the State of Minnesota, through its Attorney General, filed a complaint against American Family Mutual Insurance Company alleging that American Family violated Minnesota's Unfair Claims Practices Act, Minn. Stat §§ 72A.20 and 72A.201, which is part of the states' regulatory authority over insurers. State of Minnesota v. American Family Mut. Ins. Co., No. MC 99-3907, 2000 WL 35566048 (Henn. Cnty Dist. Ct. Oct. 12, 2000) (UPAdd.1). The case arose out of a 1998 storm that damaged some but not all of the roofing and siding of a number of homes. At issue was whether American Family violated the Unfair Claims Practices Act by not replacing all the siding and roofing the affected homes. American Family's policy required repairs to be of "like construction for similar use," and repairs of only some parts of the roofs and siding would have resulted in mismatches because of the unavailability of matching materials.

In an Order dated October 12, 2000, the trial court made the following findings of fact:

> 7. After the storm damage occurred in 1998, in many instances, materials of like kind and quality necessary to repair damages to the siding or roofing existing on consumer' homes were no longer manufactured or

were otherwise unavailable; consequently, materials reasonably matching those on consumers' homes were not available. As a result, consumers have had to incur substantial out-of-pocket costs in order to obtain matching materials or live in mismatched homes.

10. In advertising and selling its homeowners' insurance policies, American Family has not affirmatively disclosed or informed consumers of the material fact that Defendant, as a matter of practice, limits the amounts it pays for storm damages to the cost of replacing only those portions of the consumer's home that American Family maintains are directly damaged even if its failure to do so would result in a mismatch.

11. Defendant does not disclose or inform consumers, prior to their purchase of homeowners' insurance policies from Defendant or at any time prior to the consumer's filing of a claim, that Defendant limits the amount that it pays for storm damage to the cost of replacing only those portions of the consumer's home that Defendant maintains are directly damaged, even if repairs result in a mismatch.

Id. at *3-4. Based upon these facts, the trial court held as a matter of law:

6. Based on the foregoing, there is no genuine issue as to any material fact concerning the legal issue of American Family's obligation to pay claims under replacement value provisions of its homeowner's insurance policies and under Minnesota law. Defendant's practice and policy of limiting the amount paid to settle claims under the replacement value provisions of its homeowner's policies to the cost to repair only damaged areas, when the repairs result in mismatches in materials because of unavailability of matching materials, violates the requirements under Minn. Stat § 72A.20, Subd. 5(8) 1988 that replacement materials be of "like kind and quality" and is contrary to its own policy provisions agreeing to replace damaged areas with materials of "like construction for similar use."

Id. at *6. The trial court did, however, carve out an exception where the mismatch was attributable to the natural weathering of the existing material. Id.

In charging Minnesotans premiums over the past fourteen years for its replacement cost policies, American Family has known and undoubtedly accounted for

the State of Minnesota's position that the term "like construction for similar use"[2] requires American Family to replace not only the physically damaged areas, but undamaged areas as well, where repairs would result in mismatch of materials because of unavailability.

II. Given State of Minnesota v. American Family, and Other Minnesota Precedent, American Family has Been Able to Determine and Charge Premiums Consistent with the Requirement of Matching Non-Damaged Shingles and Siding.

In view of the 2000 decision in State of Minnesota v. American Family, and other precedent since that time, there can be no reasonable argument that American Family was surprised by the Court of Appeals decision in this case, or that American Family has been unable to ascertain appropriate premiums. In fact, in Seamon v. Acuity, No. A11-429, 2011 WL 6015355 (Minn. Ct. App. Dec. 5, 2011) (UPAdd.8), the Court of Appeals reversed a trial court's summary judgment order that had found in favor of the insurer. The issue was whether roof shingles were available to effectuate a repair, and whether the carrier would have to replace more than the 25% of shingles damaged by a storm. In reversing the trial court, the Court of Appeals looked at decisions where "[t]he courts have made the requisite factual determinations by considering, for example, testimony as to the materials available in the marketplace and whether those materials were sufficiently 'like' existing materials, and whether the proposed repair would be effective and would provide an acceptable aesthetic result." Id. at *4, (citations omitted). It went

[2] The language in that case is the functional equivalent of the Policy language here requiring repair materials of "like kind and quality" and with "comparable material and quality . . . used for the same purpose."

on to hold that "[i]f [the insurer] is required to replace more than 25% of the shingles, it will be because such replacement was necessary to effectuate repair of the damaged 25% pursuant to the policy terms." Id. at *5.

Furthermore, the Federal District Court in Minnesota, citing Seamon and Cedar Bluff, has held that "like kind" is ambiguous and interpretation of the term could not be resolved as a matter of law in the insurer's favor, "[r]ather a jury must determine whether these terms obligate [the insurer] to pay for matching shingles." Trout Brook South Condominium Ass'n v. Harleysville Worcester Ins. Co., ---F.Supp.2d. ---, 2014 WL 460851 at *8 (D. Minn. 2014) (UPAdd.13).

Over the past fourteen years, American Family either did, or had the opportunity to, take into account this applicable law, as well as the State of Minnesota's position under the Unfair Claims Practices Act, in setting premiums. After collecting those premiums, American Family should not now be able to walk away from its contractual obligation to pay replacement cost for undamaged, but mismatched shingles and siding. To allow American Family to do so would result in a windfall for American Family.

III. American Family Chose Not to Limit its Coverage with Readily Available Functional Replacement Cost Endorsements.

American Family fails to address the availability, since at least 2000, of the standard "Functional Replacement Cost" endorsement for homeowner policies, which limits replacement to functional equivalents when construction materials are obsolete. See standard Insurance Services Office Form HO 05 30 10 00, available at http://ic.iiat.org/docs/iso_forms/HO/H05301000.pdf (UPAdd.22). The fact that

American Family chose not to attach this endorsement, or an equivalent, to the Policy, and instead collected premiums without that limitation, should end the discussion. American Family could have limited the coverage available and charged less premiums, but chose not to do so.

Furthermore, there is no evidence in the record that American Family affirmatively disclosed or informed Cedar Bluff of the material fact that it would limit the amounts paid for storm damages to the cost of replacing only those portions of the consumer's home that American Family deems are directly damaged, even if the insurer's failure to do so would result in a mismatch. American Family's failure to disclose happened even in the light of the trial court's decision in State of Minnesota v. American Family Mut. Ins. Co. American Family should not be able use this Court to restrict coverage when it easily could have, but didn't, do so on its own. This amounts to retroactive underwriting, and should not be tolerated.

IV. Public Policy Should Not Allow the Systematic Creation of Mismatched Homes and the Resulting Decrease in Property Values.

If American Family and other carriers are allowed to pay only for spot-repair shingles and siding, it will result in homes around the state having mismatched roofs and siding. It will be particularly apparent in entire neighborhoods after they are hit by a storm, where they are repaired by the insurers with a patch-work of non-matching materials. What will inevitably result is decreased property values and diminished quality of life. Authors Kelling and Wilson described this phenomenon in their seminal piece "Broken Windows." George L. Kelling and James Q. Wilson, Broken Windows:

The Police and Neighborhood Safety, The Atlantic, March 1982 at http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/. In "Broken Windows" Kelling and Wilson wrote:

> [A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken. This is as true in nice neighborhoods as in rundown ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.

Id. at pg. 2 of online copy of article. As a matter of public policy, Minnesota courts should not favor a coverage interpretation that will systematically lead to decreased property values across the state, and acutely affect areas hit by severe storms.

CONCLUSION

In 1999, the State of Minnesota sued American Family for taking the exact position it is taking now. The State did so under Minnesota's Unfair Claims Practices Act, part of the State's regulatory authority over insurers, and American Family undoubtedly took this into account in setting premiums. At the heart of the State's case was American Family's failure to disclose how it would apply its policy. The Hennepin County District Court declared that American Family had to pay for full replacement of roofing and siding, and not just the parts physically damaged by a storm, where materials would not reasonably match in terms of color, quality, texture or type. American Family did not appeal that decision, and has collected premiums the past fourteen years in the light of that decision and similar Minnesota precedent. Furthermore, American Family

did not provide Cedar Bluff with a readily available endorsement that would have limited American Family's coverage to functional replacement, and charged Cedar Bluff on that basis. Nor did it disclose to Cedar Bluff that it would interpret its policy inconsistent State of Minnesota v. American Family and similar Minnesota Precedent. Minnesota courts should not favor a restrictive coverage interpretation under these circumstances, particularly when such an unnecessarily narrow interpretation would systematically lead to decreased Minnesota property values and quality of life in areas hit by severe storms. For each of these reasons, United Policyholders respectfully supports affirming the Court of Appeals' decision.

