2014 WIND Gulf Coast & Southeast Insurance Case Law Update

2014 WIND GULF COAST & SOUTHEAST INSURANCE CASE LAW UPDATE

I. Mississippi

A. Binder – All-Risk Policy

1. *Coastal Hardware & Rental Company v. Certain Underwriters at Lloyds, London*, --- So. 3d ---, 2013 WL 1197883 (Miss. Ct. App. March 26, 2013)
   Underwriters quoted an all-risk policy that did not expressly list wind as an excluded risk, however when deductibles were addressed, the quote stated wind was "excluded' or "not required." Insured accepted and paid the premium and the agent issued a two-page binder for all perils with mold as the only exclusion. The binder also stated it would terminate "upon ***delivery*** of the formal policy issued to replace it". The formal policy, containing a wind exclusion, was mailed two days before Hurricane Katrina struck, but was not delivered. Underwriters denied coverage based on the wind exclusion. The court found that binders are enforceable contracts in Mississippi, and the binder stated it did not terminate "until delivery." To determine the scope the policy Coastal intended to purchase and Underwriters intended to issue, you must look to circumstances surrounding the formation of the binder as well as language in the binder to determine coverage. The court found the "excluded" and "not required" language ambiguous and applied insurance contract rules of construction to construe in favor of coverage.

B. Statute of Limitations

1. *Sweet Valley Missionary Baptist Church v. Alfa Insurance Corporation*, (Miss. Oct 31, 2013)
   Sweet Valley timely filed a complaint in 2008 for breach of contract based on damage from Hurricane Katrina. In July 2009, the trial court dismissed the complaint due to a discovery violation by Sweet Valley. Sweet Valley filed a Rule 59 motion to set aside the judgment, which the court denied in January 2010. That same day, Sweet Valley filed a second complaint. The trial court dismissed the second complaint holding the statute of limitations clock resumed running in July 2009 when the original complaint was dismissed, and the limitations period had expired before the court denied the Rule 59 motion and the second complaint was filed. On appeal, the Mississippi Supreme Court, as a matter of first impression, held a Rule 59 motion tolls the statute of limitations on the underlying claim, just as it tolls the period of appeals and suspends the finality of judgments until ruled upon, and the second complaint was therefore timely.

C. Insurable Interest

1. *Nationwide Mutual Insurance Company v. Baptist*, No. 12-97, 2013 WL 4829262 (N.D. Miss. Sept. 10, 2013)
The Baptists insured their home through Nationwide in 2006. In2008, the bank purchased their home through a foreclosure sale and attempted to remove the Baptists. Despite the foreclosure, the policy was renewed by the Baptists four times, and they filed claims and received payments from Nationwide in 2010. In 2011, the house was destroyed by fire. The Baptists filed a claim for their contents coverage and Nationwide filed a declaratory action arguing the Baptists had no insurable interest in the property. Mississippi law requires an insurable interest at the time of purchase of insurance and at the time of loss. The court found the Baptists did not have a right to renew the policy after they lost ownership, and the renewed policy was void *ab initio*.

D. National Flood Insurance Program – Preemption – WYO

1. *Simmons v. Mississippi Farm Bureau Casualty Insurance Company*, No. 12-63, 2013 WL 3895043 (N.D. Miss. July 29, 2013)
Simmons had a long-standing fiduciary relationship with the insurer and insurer's agent. Simmons sought flood coverage on property about to be purchased. The insurer and agent were aware flooding was imminent and the threat of flood was the reason for the insurance transaction. An application and premium payment was submitted to the agent and Simmons proceeded with the property closing based on assurances of immediate flood coverage. The property suffered flood damage but plaintiff did not receive the policy until after the flood. The claim was denied based on an exclusion of coverage to damage due to a flood already in progress when the policy term began. Simmons sued the insurer in state court for misrepresentation and failure to procure the flood policy. The insurer removed to federal court based on subject matter jurisdiction. The court remanded to state court, holding that although federal law preempts state law tort claims arising from claims handling by a WYO, state law procurement based claims are not preempted. In this case, the alleged misrepresentations concerning flood coverage occurred when Simmons' relationship with the insurer was that of a potential future flood policyholder and further, Simmons was not trying to recover for denial of coverage under the policy, but for misrepresentation by the insurer in the procurement of the policy.

II. Louisiana

A. Law & Ordinance

1. *Orleans Parrish School Board v. Lexington Insurance Company*, 118 So. 3d 1203 (La. App. 4th Cir. June 5, 2013)

The policy contained an Ordinance or Law endorsement that stated "We will not pay for increased construction costs….[u]ntil the property is actually repaired or replaced….as soon as reasonably possible after the loss or damage, ***not to exceed 2 years***." The school board did not complete repairs from Hurricane Katrina damage within two years and the insurer asked the court to dismiss any claims for cost of code upgrades not incurred prior to the two year date based on a failure to satisfy a condition precedent to recovering under the policy. The insured argued it should not be enforced as it was an impossible condition under Civil Code Article 1769. In support the insured filed an affidavit from its CFO stating the time to secure funds, comply with laws to get approval to repair, contract with construction firms, and complete repairs within 2 years was impossible. The court affirmed the dismissal, finding Article 1769 is concerned with ***absolute*** impossibility: "An impossible condition…is not simply one that is impossible under the facts of a given case; rather, it is one that is impossible in all cases."

B. National Flood Insurance Program – Preemption – WYO

1. *Barnett v. Fidelity National Property & Casualty Company*, --- So. 3d ---, 2013 WL 1809872 (La. App. [3rd Cir.] May 1, 2013)
Permitting insureds to bring claims against insurer to recover for breach of contract, breach of warranty, negligence, and negligent misrepresentation after insurer cancelled flood insurance policy, as void from inception, on property allegedly within Coastal Barrier Resource System (CBRS) did not run afoul of the Appropriations Clause; case involved policy procurement, and federal law did not preempt the claims.

III. Texas

A. Appraisal

1. Impartiality: *Amtrust Insurance Company of Kansas v. Starship League City*, No. 11-672, 2013 WL 1222329 (E.D. Tex. March 25, 2013)
The insured filed a claim for wind damage to the roof. The insurer inspected and issued a check for $16,798, which the insured returned. The insured hired Gary Treider to provide services in connection with the claim, and convinced the insured to hire a specific engineer. The engineer determined the roof had been substantially damaged by a tornado and needed to be replaced in its entirety. The insurer disagreed and the insured demanded appraisal, appointing Treider as their appraiser, which resulted in a replacement cost award of $392, 909. The insurer moved to set aside the award claiming the insured's appraiser (Treider) was not impartial. The Court found there was no case that addressed this unique situation, and determined the insurer had offered sufficient facts to create an issue requiring a trial on the impartiality of the appraiser, based on the appraiser's admission his conduct was to advocate his "damage position;" that he convinced the insureds to hire his

recommended engineer; he serves on the Board of Directors of the engineer's company; he told the insureds not to refer to him as an expert as the insurer might object to him as an appraiser; and he did not disclose to the umpire or other appraiser that he had been counseling the insured on the claim.

2. Setting Aside Appraisal Award: *TMM Investments v. Ohio Casualty Insurance Company*, --- F. 3d ---, 2013 WL 5222625 (5th Cir. September 17, 2013)
In determining damage to insured property caused by a hailstorm, the umpire lacked authority to exclude the heating, ventilation, and air-conditioning (HVAC) damage estimate from appraisal award, where both appraisers appointed by the parties agreed as to how much damage the HVAC system sustained. However, the umpire's error in excluding the HVAC damage estimate from the appraisal award did not justify throwing out the entire appraisal award, since the award was otherwise unobjectionable, and umpire's minor mistake should not frustrate the parties' intent to be bound by the appraisal provision of their contract.

B. Examination Under Oath

1. *Shafighi v. Texas Farmers Insurance Company*, 2013 WL 1803609, (Tex. App. – Houston [14th Dist.] April 30, 2013)
The insured made a claim following fire damage to his home, but failed to appear for his EUO and the insurer denied coverage based on the failure to appear. The policy required the insured to submit to examinations under oath. The insured sued and the insurer moved to dismiss for failing to comply with condition precedent which it claimed relieved it of the obligation to pay. The penalty language in the policy stated: "No suit or action can be brought against us, our agents or our representatives unless there has been full compliance with all the terms of this policy." The Court held such a provision forbids the insured from bringing suit prior to compliance, but it does not permit the insurer to deny coverage altogether; the only remedy available to the insurer was abatement until the insured complies.

C. Business Interruption – "Suspension of Operations"

1. *GBP Partners, Limited v. Maryland Casualty Company*, 505 Fed. Appx. 389, 2013 WL 57905 (5th Cir. January 4, 2013)
The insured shopping center's lost rents were not due to "suspension of operations" following a hurricane, as would give rise to coverage for lost rents under a property insurance policy's suspension of operations clause; "operations" were defined by policy as the "business activities occurring at [shopping center]." The center's owner was in the business of owning and renting shopping center space, and operations never completely ceased because at least some of the center's tenants continued to pay rent after the hurricane.

IV. Alabama

A. Bad Faith

1. *State Farm Fire and Casualty Company v. Brechbill*, --- So. 3d ---, 2013 WL 5394444 (Ala. Sept. 27, 2013)
   Although Alabama has two methods of proving bad faith, (*Normal*: refusal to pay; *Abnormal*: failure to investigate), there is only one tort of bad faith. Regardless of whether the claim against insurer is a bad-faith refusal to pay or a bad-faith failure to properly investigate, the tort of bad faith requires proof of absence of legitimate reason for denial. If an insurer has a legitimate, debatable reason for denial of the claim, regardless of the imperfections of the investigation, they cannot be found liable for bad faith refusal to investigate or refusal to pay.

V. Florida

A. Bad Faith

1. Appraisal Constitutes "Favorable Resolution"
   a. *Hunt v. State Farm Florida Insurance Company*, 112 So. 3d 547 (Fla. 2d DCA April 5, 2013)
      The homeowner filed a civil remedy notice of insurer violation over the issue of the damages estimate. After filing suit, an appraisal award was entered in the insured's favor, the insurer paid award, and the insured filed a bad faith lawsuit. The trial court entered summary judgment in favor of the insurer on grounds that the insured could not maintain a bad faith claim without a breach of contract judgment against insurer. On appeal the Court held an appraisal award is a sufficient resolution in insured's favor to satisfy the condition precedent required to bring a bad faith action. The Court also rejected the insurer's claim the civil remedy notice was invalid because it did not specify a definite "cure" amount, holding there is no statutory requirement that the CRN must provide a specific cure amount.

B. Conditions Precedent – Late Notice -- Prejudice

1. *1500 Coral Towers Condominium Association v. Citizens Property Insurance Corporation*, 112 So. 3d 541 (Fla. 3d DCA April 3, 2013)
   The insurer was presumed to be prejudiced by the insured's late notice of damage five years after hurricane, and the insured failed to overcome the presumption of prejudice. Once the presumption of prejudice exists, the burden shifts to the insured to show that the insurer was not prejudiced by the insured's late notice. Conclusory statements by one of its engineers that, in his

opinion, the late notice did not prejudice insurer, is not the legally sufficient evidence required to overcome the presumption of prejudice.

C. Economic Loss Rule

1. *Tiara Condominium Association v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. March 7, 2013)
   Application of the economic loss rule is limited to products liability cases -- Economic loss rule does not bar an insured's suit for negligence or breach of fiduciary duty against an insurance broker where the parties are in contractual privity with one another and the damages sought are solely for economic losses.

D. Exclusions – Water Damage

1. *Cheetham v. Southern Oak Insurance Company*, 114 So. 3d 257 (Fla. 3d DCA March 27, 2013)
   Exclusion for damage caused by water or water-borne material which backs up through sewers or drains is not applicable where the damage results from water or material backing up through blocked pipe within the plumbing system. The water damage exclusion relates to damage caused by water originating from somewhere other than the residence premises' plumbing system. Because the claimed loss was caused by the deterioration of a pipe within the plumbing system, which caused water or water-borne material emanating from the residence premises' plumbing system to back up into the residence premises, the loss is a covered loss.

E. Appraisal

1. *Jossfolk v. United Property & Casualty Insurance Company*, 110 So. 3d 110 (Fla. 4th DCA March 20, 2013)
   Following payment of an appraisal award which allowed for replacement of two squares of tile roof for hurricane damage, the insured applied for roofing repair permit but was denied because repair exceeded code percentage requiring replacement of entire roof. The court held the insured was entitled to appraisal for Law & Ordinance coverage. Ordinance and Law is not recoverable until it is incurred and thus could not have been appraised at the time of the original appraisal.

F. Overhead & Profit

1. *Trinidad v. Florida Peninsula Insurance Company*, --- So. 3d ---, 2013 WL 3333823 (Fla. July 3, 2013)
   Under Florida Statute § 627.7011, governing payment for loss for which a dwelling or personal property is insured on the basis of replacement costs, insurers are not permitted to hold back any portion of the replacement cost

payment, including costs for a general contractor's overhead and profit where the insured is reasonably likely to need a general contractor for the repairs, contingent on the insured's actually repairing or replacing the property. The homeowner's policy, requiring payment of the replacement cost of the damaged property, did not require the insured to actually incur expenses for the repairs in order to be entitled to payment for costs of overhead and profit where the insured would be reasonably likely to need a general contractor for repairs.

G. Concurrent Causation/Efficient Proximate Cause

1. *American Home Assurance Company v. Sebo*, --- So. 3d ---, 2013 WL 5225271 (Fla. 2d DCA September 18, 2013)
   In a case involving multiple perils and a first-party manuscript insurance policy containing no anti-concurrent causation language, the concurrent causation doctrine should not be applied. Instead, the court held the efficient proximate cause doctrine should govern.

VII. Federal – Flood

A. Proof of Loss

1. Repudiation: *Jakubowski v. FEMA*, No. 12-2202, 2013 WL 1284389 (D. N.J. March 27, 2013)
   A New Jersey federal magistrate judge granted an insured's motion to amend his complaint to assert an additional breach of contract claim for repudiation against the Federal Emergency Management Agency (FEMA) for failing to participate in appraisal when invoked by the insured, in his lawsuit seeking coverage for Hurricane Irene flood damage. Although the insured filed a timely proof of loss for the undisputed portion of the claim, he did not file a supplemental proof of loss as to disputed portions of claim, the court found repudiation may apply in the context of an SFIP, which would relieve the insured of the obligation to file an additional proof of loss before filing suit.

2. *DeCosta v. Allstate Insurance Company*, --- F. 3d ---, 2013 WL 5290030 (1st Cir. September 20, 2013)
   The adjuster's estimate of disputed damages, accompanied by timely, executed proof-of-loss forms as to undisputed amounts, did not satisfy proof of loss provision in standard flood insurance policy (SFIP), where the insured did not sign and swear to an amount in that estimate; while SFIP did not require that the proof of loss follow any particular format, proof of loss was defined as statement of an insured, not of some third party, and insured was required to sign and swear to that statement.

B. Statute of Limitations

1. *Wolfe v. American Bankers Insurance Company of Florida*, No. 10-578 (S.D. Tex March 1, 2013)
An insurer formally denied the plaintiff's proof of loss on September 2, 2009 and the plaintiff filed suit on August 3, 2010. A Texas federal magistrate judge agreed with the opinion of Qader v. FEMA, 543 F. Supp.2d 558, 561-562 (E.D. La. 2008) and that the one-year filing period for a federal flood claim begins to run when FEMA or its fiscal agent denies a claim that is based on the insured's sworn proof of loss, not from the date a claim is denied based upon an adjuster's report. Therefore, the court held that mailing of a pre-proof of loss notice letter of disallowance by a claims examiner which informs the insured that he may file suit "within one-year of the date of this letter" does not trigger the one-year filing period in §4072 or Article VII(R) of the SFIP.
***but see*: **WYO Bulletin W-13069** (issued Nov. 21, 2013) *Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072*:

> "[I]n those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. . . The 1 year to sue typically will not be triggered until the required Proof of Loss . . . is submitted and there is a complete or partial disallowance/denial of the amount sought. However . . . there are instances when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured."

124 So.3d 643
Supreme Court of Mississippi.

SWEET VALLEY MISSIONARY BAPTIST CHURCH a/k/a Hub Community Baptist
v.
ALFA INSURANCE CORPORATION a/k/a a Alfa General Insurance Corporation a/k/a a Alfa Mutual General Insurance Company a/k/a Alfa Specialty Insurance Corporation.

No. 2010–CT–01807–SCT. | Oct. 31, 2013.

Synopsis

Background: Insured filed suit against property insurer for breach of policy arising out of payments on claims for hurricane damage. The Marion County Circuit Court, R.I. Prichard, III, J., dismissed complaint, denied insurer's motion for new trial, and then dismissed second complaint as time-barred. Insured appealed. On rehearing, the Court of Appeals, 124 So.3d 683, 2013 WL 1122310, reversed and remanded. Certiorari review was granted.

[Holding:] As matter of first impression, the Supreme Court, Coleman, J., held that insured's motion to set aside judgment or in alternative for new trial tolled three-year limitations period governing claim for breach of contract.

Judgment of Court of Appeals affirmed; judgment of Circuit Court reversed and remanded.

Attorneys and Law Firms

***643** Marc L. Frischhertz, David Lee Brewer, attorneys for appellant.

Toby Justin Gammill, Whitney Warner Gladden, Jackson, Jacob O. Malatesta, Greenville, attorneys for appellee.

EN BANC.

Opinion

***644** COLEMAN, Justice, for the Court:

¶ 1. Sweet Valley Missionary Baptist Church (Sweet Valley) filed a complaint on August 29, 2008, against its insurance carrier, Alfa Insurance Corporation (Alfa). Based on Sweet Valley's failure to cooperate in discovery, the trial court entered an order of dismissal on June 29, 2009. On July 8, 2009, Sweet Valley filed a motion to set aside judgment, or, in the alternative, a motion for new trial. The trial court denied the motion on January 29, 2010, and, in response, Sweet Valley filed a second complaint against Alfa the same day. The trial court dismissed the second claim based on the expiration of the statute of limitations. Sweet Valley appealed. On rehearing, the Court of Appeals reversed the trial court's judgment and remanded for further proceedings. Alfa filed a petition for writ of certiorari, and we granted it. We hold that a motion filed pursuant to Mississippi Rule of Civil Procedure 59(e) tolls the applicable statute of limitations, and we reverse the decision of the trial court.

FACTS AND PROCEDURAL HISTORY

¶ 2. Sweet Valley filed a complaint on August 29, 2008, against Alfa, its insurance carrier. Sweet Valley alleged a breach of contract based on Alfa's allegedly deficient coverage payment for damage caused by Hurricane Katrina. Sweet Valley alleged that Alfa's payout did not cover all of its losses and did not meet its policy limits as provided in the insurance contract. During discovery, problems arose when one of Sweet Valley's attorneys, Marc Frischhertz, failed to follow the proper procedures to be admitted to practice *pro hac vice* in Mississippi. Under the belief that he already had been admitted to practice *pro hac vice*, Frischhertz signed discovery and expert designations. Because doing so while not admitted to practice law created discovery issues, the trial court dismissed Sweet Valley's case without prejudice on June 29, 2009.

¶ 3. Soon after, on July 8, 2009, Sweet Valley filed a motion to set aside the judgment or for a new trial. A hearing was held, and on January 29, 2010, the circuit court denied Sweet Valley's motion. On that same day, Sweet Valley filed a new complaint against Alfa. Alfa filed a motion to dismiss the second complaint alleging that while the three-year statute of limitations was tolled during the first lawsuit, the clock resumed when the suit was dismissed on June 29, 2009. Therefore, Alfa argues that the statute of limitations has run as to Sweet Valley's January 29, 2010, complaint. In its order dismissing the second complaint, the trial court determined that Sweet Valley had filed its motion to set aside the judgment or for a new trial pursuant to Mississippi Rule of Civil Procedure 59, and that the motion did not toll

the running of the statute of limitations. Additionally, the trial court found that as of June 29, 2009, forty-six days remained on the three-year statute of limitations, thus making August 14, 2009, the operative deadline for the filing of new complaints. Because Sweet Valley's second complaint was not filed until January 29, 2010, the trial court dismissed the complaint as untimely, and Sweet Valley appealed. We assigned the case to the Court of Appeals.

¶ 4. The Court of Appeals first affirmed the trial court's dismissal. However, on rehearing, the Court of Appeals issued a second opinion, replacing the first, in which the court agreed with Sweet Valley's claim that its motion was timely. *Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp.*, 124 So.3d 683 (Miss.Ct.App.2013), *cert. granted*, 115 So.3d 804 (Miss.2013). The court noted that a Rule 59 motion for new trial tolls the statute of ***645** limitations on the underlying claim, just as it tolls the period of appeals and suspends the finality of judgments. The Court of Appeals reversed the judgment of the trial court dismissing the second complaint and remanded the case. Alfa filed a petition for writ of certiorari, which we granted.

DISCUSSION

¶ 5. The issue presented by Alfa is whether the "Motion to Set Aside Judgment or in the Alternative, Motion for New Trial" filed by Sweet Valley on July 8, 2009, tolled the statute of limitations on the underlying contract claim.

[1] **[2]** **[3]** ¶ 6. The standard of review concerning a trial court's grant or denial of a motion to dismiss is de novo. *Scaggs v. GPCH–GP, Inc.*, 931 So.2d 1274, 1275 (¶ 6) (Miss.2006). "When considering a motion to dismiss, the allegations in the complaint must be taken as true[,] and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Id.* (quoting *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (¶ 7) (Miss.1999)) (citing *T.M. v. Noblitt*, 650 So.2d 1340, 1342 (Miss.1995)). Issues involving the statute of limitations are reviewed de novo. *Lincoln Elec. Co. v. McLemore*, 54 So.3d 833, 835 (¶ 10) (Miss.2010).

¶ 7. Sweet Valley argues that the trial court erred when it denied Sweet Valley's motion for a new trial based on the expiration of the statute of limitations. Instead, Sweet Valley would apply the decision of Court of Appeals, which determined that the statute of limitations was tolled by the filing of the motion on July 8, 2009, until January 29, 2010, when the trial court denied the motion.

