IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BUILDERS MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

Case Nos. 24-5152/24-5179
(Consolidated)

GCC CONSTRUCTION, LLC and TAHINI MAIN STREET, LLC,

Defendants-Appellants.

Appeal from the
U.S. District Court for the
Eastern District of Tennessee
Case No. 1:22-cv-002008

BRIEF OF APPELLEE BUILDERS MUTUAL INSURANCE COMPANY

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Builders Mutual Insurance Company makes the following disclosure:

1. Is any party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest?

ALLIANZ, Reinsurance

HANOVER RUCK SE, Reinsurance

RENAISSANCE RE, Reinsurance

UNITED FIRE GROUP, Reinsurance

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is unnecessary in this case. The issues before this Honorable Court are substantively set forth in the Parties' briefs. Oral argument will not assist this Honorable Court in its decisional process.

STATEMENT OF ISSUES

I. WHETHER THE DISTRICT COURT WAS CORRECT HOLDING THAT THE LOSS AS SUBMITTED BY GCC AND TAHINI FOR SUBSTANIAL IMPAIRMENT TO THE WEST WALL AND/OR THE BUILDING WAS NOT COVERED UNDER THE POLICY BECAUSE THERE WAS NO "DIRECT PHYSICAL LOSS" AS A RESULT OF "COLLAPSE."

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B. Whether The District Court, As Fact Finder, Was Clearly Erroneous In Determining That The "Collapse" Of A Limited Number Of Bricks On November 15, 2021, Did Not Cause "Direct Physical Loss" Or Substantial Impairment To The West Wall And/Or The Building?

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V. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING, IN PART, THE DAUBERT MOTIONS FILED BY TAHINI AND GCC?

STATEMENT OF THE CASE

Builders Mutual Insurance Company (BMIC) filed this declaratory judgment action to determine its rights and obligations under a Builder's Risk policy issued to GCC Construction, LLC ("GCC"), and Tahini Main Street, LLC ("Tahini"). (*Declaratory Judgment Complaint*, RE 1, Page ID ## 8-9). The insurance policy was issued to insure the risk of certain losses during renovation of a 100-year old brick building owned by Tahini (the "Building"). (*Policy*, RE 1-4, Page ID ## 16-59; *Ex. 2*, RE 142-2, Page ID ## 2149-2462; RE 145-2, Page ID 3162-3206; *Ex. List*, RE 177, Page ID # 3870)[1].

A. The Policy.

The Policy states, in pertinent part: *"*We will pay for direct physical 'loss' to Covered Property from any Covered Cause of Loss described in the Coverage Form.*"* (*Policy*, *Ex. 2*, RE 142-2, Page ID # 2425; *Ex. List*, RE 177, Page ID 3870). The definition of Covered Property is amended by Endorsement BRC 0017 0113 EXISTING BUILDING(S) OR STRUCTURE(S) COVERAGE:

1. The following is added to COVERED PROPERTY:

   (6). The existing building or structure.

[1] Citation to the Policy will be to the copy of the policy identified by GCC and Tahini as Exhibit 2, RE 142-2.

2. Additional Condition 6. VALUATION is deleted and replaced by the following:

   The most we will pay for any "loss" to the existing building(s) or structure(s) will be the least of:

   a. The Limit of Insurance which applies to the existing building(s) or structure(s); or

   b. The amount you actually spend to repair the damage or destroyed property with property of comparable type or quality; or

   c. Actual cash value of the existing building or structure at the time of "loss"; or

   d. The amount you paid for the existing building(s) or structure(s) plus the actual cash value of the improvements made by or for you after you purchased the building(s) or structure(s) up to the time of "loss."

(*Policy, Ex. 2,* RE 142-2, Page ID # 2439; *Ex. List*, RE 177, Page ID 3870).

Covered Cause of Loss is defined, in pertinent part:

a. Risks of DIRECT PHYSICAL "LOSS," other than Collapse, to Covered Property except those causes of "loss" listed in the Exclusions.

b. Collapse

(1) We will pay for direct physical loss or damage to Covered Property, caused by collapse of all or part of a building or structure caused by one or more of the following:

* * * * *

(b) Decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

* * * * *

(2) With respect to a covered building or structure:

(a) Collapse means an abrupt falling down or caving in of a covered building or structure in whole or in part;

(b) A covered building or structure or any part thereof that is in danger of falling down or caving in is not considered to be in a state of collapse;

(c) A part of a covered building or structure that is not standing is not considered to be in a state of collapse even if it has separated from another part of the building or structure[2];

(d) A covered building or structure that is standing or any part of a covered building or structure that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

(*Policy, Ex. 2*, RE 142-2, Page ID # 2426; *Ex. List*, RE 177, Page ID 3870).

Risks of direct physical loss, other than Collapse, are subject to the exclusions set forth under Part B Exclusions as amended by BRC0041 0113, which provides, in pertinent part:

2. We will not pay for a "loss" caused by or resulting from any of the following:

a. Delay, loss of use, loss of market. This does not include profit if the policy has been endorsed for this coverage;

* * * * *

i. Wear and tear, gradual deterioration, inherent vice, hidden or latent defect, or any quality in property that causes it to damage or destroy itself, rust, corrosion….

(*Policy*, *Ex. 2,* RE 142-2, Page ID # 2440; *Ex. List*, RE 177, Page ID 3870).

[2] With regard to the west wall and Building, this sub-paragraph is inapplicable because it only addresses "a part of a building or structure that is not standing." The west wall and Building were standing at all relevant times.

Under Part F Definitions, the Policy defines the following relevant terms:

1. "**Loss**" means accidental "loss" and accidental damage.

* * * * *

4. "**Profit**" means the difference between the value of the completed structure (selling price of the dwelling, including labor, the cost of materials and overhead but excluding the cost of the land) and your financial interest in the completed structure.

(Policy, Ex. 2, RE 142-2, Page ID # 2436; *Ex. List,* RE 177, Page ID 3870).

The Policy was not endorsed for profit. (*Trial Trans.,* RE 185, Page ID ## 5332-5335; *Trial Trans.*, RE 186, Page ID ## 5525-5527; *Policy App.*, *Ex. 154*; *Ex. List*, RE 177, Page ID # 3871).

B. <u>The Claim</u>.

On November 15, 2021, as part of the renovations of the Building, the general contractor, GCC, cut a hole in the west wall of the Building to install a window. (*Trial Trans.*, RE 184, Page ID ## 5199-5200). After pushing out the cut portion of the wall for the window opening, some bricks fell from above and around the window opening. (*Trial Trans.*, RE 184, Page ID ## 5205-5206). On November 18, 2021, BMIC received a claim from Tahini that there had been a collapse. (*Trial Trans.*, RE 184, Page ID ## 5053, 5068).

BMIC hired an independent adjuster, Bankston, to investigate the claim. (*Trial Trans.*, RE 184, Page ID # 5061; RE 186, Page ID # 5492). Prior to any inspection by Bankston, the project manager for GCC told Bankston the west wall had not

collapsed. (*Trial Trans.*, RE 186, Page ID #5493). On November 19, 2021, Bankston conducted an inspection. (*Trial Trans.*, RE 186, Page ID ## 5492-5493). At the inspection, the project manager showed Bankston the west wall where the hole had been cut for the window, stated there was no collapse, and informed Bankston that GCC was concerned the west wall was unstable. (*Trial Trans.*, RE 186, Page ID # 5495). The project manager did not show Bankston any pile of bricks, nor does Bankston recall seeing any pile of bricks. (*Trial Trans.*, RE 186, Page ID ## 5495, 5499).

