IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BUILDERS MUTUAL INSURANCE COMPANY,

Plaintiff – Appellee,

v.

GCC CONSTRUCTION, LLC,

Defendant – Appellant,

and

TAHINI MAIN STREET, LLC,

Defendant – Appellant.

Case No. 24-5152
(consolidated with
Case No. 24-5179)

On Appeal from the U.S. District Court for the Eastern District of Tennessee:
Case No. 1:22-cv-00208

BRIEF OF APPELLANT TAHINI MAIN STREET, LLC

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ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Tahini Main Street, LLC makes the following disclosure:

1. Is said 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:

No.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is appropriate and requested in this matter because this appeal presents legally significant issues and questions of law regarding the proper interpretation of a builder's risk insurance policy and the proper application of builder's risk insurance to a collapse claim, when certain policy terms are left undefined, and others found to be ambiguous. Given the complexity of the legal insurance coverage issues in this case and considering the unique factual issues, which for the most part have not been addressed or decided under Tennessee law, in combination with the numerous errors committed by the trial court, Tahini avers that an oral argument would assist the Court in resolving this matter.

STATEMENT OF JURISDICTION

This matter came before the trial court pursuant to 28 U.S.C. § 2201, for a declaratory judgment with regard to an insurance policy issued by Builders Mutual Insurance Company ("BMIC") covering property located in Tennessee. Subject matter jurisdiction is proper pursuant to 28 U.S.C. § 1332 and 2201 because there is complete diversity of citizenship between the parties, as BMIC is a North Carolina company, while GCC Construction, LLC ("GCC") and Tahini Main Street, LLC ("Tahini") are Tennessee limited liability companies, and the amount in controversy exceeds $75,000.00. The trial court issued its Memorandum Opinion on January 5, 2024, granting in part and denying in part the parties' cross motions for summary judgment. (*Mem. Op.*, RE 156, Page ID #3685-3732). Following a multi-day bench trial, the trial court then issued its Trial Opinion (*Trial Opinion*, RE 181, Page ID #4961-4979) and Judgment Order (*Judgment Order*, RE 182, Page ID #4980) on January 30, 2024. This appeal is taken from the trial court's Memorandum Opinion, Trial Opinion and Judgment Order. Tahini filed a timely Notice of Appeal with the United States District Court for the Eastern District of Tennessee on February 21, 2024. (*Notice of Appeal*, RE 187, Page ID #5716-5717). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 3 and 4.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in its interpretation and application of the Policy's definition of "collapse" – as applied to the subject loss – once it determined

that said definition was ambiguous.

2. Whether the trial court erred when it determined that the collapse from November 15, 2021, did not cause any loss of structural integrity to the west wall or building as a whole, as such determination was contrary to the weight of the evidence presented at trial and contrary to controlling legal authority.

3. Whether the trial court erred in concluding that there is only coverage for the fallen bricks, despite acknowledging that a covered "collapse" occurred, when it erroneously credited testimony that did not exist and then arbitrarily confined and restricted the loss due under the Policy.

4. Whether the trial court erred by imposing additional requirements for coverage that were not contracted for by the parties and thus further erred in its ruling on coverage for this loss that was based upon an arbitrary condition that the building have no prior deterioration or decay.

5. Whether the trial court erred in its ruling concerning Tahini's damages for breach of contract and lost rental profit when it erroneously analyzed potential recovery for these claims solely under the Policy, instead of considering whether Tahini is entitled to recovery in this regard based on a measure of extra-contractual damages.

6. Whether the trial court abused its discretion and erred in denying Tahini's Daubert motion to exclude and in not excluding at trial the testimony of experts Matthew Richardson and John Speweik.

7. Whether the trial court erred in its ruling that BMIC investigated the claim with ordinary care and diligence, as such ruling was contrary to the weight of the evidence presented at trial.

STATEMENT OF THE CASE

This case involves a builder's risk insurance policy and resulting coverage dispute following the partial collapse of a century old commercial building in Chattanooga, Tennessee. Tahini owns a commercial building at 27 West Main Street, Chattanooga. (the "Property" or "Building"). (*Tahini Counterclaim*, RE 13,

Page ID #124). Tahini hired contractor GCC to perform renovations and remodel the Building. (*Tahini Counterclaim*, RE 13, Page ID #124).

Before any work, GCC and Tahini (insured and additional insured) obtained an Enhanced Builders Risk Insurance Policy (the "Policy") from BMIC with an effective period September 2, 2021, to September 2, 2022. (*Trial Opinion*, RE 181, Page ID #34962). The Policy provided coverage for loss "caused by collapse of… part of a building" if that collapse "is caused by… decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse." (*Trial Opinion*, RE 181, Page ID #4962-4963). The Policy did not define "direct physical loss or damage," but defined "loss" as "accidental loss and accidental damage." (*Trial Opinion*, RE 181, Page ID #4963). The Policy included an endorsement for coverage for loss to existing buildings. (*Trial Opinion*, RE 181, Page ID #4963).

The Policy defined "collapse" to mean "an abrupt falling down or caving in of a covered building or structure in whole **or in part**." (*Policy*, RE 1-4, Page ID #23; emphasis added). However, the Policy also contained inconsistent and contradictory language.[1]

The renovations required cutting windows into the exterior west brick wall.

[1] The Policy states that "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." (Policy, RE 1-4, Page ID #23).

(*Mem. Op.*, RE 156, Page ID #3689). These were no ordinary or contemporary wall structures. The wall structures were over 100 years old and were comprised of three wythes of bricks supporting and up against each other. There were no internal or external structural support such as framing, rebar or other members of the wall. The structural support of the walls were merely the bricks supporting bricks. (Trial Transcript, RE 186, Page ID #5452, 5453, 5465-5467).

On November 15, 2021, when the first window cut was made, bricks started falling out of and from the middle wythe and inside of the wall. (*Mem. Op.*, RE 156, Page ID #3690). Thereafter, engineer David Cartwright, PE ("Cartwright") inspected the Building. (*Id.*). Cartwright reported, on November 18, 2021, that "due to severe unforeseen deterioration … inside the existing west brick wall, that it is not structurally viable to carry the loads for the new renovation." Cartwright recommended that a "new structural wall be installed, and the old brick wall demolished." (*Cartwright Report*, RE 89-21, Page ID #795). On November 18, 2021, a claim was submitted to BMIC, advising there was a collapse. (*Mem. Op.*, RE 156, Page ID #3691). Kim Allen ("Allen") was the BMIC adjuster responsible for the investigation and handling the claim. (*Trial Transcript*, RE 184, Page ID 5048).

Allen hired independent adjuster Greg Bankston ("Bankston") to inspect the Building. (*Mem. Op.*, RE 156, Page ID #3691). Allen told Bankston there was a

reported wall collapse. (*Trial Transcript*, RE 184, Page ID #5068). Allen also told Bankston that "you may need to take an engineer as collapse is only covered by a covered peril." (*Trial Transcript*, RE 184, Page ID #5069). Bankston was not provided a copy of the Policy and Allen did not convey anything else to him about Policy coverage. (*Trial Transcript*, RE 184, Page ID #5070).