[4] **[5]** **[6]** ¶ 8. The issue of whether a Rule 59 motion tolls the statute of limitations of the underlying claim is one of first impression in Mississippi. As the Court stated in *Hill v. Ramsey*, "[i]t is elementary that, unless process is not timely served, the statute of limitations is tolled upon the filing of the complaint, and does not begin to run again until litigation has ended." *Hill v. Ramsey*, 3 So.3d 120, 123 (¶ 10) (Miss.2009). It has long been settled that a timely motion for a new trial extends a judgment until the motion is granted or denied. *Laurel Oil & Fertilizer Co. v. McCraw*, 178 Miss. 117, 172 So. 503 (1937). In other words, Rule 59(e) motions stay the finality of judgments as well as the thirty-day time period to appeal. *Bruce v. Bruce*, 587 So.2d 898, 903 (Miss.1991); *see also Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955). Further, "Professor J.W. Moore has aptly described the effect of Rule 59 motion on a previously filed notice of appeal: 'The appeal simply self-destructs.' " *Bruce*, 587 So.2d at 901 (quoting 9 *Moore's Federal Practice* ¶ 204.12[1], at 4–70, n. 17 (1989)). "[I]t is a familiar principle that no statute of limitations runs against a party until he is allowed by law to do the thing as to which the statute is interposed." *Moore v. Montgomery Ward & Co.*, 171 Miss. 420, 156 So. 875 (1934).

¶ 9. In contrast, motions filed under Mississippi Rule of Civil Procedure 60(b) for relief from a judgment do not toll the time for appeal or the enforceability of a judgment. *Bruce*, 587 So.2d at 903. The Court of Appeals also has specifically found that pending motions filed under Rule 60 do not toll the statute of limitations. *Davis v. Biloxi School Dist.*, 43 So.3d 1135, 1138 (¶¶ 9–10) (Miss.Ct.App.2009). "Importantly, a Rule 60(b) motion does not operate as a stay...." Miss. R. Civ. P. 60 cmt. Unlike a Rule 59 motion, Rule 60(b) motions may be filed later than ten days after a judgment but must concern fraud, misrepresentation, or other ***646** misconduct of an adverse party; accident or mistake; newly discovered evidence that could not have been discovered in time; or other reasons justifying relief. Miss. R. Civ. P. 60(b). Rule 59(e) motions provide the court with the opportunity to correct its own error, while "Rule 60(b) motions, on the other hand, proceed on the assumption that the trial court has entered a valid and enforceable judgment which has become final." *Bruce*, 587 So.2d at 904.

¶ 10. Logically, it stands to reason that if a Rule 59 motion tolls the period for appeals and the enforceability of a

judgment, it also should toll the statute of limitations of the underlying claim. If this is not the rule, plaintiffs who file Rule 59 motions risk being left with no remedy if their motion is denied and the statute of limitations has run. As the Court of Appeals noted, "it would not be in the best interest of judicial economy to force litigants with an impending statute of limitations to file a new complaint without first having the option to move to alter or amend the judgment." *Sweet Valley Missionary Baptist Church,* 124 So.3d at 687 (¶ 15). The U.S. Supreme Court, in *Osterneck v. Ernst & Whinney,* analyzed the federal version of Rule 59, which is substantially similar to the Mississippi rule, and held that a judgment is not final—even if it may "appear to be a final judgment"—until the court has properly disposed of pending Rule 59 motions. *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 174, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989). As noted previously, the statute of limitations is tolled upon the filing of the complaint and does not begin to run again until litigation has ended. *Hill,* 3 So.3d at 123 (¶ 10). Because the statute of limitations is tolled until litigation has ended, Rule 59 motions stay the finality of judgments, and the filing of a Rule 59 motion prevents the running of the statute of limitations on the underlying claim. Because it is consistent with our law and serves judicial economy, we hold that a properly filed motion under Rule 59 continues the tolling of the applicable statute of limitations which occurs when a complaint is filed.

[7] ¶ 11. Because we have found that the statute of limitations was tolled until the trial court denied Sweet Valley's Rule 59(e) motion, the filing of the second complaint on the same day was timely. The three-year statute of limitations applicable to contract claims began on October 14, 2005, when Alfa paid Sweet Valley $9,951.89, which Sweet Valley alleges did not fully satisfy its claim. When Sweet Valley filed its complaint on August 29, 2008, with forty-six days remaining under the statute, the statute of limitations was tolled until the case was dismissed on June 29, 2009. The statute of limitations continued to be tolled by the Rule 59 motion to alter or amend the judgment until that motion was denied by the trial court on January 29, 2010. Sweet Valley filed its second complaint with the trial court on the same day its Rule 59 motion was denied. Accordingly, the second complaint was not barred by the statute of limitations. As the statute of limitations issue is dispositive, we decline to address Sweet Valley's remaining arguments.

CONCLUSION

¶ 12. We hold that a timely filed motion under Rule 59 continues the tolling of the applicable statute of limitations until the court rules on the Rule 59 motion. As a result, we hold that the trial court erred in its dismissal of Sweet Valley's second complaint, filed on January 29, 2010. Thus, the decision of the Court of Appeals is affirmed, the judgment of the circuit court is reversed, and the case is remanded to the Marion County Circuit Court for further ***647** proceedings consistent with this opinion.

¶ 13. **THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED. THE JUDGMENT OF THE MARION COUNTY CIRCUIT COURT IS REVERSED, AND THE CASE IS REMANDED.**

WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., LAMAR, KITCHENS, CHANDLER, PIERCE, AND KING, JJ., CONCUR.

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2013 WL 5225271
Only the Westlaw citation is currently available.

District Court of Appeal of Florida, Second District.

AMERICAN HOME ASSURANCE CO., INC., Appellant/Cross–Appellee,
v.
John Robert SEBO, individually and as Trustee under Revocable Trust Agreement of John Robert Sebo dated November 4, 2004, Appellee/Cross–Appellant,
and
Paul A. Jacobsen, individually and Sarah T. Jacobsen, individually, Appellees.

No. 2D11–4063. | Sept. 18, 2013.

Synopsis

Background: Insured brought declaratory-judgment action against property insurer, asserting that policy provided coverage regarding damage that was sustained by insured's home. Following a jury trial, the Circuit Court, Collier County, Cynthia Pivacek, J., entered judgment in favor of insured. Insurer appealed.

Holdings: The District Court of Appeal, Northcutt, J., held that:

[1] efficient-proximate-cause theory, not concurrent-causation doctrine, applied when determining causation of insured's loss, and

[2] defective-work exclusion did not exclude losses arising from concurrent causes.

Reversed and remanded.

West Headnotes (5)

[1] Insurance
Risks or Losses Covered and Exclusions

"Property insurance" is a contract between the insured and the insurer to cover property losses that are either caused by certain perils that are specifically named in the policy or are caused by "all perils" except for those specifically excluded from coverage; these perils are usually physical forces such as fire, rain, and wind.

[2] Insurance
Combined or Concurrent Causes

Efficient-proximate-cause theory, not concurrent-causation doctrine, applied when determining causation of insured's loss regarding home, which sustained damage allegedly due to wind, rain, and defective construction, and thus loss would be covered under property insurance policy if efficient proximate cause of loss were covered peril.

[3] Insurance
Faulty Workmanship or Materials

Insurance
Combined or Concurrent Causes

Property insurance policy's defective-work exclusion did not exclude losses arising from concurrent causes; exclusion stated merely that it applied to any loss caused by defective work, and other exclusions in policy contained specific anti-concurrent-cause language.

[4] Insurance
Exclusions, Exceptions or Limitations

Court construes exclusionary clauses in insurance policies even more strictly against an insurer than it does coverage clauses.

[5] Insurance

Exclusions and Limitations in General

Insurer is responsible to set forth what losses are excluded under an insurance policy.

Attorneys and Law Firms

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David A. Zulian and Edward K. Cheffy of Cheffy Passidomo, P.A., Naples; and Mark A. Boyle, Geoffrey H. Gentile, Michael W. Leonard, Debbie Sines Crockett, and Amanda K. Anderson of Boyle, Gentile, Leonard & Crockett, P.A., Fort Myers, for Appellee/Cross–Appellant John Robert Sebo.

No appearance for Appellees Paul A. Jacobsen and Sarah T. Jacobsen.

Opinion

NORTHCUTT, Judge.

***1** John Sebo purchased property insurance for his home in Naples, Florida, from American Home Assurance Company (AHAC). After the home was substantially damaged by rain and a hurricane, AHAC denied Sebo's claim for the damages based on several coverage exclusions. Sebo filed a declaratory action seeking coverage and a jury found in his favor. The circuit court entered a judgment for more than $8,000,000. As we will explain in detail, we agree with AHAC that a new trial is required. We reverse and remand for proceedings consistent with this opinion.

Facts

Sebo purchased the home in April 2005, when it was four years old. AHAC provided homeowners insurance as of the date of the purchase. The policy, which insured against "all risks," was issued through a private client group and was referred to as a manuscript policy. It was not a standard form but instead was created specifically for the Sebo residence. The house and other permanent structures were insured for over $8,000,000. The policy also provided additional coverage for loss of use of the home.

Shortly after Sebo bought the residence, water began to intrude during rainstorms. Major water leaks were reported to Sebo's property manager as early as May 31, 2005. She prepared a list of problems: leaks in the main house at the foyer, the living room, dining room, piano room, exercise room, master bathroom, and upstairs bathroom. By June 22, 2005, the property manager advised Sebo of these leaks in writing. It became clear that the house suffered from major design and construction defects. After an August rain, paint along the windows just fell off the wall. In October 2005, Hurricane Wilma struck Naples and further damaged the Sebo residence.

Sebo did not report the water intrusion and other damages to AHAC until December 30, 2005. AHAC investigated the claim, and in April 2006 it denied coverage for most of the claimed losses. The policy provided $50,000 in coverage for mold, and AHAC tendered that amount to Sebo but stated that "the balance of the damages to the house, including any window, door, and other repairs, is not covered." In May 2008, Sebo renewed his claim and sent more information about the damages to AHAC, but AHAC again denied the claim except for the $50,000 in mold damages.

The residence could not be repaired and was eventually demolished. In January 2007, Sebo filed suit against a number of defendants, including the sellers of the property, the architect who designed the residence, and the construction company that built it. He alleged that the home had been negligently designed and constructed and that the sellers had fraudulently failed to disclose the defects in the property. Sebo eventually amended his complaint in November 2009, adding AHAC as a defendant and seeking a declaration that the policy provided coverage for his damages. After Sebo settled his claims against a majority of all other defendants, the trial proceeded only on his declaratory action against AHAC. The jurors found in favor of Sebo, and the court eventually entered judgment against AHAC.

The Policy

***2** The policy covered "all risks of physical loss or damage to your house, contents, and other permanent structures unless an exclusion applies" resulting from "occurrences." As it relates to this case, "occurrence" was defined as "[a] loss or an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which

occurs during the Policy Period and results in personal injury or property damages." AHAC denied coverage for most of Sebo's losses based primarily on the policy's exclusion for Faulty, Inadequate or Defective Planning:

> We do not cover any loss caused by faulty, inadequate or defective:
>
> a. Planning, zoning, development, surveying, siting;
>
> b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> c. Materials used in repair, construction, renovation or remodeling; or
>
> d. Maintenance;
>
> of part or all of any property whether on or off the residence.

Although many of the exclusions in the policy provided coverage for ensuing damages, [1] the above-quoted exclusion did not. Pertinent here, the policy did provide $50,000 in coverage for ensuing damages caused by fungi, wet or dry rot, or bacteria, as long as the damages resulted from a covered peril. Rain was a covered peril. As mentioned, AHAC offered Sebo this $50,000 to settle his claims. Sebo refused to settle.

Coverage for Damages Caused by Multiple Perils

Sebo's complaint against AHAC was for declaratory relief. It stated:

> This Count is being plead[ed] as an alternative to the Counts plead[ed] against the other Defendants arising out of the latent construction defects discovered at the property, in substantial part, because certain of the Defendants have alleged in their affirmative defenses that the damages to the Property were caused by weather-related problems, including but not limited to Hurricane Wilma. Alternatively, this action is limited to the damages to the Property and the insured caused by weather-related problems, including but not limited to Hurricane Wilma, not caused solely by construction defects.

There is no dispute in this case that there was more than one cause of the loss, including defective construction, rain, and wind. In late 2010, AHAC and Sebo filed cross-motions for summary judgment on the issue of whether the policy covered Sebo's damages. Sebo asserted AHAC was required to cover all its losses under the concurrent causation doctrine, which was applied in *Wallach v. Rosenberg*, 527 So.2d 1386 (Fla. 3d DCA 1988). Under that doctrine, when multiple perils act in concert to cause a loss, and at least one of the perils is insured and is a concurrent cause of the loss, even if not the prime or the efficient cause, the loss is covered. *See id.* at 1387–88. Thus, the *Wallach* court held "[w]here weather perils combine with human negligence to cause a loss, it seems logical and reasonable to find the loss covered by an all-risk policy even if one of the causes is excluded from coverage." *Id.* at 1388. In this case, defective construction, the basis of Sebo's suit against the codefendants, was excluded from coverage, but weather-related damages, such as rain, were covered perils.

***3** A prominent insurance treatise explains the concurrent causation rule:

> [T]he concurrent cause rule takes the approach that coverage should be permitted whenever two or more causes do appreciably contribute to the loss, and at least one of the causes is a risk which is covered under the terms of the policy. Some jurisdictions limit the application of the concurrent cause rule by requiring that the concurring causes be independent of each other in order for the rule to apply.

Steven Plitt, Daniel Maldonado & Joshua D. Rogers, *Couch on Insurance* § 101.55 (3d ed.2012) (footnote omitted). Indeed, *Wallach* requires that the causes be independent. 527 So.2d at 1388. AHAC contends that the perils at play in this case were dependent and that therefore the circuit court erred in ruling that the concurrent causation doctrine applied. We do not address this issue because, as we will explain, we disagree with *Wallach*'s determination that the concurrent causation doctrine should be applied in a case involving multiple perils and a first-party insurance policy.

The concurrent causation doctrine is one of two prevailing theories employed to decide what coverage is afforded under

these circumstances. The other one is the efficient proximate cause doctrine. Under it, the finder of fact, usually the jury, determines which peril was the most substantial or responsible factor in the loss. If the policy insures against that peril, coverage is provided. If the policy excludes that peril, there is no coverage. [2]

Although the efficient proximate cause doctrine has long existed in some form, its contemporary genesis is widely attributed to the California Supreme Court's decision in *Sabella v. Wisler*, 59 Cal.2d 21, 27 Cal.Rptr. 689, 377 P.2d 889 (1963). Wisler negligently built a home and negligently installed its sewer line on improperly compacted fill land. Four years after he sold the home to the Sabellas, the sewer line began to leak and infiltrate the unstable land beneath the foundation. The house settled but did not collapse. *Id.* at 892. The Sabellas sought coverage under a homeowners' policy that insured against "all risks of physical loss" but excluded loss caused by "settling, cracking, shrinkage, or expansion of pavements, foundations, walls, floors, or ceilings; unless loss by ... collapse of buildings ensues." *Id.* at 891–92. The insurer denied coverage for the Sabellas' losses based on this exclusion. The California Supreme Court found as a matter of law that an insured peril, negligence in the installation of the sewer pipe, was the predominating or moving efficient cause of the loss. *Id.* at 895. It applied section 530 of the California Insurance Code, which stated that " '[a]n insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.' " *Id.* at 896. Because the court had determined that a covered peril was the proximate cause of the loss, it ruled that there was coverage under the policy.

***4** About ten years later, the California court came to a somewhat different resolution in a liability insurance case, *State Farm Mutual Automobile Insurance Co. v. Partridge*, 10 Cal.3d 94, 109 Cal.Rptr. 811, 514 P.2d 123 (1973). Partridge, the named insured in a State Farm homeowners' policy and a State Farm automobile policy, filed down the trigger mechanism on his pistol to give the weapon a "hair-trigger" action. Later, Partridge had the altered pistol with him when he and several friends were hunting rabbits by shooting guns out the windows of his four-wheel-drive vehicle. Partridge veered off the road to chase a rabbit; he hit a bump and the pistol discharged, severely wounding one of his passengers. *Id.* at 125–26.

The passenger sued Partridge and a dispute arose over whether both the automobile policy and the homeowners policy provided coverage. State Farm asserted that because the accident was automobile related, there was no coverage under the homeowners policy, which excluded coverage for "bodily injury ... arising out of the ... use of ... any motor vehicle." *Id.* at 126. The lower court ruled that it was clear that the automobile policy was implicated because the accident related to the use of the insured vehicle. *Id.* at 125. But the lower court had identified two acts of negligence: driving the vehicle off the road onto rough terrain and filing the pistol's trigger mechanism. *Id.* at 127. The supreme court remarked that the use of Partridge's car was not the sole cause of his passenger's injuries, but was only one of the joint causes. *Id.* at 129. The second cause was his negligent filing of the trigger mechanism, which was not auto-related conduct. The supreme court ruled:

> Although there may be some question whether either of the two causes in the instant case can be properly characterized as the "prime," "moving" or "efficient" cause of the accident we believe that coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply [a] concurrent proximate cause of the injuries.

Id. at 130 (footnote omitted). Thus the *Partridge* court applied concurrent causation theory and found coverage for liability to a third party under both the homeowners and the automobile policies.

The California Supreme Court reconciled the *Sabella* and *Partridge* holdings in *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal.3d 395, 257 Cal.Rptr. 292, 770 P.2d 704 (1989) (In Bank). The *Garvey* court began by observing that a number of California courts had misinterpreted and misapplied *Sabella* and *Partridge*. *Sabella* was a first-party property damage case while *Partridge* was a third-party liability case involving damages for personal injury. Courts that employed the *Partridge* concurrent causation approach in a first-party property insurance case, instead of the *Sabella* efficient proximate cause theory, ignored the important distinction between property loss coverage and tort liability coverage. *Id.* at 705.

***5** **[1]** Property insurance is a contract between the insured and the insurer to cover property losses that are either caused by certain perils that are specifically named in the policy or are caused by "all perils" except for those specifically excluded from coverage. These perils are usually physical forces such as fire, rain, and wind. Liability insurance, on the other hand, looks to tort concepts such as fault, proximate cause, and duty. Insuring liability for a person's negligence includes coverage for a broad spectrum of unnamed perils, i.e., losses of any sort that are caused by the insured's negligent acts. *Id.* at 710. The covered perils in a property insurance policy determine the premium the insured will pay and the distribution of risk between the insured and the insurer. And as the *Garvey* court stated, an insured's reasonable expectations of coverage under the policy "cannot reasonably include an expectation of coverage ... in which the efficient proximate cause of the loss is an activity expressly *excluded* under the policy." *Id.* at 711.

As elucidated in *Garvey,* the distinction between first-party property loss cases and third-party personal injury liability cases is the basis of our disagreement with *Wallach.*

Florida Law on Multiple Peril Losses

[2] The First District's *Hartford Accident & Indemnity Co. v. Phelps,* 294 So.2d 362 (Fla. 1st DCA 1974), was one of the first Florida cases to examine property insurance coverage for losses caused by multiple perils. In that case, two perils combined to cause damage to the Phelpses' residence: the covered peril of water leaking from the plumbing system and the excluded peril of building settlement. The First District relied on *Sabella* and found coverage under the homeowners policy because the plumbing leak was the "proximate and efficient cause of the loss." *Id.* at 364.

This efficient proximate cause theory was the prevailing law in Florida until the Third District's decision in *Wallach,* 527 So.2d 1386, which also involved first-party coverage under a homeowners policy. The *Wallach* court briefly discussed *Phelps,* but concluded that the better rule would be that "where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not ... the prime or efficient cause of the accident' " coverage may be available. *Id.* at 1387 (quoting 11 G. Couch, *Couch on Ins.2d* § 44:268 (rev. ed.1982)). The court found *Partridge* to be persuasive and determined that the *Sabella* court's efficient proximate cause theory was of little assistance when the perils were independent of each other. Thus, *Wallach* impliedly rejected *Phelps* and adopted the concurrent causation doctrine.

Wallach was issued the year before *Garvey.* And, like the California courts that were later held to have misapplied that state's case law, *Wallach* did not differentiate between first-party coverage under a homeowners policy and a third-party tort liability policy. In fact, although *Wallach* involved a first-party dispute between a homeowner and its insurer, it quoted *Partridge* for the proposition that "coverage under a *liability insurance policy* is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries." *Id.* at 1388 (quoting *Partridge,* 109 Cal.Rptr. 811, 514 P.2d at 130) (emphasis supplied).

***6** The First District's *Phelps* aside, it seems that the multiple-peril issue has not often arisen in Florida cases involving first-party coverage under homeowners policies. The dissent in *Hagen v. Aetna Casualty & Surety Co.,* 675 So.2d 963, 971 (Fla. 5th DCA 1996) (Goshorn, J., dissenting), cited *Wallach* 's concurring causation language, but that case involved tort liability under a commercial general liability policy; it was not a first-party case. *See also Transamerica Ins. Co. v. Snell,* 627 So.2d 1275 (Fla. 1st DCA 1993) (citing the concurrent causation doctrine in a case involving an errors and omissions policy where Snell sued Transamerica's insured for negligence, a third-party case). [3]

Against this sparse background of precedents, we disagree with the rule stated in *Wallach* and applied by the circuit court in this case. As the *Garvey* court pointed out, a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy. *Garvey,* 257 Cal.Rptr. 292, 770 P.2d at 705. For example, the AHAC policy states: "Your homeowners insurance policy does not cover property damage from floods. A separate policy of flood insurance may be available to cover flood damage for an additional premium from the federal government." But taken to its extreme, the concurrent causation theory might have this policy cover flood damage in a hurricane when only a minor portion of the damages was caused by the covered peril of rain.

The coverage analysis in first-party claims, the subject of a contract between parties, should be decided on the basis of the contract: if the efficient proximate cause of the loss is a covered peril, the losses are covered; if it is an excluded peril, the losses are not covered. We recognize that *Garvey* was

underpinned by a California statute, Cal. Ins.Code § 530, 532, and that Florida does not have such a legislative mandate. [4] But we note that the majority of states have adopted the efficient proximate cause theory for analyzing this issue. *See* Michael C. Phillips & Lisa L. Coplen, *Concurrent Causation versus Efficient Proximate Cause in First–Party Property Insurance Coverage Analysis*, 36 Brief 32, 35 (Winter 2007) (listing thirty-four states that have adopted the efficient proximate cause model, and only seven, including Florida, that have applied the concurrent causation theory).

We reverse and remand this case for a new trial in which the causation of Sebo's loss is examined under the efficient proximate cause theory. Because the question of whether multiple perils are dependent or independent is relevant only under a concurrent causation analysis, *see Couch on Insurance* § 101.55 (quoted above), we need not address AHAC's argument on the point.