On November 23, 2021, Tahini submitted to BMIC an engineering memo from Cartwright, the project's structural engineer, that stated:

> It is my professional opinion that due to the severe unforeseen deterioration only recently uncovered inside the existing west brick wall that it is not structurally viable to carry the loads of the new renovation. It is my recommendation that a new structural wall be installed and that the old brick wall be demolished.

Trial Trans., RE 184, Page ID ## 5114-5115; *Engineering Report, Ex. 6,* RE 145-5, Page ID # 3217). Cartwright's engineering memo did not mention collapse. (*Trial Trans.*, RE 186, Page ID # 5274). Cartwright did not include collapse because he did not think the building had a structural collapse, i.e. "the failure of the structural elements either in part or in whole." (*Trial Trans.*, RE 186, Page ID ## 5472-5473). Further, Cartwright testified that after his inspection he did not notice any compromise of the wall of the Building in any other way than the few bricks that fell

from around the new window opening. (*Trial Trans.*, RE 186, Page ID ## 5472-5473).

BMIC's claim adjuster reviewed the information from the independent inspector and the engineering report from structural engineer Cartwright. Considering Tahini's insistence for a quick decision, and having both the information from the independent adjuster and the engineering report, on December 7, 2021, BMIC denied the claim on the basis that there was no collapse because the west wall was still standing. (*Trial Trans.*, RE 184, Page ID 5123; *Ex. 10*, RE 145-7, Page ID 3229).

Despite the engineers having provided options to repair the west wall, Tahini and/or GCC took down the west wall. (*Trial Trans.*, RE 185, Page ID ## 5284-5289; *Emails, Ex. 80*, RE 145-26, Page ID # 3400; *Design Sketch, Ex. 41*, RE 145-13, Page ID ## 3266-3267; *Ex. List*, RE 177, Page ID # 3871). On January 20, 2022, Tahini terminated the project. (*Trial Trans.*, RE 183, Page ID ## 5023-5024). Tahini did not engage in any repairs to the Building in any way. (*Trial Trans.*, RE 183, Page ID ## 5024).

Approximately six months later, on June 13, 2022, Tahini mailed BMIC a demand for payment for the cost to remove and replace the entire west wall and to pay for lost rental income from the Building. Otherwise, Tahini intended to pursue the bad faith penalty. (*Bad Faith Demand*, RE 145-8, Page ID # 3230). This demand

also contained a supplemental engineering report from Cartwright.[3] (*Bad Faith Demand*, RE 145-8, Page ID ## 3232-3241). BMIC filed this action to determine whether the loss as submitted by GCC and Tahini constituted a "direct physical loss" resulting from "collapse" as defined in the Policy. (*DJ Complaint*, RE 1, Page ID ## 1-9).

All parties filed motions for summary judgment. (*BMIC Motion*, RE 88; *GCC and Tahini Joint Motion*, RE 94). The District Court declared there was coverage under the BMIC policy with respect to replacement of the bricks that fell from the west wall. (*Memorandum Opinion*, RE 132, Page ID # 1699).The District Court further declared that there is not coverage under the Policy for removal and replacement of the portion of the west wall that remained standing after the bricks fell. (*Memorandum Opinion*, RE 132, Page ID # 1699). On the claim of bad faith, the District Court granted summary judgment to BMIC in part, but denied summary judgment in part. (*Memorandum Opinion*, RE 132, Page ID # 1697). With respect to evidentiary matters, the Court allowed all expert and other testimony in the record

[3] Cartwright testified he was asked to specifically modify his previously provided engineering report so that his report would include specific language to match how an insurance policy defines as collapse, not how an engineer defines collapse. (*Trial Trans.*, RE 186, Page ID ## 5476-4578). Cartwright initially refused, but later agreed to the modification and essentially included the identical language requested. (*Trial Trans.*, RE 186, Page ID ## 5479-5482).

subject to certain limitations. (*Memorandum Opinion*, RE 132, Page ID ## 1667-1679).

GCC and Tahini thereafter filed a motion to revise the November 30, 2023, memorandum opinion, which the District Court granted in part and denied in part. (*Revised Memorandum Opinion*, RE 156). The District Court granted this motion and revised its opinion to allow GCC and Tahini to present evidence at trial to determine if the "collapse" of the few bricks caused the west wall and the entire Building to be structurally unsound. Further, trial would consider evidence regarding damages from the "collapse" of the bricks. (*Revised Memorandum Opinion*, RE 156, Page ID # 3732).

This case was tried before the District Court as the trier of fact. (*GCC and Tahini's Motion to Strike Jury Demand*, RE 125; *BMIC Consent to Strike Jury Demand*, RE 138). "At trial, Tahini requested compensation for the following losses under the policy: (1) removal and replacement of the west wall; (2) the cost of rebuilding the entire building, or, in the alternative, the cash value of the building; (3) the purchase price plus the cost of improvements to the building; and (4) lost rental profit. GCC sought damages for debris removal and lost profit under the policy."[4] (Trial Opinion, RE 181, Page ID #4972).

[4] GCC has not appealed the District Court's ruling regarding debris removal. (*Brief of Appellant GCC Construction, LLC*, Case No. 24-5179, Doc. 25, Page 10).

At the conclusion of the trial, the District Court, sitting as fact finder, made a number of factual findings that essentially concluded that the evidence "convincingly established that the relatively minor collapse from above the window cut had no significant effect on the remainder of the wall or the building." (*Trial Opinion*, RE 181, Page ID # 4962). Consistent with the District Court's factual finding, the Court did not award damages for replacing the entire west wall, replacing the Building, the actual cash value of the Building, or the purchase price of the Building plus cost of improvements. (*Trial Opinion*, RE 181, Page ID ## 4973-4975). Further, the District Court did not award lost rental profit because lost profit is economic harm not "direct physical loss" as required by the terms of the Policy.[5] (*Trial Opinion*, RE 181, Page ID # 4975).

Although the District Court had previously declared in its Memorandum Opinion that "there is coverage under the policy with respect to replacement of the bricks that fell from the exterior west wall on November 15, 2021," Tahini did not put on any proof of damages at trial regarding any such cost, therefore the District Court awarded no damages. (*Trial Opinion*, RE 181, Page ID 4972). With similar reasoning, when ruling on GCC and Tahini's breach of contract claim, the District Court stated that BMIC could only have breached a contract with regard to the

[5] The testimony and evidence at trial established that the policy was not endorsed for profit. (*Trial Trans.,* RE 185, Page ID ## 5332-5335; *Trial Trans.* RE 186, Page ID ## 5250-5527; *Policy Application*, Ex. 154; *Ex. List*, RE 177, Page ID # 3871).

portion of the claim related to the fallen bricks; however, because there was no proof of damages in this regard there was likewise no recoverable damages for breach of contract. (*Trial Opinion*, RE 181, Page ID # 4976).

After hearing testimony and considering the evidence, the District Court made a factual finding that there was no bad faith. (*Trial Opinion*, RE 181, Page ID ## 4977 – 4979).