On November 19, 2021, Bankston inspected the Building. (*Mem. Op.*, RE 156, Page ID #3691.) He thereafter orally reported to Allen by phone his findings but did not prepare any written report to BMIC. (*Id.*, RE 156, Page ID #3691). Despite Allen's instructions, BMIC never hired an engineer to inspect the Building. (*Mem. Op.*, RE 156, Page ID #3691). On November 29, 2021, within four (4) business days of the reported claim (excluding weekends and holidays), BMIC, via email, informally denied the claim, contending that the collapse did not result from a covered peril. (*Mem. Op.*, RE 156, Page ID #3692). However, a week later, on December 7, 2021, BMIC sent its formal denial letter, changing its basis for denial of the claim to the Building was "not in a state of collapse." (*Id.*).

On June 13, 2022, Tahini sent BMIC a demand for payment of claim under the Policy and notice of statutory bad faith. (*Demand Letter*, RE 89-15, Page ID #750-766). Tahini's demand included a supplemental report from engineer Cartwright, wherein he detailed the nature and condition of the loadbearing three-wythe west brick wall and opined that the "building sustained direct physical

damage and loss as a result of the collapse of an inside existing brick wall on the west side of the building… that the same constitutes a state of collapse of all or part of the building or structure caused by decay that was hidden from view or discovery based on the nature of the inside or internal aspect of the brick wall… .” (*Cartwright Report*, RE 89-15, Page ID #752-762).

On June 27, 2022, in response to the demand, BMIC requested clarification as to which wall was claimed to have collapsed. (*BMIC Letter*, RE 89-16, Page ID #767-768). Thereafter, on July 21, 2022, Tahini sent BMIC another supplemental report from Cartwright, clarifying that “the west wall, which was comprised of multiple layers of brick, was at one time an inside or interior wall based on the history of the building;” but now is the exterior west wall in a state of collapse…” (*Cartwright Report*, RE 89-17, Page ID # 770-779). On August 11, 2022, after receipt of this clarification, BMIC represented via email it was “seriously reviewing” the reports and its coverage position. BMIC requested an extension to respond to the initial demand. (*BMIC/Tahini Emails*, RE 89-19, Page ID #780-782). That extension was accepted by Tahini, agreeing that BMIC would have until August 19, 2022 to respond to the demand. (*Id*.).

All the while, as of August 1, 2022, BMIC retained counsel to prepare and file suit. (*Tahini MSJ Brief*, RE 95, Page ID #948). On August 19, 2022, BMIC filed its Complaint for declaratory judgment against GCC and Tahini. (*Complaint*, RE 1,

Page ID #1-91). Tahini answered and filed a counterclaim to affirm coverage under the Policy as a result of the collapse, breach of contract and for all losses and damages, along with statutory bad faith penalties. (*Tahini Counterclaim*, RE 13, Page ID #118-154). On September 28, 2023, BMIC filed a motion for summary judgment. (*BMIC MSJ*, RE 88, Page ID #489-491). The next day, Tahini and GCC filed a joint motion for partial summary judgment (*GCC/Tahini MSJ*, RE 94, Page ID #932-938) and motion to exclude the expert testimony of Matthew Richardson and John Speweik. (*GCC/Tahini Daubert Motion*, RE 92, Page ID #854-857).

On November 30, 2023, the trial court entered its first memorandum opinion ruling on the cross-motions for summary judgment. (*Mem. Op.*, RE 132, Page ID # 1654-1699). In this first opinion, the trial court declared that "there is coverage under the Policy with respect to replacement of the bricks that fell from the exterior west wall…" and that "there is not coverage under the Policy for the removal and replacement of the portion of the exterior west wall that remained standing...." (*Id.*)

Thereafter, GCC and Tahini filed a joint motion to revise said ruling, arguing that the trial court exceeded the scope of the issues presented by the cross-motions for summary judgment. (*Joint Motion to Revise*, RE 135, Page ID #1702-1731). GCC and Tahini argued that although the trial court believed there was no evidence on summary judgment to support a conclusion that bricks falling from the west wall rendered the wall structurally unsound, that there was in fact such evidence that

could have been submitted but was believed to have been beyond the issues presented on summary judgment. (*Id*.).

Thus, GCC and Tahini argued to revise the trial court's conclusion on summary judgment and that revision was warranted. (*Id*.). There was expert proof developed as to the issue of whether the November 15, 2021 collapse caused structural impairment or instability to the west wall or Building. (*Id*.) The engineering assessment by Colby Butterfield, PE ("Butterfield") found that:

> "the west wall was part of the building's structural assembly, and the partial collapse of the center wythe of bricks robbed the west wall of its structural integrity, leaving at best, two far weaker walls created by the outermost and innermost wythes of brick that could not rely upon each other for support."
> …
> "because of the west wall's status as a part of the overall structural assembly of the building, the structural stability of the north wall and south wall were also negatively affected by both the partial collapse on November 15, 2021…."

(*Joint Motion to Revise*, RE 135, Page ID # 1705).

On December 20, 2023, the trial court granted the GCC/Tahini joint motion to revise. (*Order*, RE 151, Page ID #3666-3669). On January 5, 2024, the trial court issued its revised, second memorandum opinion with regard to the cross motions for summary judgment and Daubert motions, which wholly supplanted the trial court's previous, first memorandum opinion. (*Mem. Op.*, RE 156, Page ID #3685-3732). In its second opinion, the trial court made various findings and rulings with regard to the cross motions for summary judgment and as to the Daubert motions.

Pertinent to this appeal, the trial court concluded:

> "… Butterfield's opinion creates a factual dispute as to whether the collapse of the fallen bricks caused the building to become structurally impaired. (Internal Citation Omitted). If the fallen bricks – which the Court found constituted a 'collapse' – caused the structural instability in the west wall, which then in turned caused the building to become unrentable, then Tahini's lost rental profit would be covered under the Policy."

(*Mem. Op.*, RE 156, Page ID #3686, fn. 1).

Based on the Policy language on "collapse," the trial court found that the Policy is language is ambiguous. (*Id*. at Page ID #3717). On this issue, the trial court determined that:

> "In this case, due to the contradicting definition of 'collapse,' the Policy is effectively left without a definition. Since the Policy is effectively left without a definition and since the parties intended to cover a 'collapse,' the Court will apply a definition of 'collapse' from case law interpreting 'collapse' when the Policy does not define the term."

(*Id*. at Page ID #3718).

Importantly, the trial court concluded that "the fallen bricks constitute a 'collapse' under the Policy" and that the collapse was caused by "decay that was both hidden and unknown to Tahini and GCC." (*Id*. at Page ID #3719). Further, the trial court found that the bricks which fell on November 15, 2021 constitute a collapse and represent a covered loss under the Policy. (*Mem. Op.*, RE 156, Page ID #3720).