Anti–Concurrent Cause Language in Exclusion

[3] Endeavoring to avoid coverage for uninsured perils under either the efficient proximate cause theory or the concurrent causation notion, insurers began adding language known generically as anti-concurrent cause clauses to their policies. AHAC argues that the anti-concurrent cause language in its exclusion for defective work entitled it to a summary judgment on all of Sebo's claims except for the $50,000 it tendered for ensuing mold damages. We note that some states reject the application of these clauses. *See, e.g., Howell v. State Farm Fire & Cas. Co.*, 218 Cal.App.3d 1446, 267 Cal.Rptr. 708, 712–13 (1990), *disapproved on other grounds by Reid v. Google, Inc.*, 50 Cal.4th 512, 113 Cal.Rptr.3d 327, 235 P.3d 988 (2010). But Florida courts have not definitively weighed in on this topic. It is not necessary for us do so here because the language relied upon by AHAC was insufficient to exclude losses arising from concurrent causes.

***7 [4] [5]** The defective work exclusion stated merely that it applied to any loss caused by defective work. In contrast, other exclusions in the Sebo policy contained specific anti-concurrent-cause language. For example, the pollution or contamination exclusion recited that AHAC did not "cover any loss, directly or indirectly, and regardless of any cause or event contributing concurrently or in any sequence to the loss" caused by pollutants. We construe exclusionary clauses in insurance policies even more strictly against an insurer than we do coverage clauses, and we hold the insurer responsible to set forth what damages are excluded under the policy. *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1086 (Fla.2005). Contrasted with the other exclusionary clauses in the same policy, AHAC's defective work exclusion simply did not exclude losses arising from concurrent causes.

Evidence of Settlements

AHAC argues that if it is entitled to a new trial, as we so hold, it should be allowed to introduce evidence that Sebo had settled claims for faulty construction and design with some of AHAC's former codefendants. It relies on *Citizens Property Insurance Corp. v. Ashe*, 50 So.3d 645 (Fla. 1st DCA 2010), for this proposition.

Ashe was a valued policy law case. The valued policy law statute applies in the case of a total loss. It states in paragraph (1)(a) that "the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid." § 627.702(1)(a), Fla. Stat. (2005). Ashe's home was destroyed in Hurricane Ivan. Citizens insured the residence for losses caused by a windstorm. Ashe also had a policy of flood insurance through USAA and the National Flood Insurance Program that insured the house against damages from a flood. He received the full amount of the flood coverage and then sought full coverage for his loss under his windstorm policy, which was subject to the valued policy statute. In the ensuing lawsuit, the court determined that Citizens was permitted to introduce evidence that Ashe had received benefits from his flood policy, but not the amount he had received.

The decision in *Ashe* was grounded on a valued policy law concept explained in *Florida Farm Bureau Casualty Insurance Co. v. Cox*, 967 So.2d 815, 817 (Fla.2007), in which the court answered no to the following certified question:

> DOES SECTION 627.702(1), FLORIDA STATUTES (2004), REFERRED TO AS THE VALUED POLICY LAW, REQUIRE AN INSURANCE CARRIER TO PAY THE FACE AMOUNT OF THE

> POLICY TO AN OWNER OF A BUILDING DEEMED A TOTAL LOSS WHEN THE BUILDING IS DAMAGED IN PART BY A COVERED PERIL BUT IS SIGNIFICANTLY DAMAGED BY AN EXCLUDED PERIL?

It is clear from the certified question that the *Cox* court was interpreting the 2004 version of the statute. By the time the case reached the supreme court, the legislature had already amended section 627.702(1) to provide that:

> ***8** (b) The intent of this subsection is not to deprive an insurer of any proper defense under the policy, to create new or additional coverage under the policy, or to require an insurer to pay for a loss caused by a peril other than the covered peril. In furtherance of such legislative intent, when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. However, if the covered perils alone would have caused the total loss, paragraph (a) shall apply. The insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure following the total loss, after considering all other benefits actually paid for the total loss.

§ 627.702(1), Fla. Stat. (2005). Thus, the *Ashe* court ruled that evidence of benefits received for an uncovered peril was relevant to the issue of whether flood or wind caused the total loss of the home, and it was therefore admissible at trial. 50 So.3d at 652.

The problem we have in applying *Cox* and *Ashe* in this case is that it is not completely clear whether this is a valued policy law case. The jury was asked to determine the dollar amount of the FEMA [5] threshold that represented 50% of the value of the insured premises, a calculation used to determine whether, as Sebo argued, the property was a constructive total loss. Although AHAC argued valued policy law in some motions, it seems that at some point it questioned whether the property suffered a total loss. We therefore leave all issues related to valued policy law, including the admissibility of benefits Sebo received from codefendants, to be clarified on retrial. We note that the 2005 version of the statute applies to this case —Sebo's claim was filed in December 2005. *See* § 627.702(1)(c), Fla. Stat. (2005).

Because a retrial is necessary, we will not address AHAC's other two issues on appeal or Sebo's issues on cross-appeal. The parties are free to again raise these issues in the circuit court to the extent that they may still be applicable at the retrial.

Judgment reversed and remanded for a new trial consistent with this opinion.

LaROSE and CRENSHAW, JJ., Concur.

Parallel Citations

38 Fla. L. Weekly D1982

Footnotes

1 For example, while losses for damage caused by rodents, insects, birds or vermin were excluded, the policy stated that "we do insure ensuing covered loss unless another exclusion applies."

2 Texas has adopted a third approach: where covered and noncovered perils combine to cause a loss, the insured must segregate the damages and will be entitled to recover only the portion caused by the covered peril. *See Wallis v. United Servs. Auto. Ass'n,* 2 S.W.3d 300, 302–03 (Tex.Ct.App.1999).

3 Because many hurricanes have ravaged this state in recent decades, it is somewhat surprising to find so few Florida cases addressing coverage when multiple perils cause a loss. These issues arose with frequency in Louisiana and Mississippi after Hurricane Katrina hit the coasts of those states. *See, e.g., Tuepker v. State Farm Fire & Cas. Co.,* Civil Action No. 1:05CV559 LTS–JMR, 2006 WL 1442489 (S.D.Miss. May 24, 2006) (not reported in F.Supp.2d), *aff'd in part, rev'd in part, and remanded,* 507 F.3d 346 (5th Cir.2007) (involving a home damaged by the confluence of hurricane-force winds and wind-driven rain as well as a storm surge; wind and rain

damage covered under the policy but storm surge subject to a water damage exclusion); *Ruiz v. State Farm Fire & Cas. Co.*, Civil Action No. 1:07CV89 LTS–RHW, 2007 WL 1514015 (S.D.Miss. May 21, 2007) (not reported in F.Supp.3d).

4 Florida does have a statute that applies when a building is a total loss, § 627.702, Fla. Stat. (2005), which we address in a later portion of this opinion.

5 Federal Emergency Management Agency.

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E.D. Texas,
Sherman Division.

AMTRUST INSURANCE CO. OF KANSAS, INC.
v.
STARSHIP LEAGUE CITY, L.P.
and U.S.A. Self–Storage, Inc.

No. 4:11–CV–672. | March 25, 2013.

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Opinion

MEMORANDUM OPINION

AMOS L. MAZZANT, United States Magistrate Judge.

***1** Pending before the Court is Plaintiff's Motion to Set Aside Appraisal Award (Dkt.# 49). The Court, having considered the relevant pleadings, finds that the motion should be denied.

This lawsuit arises from a property insurance claim for wind damages submitted by Defendants Starship League City, L.P. ("Starship") and U.S.A. Self–Storage, Inc. ("USA") to Plaintiff Amtrust Insurance Co. of Kansas, Inc. ("Amtrust"), their insurer.

Amtrust issued property insurance Policy No. KPP 100203701 (the "Policy"), effective September 13, 2009, through September 13, 2010, to its two insureds, Starship and USA. The Policy insured the buildings at 1455 North Trades Day Boulevard, Canton, Van Zandt County, Texas, 75103 (the "Property"), pursuant to the terms and conditions of the Policy.

On January 28, 2010, Starship and USA notified Amtrust of an alleged loss due to wind damage to the roof of the Property occurring on or about January 20, 2010. Amtrust inspected the loss and issued a payment for the damage it believed was due to the wind event of January 20, 2010. The letter explaining the payment was sent March 10, 2010, and determined that the amount of damage due to the wind event was $19,298.86. Amtrust then applied the $2,500.00 deductible and had a check issued in the amount of $16,798.86. Starship and USA returned that payment on August 23, 2010, indicating the payment was insufficient and that they would forward a report shortly addressing the alleged damages.

On or about March 23, 2010, John Logsdon ("Logsdon"), a representative of the owner of the Property, hired Gary Treider ("Treider") to provide services in connection with the claim for damages to the Property. Treider inspected the Property on April 12, 2010, and formed an opinion that portions of the Property had suffered wind damages due to a storm on January 20, 2010. Treider then convinced the insured to hire an engineer Matt Phelps ("Phelps") to inspect the Property. On May 6, 2010, Treider and Phelps inspected the premises on behalf of Starship and USA. Phelps concluded that the roof had been substantially damaged by a tornado that passed nearby and needed to be replaced in its entirety. Phelps issued a report dated June 1, 2010, which was not forwarded to Amtrust until September 2, 2010.

Following receipt of the September 2, 2010 letter, Amtrust issued a reservation of rights letter to Starship and USA on September 13, 2010. Amtrust thereafter requested an opportunity to reinspect the premises with an engineer. The reinspection occurred on October 12, 2011, when Darin Lasater of Acute Engineering ("Lasater") visited the site on behalf of Amtrust and inspected and photographed the building. Treider attended on behalf of the insureds.

Lasater issued a written report on November 17, 2010, finding no direct physical damage to the roof and disagreeing with Phelps as to the cause of the damage to the roof. In Lasater's opinion, the primary cause of leaks within the building was the result of excessive thermal expansion and contraction of the through fastened metal roof panels resulting in reaming of the panels around the fixed through fasteners. Lateral forces from high winds did not cause structural damage to the subject building. Lasater disagreed with Phelps that the building sustained structural and roof damage during the wind event that warranted replacement of the roof surface and numerous purlins and columns. Lasater also opined that observed web crippling kinks in the metal roof panels were a function of top flange panel compression that is not consistent

with wind damage and an exposed fastener metal roof on a building of this size was an unfortunate design choice. Amtrust forwarded Lasater's opinions to Starship and USA.

***2** On March 3, 2011, Starship and USA demanded appraisal under the Policy. The parties appointed their appraisers, Treider for Starship and USA, and Mitch Butler for Amtrust. The appraisers agreed upon Allen Neff ("Neff") of Unified Building Science as the umpire. The matter then proceeded through the appraisal process.

On September 24, 2011, the Appraisal Award was issued: a Replacement cost of $392,909.00 with an actual cash value amount of $196,454.50. The Appraisal Award was signed by Treider and by Neff, but not by Butler.

On November 29, 2012, Amtrust filed a motion to set aside the award (Dkt. # 49). On December 17, 2012, Starship and USA filed a response (Dkt.# 50). On December 27, 2012, Amtrust filed a reply (Dkt.# 51). On January 2, 2013, Starship and USA filed a sur-reply (Dkt.# 52).

ANALYSIS

Amtrust asks that the Apprisal Award be set aside for the following two reasons: (1) whether the Appraisal Award should be set aside by reason of fraud, mistake, or accident; and (2) whether the Appraisal Award should be set aside by reason that it was not in conformity with the insurance policy.

Under Texas law, " 'appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable, and every reasonable presumption will be indulged to sustain [them].' " *JM Walker LLC v. Acadia Ins. Co.*, 356 F. App'x 744, 746 (5th Cir.2009) (quoting *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 786 (Tex.App.-Houston 2004, no pet.)). An appraisal award "estop[s] one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court." *Lundstrom v. United Servs. Auto. Ass'n–CIC*, 192 S.W.3d 78, 87 (Tex.App.-Houston [14th Dist.] 2006, pet. denied). "Because a court indulges every reasonable presumption to sustain an appraisal award, the burden of proof is on the party seeking to avoid the award." *Id.* Texas courts recognize "three situations in which the results of an otherwise binding appraisal may be disregarded: (1) when the award was made without authority; (2) when the award was made as a result of fraud, accident, or mistake; or (3) when the award was not in compliance with the requirements of the policy." *Id.* Although Amtrust issues section only raises two of these exceptions, its motion argues that all of the exceptions for disregarding an appraisal award apply.

Was the Award in Compliance with Policy Requirements?

The Policy states, "If we and you disagree on the value of the property or the amount of loss, either may make a written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser." (Dkt.# 49, Ex. A). Amtrust complains that Starship and USA's appraiser was not impartial as required by the Policy.

Texas courts have held that "[t]he showing of a pre-existing relationship, without more, does not support a finding of bias." *Franco*, 154 S.W.3d at 786. Texas law requires a certain level of proof to allow an award to be set aside. *Gardner v. State Farm Lloyds*, 76 S.W.3d 140, 143 (Tex.App.-Houston [1st Dist.] 2002, no pet.). In *Gardner*, the plaintiffs filed a claim with their homeowners' insurer, State Farm, for hail damage to the roof of their home. *Gardner*, 76 S.W.3d at 141. After State Farm denied the claim, the plaintiffs invoked appraisal. *Id.* at 142. State Farm's appraiser "inspected the Gardners' roof, but did not find hail damage exceeding the amount of the policy deductible." *Id.* The Gardners' appraiser disagreed. The dispute was submitted to the umpire, who sided with the State Farm appraiser. The umpire and the State Farm appraiser "signed an appraisal determination which awarded the Gardners no money as a result of the storm." *Id.* After the Gardners sued State Farm "for breach of contract, bad faith, and statutory violation claims," State Farm moved for summary judgment on the ground that "that the Gardners were estopped from pursuing their claims because there had been a valid presuit appraisal determination." *Id.* The trial court "rendered summary judgment for State Farm." *Id.*

***3** On appeal, the Gardners argued that the State Farm appraiser was not "independent" as required under their insurance policy because of a preexisting business relationship between State Farm and a company that employed the State Farm appraiser. As a result, according to the Gardners, the trial court should have disregarded the appraisal award. *Id.* at 143. The Gardners' evidence showed that: (1) the employer of the State Farm appraiser wrote a training program used by State Farm, about hail damage claims; (2) the employer of the State Farm appraiser

wrote numerous publications about hailstorm evaluations, and served as a consultant for State Farm on those matters; and (3) the employer of the State Farm appraiser was paid by various State Farm companies for assignments across the United States over seven years. *Id.* The Texas Court of Appeals held that the summary judgment record did not raise "a fact issue about whether [the State Farm appraiser] lacked independence." *Id.* at 144. The court stated that the Gardners:

> presented no evidence that State Farm influenced or exercised control over [their appraiser]. There [was] no evidence that [their appraiser] ever was an employee of State Farm or had a financial interest in the claim. None of their evidence relate[d] to [the appraiser], the Gardners' claim, or the particular hailstorm. Instead, their evidence involve[d] an arm's length business relationship, which [was] unrelated to [their] specific claim, between various State Farm companies and [the appraiser's employer].

Id. at 143.

In *Franco,* the plaintiff sought coverage from her insurer, Slavonic Mutual Fire Insurance Association, for the cost of repairing damage caused by a plumbing leak in her home. *Franco,* 154 S.W.3d at 780. Slavonic "acknowledged Franco's claim and hired Southland Services, Inc. to inspect the premises at Franco's residence and adjust the claim." *Id.* After adjusting the claim, Slavonic tendered a $3,680.55 check, but Franco refused the payment and invoked appraisal. *Id.* Slavonic appointed Garibay as its appraiser. *Id.* at 781. Before this appointment, Southland had hired Garibay "to examine the premises of the Franco home and determine the cause of the damage, and Garibay [had] issued a report regarding his examination of the Franco residence and his findings." *Id.* Dissatisfied with the appraisal award, Franco sued Slavonic for, among other things, breach of contract. The trial court granted summary judgment against Franco on the breach of contract claim based on Slavonic's paying the appraisal award. *Id* . at 782–83.

On appeal, Franco argued that "the appraisal award should be set aside because Garibay was an interested, prejudiced, and biased appraiser, due to his status as an investigating engineer for Southland and the fact that he already had issued a report containing his opinions regarding the scope of [Franco's] damages and coverage prior to his appointment as appraiser." *Id.* at 785. The Texas Court of Appeals held that the summary judgment evidence did not raise a fact issue as to whether Garibay was biased against Franco. *Id.* at 787. The court explained that "Garibay was not an employee of Slavonic, and Garibay's report and conclusions regarding the cause of the plumbing leak were his own." *Id.* There was "no evidence suggesting that Slavonic influenced or exercised control over Garibay, that Garibay had a financial interest in Franco's claim, or that Garibay's previous inspection of the premises somehow factored into his damages valuation." *Id.*

***4** The Court must now examine the summary judgment record to see if there is a basis to set aside the appraisal award on the ground that Treider was a biased or partial appraiser.

Treider inspected the Property on April 12, 2010, and formed an opinion that portions of the Property had suffered wind damages due to a storm on January 20, 2010. Treider is neither a licensed public adjuster nor is he a licensed private investigator. Treider provided the insureds specific advice on what type of experts to hire and the qualifications the expert should have. Treider then convinced the insureds to hire his recommended engineer Phelps. Treider serves on The Board of Directors for Phelps' company and has done so since April 2010. Treider recommended to Logsdon that Phelps be retained as a professional engineer to inspect the Property, for purposes of providing testimony to an umpire in an appraisal process.

On or about May 6, 2010, Treider and Phelps inspected the premises on behalf of Starship and USA. Phelps concluded that the roof had been substantially damaged by a tornado that passed nearby and needed to be replaced in its entirety. Phelps issued a report dated June 1, 2010. Treider reviewed the report and made comments to Phelps before Phelps finalized the report. Treider provided the insureds guidance on how to pursue their claim as well as provided language to the insureds on what to say and not to say in correspondence with the company. Treider specifically told the insureds not to refer to him as an expert as that may cause Amtrust to object to him as an appraiser. Amtrust points the Court to Treider's e-mail communications with the insureds and the insureds' counsel before appraisal is even demanded as particularly telling as evidence of Treider's alleged bias and lack of impartiality.

Treider attended Amtrust's reinspection of the Property by Lasater on behalf of the Starship and USA, being careful to

introduce himself as "the appraiser for the insured just waiting to get my marching orders for proceeding with the appraisal." Treider admits his conduct at the inspection in October 2010, as well as subsequently at the meeting of the appraisers, was to advocate his "damages position."

Treider provided a repair estimate for the Property, and provided it to Logsdon on the condition that Treider's name not be on it. Treider stated at his deposition, "If I am introduced as an expert, then my involvement in the—in an umpire appraisal could be objected by the carrier." Treider encouraged Starship and USA to send a letter that Treider believed would put "the insurance carrier in the corner so that they must proceed with a prompt inspection, or they could actually demand appraisal, but this is very unlikely," and later suggested that certain categories of damages, including lost business and expenses, could be used as part of a bad faith claim.

On March 3, 2011, Starship and USA, at Treider's urging, demanded appraisal under the Policy. At no time did Treider disclose to the umpire, or to Butler, Amtrust's appraiser, that he had been counseling Starship and USA with respect to the claims process.

***5** Starship and USA argue that there was no effort to conceal Treider's involvement with the Property owner prior to the appraisal. It is argued that Amtrust was aware of Treider's role as an expert representing Logsdon no later than September 26, 2010. Lasater's report dated November 12, 2010, indicated that Treider was present during Lasater's inspection. Starship and USA argue that despite this knowledge, Amtrust consented to the naming of Treider as an appraiser.

It is without question that Treider had a pre-existing relationship with Starship and USA. However, this fact alone is not sufficient. It is also without question that Treider was utilized as an expert to inspect the Property prior to becoming an appraiser. This fact is also not sufficient. The failure to disclose a prior business relationship, under Texas law, does not help Amtrust's argument. Texas law gives a preclusive effect to the appraisal award. Texas courts require "evidence that the [challenged] appraiser performed 'some act or conduct tending to exhibit his serving the [insurer's] interest as a partisan would.' " *Gardner*, 76 S.W.3d at 144 (quoting *Am. Cent. Ins. Co. v. Terry*, 298 S.W. 658, 662 (Tex.Civ.App.-Texarkana 1927, no writ)).

Amtrust asserts that the evidence shows that Treider was serving the interests of Starship and USA. The Court agrees with Amtrust that, in this case, there is more evidence which raises a fact issue. It appears that Treider was an advocate for Starship and USA. Treider recommended expert witnesses and gave advice to Starship and USA on when to ask for an appraisal under the Policy and how to proceed with the apprisal process. The Court finds that there is a fact issue whether Treider's conduct demonstrates that he was an impartial, unbiased, disinterested appraiser. The Policy requires that Starship and USA appoint an impartial appraiser. Neither party cites the Court to a case that addresses this unique situation where the appraiser was hired prior to being appointed appraiser and seemed to become an advocate for the insured as compared to merely an inspector.

Was the Award a Result of Fraud, Mistake, or Accident?

Amtrust asserts that the Appraisal Award should be set aside due to fraud, mistake, or accident because the evidence that the umpire, Neff, was misled into a finding he did not intend, not expressing his true attitude. "A court may set aside an award on the ground of mistake [or accident] only 'upon a showing that the award does not speak the intention of the appraisers.' " *JM Walker*, 356 F. App'x at 746 (quoting *Providence Wash. Ins. Co. v. Farmers Elevator Co.*, 141 S.W.2d 1024, 1026 (Tex.Civ.App.-Amarillo 1940, no writ)). The elements of fraud are as follows: (1) a material misrepresentation; (2) that was false; (3) and was either known to be false when made or was asserted without knowledge of its truth; (4) intended to be acted upon; (5) relied upon; (6) and causing injury. *Id.* at 747.

***6** Amtrust asserts that as to fraud, Treider materially misrepresented his role to Neff and to its appraiser, Butler. Amtrust asserts that Treider failed to disclose his services on behalf of Starship and USA, and did so intentionally, to preserve his ability to serve as appraiser and to deceive Neff and Butler to preempt any objections either might offer to his service as appraiser. As to mistake or accident, Amtrust asserts that there is fundamental disagreement between Treider and Neff as to what the Appraisal Award represents. The Court finds that Amtrust has failed to raise a fact issue that the award was the result of fraud, mistake or accident.

Was the Appraisal Award made without authority?