SUMMARY OF ARGUMENT

The judgment of the District Court is due to be affirmed because that court committed no reversible error. The District Court applied the terms and definitions of the Policy to the facts presented, holding that because the west wall was still standing, it had not suffered "collapse" as defined by the Policy, but the portion of bricks that fell was "collapse." The fact question presented at trial was what "direct physical loss" was caused by the bricks that fell.

After hearing testimony from witnesses and experts, the District Court, sitting as fact finder, was not clearly erroneous in finding that the bricks that fell did not cause any damage to the west wall that was standing. Additionally, the District Court was not clearly erroneous in finding that because there was no evidence of any cost to repair the portion of bricks that fell, there could be no recovery because there was no proof of damages.

The District Court, as fact finder, was not clearly erroneous when it found there was no bad faith on the part of BMIC because it investigated the claim with ordinary care and diligence. BMIC sent an independent adjuster to investigate the claim, considered the information provided by that independent adjuster, and accepted Tahini's engineer's report. GCC and Tahini's own expert testified there is nothing wrong with an insurance company relying on an engineering report provided by its insured.

The District Court did not abuse its discretion in partially denying GCC and Tahini's Daubert motions. BMIC's experts both had experience and/or training sufficient to be qualified as experts for the topics for which the District Court qualified them.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE LOSS AS SUBMITTED BY GCC AND TAHINI FOR SUBSTANTIAL IMPAIRMENT WAS NOT COVERED UNDER THE POLICY BECAUSE THERE WAS NO "DIRECT PHYSICAL LOSS" AS A RESULT OF "COLLAPSE".

A. The Policy's Definition Of "Collapse" Is Not Ambiguous With Respect To The Loss Submitted By GCC And Tahini For Substantial Impairment.

The Policy's definition of "collapse" is unambiguous with respect to the loss as submitted by GCC and Tahini for substantial impairment to the west wall and/or the Building which remained standing. Under Tennessee law, issues pertaining to

insurance coverage and obligations "present issues of law involving the interpretation of contractual language." *So. Trust Ins. Co. v. Phillips*, 474 S.W.3d 660, 664 (Tenn. Ct. App. 2015). At their core, "[i]nsurance policies are …contracts" which should be interpreted "using the same tenets that guide the construction of any other contract." *So. Trust*, 474 S.W.3d at 664 (citing *Allstate Ins. Co. v. Tarrant*, 363 S.W.3d 508, 527 (Tenn.2012) and *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W. 3d 811, 814 (Tenn. 2000)). As with all contracts, the primary rule of interpreting an insurance policy is "to ascertain and give effect to the intent of the parties." *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012). In the absence of fraud or mistake, an insurance contract should be interpreted as written and its terms should "construed as a whole in a reasonable and logical manner." *Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998); *Aetna Cas. & Sur. Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978). The terms of the insurance contract should be "construed according to their plain, ordinary, and popular sense . . . ." *Purdy v. Tennessee Farmers Mut. Ins. Co.*, 586 S.W.2d 128, 130 (Tenn. Ct. App. 1979)(citing *Lewellyn v. State Farm Mutual Auto. Ins. Co*., 222 Tenn. 542, 438 S.W.2d 741 (1969) and S*windler v. St. Paul Fire & Marine Ins. Co.*, 223 Tenn. 304, 444 S.W.2d 147 (1969).

A claimant under an insurance policy has the initial burden of proving that his or her claim comes within the terms of the policy. *Blaine Const. Corp. v. Ins. Co.*

of N. Am., 171 F.3d 343, 349 (6th Cir. 1999) (citing *Farmers Bank & Trust Co. of Winchester v. Transamerica Ins. Co.*, 674 F.2d 548, 550 (6th Cir.), cert. denied, 459 U.S. 943 (1982) (applying Tennessee law)). Although "contracts of insurance are strictly construed in favor of the insured, courts are not allowed to "create an ambiguity where none exists." *Purdy*, 586 S.W.2d at 130 (citing *Brown v. Tenn. Auto Ins. Co.*, 192 Tenn. 60, 237 S.W.2d 553 (1951) and *American Employers Ins. Co. v. Knox-Tenn Equipment Co. et al*, 52 Tenn. App. 643, 377 S.W.2d 573 (1963)). Furthermore, courts need only construe provisions of a contract that are at issue. See *Va. Ins. Reciprocal v. Wagner, Myers & Sagner*, 1998 WL 79011, at *2 (Tenn. Ct. App.) (construing "policy provision at issue"); *Reed v. Tenn. Farmers Mut. Ins. Co*., 2006 WL 842908, at *2 (Tenn. Ct. App.) ("The policy provision at issue is not ambiguous."). Mixed questions of law and fact are reviewed *de novo. Thoroughbred Software Int'l, Inc. v. Dice*, 488 F.3d 352, 358 (6th Cir. 2007).

The primary issue in this case is the Policy's definition of "collapse." The policy states:

> (2) With respect to a covered building or structure:
>
> * * * * *
>
> b. A covered building or structure or any part thereof that is in danger of falling down or caving in is not considered to be in a state of collapse;
>
> * * * * *

> d. A covered building or structure that is standing or any part of a covered building or structure that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

(*Policy, Ex. 2*, RE 142-2, Page ID # 2426; *Ex. List*, RE 177, Page ID # 3870; *BMIC Denial Letter*, Ex. 11, RE 145-7, Page ID # 3229; *Ex. List*, RE 177, Page ID # 3870).

There are few Tennessee cases addressing insurance coverage for collapse. In one of the first cases to address "collapse," the Tennessee Court of Appeals held that collapse meant a "complete falling down." *Owens v. Tennessee Farmers Mut. Ins. Co.*, 1989 WL 61239 (Tenn. Ct. App.). In *Owens*, the homeowners filed a claim for damages, alleging that the cracks and bulges in the living room ceiling constituted a collapse. *Owens*, 1989 WL 61239, at *1. The policy provided coverage for collapse with the limitation that "collapse does not include settling, cracking, shrinkage, bulging or expansion." *Owens*, 1989 WL 61239, at *1. The term "collapse," however, was not defined in the policy.

Although the ceiling had not fallen to the floor, the homeowners contended its separation from the roof truss system was a collapse and that the cracking and bulging simply resulted from the ceilings collapse. *Owens*, 1989 WL 61239, at *1. The insurer argued that the policy was unambiguous and that the term "collapse" must be construed in its plain meaning, which required a total destruction or caving in. *Owens*, 1989 WL 61239, at *1. Based upon the plain and ordinary meaning of

the term collapse, the court held the homeowners' ceiling had not collapsed. *Owens*, 1989 WL 61239, at *2.

Almost a decade after *Owens*, the Tennessee Court of Appeals once again addressed the issue of "collapse" in *Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237 (Tenn. Ct. App. 1998). In *Rankin*, heavy machinery was parked next to a building causing the front basement wall to rotate inward, which in turn caused the same wall to twist outward in the upper floor. *Rankin,* 986 S.W.2d at 237. The policy did not define the term "collapse." The court conducted a jurisdictional survey of how other states interpreted the term "collapse" when that term is not defined in an insurance policy. *Rankin*, 986 S.W. 2d at 238. The Tennessee Court of Appeals followed the majority view and held that substantial impairment of a structure constituted a collapse. *Rankin*, 986 S.W.2d at 238-239. Citing an opinion by the U.S. District Court of Utah, the Tennessee Court of appeals summarized reasoning for the majority view, stating, in part, that "if the insurer had intended to define collapse as meaning reduced to a flattened form or rubble, it could have done so in the contract." *Rankin*, 986 S.W.2d at 239 (citing *American Concept Inc. v. Jones*, 935 F. Supp. 1220 (D. Utah 1996)).

