IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MICHAEL HIGGINS AND APRIL HIGGINS,

Case No.: 22-CV-198

Plaintiffs,

v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Plaintiffs Michael and April Higgins, by their attorneys, Mayer, Graff & Wallace LLP, submit the following legal support for their Motion for Reconsideration of the Court's Decision and Order, dated July 5, 2022 (the "Order") (Doc. 36) or, in the alternative, to amend the Order, or separately, to direct the entry of judgment on Plaintiffs' Fourth Cause of Action for Declaratory Judgment under Fed. R. Civ. P. 54(b) and make the express determination that there is no just reason to delay the entry of judgment on that claim so that the Plaintiffs may pursue a permissive appeal with the Seventh Circuit.

INTRODUCTION

The relevant facts are undisputed. The Higgins' property located at 1228 Day Street in Green Bay, Wisconsin suffered a fire loss on February 24, 2021. (Doc. 19, Pls.' Proposed Findings of Fact ("PPFF"), ¶ 6.) The Higgins made an insurance claim with State Farm for the loss. (Id., ¶ 9.) State Farm made several revisions to its estimate before concluding the amount of loss was $72,166.96. (Id., ¶ 14.) The Higgins disputed State Farm's estimate and asserted the amount of

loss was $156,993.49, plus $8,373.63 for debris removal. (Id., ¶ 15.)

In particular, the parties disagreed on four "pricing" items (i.e., the price per square foot of carpet pad, carpet, stain, and drywall) and 41 "scope" items (i.e., whether windows and doors could be cleaned or had to be replaced, or whether a plaster ceiling could be repaired or had to be removed and replaced). (Id., ¶¶ 21-24.) As a result, the Higgins invoked the appraisal clause in their policy and demanded that the "amount of loss" be set by an appraisal panel. (Id., ¶ 19.)

The appraisal clause reads:

> 6. **Appraisal**. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the **residence premises** is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.

(Id., ¶ 8.) State Farm rejected the Higgins' appraisal demand and later asserted any appraisal would be limited to resolving the four pricing disputes but would not consider the 41 scope disputes. (Id., ¶¶ 21-24.) This lawsuit followed.

The parties subsequently filed competing motion for summary judgment on this issue. On July 5, 2022, this Court entered its Decision and Order holding, in relevant part:

> Under the plain language of the policy at issue in this case, the appraisal process is limited to circumstances where the insurer and insured disagree as to the 'amount of loss,' or the valuation of loss, *not the scope or extent of damage and the method of repair*.
>
> [...]
>
> The appraisal provision in the insurance policy is limited to disputes over valuation, not causation or coverage.

(Doc. 36 at 6-7, emphasis added.) The Court granted State Farm's Motion for Partial Summary Judgment (Doc. 25) and denied the Higgins' Motion for Declaratory Judgment, for Partial Summary Judgment and to Compel Appraisal (Doc. 15). The Higgins respectfully request the Court reconsider this ruling based on manifest errors of fact and law which led to the wrong result or, in the alternative, to amend the Order or separately direct the entry of judgment on Plaintiffs' Fourth Cause of Action for Declaratory Judgment under Fed. R. Civ. P. 54(b) and make the express determination that there is no just reason to delay the entry of judgment on that claim so that the Plaintiffs may pursue a permissive appeal with the Seventh Circuit.

ARGUMENT

I. Standard of Review

The disposition of a motion for reconsideration is entrusted to the district court's discretion. Caisse Nationale de Credit Agricole v. CBI Indus., Inc., 90 F.3d 1264, 1270 (7th Cir. 1996) (citing Billups v. Methodist Hosp., 922 F.2d 1300, 1305 (7th Cir. 1991)). To prevail on a motion to alter or amend under Rule 59(e), the movant must present newly discovered evidence or establish a "manifest error of law or fact." Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir.