Amtrust asserts that the Appraisal Award was made without authority because Treider was not qualified to serve as an

appraiser for Starship and USA because, by the terms of the Policy, Starship and USA were required to select an impartial, unbiased appraiser.

"Under Texas law, appraisers exceed their authority when they decide coverage and liability questions, but do not necessarily exceed their authority every time causation factors into their award ." *MLCSV10 v. Stateside Enterprises, Inc.*, 866 F.Supp.2d 691, 703 (S.D.Tex.2012). Amtrust does not make this sort of challenge and fails to cite the Court to any case that asserts that the impartiality question is part of this exception.

The Court finds that Amtrust's motion should be denied. Amtrust has failed to raise a fact issue on two of the three exceptions. However, Amtrust has raised a fact issue on whether or not there was compliance with the Policy with respect to the impartiality of an appraiser. Amtrust has offered sufficient facts to create a fact issue which requires the Court to conduct a trial on this one limited issue.

It is therefore ORDERED that Plaintiff's Motion to Set Aside Appraisal Award (Dkt.# 49) is hereby DENIED. However, Plaintiff has raised a fact issue entitling it to a trial to decide the issue.

Conclusion

2013 WL 1809872

Court of Appeal of Louisiana,
Third Circuit.

Kay BARNETT, et ux.
v.
FIDELITY NATIONAL PROPERTY
& CASUALTY CO., et al.

No. 12–1415. | May 1, 2013.

Synopsis

Background: Insureds brought action against insurer and agent to recover for breach of contract, breach of warranty, negligence, and negligent misrepresentation after insurer cancelled flood insurance policy, as void from inception, on property within Coastal Barrier Resource System (CBRS). The Thirty–Eighth Judicial District Court, Parish of Cameron, No. 10–18494, Penelope Quinn Richard, J., entered judgment in favor of insureds. Insurer and agent appealed.

Holdings: The Court of Appeal, Amy, J., held that:

[1] claims involved policy procurement and, therefore, were not preempted by federal law;

[2] permitting insureds to sue insurer did not run afoul of Appropriations Clause;

[3] insurer breached duty to notify insureds that property was potentially in CBRS zone;

[4] evidence supported conclusion that agent breached duty to insureds.

Affirmed.

West Headnotes (8)

[1] Insurance
Particular Laws or Activities
Insurance
Federal insurance programs
States
Insurance

Insureds' claims against insurer and agent to recover for breach of contract, breach of warranty, negligence, and negligent misrepresentation after insurer cancelled flood insurance policy, as void from inception, on property within Coastal Barrier Resource System (CBRS) involved policy procurement and, therefore, were not preempted by federal law.

[2] Insurance
Particular Laws or Activities
Insurance
Federal insurance programs
Insurance
Cancellation or rescission of policy; failure to renew
Insurance
Fraud or misrepresentation; concealment
States
Insurance
United States
Appropriations

Permitting insureds to bring claims against insurer to recover for breach of contract, breach of warranty, negligence, and negligent misrepresentation after insurer cancelled flood insurance policy, as void from inception, on property allegedly within Coastal Barrier Resource System (CBRS) did not run afoul of Appropriations Clause; case involved policy procurement, and federal law did not preempt the claims. U.S.C.A. Const. Art. 1, § 9, cl. 7; National Flood Insurance Act of 1968, § 1340(a)(1), 42 U.S.C.A. § 4071(a)(1); 44 C.F.R. pt. 62, app. A, Art. III(D).

[3] Insurance

Cancellation or rescission of policy; failure to renew

Insureds' recovery from flood insurer for canceling policy from its inception after hurricane damaged house allegedly in Coastal Barrier Resource System (CBRS) zone was not barred by statutory prohibition against availing oneself of ignorance of the law; although federal flood insurance was unavailable in CBRS zones, status of the property's location was unclear, and insureds did not make misleading representations in this regard. LSA–C.C. art. 5.

[4] Insurance

Negligence in general

Insurance

Cancellation or rescission of policy; failure to renew

Insurance

Fraud or misrepresentation; concealment

Flood insurer for house damaged by hurricane breached duty to notify insureds that property was potentially in Coastal Barrier Resource System (CBRS) zone and, therefore, could be held liable for negligence and negligent misrepresentation after canceling policy from inception; duty arose when insurer became aware that another property in subdivision was in the zone, and the relationship between insurer and insureds existed outside National Flood Insurance Program (NFIP).

[5] Insurance

Negligence in general

Insurance agent's duty of reasonable diligence to customer is fulfilled when the agent procures the requested insurance.

[6] Insurance

Failure to procure coverage

An insured pursuing a claim against agent for breaching duty of reasonable diligence must demonstrate that: (1) the agent agreed to procure the insurance; (2) the agent failed to use reasonable diligence in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain insurance; and (3) the agent acted in such a way that the client could assume he was insured.

[7] Insurance

Duties and Liabilities to Insureds or Others

Evidence supported conclusion that agent breached duty to insureds by forwarding to flood insurer deficient application without checking that property was in Coastal Barrier Resource System (CBRS) zone; insurer cancelled policy from its inception after hurricane.

[8] Insurance

Actions

Damages owed by insurance agent for procuring flood insurance policy that insurer cancelled from inception after hurricane on ground that property was in Coastal Barrier Resource System (CBRS) zone could be determined by reference to quote for private insurance coverage for less than the full coverage sought under the National Flood Insurance Program (NFIP), rather than rejected quote for full coverage under private flood insurance policy.

Attorneys and Law Firms

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Court composed of JOHN D. SAUNDERS, JIMMIE C. PETERS, and MARC T. AMY, Judges.

Opinion

AMY, Judge.

***1** After the plaintiffs sustained damage to their Cameron Parish beach house as a result of Hurricane Ike, their flood insurance provider declared the policy void *ab initio.* They filed suit against their insurance agency and the flood insurance provider, seeking damages for tort and contractual claims. The trial court denied pre-trial exceptions regarding subject matter jurisdiction and preemption by federal law. After trial, the trial court found in favor of the plaintiffs, awarding damages and apportioning fault equally between the defendants. We affirm the judgment of the trial court.

Factual and Procedural Background

The plaintiffs, Kay and Barry Barnett, own a beach house in Cameron Parish. Their original dwelling on that property was destroyed in 2005 by Hurricane Rita. Although Travelers Insurance Company had issued a policy on the property to the plaintiffs under the National Flood Insurance Program (NFIP), Travelers informed them after Hurricane Rita that their property could not be insured under that program given its location within a Coastal Barrier Resource System (CBRS).

Thereafter, Mr. Barnett contacted Gary Pearce, an agent at Insurance Unlimited of Louisiana, Inc., to inquire about the possibility of obtaining NFIP flood insurance for their property. Mr. Barnett explained that he did so after learning that a neighbor had been able to insure his property through the agency. Mr. Pearce forwarded the Barnett application to Fidelity National Property and Casualty Insurance Company, a Write Your Own (WYO) Program carrier ***2** participating in the NFIP.[1] Fidelity subsequently issued the policy, purportedly effective on July 2, 2008.

However, after the plaintiffs' house sustained damage as a result of Hurricane Ike in September 2008, Fidelity issued a December 2008 notice of cancellation indicating that the policy was cancelled, retroactive to the policy inception date of July 2, 2008. The record establishes that the basis for the cancellation was a determination that the property was located within a CBRS zone.

The Barnetts filed suit against Fidelity and Insurance Unlimited, seeking damages for breach of contract, breach of warranty, negligence, and negligent misrepresentation. The trial court rejected exceptions and a motion for summary judgment filed by Fidelity, wherein it asserted that the trial court lacked subject matter jurisdiction and that the matter was preempted by federal law as the policy was issued pursuant to the NFIP. The trial court also denied a motion for summary judgment filed by Insurance Unlimited wherein it had alleged that the plaintiffs failed to inform the agency of the home's location in a CBRS.

After a trial on the merits, the trial court rendered judgment in favor of the plaintiffs. In reasons for ruling, the trial court found that Insurance Unlimited was negligent in failing to follow federal guidelines in processing the plaintiffs' application. It found that both Insurance Unlimited and Fidelity were ***3** negligent in failing to determine that the property was in a CBRS zone and that they had negligently misrepresented the validity of the flood insurance policy issued and the insurability of the property under the NFIP. The trial court determined that the plaintiffs relied on those negligent misrepresentations, believing that they had a valid policy in place at the time of Hurricane Ike and that the defendants also breached fiduciary duties owed to the plaintiffs. The defendants' negligence, negligent misrepresentation, and breach of fiduciary duties, the trial court concluded, were causes-in-fact of the harm suffered by the plaintiffs. The risk of the harm suffered was found to be within the scope of the duties owed by the defendants. The trial court assessed fault equally to the defendants.

With regard to damages, the trial court found that the plaintiffs sustained in excess of $50,000.00 in damages stemming from the conduct of the defendants. However, given the plaintiffs' pre-trial stipulation and waiver of jury demand under La.Code Civ.P. art. 1732(1), the judgment reduced the damages awarded to $50,000.00.

Both defendants have appealed the judgment.

Discussion

Fidelity—Subject Matter Jurisdiction and Preemption

The plaintiffs advanced state-law-based claims against Fidelity, asserting that they relied on the representation of a flood insurance policy. In pre-trial exceptions, and again on appeal, Fidelity asserts that the state court lacked subject matter jurisdiction insofar as the claim stems from a policy involving the NFIP. ***4** *See* 42 U.S.C. §§ 4071–72. It also

asserts that any state-law claims are preempted by operation of the NFIP. *See* 44 C.F.R. § 61.5(e).

[1] The trial court denied Fidelity's exceptions regarding the existence of federal question jurisdiction and preemption, rejecting its claims throughout this litigation. The trial court resolved the jurisdiction and preemption issues by relying on *Campo v. Allstate Insurance Company*, 562 F.3d 751 (5th Cir.2009), [2] ***5** wherein the United States Court of Appeals, Fifth Circuit recognized the federal statutory and regulatory framework of the NFIP and the federal question jurisdiction and preemption implications of that body of law. However, the Fifth Circuit recognized a distinction between state-law claims arising from *claims handling*, which implicate both jurisdiction and preemption concerns, and those state-law claims stemming from *policy procurement*, which do not have such implications. *Id.* Under the guidance of *Campo*, the trial court found that the plaintiffs advanced claims strictly related to policy procurement. Thus, the trial court ultimately resolved this matter under the plaintiffs' state-law claims. After review, we find that the trial court correctly determined that this case involves policy procurement.

In this case, Fidelity declared the policy to be cancelled and did so retroactive to the inception date. [3] At trial, Fidelity's Vice President of Claims, ***6** Deborah Price, affirmed that the policy was determined to be void from its inception. When the plaintiffs' counsel inquired whether it was "as if it never existed basically," Ms. Price replied "[c]orrect." While denying the existence of the policy at issue, Fidelity seeks to avail itself of the jurisdictional and preemptive qualities of the federal statutory scheme applicable to that very policy.

We note that, in *Landry v. State Farm Fire & Casualty Company*, 428 F.Supp.2d 531 (E.D.La.2006), the United States District Court for the Eastern District of Louisiana considered a case in which the insurer posed the preemption issue in the context of a plaintiff's claim against an agent and NFIP insurer for failure to procure contents coverage as part of the insured's flood insurance policy issued under the NFIA. Even for this discrete aspect of coverage, the district court concluded that the matter was one involving procurement insofar as it "involve[d] the initial obtaining of coverage." *Id.* at 535. It noted that "many aspects of NFIPs are heavily regulated by FEMA; however, the obtaining of coverage does not involve the interpretation or management of an *active NFIP*." *Id.* (Emphasis added.) Therefore, the federal district court determined that the matter before it involved procurement and did not pose a federal question. *Id.* The matter was ultimately remanded to a Louisiana state district court. *Id.*

In *Campo*, 562 F.3d 751, a case involving a renewal of a flood insurance policy, the Fifth Circuit remarked favorably on the approach of *Landry* and extended that reasoning beyond *initial* procurement. Rather, the plaintiff in *Campo* alleged that the insurer and its representatives made negligent misrepresentations preventing a *renewal* of his flood insurance policy. The Fifth Circuit noted that the ***7** plaintiff's "claim" was merely a "fictitious claim" insofar as "the act of filing a claim on an *expired* policy, i.e., a dormant policy, is equivalent to filing no claim at all." *Id.* at 756. The court stated that: "At the relevant time, Campo's policy had expired subject to restoration only in the event that he paid the premium within the extended grace period. Allstate was thus by definition incapable of *handling* any new claims based on post-expiration occurrences." *Id.* The court observed that in light of a failure to renew:

> Campo's coverage had *expired;* there was thus nothing to continue. Instead, as a former policyholder, Campo would have had to *procure* flood insurance. One way for him to do this was to pay his renewal premium to Allstate by December 12, which would have caused his expired policy to be *reinstated.* The mere fact that Allstate, for a time, mistakenly acted as though a claim existed does not make it so. It is thus impossible for Campo's claims to fall within the category of handling.

Id.

Here, it is apparent that the claims are procurement-related. As in *Campo*, there was no claim to handle and the plaintiffs do not seek to enforce the policy or pursue their damages claim under the policy. Rather, in essence, the plaintiffs in this case did not procure a policy. The mere issuance of a declaration page cannot be said to equate to the existence of a policy when, as here, the insurer declared that policy to be invalid from the date of inception. As affirmed by Ms. Price of Fidelity, whose testimony is referenced above, the policy essentially never existed.

Additionally, in *Grissom v. Liberty Mutual Fire Insurance Company*, 678 F.3d 397, 401 (5th Cir.2012), the Fifth Circuit explained that:

> The key factor to determine if an interaction with an insurer is "claims handling" is the status of the insured at the time of the interaction between the parties. If the individual is already covered and in the midst of a non-lapsed insurance policy, the interactions between the insurer and insured, including renewals of insurance, are "claims handling" subject to preemption.

***8** Consideration of this "key factor" in light of the facts of this case pointedly reveals the interactions involved as procurement-related, not claims handling. Fidelity's treatment of the underlying policy as one that never came into existence evidences that any interaction was not in the midst of a relationship between an insured and an insurer. In light of the above guidance, we find that this matter does not involve federal question jurisdiction.

Further, we find that the trial court appropriately determined that the plaintiffs' policy procurement claims are not preempted by federal law. Such a result is dictated by *Campo,* 562 F.3d 751. In reaching its pronouncement that "federal law does not preempt state-law procurement based claims[,]" the Fifth Circuit found that the United States Congress expressly preempted state law only as to handling-related claims. *Id.* at 757. In a footnote, the Fifth Circuit referenced that portion of the Standard Flood Insurance Policy (SFIP) providing that: " 'This policy and all disputes arising from the *handling* of any claim under the policy are governed exclusively by' FEMA regulations." *Campo,* 562 F.3d at 757, n. 38 (quoting 44 C.F.R. pt. 61, app. A(1), art. IX).[4] This defined term of preemptive reach, the Fifth Circuit determined, reveals a lack of congressional interest in a ***9** more wide-reaching limit of state power. *Id.* (quoting *United States v. 4,432 Mastercases of Cigarettes, More or Less,* 448 F.3d 1168 (9th Cir.2006)).

Additionally, the Fifth Circuit concluded that "unlike in handling-based cases, permitting prosecution of procurement-related state-law tort suits does not impede the full purposes and objective of Congress." *Campo,* 562 F.3d at 758. Instead, it noted that the purpose of the NFIP is to reduce the burden on the federal fisc since FEMA does not reimburse insurers for judgments that are procurement-related. *Id.* (citing, in part, *Landry,* 428 F.Supp.2d 531).

Finally, in this discussion, we are mindful that Fidelity suggests that this case should follow Florida and California state appellate court decisions finding that those states lacked concurrent subject matter jurisdiction. *See Seibels Bruce Ins. Cos. v. Deville Condo. Ass'n, Inc.,* 786 So.2d 616 (Fla.Dist.Ct.App. 1st Cir.2001); *McCormick v. Travelers Ins. Co.,* 86 Cal.App.4th 404, 103 Cal.Rptr.2d 258 (Cal.Ct.App.2001). However, those cases were rendered outside the Fifth Circuit, were rendered before *Campo* was decided, and involved claims on existing policies. They did not involve, as here, state-law claims based on a policy void from its inception.

For these reasons, we find no merit in Fidelity's arguments regarding federal question jurisdiction and preemption of state law claims.

Fidelity—Federal Funds

[2] Fidelity also argues that the trial court's rejection of its preemption claims runs afoul of the Appropriations Clause of the United States Constitution and United States Supreme Court jurisprudence. *See* U.S. Const. art. I, § 9, cl. 7. *See also Office of Personnel Mgmt. v. Richmond,* 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (wherein the Supreme Court found that payments from the Federal Treasury are limited to those statutorily authorized). Fidelity asserts that proceedings arising ***10** from its status as an insurer under the NFIP implicates federal funds, whether such expenditures are related to litigation or to a resulting judgment against it. It contends that the plaintiffs had the burden of proving that federal funds are not, in fact, at risk, citing *Grissom,* 678 F.3d 397 and *Wright v. Allstate Insurance Company,* 415 F.3d 384 (5th Cir.2005).

Under the facts of this case, however, we find no merit in Fidelity's argument. Certainly, 42 U.S.C. § 4071(a)(1) recognizes insurers under the NFIP as fiscal agents of the United States. Additionally, the financial relationship between FEMA and such insurers is governed by the terms and conditions of the Federal Emergency Management Agency, Federal Insurance Administration, Financial/Assistance Subsidy Arrangement. *See* 44 C.F.R. pt. 62, app. A. *See also Grissom,* 678 F.3d 397. That Arrangement provides that the federal government will pay certain claims and reimburse certain costs incurred by those private insurers participating in the NFIP. *See* 44 C.F.R. pt. 62, app. A, art. III(D). Specifically, the federal government indemnifies and defends NFIP insurers for insurance and litigation expenses. *Id.*

However, the federal regulations plainly provide that such expenses will be provided unless the FEMA Office of the Chief Counsel finds "that the litigation is grounded in actions by the Company that are significantly outside of this Arrangement, and/or involves issues of agent negligence." 44 C.F.R. pt. 62, app. A, art. III(D)(3)(a). The Arrangement, thereafter, provides for related notices and reviews of such a determination. *See* 44 C.F.R. pt. 62, app. A, art. III(D)(3)(a).

Additionally, in *Grissom,* 678 F.3d 397, the Fifth Circuit considered the above aspects of the Arrangement in its consideration of whether cases arising ***11** under the NFIP may be heard by a jury. In the context of that discussion, the Fifth Circuit explained that:

> Unless FEMA explicitly notifies the insurance company of its intent not to defend or indemnify, FEMA is presumed to pay the litigation expenses and any resulting damages awards. In the absence of this document or even any allegation that FEMA notified [the insurer] of its intent not to defend or indemnify, FEMA is assumed to be paying the expenses of the litigation.

Id. at 402. Fidelity points to this presumption and asserts that the plaintiffs failed to present evidence of an intent not to defend or indemnify in this case.

However, this case differs from *Grissom,* 678 F.3d 397. Significantly, *Grissom* was a claims handling case in which a policy was in place. Thus, the Fifth Circuit determined that "*Campo* [did] not control" and the plaintiff's "state law claim [was] preempted." *Id.* at 401. Additionally, the Fifth Circuit considered the question before it in the context of whether the use of federal funds prohibited consideration of the matter by a jury. *Id.*

In contrast to *Grissom,* this case involves policy procurement. Neither are the plaintiffs' state law claims preempted in this case. *See Campo,* 562 F.3d 751. Further, in light of the circumstances of this case, we note that the Arrangement provides for the payment of litigation expenses unless "the litigation is grounded in actions by the Company that are significantly outside of this Arrangement, and/or involves issues of agent negligence." 44 C.F.R. pt. 62, app. A, art. (III)(D)(3)(a). Having recognized these distinctions, we do not disturb the trial court's adherence to *Campo,* wherein the Fifth Circuit pointedly concluded: "[S]tate-law tort claims related to procurement do not interfere with Congress's objectives. Federal law thus does not preclude Campo from pursing his procurement-based suit that asserts ***12** a state-law cause of action for Allstate's allegedly negligent misrepresentations." *Id.* at 758 (footnotes omitted). [5]

This assignment lacks merit.

Fidelity—Misrepresentation Claims

The distinction that the subject policy was void from its inception date also undermines Fidelity's contention that the plaintiffs cannot pursue claims for misrepresentations against it, as a fiscal agent of the federal government, through the NFIP. However, the cases that Fidelity cites are factually distinguishable insofar as they involve the existence of a relationship between the plaintiff and the federal government or its agents. *See e.g., Federal Crop. Ins. Corp. v. Merrill,* 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.,* 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). In those cases, litigants were charged with knowledge of the laws surrounding the federal programs at issue and were not able to, therefore, rely on representations of the government's agents. However, as explained above, the policy in this case was void from inception, distancing this case from the NFIP through which Fidelity could claim status as a fiscal agent of the federal government per 42 U.S.C. § 4071.

[3] Within this assignment, Fidelity also suggests that the plaintiffs' recovery is barred by La.Civ.Code art. 5, which provides that: "No one may avail himself of ignorance of the law." Fidelity contends that the plaintiffs must be held to have known of the prohibitions regarding the general unavailability of federal flood insurance in CBRS zones. However, in this case, the trial court found the status of ***13** the property's location unclear and rejected the assertion that the plaintiffs made misleading representations in this regard. We find that the record supports this factual finding; thus, we find no merit in this assignment of error.

Fidelity—Merits

[4] In its final assignment, Fidelity argues that the trial court erred in entering judgment on the plaintiffs' negligence-based claims insofar as the evidence does not reveal a breach of a specific standard of care. Further, Fidelity contends that doing

so suggests that the courts of this state can dictate the national standards applicable to the NFIP.

We find no merit in this argument. Again, any relationship in this case has been found to exist outside of the NFIP. Thus, any requirement cannot be said to tread upon the dictates of that program as contained within the federal statutory and regulatory framework.

