

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

<p>BIGFOOT CO-OP A, INC., dba PARK MADISON APARTMENTS and PHG, INC., DBA PINNACLE ROOFING CONSULTANTS,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>NATIONWIDE MUTUAL INSURANCE COMPANY,</p> <p>Defendant.</p>	<p>Case No. 3:24-cv-00022-SMR-HCA</p> <p>PLAINTIFFS’ BRIEF IN SUPPORT OF RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT</p>
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Pursuant to Federal Rule of Civil Procedure 56, and Local Rule 56, Plaintiffs Bigfoot Co-Op A, Inc. dba Park Madison Apartments (“Park Madison”) and PHG, Inc., dba Pinnacle Roofing Consultants (“Pinnacle”) (collectively “Plaintiffs”), by and through their counsel, file this Brief in Support of their Response in Opposition to Defendant Nationwide Mutual Insurance Company’s (“Nationwide”) Motion for Summary Judgment (the “Defendant’s Motion”). The Plaintiffs would respectfully show this Court the following.

**SUMMARY**

This case stems from a hail storm that damaged the property in question, and the appraisal that followed. The appraisers issued two separate appraisal awards, and Nationwide issued payment to the Plaintiffs on both of them. The first appraisal award listed damage to the dwellings themselves, a total of five buildings all covered by the same policy. Pinnacle pointed out that the City of Burlington required certain minimum standards of every building according to the 2021 Code that it had adopted. (SUMF 2, Appx. 0027). The appraisers issued a second award, and listed an additional amount for what it called “Code per Appraisal Estimate.” (SUMF 2-3, Appx. 0036).

Nationwide did not pay the full amount listed in the appraisal awards, arguing that the Policy stated that they did not have to because of a section of the policy called the “Increased Cost of Construction” provision (the “ICC”). The Defendant’s Motion is based entirely on that clause of the Policy, and they’ve argued that they paid everything required under the Policy, and that the Plaintiff’s claims for breach of contract and bad faith therefore fail. Def. BIS, 1-2.

Plaintiffs argue that the property’s roof sheathing conformed with the code in place before the storm. It is undisputed that those materials that met the applicable code standards all had to be replaced. The code governing the property’s construction required thicker, and thus more costly, sheathing that must run continuously throughout the roofing system. Only the difference between the cost of the original sheathing and the new material would constitute “increased” costs of construction as defined by the policy. Since Nationwide’s payments were based on its position that all sheathing constituted “increased costs of construction”, its payments fall short of their obligation for recovery cost value payments under the Policy.

Additionally, the policy is the master document that lists and describes all of the appraisers duties when a claim goes to appraisal. Any action beyond those qualifies as an act that exceeds the appraiser’s scope as defined by the Policy. The appraisers listed the “code” items as being separate and distinct from the estimate for the buildings, when in fact they were estimates for damage to the same buildings. In doing so, they created coverage not defined by the policy, and thus exceeded the scope of their authority as appraisers as described in the policy. In doing so, under Iowa State law, they invalidated the entire appraisal award.

### **LEGAL STANDARD**

The Eighth Circuit recognizes “that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries.” *Wabun–*

*Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir.1990). On the other hand, the Federal Rules of Civil Procedure have authorized for nearly 60 years “motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). Thus, “summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Wabun–Inini*, 900 F.2d at 1238 (quoting *Celotex*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986)); *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir.1992).

A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “The necessary proof that the nonmoving party must produce is not precisely measurable, but it must be enough evidence so that a reasonable jury could return a verdict for the nonmovant.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). “[A] summary judgment motion should be interpreted by the trial court to accomplish its purpose of disposing of factually unsupported claims, and the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.” *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir.1990). The trial court, therefore, must “assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial.” *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552).

If non-moving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is “entitled to judgment as

a matter of law.” *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552. However, if the court can conclude that a reasonable trier of fact could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510.