2000). A "manifest error" is the "whole[]sale disregard, misapplication, or failure to recognize controlling precedent." Oto, 224 F.3d at 606 (quoting Sedrak v. Callahan, 987 F. Supp. 1063, 1069 (N.D. Ill. 1997)).

II. The District Court Committed a Manifest Error of Fact by Concluding the Higgins' Claim Involved a Coverage Dispute

It is undisputed that the Higgins sustained a fire loss, made a claim with State Farm for the damage, and State Farm accepted coverage for the claim. (PPFF, ¶¶ 6, 9, 14.) The only remaining dispute between the parties is the amount of loss (or damage) and the cost to repair it. (See id., ¶¶ 14-15.) State Farm has never asserted any other cause—whether excluded, limited, or otherwise—contributed to the damage at the Higgins' property. (Doc. 27, Def.'s Resps. to PPFF, ¶ 18.) There is no coverage dispute at issue in this action and appraisal is proper to resolve the remaining factual dispute which amounts to about $85,000. (Id., ¶ 16.)

The Court initially agreed the parties' dispute centered on the amount of loss, stating, "Plaintiffs' disputed the *amount of loss* and provided an estimate in the amount of $159,019.06" and "The difference between State Farm's estimate and Plaintiffs' estimate is close to $85,000." (Doc. 36 at 2, emphasis added.) The Court also acknowledged the pertinent language in the appraisal clause, which reads: "If you and we fail to agree on the amount of loss, either one can make demand that the amount of loss be set by appraisal." (Id.) The analysis should have ended there.

However, the Court went on to adopt State Farm's position that "[a]llowing an appraiser to determine issues of causation and the scope of damages would impermissibly result in the appraiser deciding whether certain damage is covered under the policy." (Doc. 36 at 7.) This conclusion assumes two facts not in evidence: (1) that State Farm contested coverage for the fire

loss; and (2) that the Higgins' requested the appraisal resolve this coverage issue.

A. *The Higgins' Claim Does Not Involve a Coverage Dispute*

State Farm has *never* contested coverage for this loss. Both parties agree this was a fire loss. State Farm has never identified any other cause which contributed to the damage claimed by its insureds. There is no motion on file or anticipated which will address coverage under the policy. The only dispute between these parties is over the cost to repair the fire damage. This is precisely the type of *factual* dispute an appraisal panel is meant to resolve. Instead, under the current ruling, the Higgins are now forced to incur the time and expense to have a jury decide the amount of loss.

There is no basis for State Farm or this Court to conclude an appraisal panel would be asked to determine coverage on this claim. State Farm identified 41 "scope" differences between the parties' estimates and argued that "a disagreement of scope implicates coverage because resolution of scope disagreements necessarily entails an interpretation of whether an item suffered 'accidental direct physical loss' sufficient to trigger coverage under the State Farm Policy." (Doc. 34 at 2, State Farm's Reply Br. in Supp. of Mot. for Summ. J.) This is a gross mischaracterization of the facts and the policy which the Court relied upon to reach its conclusion.

Out of 41 scope differences, State Farm agreed 32 involved some measure of accidental direct physical loss. (See Doc. 29-5 at 1-3, State Farm's 11/16/2021 Letter.) The dispute over most of these items is whether the particular unit of property—i.e., window, door, flooring, trim, etc.—could be cleaned or refinished, or if it had to be removed and replaced; not whether it sustained accidental direct physical loss. (Id.) The remaining items largely involve ancillary work related to those items which have already been confirmed damaged by fire. (See Doc. 18-3, MPA's 7/14/2021 Estimate.) For example, if a window had to be removed and replaced (as asserted by

the insured) rather than cleaned (as asserted by State Farm), there might be additional necessary work such as installing window wraps, trim and sill flashing. (Id. at 33.) Again, these were **not** differences in coverage—i.e., whether a covered cause of loss caused accidental direct physical loss to the property—but rather a dispute over the cost to repair the undisputed damage from a fire. While the Court was correct in holding that coverage disputes are outside the purview of an appraisal panel, it was incorrect in adopting State Farm's unsupported assertion that a coverage issue existed in this claim. This is a manifest error of fact which supports reconsideration.