Despite the finding of ambiguity, the trial court in its second opinion went back to the Policy's definitions and ruled that the loss of the remaining portion of

the west wall still standing after the collapse was not covered under the Policy, although at the same time ruling that "direct physical loss' is covered under the Policy if either (1) the structural unsoundness of the remaining portion of the wall itself constitutes a 'collapse' and that 'collapse' was caused by hidden decay; or (2) the fallen brick caused the remaining portion of the wall to become structurally unsound ….." (*Id*.). In sum, the trial court left this issue open for trial on the collapse causing loss of structural integrity, and concluded in its second opinion "…lost rental profit is covered by the Policy if [due to loss of structural integrity of the wall and] the lack of structural integrity of the wall was caused by the collapse – fallen bricks." (*Id*.).

As for the Daubert motions challenging BMIC's experts, Matthew Richardson and John Speweik, the trial court held "Richardson may testify as to his opinions that 'the dislodging of pieces of the interior of the wall assembly during the removal of the cut masonry did not adversely affect the structural integrity of the wall…'". (*Id*. at Page ID#3704-3705). With regard to Speweik, the trial court ruled that he "may testify about defects in the building; the planning and design on this project; and the cause, origin, circumstances and nature of the collapse and structural integrity of the wall." (*Id*. at 3708).

After trial, despite no supporting evidence, the trial court erroneously found and inappropriately interpretated and applied the Policy and applicable law to

conclude that the "building's structural integrity was compromised long before the November 15, 2021 collapse and long before the Policy went into effect" and that "the collapse merely revealed the building's long-existing lack of structural integrity." (*Trial Opinion*, RE 181, Page ID #4962). Further, despite finding an ambiguous Policy with no definition of "collapse" or "direct physical loss," and after finding that a covered collapse had occurred by the bricks falling from the middle wythe, the trial court awarded no losses or damages for the collapse. (*Id*. at Page ID # 4969, 4972).

In addition, without evidentiary support, and despite the nature and character of the Building and three wythe brick walls supporting brick on brick, the trial court erred in finding that the collapse on November 15, 2021 had no impact of the structural integrity of the west wall itself and the 100 year old Building, and arbitrarily limited or restricted the interpretation of the subject Policy to afford coverage for such an event of collapse. (*Id*. at Page ID #4973).

The trial court erred in finding that the Policy under applicable law does not provide coverage for the structural instability of the loss of the west wall or the Building, and further that no lost rental profits would be covered. (*Id*. at Page ID #4975). Finally, with respect to the claim of statutory bad faith, the trial court found that "Builders Mutual investigated this claim with ordinary care and diligence," finding that "the initial claim never mentioned the bricks that fell and instead focused

on replacing the entire wall," and losses per the Policy or extracontractual damages were not warranted. (*Id*. at Page ID # 4978).

SUMMARY OF THE ARGUMENT

The trial court erred when it misinterpreted and misapplied the Policy and corresponding law on coverage for a "collapse" loss. The trial court also erred to find that the collapse of November 15, 2021 did not cause any loss of structural integrity to the west wall or Building, and when it credited testimony claiming that the interior wythe of bricks could be replaced, when no such evidence exists. Despite finding the collapse was a covered loss, the trial court erred by arbitrarily confining or restricting the loss due under the Policy to only the fallen bricks and by erroneously creating a condition for coverage that the Building have no prior deterioration or decay. Finally, the trial court erred in not excluding at trial the testimony of purported experts Richardson and Speweik and erred in finding that BMIC investigated the claim with ordinary care and diligence. The misinterpretation of the Policy and law and the misapplication of the evidence in the record requires reversal of the lower court's Trial Opinion and Judgment Order and requires the entry of a judgment in Tahini's favor.

STANDARD OF REVIEW

In an appeal from a judgment entered after a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. *Beaven v.*

U.S. Dep't of Justice, 622 F.3d 540, 547 (6th Cir.2010). Mixed questions of law and fact are also subject to de novo review. *Thoroughbred Software Int'l, Inc. v. Dice Corp.,*488 F.3d 352, 358 (6th Cir.2007). A finding of fact "is clearly erroneous when, although there may be some evidence to support the finding, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Darwich*, 337 F.3d 645, 663 (6th Cir.2003) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). "This Court reviews the district court's decision on a motion for summary judgment de novo." *Max Arnold & Sons, LLC v. W.L. Hailey & Co*., 452 F.3d 494, 498 (6th Cir.2006) (citing *Turner v. City of Taylor*, 412 F.3d 629, 637 (6th Cir.2005)). As for expert witnesses, this Court reviews the exclusion of a proffered expert for an abuse of discretion. *Gales v. Allenbrooke Nursing and Rehabilitation Center, LLC*, 91F.4th 433, 435 (6th Cir. 2024). "An abuse of discretion occurs if the district court (1) misunderstood the law, (2) relied on clearly erroneous factual findings, or (3) made a clear error of judgment. (*Id*.). Finally, under Tennessee law, the question of the extent and scope of insurance coverage is a question of law involving the interpretation of contractual language. *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012). Since the interpretation of a contract is a legal question, it is reviewed de novo on appeal with no presumption of correctness. *Eye Centers of America, LLC v. Series Protected Cell 1, LLC*, 2022 WL

13983763 at *2 (6th Cir. Oct. 24, 2022).

ARGUMENT

1. The trial court erred as a matter of law in its interpretation and application of the Policy's definition of "collapse" – as applied to the subject loss – once it determined that the definition was ambiguous.

Courts in Tennessee have observed that where policy language is ambiguous, "the policy must be construed in favor of the insured and against the insurer." *Lineberry v. State Farm Fire & Cas. Co*., 885 F.Supp. 1095, 1098 (M.D. Tenn. 1995) (citing *Purdy v. Tenn. Farmers Mut. Ins. Co.*, 586 S.W.2d 128, 130 (Tenn. Ct. App. 1979); *State Farm Mutual Auto Ins. Co. v. Oliver*, 406 F.2d 409, 410 (6th Cir. 1969); *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 885 (Tenn. 1991)).

The Policy at issue here was found to be ambiguous as to the definition of and what is a "collapse" for loss. So, the Policy must be construed in favor of Tahini. At the summary judgment stage, the trial court found that the Policy's "collapse" coverage provision provided "contradictory outcomes," it was ambiguous "as to whether the fallen bricks constitute a collapse," and that once ambiguity is determined, the court 'applies established rules of construction to determine the parties' intent.'" (*Memorandum Opinion*, RE 156, Page #3717) (citing *Planters Gin Co. v. Fed Compress & Warehouse Co., Inc*., 78 S.W.3d 885,890 (Tenn. 2002).

Of course, it was found that "the parties intended to insure the building in the event of a collapse." (*Mem. Op.*, RE 156, Page #3718). Considering the ambiguity

and the Policy left without a "collapse" definition, it was noted that such coverage provisions "provide coverage if there is a substantial impairment of the structural integrity of the building or any part of the building." Coverage for "collapse does not require complete destruction or falling in of the building." (*Mem. Op.*, RE 156, Page #3718) (quoting *Rankin ex rel. Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237, 238 (Tenn. Ct. App. 1998).