### **ARGUMENTS**

Plaintiffs Park Madison and Pinnacle offer the following arguments in support of their position that this Court should deny Nationwide’s Motion. Nationwide is not entitled to summary judgment on Plaintiffs’ claims for breach of contract or for common-law insurance bad faith because (1) Nationwide’s payments for “increased costs of construction” were inadequate because they do not reflect the cost of the sheathing already in place on the Property that was damaged by the Storm. The difference in cost of the original sheathing and the new sheathing are not “increased” costs of construction, and Nationwide owes payment based on that difference; and (2) the Appraisers exceeded their authority by creating coverage items not defined nor supported by the Policy, and the appraisal award is therefore invalid.

**(1) NATIONWIDE’S PAYMENTS FOR “INCREASED COSTS OF CONSTRUCTION” WERE INADEQUATE BECAUSE THEY DO NOT REFLECT THE COST OF THE SHEATHING ALREADY IN PLACE ON THE PROPERTY THAT WAS DAMAGED BY THE STORM. THE DIFFERENCE IN COST OF THE ORIGINAL SHEATHING AND THE NEW SHEATHING ARE NOT “INCREASED” COSTS OF CONSTRUCTION, AND NATIONWIDE OWES PAYMENT BASED ON THAT DIFFERENCE.**

**A. Breach of Contract**

Nationwide’s position in their Motion lies in the alleged adequacy of their prior payments made on the appraisal award in this case. The Policy language at issue states:

**e. Increased Cost Of Construction**

- (1) This Additional Coverage applies only to buildings to which the Replacement Cost Optional Coverage applies.
- (2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with the minimum standards of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in e.(3) through e.(9) of this Additional Coverage.
- (3) The ordinance or law referred to in e.(2) of this Additional Coverage is an ordinance or law that regulates the construction or repair of buildings or establishes zoning or land use requirements at the described premises and is in force at the time of loss.
- (4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:
  - (a) You were required to comply with before the loss, even when the building was undamaged; and
  - (b) You failed to comply with.
- (6) The most we will pay under this Additional Coverage, for each described building insured under this Coverage Form, is \$10,000 or 5% of the Limit of Insurance applicable to that building, whichever is less. If a damaged building is covered under a blanket Limit of Insurance which applies to more than one building or item of property, then the most we will pay under this Additional Coverage, for that damaged building, is the lesser of \$10,000 or 5% times the value of the damaged building as of the time of loss times the applicable Coinsurance percentage.  
The amount payable under this Additional Coverage is additional insurance.

Def. Appx. 0035.

The City of Burlington adopted the 2021 International Building Code (IBC) in July 2023.

2021 IBC § 2304.8(3) states the following:

**2021 International Building Code (IBC)**

CHAPTER 23 WOOD

**2304.8.2 Structural roof sheathing.**

Structural roof sheathing shall be designed in accordance with the general provisions of this code and the special provisions in this section.

Roof sheathing conforming to the provisions of Table 2304.8(1), 2304.8(2), 2304.8(3) or 2304.8(5) shall be deemed to meet the requirements of this section. *Wood structural panel* roof sheathing shall be of a type manufactured with exterior glue (Exposure 1 or Exterior).

(SUMF 2, Appx. 0002, 0034). Table 2304.8(3) requires that the “wood structural panel sheathing and single floor grades [run] continuous over two or more spans with [a] strength axis perpendicular to [the] support. 2021 IBC Table 2304.8(3). (SUMF 2 – Appx. 0030).

The sheathing in place on the Property at the time of the storm was 1/4 inches that ran continuously across the support beams beneath the roof. (Appx. 0067). This sheathing was damaged, and had to be replaced on the five buildings in dispute. *Id.* The cost to replace this sheathing was \$83,437.50. *Id.* The sheathing now required by the 2021 IBC is 7/16 inches, to run continuously across the roof system. (Appx. 0027-35, 0067). According to the second appraisal award, the cost of this new sheathing is \$164,030.98. (Appx. 0040, 43, 45, 47, 50). The ICC does not apply to the \$83,437.50 which would indemnify Plaintiffs for the value of the sheathing previously in place on the Property. The difference in value between the sheathing in place and the sheathing that now conforms with the applicable building codes governing construction of the Property is \$80,593.48. Only this amount would constitute *increased* costs, because it reflects the difference in value between what was previously in place, and the increased costs of the new sheathing required by the 2021 IBC.