B. The Higgins Did Not Seek to Resolve Any Perceived Coverage Dispute Through Appraisal

Even if a coverage issue did exist on the Higgins' claim, there is no evidence the Higgins requested the appraisal panel to resolve it. Everyone agrees the appraisal clause is meant to resolve factual disputes over the amount of loss. Here, the factual dispute over the amount of loss was the parties' competing estimates which differed by about $85,000. (PPFF, ¶¶ 14-15.) The Higgins' demanded appraisal to resolve a dispute over the "cost and scope of repairs needed to return the property back to its pre-loss condition." (Doc. 18-5, MPA's 10/1/2021 Letter.) There is no evidence the Higgins sought to have an appraisal panel determine the cause of damage to the property or whether such damage was covered by the policy.

The purpose of an appraisal is to resolve the damages question (amount of loss), not the liability question (coverage), without the need for litigation. Suppose State Farm contended some of the Higgins' claimed damages (i.e., to the siding) were the result of some excluded cause of loss unrelated to the fire (i.e., wear and tear). The Higgins might claim $10,000 to replace the siding; whereas State Farm would offer $0 to replace the siding. In the event of an appraisal, the panel might conclude the damage to the siding was more than $0. However, State Farm could still refuse

to pay for that portion of the loss based on its coverage determination. There is nothing in the appraisal clause which prevents State Farm from applying policy limits, exclusions or limitations after the appraisal is complete. In that situation, the Higgins would have the option to sue and have a court determine whether there was coverage for the siding in the amount set by the appraisal panel.

Here, the Court incorrectly assumed that an appraisal award would potentially bind State Farm to pay for damage it does not cover. (See Doc. 36 at 7.) There is no evidence to support the Court's conclusion that the appraisal panel would "impermissibly" consider coverage in this claim. That is, there is no showing that the appraisal was invoked specifically to resolve a coverage dispute or that the Higgins' appraiser (or an unnamed umpire) was provided a copy of the insurance policy and asked to weigh in on whether the cause of damage to any component of the property was covered or excluded. The appraisal clause was invoked to settle a factual dispute over the amount of loss and avoid litigation on this factual dispute.

To the extent a coverage issue existed, State Farm—like any other insured—reserved the right to apply the policy terms (including the limits, exclusions and other limitations) to the appraisal award. The Court erred in attempting to remedy a problem which did not exist in this claim and for which there is no evidence. If an appraisal panel did improperly consider or apply coverages, State Farm's remedy would be to move to set aside the appraisal award. See Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co., 2009 WI 73, ¶ 44, 319 Wis. 2d 52, 73–74, 768 N.W.2d 596, 607. This is a second manifest error of fact which supports reconsideration.

III. The District Court Committed a Manifest Error of Law by Failing to Recognize or Apply Controlling Precedent

This Court's construction of the appraisal clause is inconsistent with the Wisconsin

Administrative Code, the Wisconsin Court of Appeals' decision in St. Croix, and the Seventh Circuit's application of a functionally identical appraisal clause. In particular, the Court held "[u]nder the plain language of the policy at issue in this case, the appraisal process is limited to circumstances where the insurer and insured disagree as to the 'amount of loss,' or the valuation of loss, not the scope or extent of damage and the method of repair." (Doc. 36 at 6.) This conclusion renders the language of Wis. Admin. Code § Ins. 6.76(3)(L) superfluous, ignores the Wisconsin Court of Appeals' St. Croix decision, and is at odds with the Seventh Circuit's interpretation of a similar appraisal clause in Villas at Winding Ridge v. State Farm Fire & Cas. Co., 942 F.3d 824 (7th Cir. 2019) (applying Indiana law). Each of these errors are grounds for reconsideration and reversal of the Court's decision.