However, despite finding that the Policy was ambiguous with regard to a "collapse," the trial court still nonetheless applied the Policy's ambiguous "collapse" coverage provision to the subject loss when it ruled that "the fallen bricks constitute a collapse under the Policy." (*Mem. Op.*, RE 156, Page #3719). To be clear, Tahini avers that the finding that the fallen bricks constitute a covered collapse and loss under the Policy is not at issue; however, the trial court erred as a matter of law when it thereafter applied the Policy's "collapse" provisions to limit the loss to only fallen bricks as opposed to the loss of the wall or Building that remained standing, but was structurally unsound. (Mem. Op., RE 156, Page# 3717-3722).

Instead, under applicable law, once "collapse" is determined, the focus should be on whether or not the collapse of the bricks from the west wall resulted in any substantial impairment to the structural integrity of the west wall and / or Building, per applicable law. In other words, once it was determined that the Policy was ambiguous and a covered collapse occurred that there was an ambiguity in the Policy

as to coverage for the collapse, and the decision was made to apply the caselaw definition, the trial court should not have gone back to the Policy's definition; but instead, should have analyzed the "collapse" pursuant to the authority outlined in *Rankin* and then determine the extent of loss

The trial court erred in the interpretation and application of facts for additional requirements for a covered collapse loss under the Policy. Under Tennessee law, coverage was intended and should be afforded when there is a substantial impairment of the structural integrity of the building or any part thereof caused by a covered collapse. Here, the covered collapse of the middle wythe of the wall resulted in a substantial impairment of that west wall and of the building itself, although both remained standing.

2. The trial court erred when it determined that the collapse from November 15, 2021 did not cause any loss of structural integrity to the west wall or building as a whole, as such ruling was contrary to the weight of the evidence and contrary to controlling legal authority.

The trial court found that the "November 15, 2021, collapse did not cause a loss of structural integrity; it merely revealed the existing lack of structural integrity" (*Trial Opinion*, RE 181, Page ID #4695) and that the "limited collapse had no impact on the structural integrity of the west wall or the building." (*Trial Opinion*, RE 181, Page #4965-4966). However, such findings and opinions by the trial court were in error as they are without supporting evidence, contrary to the evidence presented at trial, and further contrary to controlling legal authority for collapse coverage. First,

the trial court's finding that the collapse did not cause any loss of structural integrity was entirely contrary to the weight of the evidence presented at trial. Cartwright – the only engineer to physically see and inspect the west wall both before and after the collapse – testified that the multi-wythe west brick wall was rendered substantially impaired and structurally unsound from the collapse, and would need to be rebuilt as a result. *(see Trial Transcript*, RE 186, Page ID #5465-5467).

Furthermore, Cartwright testified with regard to the importance of how each wythe of brick in the 3-story unreinforced masonry brick Building needed to be connected and tied together because brick is supporting brick within the structure, and if certain bricks fall or fail then the entire structure is compromised. (*see Trial Transcript*, RE 186, Page ID #5452-5453).

In addition to Cartwright, another structural engineer –Butterfield – testified at trial with regard to the effects of the collapse and its negative impact on the structural integrity of the west wall and building as a whole. Specifically, Butterfield affirmed that the collapse of bricks on November 15, 2021 affected the structural integrity of the west wall and rendered it unstable from an engineering standpoint because the wall structure relies on all 3 wythes to act together -- if the wall loses its center wythe then the wall is no longer connected together. *(see Trial Transcript*, RE 186, Page ID #5405-5408). Furthermore, Butterfield went on to explain how the loss

of structural integrity with regard to the west wall further results in the structural impairment of the entire building (*see Trial Transcript*, RE 186, Page ID #5413).

Despite this essentially unrefuted testimony, the trial court concluded that the November 15, 2021 collapse did not cause any loss of structural integrity, but merely "revealed" the lack of structural integrity. This finding and determination of such a critical issue in this case was not supported by any evidence offered at trial. In fact, it was entirely contrary to the evidence and testimony of engineers Cartwright and Butterfield, and was also contrary to the testimony and opinions of BMIC's engineer, Richardson, who agreed that if the west wall lost its structural integrity, then the entire building did too. (*see Trial Transcript*, RE 186, Page ID #5593-5594).

The record is devoid of any credible evidence that contradicts the testimony of engineers Cartwright and Butterfield, who both established that the west wall and Building were rendered structurally unsound and impaired as a result of the collapse on November 15, 2021. The evidence in the record establishes that the west wall was structurally unsound and substantially impaired as a result of the collapse, and further that the same, made the entire building's structural integrity impaired. There was simply no testimony or evidence presented at trial to suggest that the collapse "merely revealed the existing lack of structural integrity," as erroneously concluded by the trial court. (*see Trial Opinion*, RE 181, Page ID #4965). The trial court's conclusion that the collapse and loss of bricks from the middle wythe did not cause

any loss of structural integrity was in error and not supported by sufficient evidence, thus requiring reversal.

In addition to being against the weight of the evidence, the trial court's finding that the collapse did not cause any loss structural integrity to the west wall or Building was contrary to the controlling legal authority. Under such authority, if "collapse" is not defined in a policy, Tennessee courts follow the modern trend and majority view that a "collapse" does not require a "complete destruction or falling in of the building…." (see *Rankin* at 238 (Tenn. Ct. App. 1998).

In *Rankin*, the insured's building was damaged as a result of heavy machinery parked next to the building, which exerted pressure on the parking area and caused the walls to rotate and twist. *Id*. at 237. The insured sought coverage under a collapse provision of its insurance policy. The trial court determined that the building did not "collapse" within the meaning of the policy and that the policy did not cover the damage, finding that "for the loss of the wall to be covered, there must be in ordinary language a complete falling down of the wall into a mass or disorganized condition." *Id*. However, once on appeal, the *Rankin* court disagreed with the lower court's decision, and reversed and remanded the case for the entry of a judgment for the insured's damages for repairing the building. *Id*. at 240.

Noting that no reported Tennessee case which precisely defined "collapse," the *Rankin* court then analyzed decisions from other jurisdictions and ultimately held

that Tennessee would follow the majority view on collapse coverage. The appellate court explained:

> "Some courts have held that 'collapse' is an unambiguous term 'which denotes a falling in, loss of shape, or reduction to flattened form of rubble.' (internal citations omitted). Under the majority view, however, the term 'collapse' does not require complete destruction or falling in of the building.. (internal citations omitted). **Thus 'the clear modern trend is to hold that collapse coverage provisions… which define collapse as not including cracking and settling – provide coverage if there is a substantial impairment of the structural integrity of the building or any part of a building**.' (internal citations omitted)
>
> …the modern trend favors a more expansive approach. In light of the compelling policy reasons underlying the majority view, we will follow the majority's rationale in this case and reverse the Trial Judge's determination…

Rankin at 238 (emphasis added).