Respectfully submitted,

Dated: April 25, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record, pursuant to Minn. R. Civ. App. P. 132.01, Subd. 3(a) hereby certifies that the attached brief has been prepared using Microsoft Word 2010 (Part of Microsoft Office Professional), Times New Roman Font, with a font size of 13 pt. The word count on this brief excluding the cover, Table of Contents, Table of Authorities, Addendum and this Certificate is 2,124.

Dated: April 25, 2014

Christopher H. Yetka

INDEX TO UNITED POLICYHOLDERS' ADDENDUM

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

State of Minnesota, by its Attorney General, Mike Hatch,

Plaintiff,

vs.

American Family Mutual Insurance Company,

Defendant.

File No. MC 99-3907

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court for a hearing on September 14, 2000, upon both parties' Motions for Partial Summary Judgment, and the State's Motion to Appoint a Special Master. Assistant Attorney General David Woodward and Assistant Attorney General Alan Gilbert appeared on behalf of the State of Minnesota. Corey J. Ayling, Esq., and Vicki Risollo, Esq., appeared on behalf of Defendant, American Family Mutual Insurance Company (hereinafter American Family).

BACKGROUND AND PROCEDURAL HISTORY

1. Devastating tornadoes, hail and wind storms swept through Minnesota in May and July of 1998, directly causing damage to the homes of consumers who had purchased homeowners' insurance policies from American Family that provide for full replacement cost coverage in the event of storm damages.

2. In settling claims after the storms of 1998, as a matter of practice and policy, Defendant, American Family, offered to pay under the replacement value provisions of its homeowners' policies only in amounts necessary to replace siding or roofing on an insured's home that Defendant maintains has been directly physically damaged by the storm.

3. Minnesota policyholders of American Family complained to the State of Minnesota that American Family's practices in limiting payment under the terms of its homeowners' insurance policies to replacement of only the directly damaged portion of the policyholder's home results in mismatched materials in situations where the siding and/or roofing on the policyholder's home is no longer manufactured or is otherwise unavailable.

4. On March 22, 1999, the State, by its Attorney General, filed a summons and complaint in the above captioned action, alleging that Defendant, American Family, violated Minnesota consumer laws prohibiting false advertising, deceptive trade practices and consumer fraud, and State laws prohibiting unfair or deceptive acts or practices in the business of insurance when offering to settle the 1998 storm damage claims of its insureds. Minn. Stat. {{325F.67, 325D.44, Subd. 1(5), (13), 325F.69, 72A.19, 72A.20, and 72A.201, Subd. 5(8) (1998).

5. On April 4, 2000, the Minnesota Court of Appeals unanimously upheld this Court's ruling that it has subject matter jurisdiction to decide this matter and that the Attorney General has the authority to sue an insurance company for alleged violations of consumer protection laws, including the Unfair Claims Practices Act pursuant to Minn. Stat. {72A.20 and 72A.201. On June 13, 2000, the Minnesota Supreme Court, by Order of Chief Justice Kathleen A. Blatz, denied Defendant's petition for further review.

6. The case is now before this Court upon the parties' cross-motions for partial summary judgment on the question of law concerning the extent of American Family's obligation to pay claims under the replacement value provisions of its homeowners' insurance policies under Minnesota Stat. {72A.201, Subd. 5(8) 1998, and upon the State's motion for appointment of a special master, pursuant to Minn.R.Civ.P. 53.

Based upon all of the pleadings, records and proceedings herein, the arguments of counsel and the parties' memoranda of law, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. Mike Hatch is the Attorney General of the State of Minnesota.

2. Defendant, American Family Mutual Insurance Company, is a corporation organized under the laws of Wisconsin, having its principal place of business at 6000 American Parkway, Madison, Wisconsin 53783-0001, and having a regional office located at 6131 Blue Circle Drive, Eden Prairie, Minnesota 55344.

3. Defendant, American Family, transacts, has transacted, and is engaged in the business of insurance in Minnesota, including the advertising and sale of, and processing of claims for coverage under various insurance products, including homeowners' insurance policies. Defendant, American Family, has advertised, offered and sold homeowners' insurance policies to the public in Minnesota.

4. Defendant, American Family, has disseminated to the public in Minnesota advertisements for its homeowners' insurance policies in various media, including radio, television, newspapers, brochures, pamphlets, and other promotional materials provided to the public, as well as through Defendant's internet World Wide Web site and through sales agents.

5. American Family's homeowners' policies provide for full replacement costs, without deduction for depreciation, and insure the policyholder's dwelling for all loss or damage unless the loss is excluded in the policy. Under the "Replacement Cost" section of American Family's policies, American Family undertakes the following obligation:

> [W]e will pay the full cost to repair or replace the damaged building without deducting for depreciation, but not exceeding the smallest of...ii. the cost to replace the damaged building with like construction for similar use on the same premises; or iii. the amount actually and necessarily spent for repair or replacement of the damaged building.

See; e.g., Minnesota Homeowner Policy, Gold Star Special Deluxe Form, attached to Plaintiff's complaint, Exhibit 10, pg.8; Minnesota Homeowners Policy, Basic Form 1, pg. 7; Minnesota Homeowners Policy, Broad Form 2, pg. 8; Minnesota Homeowners Policy, Special Form 3, pg.8.

6. American Family's policies also specifically provide for settlement to replace all or part of the damaged property:

> Our Settlement Option. In the event of a covered loss, we have the option to: a. make a cash settlement for all or part of the damaged, destroyed or stolen property; or b) pay the cost to repair, rebuild or replace all or the necessary part(s) of the damaged, destroyed or stolen property with like property, as of the time of loss, less an allowance for depreciation when replacement cost coverage doesn't apply.

Exhibit 10, p.9, paragraph 15; Basic Form 1, pg. 8, paragraph 15; Broad Form 2, pg. 8, paragraph 15; Special Form 3, pg. 9, paragraph 15.

7. After the storm damage occurred in 1998, in many instances, materials of like kind and quality necessary to repair damages to the siding or roofing existing on consumers' homes were no longer manufactured or were otherwise unavailable; consequently, materials reasonably matching those on consumers' homes were not available. As a result, consumers have had to incur substantial out-of-pocket costs in order to obtain matching materials or live in mismatched homes.

8. Minn. Stat. {72A.201, Subd. 5(8) (1998) prohibits as an unfair settlement practice:

> [E]xcept where limited by policy provisions, settling or offering to settle a claim or part of a claim with an insured under replacement value provisions for less than the sum necessary to replace the damaged items with one of like kind and quality, including all applicable taxes, license and transfer fees. *[Emphasis added.]*

9. Nothing in American Family's policies limits the insurer's obligation, excludes coverage or otherwise supports American Family's practice of limiting payment under replacement value provisions of its policies to sums necessary to replace only the portion of the policyholder's dwelling that is directly damaged by a covered peril, including a hail or wind storm, where replacement materials that reasonably match (i.e., that are, under the policies' language, "of like construction for similar use" to) the existing materials on the dwelling are no longer manufactured or are otherwise not available.

10. In advertising and selling its homeowners' insurance policies, American Family has not affirmatively disclosed or informed consumers of the material fact that Defendant, as a matter of practice, limits the amount it pays for storm damages to the cost of replacing only those portions of the consumer's home that American Family maintains are directly damaged even if its failure to do so would result in a mismatch.

11. Defendant does not disclose or inform consumers, prior to their purchase of homeowners' insurance policies from Defendant or at any time prior to the consumer's filing of a claim, that Defendant limits the amount that it pays for storm damages to the cost of replacing only those portions of the consumer's home that Defendant maintains are directly damaged, even if repairs result in a mismatch.