A. *The District Court's Holding is Inconsistent with the Administrative Code*

The Court noted "[u]nder the plain language of the policy at issue in this case," the appraisal process was limited to disputes over value or price, not scope or means and methods of repair. (Doc. 36 at 6.) However, State Farm's appraisal clause is not unique or special. It is an administrative construct. In 1977, the Wisconsin Office of the Commissioner of Insurance ("OCI") promulgated Wis. Admin. Code § Ins. 6.76 in part to limit "diversity in language" and *reduce litigation* by encouraging "standardization of certain clauses" in fire insurance policies. The rule, which remains in effect and unchanged as it relates to appraisal clauses, reads:

> (3) AUTHORIZED CLAUSES. The following clauses, or any of them, shall be considered authorized clauses pursuant to s. 631.23, Stats. Appropriate liberalization of the prescribed language shall also be permitted.
>
> ***
>
> (L) Appraisal. In case the insured and this Company shall fail to

> agree *as to the actual cash value or the amount of loss*, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraisal selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him or her and the expenses of the appraisal and umpire shall be paid by the parties equally.

Wis. Admin. Code § Ins. 6.76(3)(L) (emphasis added). The rule states appropriate liberalization is acceptable. Id.

Notably, this standard-form appraisal clause allows two types of disputes to be resolved by appraisal: (1) over the actual cash value; or (2) over the amount of loss. While the rule is silent as to the definitions of those two terms—"actual cash value" and "amount of loss"—the rules of interpretation and construction require that each be afforded a separate and distinct meaning in the context of an appraisal clause. See TRW Inc. v. Andrews, 534 U.S. 19 (2001) (stating it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); State v. Harenda Enterprises, Inc., 2008 WI 16, ¶ 25, 307 Wis. 2d 604, 618, 746 N.W.2d 25, 32 ("Administrative code provisions are interpreted according to principles of statutory construction."); see also Advance Cable Co., LLC v. Cincinnati Ins. Co., 788 F.3d 743, 747 (7th Cir. 2015) (upholding district court's determination that "damage" in the phrase

"accidental loss or damage" meant something different than loss and there was no evidence to suggest it was superfluous).

State Farm's policy defines actual cash value as "*the value of the damaged part of the property at the time of loss, calculated as the estimated cost to repair or replace such property*, less a deduction for pre-loss depreciation." (Doc. 29-7 at 23, emphasis added.) If such definition were inserted in place of "amount of loss" in the appraisal clause, it would read:

> If you and we fail to agree on the [*value of the damaged part of the property at the time of loss, calculated as the estimated cost to repair or replace such property*], either one can demand that the [*value of the damaged part of the property at the time of loss, calculated as the estimated cost to repair or replace such property*] be set by appraisal.

This is essentially how the Court constructed State Farm's appraisal clause in holding that it was "limited to disputes over valuation[.]" (Doc. 36 at 7.) However, the term actual cash value does not appear in State Farm's appraisal clause so the policy cannot be construed this way.

Instead, State Farm's appraisal clause allows parties to submit to appraisal when the parties "fail to agree on the *amount of loss*." (PPFF, ¶ 8, emphasis added.) The only reasonable interpretation of the term "amount of loss" is that it means something broader than "actual cash value" or value or price of an item. Any other interpretation would render the distinction between those two terms in the administrative code superfluous and violate its mandate that insurers adopt the standard form or a more liberalized (less restrictive) version of the standard form. <u>See</u> Wis. Admin. Code § Ins. 6.76(3)(L).

There are other provisions in State Farm's policy which support this conclusion. On page 5, under "**SECTION I – LOSSES INSURED, COVERAGE A – DWELLING**", the policy reads:

> We insured for accidental direct physical <u>*loss*</u> to the property described in Coverage A [...], except as provided in Section I –

> Losses Not Insured.