The Sixth Circuit has addressed a factually analogous insurance coverage case involving the partial collapse of a near century old church in the case of *Tabernacle-The New Testament Church v. State Farm Fire and Casualty Company*, 616 Fed.Appx.802 (6th Cir. June 22, 2015). In *Tabernacle*, the ceiling of a church that was constructed in 1927 partially collapsed in 2012. At that time, Tabernacle had a State Farm policy that covered "accidental direct physical loss" to the premises and it provided coverage for "collapse" caused by hidden decay or use of defective materials or methods in construction. *Id*. at 804.

In *Tabernacle*, State Farm questioned whether the collapse was covered and both sides retained an engineer. The engineers determined that the roof structure

and trusses had inherent problems that contributed to the collapse. *Id*. at 804-805. State Farm's engineer also concluded that the collapse was due to vertical and horizontal movement of the trusses, which caused the ceiling to crack and loosen. *Id*. at 805.

State Farm denied the claim and the insured filed suit. The district court granted summary judgment in State Farms' favor, finding that the loss was the result of the manner in which the roof trusses were originally constructed many years ago and not the result of any of the listed perils for which coverage would apply, such as hidden decay. *Id*. at 807. Tabernacle appealed and this Court determined that summary judgment was inappropriate, reasoning:

> "The record shows a gradual degradation of the organic materials used to construct the roof and walls over time: 'deterioration' which Miller, State Farm's expert, described as likely beginning 'as soon as the structure was finished' in 1927 and resulted in the wood trusses eventually not 'having the strength they were intended to have.'
> …
> We find that the deterioration of the 90-year-old church roof structure was unlike the four-year-old building with loosened nails at issue in *Eyde*, and more similar to Eyde's description of the older buildings in *Stamm Theatres* and *Northeaster Center* in which wood and mortar weakened over time due to age and extended exposure to humidity and weather. *Eyde's* analysis suggests that deterioration and degradation of the wooden roof structure and walls over a long period of time may qualify as 'decay' that was 'hidden' and such decay may be what 'caused in part' the ceiling collapse. Therefore such loss could be covered under the policy even though 'defective material or methods in construction' also 'contribute to the collapse.'

Tabernacle at 810-811.

The decay of the roof trusses in *Tabernacle* is analogous to the decay of the brick and mortar in the west wall and Building. Both instances of decay, which are covered causes of loss under the policies, developed over time, and caused the collapse -- which in turn directly impacted and impaired the structural integrity of the buildings. Based on the evidence and applicable law, the trial court erred in this mixed question of law and fact in finding that that the loss of structural integrity was merely revealed when such decay causing a collapse with structural impairment would and should afford coverage for the loss under the Policy.

3. The trial court erred as a matter of law in concluding that there is only coverage for the fallen bricks although finding a covered "collapse" occurred and erred by relying on support for same from evidence not in the record and thereby restricting loss the Policy.

As with any builder's risk policy, an owner of a building or general contractor on a building "seeks to insulate himself from loss which he might suffer because of damage to or loss of a building in the process of construction, alteration or repair." *Miller v. Russell*, 674 S.W.2d 290, 292 (Tenn. Ct. App. 1983) (citing 22 A.L.R. 4th 704 (1983). So, builder's risk insurance is designed to cover losses that occur during the course of construction or renovation. *Dennis v. Allstate Ins. Co*., 1993 WL 177161 at *2 (Tenn. Ct. App. May 26, 1993). In order to trigger coverage under such a policy, the insured must establish that the loss fits within terms of coverage. Particularly, as noted by this Court, "It is elementary in insurance law that a claimant under an insurance policy has the initial burden of proving that he comes within the

terms of the policy." *Blaine Construction Corp. v. Insurance Company of North America*, 171 F.3d 343, 349 (6th Cir. 1999).

Tahini established that its loss fits within the terms of coverage. In fact, the trial court correctly determined that a covered collapse occurred on November 15, 2021 -- which was caused by decay hidden from view and unknown to the insureds. However, the trial court erred as a matter of law when it arbitrarily confined or restricted the loss and damages due under the subject Policy to only those bricks that collapsed and fell on November 15, 2021.

The Policy does not require that the insured prove how many bricks fell or what percentage of the structure collapsed (*see Trial Transcript*, RE 184, Page ID #5138-5139), and the trial court erred in ruling that the only compensable loss pertained to the bricks that fell from the west wall. Rather, the Policy requires that the insured establish "direct physical loss or damage" as provided per the Policy or applicable law. The Policy does not define "direct physical loss or damage" and the trial court noted that no Tennessee courts have interpreted the term under similar insurance policies. (*see Trial Opinion*, RE 181, Page ID #4974). The trial court then proceeded to apply a definition of the term from a Sixth Circuit case interpreting Michigan law, *Universal Image Productions, Inc. v. Fed. Ins. Co*., 475 F.App'x. 569, 573 (6th Cir. 2012), that noted "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." (*Id*). In using this definition, the trial court place historic condition requirements on the structure, wrongly limited coverage for a building that was already underwritten by the insurer, wrongly concluded that the wall was previously in an "unsatisfactory state" without any such evidence, and interpreting the Policy coverages against the insureds and contrary to applicable law dealing with a "collapse" loss. (*Id*).

Before such error, the trial court correctly found that a covered collapse occurred on November 15, 2021. However, by using a "satisfactory vs. unsatisfactory state" requirement for the loss, the trial court arbitrarily confined and limited the coverage (to just the fallen bricks and not to the remaining structurally impaired west wall and/or building as a whole), invalidated the "hidden decay" covered cause of a collapse loss that was part of the Policy and did not apply controlling authority such as *Rankin*. Under *Rankin*, there is no "satisfactory state" requirement, and a covered "collapse" provide loss coverage not only to portions of the structure that "collapsed," but also loss of the structurally impaired remaining wall and/or building that may remain. The definition of "direct physical loss or damage" used by the trial court directly contradicts the language of the Policy -- the west wall and building had unknown deterioration and decay which is a covered cause of loss for "collapse" and as such was not in a "satisfactory" state when the

Policy took effect. However, it was the intent of the parties and Policy to provide coverage for such a hidden and unknown condition that caused "collapse." The trial court's requirement for a "satisfactory state" building is contrary to the that intent, invalidates one of the very purposes of the coverage, and erroneously narrows any coverage for such a loss.

Along with this error of interpretation, it is also pointed out that in determining only the fallen bricks were covered under the Policy and supposedly could be replaced, the trial court erred by relied on ting supposed testimony of John Speweik that simply did not exist. Speweik was not disclosed to or mentioned to offer any opinion that fallen bricks could simply be replaced and he did not so testify. Yet, in its trial opinion, the trial court went as far as to credit Speweik's testimony "at least to the extent that the few bricks that fell could have been replaced, even if some of the bricks from another wythe would have to be temporarily removed for purposes of accessing the inner wythe" (*Trial Opinion*, RE 181, Page ID #4969, 4972).