Furthermore, and within the context of Louisiana negligence law, we do find that the record supports the trial court's conclusion that Fidelity breached a standard of care owed to the plaintiffs. In particular, Donald Brayer, accepted by the trial court as an expert in the customs and practices of agents and insurers in the procurement of insurance, testified that Fidelity had a duty to notify the plaintiffs that their property was potentially located in a CBRS zone, even after the policy was issued on July 2, 2008. Such a duty arose when Fidelity became aware that another property in the plaintiffs' subdivision was identified as being located in the CBRS zone. Mr. Brayer explained that both Insurance Unlimited and Fidelity should have informed the plaintiffs of the potential that their policy was null and void due to its location. Yet, it is undisputed that such a question was not raised with regard to the plaintiffs' property until after the claim was made on the ***14** damage sustained in Hurricane Ike. Insofar as it touches on the elements of negligent misrepresentation and damages, Mr. Brayer opined that it was more likely than not that, during that time frame, other flood insurance would likely have been available to the plaintiffs for their property.

Accordingly, we find no merit in Fidelity's contention that the plaintiffs' did not provide adequate proof of a breach of a specific standard of care.

Insurance Unlimited—Breach of a Duty

In its separate appeal, Insurance Unlimited also contends that the trial court erred in finding that it breached a duty owed to the plaintiffs. In particular, Insurance Unlimited contends that Mr. Pearce fulfilled his duty of seeking to secure a flood policy and that he did so by completing the NFIP application using information provided by the plaintiffs. It also notes that the application was submitted based on what it contends was the best available evidence on the question of eligibility.

In finding in favor of the plaintiffs, the trial court determined that Insurance Unlimited failed to follow the guidelines of the NFIP Flood Insurance Manual in processing the application and in failing to determine that the plaintiffs' property was located in a CBRS zone. This negligence ultimately enabled the negligent misrepresentation that a valid policy was in place.

[5] **[6]** The supreme court has explained that "an insurance agent owes a duty of 'reasonable diligence' to his customer." *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 09–2161, p. 7 (La.7/6/10), 42 So.3d 352, 356 (quoting *Roger v. Dufrene*, 613 So.2d 947, 949 (La.1993)). That duty is fulfilled when the agent procures the requested insurance. *Id.* An insured pursuing a claim must demonstrate that: "1) the insurance agent agreed to procure the insurance; 2) the agent failed to use ***15** 'reasonable diligence' in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain insurance and 3) the agent acted in such a way that the client could assume he was insured." *Id.* at 356–57.

[7] The record supports the trial court's ruling in light of the above standard. In part, the evidence supports the view that the application, as forwarded to Fidelity, was insufficient under the dictates of the NFIP manual. Shelley Young, Insurance Unlimited's Managing Supervisor, confirmed that agents are expected to abide by the NFIP manual. However, despite knowledge that the Long Beach Road community was potentially in a CBRS zone, Mr. Pearce did not take measures to verify the property's insurability in that regard. On this point, the NFIP manual provides that:

> To determine if a building is eligible for flood insurance coverage, the producer should consult the list of communities where coastal barriers and/or [Otherwise Protected Areas] have been identified. The list is included in this section. The community's map should ***always*** be reviewed to determine if the property to be insured is located in a designated CBRS area or an OPA.

(Emphasis in the original.)

Ms. Young explained that the agency follows this guideline as the agents are familiar with the maps. However, it is clear that Mr. Pearce did not consult the map to "determine if the property to be insured [was] located in a designated CBRS area or an OPA." Even assuming familiarity on the part of Mr. Pearce in this case, it is apparent that, ultimately, the plaintiffs' property was determined to be within the CBRS.

Additionally, the application Insurance Unlimited forwarded to Fidelity included an Elevation Certificate for the property which was silent on the CBRS location. According to Ms. Price of Fidelity, the NFIP manual requires that the document be certified as complete by the surveyor. However, the ***16** Elevation Certificate submitted with the application did not resolve the CBRS question.

Thus, the evidence supports a view that Insurance Unlimited forwarded a deficient application to Fidelity, which, in turn, issued the subject policy. Relying upon this policy, later found to be void, the plaintiffs did not pursue other measures of insuring their property and subsequently sustained damage based on the lack of a valid policy.

This assignment lacks merit.

Insurance Unlimited—Material Misrepresentation

Neither do we find merit in Insurance Unlimited's contention that its liability is negated or diminished because it relied on information provided by the plaintiffs. The insurer asserts that the plaintiffs were aware that their property was uninsurable given Travelers' cancellation of their prior policy in 2007, but that they did not reveal that the location of their property was within the CBRS zone in completing their 2008 application. Insurance Unlimited notes that the plaintiffs signed the application indicating that their statements were true and correct.

In ruling on this defense, the trial court explained:

> The DEFENDANTS argue that Mr. Barnett intentionally hid the fact that his property was not eligible for NFIP coverage, and that his previous policy had been cancelled by Travelers because it was located in a CPRS [sic] zone. The overall testimony and evidence presented at trial does not indicate that Mr. Barnett was being deceitful or was intentionally omitting information to Mr. Pearce in order to obtain flood insurance. In fact, Mr. Barnett seems to be someone who does not really understand the working of insurance policies. He provided everything that Mr. Pearce had requested. Further, there was a sufficient question as to whether the plaintiffs' property was actually located in a CBRS zone. Mr. George A. Evans, Jr., a registered professional land surveyor, issued ***17** an elevation certificate on the property, dated May 24, 2004, and did not check the applicable box indicating that the property was in a CBRS zone. Mr. Lonnie C. Harper, a registered professional land surveyor, also issued an elevation certificate on the same property, dated June 27, 2007, and he did not check the applicable box indicating that the property is located in a CBRS zone. Mr. Barnett's neighbor had advised Mr. Barnett that his property was eligible for flood insurance. Further, two separate site specific Standard Flood Hazard Determinations were completed on the Barnetts' property during the application process. Both indicated that the Barnetts' property was eligible for NFIP. Accordingly, the court does not find that Mr. Barnett made any material misrepresentations during the application process.

The transcript and documentary evidence in this case support the trial court's observations regarding the questions surrounding the location of the plaintiffs' property and further support the determination that no material misrepresentations were made. We point out that Mr. Barnett testified that he met with Mr. Pearce after being informed that a neighbor had obtained flood insurance through Insurance Unlimited. Mr. Barnett explained that he indicated to Mr. Pearce that Travelers had cancelled a prior policy due to location in a CBRS zone. Mr. Barnett denied that he withheld the information regarding the Travelers' cancellation and stated that: “It was never my intent to hide anything.”

In light of this evidence and the attendant credibility determinations made by the trial court, we find no merit in this claim of material misrepresentation.

Insurance Unlimited—Federal Law

Like Fidelity, Insurance Unlimited claims that the plaintiffs' state law claims are preempted by the NFIP. However, as stated above, *Campo,* 562 F.3d 751, clearly indicates

that claims related to policy procurement are not, in fact, preempted. In light of the discussion above, we do not address this assignment further. Neither do we separately address Insurance Unlimited's assertion that the plaintiffs must be charged with the knowledge of the guidelines surrounding the NFIP. Rather, as explained above, the subject policy was determined to be void ***18** from its inception, removing this case from the federal framework Insurance Unlimited asserts is applicable.

For the reasons expressed herein, Insurance Unlimited's arguments regarding the applicability of federal law lack merit.

Insurance Unlimited—Damages

[8] Finally, Insurance Unlimited contests the trial court's award of damages.[6] In particular, it notes that the trial court reduced the damages awarded by reference to an alternate, private flood insurance policy obtained by the plaintiff shortly before trial. However, Insurance Unlimited argues that the trial court erred in relying on the figure of the private insurance since the quoted private insurance coverage was ***19** for less than the full coverage sought under the NFIP. Insurance Unlimited contends that "any damage consideration should include the appropriate reduction for premium and deductible amounts for similar coverage." On this point, Insurance Unlimited would have preferred for the trial court to rely on a 2007 quote for full coverage, private flood insurance rejected by the plaintiffs before seeking NFIP coverage through Insurance Unlimited.

While the private insurance ultimately obtained by the plaintiffs was not for the full coverage sought from the NFIP, we find no abuse of the trial court's discretion in relying on those figures as the appropriate evidence before it. The plaintiffs specifically rejected the 2007 private insurance quote for full coverage in light of its costs and, only later, pursued NFIP coverage. Without notice of their ineligibility under the NFIP, the plaintiffs did not pursue any available options for private insurance, full coverage or otherwise, until after the final determination that the instant policy was void from inception. Given the evidence before it, we find no abuse of the trial court's discretion in shaping the final award of damages.

This assignment lacks merit.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this proceeding are assessed equally to the defendants/appellants, Fidelity National Property & Casualty Insurance Company and Insurance Unlimited of Louisiana, Inc.

AFFIRMED.

Parallel Citations

2012-1415 (La.App. 3 Cir. 5/1/13)

Footnotes

1 The NFIP Flood Insurance Manual, portions of which were entered into evidence in this case, provides as follows with regard to the Write Your Own Program:

> The Write Your Own (WYO) Program, begun in 1983, is a cooperative undertaking of FEMA and the private insurance industry. The WYO Program operates within the context of the NFIP and is subject to its rules and regulations. WYO allows participating property and casualty insurance companies to write and service federal flood insurance in their own names. The companies receive an expense allowance for policies written and claims processed while the federal government retains responsibility for underwriting losses. Individual WYO Companies may, to the extent possible, and consistent with Program rules and regulations, conform their flood business to their normal business practices for other lines of insurance. Many producers have elected to move or place their flood policies with one or more of the WYO Companies they represent.

2 In reasons for ruling, the trial court explained:

> FIDELITY argues that it acted at all times herein in its capacity as a Write Your Own (WYO) Program flood insurance carrier, as a fiscal agent of the United States, in a program governed exclusively by federal law. Further, the plaintiffs' claims raise exclusive questions of federal law, and thus this court lacks concurrent subject matter jurisdiction over this litigation.
>
> Plaintiffs argue that while federal law preempts state law tort claims arising from *claims handling* by a WYO carrier, federal law does not preempt state law claims related to insurance *procurement*, and directs the court to *Campo v. Allstate Ins. Co.*, 562 F.3d 751 (5th Cir.2009). In that case, the United States Fifth Circuit Court of Appeal addressed this issue. The Campos had

purchased a Standard Flood Insurance Policy (SFIP) through Allstate Insurance Company in its capacity as a WYO. For over twenty years, plaintiffs had SFIP on their home. On August 13, 2005, plaintiffs' coverage ended when the premium was paid. The policy included a 30–day grace period for payments, so that if the Campos paid the premium by September 13, they would have avoided a gap in coverage. On August 29, 2005, Hurricane Katrina destroyed plaintiffs' home. Because of Hurricane Katrina, the Federal Emergency Management Agency (FEMA) extended the deadline for an additional 90 days or until December 12, 2005 for the purposes of the plaintiffs' policy. Shortly after Hurricane Katrina, Plaintiffs made a claim on their SFIP. Allstate indicated that they were evaluating the claim and had requested that the policy limits be paid. Allstate also made an advance payment of $2500 to the plaintiffs. However, Allstate never advised the plaintiffs that the payments were conditioned upon the timely payment of the renewal premium. After the deadlines for paying the premium had expired, Allstate denied the claim based on no coverage being in place. The Fifth Circuit concluded that the plaintiffs' claims were related to *policy procurement* and not preempted by federal law.

In the instant case, the plaintiffs' allege that FIDELITY sold them a policy that was invalid under federal law, and therefore, the plaintiffs never dealt with the federal government or its agents. Rather they were dealing with FIDELITY as a private insurer acting outside of its scope as a WYO carrier. Furthermore, because there was never any valid SFIP under federal law in this case, there are no federal laws at issue and thus no question of federal jurisdiction.

Just as in the *Campo* case, this court finds that the issues in this case are related to *policy procurement* and not *claims handling* and thus are not preempted by federal law. Thus, the court has subject matter jurisdiction over plaintiffs' state law claims. The defendant's Exception of Lack of Subject Matter Jurisdiction is therefore overruled.

The trial court revisited the matter upon summary judgments filed by Fidelity and Insurance Unlimited. Denying both motions, the trial court explained:

FIDELITY argues that this court lacks subject matter jurisdiction because this matter involves only questions of federal law. This court has previously ruled on FIDELITY's Exception of Subject Matter Jurisdiction and subsequently provided written reasons. FIDELITY's motion for summary judgment is basically a reconsideration of its exception of lack of subject matter jurisdiction. Thus, the court will deny FIDELITY's motion for summary judgment.

3 The Fidelity "Notice of Cancellation" issued to the plaintiffs provides:

Dear Insured:

We have sent you a policy under which you are anticipating coverage or have been provided coverage. Unfortunately, because of recently discovered information we are unable to provide the coverages set forth in your policy. Consequently, the policy indicated above has been cancelled as of the date and for reason(s) listed below.

Cancellation Date: 12:01 a.m. Standard Time on 7/02/08

Reason(s) for Cancellation

06—RISK NOT ELIGIBLE FOR COVERAGE

The "Flood Declarations Page" includes an "Inception Date" of "7/02/08 12:01 am" and a "Policy Period" of "7/02/08 to "7/02/09 12:01 am Standard Time."

4 Fidelity lodged separate jurisdictional and preemption arguments in this case. However, as with preemption, the Standard Flood Insurance Policy addresses the federal jurisdiction question in reference to *claims handling.* In this regard, the SFIP provides:

R. Suit Against Us

You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim, and you must file the suit in the United States District Court of the district in which the covered property was located at the time of loss. This requirement applies to any *claim that you may have under this policy* and *to any dispute that you may have arising out of the handling of any claim* under the policy.

See 44 C.F.R. pt. 61, app. A(1), art. VII (emphasis added).

5 We further point out that *Campo* acknowledged 44 C.F.R. pt. 62, app. A, art. III(D)(3)(a) in its consideration of the statutory and regulatory framework surrounding the preemption question.

6 In awarding damages, the trial court explained:

DEFENDANTS further argue that the plaintiffs should not get the benefit of purchasing a non-NFIP policy just forty-five (45) days prior to trial. The explanation given by Mr. Barnett for waiting to purchase flood insurance until approximately two months before trial was that the defendants were still disputing whether the property was located in a CBRS zone and they had recently agreed that the property was in a CBRS zone. [Record citations omitted.] The court is aware that the defendants maintained up until February of 2012 that there was a valid flood insurance policy in effect on plaintiffs' property at the time Hurricane Ike made landfall. It was not until February of 2012 that they conceded that the policy was without any effect.

The court finds judgment in favor of the plaintiffs and against the defendant equally in this matter. The damages proven by the plaintiffs are as follows:

Flood Damage sustained by Hurricane Ike:	$62,531.86
Premium paid to Fidelity:	$ 1,539.00
TOTAL:	$64,070.86

These damages are reduced by the SWBC Premium of $3,455.55 paid by the plaintiffs, and the $10,000 deductible that was applicable under the policy. The total damages proven by the plaintiffs, therefore, is $50,615.31. This amount is further reduced to $50,000 due to plaintiffs' stipulation that their claim did not exceed the sum of $50,000, exclusive of interest and costs.

We note that the plaintiffs' calculation in their brief to this court reflects a reduction of an SWBC premium of $4,058.25 and a total damages award of $50,012.61. These figures relate to expert testimony estimating the expense associated with procuring private flood insurance in 2008. The trial court's calculations are set forth above for purposes of illustration. Under either calculation, the sustained damages exceeded $50,000.00. In light of the plaintiffs' pre-trial stipulation and waiver of jury demand pursuant to La.Code Civ.P. art. 1732(1), the resulting judgment awarded a reduced figure of $50.000.00.

114 So.3d 257
District Court of Appeal of Florida,
Third District.

Melania CHEETHAM and
Charlie Cheetham, Appellants,
v.
SOUTHERN OAK INSURANCE
COMPANY, Appellee.

No. 3D11–3277. | March 27, 2013. | Rehearing Denied June 7, 2013.

Synopsis

Background: Insureds under all-risk homeowners' insurance policy brought action against insurers after their water damage claim was denied. The Circuit Court, Miami–Dade County, John Schlesinger, J., entered declaratory judgment in favor of insurer. Insureds appealed.

[Holding:] The District Court of Appeal, Rothenberg, J., held that exception to deterioration exclusion for accidental discharge of water from within a plumbing system caused by deterioration applied.

Reversed and remanded.

West Headnotes (6)

[1] Appeal and Error
Cases Triable in Appellate Court

District Court of Appeal reviews de novo grant of directed verdict.

[2] Insurance
Ambiguity in general

Insurance
Plain, ordinary or popular sense of language

Insurance
Risks Covered and Exclusions

Insurance contracts are construed in accordance with plain language of policy as bargained for by parties; however, if salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, policy is considered ambiguous.

[3] Insurance
Particular Portions or Provisions of Policies

Insurance
Exclusions and limitations in general

Ambiguous coverage provisions are construed strictly against insurer that drafted policy and liberally in favor of insured; thus, insurer is held responsible for clearly setting forth what damages are excluded from coverage under terms of policy.

[4] Insurance
Exclusions, exceptions or limitations

Insurance
Exclusions and limitations in general

Ambiguous exclusionary clauses are construed even more strictly against insurer than coverage clauses; thus, insurer is held responsible for clearly setting forth what damages are excluded from coverage under terms of policy.

[5] Insurance
Ambiguity in general

Insurance
Construction as a whole

District Court of Appeal examines insurance policies as a whole, to determine if they are ambiguous; however, policy is not ambiguous simply because it is complex or requires analysis, or because relevant words used within the policy are not defined by the policy.

[6] Insurance
Sewers and drains; plumbing

Insurance
Corrosion or deterioration; mold or fungus

Broken pipe, which caused water or water-borne material emanating from plumbing system of

> insureds' premises to back up into residence, was designed to carry waste water and/or material away from residence, and was located on premises, was a part of the "plumbing system" under insureds' all-risk homeowners' insurance policy, and, thus, exception to deterioration exclusion for accidental discharge of water from within a plumbing system caused by deterioration applied.

Attorneys and Law Firms

***258** Alvarez, Carbonell, Feltman, Jimenez & Gomez, PL, and Paul B. Feltman, for appellants.

Russo Appellate Firm, P.A., and Elizabeth K. Russo and Susan S. Lerner; Diaz Briscoe Medina, P.A., and Esperanza Diaz Briscoe, Miami, for appellee.

Before ROTHENBERG, EMAS, and LOGUE, JJ.

Opinion

ROTHENBERG, J.

Melania and Charlie Cheetham (collectively, "the Cheethams") appeal from a final judgment entered in favor of their insurer, Southern Oak Insurance Company ("Southern Oak"), based on the trial court's finding that the Cheethams' claimed loss was specifically excluded under their policy. As we conclude the claimed loss does not fall within the exclusion, we reverse the final judgment and remand for further proceedings.

I. FACTS

The Cheethams filed a claim with their insurer, Southern Oak, after their home sustained water damage. After Southern ***259** Oak denied the claim, the Cheethams filed suit, claiming the loss was covered by their all-risk homeowners' insurance policy. In response, Southern Oak asserted that the "Water Damage" exclusion, specifically section A.3.b., was applicable, and, therefore, the Cheethams' loss was not covered. The relevant provisions of the policy, including the water damage exclusion, provide as follows:

HOMEOWNERS 3—SPECIAL FORM

....

SECTION I—PERILS INSURED AGAINST

A. Coverage A—Dwelling And Coverage B—Other Structures

1. We insure against risk of direct physical loss to property described in Coverages **A** and **B.**

2. *We do not insure, however, for loss:*

a. *Excluded under Section **I**—Exclusions;*

....

c. *Caused by:*

....

(6) Any of the following:

(a) Wear and tear, marring, *deterioration;*

....

Exception To c.(6)

Unless the loss is otherwise excluded, we cover loss to property covered under Coverage **A** or **B** resulting from an accidental discharge or overflow of water or steam from *within a:*

(i) Storm drain, or water, steam or sewer pipe, off the "residence premises"; or

(ii) *Plumbing ... system*[1] *... on the "residence premises ".*[[2] This includes the cost to tear out and replace any part of a building, or other structure, on the "residence premises", but only when necessary to repair the system.... However, such tear out and replacement coverage only applies to other structures if the water ... causes actual damage to a building on the "residence premises".

We do not cover loss to the system ... from which this water ... escaped.

> ***260** For purposes of this provision, a plumbing system ... does not include a sump, sump pump or related equipment or a roof

drain, gutter, down spout [sic] or similar fixtures or equipment.

Section **I**—Exclusion **A.3.** Water Damage, Paragraphs **a.** and **c.** that apply to surface and water below the surface of the ground do not apply to loss by water covered under **c.(5)** and **(6)** above.

....

B. Coverage C—Personal Property

We insure for direct physical loss to the property described in Coverage **C** caused by any of the following *perils unless the loss is excluded in Section I—Exclusions.*

....

12. Accidental Discharge Or Overflow Of Water Or Steam

a. This peril means accidental discharge or overflow of water ... from within a plumbing ... system....

b. This peril does not include loss:

(1) To the system ... from which the water ... escaped;

....

(3) On the "residence premises" caused by accidental discharge or overflow which occurs off the "residence premises"; ....

....

c. In this peril, a plumbing system ... does not include a sump, sump pump or related equipment or a roof drain, gutter, downspout or similar fixtures or equipment.

d. Section **I**—Exclusion **A.3.** Water Damage, Paragraphs **a.** and **c.** that apply to surface water and water below the surface of the ground do not apply to loss by water covered under this peril.

....

SECTION I—EXCLUSIONS

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

....

3. Water Damage

Water Damage means:

a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

b. *Water or water-borne material which backs up through sewers or drains* or which overflows or is discharged from a sump, sump pump or related equipment; or

c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure;

caused by or resulting from human or animal forces or any act of nature.

(emphasis indicated by underscoring).

The Cheethams' claim was tried. At trial, it was undisputed that due to age and deterioration, a pipe located on the "residence premises" broke and/or collapsed. As the pipe was located underneath the ground, debris entered the pipe, forming a blockage, which ultimately caused waste water and/or material to back up through the blocked pipe and into the "residence premises" through drains. At the close of ***261** the evidence, based on the undisputed facts, Southern Oak renewed its motion for a directed verdict, arguing that the relevant policy provisions were unambiguous and that the Cheethams' claimed loss was excluded under the policy. The trial court granted Southern Oak's motion for a directed verdict, finding that the relevant policy provisions were unambiguous and that the Cheethams' loss was excluded by section A.3.b. The trial court entered final judgment in favor of Southern Oak, and the Cheethams' appeal followed.