(Doc. 29-7 at 10, emphasis added.) On page 7, under SECTION I – CONDITIONS, 2. Your Duties After Loss, the policy reads:

> In case of a *loss* to which this insurance may apply, you shall see that the following duties are performed: [...]

(Id. at 12, emphasis added.) These two provisions, both of which apply to claims for damage to a dwelling, make clear that the term "loss" is broad; it means all damage to covered property—whether covered, excluded or limited. It follows that for an appraisal panel to determine the "amount of loss", they must first determine what is damaged (i.e., the scope) and then determine the cost to repair or replace that damage (i.e., the actual cash value).

Here, the Higgins and State Farm disagreed on the manner and cost in which to repair the property back to its pre-loss condition. This dispute is over more than just the "value of the damaged part of property at the time of loss, calculated as the estimate cost to repair or replace such property", or actual cash value. It extends to the manner in which those repairs must be made (i.e., repair versus remove and replace a window). (Compare PPFF, ¶¶ 14 and 15.) These are *factual* disputes which speak only to the amount of loss and have nothing to do with coverage. Any other limited or narrow reading of the appraisal clause is in direct conflict with both the standard appraisal clause in the administrative code and State Farm's definition of actual cash value which must mean something different than amount of loss. It was a manifest error of law for the Court to construe the policy in this way.

B. *The District Court Misapplied Relevant Authority and Failed to Recognize Relevant Authority*

The Court also noted the "Wisconsin Court of Appeals in St. Croix Trading Co./Direct Logistics, LLC. v. Regent Ins. Co., 2016 WI App 49, 370 Wis. 2d 248, 882 N.W.2d 487, recently

held that an appraisal panel can only determines disputes regarding value, not coverage." (Doc. 36 at 5.) It is unclear how this Court arrived at the conclusion that scope of repairs, or means and methods of repairs, relate to the legal question of coverage as opposed to the factual question of amount of loss. However, this restrictive reading of the appraisal clause conflicts with St. Croix's analysis and the Seventh Circuit's interpretation of a functionally identical appraisal clause.

St. Croix stands for the proposition that an appraisal panel cannot resolve questions of coverage. In reaching the conclusion that an appraisal panel must refrain from resolving coverage disputes, the St. Croix court adopted the following principles:

> After reading the appraisal clause in the context of the insurance policy as a whole, *we conclude that the phrase "amount of loss" is not ambiguous, because it is susceptible to only one reasonable interpretation. Specifically, in the insurance context, an appraiser's assessment of the "amount of loss" necessarily includes a determination of the cause of the loss, and the amount it would cost to repair that loss....*

2016 WI App 49, ¶¶ 11-14 (quoting with approval Quade v. Secura Ins., 814 N.W.2d 703 (Minn. 2012)). The St. Croix court further noted its decision based on the above principles was consistent with:

> a long line of other jurisdictions that have also restricted an appraisal panel's authority to consider coverage. See, e.g., Jefferson Ins. Co. of New York v. Superior Court of Alameda Cty., 3 Cal.3d 398, 90 Cal.Rptr. 608, 475 P.2d 880, 883 (1970) (interpreting "actual cash value or the amount of loss" to mean that appraisers could determine amount of damage relating to items submitted for their consideration, but not decide questions of coverage or policy interpretation); Johnson v. State Farm Lloyds, 204 S.W.3d 897, 903 (Tex.App.2006) (stating that "if the parties agree there is coverage but disagree on the extent of the damage, the dispute concerns the 'amount of loss' and that issue is determined in accordance with the appraisal clause"); Kendall Lakes Townhomes Developers, Inc. v. Agricultural Excess & Surplus Lines Ins. Co., 916 So.2d 12, 16 (Fla.App.2005) (permitting "appraisal panel to decide causation issues when causation is not a coverage question, but rather an

> amount-of-loss question"); Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142, 150 (Tenn.App.2001) (interpreting "amount of loss" language to authorize appraiser only to value property loss and not to resolve insurer's liability under policy); Kawa v. Nationwide Mut. Fire Ins. Co., 174 Misc.2d 407, 408, slip op., 664 N.Y.S.2d 430 (N.Y.1997) ("appraisal clause only applies to a case with a disagreement 'as to the amount of loss or damage[,]' and not where the insurer denies liability") (citation and one set of quotation marks omitted).