However, Speweik did not testify that the fallen bricks could have been replaced. In fact, the record is entirely devoid of any testimony that the bricks that fell from the west wall on November 15, 2021 could have been replaced. Further, the other expert for BMIC, Richardson, attempted to opine in response to a question from BMIC's counsel with regard to the feasibility of repair, but the trial court

appropriately sustained an objection to this line of questioning. (*see Trial Transcript*, RE 186, Page ID #5569-5570).

As for Speweik rather, when testifying about his observations as to the condition of the brick on the exterior west wall before the collapse, he offered limited testimony with regard to replacing exterior brick from the building's façade, particularly as it pertained to certain bricks that showed signs of deterioration. (see *Trial Transcript*, RE 186, Page ID #5637-5639). Speweik did not offer any testimony that the internal bricks (inside the middle wythe) which collapsed and fell out of the wall on November 15, 2021 could have been replaced. (see *Trial Transcript*, RE 186, Page ID #5612-5668). There is no such testimony in the record that the collapsed and fallen bricks could have been replaced.

On the other hand, Alex Grace of GCC Construction testified that it would have been impossible to replace just the fallen bricks from the center wythe of a 3-wythe structure. *(see Trial Transcript*, RE 185, Page ID #5266-5267). Additionally, contractor Arch Willingham testified and opined that it was impractical and not feasible to simply replace fallen bricks from the middle wythe and that the current building code wouldn't even allow it. *(see Trial Transcript*, RE 185, Page ID #5433)

Yet, in finding that the fallen bricks from the middle wythe could supposedly and merely have been replaced, the trial court was in error as there was no evidence, or insufficient evidence, for such finding and such a finding arbitrarily narrow

coverage of loss against the insureds and contrary to legal authority. The trial court's ruling in this regard was clearly erroneous because it was not based on any evidence or testimony in the record. As noted by this Court, "a finding of fact will be found to be clearly erroneous if it is not supported by substantial evidence." *Duty v. U.S. Dept. of Interior*, 735 F.2d 1012, 1014 (6th Cir. 1984) (citing 9 C. Wright & A. Miller, Federal Practice and Procedure § 2585 (1971)). Here, the trial court's finding that the bricks that fell from the west wall could have been replaced was not supported by any evidence whatsoever.[2]

In fact, such ruling by the trial court as to the feasibility of repair by simple replacement of bricks inside the west wall was entirely contrary to the evidence and testimony at trial - the west wall was structurally compromised as a result of the collapse and that it should have been replaced and it was not even possible to merely replace the fallen bricks. BMIC did not present any evidence to rebut or refute the testimony that it would be impossible to replace the middle wythe of brick in this

[2] The trial court made various other findings and conclusions that were clearly erroneous and not supported by any testimony or evidence in the record. Such examples include: "The building's structural integrity was compromised long before the November 15, 2021 collapse and long before the policy went into effect." (*Trial Opinion*, RE 181, Page ID # 4962); "Before work began, the west wall, as well as the entire building, was structurally unsound." (*Trial Opinion*, RE 181, Page ID #4965); "The November 15, 2021 collapse did not cause a loss of structural integrity, it merely revealed the existing lack of structural integrity." (*Trial Opinion*, RE 181, Page ID #4965); "This limited collapse had no impact on the structural integrity of the west wall or the building. Whatever the remainder of the wall and building lacked in structural integrity after the collapse, they had already lacked for years before." (*Trial Opinion*, RE 181, Page ID #4965-4966).

multi-wythe brick structure. Accordingly, the trial court's determination in this regard was clearly erroneous and it should be reversed in this appeal.

4. The trial court erred as a matter of law by imposing additional requirements for coverage that were not contracted for by the parties and erred in its ruling that was based upon an arbitrary condition that the building have no prior deterioration or decay.

In the absence of fraud or mistake, courts should construe contracts as written and construe them in the context of the entire contract. *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d 678, 681 (Tenn. Ct. App. 1999) (internal citations omitted). Moreover, the courts "may not make a new contract for parties who have spoken for themselves." *Id*. at 682. Importantly, courts "must avoid rewriting an agreement under the guise of interpreting it." *Johnson v. Welch*, 2004 WL 239756 at *7 (Tenn. Ct. App. Feb. 9, 2004). In a footnote to its decision that there is no coverage under the Policy for removal and replacement of the west wall or building, the trial court reasoned as follows:

> "Given the severe deterioration of the building, it is clear that the building was rendered unstable long before the policy period—which started on September 2, 2021, just over two months before the collapse—began. The severity and extent of the decay could not possibly have occurred over a period of two months. The building was unstable long before the coverage period of the policy. Any pre-policy "collapse" of the remainder of the wall under this alternative legal theory likewise results in no further coverage."

(*Trial Opinion*, RE 181, Page ID #4973, fn. 7).

For reasons unknown, the trial court seemingly concludes that in order for there to be coverage for the collapse or structural impairment to the west wall that is

caused by decay, then the decay would have had to develop during the Policy period. In other words, for coverage to be implicated, then the Building could not have any pre-existing deterioration or decay. Such a finding by the trial court was clearly in error and it imposes additional restrictions or conditions for coverage that are not in the Policy. To the contrary, the Policy actually contains an endorsement for an existing building or structure and specifically provides coverage for a "collapse" that is caused by hidden and unknown decay.

The trial court erroneously concludes that "Claimants effectively ask the court to assume the building was structurally sound before the renovations." (*Trial Opinion*, RE 181, Page ID #4973). To the contrary, the only evidence in the record is that Cartwright performed engineering load calculations prior to the renovations and after the collapse, establishing that the building was structurally sound beforehand but structurally impaired after the collapse. (*Trial Transcript*, RE 186, Page ID # 5669-5671).

Before issuing the Policy, BMIC was well informed about the nature and condition of the existing commercial building and had knowledge of the renovations and scope of work that was planned. (see *Trial Transcript*, RE 186, Page ID #5529-5530, 5532-5536). BMIC then bound coverage and issued the Policy, covering the renovation work on the existing Building. The Policy is supposed to cover losses sustained as a result of a "collapse" caused by decay that is unknown to the insured.

There was no requirement for the severity or extent of the decay to develop or occur during the Policy period, as suggested by the trial court,

Accordingly, it was error for the trial court to base its decision on coverage, at least in part, by arbitrarily concluding that the severity and extent of decay – which caused the collapse – "could not have possibly occurred or developed over a period of two months during the Policy period." There is no requirement in the Policy as it relates to coverage for "collapse" caused by hidden decay, that the decay has to occur or develop during the Policy period." (*see Trial Opinion*, RE 181, Page ID #4973, fn.7). Therefore, the trial court erred as a matter of law by imposing this additional condition for coverage under the Policy when no such condition exists.

5. The trial court erred as a matter of law in its ruling concerning Tahini's damages for breach of contract and lost rental profit, as the trial court erroneously analyzed potential recovery for these claims solely under the Policy, instead of considering whether Tahini is entitled to recovery in this regard as a measure of extra-contractual damages.