Presumably in response to the majority of court decisions addressing the undefined term "collapse," such as the Tennessee Court of Appeals decision in *Rankin*, the "Insurance Services Organization (ISO), a supplier of statistical,

actuarial and underwriting information", proposed changes to the language of collapse coverage to reflect an intended meaning of the term "collapse." *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 444 n. 44 (Del. Super. 2002). These proposed changes included, in part, the following: "Collapse means an abrupt falling down or caving in of a building or part of a building . . . a building that is in danger of falling down is not considered to be in a state of collapse . . . . [and] a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage, or expansion." *Weiner*, 793 A.2d 434, 444 n. 44 (Del. Super. 2002).

In 2009, the United States District Court for the Middle District of Tennessee, applying Tennessee law, addressed the term "collapse" in a policy which specifically defined the term. *Huntingdon Ridge Townhouse Homeowners Assoc. Inc. v. QBE Ins. Corp.*, 2009 WL 4060458 (M.D. Tenn.). In *Huntindgon Ridge*, the policy at issue in that case was similar to the Policy issued to GCC and Tahini in this case because it specifically defined the term "collapse." *Huntingdon Ridge*, 2009 WL 4060458, at * 2. The policy in *Huntingdon Ridge* also listed specific conditions which did not constitute collapse; these conditions are similar to those stated in the

Policy in this case.[6] (*Policy, Ex. 2*, RE 142-2, Page ID # 2426; *Ex. List*, RE 177, Page ID # 3870).

In *Huntingdon Ridge*, the plaintiff homeowners association claimed that the floor trusses in the units, which were defective and had been improperly installed, were progressively failing and, if left unrepaired, would eventually cause the buildings to collapse. *Huntington Ridge*, 2009 WL 4060458, at *1. Although no collapse had taken place, there was evidence in the units of wall deflection and sagging floors. *Huntingdon Ridge*, 2009 WL 4060458, at *1. As in this case, the plaintiff argued that there was substantial impairment to the buildings, thus qualifying as a collapse under the *Rankin* decision. Although not the determinative factor for the court's decision in *Huntingdon Ridge* that the policy provided no coverage, the court stated: "[a]s an initial matter, the property damage here does not fall under the definition of "collapse" listed in the policy, which requires an "abrupt falling down . . . ." *Huntingdon Ridge*, 2009 WL 4060458, at *5.

The fundamental issue presented to this Honorable Court is whether the term "collapse" should be interpreted based on the actual language of the Policy, or

[6] The policy in *Huntingdon Ridge* defined "collapse" to mean an "abrupt falling down, caving in or flattening of a building…with the result that the building…cannot be occupied for its intended purpose," and separately, "a building, structure or any part of either that is in danger of falling down or caving in is not considered to be in a state of collapse . . . ." *Huntingdon Ridge*, 2009 WL 4060458, at *2.

whether the actual language of the Policy should be disregarded so that term "collapse" is construed as if there was no definition of the term "collapse" in the Policy, as it was in *Rankin*. GCC and Tahini desperately want this Honorable Court to write into the Policy the *Rankin* decision in which the term "collapse" was undefined.[7] BMIC submits the *Rankin* decision is not controlling with regard to the west wall and/or Building which remained standing because the Policy specifically and clearly defines "collapse." BMIC followed the suggestion by the court in *Rankin* and defined "collapse." The District Court correctly held the Policy was not ambiguous with respect to "collapse" as applied to the west wall and the Building,

[7] The District Court held that sub-paragraph A.3.b.(2)(c) of the Policy was ambiguous as applied to the bricks that fell because that sub-paragraph is susceptible to two or more reasonable interpretations. *American Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 815 (Tenn. 2000). Sub-paragraph (c) states: "a part of a covered building or structure that is not standing is not considered to be in a state of collapse even if it has separated from another part of the building or structure." With regard to the bricks that fell, the District Court reasoned *Rankin* could potentially have application because the bricks that fell were substantially impaired, but even if *Rankin* was not followed, the bricks that fell actually did fall which would also trigger coverage if "collapse" was defined to mean actually falling, as it was in *Owens*. Accordingly, regardless of whether *Rankin* applied or not, there would be coverage available for those bricks that actually fell. (*Memorandum Opinon*, RE 156, Page ID # 3718-3719). With regard to the west wall and Building which were still standing, however, the District Court held sub-paragraph (c) was not ambiguous and had no application because that sub-paragraph only addressed "a part . . . that is not standing." The west wall and Building were standing. The District Court need only construe "relevant" provisions, thus the District Court applied the other relevant terms of the Policy to conclude that the Policy definition of "collapse" does not mean "substantial impairment" to the west wall and Building.

both of which remained standing. Accordingly, the District Court is due to be affirmed in this regard.

B. The District Court, Sitting As The Fact Finder, Was Not Clearly Erroneous In Determining That The "Collapse" Of A Limited Number of Bricks Did Not Cause "Direct Physical Loss" Or Substantial Impairment To The West Wall And/Or The Building.

Whether the bricks that fell caused "substantial impairment" to the west wall and/or building was a fact issue for the fact finder. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Rule 52(a)(6), Fed. R. Civ. P.

There is no dispute that the west wall and the Building remained standing until demolished by Tahini. GCC and Tahini, nevertheless, argue that the partial collapse of a few bricks on November 15, 2021, rendered the west wall and the entire Building structurally unsound, thus constituting a "direct physical loss." The District Court, sitting as the finder of fact, determined that the bricks that fell on November 15, 2021, did not cause any "direct physical loss," to the west wall or Building. The District Court held "the evidence is overwhelming that the collapse had no such impact. In fact, its impact was negligible, affecting on a small portion of the west wall." (*Trial Opinion*, RE 181, Page ID # 4973).

The testimony and evidence at trial support the District Court's factual finding. Engineer Cartwright did not include collapse in his engineering

memorandum because he did not think the building had a structural collapse, i.e. "the failure of the structural elements either in part or in whole." (*Trial Trans.*, RE 186, Page ID ## 5472-5473). Further, Cartwright testified that after his inspection he did not notice any compromise of the wall of the Building in any other way than the few bricks that fell from around the new window opening. (*Trial Trans.*, RE 186, Page ID ## 5472-5473). Project manager McBee testified other than the absence of the bricks that fell from above the header of the window cut and the separation of mortar in that area, he did not notice any difference in the west wall after the bricks had fallen out. (*Trial Trans.*, RE 184, Page ID # 5209).