Id., ¶ 18. Despite this long line of cases, and those cited by the Higgins in their briefs on this issue, the Court did not address or accept St. Croix's principles or apply them to this case. Instead, the Court held that "[a]llowing an appraiser to determine issues of causation and scope of damages would impermissibly result in the appraiser deciding whether certain damage is covered under the policy." (Doc. 36 at 7.)

The Court's position in this regard is at odds with the Seventh Circuit's holding in Villas at Winding Ridge v. State Farm Fire & Cas. Co., 942 F.3d 824 (7th Cir. 2019) (applying Indiana law). There, the insured condominium association sustained hail damage. Villas, 942 F.3d at 828. State Farm investigated the claim and determined only 12 of 32 buildings sustained hail damage and estimated the cost of repairs at $65,713.54. Id. The insured argued that all 32 buildings sustained hail damage and estimated the cost of repairs at $1,975.264.00. Id. The insured demanded appraisal (under a functionally identical appraisal clause to the one at issue here) and State Farm accepted, noting the process was limited to determining the amount of loss, not coverage disputes. Id.

The insured's appraiser estimated $676,824.07 for repairs including full shingle replacement on 13 buildings. Id. at 829. State Farm's appraiser estimated $79,921.80 for spot repairs to all 33 buildings. Id. The dispute was submitted to an umpire who proposed an award of

$154,391.77, including to replace 20 percent of the roofs on 13 buildings, to replace soft metals on all 33 buildings and to complete ancillary work. Id. State Farm's appraiser accepted and signed the award and State Farm issued payment to the insured. Id.

The insured filed suit and, on appeal to the Seventh Circuit, argued, in part, the appraisal provision was ambiguous and therefore unenforceable and that the award was not binding because the appraisal panel improperly determined the scope of the loss rather than just the amount of the loss. Id. at 830. Under a legal framework that is identical to the law in Wisconsin, the Seventh Circuit rejected both arguments, stating:

> We find that the policy's appraisal provision is unambiguous. ***The policy states that, if the parties "disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss." Winding Ridge and State Farm disagreed on the amount of loss***, Winding Ridge demanded an appraisal, and State Farm accepted the demand. As required, both Winding Ridge and State Farm selected appraisers. ***The parties' appraisers disputed how much hail damage Winding Ridge had sustained. Specifically, Winding Ridge claimed shingle replacements were needed for 13 buildings.*** Following the appraisal provision, the appraisers selected an independent umpire and presented their estimates to him. Kalemba resolved the dispute by awarding (1) 20% repair allowance for roofing shingles on 13 buildings, (2) replacement costs for soft metal damage on 33 buildings, and (3) replacement costs for roofing shingles around new turtle roof vents on 33 buildings. Both Kalemba and Scott signed the award, and the award became binding.
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> In an attempt to set aside the award, ***Winding Ridge argues that the award is not binding because Kalemba mistakenly determined the scope of the loss. We disagree. First, Kalemba resolved the dispute that the parties presented to him: namely, the amount of hail damage to the roofing shingles on 13 buildings and to the soft metal on 33 buildings.*** Winding Ridge has not identified any exceptional circumstances such as unfairness, manifest injustice, fraud, collusion, or misfeasance that would warrant setting this award aside. See FDL, Inc., 135 F.3d at 505. ***Second, the mere presence of coverage disputes (like matching shingles) in addition***