In a claim for breach of contract, a plaintiff must prove (1) the existence of an enforceable contract, (2) nonperformance amounting to breach of the contract, and (3) damages caused by the breach of contract. *Bancorp South Bank, Inc. v. Hatchel*, 223 S.W.3d 223, 227 (Tenn. Ct. App. 2006). The trial court correctly found the existence of an enforceable contract – the Policy – and nonperformance on the part of BMIC amounting to breach. However, the trial court erred in its analysis of damages that were caused by the breach.

In addition to damages due under the Policy for losses it sustained as a result of the collapse – which are insured losses –Tahini is also entitled to recover its incidental and consequential damages that stem from BMIC's breach of contract and failure to pay. In other words, Tahini is not limited to recovery of just its insured losses, but it may also recover other damages as well, such as those for breach of contract. (*see Riad v. Erie Ins. Exchange*, 436 S.W.3d 256 (Tenn. Ct. App. 2013). As it relates to damages in this regard, the purpose of assessing damages in a breach of contract action is to place plaintiff in nearly the same position he would have been in if the contract had been performed. *Id*. at 274 (citing *Wilhite v. Brownsville Concrete Co*., 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990)).

The trial court held in its Memorandum Opinion that "the undisputed facts show that Tahini's lost rental profit resulted from the impaired structural integrity of the wall." (*Memorandum Opinion*, RE 156, Page ID # 3723). The trial court went on to conclude that "because the fallen bricks constitute a collapse and because Tahini's lost rental profit was caused by the west wall's impaired structural integrity, Tahini's lost rental profit is covered by the Policy if the lack of structural integrity of the wall was caused by the collapse." (*Id*.).

Then, in its Trial Opinion, the trial court disregarded its previous findings and changed its analysis of lost rental profit when it held that "to award Tahini's lost rental profit, the 'collapse' must have caused the building to become unrentable" but

that since the collapse "did not cause the wall or building to become structurally unsound or unrentable," the "policy provides no coverage." (*Trial Opinion*, RE 181, Page ID #4975).

The trial court erred in analyzing the lost rental profit as a measure of losses under the Policy, and not as extra-contractual damages provided based common law breach of contract. (*see Id*.).

The record provides that Tahini incurred additional damages from the insurer's breach above and beyond those that are due under the Policy. Tahini's Director of Development Services, Jason Rothenberg, testified that following the collapse and due to the denial of the claim, Tahini was unable to complete renovation and lost rental profit in the amount of $348,750.00 from tenants leasing space of the Building. *(see Trial Transcript*, RE 185, Page ID #5359-5362). Accordingly, the trial court erred as a matter of law in the analysis of extra-contractual damages, and the same should be reversed on appeal.

6. The trial court abused its discretion and erred in denying the Daubert motions to exclude and in not excluding at trial the testimony of experts Matthew Richardson and John Speweik.

Under Rule 702 of the *Federal Rules of Evidence*, the Sixth Circuit has noted that a proposed expert's opinion is admissible if the witness is qualified by "knowledge, skill, experience, training or education," if the testimony is relevant and "will assist the trier of fact to understand the evidence or to determine a fact in issue,"

and if testimony is "reliable." *Burgett v. Troy-Bilt, LLC*, 579 Fed.Appx. 372, 376 (6th Cir. 2014) (citing *In re Scrap Metal Antitrust Litig*., 527 F.3d 517, 528-29 (6th Cir. 2008)).

Importantly, the focus of a Daubert inquiry – as envisioned by Rule 702 – "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrel Dow Pharmaceuticals, Inc*., 509 U.S. 579, 595 (1993). "After all, Rule 702 requires more than simply 'taking the expert's word for it.'" *Gales*, 91 F.4th 433, 437 (6th Cir. 2024) (citing Fed. R. Evid. 702 advisory committee's note to 2000 amendment).

The trial court determined that Matthew G. Richardson, PE was permitted to testify as to his opinions that the fallen brick did not adversely affect the structural integrity of the west wall. (*Mem. Op.*, RE 156, Page ID #3704-3705). The trial court also ruled that brick preservation expert John Speweik was permitted to testify about defects in the building and the cause, origin, circumstances and nature of the collapse and structural integrity of the wall. (*Mem. Op.*, RE 156, Page ID #3708). However, the trial court erred in not denying this scope of testimony upon Tahini's Daubert motion and further erred in permitting and relying upon the testimony of these witnesses at trial.

Richardson – who was retained in this matter just one month prior to the expert disclosure deadline and who only performed a desk review – was tendered as an

expert witness in the field of forensic engineering. However, he is not qualified to opine about the structural integrity of the west wall or Building because he did not physically examine the Building nor perform any scientific or mathematic calculations at all in forming his opinions.

During trial, Richardson acknowledged and agreed that a forensic engineering investigation "is a complex and meticulous process that involves the use of scientific methods and techniques to analyze physical evidence." *(Trial Transcript*, RE 186, Page ID #5573). However, he did not perform anything that resembled a forensic investigation, as all Richardson did was simply look at photographs and videos of the building and review Google images. *(Trial Transcript*, RE 186, Page ID #5574). In fact, Richardson did not take any measurements, did not perform any structural efficiency formulas on the wall or building, did not perform any structural integrity calculations, did not consider any engineering load calculations and did not make any scientific or mathematical calculations whatsoever to arrive at his opinions with regard to the structural integrity of the building. (*see Trial Transcript*, RE 186, Page ID #5578-5579). Moreover, Richardson confirmed that he does not have any experience with structural load testing and whether a certain load could be supported when determining if a wall or building has maintained its structural integrity. *(Trial Transcript*, RE 186, Page ID #5586-5587). Accordingly, Richardson's opinions

should have been excluded since they are not reliable and since they were not supported by any engineering principles or scientific methodologies.

Like Richardson, brick preservation expert John Speweik should also have been excluded from testifying with regard to the cause and origin of the collapse and structural integrity of the west wall. The trial court erred in not excluding Speweik's opinions at trial since they do not meet the minimum standards for expert testimony under the Federal Rules of Evidence and applicable case law.

At trial, Speweik testified that that the bricks that fell from the west wall did not impair the structural stability or integrity of the wall structure. *(Trial Transcript*, RE 186, Page ID #5653). However, by his own admission, Speweik is not qualified to make such an analysis with regard to the structural integrity of a building, as he is not an architect, engineer nor general contractor. *(Trial Transcript*, RE 186, Page ID #5654). In his view, a brick structure is safe or structurally sound so long as bricks are not following off and hitting people in the head. *(Trial Transcript*, RE 186, Page ID #5657). Yet, Speweik confirmed at trial that he is not able to do an engineering assessment of the structural integrity of the west wall or Building. *(see Trial Transcript*, RE 186, Page ID #5658-5659, 5667).