Forensic engineer Richardson testified he reviewed "numerous photographs, several videos . . . portions of the Estes-Russell [engineering memo] . . . Google Earth street imagery as far as looking at historical images of the – of the building, at least from the Google Earth street-view cameras." (*Trial Trans.*, RE 186, Page ID # 5543). Based upon his review of these items, Richardson testified the "integrity of the wall had not been affected by the removal of the masonry within that cut, by the cuts that were made where the masonry hadn't been removed yet, or by any of the brick portions that had fallen out of the area where the masonry had been removed." (*Trial Trans.*, RE 186, Page ID # 5560). Richardson concluded that "[t]he wall itself as a whole, other than the portions that were removed for the opening and the portions that were displaced right above the header there, is still functioning as it

was intended . . . the wall itself is still in plane and serving the function it served prior to the window cuts . . . it hasn't affected the structural integrity of the wall." (*Trial Trans.*, RE 186, Page ID 5568).

The Policy does not specifically define "direct physical loss." BMIC nor the District Court could identify any Tennessee cases that define the term "direct physical loss" in a similar insurance policy. However, the District Court correctly observed that the Sixth Circuit, interpreting Michigan law, held that "direct physical loss" only includes "tangible, physical losses, [not] economic losses." (*Trial Opinion*, RE 181, Page ID # 4974). See *Universal Image Productions, Inc. v. Federal Insurance Company*, 475 F. App'x. 569, 573-74 (6th Cir. 2012)(quoting 10 *Couch on Ins.* § 148:46 (3d ed. West 1998)). The District Court further reasoned "the Sixth Circuit cited approvingly a case stating that 'a direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." (*Trial Opinion*, RE 181, Page ID # 4974); See *Universal Image*, 475 F. App'x at 573 (quoting *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co*., 115 Cal. Rptr. 3d 27, 37-38 (Cal. Ct. App. 2010)).

GCC and Tahini presented no evidence that the west wall or the Building changed from a satisfactory state to an unsatisfactory state when the small number

of bricks fell on November 15, 2021. Rather, the evidence showed that neither the west wall nor the Building suffered any differential or lateral movement, or cracking or bulging, after the window opening was cut. Cartwright testified that upon his inspection after the November 15, 2021, event, that some bricks and potentially some mortar in the middle wythe above the window opening had fallen. (*Trial Tran.,* RE 186, Page ID # 5482). Cartwright did not observe any compromise of the wall in any other way. (*Trial Trans.*, RE 186, Page ID # 5852). Engineer Richardson testified he saw no differential movement in the wall based on his review. (*Trial Trans.*, RE 186, Page ID ## 5557, 5566, 5568). Additionally, the evidence at trial established that, to the extent there was any deterioration or compromise of the west wall and the Building, this condition existed before construction began. Both of Cartwright's engineering reports concluded that there was "unforeseen deterioration only recently discovered." (*Trial Trans.*, RE 184, Page ID ## 5114-5115, *Engineering Report, Ex. 6*, RE 145-5, Page ID # 3217). Cartwright thought the "deterioration" which affected the viability of the planned renovation, had existed for some time. The "collapse" of November 15, 2021, merely revealed the existing condition of the Building.

Expert engineer Butterfield testified regarding some of the existing conditions he observed during his inspection of the Building after Tahini had ordered the west wall taken down. Specifically, Butterfield observed "a significant amount of rot"

throughout the building, "a significant amount of deterioration in the mortar joints", and deterioration of the central wythe that he opined was "likely caused by exposure to water over time." (*Trial* Trans., RE 185, Page ID ## 5402-5403). The few bricks that fell did not affect the structural status of the Building. In fact, Cartwright specifically testified he did not consider what happened on November 15, 2021, to be a structural collapse in whole or in part. (*Trial Trans.,* RE 186, Page ID 5472-5473). Cartwright testified the Building was not in danger of imminent collapse, but cutting more holes for windows could create more problems. (*Trial Trans*., RE 186, Page ID ## 5475-5476).

Considering the foregoing, the factual finding of the District Court that the bricks that fell did not cause the west wall or Building to be substantially impaired is not clearly erroneous, but rather is supported by testimony and evidence. The ruling of the District Court is due to be affirmed.

II. PUBLIC POLICY CONSIDERATIONS ARE NOT PROPERLY BEFORE THIS HONORABLE COURT, AND EVEN IF SUCH CONSIDERATIONS WERE PROPERLY BEFORE THIS HONORABLE COURT, THOSE CONSIDERATIONS WEIGH IN FAVOR OF ENFORCING THE POLICY AS WRITTEN.

GCC and Tahini have waived any arguments based on public policy. No party asserted issues of public policy in the District Court. "The clear rule is that appellate courts do not consider issues not presented to the district court*." Brown v. Marshall*, 704 F.2d 333, 334 (6th Cir. 1983)*.,* 888 F.2d 385, 397 (6th Cir.1989); *see also Russ'*

Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 217 (6th Cir.1985); *see also Taft Broad. Co. v. United States*, 929 F.2d 240, 243–44 (6th Cir. 1991). Because the District Court did not consider any public policy argument, this Honorable Court should deem any such argument by GCC and/or Tahini waived.

Further, even if GCC or Tahini had raised public policy issues at the District Court, such argument is not compelling. The Tennessee Supreme Court has held: "It is well-settled that the public policy of Tennessee "is to be found in its constitution, statutes, judicial decisions and applicable rules of common law." *Purkey v. Am. Home Assur. Co*., 173 S.W.3d 703, 705 (Tenn. 2005)(*quoting Alcazar v. Hayes,* 982 S.W.2d 845, 851 (Tenn.1998)). The Supreme Court of Tennessee has likewise held that insurance policies are due to be enforced as written. *Clifton v. Tennessee Farmers Mut. Ins. Co.*, 638 S.W.3d 664, 671 (Tenn. Ct. App. 2021). This is the public policy of the State of Tennessee. The Sixth Circuit, quoting case law from the Fourth Circuit, has held "the power to refuse to enforce contracts on the ground of public policy is therefore limited to occasions where the contract would violate 'some explicit public policy' that is 'well defined and dominant . . . .'" *Federal Deposit Ins. Corp. v. Aetna Cas. and Sur. Co.*, 903 F.2d 1073, 1077 (6th Cir. 1990)(quoting *St. Paul Mercury Ins. Co. v. Duke Univ.*, 849 F.2d 133, 135 (4th Cir. 1988)). The Sixth Circuit further stated "questions of public policy are to be determined in the first instance by the legislature." *Id.* Because it is the public policy

of Tennessee to enforce insurance policies as written and there is no other "well defined and dominant" contrary public policy, any considerations of public policy weigh in favor of enforcing the Policy as written.

The District Court had no chance to address the issue of public policy considerations, therefore it committed no error. Further, the District Court committed no error by enforcing the Policy as written because that is the public policy of the State of Tennessee.

III. THE DISTRICT COURT, AS FACT FINDER, WAS NOT CLEARLY ERRONEOUS WHEN IT DID NOT AWARD DAMAGES.

A. The District Court Was Not Clearly Erroneous When It Did Not Award Damages For The Repair Or Replacement Of Bricks That Fell Because Neither GCC Or Tahini Offered Proof Of Damages.