12. As a matter of practice and policy, American Family routinely settles claims under its automobile insurance policies and Minnesota law with parts of 'like kind and quality' that match or are painted to match the undamaged parts of the vehicle. At oral argument, American Family explained this discrepancy in its interpretation of 'like kind and quality' between its homeowners and automobile insurance as one strictly of cost.

CONCLUSIONS OF LAW

1. Summary judgment is proper where there is no genuine issue of material fact in dispute and where the determination of the question of law in dispute will resolve the controversy. Minn.R.Civ.Proc. 52.02. In the instant case, both parties, in moving for partial summary judgment for a determination on the question of law as to what Defendant insurer's obligations are under Minn. Stat. {72A.201, Subd. 5(8) for losses incurred by an insured under the replacement value provisions of their homeowner's insurance policy, have conceded that no genuine issue of material fact to the making of such a determination is in dispute.

2. In construing and interpreting the text of an insurance policy, the Court must consider the interaction of the policy clauses, the insured causes of loss and any limitations or exclusions on the insurer's liability for the consequences of an otherwise insured event. Witcher Construction Company v. St. Paul Fire & Marine Insurance Co., 550 NW2d 1 (Minn. App. 1996), *rev. denied* (Minn. 1996). Pursuant to American Family's policies, hail damage to a dwelling is a covered loss with the amount of monetary loss subject to the limitations as set out in the replacement value provisions and the exclusions contained within the different policies.

3. A court is not to read an ambiguity into the plain language of a policy to ensure coverage. Farkas v. Hartford Acc, & Indem., 173 NW2d 21, 24 (Minn.). Instead, the Court must give the terms in a policy their plain, ordinary and popular meaning, Columbia Heights Motors v. Allstate Insurance, 275 NW2d 32, 34 (Minn. 1979) and construe the policy terms in conformance with applicable statutes. When policy language is ambiguous or confusing, it is public policy in Minnesota to extend coverage, rather than restrict it. Hennen v. St. Paul Mercury Insurance, 312 Minn. 131, 136, 250 NW2d 840, 844 (1977). The language in the Defendant's policy regarding replacement value for the repair of covered damages is not ambiguous and not subject to more than one interpretation. Estes v. State Farm & Casualty Co., 358 NW2d 123, 124 (Minn.App.1984); Columbia Heights Motors v. Allstate Insurance, 275 NW2d 32 (Minn.1979). In this case, any confusion as to the amount of a covered loss has resulted from Defendant's argument that their obligations under their policy provisions are met by only paying for new materials to replace the damaged areas of the home, without regard as to whether the new materials match in color, quality, texture or material the original siding or roofing on the home "at the time of the loss". At oral argument, Defendant conceded that pursuant to the same statutory language of "like kind and quality", Defendant repairs damaged automobiles with matching parts, both physically and "cosmetically." Defendant points out that the difference in their interpretation of their obligations under these two subdivisions of Minn. Stat. 72A.201 is based on the greater cost to Defendant to achieve a "matching" result on a damaged home. *Compare* Minn. Stat. 72A.201, Subd. 6 (2) and 72A.201, Subd. 5 (8).

4. Generally, given the discrepancy in the bargaining positions of the insured and insurer, when the meaning of insurance policy language is in dispute, the matter is to be resolved in favor of the insured. State Farm Insurance v. Seefeld, 481 NW2d 62 (Minn. 1992). Here, Defendant was in a position to add an exclusion or limitation in its replacement coverage under its homeowners' policies for what should be the common and easily anticipated event that matching housing materials would no longer be available for repairs over the entire useful life of a dwelling. Defendant's policies contain no such exclusion or limitation. Further, the greater cost to Defendant to achieve a matching result on a home versus an automobile is not a justification to interpret identical language in Minn. Stat.72A.201differently.

5. The State, pursuant to Minn.R.Civ.P.53, is also moving to have this matter referred to a referee or 'special master' for settlement of the cases between the insured and the insurer. However, the Rule states that such a referral should occur only in exceptional cases and only if the issues are complicated. In this case, Defendant's homeowners' policies provide an adequate and agreed upon method of dispute resolution when only the amount of loss is at issue. Minnesota Homeowners Policy, Gold Star Special Deluxe Form, Except 10, pg. 7; Minnesota Homeowners Policy, Basic Form 1, pg.6; Minnesota Homeowners Policy, Broad Form 2, pg. 7; and, Minnesota Homeowner's Policy, Special Form 3, pg. 7.

6. Based on the foregoing, there is no genuine issue as to any material fact concerning the legal issue of American Family's obligation to pay claims under replacement value provisions of its homeowner's insurance policies and under Minnesota law. Defendant's practice and policy of limiting the amount paid to settle claims under the replacement value provisions of its homeowner's policies to the cost to repair only the damaged areas, when the repairs result in mismatches in materials because of the unavailability of matching materials, violates the requirement under Minn. Stat. {72A.20, Subd. 5(8) 1988 that replacement materials be of "like kind and quality" and is contrary to its own policy provisions agreeing to replace damaged areas with materials of "like construction for similar use."

THE COURT HEREBY ORDERS:

1. The State is awarded partial summary judgment against American Family Mutual Insurance Company for declaratory relief that American Family's obligation to pay claims under replacement value provisions of its homeowners' insurance policies, based upon American Family's policies and Minn. Stat. {72A.201, Subd. 5(8) (1998):

(a) requires American Family to pay for full replacement with materials of like kind and quality;

(b) is not satisfied by the replacement of only those materials that are physically damaged by a storm, if the replacement materials do not or would not reasonably match in terms of color, quality, texture or type of material the existing materials on the policyholders' home; and

(c) when the materials replacing the physically damaged materials do not or would not reasonably match the existing materials, American Family must also pay the sum necessary to replace the existing materials so there is a reasonable match, except where the mismatch is attributable to the natural weathering of the existing materials.

2. The State's Motion for Appointment of a Special Master is hereby ***denied.*** Any remaining loss disputes between Defendant and its insureds after compliance with this Order are to be resolved pursuant to homeowner policy provisions.

3. Defendant's Motion for Partial Summary Judgment and for a trial of disputed issues of fact is hereby ***denied.***

4. This Order is made without prejudice to the right of either party to present any and all remaining issues to the Court for hearing prior to the entry of final judgment in this matter.

Dated: October 12, 2000

BY THE COURT

Patricia Kerr Karasov
Judge of District Court

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Not Reported in N.W.2d, 2011 WL 6015355 (Minn.App.)
(Cite as: 2011 WL 6015355 (Minn.App.))

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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
Gregory **SEAMON**, Appellant,
v.
ACUITY, Respondent.

No. A11–429.
Dec. 5, 2011.

Washington County District Court, File No. 82–CV–10–5331.
Andrew T. Jackola, Oakdale, MN, for appellant.

Lawrence M. Rocheford, Vicki A. Hruby, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, MN, for respondent.

Considered and decided by KALITOWSKI, Presiding Judge; PETERSON, Judge; and CRIPPEN, Judge.[FN*]

FN* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge.

*1 In this insurance-coverage dispute, appellant Gregory Seamon contends that the district court erred in awarding summary judgment to respondent Acuity, A Mutual Insurance Company (Acuity), on his claims for breach of contract and declaratory judgment because (1) the policy requires Acuity to cover the cost of replacing his entire roof; and (2) in the alternative, there is a genuine issue of material fact as to the availability of appropriate materials for repair. Acuity argues that the district court lacked subject-matter jurisdiction, and in the alternative, the district court properly granted summary judgment. Because there are genuine issues of material fact, we reverse the district court's grant of summary judgment and remand for further proceedings.

DECISION

In May 2009, a windstorm damaged part of appellant's roof. Appellant filed a claim with Acuity pursuant to his homeowner's insurance policy. An independent claims adjuster determined that the wind caused damage to 25% of the roof, and Acuity disbursed a check to appellant for $4,161.97, the estimated value of damage to 25% of the roof minus a $1,000 deductible. Appellant rejected the check, indicating by letter on July 1, 2009, that Certainteed Hearthstead shingles—the brand and style of his existing shingles—were discontinued and unavailable. Because he could not obtain matching shingles, appellant stated that he could not repair his roof and requested that Acuity pay for the cost of replacing his entire roof.