II. ISSUES

The issues before this Court are (1) whether the all-risk policy is ambiguous where it provides for coverage for the "accidental discharge" of water "within a ... plumbing ... system ... on the 'residence premises' " caused by "deterioration," but excludes "water damage" caused by "[w]ater or water-borne material which backs up through sewers or drains," and (2) whether the exclusion applies when a pipe located *within* the plumbing system of the "residence premises" breaks due to deterioration, causing debris to enter the pipe and forming a blockage, and as a result of the blockage, waste water and/or material backed up through the blocked pipe "within" the "plumbing system" and then into the "residence premises" through drains.

III. ANALYSIS

[1] We review de novo the trial court's granting of Southern Oak's motion for a directed verdict based on its finding that the policy excluded coverage for the claimed loss. *See Diaz v. Impex of Doral, Inc.*, 7 So.3d 591, 593 (Fla. 3d DCA 2009) ("The standard of review of a trial court's ruling on a motion for directed verdict is de novo."); *see also Fayad v. Clarendon Nat'l Ins. Co.*, 899 So.2d 1082, 1085 (Fla.2005) (holding that whether specific damage "comes within the scope of the exclusionary clause is a question of law"); *State Farm Mut. Auto. Ins. Co. v. Parrish*, 873 So.2d 547, 549 (Fla. 5th DCA 2004) ("When the interpretation of an insurance contract is in question, the applicable standard of review is *de novo*."); *Liberty Mut. Ins. Co. v. Weiss*, 790 So.2d 475, 476 (Fla. 3d DCA 2001) (holding that when the cause of loss is undisputed, whether the loss is covered by the insurance policy is a question of law).

[2] [3] [4] [5] In determining whether the Cheethams' all-risk insurance policy excludes coverage for their claimed loss, we are guided by the following principles of insurance contract interpretation:

> We begin with the guiding principle that insurance contracts are construed in accordance with "the plain language of the polic[y] as bargained for by the parties." *Auto–Owners Ins. Co. v. Anderson*, 756 So.2d 29, 33 (Fla.2000) (quoting *Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So.2d 467, 470 (Fla.1993)) (alteration in original). However, if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous. *See Anderson*, 756 So.2d at 34; *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161, 165 (Fla.2003). Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured. *See Anderson*, 756 So.2d at 34; *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So.2d 1072, 1076 (Fla.1998); *Deni Assocs. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1138 (Fla.1998). Further, ambiguous "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." ***262** *Anderson*, 756 So.2d at 34; *see also Demshar v. AAACon Auto Transport, Inc.*, 337 So.2d 963, 965 (Fla.1976) ("Exclusionary clauses in liability insurance policies are always strictly construed."). Thus, the insurer is held responsible for clearly setting forth what damages are excluded from coverage under the terms of the policy.

Fayad, 899 So.2d at 1086. Based on these principles, we must examine the all-risk policy, as a whole, to determine if it is ambiguous. However, we note that an insurance policy is not ambiguous "simply because it is complex or requires analysis," *Garcia v. Fed. Ins. Co.*, 969 So.2d 288, 291 (Fla.2007), or because relevant words used within the policy are not defined by the policy. *Old Dominion Ins. Co. v. Elysee, Inc.*, 601 So.2d 1243, 1246 (Fla. 1st DCA 1992).

[6] The portion of the Cheethams' all-risk policy titled, "Section I—Perils Insured Against," provides, in relevant part, that Southern Oak "insure[s] against risk of direct physical loss" to the dwelling or other structures, but does not insure for any loss "*[e]xcluded by Section I—Exclulsions* " or caused by "*deterioration.*" (emphasis added). Thus, at first glance, without examining the "Section I—Exclusions," it would appear that the claimed loss would not be covered because the loss was caused by a deteriorated pipe. However, the policy includes an exception to the no-coverage provision involving "deterioration," which provides, in pertinent part, as follows:

> **Exception To c.(6)**
>
> *Unless the loss is otherwise excluded*, we cover loss to property covered under Coverage **A** [Dwelling] or **B** [Other Structures] resulting from an *accidental discharge* or overflow of *water* ... from *within a:*
>
> ....

(ii) *Plumbing ... system ...* on the "*residence premises* " ....

(emphasis indicated by underscoring). Therefore, based on paragraph (ii) under "Exception To c.(6)," an "accidental discharge" of water from within a plumbing system caused by deterioration is a covered loss, "[u]nless the loss is otherwise excluded." Exclusions pertaining to water damage are found in Section I A.3. of the policy.

SECTION I—EXCLUSIONS

A. We do not insure for loss caused directly or indirectly by any of the following....

....

3. Water Damage

Water Damage means:

a. Flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

b. *Water or water-borne material which backs up through sewers or drains* or which overflows or is discharged from a sump, sump pump or related equipment; or

c. Water or water-borne material below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure;

caused by or resulting from human or animal forces or any act of nature.

(emphasis indicated by underscoring).

Paragraphs a. and c. of the water damage exclusion reflect that there will be no coverage for water damage to the residence premises, which were caused by *outside* forces unrelated to the residence premises' plumbing system. For example, paragraph a. excludes coverage for water ***263** damage caused by "[f]lood, surface water, waves, tidal water, or the overflow of a body of water," and paragraph b. excludes coverage for water damage caused by "water or water-borne material below the surface of the ground." Likewise, the water damage excluded in paragraph c. pertains to damage caused by water *not* originating from the residence premises' plumbing system even though the water or water-borne material eventually backs up through a pipe and/or drain within the plumbing system of the residence premises. *See Phelps,* 294 So.2d at 363 ("When we consider the terminology used in the exclusion clause in pari materia with the affirmative statement of coverage from leaks in the plumbing system, we conclude that the exclusion was intended to relate only to damage from water not emanating from the plumbing system.").

Based on our de novo review of the relevant policy provisions, we conclude that the exclusions from coverage contemplated by paragraphs a., b., and c. of the water damage exclusion relate to damage caused by water originating from somewhere other than the residence premises' plumbing system. Because the claimed loss in this case was caused by the deterioration of a pipe within the plumbing system, which caused water or water-borne material emanating from the residence premises' plumbing system to back up into the residence premises, we find the Cheethams' loss is a covered loss under the policy.

Our interpretation of these provisions is consistent with the First District Court of Appeal's interpretation of a virtually identical water damage exclusion in the policy reviewed in *Old Dominion.* In *Old Dominion,* the insured premises, a store within a mall, sustained water damage when a blockage in the main drain pipe that services the entire mall caused water to back up into the store. The blockage occurred in the main drain pipe that led to the treatment plant, and which was located off the insured premises.

The First District Court of Appeal noted that while "sewer" and "drain" were not defined in the policy issued by Old Dominion, "the mere failure to provide a definition for a term does not render the term ambiguous." *Old Dominion,* 601 So.2d at 1245. The First District concluded that "[t]he common understanding of the words 'sewer' and 'drain' is that they describe devices which carry water and sewage *away from* property. It is also understood that a plumbing blockage which contains waste from another premises must be a backup from a 'sewer' or 'drain.' " [3] *Id.* After reviewing several out-of-state cases, the court found that "the general understanding in the case law is that a sewer or drain begins at the ... property line." Thus, the First District concluded that the damages to the store were not covered by the insurance policy, and, therefore, reversed the summary judgment entered in favor of the insured store, and remanded for entry of summary judgment in favor of Old Dominion. *Id.* at 1245–46; *see also Hallsted v. Blue Mountain Convalescent Ctr., Inc.,* 23 Wash.App. 349, 595 P.2d 574, 575 (1979) ("When the

ADDITIONAL EXCLUSIONS clause and Paragraph 15 are read together, it is apparent they are not contradictory. If the cause of the discharge is in the plaintiff's system, E. g., A clogged sink drain which causes water in the plumbing system to overflow, the ADDITIONAL ***264** EXCLUSIONS clause does not apply. If the cause of the discharge is outside that system, E. g., a clogged sewer pipe which forces water from outside plaintiff's system to overflow, then the cause is applicable even though the water flowed through plaintiff's plumbing system.”).

IV. CONCLUSION

As we conclude that the relevant policy provisions are not ambiguous, and that section A.3.b. of the water damage exclusion is not applicable, we reverse the final judgment entered in favor Southern Oak and remand for further proceedings.

Reversed and remanded.

Parallel Citations

38 Fla. L. Weekly D694

Footnotes

1 The Cheethams' policy does not define “plumbing system.” However, dictionary definitions of the term indicate that a “plumbing system” includes any device that is necessary to bring water into a building *and* any device necessary to remove water and/or sewage away from the building. *See* http://www.dictionaryofconstruction. com/definition/plumbing-system.html (defining “plumbing system” as “[a]rrangements of pipes, fixtures, fittings, valves, and traps, in a building which supply water and remove liquid-borne wastes”); http://www. webster-dictionary.org/definition/plumbing%#20system (defining “plumbing system” as “utility consisting of the pipes and fixtures for the distribution of water ... in a building and for the disposal of sewage”). Therefore, as the pipe that broke is designed to carry waste water and/or material away from the Cheethams' house and is located on the insured premises, the pipe is a part of the “plumbing system.” *See also Hartford Accident & Indem. Co. v. Phelps*, 294 So.2d 362, 363 (Fla. 1st DCA 1974) (“[I]t is our view that the pipe which developed the leak was within and a part of the plumbing system of the house although it was buried in the ground below the house.”).

2 The policy defines “residence premises” as:

a. The one family dwelling where you reside;

b. The two, three or four family dwelling where you reside in at least one of the family units; or

c. That part of any other building where you reside;

and which is shown as the “residence premises” in the Declarations.

“Residence premises” also includes other structures and grounds at that location.

3 Citing to Webster's New World Dictionary, Third College Edition (1988), the court noted that the definition of “sewer” is “a pipe or drain usually underground, used to carry off water and waste matter,” and the definition of “drain” is a “channel or pipe for carrying off water, sewage, etc.” *Old Dominion*, 601 So.2d at 1245.

120 So.3d 1017
Court of Appeals of Mississippi.

COASTAL HARDWARE AND RENTAL COMPANY, LLC, Appellant/Cross–Appellee
v.
CERTAIN UNDERWRITERS AT LLOYDS, LONDON, Appellees/Cross–Appellants.

No. 2011–CA–00765–COA. | March 26, 2013.

Synopsis

Background: Hardware store brought action against commercial property insurer to enforce an alleged insurance contract in the form of an interim binder. The Circuit Court, Hancock County, Lisa P. Dodson, J., entered summary judgment in store's favor on issue of coverage and ultimately entered judgment on jury verdict awarding store $1.17 million on its insurance-contract claim but rejected store's tort claim for lost net profits allegedly caused by insurer's denial of insurance proceeds and denied store's post-trial request for attorney fees and pre-judgment interest. Store appealed and insurer cross-appealed.

Holdings: The Court of Appeals, Maxwell, J., held that:

[1] binder was a temporary but nevertheless enforceable insurance contract;

[2] temporary insurance binder provided wind damage coverage to store;

[3] expert witness's proffered testimony concerning store's lost profits was appropriately excluded as confusing or misleading;

[4] store's failure to disclose its expert witness's lost-net-profits calculations in a pretrial expert report or deposition rendered expert's testimony inadmissible;

[5] store was not entitled to attorney fees on its motion to alter or amend judgment; and

[6] store was not entitled to prejudgment interest on damages award.

Affirmed.

Carlton, J., concurred in result only without separate written opinion.

West Headnotes (24)

[1] Insurance
Binders

Binder was a temporary but nevertheless enforceable insurance contract effective at the time of hardware store's damage as result of Hurricane Katrina; although the binder anticipated a future formal policy, it expressly stated it did not terminate "until delivery" of that policy, and, since it was undisputed that the underwriters' policy was never delivered, the binder never terminated.

[2] Insurance
Binders

A "binder" is a contract for temporary insurance, until either a permanent policy can be written or its issuance approved or disapproved by the insurer.

[3] Insurance
Binders

Insurance
Wind

Insurance
Burden of proof

Despite the lack of an express provision acknowledging such coverage, a temporary insurance binder provided wind damage coverage to hardware store that was leveled by Hurricane Katrina; insurer never intended to exclude wind, as it had chosen to rely on the written language of the binder when questioned by an insurance agent as to whether a quote for an expanded all-risk policy included wind, and the language of the binder did not plainly and unambiguously specify wind as an excluded risk, and insurer, by offering an all-risk policy

that would cover all risks unless specifically excluded, bore the burden of establishing a wind damage exclusion.

[4] Insurance

Risks or Losses Covered and Exclusions

"All-risk insurance policies" provide coverage for all risks unless the specific risk is excluded.

[5] Insurance

Burden of proof

With "named-peril coverage" policies that provide coverage only for the specific risks enumerated in the policy and exclude all other risks, the insured has the burden of proving that any losses were caused by a peril covered by the policy.

[6] Insurance

Burden of proof

With all-risk coverage, while the insured still has the basic burden of proving his right to recover, the insurer bears the burden of proving that a particular peril falls within a policy exclusion.

[7] Appeal and Error

Cases Triable in Appellate Court

Appeal and Error

Rulings on admissibility of evidence in general

While appellate court reviews a grant of a directed verdict de novo, it reviews the admission or suppression of evidence for an abuse of discretion.

[8] Damages

Loss of profits

Lost profits are recoverable as extra-contractual damages as long as such profits are proved with reasonable certainty, not based on speculation or conjecture.

[9] Damages

Loss of profits and expenses incurred

The particular lost profits that must be proved in order to support an award for extra-contractual damage are net profits as opposed to gross profits.

[10] Evidence

Damages

Expert witness's proffered testimony concerning hardware store's lost profits resulting from commercial property insurer's refusal to process store's claim and demand for coverage following Hurricane Katrina was appropriately excluded, in action in which store sought extra-contractual damages based on insurer's alleged grossly negligent or willful refusal to pay under the insurance contract, which, according to store, rose to the level of an independent tort, or bad faith; expert presented the issue of lost net profits in a way that created a misunderstanding about whether his figures were for lost net profits, lost gross profits, or lost gross sales. Rules of Evid., Rule 702.

[11] Evidence

Necessity and sufficiency

The trial judge assumes the critical role as a gatekeeper in assessing the value of proffered expert testimony.

[12] Appeal and Error

Rulings on admissibility of evidence in general

Evidence

Determination of question of competency

The trial judge has the sound discretion to admit or refuse expert testimony and the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous.

[13] Evidence

Matters involving scientific or other special knowledge in general

To be relevant, and thus admissible, expert testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. Rules of Evid., Rule 702.

[14] Pretrial Procedure

Facts known and opinions held by experts

Pretrial Procedure

Opinions and conclusions

Hardware store's failure to disclose its expert witness's lost-net-profits calculations in a pretrial expert report or deposition rendered inadmissible the expert's testimony concerning store's lost profits resulting from commercial property insurer's refusal to process store's claim and demand for coverage following Hurricane Katrina, in action in which store sought extra-contractual damages based on insurer's alleged grossly negligent or willful refusal to pay under the insurance contract, which, according to store, rose to the level of an independent tort, or bad faith; disclosures for lost net profits were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Rules of Evid., Rule 702; Rules Civ.Proc., Rule 26(b, f).

[15] Pretrial Procedure

Facts known and opinions held by experts

Civil procedure rule imposing a pretrial expert-testimony-disclosure requirement means that the substance *of* every fact and every opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial. Rules Civ.Proc., Rule 26(b)(4)(A)(i).

[16] Appeal and Error

Amendment, modification, or review in same court

Review of the denial a motion to alter or amend judgment is limited to abuse of discretion. Rules Civ.Proc., Rule 59(e).

[17] Insurance

Costs and Attorney Fees

Although hardware store was awarded $1.17 million in damages on its insurance contract claim against insurer, based on insurer's refusal to process store's claim and demand for coverage following Hurricane Katrina, store was not entitled to attorney fees on its motion to alter or amend judgment; because no statute or contractual provision created the right to attorney fees, and because jury did not award punitive damages, trial court had no authority to award attorney fees as a collateral matter post-judgment. Rules Civ.Proc., Rule 59(e).

[18] Costs

American rule; necessity of contractual or statutory authorization or grounds in equity

When an insured, like any other successful litigant, requests attorney fees and expenses post-judgment, absent some statutory authority or contractual provision, attorney fees cannot be awarded unless punitive damages are also proper.

[19] Costs

American rule; necessity of contractual or statutory authorization or grounds in equity

If independent grounds for attorney fees exist, a trial judge may award such fees collaterally; however, if the jury does not award punitive damages, attorney fees are clearly not to be awarded by the trial judge.

[20] Interest

Insurance matters

Hardware store that prevailed in breach of insurance contract action was not entitled to prejudgment interest on damages award upon finding that a bona fide dispute existed not

only with regard to the amount of damages but also over whether commercial property insurer was responsible to pay for wind damages, a temporary binder having been issued pending issuance of policy at the time of Hurricane Katrina, which destroyed the store.

[21] Interest

Insurance matters

For prejudgment interest to be allowed in actions for a breach of contract of insurance, the amount due must have been liquidated when the claim was originally made, or the denial of the claim must have been frivolous or in bad faith.

[22] Interest

Liquidated or unliquidated claims in general

Prejudgment interest may be denied where there is a bona fide dispute as to the amount of damages as well as the responsibility for the liability therefor.

[23] Interest

Insurance matters

The purpose of prejudgment interest in cases involving insurance coverage disputes is not to penalize wrongdoing but rather to compensate insureds for the time value of money.

[24] Interest

Discretion in general

The decision to award prejudgment interest rests within the trial judge's discretion.

Attorneys and Law Firms

***1020** J. Brad Pigott, Jackson, attorney for appellant.

Whitman B. Johnson III, Michael F. Myers, Jackson, Paul L. Fields Jr., Richard E. Zelonka Jr., attorneys for appellees.

Before GRIFFIS, P.J., MAXWELL and FAIR, JJ.

Opinion

MAXWELL, J., for the Court:

¶ 1. This case involves a dispute between a hardware store leveled by Hurricane Katrina and its insurer, who denied coverage for the wind damage. The trial judge granted summary judgment in the store's favor on the wind-coverage issue, and the case proceeded to trial on damages. A jury returned a verdict of $1.17 million in the store's favor on its insurance-contract claim against the insurer. But the trial judge directed a verdict in the insurer's favor on the store's tort claim for lost net profits allegedly caused by the insurer's denial of insurance proceeds. The trial judge also denied the store's post-trial request for attorney's fees and pre-judgment interest. Both parties appeal.

¶ 2. As to the wind-coverage issue, we affirm the grant of partial summary judgment. The damage occurred after the insurer issued the store a written binder for all-risk coverage but before a more formal policy was delivered. Based on the circumstances surrounding the formation of this agreement to be bound to coverage and the language of the written binder and quote, we cannot find that wind was an excluded risk.

¶ 3. We also affirm the grant of a directed verdict against the hardware store for failure to prove its tort claim against the insurer. We find the trial judge properly exercised her gatekeeper role when excluding expert testimony about the hardware store's lost net profits. Without this testimony, the store lacked evidence of the only extra-contractual damages it alleged were proximately caused by the insurer's bad-faith refusal to pay under the contract.

¶ 4. Finally, we affirm the trial judge's denial of the hardware store's request for attorney's fees and pre-judgment interest, which it sought in a post-judgment motion. As the Mississippi Supreme Court recently held, the award of attorney's fees is not a collateral matter that the judge can address through a post-trial motion.[1] We acknowledge the trial judge's authority to award pre-judgment interest had she found the insurer's denial of wind coverage was in bad faith. But we find she did not abuse her discretion in finding that an ambiguity in the binder and quote gave the insurer a legitimate basis to deny wind coverage.

Background Facts

¶ 5. Coastal Hardware (Coastal) is located in Kiln, Mississippi. Prior to Hurricane Katrina, Coastal operated a 22,000 square foot retail space, containing lumber, hardware, and some clothing. Certain Underwriters at Lloyds, London (the Underwriters) are a group of underwriters that subscribed to the Certificate No. JA000700Y/0040, the particular policy that was to be issued to Coastal. [2]

¶ 6. In July 2005, Coastal worked with its insurance agent, Dan McManus of ***1021** Statewide Insurance, to renew its insurance that was to expire at the end of the month. For the previous policy year (July 2004–July 2005), Coastal had obtained through Lloyds, London a named-risk policy in which flood, earthquake, and wind were not named risks. Coastal had a separate wind policy with XL Specialty Insurance. Coastal had renewed its wind policy with XL Specialty Insurance for the July 2005–July 2006 policy year but let it lapse through nonpayment after it negotiated a new contract with the Underwriters.

¶ 7. Instead of offering another named-perils policy, the Underwriters had quoted an "all-risk" policy that expressly excluded flood, earthquake, and mold. Wind was not expressly listed as an excluded risk. However, in several places, when deductibles were addressed, the quote either stated wind was "excluded" or "not required." McManus called the Underwriters' American agent, John Hulen, and asked if wind was covered under the offered all-risk policy. Hulen refused to state a position but instead advised McManus to read the quote himself. On July 14, McManus sent XL Specialty a fax informing the insurer that, after renewing the wind policy, Statewide had "obtain[ed] a renewal quote on [Coastal's] fire policy [in which] we were able to include wind and hail." McManus asked for advise on the best way to cancel the separate wind policy and, prior to Katrina, intentionally allowed the wind policy to lapse due to nonpayment of the premium.

¶ 8. Coastal accepted the Underwriters' quote and paid the $9,800 premium. The Underwriters agreed to bind coverage beginning July 23, 2005. On July 29, the Underwriters' agent issued a two-page written binder for an "all perils" policy, listing "mold" as the only notable exclusion. But the binder did state that Coastal should "READ THIS CONFIRMATION CAREFULLY AND COMPARE IT WITH ANY QUOTE AND SUBMISSION DOCUMENTS AND REVIEW THE POLICY FORMS FOR THE ACTUAL COVERAGE PROVIDED." The binder also stated: "THIS INSURANCE BINDER WILL BE TERMINATED AND SUPERSEDED UPON *DELIVERY* OF THE FORMAL POLICY(IES) ISSUED TO REPLACE IT." (Emphasis added).

¶ 9. According to Hulen's records, on Wednesday, August 24, Hulen received an electronic copy of the formal policy—which contained a wind exclusion—from the Underwriters. Hulen purportedly printed a hard copy and mailed the policy to Statewide. But a representative of Statewide [3] claimed Statewide neither received the policy nor delivered it to Coastal. By Friday, August 26, the Mississippi Gulf Coast was bracing for Hurricane Katrina. Statewide closed its office early that day, having never checked the mail. When the storm struck Monday, August 29, both Statewide's office and the U.S. post office in Kiln were destroyed. The mailed policy was never recovered.