First, GCC and Tahini incorrectly argue that the District Court arbitrarily found that the Policy limited coverage to the fallen bricks.[8] On the contrary, the District Court held that among the issues for trial were: "[w]hether the 'collapse' of the bricks that fell on November 15, 2021, rendered the west wall structurally unsound and any damages resulting from the 'collapse'". [*Memorandum Opinion*, RE 156, Page ID # 3732). Accordingly, the fact question at trial was what damage,

[8] Neither GCC or Tahini reported to BMIC or the independent adjuster that a number of bricks had fallen. (*Trial Trans*., RE 184, Page ID # 5119; *Trial Trans.*, RE 186, Page ID ## 5495, 5499). Upon inspection, the project manager did not show the independent adjuster any pile of bricks, nor does Bankston recall seeing any pile of bricks. (*Trial Trans.*, RE 186, Page ID ## 5495, 5499).

i.e. direct physical loss, was caused by the bricks that fell. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Rule 52(a)(6), Fed. R. Civ. P.

Second, the District Court was correct in not awarding any damages for repair or replacement of the bricks that fell on November 15, 2021, because neither GCC or Tahini offered any proof of what cost there would have been to replace those bricks that fell. John Speweik, an expert in historic masonry, testified the brick in the west wall can be replaced. Speweik testified that the type of brick that was used to construct the west wall is "common brick" and this type of brick "throughout the wall" does deteriorate over time. (*Trial Trans.*, RE 186, Page ID 5639). However, as an expert in historic masonry, Speweik testified "that's not the end of the world . . . you can just quickly cut those brick out and replace them with another common brick and, like and you're right back to square 1 so you're good to go.. So there's ways to remedy that condition, and it can be repaired pretty efficiently." (*Trial Trans.*, RE 186 Page ID 5639).

Speweik does not look at a wall from the standpoint of "how much weight the wall will absorb," he is "looking at it from a constructability standpoint as a mason." (*Trial Trans.*, RE 186, Page ID # 5568). Speweik further testified regarding his review and assessment of the wall from a video of the portion of the wall in which

the window had been cut and from which some bricks are alleged to have fallen. (*Trial Trans.*, RE 186, Page ID # 5645). When asked about the number of bricks that might have fallen from the interior wythe of bricks, Speweik testified: "Some bricks were lost to the interior, that need to be repaired, and to the exterior wythes." (*Trial Trans.,* RE 186, Page ID ## 5650-5651). Speweik testified that because the portion of the wall above the window cut was in solid condition, nothing needs to be done to the remainder of the wall. (*Trial Testimony*, RE 186, Page ID # 5649).

GCC and Tahini expert engineer, Butterfield, testified because the window cuts were relatively small there was not much structural load other than the bricks. (*Trial Trans.*, RE 185, Page ID ## 5416-5417). Moreover, Cartwright testified after the few bricks fell, he designed a proposed solution that did not involve removing the west wall, but he was notified the decision by the architect or someone was to take down the whole wall. (*Trial Trans.*, RE 186, Page ID # 5475). GCC and Tahini's expert, Willingham, testified it was not impossible to repair the wall. (*Trial Trans.*, RE 185, Page ID ## 5433). The District Court, as the finder of fact, took all of this testimony into consideration and, according to the District Court, "credits Speweik's testimony that the fallen bricks could have been replaced." (*Trial Opinion*, RE 181, Page ID 4972). The District Court observed, however, that GCC and Tahini "argued that the bricks could not be replaced and that the entire wall had to be replaced." (*Trial Opinion*, RE 181, Page ID 4972). The District Court, as fact

finder, disagreed with that the contention of GCC and Tahini, and because neither GCC or Tahini offered any proof of damages regarding a repair to the bricks that had fallen, the District Court awarded no damages for a repair that it concluded as a matter of fact finding could have been made. (*Trial Opinion*, RE 181, Page ID # 4972). Because the District Court's finding of fact was supported by evidence and testimony at trial, this finding is not "clearly erroneous." The order of the District Court in is due to be affirmed.

B. The District Court Was Not Clearly Erroneous When The Court Did Not Award Damages For Breach of Contract or Lost Rental Profit.

The District Court ruled that the claim of breach of contract against BMIC was limited to BMIC's failure to indemnify the loss associated with the bricks that fell. (*Trial Opinion*, RE 181, Page ID # 4976). Because the District Court, sitting as fact finder, made a factual finding that the bricks that fell did not cause any substantial impairment to the west wall or Building, and separately, Tahini offered no proof of damages regarding the cost to repair or replace the bricks that fell, there could be no recovery under the breach of contract claim because there was no proof of damages. (*Trial Opinion*, RE 181, Page ID ## 4976-4977). Because this was a finding of fact, the District Court's finding may only be reversed if it was clearly erroneous. The District Court's findings with regard to the effect of the bricks that fell have previously been discussed and there is no evidence in the record of any

proof of damages to repair or replace these bricks. Moreover, damages for lost profit were purely economic damages, not damages for "direct physical loss" as required by the Policy. See *Universal Image Productions, Inc. v. Fed. Ins. Co.,* 475 F. App'x 569, 573 (6th Cir. 2012)(analyzing an insurance policy's undefined term "direct physical loss"). Accordingly, the District Court was not clearly erroneous in not awarding damages for breach of contract or lost rental profit.

Tahini argues the District Court erred in this determination because the court did not consider generally awarding extra-contractual damages that naturally flowed from the breach of contract, specifically lost rental profit.[9] The District Court, however did contemplate extra-contractual damages as requested by GCC and Tahini, but held "none of the Claimants' claimed damages resulted from Builders Mutual's failure to pay for the fallen brick." (*Trial Opinion*, RE 181, Page ID 4977, n.8). "A plaintiff asserting a claim for breach of contract may recover damages that 'arise naturally' from the breach and . . . were reasonably foreseeable and within contemplation of the parties when they entered into the contract." *Heim v. Town of Camden*, 1992 WL 1391, at *4 (Tenn. Ct. App.) (citing *Baker v. Riverside Church of God*, 61 Tenn. App. 270, 453 S.W.2d 801, 809–10 (1970)). The District Court

[9] The Policy was not endorsed for profit. (*Trial Trans.,* RE 185, Page ID ## 5332-5335; *Trial Trans.*, RE 186, Page ID ## 5250-5527; *Policy App.*, *Ex. 154*; *Ex. List*, RE 177, Page ID # 3871).

properly determined that claims by Tahini for extra-contractual damages, i.e. lost rental profit, did not arise naturally from any failure to pay the claim associated with the few fallen bricks.[10] (*Trial Opinion,* RE 181, Page ID # 4975). Rather, such a claim, if any, for lost rental profit would have flowed from the substantial impairment of the west wall or Building. Because the District Court found as factual determination any impairment to the west wall or Building did not arise from the fallen bricks, the lost rental profit that arguably would have resulted cannot be connected back to the few fallen bricks. Accordingly, the District Court was not clearly erroneous in not awarding damages for breach of contract.

IV. THE DISTRICT COURT, SITTING AS THE FACT FINDER, COMMITTED NO REVERSIBLE ERROR IN FINDING BMIC DID NOT ACT IN BAD FAITH.

The question of whether an insurer acted in bad faith is generally a fact question for a trier of fact. *Giles v. Geico Gen. Ins. Co.,* 643 S. W.3d 171, 181 (Tenn. Ct. App. 1986). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Rule 52(a)(6),

[10] Tahini's claim for lost rental profit is also speculative. Tahini terminated the renovation project approximately one month after the bricks fell on November 15, 2021. (*Trial Trans.*, RE 183, Page ID # 5024). The renovation project was not even scheduled to be complete until months later. (*Trial Trans.*, RE 183, Page ID # 5023).