On July 23, 2009, Acuity notified appellant that it had located a supplier with a limited number of matching shingles in stock. Subsequently, appellant alleged that the supplier was unresponsive to his inquiries about purchasing the shingles. On August 11, 2009, Acuity notified appellant that the supplier's stock of shingles had been sold.

Appellant's homeowner's insurance policy provided a binding appraisal process for the resolution of loss-valuation disputes. Pursuant to the policy, two appraisers and a neutral umpire conducted an appraisal on June 15, 2010, and issued an appraisal

award. The award listed "Loss Replacement Cost" and "Loss Actual Cash Value" as $5,161.97. But under the heading "CLARIFICATIONS IF ANY" the award further indicated, "Gross loss. Roof only. We did not determine whether the Hearthstead 4 tab Certainteed shingles are available for repairs of the roof. If replaced, roof replacement is $20,105.90. ACV [actual cash value] is $10,052.95." Following the issuance of the appraisal award, Acuity again issued a check to appellant for $4,161.97, and appellant again rejected the check.

On August 13, 2010, appellant filed this action asserting that coverage of only the 25% loss was a breach of contract and seeking a declaratory judgment that the policy covered full replacement of his roof. Acuity moved for summary judgment, arguing that the nondamaged 75% of the roof was not a loss covered by the policy, and so it was not in breach of the contract. The district court granted Acuity's motion for summary judgment.

*2 In its findings of fact, the district court noted that it was disputed whether identical shingles were available between May and July 2009, but as of August 2009, the shingles were unavailable. Also in its findings of fact, the court stated that the provisions of the policy setting forth exclusions from coverage—specifically exclusions for defective materials, wear and tear, and shrinking—were relevant. Lastly, the court determined that appellant's policy did not contain consequential coverage or replacement coverage provisions. The district court determined that appellant's policy covered only the 25% loss and did not cover the full replacement cost. It confirmed the appraisal award of $4,161.97 and ordered judgment to be entered accordingly. *See* Minn.Stat. § 572.18 (2010) ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award....").

I.

Acuity first argues that the district court lacked subject-matter jurisdiction because a timely application for modification, correction or vacation under the Uniform Arbitration Act (UAA) was appellant's exclusive remedy for relief from the binding appraisal award. We disagree.

Jurisdiction is a question of law that is reviewed de novo. *In re Comm'r of Pub. Safety,* 735 N.W.2d 706, 710 (Minn.2007). "[L]ack of subject matter jurisdiction may be raised at any time, including for the first time on appeal." *Cochrane v. Tudor Oaks Condo. Project,* 529 N.W.2d 429, 432 (Minn.App.1995), *review denied* (Minn. May 31, 1995); *see also* Minn. R. Civ. P. 12.08(c) (permitting the court to dismiss an action "[w]henever it appears ... that the court lacks jurisdiction of the subject matter). Appraisal awards are subject to Minn.Stat. §§ 572.08–.30 (2010), Minnesota's codification of the UAA. *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n,* 778 N.W.2d 393, 398 (Minn.App.2010). "[T]he time limits in the arbitration statute are jurisdictional...." *All Metro Supply, Inc. v. Warner,* 707 N .W.2d 1, 5 (Minn.App.2005).

Acuity argues that the appraisal award is subject to the UAA and any application to modify, correct or vacate an arbitration or appraisal award must be made within 90 days of receipt of the award. *See* Minn.Stat. § 572.19, subd. 2. But although appellant did not specifically make an application for modification, correction or vacation of the appraisal award, he commenced this action for breach of contract and declaratory judgment within 90 days of the award. Pleadings are to be "liberally and broadly construed," *Midwest Family Mut. Ins. Co. v. Schmitt,* 651 N.W.2d 843, 846 (Minn.App.2002), and "[n]o technical forms of pleading or motions are required." Minn. R. Civ. P. 8.05(a). Pleadings will be held sufficient if they provide the adverse party with fair notice of the theory on which the claim for relief is based. *Save Our Creeks v. City of Brooklyn Park,* 682 N.W.2d 639, 646 (Minn.App.2004), *aff'd,* 699 N.W.2d 307

(Minn.2005).

*3 Because appellant's breach-of-contract and declaratory-judgment claims contended that he was entitled to the cost of replacement, Acuity was on notice that appellant was challenging the appraisal award. Moreover, both Acuity and the district court treated appellant's action as a challenge to the appraisal award, as indicated by Acuity's request for confirmation of the appraisal award pursuant to the UAA, and the district court's confirmation of the award. Accordingly, we conclude that this action was timely filed and the district court did not lack subject-matter jurisdiction.

II.

Appellant argues that the district court erred by granting summary judgment to Acuity because there are genuine issues of material fact. We agree.

Summary judgment is appropriate when "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. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Kratzer v. Welsh Cos.*, 771 N.W.2d 14, 18 (Minn.2009). The evidence is viewed "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993).

To resolve an insurance-coverage dispute, we begin by examining the policy language. *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn.2006). Interpretation of an insurance policy and its application to the facts are questions of law subject to de novo review. *Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 768 N.W.2d 346, 348 (Minn.2009). "General principles of contract interpretation apply to insurance policies." *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn.1998). Unambiguous language must be given its plain and ordinary meaning. *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn.1986).

Here, the relevant policy language provides that losses to a residence

> [a]re settled at replacement cost without deduction for depreciation, subject to the exceptions, limitation and conditions shown below.
>
> a. We will pay no more than the smallest of the following amounts:
>
> (1) If a loss to the dwelling, the dwelling stated value;
>
> ...
>
> (3) The replacement cost at the time of loss for equivalent property, construction and use on the same premises; however, the insurance coverage may not be conditioned on replacing or rebuilding the damaged property at its original location on the owner's property if the structure must be relocated because of zoning or land use regulations of state or local government; or
>
> (4) The amount actually and necessarily spent to repair or replace the property.

*4 It is undisputed that the "amount actually and necessarily spent to repair or replace" appellant's roof is lower than the "dwelling stated value" or the "replacement cost at the time of loss for equivalent property, construction and use on the same premises."

The policy also states, "**[W]e** may repair or replace any part of the damaged property with like property if **we** give **you** written notice within 30 days after **we** receive **your** signed, sworn proof of loss." Thus, assuming proper notice, pursuant to the policy, Acuity is obligated to cover "the amount actually and necessarily spent to repair or replace" appellant's roof with "like" property.

The phrase "actually and necessarily spent" unambiguously provides that the amount of covered loss requires a factual determination of the amount the insured actually must spend to repair the property, and whether such expenditure is necessary under the circumstances. *See Estes v. State Farm Fire & Cas. Co.*, 358 N.W.2d 123, 124–25 (Minn.App.1984) (holding that the phrase "the amount actually and necessarily spent to repair or replace the building" unambiguously limited coverage to the amount the insureds actually spent on repair), *modified on other grounds*, 365 N.W.2d 769 (Minn.1985). And if it is established that repair is not feasible, replacement is contemplated by the policy. Moreover, the phrase "like property" indicates that the policy requires repair with comparable or similar materials, but does not require the use of identical materials. *See, e.g., Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 756 N.W.2d 461, 471 (Wis.Ct.App.2008) (holding that replacement of "like kind and quality" does not require identical replacement). Whether particular replacement shingles are "like property" also must be determined by the fact-finder.

The appraisal process in appellant's policy was intended to resolve these factual issues. But the appraisal panel failed to do so. Two different amounts are set forth in the panel's award—$5,161.97 and $20,105.90—apparently because the panel did not know whether identical shingles were available. And in confirming the award, the district court did not resolve this issue. But although appellant directed his arguments to the availability of Certainteed Hearthstead shingles, the policy does not require identical materials. "Like" materials are allowed by the policy. Our review of the record indicates that the parties presented no evidence as to the availability and suitability of "like" materials to effectuate repair.