Nationwide paid \$505,137.49, which includes \$455,137.49 ACV for the appraisal award based on damage to the buildings, plus \$50,000.00, \$10,000 for each of the five buildings in dispute, for what was claimed as increased costs of construction pursuant to the ICC policy. (Def. BIS, 3). The appraisal award itemized an amount of \$189,380.02 for “Code per Appraisal Estimate.” (SUMF 3 – Appx. 0036). Nationwide’s position is that the entire amount stated in the appraisal award constitutes an “increased” cost of the repair or replacement to the property. Def. BIS, 1-2.

In sum, Nationwide’s ICC payment of \$50,000 only accounted for the increased cost of the new sheathing (valued at \$80,593.48 as described above). However, Nationwide still owes payment to Plaintiff to account for the value of the sheathing previously in place, or \$83,437.50. Refusal to tender such payments constitutes a breach of the RCV provision of the Policy.

Nationwide misrepresents the nature of the Code per Appraisal Estimate itemized in the award. The award does not distinguish between the sheathing in place before the storm which complied with the building code in place at the time of installation, nor does it account for the difference in amount between what was already in place and what the 2021 IBC now requires. Only this difference in amount would fall under the ICC provision in the Policy. It strains credulity to consider the replacement of sheathing in place before the storm, essentially a reimbursement, as an “increased cost.”

Nationwide therefore still owes \$83,437.50 to Plaintiffs pursuant to the Policy and the second appraisal award. In failing to provide this payment, Nationwide breached the terms of the Policy. Due to this genuine issue of material fact, Nationwide is not entitled to summary judgment for Plaintiffs’ claim for breach of contract.

#### B. Common Law Bad Faith

Regarding Plaintiffs’ claims for common law bad faith, under *Dolan v. Aid Ins. Co.*, a cause of action exists for individuals against their insurance carrier if they can prove:

[T]he absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.

431 N.W.2d 790, 794 (Iowa 1988), citing *Anderson v. Cont’l Ins. Co.*, 85 Wis. 2d 675, 692, 271 N.W.2d 368, 376 (1978).

As earlier discussed, it strains logic and reason to state that amounts spent to replace damaged portions already present on the property at the time of the Storm were *increased* costs of construction. In applying the ICC to the amount of “Code per Appraisal Estimate,” Nationwide failed to factor in the value of the code materials already in place at the time of the storm, and mischaracterized them as “increased costs” rather than *replacements*. As described above, only the

difference in value between the new sheathing required under the 2021 IBC and the old sheathing required under the previous building code would fall under the ICC, because those costs alone would constitute *increased* costs of reconstruction as defined by the Policy.

Nationwide was reasonably aware of this distinction when they issued their incomplete payment of the appraisal award. Its theory that 100% of the sheathing that must be installed, including the value of the sheathing was already there and must be replaced with thicker and more expensive sheathing, can only show an absence, or even a knowing or reckless disregard, of a reasonable basis for denying the Plaintiffs benefits under their Policy. Nationwide is therefore not entitled to summary judgment on Plaintiffs' claims for common law bad faith under *Dolan*.

**(2) THE APPRAISERS EXCEEDED THEIR AUTHORITY BY CREATING COVERAGE ITEMS NOT DEFINED NOR SUPPORTED BY THE POLICY, AND THE APPRAISAL AWARD IS THEREFORE INVALID.**

The Policy includes the following appraisal provision:

**2. Appraisal**

If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

Def. Appx 0040.

This claim was submitted to appraisal, and the appraisers issued an award on July 11, 2023.