Fed. R. Civ. P. In this case, the finder of fact determined, after hearing the evidence, that there was not bad faith by BMIC.

As interpreted by the Tennessee Supreme Court, bad faith is defined, in part, as "an insurer's disregard or demonstrable indifference toward the interests of its insured." *Johnson v. Tennessee Farmers Mutual Insurance Company*, 205 S.W.3d 365 (Tenn. 2006). Tennessee law provides that bad faith is only appropriate if the insurer's refusal to pay a claim was not in good faith. "To discharge its duty to act in good faith, an insurer must exercise ordinary care and diligence in investigating the claim and the extent of damages for which the insured may be held liable." *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (2006)(citing *S. Fire & Cas. Co.,* 250 S.W.2d 785, 787 (1952)). The insured bears the burden of proving that the insurer acted in bad faith in refusing to pay a claim. *Stooksbury v. Am. Nat'l Prop. & Cas. Co., 126* S.W.3d 505, 519 (Tenn. Ct. App. 2003). Pursuant to Tenn. Code Ann. § 56-7-102(f), the filing of a declaratory judgment action creates a "rebuttable presumption the insurance company is acting in good faith when making a determination of its obligations under a policy of insurance."

GCC and Tahini assert through testimony of their expert, Dr. Warfel, that BMIC did not investigate the claim with ordinary care and diligence. (*Trial Trans.*, RE 184, Page ID ## 5175-5176). The District Court, after hearing all of the testimony at trial, disagreed with this assertion. (*Trial Opinion*, RE 181, Page ID #

4978). The District Court was correct in its finding of fact that BMIC did not commit bad faith.

The District Court's finding that BMIC is not liable for bad faith was supported by evidence and testimony at trial. Specifically, the testimony revealed that the initial claim by GCC and Tahini only focused on the entire wall not being structurally viable to carry the load of the new renovation. (*Dft. Trial Ex. 6*, RE 145-5, Page ID # 3217; *Ex. List*, RE 177, Page ID # 3870). BMIC claim adjuster, Kim Allen, testified that when the claim was made by the insureds, no one told her to look for any bricks that had fallen. (*Trial Trans.*, RE 184, Page ID # 5119).

The independent adjuster hired by BMIC focused on the claim that the west wall was unstable not on some number of bricks on the ground. Specifically, the independent adjuster testified about his first discussion with the project manager in which the project manager told him: "the wall had not collapsed." (*Trial Trans.*, RE 186, Page ID # 5493). Further, when the independent adjuster was physically present at the site, the project manager told the adjuster "they were cutting the holes and the wall is unstable and they were not proceeding any further until someone told them what to do." (*Trial Trans.*, RE 186, Page ID # 5495). The independent adjuster specifically testified no one told him to take pictures of a pile of bricks that fell. (*Trial Trans.*, RE 186, Page ID # 5495).

The engineering report provided by GCC and Tahini in support of the claim did not mention the bricks that had fallen. (*Dft. Trial Ex. 6*, RE 145-5, Page ID # 3217; *Ex. List*, RE 177, Page ID # 3870). The engineering report provided by GCC and Tahini to BMIC did not mention "collapse." (Trial Trans., RE 186, Page ID # 5472). The engineer who prepared the report, Cartwright, testified he did not consider the event that gave rise to the insurance claim to be a structural collapse, i.e. "the failure of the structural elements either in part or in whole." (*Trial Trans.*, RE 186, Page ID ## 5472-5473).

Finally, with regard to the contention that BMIC did not obtain its own independent engineer, the BMIC claims adjuster testified she had the engineering report from GCC and Tahini's engineer, upon which she relied in adjusting the claim. (*Trial Trans.*, RE 184, Page ID ## 5114-5115, 5117; *Dft. Trial Ex. 6*, RE 145-5, Page ID # 3217; *Ex. List*, RE 177, Page ID # 3870). GCC and Tahini's own expert, Dr. Warfel, testified BMIC could not be faulted for relying on what GCC or Tahini said, or for relying on the engineering report provided by GCC and Tahini's engineer. (*Trial Trans.*, RE 184, Page ID # 5179).

The engineering report provided to BMIC by GCC and Tahini did not mention collapse but only the inability of the wall to handle the load of the proposed renovation. (*Trial Trans.*, RE 184, Page ID ## 5114-5115; 5121-5122; *Dft. Trial Ex. 6*, RE 145-5, Page ID # 3217; *Ex. List*, RE 177, Page ID # 3870). Finally, with

regard to the quick response by BMIC to the claim, testimony reveals that there was pressure by Tahini for BMIC to give a quick response. (*Trial Trans.*, RE 184, Page ID ## 5122-5123). BMIC's claim adjuster testified that because she had appropriately documented the file, BMIC provided a response that there was no coverage available under the Policy for the claim presented. (*Trial Trans.*, RE 184, Page ID ## 5123-5125). Thereafter, BMIC effectively closed its file. (*Trial Trans.*, RE 184, Page ID ## 5125).

Approximately six (6) months after BMIC informed GCC and Tahini there was no coverage available Tahini questioned BMIC's decision that there was no coverage. (*Trial Trans.*, RE 184, Page ID ## 5081-5082; *Trial Ex. 12*, RE 145-8, Page ID # 3230; *Ex. List*, RE 177, Page ID # 3870). Tahini presented to BMIC a revised engineering report by the project engineer, David Cartwright, which did mention "collapse". (*Trial Ex.* 12, RE 145-8, Page ID ## 3232-3241). Cartwright testified Craig Peavey, the architect, asked Cartwright to include the revised language in his engineering report at the request of Jason Rothenberg at Tahini. (*Trial Trans.*, RE 186, Page ID ## 5480-5481). Cartwright testified the language he included in his revised engineering report was effectively the same language as what Rothenberg requested. (*Trial Trans.*, RE 186, Page ID ## 5480-5481). Upon receipt of the letter, BMIC re-opened the claim. (*Trial Trans.*, RE 184, Page ID ## 5125-5127). That letter, nor any further clarification of that letter, mentioned any bricks

that fell. (*Trial Trans.*, RE 184, Page ID # 5133). Nonetheless, BMIC sent the matter for a coverage analysis. (*Trial Trans.*, RE 184, Page ID # 5134). BMIC thereafter filed this declaratory judgment action. (*Trial Trans.*, RE 184, Page ID # 5134).

Considering all of this evidence and the circumstances presented in the adjustment of the claim, the District Court, sitting as fact finder, determined that BMIC did not commit bad faith. (*Trial Opinion*, RE 181, Page ID 4979). Because there was testimony and evidence presented that support the finding by the District Court, this finding is not clearly erroneous and should not be set aside. This Honorable Court should give due regard to the District Court's opportunity to judge the witnesses' credibility and affirm the judgment in favor of BMIC on the claim of bad faith.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING, IN PART, THE *DAUBERT* MOTIONS FILED BY GCC AND TAHINI.