¶ 10. The storm also destroyed Coastal's 22,000 square foot building, forcing the hardware store to operate out of a much smaller building during hurricane recovery. Several weeks after the storm, Coastal contacted Hulen to make a claim. In a brief phone conversation, Hulen told Coastal that the policy did not cover wind damage and that Coastal should make a claim with its wind carrier.

Procedural History

¶ 11. Coastal sued the Underwriters, seeking both damages under the insurance contract and tort damages. Both parties moved for partial summary judgment on ***1022** the issue of coverage under the insurance contract.

¶ 12. Mississippi Rule of Civil Procedure 56(c) directs that summary judgment "shall be rendered ... if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." [4] "Under Mississippi law, the interpretation of an insurance policy is a question of law, not one of fact[,]" so this issue was appropriate for summary judgment. *Shelter Mut. Ins. v. Simmons*, 543 F.Supp.2d 582, 585 (S.D.Miss.2008) (citing *Noxubee Cnty. Sch. Dist. v. United Nat'l Ins.*, 883 So.2d 1159, 1165 (¶ 13) (Miss.2004)). The day before trial, the trial judge granted partial summary judgment in Coastal's favor, finding that, through the insurance binder, the Underwriters had agreed to cover wind damage.

¶ 13. With coverage deemed established, trial proceeded on the issue of contract damages—what amount Coastal was owed under the policy. The jury heard evidence on this issue and awarded Coastal $1.17 million under the insurance policy. But Coastal's tort claim for lost net profits never reached the jury.

¶ 14. As to Coastal's tort claim—that the Underwriters' willful and/or negligent failure to pay Coastal under the policy led to lost profits it would have realized if it had been able to timely invest the insurance proceeds it was due—the trial judge held Coastal's accounting expert could not testify about lost net profits. Coastal's tort claim for lost profits was separate from its claim for losses due to business interruption, a loss covered under the insurance contract.[5] The trial judge excluded the expert's testimony on lost net profits, finding the accountant could not identify the differences between business-interruption loss and lost net profits in a way that would not confuse the jury. The judge also found the expert, in his report and deposition, had failed to address lost net profits but instead opined about lost market share and lost gross sales.

¶ 15. The only tort damages Coastal sought to prove to the jury were damages for lost profits. And having excluded Coastal's only evidence of lost net profits proximately caused by the Underwriters' allegedly negligent denial of coverage, the trial judge directed a verdict in the Underwriters' favor on Coastal's tort claim.

¶ 16. The trial judge did submit the issue of punitive damages to the jury, which found punitive damages should not be assessed against the Underwriters.

¶ 17. After a judgment was entered, Coastal moved to alter and amend the judgment, seeking an award of pre-judgment interest, attorney's fees, and litigation expenses. *See* M.R.C.P. 59(e). Because the jury did not find the Underwriters' denial of coverage warranted punitive damages, and because the trial judge likewise found no bad faith, she denied Coastal's request. Coastal also moved for a new trial on its tort claim, arguing its expert testimony on lost net profits was wrongly excluded.[6] This motion was also denied.

***1023** ¶ 18. Both sides now appeal. Coastal claims the trial judge improperly excluded expert testimony on lost net profits and thereby wrongly granted a directed verdict on its tort claim. Coastal also appeals the denial of its post-trial motion to alter or amend the judgment to include pre-judgment interest and attorney's fees.

¶ 19. The Underwriters cross-appeal the partial grant of summary judgment on the coverage issue.[7]

Discussion

I. Coverage Under the Insurance Contract

¶ 20. We begin with the Underwriters' cross-appeal and the issue of coverage, reviewing the grant of summary judgment de novo. *See Clark v. Moore Mem'l United Methodist Church,* 538 So.2d 760, 762 (Miss.1989) (citation omitted).

A. Recognizing the Binder as the Insurance Contract

[1] ¶ 21. We must first clarify that the undelivered policy was not the insurance contract in force at the time of Hurricane Katrina—the binder was.

[2] ¶ 22. "[A] binder is a contract for temporary insurance, until either a permanent policy can be written or its issuance approved or disapproved by the insuror." *Miss. Farm Bureau Mut. Ins. v. Todd,* 492 So.2d 919, 929 (Miss.1986) (citations omitted). "A binder is not an insurance policy but is generally taken to be a contract providing for interim insurance effective as of the date of the application and terminating at either completion or rejection of the principal policy." 1A Stephen Plitt, Daniel Maldonado, & Joshua D. Rogers, *Couch on Insurance* § 13:1 (Rev. ed.2010). Mississippi recognizes binders as enforceable insurance contracts. *See Todd,* 492 So.2d at 929. "Although a binder may be sketchy and informal in comparison with the policy contemplated for issuance and delivery in the future, it is a contract of insurance [at present], subject only to the conditions that it imposes." 1A *Couch on Insurance* § 13:1.

¶ 23. The Underwriters argue the trial judge erred by finding the written binder, which incorporated the quote, was "the final insurance contract." We do agree that the binder anticipated a future formal policy. But the binder expressly stated it did not terminate "until delivery" of that policy. Since it is undisputed that the Underwriters' 2005–2006 policy was never delivered, the binder never terminated. So the trial court was correct that the binder was the temporary insurance contract effective at the time of Coastal's loss.

B. Construing the Binder

[3] ¶ 24. Because the binder expressly "incorporate[d] the terms of the prospective policy," the question becomes —What was the scope of the policy Coastal intended to purchase and the Underwriters intended to issue? *See Alea London Ltd. v. Bono–Soltysiak Enters.*, 186 S.W.3d 403, 410 (Mo.Ct.App.2006) ("When a loss occurs after coverage has been bound but before the issuance of a policy, the question of the scope of coverage is resolved by determining the amount of coverage contemplated by the binder.").

¶ 25. We cannot answer this question by simply looking to the terms of the ***1024** undelivered, unaccepted formal policy. As the Eighth Circuit has observed:

> [I]f binders are always to be read as including all of the limitations and exclusions that may turn up in the written policy when eventually issued, and if this rule is applied even to written policies issued after the occurrence of a loss, then the oral contract can be rendered completely nugatory by the unilateral act of one party to it, the insurance company.

Hilt Truck Lines, Inc. v. Riggins, 756 F.2d 676, 678 (8th Cir.1985).

¶ 26. Instead, we are guided by Mississippi Supreme Court precedent, which has looked to the circumstances surrounding the formation of the binder as well as the language of the written binder to determine coverage. *Todd*, 492 So.2d at 930; *Gulf Nat'l Bank v. Hartford Fire Ins.*, 264 So.2d 401, 403 (Miss.1972). And after considering the relevant circumstances and language, we, like the trial judge, conclude that the binder covered Coastal's wind damage.

1. The Circumstances

¶ 27. The Underwriters argue that, in finding the binder covered wind damage, the trial judge ignored the past dealings between Coastal and the Underwriters. As support, the Underwriters latch to the following language from *Todd:* "The general rule permits the essential terms of an insurance binder to be supplied by implication, but these terms must be readily inferable from the prior course of dealing between the parties[.]" *Todd*, 492 So.2d at 930. They argue that to find the insurance contract covered wind damage would be to infer a term not in the binder. And because wind was not covered in the 2004–2005 policy, such an inference is not "readily inferable from the prior course of dealings."

¶ 28. While this general rule perhaps applies where prior dealings mirror recent negotiations, here they do not. The contract for coverage in 2005–2006 was not merely a "renewal" of the 2004–2005 *named-peril* policy. Rather, the undisputed evidence showed Coastal was instead receiving expanded coverage through an *all-risk* policy.

[4] **[5]** **[6]** ¶ 29. This was certainly a distinctive change. " 'Named perils' or 'specific perils' policies provide coverage only for the specific risks enumerated in the policy and exclude all other risks. 'All–Risk' policies provide coverage for all risks unless the specific risk is excluded." *Robichaux v. Nationwide Mut. Fire Ins.*, 81 So.3d 1030, 1039 n. 5 (Miss.2011) (quoting 7 Stephen Plitt, Daniel Maldonado, & Joshua D. Rogers, *Couch on Insurance* § 101:7 (3d ed.2006)). Further, with named-peril coverage, the insured "has the burden of proving that any losses were caused by a peril covered by the policy." *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 356 (5th Cir.2007) (citing *Lunday v. Lititz Mut. Ins.*, 276 So.2d 696, 699 (Miss.1973)). But with all-risk coverage, while the insured "still has the basic burden of proving his right to recover[,] ... the insurer bears the burden of proving that a particular peril falls within a policy exclusion [.]" *Id.* (quoting *Leonard v. Nationwide Mut. Ins.*, 499 F.3d 419, 429 (5th Cir.2007)).

¶ 30. Consequently, the question of wind-damage coverage cannot be resolved by simply looking at the 2004–2005 named-perils policy, in which wind was not a named peril. By offering an all-risk policy, the Underwriters were offering to cover all risks, unless specifically excluded. So it is actually the Underwriters, not Coastal, that ask us to infer from the prior dealings that wind was an excluded risk from the all-risk coverage being offered.

***1025** ¶ 31. Looking at the course of dealings between the parties, we cannot make such an inference. We note that Coastal's agent, McManus, specifically asked the Underwriters' agent, Hulen, if the 2005 quote for an expanded all-risk policy included wind. And Hulen admitted he did not inform McManus that wind was a specifically excluded risk. Hulen instead directed McManus to the language of the written binder to answer his question about wind-damage coverage. Thus, we cannot readily infer from the circumstances that the Underwriters intended to exclude

wind, when they chose to rely on the written language of the binder and quote.

2. The Language of the Binder

¶ 32. Looking to the language of the binder, which incorporated the language of the quote by reference, the trial judge found that, at best, there was an ambiguity as to whether wind was an excluded risk. *See Todd,* 492 So.2d at 930 (looking to express terms of written binder to supply terms for oral binder); *Gulf Nat'l Bank,* 264 So.2d at 403 (looking to "the language of the binder itself" in addition to "the circumstances" to find coverage); *see also Hartford Nat'l Bank & Trust Co. v. United Truck Leasing Corp.,* 24 Mass.App.Ct. 626, 511 N.E.2d 637, 640 (1987) ("The binder contract ... is to be read in accordance with its terms and not in accordance with unexpressed terms which a party later wishes had been written into it.").

¶ 33. The quote stated the Underwriters were offering "All risk of Physical Loss or Damage excluding Flood and Earthquake." In addition to listing flood and earthquake as exclusions in the quote, the binder listed "mold" as the only "notable exclusion." But neither the binder nor the quote specified that wind was an exclusion. It is only in sections of the quote and binder not dealing with exclusions but rather deductibles that the deductible for wind is listed as "excluded." And in another section, the quote stated "not required" next to the line item for "WindStorm Cover." We agree this creates an ambiguity.

¶ 34. The Underwriters argue the trial judge erred in construing the ambiguity against the drafter (the Underwriters) and in favor of coverage—finding wind was not a specifically excluded risk. In particular, the Underwriters insist that trial judges should not apply the canons used to construe insurance policies to the language of an insurance binder. We disagree.

¶ 35. Indeed, the general rule is that "a contract of temporary insurance is subject to the same rules of construction as any ordinary contract of insurance." 1A *Couch on Insurance* § 13:6 (Rev. ed.2010).

¶ 36. Under these rules of construction:

- when the words of an insurance policy are plain and unambiguous, the court will afford them their plain, ordinary meaning and will apply them as written;
- any ambiguities in an insurance contract must be construed against the insurer and in favor of the insured and a finding of coverage; and
- provisions that limit or exclude coverage are to be construed liberally in favor of the insured and most strongly against the insurer.

Simmons, 543 F.Supp.2d at 585 (citing *Noxubee Cnty. Sch. Dist.,* 883 So.2d at 1165 (¶ 13); *Nationwide Mut. Ins. v. Garriga,* 636 So.2d 658, 662 (Miss.1994)).

¶ 37. And the rule that ambiguity is construed in favor of the insured and a finding of coverage applies to binder language just as it would to formal policy language. 1A *Couch on Insurance* § 13:6 (Rev. ed. 2010) ("In accordance with the general rule of construction, a binding receipt ***1026** that is ambiguous is to be construed in favor of the insured."); *see also Sparks v. Shelter Life Ins.,* 838 F.2d 987, 989 (8th Cir.1988) ("Binding or conditional receipts are subject to the rules of construction generally utilized in interpreting insurance policies; if the provisions are ambiguous, making them susceptible to two reasonable constructions, one favorable to the insurer and one favorable to the insured, the latter will be adopted."); *Alea London Ltd.,* 186 S.W.3d at 412 ("With respect to the construction of binders in particular, a binder which is ambiguous should be construed in favor of the insured."); *DeFoure v. MFA Life Ins.,* 268 Ark. 829, 596 S.W.2d 7, 9 (Ark.Ct.App.1980) ("It is settled law that ambiguities in insurance contracts will be construed against the insurer who prepared it. Binding or conditional receipts are subject to this rule of construction.").

¶ 38. Thus, we find nothing radical in the trial judge's approach where she resolved the ambiguity in favor of the insured and applied the same principles to find in favor of Coastal on the issue of coverage. While the Underwriters argue this approach unfairly penalizes insurers for not listing in the temporary contract every exclusion that will appear in the later formal policy, we find no such penalty arising under these circumstances. When Hulen was given the opportunity to explain to Coastal's agent whether the Underwriters intended to exclude wind, Hulen did not discuss the future policy but instead relied on the language of the binder and quote, without any further comment. According

to the Underwriters' own representative, the answer about wind coverage could be found in the binder and quote. And because the language of the binder and quote did not plainly and unambiguously specify wind as an excluded risk, we, like the trial judge, construe the binder in favor of the insured and find wind was a covered risk.

¶ 39. We affirm the judgment for $1.17 million in contract damages based on the trial judge's grant of partial summary judgment on the coverage issue.

II. Exclusion of Expert Testimony

¶ 40. We now address Coastal's issues on appeal.

[7] ¶ 41. Coastal seeks reversal of the grant of a directed verdict against Coastal on its tort claim and urges that we remand this claim for a new trial. Specifically, Coastal argues the directed verdict was improper because it resulted from an erroneous evidentiary ruling. While we review a grant of a directed verdict de novo, *Solanki v. Ervin*, 21 So.3d 552, 556 (¶ 8) (Miss.2009), "[o]ur well-settled standard of review for the admission or suppression of evidence is abuse of discretion." *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (¶ 4) (Miss.2003).

A. Coastal's Tort Claim

¶ 42. In addition to its insurance-contract claim, Coastal sought extra-contractual damages, alleging the Underwriters' grossly negligent and/or willful refusal to pay under the insurance contract rose to the level of an independent tort, or "bad faith." *See United Servs. Auto. Ass'n (USSA) v. Lisanby*, 47 So.3d 1172, 1178 (¶ 18) (Miss.2010) (explaining level of malfeasance an insured must show to be entitled to extra-contractual damages); *see also Fulton v. Miss. Farm Bureau Cas. Ins.*, 105 So.3d 284, 288 (¶ 20) (Miss.2012) (citing *Universal Life Ins. v. Veasley*, 610 So.2d 290, 295 (Miss.1992)) (discussing extra-contractual damages as an "intermediate form of relief" between contractual and punitive damages). The only type of extra-contractual damages Coastal alleged and sought to prove at trial were lost profits it would have realized post-Katrina, ***1027** had the Underwriters paid under the contract and had Coastal been able to use that money to reopen a 22,000 square foot retail space, instead of operating out of a much smaller building.

[8] **[9]** ¶ 43. Lost profits are recoverable as extra-contractual damages "as long as such profits are proved with reasonable certainty, not based on speculation or conjecture." *Lovett v. E.L. Garner, Inc.*, 511 So.2d 1346, 1353 (Miss.1987). The particular lost profits that must be proved are "net profits as opposed to gross profits." *Id.* (citations omitted) ("To ascertain net profits, a party must deduct such items as overhead, depreciation, taxes and inflation.").

¶ 44. Coastal sought to prove lost net profits through its accounting expert. The trial judge had accepted the expert as a qualified expert in accounting and permitted him to testify about Coastal's contractual damages due to business-interruption loss. But the trial judge excluded his testimony about any extra-contractual damages in the form of lost net profits.

¶ 45. Without this testimony, Coastal had no evidence to prove lost net profits to a reasonable certainty. *See id.* Coastal does not dispute that without this evidence a directed verdict was proper. *See Troupe v. McAuley*, 955 So.2d 848, 858 (¶ 28) (Miss.2007) (holding directed verdict was proper because, "when considering all the evidence offered during the plaintiff's case-in-chief, as well as all reasonable inferences which could be drawn from the evidence, all in the light most favorable to the plaintiff, the plaintiff was unable to make out a prima facie case"). Rather, Coastal argues that, but for the trial judge's abusing her discretion and excluding the evidence, its tort claim would have survived the Underwriters' motion for a directed verdict.

B. Trial Judge's Evidentiary Ruling

[10] **[11]** **[12]** ¶ 46. "The trial judge assumes the critical role as a gatekeeper in assessing the value of [proffered expert] testimony." *Webb v. Braswell*, 930 So.2d 387, 397 (¶ 16) (Miss.2006) (citing *McLemore*, 863 So.2d at 39 (¶ 21)). "The trial judge has the sound discretion to admit or refuse expert testimony; ... [and] the judge's decision will stand unless the discretion he used is found to be arbitrary and clearly erroneous." *Troupe*, 955 So.2d at 856 (¶ 19) (quoting *Poole v. Avara*, 908 So.2d 716, 721 (¶ 8) (Miss.2005)). Because we find the trial judge's decision to refuse the expert testimony on lost net profits was neither arbitrary nor clearly erroneous, the judge's evidentiary ruling stands. And consequently, so does the grant of a directed verdict on Coastal's tort claim. [8]

[13] ¶ 47. To get past the gatekeeper, expert testimony must be both relevant and reliable. *See* M.R.E. 702. To be relevant, and thus admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in

issue[.]" *Id.; see also Century 21 Deep S. Props., Ltd. v. Corson*, 612 So.2d 359, 370 (Miss.1992). Here, the judge found the expert's lost-net-profits testimony would not assist the jury to do either.

¶ 48. First, the judge found the expert failed to connect his projected lost profits to the Underwriters' failure to pay under the insurance contract. Thus, the judge was skeptical whether his testimony would assist the jury in determining whether any damages were proximately caused by the Underwriters' alleged bad faith refusal to pay. *See Se. Med. Supply, Inc. v. Boyles,* ***1028** *Moak & Brickell Ins.*, 822 So.2d 323, 328 (¶ 14) (Miss.Ct.App.2002) (citation omitted) ("requir[ing] that both the existence of lost profits damages as well as the showing that the cause of the lost profits is due to the breach must be shown with reasonable certainty").

¶ 49. Second, the judge found the expert's lost-net-profits testimony too confusing to aid the jury in understanding the evidence. The trial judge was troubled that the expert could not distinguish lost-net-profits from business-interruption losses in a way that would assist the jury in determining extra-contractual damages, versus contractual damages. Further, the expert could not explain how he arrived at a net-loss figure, versus a gross-loss figure, in a way that would assist the jury.

¶ 50. Interestingly, Coastal's argument for why the trial judge erred in excluding the lost-net-profits evidence was that the judge "misunderstood" how the expert had calculated lost net profits. Coastal also asserts the trial judge improperly stepped into the role of fact-finder when excluding the evidence. Though Coastal describes the misunderstanding as a factual disagreement between the judge and expert about what expenses to subtract in arriving at a net figure, we disagree and instead find the trial judge was properly exercising her role as gatekeeper.

¶ 51. To be admissible, expert testimony has to "assist the trier of fact to understand the evidence." M.R.E. 702. And by Coastal's own characterization, the way its expert presented the issue of lost net profits created a misunderstanding about whether his figures were for lost net profits, lost gross profits, or lost gross sales. Because of this potential for confusion, we find the trial judge did not abuse her discretion by excluding this evidence under Rule 702.

[14] **[15]** ¶ 52. The exclusion of Coastal's expert's testimony was also based on his failure to disclose his lost-net-profits calculations in his pretrial expert report or deposition, as required under Mississippi Rule of Civil Procedure 26(b) and (f). Recently, the Mississippi Supreme Court held a trial judge failed in his gatekeeper role when he permitted an expert to testify about future medical expenses "when the substance of his opinion in that regard was not provided to [opposite] counsel prior to trial." *Bailey Lumber & Supply Co. v. Robinson*, 98 So.3d 986, 997–98 (¶¶–29–31) (Miss.2012). The supreme court explained that the expert-testimony-disclosure requirement of Mississippi Rule of Civil Procedure 26(b)(4)(A)(i) "means that the *substance* of *every* fact and *every* opinion which supports or defends the party's claim or defense must be disclosed and set forth in meaningful information which will enable the opposing side to meet it at trial." *Bailey Lumber*, 98 So.3d at 997 (¶ 30) (quoting *Nichols v. Tubb*, 609 So.2d 377, 384 (Miss.1992)).

¶ 53. Coastal suggests that, because of the way its expert addressed overhead expenses, what its expert called "gross profits" in his report and deposition were also the "net profits." So as Coastal sees it, the Underwriters were by no means ambushed because Coastal's lost-net-profits figures had already been disclosed. But Rule 26(b) requires an expert's disclosure to be "set forth in meaningful information which will enable the opposing side to meet it at trial." *Bailey Lumber*, 98 So.3d at 997 (¶ 30). And here, the judge found the disclosures for lost net profits were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Also, the fact it was not readily apparent from the expert's report or deposition whether he was presenting lost-net-profits calculations—versus those for ***1029** lost gross profits, lost net sales, or lost market share—further underscores the judge's decision that his testimony was confusing and would not help the jury decide if extra-contractual damages were warranted.

¶ 54. Having evaluated the trial judge's reasons for excluding the testimony about lost-net-profits evidence, we find no abuse of her discretion in exercising her role as gatekeeper and excluding the proposed expert testimony. Thus, we affirm the grant of a directed verdict against Coastal on its tort claim.

III. Denial of Post–Judgment Motion

[16] ¶ 55. Coastal's final issue is with the trial judge's denial of its Rule 59 motion to alter or amend the $1.17 million judgment to add attorney's fees, expenses, and pre-judgment interest. *See* M.R.C.P. 59(e) (governing post-trial motions to alter or amend filed within tens days of the entry of the

judgment). Our review of the denial a Rule 59 motion is limited to abuse of discretion. *Fulton*, 105 So.3d at 287 (¶ 9).