Courts in other jurisdictions have provided guidance in their application of similar policy language to comparable facts. The courts have made the requisite factual determinations by considering, for example, testimony as to the materials available in the marketplace and whether those materials were sufficiently "like" existing materials, and whether the proposed repair would be effective and would provide an acceptable aesthetic result. *See, e.g., Higginbotham v. New Hampshire Indem. Co.*, 498 So.2d 1149, 1153 (La.Ct.App.1986) (holding that the insured was entitled to the cost of replacing his entire roof because spot replacement, while possible, would not guarantee a leak-free roof); *Eledge v. Farmers Mut. Home Ins. Co.*, 571 N.W.2d 105, 111–12 (Neb.Ct.App.1997) ("[W]here a single square of shingles is damaged and matching replacements can be found, and where the repair can be made without damage to the remainder of the roof, ... the [policy] does not require the replacement of the whole when it is factually shown that the whole can be satisfactorily repaired by replacement of a 'part,' so long as the building is returned to 'like construction and use' as a result."); *Greene v. United Servs. Auto. Ass'n*, 936 A.2d 1178, 1186 (Pa.Super.Ct.2007) (holding that, although the exact shingles were not available, the insurer was not required to cover total replacement because trial testimony revealed that shingles of a similar color and texture were available and could have been used to repair the insured's roof).

***5** A determination of loss—the amount actually and necessarily spent to repair or replace the roof with "like" materials—can only be made after evidence is presented as to the feasibility of repair and the availability of materials. We therefore conclude that there are outstanding issues of material fact and summary judgment was inappropriate. Accordingly, we reject

the argument that the policy, as a matter of law, requires coverage of a specific percentage of loss. And we need not address appellant's additional argument that the district court erroneously relied upon disputed facts at the summary judgment stage.

Finally, Acuity argues that appellant is precluded from recovering more than 25% loss because the policy is not a "replacement policy." We disagree. Appellant's policy provides that losses are "settled at *replacement cost without deduction for depreciation*" subject to the exceptions discussed above. This is the hallmark of a replacement value policy. *See* 12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 176:56 (2005) ("[W]hile a standard policy compensating an insured for the actual cash value of damaged or destroyed property makes the insured responsible for bearing the cash difference necessary to replace old property with new property, replacement cost insurance allows recovery for the actual value of property at the time of loss, without deduction for deterioration, obsolescence, and similar depreciation of the property's value.").

III.

Acuity argues that policy exclusions preclude appellant from obtaining coverage for more than the 25% loss caused by wind damage. We disagree.

The policy provides that Acuity does not insure for loss to a residence attributable to an excluded cause, such as wear and tear, shrinkage, and defective materials. Acuity argues that 75% of appellant's roof was damaged by one or more of these excluded causes. But Acuity's argument is inapplicable here. It is undisputed that the 25% damage to appellant's roof was caused by a windstorm and thus was a covered loss. Appellant's claim is not that unrelated damage to 75% of his roof is covered by the policy. If Acuity is required to replace more than 25% of the shingles, it will be because such replacement was necessary to effectuate repair of the damaged 25% pursuant to the policy terms.

Reversed and remanded.

Minn.App.,2011.
Seamon v. Acuity
Not Reported in N.W.2d, 2011 WL 6015355 (Minn.App.)

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--- F.Supp.2d ----, 2014 WL 460851 (D.Minn.)
(Cite as: 2014 WL 460851 (D.Minn.))

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.
TROUT BROOK SOUTH CONDOMINIUM ASSOCIATION, Plaintiff,
v.
HARLEYSVILLE WORCESTER INSURANCE COMPANY, Defendant.

Civ. No. 12–2888 (RHK/JSM).
Feb. 5, 2014.

Karen K. Kurth, Barna, Guzy & Steffen, Ltd., Minneapolis, MN, for Plaintiff.

Katherine A. McBride, Andrew D. Deutsch, Leatha G. Wolter, Meagher & Geer, PLLP, Minneapolis, MN, for Defendant.

MEMORANDUM OPINION AND ORDER

RICHARD H. KYLE, District Judge.

INTRODUCTION

***1** This insurance-coverage action arises out of hail damage sustained by a townhome development, Plaintiff Trout Brook South Condominium Association ("Trout Brook"), in 2010. Trout Brook alleges that its insurer, Defendant Harleysville Worcester Insurance Company ("Harleysville"), failed to pay all of the damages it is entitled to recover under its policy. Presently before the Court is Harleysville's Motion for Summary Judgment. For the reasons that follow, the Court will deny its Motion.

BACKGROUND

Most of the relevant facts are undisputed; where disputed, they are recited below in the light most favorable to Trout Brook.

I. The parties and the policy

Trout Brook comprises eighteen buildings, each containing between four and eight townhomes, in Elk River, Minnesota. At all relevant times, the buildings were insured under a Harleysville policy (the "Policy") providing (in pertinent part) coverage for "direct physical loss" to "covered property." In the event of a loss to covered property, the Policy obligated Harleysville to pay for its "replacement cost," defined as the lesser of (1) "the cost of repair or replacement with similar materials for the same use and purpose, on the same site" or (2) "the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable."

II. The hail storms and the dispute over the amount of loss

In July 2009, a hail storm struck the Elk River area, causing damage to Trout Brook's buildings. It submitted a claim to Harleysville, which determined there was damage to the flashings, vents, and valleys on the buildings' roofs, but not to the roofs' shingles. Believing there was shingle damage, Trout Brook asked Harleysville for reexamination; Harleysville hired an engineering firm, Haag Engineering ("Haag"), to do so. Haag reinspected the roofs on June 25, 2010, but that same day, another hail storm struck the area and caused further damage. Trout Brook then submitted a second claim to Harleysville. Haag once again inspected the roofs, this time determining (among other things) that there had been some, but not "significant," damage to the roof shingles. It estimated total repair costs of approximately $270,000, of which $21,000 was allocated for roof repairs. Harleysville promptly paid this amount to Trout Brook.

Trout Brook did not agree with Harleysville's assessment and hired its own expert, First Rate Construction ("First Rate"), to evaluate the roofs and prepare a repair estimate. First Rate noted "large hail

impacts" that had substantially damaged the roofs' vents, flashings, and shingles, and accordingly it proposed replacing the roofs in their entirety, at a cost of more than $800,000. Harleysville disagreed with this assessment, and the parties could not reach an accord on the scope of damage and the resulting repair costs. Trout Brook then demanded an "appraisal" under the Policy. [FN1]

*2 After examining the buildings, the appraisal panel unanimously determined on July 21, 2011, that Trout Brook was entitled to an additional $81,765.50 in damages. The panel's award was extremely cursory and neither itemized the damaged property nor addressed precisely how the award was calculated. Nor did the award specify whether the additional damages were predicated on replacement of the roofs in their entirety, or rather only upon replacement of damaged shingles.[FN2] The award simply provided that the additional sum was for the "gross loss" determined by the appraisal panel, minus Harleysville's previous payment.

III. Trout Brook attempts repairs

Following the appraisal, Trout Brook hired First Rate to complete the needed repairs. But when it attempted to purchase the same shingles previously used on the roofs—Certain Teed XT–25 shingles in "weathered wood" color—it learned that they were no longer being manufactured. Instead, Certain Teed had changed the shingles' "color blend" in January 2010, and it recommended that newly manufactured "weathered wood" shingles (now called XT–30) not be mixed with old ones in significant quantities due to the color difference. Nevertheless, Trout Brook purchased several XT–30 shingles in "weathered wood" color to determine how they appeared next to the old shingles, but it concluded the colors were not a **match**. It then contacted Harleysville to advise it of the situation, contending that the unavailability of color-matching shingles entitled it to complete roof replacement. Harleysville responded by requesting more information, and Trout Brook forwarded a letter from Certain Teed advising of the color change and indicating that it had "no inventory of the old color product and [did] not know of any inventory in the field of the old color product in the XT series."

By letter dated March 26, 2012, Harleysville informed Trout Brook that it had "complied with all requirements of the appraisal process" and it would not "give further consideration to the issue" of color matching. Trout Brook then retained counsel, who wrote Harleysville on April 11, 2012, asserting that "the problem of non-matching shingles was not considered by the 'appraisers' and, therefore, was not part of the loss valuation." Counsel further noted that the Policy required the use of material "of *like kind and quality* " or "*similar* materials on the same site," and non-matching shingles would not meet these terms.