The first award was accompanied by an estimate, which included several line items for "Code",



including “Ice & water barrier”, which accounts for line items 23, 49, 73, 96, and 120. (Appx. 0040, 43, 45, 47, 50). The award itself listed the following:

ITEM	Loss Replacement Cost	Loss Actual Cash Value
1. Buildings per Appraisal Estimate (7-6-23)	<u>\$478,116.42</u>	<u>\$430,043.66</u>
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
<b>TOTAL</b>	<u><b>\$478,116.42</b></u>	<u><b>\$430,043.66</b></u>

(SUMF 2 – Appx. 0005). Notably, the first award did not itemize the “Code” provisions into the “Buildings per Appraisal Estimate (7-6-23); those line items were incorporated into this award figure of \$478,116.42 (RCV), \$430,043.66 (ACV). *Id.*

On the other hand, the second appraisal award included two items as illustrated in the appraisal award below:

ITEM	Loss Replacement Cost	Loss Actual Cash Value
1. Buildings / Appraisal Estimate (10-2-23)	<u>\$455,137.49</u>	<u>\$447,943.08</u>
2. Code per Appraisal Estimate (10-2-23)	<u>\$189,380.02</u>	<u>\$189,380.02</u>
3. _____	_____	_____
4. _____	_____	_____
<b>TOTAL</b>	<u><b>\$644,517.51</b></u>	<u><b>\$637,323.10</b></u>

SUMF 2-3 – Appx. 0036). In this associated estimate, “Code” costs, including repeated items for “Ice & water barrier” and “Pinnacle Roofing Invoice for Roof [] Sheathing” are again listed in various line items, including 23, 24, 50, 51, 75, 76, 99, 100, 124, and 125. (Appx. 0040, 43, 45, 47, 50). In short, the second award itemizes “Code” provisions in the award as separate and distinct from the “Building” item in the award, whereas “Code” costs had been previously incorporated into the overall “Building” item in the award. *Id.*

The Policy provides coverage for buildings located on the Property. The term “Building” is defined in the Policy as:

**A. Coverage**

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

**1. Covered Property**

Covered Property, as used in this Coverage Part, means the type of property described in this section, **A.1.**, and limited in **A.2.** Property Not Covered, if a Limit Of Insurance is shown in the Declarations for that type of property.

**a. Building**, meaning the building or structure described in the Declarations, including:

- (1) Completed additions;
- (2) Fixtures, including outdoor fixtures;
- (3) Permanently installed:
  - (a) Machinery; and
  - (b) Equipment;
- (4) Personal property owned by you that is used to maintain or service the building or structure or its premises, including:
  - (a) Fire-extinguishing equipment;
  - (b) Outdoor furniture;
  - (c) Floor coverings; and
  - (d) Appliances used for refrigerating, ventilating, cooking, dishwashing or laundering;
- (5) If not covered by other insurance:
  - (a) Additions under construction, alterations and repairs to the building or structure;
  - (b) Materials, equipment, supplies and temporary structures, on or within 100 feet of the described premises, used for making additions, alterations or repairs to the building or structure.

(Def. Appx. 0032). The term “code”, however, is not defined by the Policy and only appears in relation to a zip code or in reference to a harmful computer code. *Id.* at 0037. The Policy therefore does not state whether any “code” items are covered under the Policy. The First Appraisal Award included “code” items into their calculation for coverage under the “Building”. (Appx. 0009, 0012, 0014, 0016, 0018, 0020). The Second Award, however, created an award line item for “Code per Appraisal Award” which appropriated value from the Buildings item. (Appx. 0036). This, in effect, created an entirely new item of coverage which was not provided for under the Policy.


An appraisal award “will not be set aside *unless the complaining party shows fraud, mistake or misfeasance on the part of an appraiser or umpire.*” *Yogeshwar, Inc. v. Soc’y Ins.*, No. C23-1005-LTS-KEM, 2024 WL 3337487, at \*12 (N.D. Iowa July 9, 2024) (emphasis added). The

itemization of the Code provisions in one award but not the other, and the creation of a new kind of coverage not defined by the Policy, constitutes a fraud, or at least a mistake, on the part of the appraisers. Pursuant to established Iowa State law, the appraisal award is therefore invalid, and must be set aside.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Park Madison and Pinnacle request that this Honorable Court deny Nationwide's Motion for Summary Judgment, and that the Court grant any further relief that the Court deems necessary and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was served upon all counsel of record and unrepresented parties via the Court's electronic CM/ECF document filing system on this 19<sup>th</sup> of November, 2024, and submitted to the following recipients:

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By: /s/ Michael E. Cooper  
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