Simply put, Speweik is not qualified to opine as to the structural integrity of a building or structure. Accordingly, Speweik's testimony and opinions with regard to the collapse and its effect – or lack thereof – on the structural integrity of the west

wall and building are not reliable and thus should have been excluded. The trial court abused its discretion and erred when it first permitted Speweik to testify as to the "cause, origin, circumstances and nature of the collapse and structural integrity of the wall." (see *Mem. Op.*, RE 156, Page ID #3706). Secondly, the trial court abused its discretion and erred when it permitted Speweik to testify at trial and opine as to whether or not the collapse of bricks impaired the structural stability or integrity of the west wall. (see *Trial Transcript*, RE 186, Page ID #5653).

7. The trial court erred in ruling that BMIC investigated the claim with ordinary care and diligence, as such a ruling was contrary to the weight of the evidence.

To recover statutory bad faith penalties in Tennessee under Tenn. Code Ann. § 56-7-105(a), a plaintiff must prove (1) that the policy of insurance had, by its terms, become due and payable; (2) the plaintiff made a formal demand for payment and then waited sixty (60) days after making the demand before filing suit; and (3) the refusal to pay was made in bad faith. *See Riad v. Erie Ins. Exchange*, 436 S.W.3d 256, 270 (Tenn. Ct. App. 2013); *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 361 (6th Cir. 2018).

An insurer may be held liable for bad faith where it displays "disregard or demonstrable indifference toward the interests of its insured." *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006) (internal citations omitted). "[A]n insurer must exercise ordinary care and diligence in investigating

the claim and the extent of damage ….” and to such an extent that it can exercise an honest judgment….” *Id.* (internal citations omitted).

The actions and omissions of the insurer may and should be considered in the determination of bad faith, along with any other circumstantial evidence to suggest an indifference toward an insured's interest. *Id*. However, to prevail in an action for bad faith, Tennessee law does not require proof that the insurer acted with dishonesty, ill will or deceit. *Johnson* at 373.

In the case sub judice, the statutory requirements to trigger the bad faith penalty were overwhelming proven at trial because: (1) the Policy, by its terms, became due and payable upon submission of the clam; (2) a formal demand for payment was made on June 13, 2022; and (3) BMIC’s refusal to pay was not in good faith, as the refusal to pay the claim was made in such a short amount of time and with no legitimate or sincere investigation on the part of the insurer.

With regard to the issue of claims handling and bad faith, Tahini presented the expert testimony of Dr. William Warfel. Dr. Warfel testified as to the industry standards for proper insurance claims handling and how insurers:

> “…have a duty to conduct a prompt and thorough investigation, develop the facts the comprise the claim, the circumstances, and then, once they’ve done that, to plug those facts within the applicable policy language, the policy that applies, and make a timely coverage determination and state clearly what their coverage position is, particularly if they assert that there is no coverage.”

(Trial Transcript, RE 184, Page ID #5161-5162).

Dr. Warfel further explained that a prompt and thorough investigation includes interviews with the insureds and witnesses on scene, property inspection and observations of the loss, inspection report, review of the policy and applicable law or precedent, retention of experts to determine the cause of loss and proper file documentation. *(Trial Transcript*, RE 184, Page ID #5165-5167).

At trial, Dr. Warfel then testified and provided examples of how BMIC did not perform a prompt and thorough investigation of this claim. Dr. Warfel testified that he did not see any indication or evidence where BMIC ever asked about or noted the identity of any witnesses, ever took any statements from the insureds, ever documented the identity of any subcontractors working on site, ever obtained a coverage opinion before denying the claim or ever reviewed legal precedent on collapse coverage. (*see Trial Transcript*, RE 184, Page ID #5170, 5174).

Dr. Warfel also testified that the BMIC claim file did not contain any information or documentation from Bankston other than his photographs nor did it contain any findings from Bankston or what he communicated to the adjuster. (*see Trial Transcript*, RE 184, Page ID #5171-5172). According to Dr. Warfel, when coverage hinges on the cause of loss and there is a disagreement or question about the assessment performed by the engineer retained by the insured, then he would expect BMIC to have retained its own engineer for a follow-up inspection. *(see Trial Transcript*, RE 184, Page ID #5173). Ultimately, Dr. Warfel came to the conclusion

that BMIC really did not perform any investigation of this claim at all and what little the insurer did was certainly not consistent with sound claims handling practices. *(see Trial Transcript*, RE 184, Page ID #5175).

Yet, the trial court somehow determined and concluded that "Builders Mutual investigated this claim with ordinary care and diligence." (*Trial Opinion*, RE 181, Page ID #4978). Despite the fact that Tahini presented the testimony of Dr. Warfel – who pointed out all of the failures and deficiencies in BMIC's claims handling and as to actions that should have been taken – the trial court was of the opinion that "all these actions were unnecessary in this case." (*Id*.). It should be noted that BMIC provided no expert nor any witness whatsoever to refute, challenge or rebut the testimony of Dr. Warfel. The evidence clearly preponderates against the trial court's finding that BMIC investigated this claim with ordinary care and diligence and it was clear error for the trial court to make such unsupported findings and conclusions in this regard.

CONCLUSION

Based upon the foregoing, and in light of the numerous errors committed by the trial court, Tahini respectfully requests that this Court reverse the lower court's Trial Opinion and Judgment Order and in doing so, enter a judgment in Tahini's favor. Tahini avers that the overwhelming evidence presented at trial established that

there was substantial impairment to the structural integrity of both the west wall and building as a whole as a result of the collapse on November 15, 2021.

Specifically, Tahini avers that the evidence preponderates in favor of a finding that the collapse from November 15, 2021 is a covered cause of loss under the Policy and that it resulted in a substantial impairment to the west wall and entire Building as a whole. Accordingly, it is requested that a judgment be entered in Tahini's favor in the amount of $2,880,000.00 (ACV at time of loss), plus a 25% statutory bad faith penalty in the amount of $720,000.00 and for Tahini's lost rental profit in the amount of $348,750.00.

Tahini avers that the only proof or measure of damages are those that were set forth by Tahini at trial, as BMIC did not present any testimony or evidence to rebut the figures introduced at trial for replacement of the west wall and BMIC even stipulated as to the ACV of the building at the time of loss. (*see Joint Stipulation*, RE 169, Page ID #3825-3829). Since it would cost a little over $6.2 million dollars to rebuild the building at 27 West Main Street, then the proper measure of damages – pursuant to the Existing Buildings or Structures endorsement – would be the ACV of $2,880,000.00. (*see Trial Transcript*, RE 185, Page ID #5435; *Trial Opinion*, RE 181, Page ID #4963). Pursuant to Fed. R. App. P. 28(i), Tahini hereby adopts and incorporates by reference the principal brief filed by Appellant GCC Construction, LLC in this matter as if stated verbatim herein.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, and the Order granting motion to exceed page limitation (Doc. 21), the undersigned certifies that the foregoing Brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions as set forth and provided by Fed. R. App. P. 32(f), the word processing system used to prepare the foregoing Brief specifies that this document contains 40 pages.

2. This document 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.

SPICER RUDSTROM, PLLC

By: /s/ Robert J. Uhorchuk
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CERTIFICATE OF SERVICE

I hereby certify that 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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This 14th day of June, 2024.

SPICER RUDSTROM, PLLC

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