Harleysville responded on June 8, 2012, asserting that under the Policy's "clear and unambiguous" language, it was required only to pay for property that had sustained "direct physical loss." Thus, it asserted it could not be required to pay for the replacement of *undamaged* roof shingles—even if they did not **match** the replacement shingles then available. Despite this assertion, however, it indicated it was "willing to conduct an inspection of the non-damaged shingles and any additional information [Trout Brook] may provide in support of [its] position." And because the Policy's "two (2) year suit limitation provision" was set to expire on June 25, 2012—two years after the date of the second hailstorm—and in "light of [Trout Brook's] supplemental claim for additional damages, and Harleysville's request for further information and inspection," Harleysville agreed to extend the suit limitation period for 90 days, that is, to September 25, 2012.

*3 Meanwhile, on June 27, 2012, another roof inspection took place. Jennae Majerus, Trout Brook's property manager, was present, along with Harleysville's claims adjuster (Christopher Bennett), Harleysville's appraiser (Brad Langerman), and Trout

Brook's appraiser (Paul Norcia). Majerus brought new XT–30 shingles with her, and she overlaid them on one building's roof for color comparison. Unsurprisingly, the parties differed in their assessments—Langerman and Bennett believed the new shingles were "a good **match**" and "looked okay," while Majerus and Norcia believed that the new shingles simply did not **match** the color of those on the roof.

In August 2012, Harleysville offered to submit the "matching" issue to the appraisal panel that had rendered the prior award. Trout Brook refused. On September 11, 2012, Harleysville again offered to submit the "claim for additional roof coverage on a 'matching' theory to the same panel that entered the Appraisal Award ." Though it disputed that an insured is entitled to multiple appraisals, it nevertheless recognized that Trout Brook's claim was "premised on the fact that in determining the 'amount of loss,' the Appraisal panel did not address the legal issue of 'matching.' " It was Harleysville's position, therefore, that the issue "must be resolved by the Appraisal panel" in the first instance. The insurer gave Trout Brook until October 1, 2012, to accept its offer of reappraisal, and at the same time, it agreed to extend the Policy's suit limitation period for another 30 days, to October 25, 2012.

Trout Brook again demurred. On October 1, 2012, its counsel informed Harleysville that it would "not agree to the same appraisal 'panel,' " because the panel "did [not do] a very good job" and had "failed to submit any documentation as to how [it] reached [its] decision and what was considered in the decision making process."

IV. Litigation ensues, and "replacement" shingles are located

A short time later, Trout Brook commenced this action in the Sherburne County, Minnesota District Court, seeking a declaration of coverage under the Policy for full roof replacement, as well as damages for Harleysville's (alleged) breach of contract. Harleysville later removed the action to this Court on diversity-jurisdiction grounds.

While undertaking discovery, one of Harleysville's expert witnesses, John Pederson, located and obtained a supply of XT–25 shingles in "weathered wood" color that had been manufactured in 2009—that is, before Certain Teed's color change. He offered the opinion that the shingles were essentially identical to the existing ones on the Trout Brook's roofs and could be used for repairs. Trout Brook, however, harbored concerns about using four-year-old shingles for repairs. Accordingly, it purchased one bundle of the shingles (26 total) from Pederson in order to examine them.[FN3]

Majerus inspected the shingles and was immediately troubled by their appearance—they had an "odd discoloration" making them appear "wet" in spots, and the discolored portions were "smoother than the rest of the shingle." Sue Broberg, Trout Brook's President, thought the shingles "look[ed] awful" and using them "would be like having an orange and a green next to each other." Norcia, who Trout Brook had retained as an expert in this case, also was concerned by the shingles. While he agreed with Pederson that they were the same composition, type, size, dimensions, and thickness as those on the roofs, he, too, believed they appeared "wet" and were not a color **match**. He also believed they were too brittle and needed additional testing to confirm they were suitable for repairs.[FN4] Ultimately, no repairs were completed with the shingles Pederson obtained.

*4 With discovery now complete, Harleysville moves for summary judgment. Its Motion has been fully briefed, the Court heard oral argument on January 23, 2014, and the Motion is now ripe for disposition.

STANDARD OF REVIEW

Summary judgment is proper if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Ricci v. DeStefano,* 557 U.S. 557, 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). The moving party bears the burden of showing that the material facts in the case are undisputed. *Torgerson v. City of Rochester,* 643 F.3d 1031, 1042 (8th Cir.2011) (*en banc*); *Whisenhunt v. Sw. Bell Tel.,* 573 F.3d 565, 568 (8th Cir.2009). The Court must view the evidence, and the inferences that may be reasonably drawn from it, in the light most favorable to the nonmoving party. *Beard v. Banks,* 548 U.S. 521, 529–30, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006); *Weitz Co., LLC v. Lloyd's of London,* 574 F.3d 885, 892 (8th Cir.2009). The nonmoving party may not rest on mere allegations or denials, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue of material fact for trial. Fed.R.Civ.P. 56(c)(1)(A); *Wood v. SatCom Mktg., LLC,* 705 F.3d 823, 828 (8th Cir.2013).

ANALYSIS

I. Timeliness

Citing the Minnesota Uniform Arbitration Act (MUAA), Minn.Stat. § 572B.22, Harleysville tees off its argument by asserting that Trout Brook did not challenge the appraisal award within 90 days and, accordingly, is barred from doing so now. (*See* Def. Mem. at 12–15.) It further argues that absent a timely motion to modify or vacate, the Court "must" confirm the appraisal award. (*Id.*) But this argument is simply a red herring, as the appraisal award does not affect the disposition of the claims currently before the Court.

A review of the Complaint lays bare the problem with Harleysville's argument. While that pleading discusses the appraisal process and the underlying award when reciting the factual background in this case, *it does not challenge or otherwise seek to overturn the award.* Rather, in Count 1 Trout Brook seeks a declaration that Harleysville is required to pay for full roof replacement due to the "matching" issue (*see* Compl. ¶¶ 36, 45), and in Count 2 it asserts that Harleysville breached the Policy by failing to do so (*id.* ¶¶ 50–51). Furthermore, Harleysville nowhere asserted in its Answer (or through a counterclaim) that the award must be confirmed by the Court.

The reason for this is obvious. The appraisal panel only determined the cost of repairing Trout Brook's roofs—the "matching" issue was not before it, as it is undisputed Trout Brook did not learn Certain Teed had changed the color of XT–25 "weathered wood" shingles until *after* the appraisal award was rendered. [FN5] In fact, in correspondence to Trout Brook's counsel, Harleysville acknowledged the "matching" claim was "for *additional* damages" (Deutsch Decl. Ex. 10 (emphasis added)), and further noted that it was "premised on the fact that in determining the 'amount of loss,' the Appraisal panel did not address the legal issue of 'matching' " (*id.* Ex. 11). And Harleysville did *not* assert in its letters that the claim had already been addressed by the appraisal panel and, consequently, was barred by a 90–day limitation period. Succinctly stated, whether the appraisal award is assailable at this juncture has no bearing on this case, because Trout Brook's claims raise an issue beyond the scope of that award: Is it entitled to coverage for roof replacement because matching shingles (allegedly) are not available? [FN6]

*5 Bolstering the Court's conclusion is the fact that in Minnesota, [FN7] coverage questions are not for appraisers. While appraisers generally have authority "to decide the 'amount of loss,' " they "may not construe the policy or decide whether the insurer should pay." *Quade v. Secura Ins.,* 814 N.W.2d 703, 706 (Minn.2012). In other words, "[t]he scope of appraisal is limited to damage questions[,] while liability questions are reserved for the courts." *Id.* The issue currently before the Court, therefore, was not subject to the appraisal panel's authority and cannot be time-barred due to Trout Brook not challenging the appraisal award.

In any event, even if a 90–day limitation period were potentially applicable, the Court would conclude on the present record that there exists a genuine issue whether Harleysville is estopped from relying upon it. The record does not indicate that Trout Brook slept on its rights, but rather promptly brought the "matching" issue to Harleysville in September 2011, shortly after it was discovered. (*See* Deutsch Decl. Ex. 5.) In response, Harleysville did not invoke the (supposed) 90–day limitation period, but rather requested additional information, engaged in discussions with Trout Brook's counsel, reinspected the roofs, and most importantly, *twice extended the limitation period for Trout Brook to sue.* Such conduct, in the Court's view, would at least be sufficient to create a genuine issue whether Harleysville had "lull[ed] [Trout Brook] into inactivity." *L & H Transp., Inc. v. Drew Agency, Inc.*, 403 N.W.2d 223, 227 (Minn.1987); *see also Brenner v. Nordby,* 306 N.W.2d 126, 127 (Minn.1981) (reversing summary judgment for defendant on statute-of-limitations grounds where plaintiff asserted that during negotiations, defendant never denied liability, told plaintiff he was investigating her claim, and represented that the investigation might lead to a settlement). Indeed, the Court strongly suspects that had Trout Brook sued to vacate the appraisal award before giving Harleysville an opportunity to address the matching issue, the insurer would have argued the suit was premature.