The District Court did not abuse its discretion in denying, in part, the *Daubert* motions filed by GCC and Tahini, thus allowing certain expert testimony by BMIC expert witnesses, Matthew G. Richardson, P.E. and John Speweik. The District Court's ruling to admit expert testimony should only be reversed if there was abuse of discretion by the District Court. *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001)(citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 138–139, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)). The Sixth Circuit has held that such an abuse

only is to be found if the appellate court is firmly convinced that the District Court erred. *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001)(citing *Greenwell v. Boatwright*, 184 F.3d 492, 495 (6th Cir.1999)). This Honorable Court has recognized that deference to the District Court's decisions "is the hallmark of abuse of discretion review." *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001)(citing *Joiner*, 522 U.S. at 143, 118 S.Ct. 512)).

The Sixth Circuit has stated expert opinion is admissible under Rule 702, Fed. R. Evid., at the discretion of the trial court, if three requirements are satisfied: (1) "the witness must be qualified by knowledge, skill, experience, training or education"; (2) "the testimony must be relevant, meaning it will assist the trier of fact to understand the evidence or to determine a fact issue"; and (3) "the testimony must be reliable." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528-529 (6th Cir. 2008). With regard to the third factor, the focus is on reliability rather than "credibility and accuracy." *Superior Prod. Partnership v. Gordon Auto Body Parts Co, Ltd.,* 784 F. 3d 311, 323 (6th Cir. 2015)(quoting *In re Scrap Metal*, 527 F. 3d at 529)).

At trial, the District Court, without any objection, qualified Matthew Richardson as an expert in the field of forensic civil engineering. (*Trial Trans.*, RE 186, Page ID # 5542). Richardson is employed as a forensic engineer. (*Trial Trans.*, RE 186, Page ID # 5539). He graduated from Tennessee Technological University,

an ABET-accredited school. (*Trial Trans.*, RE 186, Page ID # 5539). Although early in his career he was generally employed in civil engineering, since April, 2005, he has been a forensic engineer. (See generally, *Trial Transcipt*, RE 186, Page ID # 5541; *Richardson CV, Ex. 118*, RE 145-36, Page ID ##3447-3449; *Ex. List*, RE 177, Page ID # 3872).

Richardson testified forensic engineering is "problem-solving." (*Trial Trans.*, RE 186, Page ID # 5540). In his role as a forensic engineer he is called upon to answer questions about structures to determine what may be wrong with a structure, what caused a problem to the structure, and what may need to be done to repair the structure. (*Trial Trans.*, RE 186, Page ID # 5540). Richardson has served as an expert numerous times, has testified in numerous courts and has never been disqualified as an expert. (*Trial Trans.*, RE 186, Page ID # 5542).

When Richardson became involved with the evaluation of the west wall and Building, the physical structure was no longer in place. (*Trial Trans.*, RE 186, Page ID # 5543). Accordingly, Richardson conducted a desk review. (T*rial Trans.*, RE 186, Page ID #5591). Richardson carefully reviewed and analyzed numerous photographs and videos of the building, engineering reports and associated photographs, videos provided by GCC, as well Google Earth street imagery looking at historical images of the building from the Google Earth street-view cameras."

(*Trial Testimony*, RE 186, Page ID ## 5543-5546; *Ex.* 120, 125, 160, RE 145-38, 145-39; *Ex. List*, RE 177, Page ID # 3872).

In offering his opinion, Richardson utilized his education and experience in engineering, his engineering expertise with regard to differential movement, his review of the engineering reports and associated photographs regarding the Building and west wall, videos provided by GCC Construction, LLC, as well numerous separate photographs and videos of the building, to arrive at a professional engineering conclusion. The District Court held Richardson's testimony was reliable because "Richardson reviewed data – in the form of pictures, videos, Google Street View Images, and Cartwright's report – and drew conclusions specifically based on observations from this data." (*Memorandum Opinion*, RE 156, Page ID # 3702).

Tahini argues on appeal that Richardson did not do certain things that Tahini claims should have been done in a forensic engineering investigation, therefore his testimony should not be allowed because it is not reliable. Such argument, however, is one regarding credibility, not reliability. The District Court did not abuse its discretion in allowing the expert testimony of Matthew Richardson.

At trial, the District Court also qualified John Speweik, without any objection as to the scope of his testimony,[11] as an expert to testify "regarding the cause, origin, circumstances, and nature of collapse . . . and to testify about the characteristics of historic masonry buildings or traditional masonry buildings and the characteristics and effects of . . . that type of construction" as it relates to this case. (*Trial Trans.*, RE 186, Page ID ## 5622-5625). Tahini argues on appeal that Speweik's testimony should be excluded because it is not reliabile and not supported by engineering principles or scientific methodologies.

Speweik is a historic or traditional masonry specialist. (*Trial Trans.*, RE 186, Page ID # 5612). Speweik has approximately 35 years of professional masonry experience, numerous publications regarding historic masonry, and a history of consulting work regarding over 1,500 buildings with regard to historic masonry, of which about 500 are on the National Registry of Historic Buildings. (*Trial Trans.*, RE 186, Page ID # 5616; *Speweik CV, Ex. 127*, RE 145-40, Page ID ## 3515-3516; *Ex. List*, RE 177, Page ID # 3872). Among these projects are significantly notable ones such as The Biltmore Estate, Abraham Lincoln Presidential Library and Museum, the United States Capitol, and the Capitols of Georgia, Nebraska,

[11] GCC objected to the language BMIC used regarding Speweik's scope of testimony, but after discussion, GCC agreed there was no objection to the extent Speweik testified consistent with the District Court's memorandum opinion and consistent with what had been disclosed by BMIC.

Wisconsin, and Washington. (*Speweik CV, Ex. 127*, RE 145-40, Page ID ## 3515-3516; *Ex. List*, RE 177, Page ID # 3872).

Speweik reviewed information from the Hamilton County, Tennessee property assessor's office, photographs and videos of the Building and west wall, engineering reports regarding the Building, and conducted an on-site inspection of the Building after the west wall had been removed. (*Trial Trans.*, RE 186, Page ID # 5631-5633; *Ex. 130, 131, RE 145-43*; *Ex. List*, RE 177, Page ID # 3872).

Considering the fundamental issues at play in this case involve the masonry in this 100 year-old building, Speweik's experience in historic masonry presented a valid connection to the pertinent inquiry. Based on Speweik's years of experience in the field of historic or traditional masonry, he testified that the few bricks that fell out of the opening did not dictate a theory that the rest of the wall is in danger, nor did those few bricks affect the integrity of the "entire wall system." (*Trial Tesimony*, RE 186, Page ID # 5653). Such testimony is squarely within Speweik's qualifications because it is based on his understanding of historic masonry techniques. The admission by Speweik that he is not an engineer does not affect the reliability of his testimony as a historic masonry expert. If anything, Speweik's inability to conduct certain engineering assessments goes to the credibility of his testimony, but not the reliability of such testimony. The District Court did not abuse its discretion in allowing Speweik's testimony.

CONCLUSION

The District Court committed no reversible error. BMIC requests this Honorable Court affirm the factual findings and orders of the District Court regarding all issues presented.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32, Fed. R. App. P., and 6 Cir. R. 32, the undersigned certifies that foregoing Brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions as set forth in Fed. R. App. P. 32(f), the word processing system used to prepare the foregoing Brief specifies that the Brief contains 10,572 words.

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in 14-point Times New Roman typeface using Microsoft Word.

s/James M. Smith

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, I electronically filed this document along with any exhibits with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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135	GCC and Tahini Motion to Amend Memorandum Opinion	1702-1713
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