> ***to an amount of loss disputes does not negate an appraisal award.*** See Philadelphia Indem. Ins. Co., 44 F. Supp. 3d at 818 ***("To hold otherwise would be to say that an appraisal is never in order unless there is only one conceivable cause of damage—for example, to insist that 'appraisals can never assess hail damage unless a roof is brand new.'"*** (citation omitted)). Here Kalemba determined the value of the loss based on the disputed loss submitted by the parties' appraisers and as required under the policy; he did not decide the coverage issues.
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> [...]
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> Further, the appraisal award plainly resolved the entire claim, not just the damage to 13 buildings as Winding Ridge contends. The parties submitted the disputed loss to the umpire, and that disputed loss did not include the replacement of the shingles on all buildings. The umpire resolved the parties' dispute. Specifically, the binding award has three parts. The first and big-ticket item was whether the hail damaged some or all the shingles on 13 buildings. The umpire testified that State Farm's and Winding Ridge's appraisers agreed that there was no shingle damage on the other 20 buildings. Neither Scott's estimate nor Kurtt's estimate included full shingle replacement on 13 buildings. The umpire determined that there was minor hail damage to the roofing shingles on 13 buildings and awarded 20% allowance to repair those shingles. Second, the award also included replacement costs for soft metal damage on all 33 buildings. Specifically, it provided $54,846.61 actual cash value for "roofing metals and elevation repairs" and noted that "the above line item reflects the York Appraisal estimated damage," which itemized soft metal damage to the entire property. Lastly, the award covered the cost of replacement shingles around the new turtle roof vents on all 33 buildings.

Id. at 830–32 (emphasis added).

Like the St. Croix and Villas insureds, the Higgins sought to have their dispute over the amount of loss resolved through appraisal rather than litigation. The St. Croix court recognized the principles that an appraisal panel must be able to determine the scope of damage and the proper means and methods of repair to arrive at the amount of loss. 2016 WI App 49, ¶¶ 11-14. The Seventh Circuit has applied these same principles under Indiana's identical legal framework.

Villas, 942 F.3d at 830-31. Here, the Court failed to apply these principles and narrowed the appraisal clause to situations where, for example, the parties agree on the precise number of shingles damaged by hail but disagree as to the price to replace them (i.e., the actual cash value). This decision has no basis in the plain policy language (discussed above) or applicable precedent. The Court committed a manifest error of law by misapplying the principles discussed in St. Croix and reaching a decision at odds with the Seventh Circuit.

IV. Alternatively, the Higgins Request the Court Enter Final Judgment on the Declaratory Judgment Claim

In the event this Court disagrees it has committed any manifest error of fact or law and is inclined to deny this motion and maintain its Order, the Higgins request the Court direct the entry of judgment on their declaratory judgment claim and recognize "there is no just reason for delay" under Fed. R. Civ. P. 54(b) so they may seek permission to appeal this issue. Under the current ruling, the Higgins' right to appraisal has been denied and they will now incur the time and expense to have a jury resolve the "amount of loss" question at trial. Under the current order, the Higgins' right to appeal the Order will be triggered only after the jury has returned a verdict and judgment is final. By then, it would be of limited value to have the Seventh Circuit weigh in on the appraisal issue because the amount of loss question will have been answered by the jury. As a result, there is no just reason for delay and the Higgins should be permitted to pursue appellate relief at this stage of the litigation, if necessary.

CONCLUSION

For the above reasons, the Higgins respectfully request this Court's Order denying their right to appraisal or, in the alternative, request the Court amend its Order and enter judgment on their Declaratory Judgment Claim under Fed. R. Civ. P. 54(b) and indicate there is no just reason

for delay so that they may seek appellate relief. The Higgins' right to appeal after trial carries little value on this issue because, by then, a jury will have determined the amount of loss and there will be little need or room for an appraisal panel to repeat the process.

Dated this 19th day of July, 2022.

By: /s/ Joshua M. Greatsinger

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