In sum, because the appraisal panel did not have before it the "matching" issue now at play in this lawsuit, and because questions of coverage are for the Court and not the appraisers, the award—and Trout Brook's failure to challenge it within 90 days—simply does not bar Trout Brook's causes of action.

II. Genuine issues of material fact exist

As noted above, state law governs the interpretation of **insurance** policies. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Terra Indus., Inc.*, 346 F.3d 1160, 1164 (8th Cir.2003). Under Minnesota law, interpretation of an **insurance** policy generally is a question of law for the Court. *Watson v. United Servs. Auto. Ass'n,* 566 N.W.2d 683, 688 (Minn.1997). When policy language is unambiguous, it is interpreted "in accordance with its plain and ordinary meaning." *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 799 (Minn.2004). Ambiguity in policy language, however, must be resolved in favor of the insured. *Lott v. State Farm Fire & Cas. Co.*, 541 N.W.2d 304, 307 (Minn.1995). "Ambiguity exists if the language of the policy is reasonably subject to more than one interpretation." *Minn. Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn.1990).

*6 The relevant Policy language here provides coverage for "direct physical loss" to "covered property." In the event of a loss to covered property, Harleysville is obligated to pay for the property's "replacement cost," defined as the lesser of (1) "the cost of repair or replacement with similar materials for the same use and purpose, on the same site" or (2) "the cost to repair, replace, or rebuild the property with material of like kind and quality to the extent practicable." According to Harleysville, these provisions unambiguously do not require replacement of Trout Brook's roofs. The Court disagrees.

A. "Direct physical loss"

Seizing on the Policy language requiring "direct physical loss" to "covered property," Harleysville first argues that there cannot be coverage for *undamaged* shingles on Trout Brook's roofs—even if they do not **match** replacement shingles used for repairs. (*See* Def. Mem. at 17 ("Applying the plain language of the policy, the undamaged parts of the roof[s] did not sustain 'direct physical loss.' ").) While superficially appealing, there at least are two problems with this argument.

First, it is predicated on an unsupported definition of the term "covered property." By Harleysville's logic, each individual roof shingle on Trout Brook's buildings constitutes "covered property," undermin-

ing any obligation to pay for shingles not damaged by hail. But in the Court's view, this reads the term "covered property" too narrowly. Harleysville points to no Policy definition supporting its argument, and in fact the Policy's "Property Covered" section indicates coverage extends to "*buildings and structures.*" (Doc. No. 24 at 105 (emphasis added).) Moreover, the Policy's "location schedule," which defines the extent of Trout Brook's "property coverage," simply lists the association's eighteen buildings. (*Id.* at 32–34.) Accordingly, the Policy suggests that "covered property" is each of Trout Brook's *buildings*, and not individual items (such as shingles or siding) attached or appurtenant to them. And it is undisputed that each *building* sustained "direct physical loss" from the 2010 hail storm.

Second, recent Minnesota case law undermines Harleysville's argument. Just two months ago, the Minnesota Court of Appeals, in a case with strikingly similar facts to this one, held that an insurer was required to replace all of the siding on twenty townhome buildings, even though only a small portion was actually damaged in a hail storm, because the original siding was no longer manufactured in the same color. *See Cedar Bluff Townhome Condo. Ass'n, Inc. v. Am. Family Mut. Ins. Co.*, No. A13–0124, 2013 WL 6223454, at *3–4 (Minn.Ct.App. Dec.2, 2013). And there, as here, the policy required the insurer to pay only for "direct physical loss or damage to covered property." *Id.* at *1.

Harleysville retorts that *Cedar Bluff* erred and this Court should not propagate that error. (Def. Mem. at 22 ("[The] court of appeals completely ignored the threshold requirement in the policy before it—and in all property indemnity policies—that the property sustain some loss or damage before the insurer is required to replace it.").) But *Cedar Bluff* hardly broke new ground. Indeed, the Court of Appeals reached the same conclusion nearly two years earlier, in a case in which only a portion of the insured's roof was damaged by wind. *Seamon v. Acuity*, No. A11–429, 2011 WL 6015355, at *3–5 (Minn.Ct.App. Dec.5, 2011) (reversing grant of summary judgment to insurer, because whether entire roof replacement was required under insured's policy when matching shingles were no longer available presented a jury question). [FN8]

*7 Harleysville also argues that *Cedar Bluff* embodies bad public policy, because requiring roof replacement under these circumstances would "dramatically drive up premiums for the state's insureds." (Def. Mem. at 28; *accord, e.g.*, Reply Mem. at 12–13.) But it is not this Court's role to decide what should, or should not, be the public policy of Minnesota. *See, e.g., Twin Cities Galleries, LLC v. Media Arts Grp., Inc.*, 476 F.3d 598, 600–01 (8th Cir.2007) (federal courts look to state statutes, rules, and court decisions to determine state public policy). And while Harleysville cites several *out-of-state* cases to bolster its argument (*see* Def. Mem. at 19 (collecting cases holding that "insurers are [not] obligated to replace undamaged materials simply to assure precise aesthetic **matches**")), this is far from a settled area of the law, and courts in different states weigh the policy considerations differently. *See, e.g., Collins v. Allstate Ins. Co.*, No. 2:09–cv–01824, 2009 WL 4729901, at *6 n. 4 (E.D.Pa. Dec.10, 2009) ("[C]ases in other jurisdictions on the subject of 'matching' undamaged areas of a property to damaged areas are mixed."). This is all the more reason why this federal Court cannot simply ignore *Cedar Bluff* (and *Seamon*) based on its own notions of what is "best" for Minnesota insureds.[FN9]

B. "Like kind and quality"

Harleysville next notes that the Policy obligates it to pay Trout Brook only for the cost of repairing the roofs with "similar materials" or those of "like kind and quality" as already on the buildings. (Def. Mem. at 24–30.) And it argues that under this "unambiguous" language, it need not "pay the cost to replace *all* of the roofs on *all* of the buildings," because "like kind" and "similar" mean shingles "made of a similar substance and ... similar in nature to [those] being

replaced," which are "concept[s] completely divorced from color." (*Id.* at 26 (emphases in original) (asserting that color "impacts neither the physical makeup (i.e., the composition) nor the quality or essential character of the shingles").) Yet, "like" is commonly defined as "similar to," American Heritage Dictionary 731 (2d ed.1985), and "similar" means "related *in appearance* or nature; alike though not identical," *id.* 1141 (emphasis added).[FN10] Accordingly, the Court does not believe the terms "like kind" and "similar" can be so easily "divorced" from color.

Furthermore, the Minnesota Court of Appeals noted in *Seamon* that a policy provision requiring the use of "like" materials necessitated a determination whether repairs using unmatched shingles "would provide an acceptable *aesthetic* result." 2011 WL 6015355, at *4 (emphasis added). Similarly, the policy in *Cedar Bluff* required the use of materials "of like kind and quality," language the insurer argued would be "unreasonable to interpret ... to require replacement of both damaged and undamaged siding in order to achieve an exact color **match**." 2013 WL 6223454, at *4. But the court noted the policy did not define the phrase "of like kind and quality," and the insured's interpretation—"requir[ing] that the buildings have uniformly colored siding"—was no less reasonable. *Id.* Because there were multiple reasonable interpretations, the policy was ambiguous and could not be resolved as a matter of law in the insurer's favor. *Id.*

*8 This Court perceives no principled reason to deviate from these holdings. The terms "similar materials" and "material of like kind and quality" simply cannot be defined, as a matter of law, to preclude consideration of color. Rather, a jury must determine whether these terms obligate Harleysville to pay for matching shingles on Trout Brook's property. *See Seamon,* 2011 WL 6015355, at *4–5.

Harleysville also argues that even if color matching is required, it has "fulfilled all of its obligations" under the Policy because it "located replacement shingles that are identical to the existing [ones]." (Def. Mem. at 23.) Putting aside that the record does not reveal whether Pederson obtained a sufficient number of shingles to complete all necessary repairs, it is far from clear that the shingles are "identical" to those on Trout Brook's roofs. To be sure, they are the same "weathered wood" Certain Teed X–25 model as those on the roofs, but several witnesses testified in their depositions that the shingles located by Pederson—whether due to time, fading, exposure to water, or some other unknown reason—simply do not **match** the existing ones. Moreover, the parties have submitted pictures of the newly located shingles overlaid on a Trout Brook roof, and in the Court's view a reasonable jury could conclude that the colors are not "similar." And, although testing of a small sample showed that the newly obtained shingles adhered adequately, several of Trout Brook's witnesses testified that the shingles are brittle and crack easily. Under these facts, whether Pederson's replacement shingles are of "like kind and quality" is a disputed fact that cannot be resolved at summary judgment.[FN11]

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Harleysville's Motion to Confirm the Appraisal Award and for Summary Judgment (Doc. No. 29) is **DENIED.**

FN1. The Policy provides that when the parties cannot agree on the amount of a covered loss, either may demand an appraisal. Under that process, each party selects an independent appraiser, and the appraisers jointly select an impartial "umpire." The appraisers then submit their differences to the umpire, after which "[w]ritten agreement ... by any two of these three [individuals] sets the amount of the loss."

FN2. Given First Rate's estimated cost of completely replacing the roofs, however, it

seems unlikely the panel concluded roof replacement was appropriate.

FN3. Pederson would not inform Trout Brook how many shingles he obtained, although he has submitted a Declaration averring he has "an amount sufficient to replace the shingles on the roofs of [Trout Brook's] buildings ... according to [the] scope of damage identified in the Haag Engineering report." Trout Brook asserts in its brief, however, that Pederson "had about 96–98 bundles visible for inspection on two pallets, [but it] needs approximately 470–520 bundles to make repairs." (Mem. in Opp'n at 14.)

FN4. John Russo, another Trout Brook expert, testified in his deposition that he believed the shingles were "probably appropriate" for repairs, but he also testified that "there is a question about whether they look the same ... and that's something that's going to have to be dealt with."

FN5. Harleysville asserts that the appraisal panel "obviously concluded ... there were shingles available to make the repairs." (Reply Mem. at 10.) At oral argument, however, its counsel acknowledged that the panel had simply *assumed* matching shingles were available. And that is consistent with Norcia's deposition testimony, in which he averred that the appraisers "certainly didn't consider ... matching issues."

FN6. For the same reason, the Court finds misplaced Harleysville's request for confirmation of the appraisal award. Under the MUAA, which Harleysville argues is applicable to this case, confirmation is appropriate only "[i]f a motion to vacate an award is denied and a motion to modify or correct the award is not pending." Minn.Stat. § 572B.23(d).

FN7. State law governs the interpretation of **insurance** policies, *Nat'l Union Fire Ins. Co. of Pittsburgh v. Terra Indus., Inc.*, 346 F.3d 1160, 1164 (8th Cir.2003), and the parties agree that Minnesota provides the relevant state law.

FN8. *Rest Assured, Inc. v. American Motorist Insurance Co.*, No. C9–98–2302, 1999 WL 431112 (Minn.Ct.App. June 29, 1999), cited by Harleysville, is distinguishable because "matching" was not at issue.

FN9. Following oral argument, Harleysville's counsel submitted a "Bulletin" (attached to Doc. No. 36) from the Minnesota Department of Commerce, the entity that regulates the **insurance** industry in Minnesota, ostensibly supporting its position. But that Bulletin actually *undermines* its argument. The Bulletin provides that when only a portion of a roof is damaged and "existing materials cannot be 'reasonably' matched, the **insurance** company would have to replace the entire roof." (Id.) In other words, it indicates that an insurer may be required to pay for replacement of *undamaged* shingles if they do not **match** those available for repairs. Moreover, the Bulletin suggests that Minnesota public policy supports requiring roof replacement in such circumstances.

FN10. Because **insurance** policy language is interpreted "in accordance with its plain and ordinary meaning," *Ill. Farmers Ins.* ., 683 N.W.2d at 799, Minnesota courts routinely resort to dictionary definitions to ascertain the meaning of undefined policy terms, *see, e.g., Carlson v. Allstate Ins. Co.*, 749 N.W.2d

41, 45–46 (Minn.2008); *see also Javinsky v. Hartford Life Ins. Co.*, Civ. No. 09–888, 2010 WL 889961, at *4 (D.Minn. Mar. 8, 2010) (Montgomery, J.) (collecting cases).

FN11. Harleysville notes that the Policy only requires it to provide "similar" or "like" materials "*to the extent practicable.*" (Reply Mem. at 13 (emphasis added).) But in the Court's view this adds little to the mix, because what is "practicable" under the circumstances is far from evident, especially given that the scope of the roof damage is not clearly spelled out in the parties' Motion papers. Indeed, Norcia testified in his deposition that approximately 12,000 shingles would be needed to complete repairs, and hence a jury could determine under the circumstances that it is "practicable" to require complete roof replacement.

D.Minn.,2014.
Trout Brook South Condominium Ass'n v. Harleysville Worcester Ins. Co.
--- F.Supp.2d ----, 2014 WL 460851 (D.Minn.)

END OF DOCUMENT

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNCTIONAL REPLACEMENT COST LOSS SETTLEMENT

FORMS HO 00 02, HO 00 03 AND HO 00 05 ONLY

DEFINITIONS

The following definition is added when this endorsement is attached to the policy:

"Functional replacement cost" means the amount which it would cost to repair or replace the damaged building with less costly common construction materials and methods which are functionally equivalent to obsolete, antique or custom construction materials and methods used in the original construction of the building.

SECTION I – CONDITIONS

C. Loss Settlement

Paragraph **2.** is deleted and replaced by the following:

2. Buildings covered under Coverage **A** or **B**:

   a. If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the "functional replacement cost" of the building immediately before the loss and you contract for repair or replacement of the damaged building for the same use, within 180 days of the damage unless we and you otherwise agree, we will pay, after application of any deductible, the lesser of the following amounts:

   (1) The limit of liability under this policy that applies to the building; or

   (2) The necessary amount actually spent to repair or replace the damaged building on a "functional replacement cost" basis.

   b. If you do not make claim under **2.a.** above, we will pay, after application of any deductible, the least of the following amounts:

   (1) The limit of liability under this policy that applies to the building;

   (2) The actual cash value of the damaged part of the building; or

   (3) The amount which it would cost to repair or replace the damaged building on a "functional replacement cost" basis.

   c. If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the "functional replacement cost" of the building immediately before the loss, we will pay that proportion of the cost to repair or replace that part of the building damaged:

   (1) After application of any deductible; and

   (2) Without deduction for depreciation;

   which the total amount of insurance in this policy on the damaged building bears to 80% of the "functional replacement cost" of the building, but not more than the limit of liability under this policy that applies to the building.

   d. To determine the amount of insurance required to equal 80% of the "functional replacement cost" of the building immediately before the loss, do not include the value of:

   (1) Excavations, footings, foundations, piers, or any other structures or devices that support all or part of the building, which are below the undersurface of the lowest basement floor;

   (2) Those supports in **(1)** above which are below the surface of the ground inside the foundation walls, if there is no basement; and

   (3) Underground flues, pipes, wiring and drains.

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e. If the actual cash value of the damage is less than the "functional replacement cost" then:

(1) We will pay no more than the actual cash value of the damage until replacement is complete. Once replacement is complete, we will settle the loss according to the provisions of **2.a.** and **c.** above.

However, if the cost to functionally repair the damage is both:

(a) Less than 5% of the amount of insurance in this policy on the building; and

(b) Less than $2,500;

we will settle the loss according to the provisions of **2.a.** and **c.** above whether or not replacement is complete.

(2) You may disregard the "functional replacement cost" loss settlement provisions and make claim under this policy for loss to buildings on an actual cash value basis.

You may then make claim for any additional liability according to the provisions of this Condition **C.** Loss Settlement, provided you notify us of your intent to do so within 180 days of the date of loss.

All other provisions of this policy apply.