A. Attorney's Fees and Expenses

[17] ¶ 56. Coastal argues the trial judge legally erred by holding that she would not award attorney's fees and expenses because the jury had not awarded punitive damages. Coastal relies on *Universal Life Insurance Company v. Veasley*, which holds attorney's fees may be awarded to insureds as extra-contractual damages when there is no arguable basis to deny coverage, even though the circumstances do not warrant punitive damages. *See Veasley*, 610 So.2d at 295.

¶ 57. Considering the procedural posture of Coastal's request, we turn to a recent, factually similar case, where the supreme court distinguished *Veasley* because it did not address a *post-judgment* request for attorney's fees. *Fulton*, 105 So.3d at 290 (¶ 20). In *Veasley*, the jury had awarded extra-contractual damages, even though it declined to award punitive damages, and the supreme court affirmed the award. *Veasley*, 610 So.2d at 292, 295. But in *Fulton*, the insured, who had prevailed against his insurer at trial but had not been awarded punitive damages, had requested attorney's fees in a Rule 59 motion to alter or amend. *Fulton*, 105 So.3d at 286 (¶ 7), 287–88 (¶¶ 13–19). While the supreme court acknowledged that "*Veasley* permits an award of attorney's fees without an award of punitive damages," the court clarified that "*Veasley* does not stand for the proposition that attorney['s] fees may be awarded post-trial[.]" *Id.* at 290 (¶ 27).

[18] **[19]** ¶ 58. Instead, when an insured, like any other successful litigant, requests attorney's fees and expenses post-judgment, "[a]bsent some statutory authority or contractual provision, attorneys' fees cannot be awarded unless punitive damages are also proper." *Id.* at 287–88 (¶ 16) (quoting *Miss. Power & Light Co. v. Cook*, 832 So.2d 474, 486 (¶ 40) (Miss.2002)). "If independent grounds for attorney's fees exist, a trial judge may award such fees collaterally. But if the jury does not award punitive damages, attorneys' fees are clearly not to be awarded by the trial judge." *Id.* at 288 (¶ 16) (internal citations an quotations omitted).

¶ 59. Here, no statute or contractual provision created the right to attorney's fees. And the supreme court in *Fulton* emphasized that "*Veasley* does not create an independent right to attorney's fees." *Fulton*, 105 So.3d at 290. Because the jury did not award punitive damages, the trial judge had no authority to award attorney's fees as a collateral matter post-judgment. *See id.* at 287–88 (¶¶ 14–19).

***1030** ¶ 60. Since Coastal had no post-judgment right to attorney's fees and expenses, its request fell under the standard for a Rule 59(e) motion to alter or amend. *Id.* at 287 (¶ 15). "[T]o succeed on a Rule 59(e) motion, the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice. *Brooks v. Roberts*, 882 So.2d 229, 233 (¶ 15) (Miss.2004). Coastal makes no argument that any of those three circumstances are present here.

¶ 61. Thus, we find no abuse of discretion in the trial judge's denial of Coastal's request for attorney's fees and expenses.

B. Pre-judgment Interest

[20] **[21]** **[22]** ¶ 62. In contrast to attorney's fees and expenses, "Mississippi [does] recognize[ ] judicial authority to award prejudgment interest to a prevailing party in a breach of contract suit." *Moeller v. Am. Guar. & Liab. Ins.*, 812 So.2d 953, 958 (¶ 11) (Miss.2002) (citation omitted); *see also Arcadia Farms P'ship v. Audubon Ins.*, 77 So.3d 100, 105 (¶ 18) (Miss.2012) ("As a general rule, 'in actions for a breach of contract of insurance, when the amount which the insured is entitled to under the contract is withheld after payment is due, interest on such amount can be allowed as damages.' " (quoting *State Farm Mut. Auto. Ins. v. Bishop*, 329 So.2d 670, 673 (Miss.1976))). "For interest to be allowed, the amount due must have been liquidated when the claim was originally made, or the denial of the claim must have been frivolous or in bad faith." *Arcadia Farms P'ship*, 77 So.3d at 105 (¶ 18) (citing *Moeller*, 812 So.2d at 958 (¶ 11)). Conversely, "interest may be denied where there is a bona fide dispute as to the amount of damages as well as the responsibility for the liability therefor." *Id.* (quoting *Simpson v. State Farm Fire & Cas. Co.*, 564 So.2d 1374, 1380 (Miss.1990), *abrogated on other grounds by Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100, 1118 (¶ 45) (Miss.2007)).

[23] **[24]** ¶ 63. "The purpose of prejudgment interest is not to penalize wrongdoing," but rather to "compensate[ ] insureds for the time value of money." *Id.* at (¶ 19) (citations omitted). "The decision to award such interest rests within the trial [judge]'s discretion." *Id.*

¶ 64. The trial judge found there was a bona fide dispute not only over the amount of damages but also over whether the Underwriters were responsible to pay for wind damages.

Though the trial judge held that, because of this ambiguity, the Underwriters were bound to provide Costal coverage for wind damage, the judge reasoned that the ambiguity did create a legitimate reason for the Underwriters to dispute coverage. In *United States Fidelity & Guaranty Company of Mississippi v. Martin*, 998 So.2d 956, 971 (¶ 50) (Miss.2008), the supreme court held "that an insurance company could legitimately deny coverage under a policy that has ambiguous provisions for coverage." Because we too find the binder and quote were ambiguous as to whether wind was an excluded risk, we find the trial judge did not abuse her discretion by finding the Underwriters did not act frivolously or in bad faith in denying coverage. We thus affirm the denial of pre-judgment interest.

¶ 65. **THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL SHALL BE DIVIDED EQUALLY BETWEEN THE APPELLANT/CROSS–APPELLEE AND THE APPELLEES/CROSS–APPELLANTS.**

***1031** LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.

Footnotes

1 *Fulton v. Miss. Farm Bureau Cas. Ins.*, 105 So.3d 284, 288 (¶ 16) (Miss.2012).

2 Lloyds, London is not an insurance company but instead provides a market for the buying and selling insurance risk among its individual members. *Corfield v. Dallas Glen Hills LP*, 355 F.3d 853, 857–58 (5th Cir.2003). So Coastal's insurer was not Lloyds but instead the members, or underwriters, who agreed to buy the risk of insuring Coastal's property.

3 McManus died in 2007, prior to giving any sworn testimony in this case.

4 Further, "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages." M.R.C.P. 56(c).

5 Coastal's $1.17 million award included $20,000 for losses for business interruption.

6 Coastal additionally moved for a new trial on the issue of punitive damages but appeals neither the denial of this aspect of its post-trial motion nor the underlying jury verdict denying punitive damages.

7 The Underwriters also claim in their cross-appeal that the trial judge erred in prohibiting their representative at trial from speaking with their counsel after the representative had testified as an adverse witness. Because we find there are no issues to remand, we do not address this issue.

8 Because we find that Coastal failed to present evidence of damages, we decline to address whether Coastal presented a prima facie case on the required element of bad faith.

730 F.3d 76
United States Court of Appeals,
First Circuit.

Wayne DeCOSTA, Plaintiff, Appellee,
v.
ALLSTATE INSURANCE
COMPANY, Defendant, Appellant.

No. 13–1176. | Sept. 20, 2013.

Synopsis

Background: Insured filed action against insurer alleging breach of Standard Flood Insurance Policy (SFIP). The United States District Court for the District of Rhode Island, John J. McConnell, J., 2013 WL 80514, entered judgment on behalf of insured. Insurer appealed.

[Holding:] The Court of Appeals, Lynch, Chief Judge, held that adjuster's estimate of disputed damages, accompanied by timely, executed proof-of-loss forms as to undisputed amounts, did not satisfy proof-of-loss provision.

Reversed.

West Headnotes (7)

[1] Insurance
Of proof of loss

Insurance
Verification

Adjuster's estimate of disputed damages, accompanied by timely, executed proof-of-loss forms as to undisputed amounts, did not satisfy proof-of-loss provision in standard flood insurance policy (SFIP), where insured did not sign and swear to amount in that estimate; while SFIP did not require that proof of loss follow any particular format, proof of loss was defined as statement of insured, not of some third party, and insured was required to sign and swear to that statement.

2 Cases that cite this headnote

[2] United States
Appropriations

Because the federal government is liable for claims brought under a standard flood insurance policy (SFIP) issued by a private insurer, the Appropriations Clause of the Constitution mandates strict compliance with the SFIP. U.S.C.A. Const. Art. 1, § 9, cl. 7.

[3] United States
Conditions and restrictions

Given that it is the government's liability at stake in any suit against a "Write Your Own" (WYO) insurer, compliance with the proof-of-loss provision serves as a condition precedent to a waiver by the federal government of its sovereign immunity; where waiver depends on compliance with the terms of a federal insurance policy, it follows that the terms of that policy must also be strictly construed and enforced.

[4] Insurance
Liberal or strict construction

The need for uniformity in federal law supports strict construction of the standard flood insurance policy (SFIP).

[5] United States
Disbursements in General

Where federal funds are implicated, the person seeking those funds is obligated to familiarize himself with the legal requirements for receipt of such funds.

[6] Insurance
Payment of loss

Mere payment of claims properly submitted in a proof of loss does not waive objections to further sums not submitted as required by the proof-

of-loss provision in a standard flood insurance policy (SFIP).

2 Cases that cite this headnote

[7] Insurance

Validity and Enforceability

Consistent with their duty to strictly enforce the standard flood insurance policy (SFIP), private insurance companies can vary the terms of a policy only with express written consent from the Federal Emergency Management Agency (FEMA). Housing and Urban Development Act of 1968, § 1340(a)(1), 42 U.S.C.A. § 4071(a)(1).

Attorneys and Law Firms

***77** Gerald J. Nielsen, with whom Joseph J. Aguda, Jr., Nielsen, Carter & Treas, LLC, David W. Zizik, and Zizik, Powers, O'Connell, Spaulding, & Lamontagne, PC were on brief, for appellant.

Patrick F. Dowling, Jr., with whom D'Amico Burchfield, LLP was on brief, for appellee.

Before LYNCH, Chief Judge, TORRUELLA, Circuit Judge, and STEARNS, * District Judge.

Opinion

LYNCH, Chief Judge.

This appeal concerns the special requirements that policyholders, by federal law, must follow to recover their covered losses under flood insurance policies issued as part of the government's National Flood Insurance Program (NFIP). *See McGair v. Am. Bankers Ins. Co. of Fl.*, 693 F.3d 94, 100–01 (1st Cir.2012).

Plaintiff Wayne DeCosta's property in Warwick, Rhode Island is insured by a Standard Flood Insurance Policy (SFIP) issued by Allstate Insurance Company (Allstate), a private insurer participating in the NFIP. Allstate issued DeCosta's SFIP on behalf of the Federal Emergency Management Agency (FEMA), the agency that administers the NFIP. DeCosta's insured property was damaged by a flood, Allstate promptly paid him for some claims, and he successfully sued Allstate for what he said were the remaining unpaid covered losses. Allstate appeals from the final judgment in favor of DeCosta.

On appeal, Allstate argues that the court erred because DeCosta's failure to comply with the SFIP's requirement that he timely file a proof of loss as to all of the ***78** damages sought bars recovery under his policy for those damages and requires dismissal. Allstate argues, in addition, that the court erred when it invoked the SFIP's appraisal clause to resolve disputes not suited for appraisal.

We agree that DeCosta cannot recover under the SFIP because of his failure to comply with its proof-of-loss requirements as to the sums sued on. We reverse and direct the district court to enter summary judgment in Allstate's favor.

I.

A. *Background*

The parties agree on the following facts. A flood damaged DeCosta's property on or about March 31, 2010, with sixteen to eighteen inches of water accumulated on the main floor of his house. His policy covers flood damage to the building, as well as damaged personal property.

DeCosta notified Allstate of the flood damage, and Allstate hired an independent adjuster, Kim Stevens, to assess DeCosta's damages and process his claim. DeCosta also hired an adjuster to represent him in filing his claim for loss. Stevens visited DeCosta's property twice in April to assess the flood damages. After completing a report about DeCosta's loss, Stevens forwarded two proof-of-loss forms to DeCosta on or about May 8, 2010, which listed the costs that Stevens found to be covered.

A "proof of loss" is an insured's "official claim of damages," which states, inter alia, the amount of money that an insured is claiming under his flood insurance policy, accompanied by detailed information about the property and damages. Nat'l Flood Ins. Program, *Flood Insurance Claims Handbook* 6 (Feb.2009), *available at* http://www.fema.gov/media-library-data/20130726-1540-20490–5312/f687_claimshandbook_feb09.pdf [hereinafter NFIP Handbook]; *see* 44 C.F.R. pt. 61, app. A(1), art. VII(J)(4).

A copy of a model form is available online. Importantly, the SFIP requires the proof of loss to be signed and sworn by policyholders and filed within sixty days of the flood loss. 44 C.F.R. pt. 61, app. A(1), art. VII(J)(4).

As a matter of federal law, it is the policyholder's responsibility to submit timely proofs of loss regardless of whether his insurer's adjuster provides him with a form. *Id.* While it is common for insurance adjusters to send policyholders proof-of-loss forms, as Stevens did, the policy explicitly warns policyholders that such adjusters furnish those forms as "a matter of courtesy only." *Id.* art. VII(J)(7); NFIP Handbook at 6.

The first proof-of-loss form that Stevens sent DeCosta, and which DeCosta executed and filed, was for building damages of $95,119.05. The second was for recoverable depreciation of $7,539.98. On or about May 29, 2010, Allstate received those two executed proofs of loss with the term "Undisputed" handwritten on each by DeCosta.

In addition to submitting the two executed proofs of loss that were prepared by Allstate, DeCosta also included a separate sixteen-page document from one of his adjusters, Richard Juchnik. That document estimated that DeCosta's building damages were $212,071.32, which is about double the amount of damages included in the executed proofs of loss. That document was not from DeCosta, nor was it sworn or signed by him.

Within days, by May 31, 2010, Allstate had paid DeCosta $102,659.03. That amount is the total amount claimed in the two original executed proof-of-loss forms for building damages. DeCosta accepted and cashed that check.

***79** DeCosta's adjuster sent Allstate another estimate of building damages on June 14, 2010, that pointed out building damages that were not included in Allstate's proof-of-loss forms and also disputed the valuation of some damages in those forms. As a result, a different Allstate adjuster, Yarri Soteros, met with DeCosta and his adjuster on June 28, 2010, on Allstate's third visit to DeCosta's flood-damaged property.

Soteros's notes from the site visit indicate that she disagreed with Juchnik, DeCosta's adjuster, as to the scope of damages that the SFIP covered; [1] she concluded that DeCosta's policy did not cover many of the items for which he sought compensation. At the site visit, Juchnik informed Soteros that he would appeal to FEMA if Allstate denied coverage of various building repairs he listed. [2]

The day after the site visit, Soteros called an Allstate agent to "discuss the ... claim issues and partial denials for [DeCosta's claim for additional damages]." Soteros's notes indicate that DeCosta's claim remained "pending" while she awaited additional "documentation" from Juchnik. Between July and November of 2010, Soteros left at least 14 messages for Juchnik requesting that he submit additional documents that she needed to process DeCosta's claim for supplemental damages.

While Soteros received a couple of emails from Juchnik in late September, she eventually transferred DeCosta's claim to another adjuster on November 15, 2010, because she had not received all of the documents required to finish processing it. In mid-November, Juchnik sent Allstate a list covering the amount of loss for personal property.

Allstate's adjuster finished reviewing DeCosta's claim for personal property loss, as well as his claim for additional building damages, and sent DeCosta two more proof-of-loss forms in late November. The first was largely for damaged contents—or personal property—totaling $41,221.52; however, $126.78 of that amount covered additional building damages. The second was for recoverable depreciation of $7,539.98.

Allstate received back from DeCosta those two executed proofs of loss on or about December 15, 2010, more than sixty days after the flood damaged DeCosta's property at the end of March 2010. Those proofs of loss were untimely. *See* 44 C.F.R. pt. 61, app. A(1), art. VII(J)(4) (requiring policyholder to submit proof of loss within sixty days after flood).

Allstate requested a waiver of the sixty-day time limit for these two proofs of loss from FEMA on December 22, 2010. FEMA approved the proof-of-loss waiver that same day, and Allstate also paid the $48,761.50 claimed in the second set of proofs of loss on December 22, 2010. This appeal concerns only claims for additional building damages; DeCosta does not seek any further compensation for damaged personal property.

***80** As a matter of law, a flood insurance claim is not payable until both: 1) the policyholder and insurer agree on the amount of damages; and 2) the insurer receives

the policyholder's "complete, accurate, and signed Proof of Loss." NFIP Handbook at 6. [3]

DeCosta acknowledges that his adjuster, Juchnik, and Allstate never agreed on the amount of building damages he was owed under the policy. What is clear is that Allstate only sent DeCosta proof-of-loss forms for the amount of damages to which it agreed DeCosta was entitled. These were the only documents that DeCosta submitted which met the requirements of a proof of loss.

Because DeCosta believed he could recover around $200,000.00 in building damages under the policy, but Allstate paid him only about half that amount—or $102,785.81—DeCosta sued Allstate in March 2011 for the difference. [4]

B. ***District Court Proceedings***

DeCosta filed suit against Allstate in Rhode Island Superior Court on March 18, 2011, alleging among other things that Allstate's actions constituted a breach of contract. Allstate removed the case to the Rhode Island U.S. District Court. DeCosta then sought an appraisal.

In opposing DeCosta's motion to compel appraisal and in its own summary judgment motions, Allstate made two arguments. First, DeCosta's claim for additional recovery under the policy for building damages is barred because he failed to comply with the SFIP's proof-of-loss requirement as to those damages. Second, DeCosta could not invoke the SFIP's appraisal clause because the parties disagreed about the scope of damages covered under the SFIP, not just the value of those damages. Indeed, these themes were consistently sounded by Allstate throughout the litigation, and DeCosta does not contend otherwise.

The district court rejected Allstate's arguments and granted DeCosta's motion to compel appraisal, saying that it thought the parties' dispute concerned the "value of loss" rather than what the policy covers. In so concluding, the district court ignored substantial evidence, including claim processing notes from Allstate's adjusters, which reveals the parties' disagreement as to the scope of coverage under DeCosta's policy. However, the district court retained jurisdiction to give Allstate an opportunity to seek judicial determination of any "overall coverage issue prior to the appraisal process." Thereafter, the district court also denied Allstate's summary judgment motion and rejected its proof-of-loss argument in one sentence, stating only that it "finds that [DeCosta] timely filed the proof of loss [as] required by the policy."

The district court directed the parties to proceed to appraisal, ordering them to "instruct the appraisal panel to separate in any award any damages [alleged] by [Allstate] to be beyond the[ ] policy coverage ***81** ... so as to preserve such for later Court review if necessary."

The three appraisers on the panel concluded that DeCosta's building damages totaled $205,000.00. After deducting the $102,785.81 that Allstate had already paid DeCosta for building repairs, as well as other related costs, the final award came out to $99,805.67. Allstate filed a second summary judgment motion and moved to strike the appraisal award. DeCosta moved to confirm that award.

The district court confirmed the appraisal award. Although the appraisers' signed memorandum stated that they would "solely [determine] the actual cash value/replacement cost" of DeCosta's property, thereby disclaiming any decision over policy coverage determinations, the district court found significant that the "appraisers did not specifically separate any ... out-of-scope damages." The court rejected Allstate's argument that the appraisers implicitly made decisions about the scope of damages covered under the policy—in violation of the SFIP—because the damages they included in their loss calculations were much broader than the type of damages included in Allstate's pre-appraisal estimate.

The district court also denied Allstate's second summary judgment motion and stated in a footnote that Allstate had waived its argument that DeCosta had not preserved his claim for additional damages by failing to comply with the SFIP's proof-of-loss requirement "[b]ecause Allstate did pay on the allegedly improperly filed claim." Notably, neither party argued that Allstate had waived this requirement, nor does DeCosta so contend on appeal. In a final judgment, the district court ordered Allstate to pay DeCosta the appraisal award of $99,805.67. Allstate timely appealed.

II.

This court reviews a denial of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. *Colon v. Tracey*, 717 F.3d 43, 49 (1st Cir.2013). Neither party suggests that there are disputed material facts that would warrant remand.

A. *Strict Compliance with the SFIP's Proof–of–Loss Provision*

Under the NFIP, the federal government provides subsidized flood insurance to fill a gap in the private insurance market. *See* 42 U.S.C. § 4001(b). In administering the NFIP, FEMA creates regulations that govern the process of adjusting, approving, and paying claims for flood loss. *Id.* § 4019. In 1983, FEMA created the Write–Your–Own (WYO) program by which private insurers, such as Allstate, can and do issue flood insurance policies under the NFIP. *McGair*, 693 F.3d at 96. These private insurers are often called "WYO companies." *See id.* Although FEMA can issue policies directly, currently about ninety-five percent of the NFIP's flood insurance policies are issued by WYO companies. *See Mun. Ass'n of S.C. v. USAA Gen. Indem. Co.*, 709 F.3d 276, 280 (4th Cir.2013).

FEMA has promulgated regulations under 44 C.F.R. pt. 61 that dictate the terms of the standard flood insurance policies, or SFIPs, which private insurers can issue on its behalf. *McGair*, 693 F.3d at 96. By regulation, WYO companies must issue identical SFIPs, and "no provision of [an SFIP] shall be altered, varied, or waived other than by the express written consent of the Federal Insurance Administrator." *Id.* (quoting 44 C.F.R. § 61.13(d)) (internal quotation mark omitted).

Under the SFIP, the first step that policyholders must take to recover their loss ***82** from flood damages is give their insurer "prompt written notice" of that flood loss. 44 C.F.R. pt. 61, app. A(1), art. VII(J)(1). This initial notice provision is distinct from the requirement that policyholders timely submit a signed and sworn proof of loss. *Gowland v. Aetna Flood Ins. Program*, 143 F.3d 951, 954 (5th Cir.1998); *compare* 44 C.F.R. pt. 61, app. A(1), art. VII(J)(1), *with id.* art. VII(J)(4).

This dispute centers on whether DeCosta, as to the sums he seeks, complied with the SFIP's proof-of-loss requirement, which states:

> In case of a flood loss to insured property, you [insured] must: [...]
>
> 4. Within 60 days after the loss, *send us a proof of loss, which is your statement of the amount your are claiming under the policy signed and sworn to by you,* and which furnishes us with the following information:
>
> a. The date and time of loss;
>
> b. A brief explanation of how the loss happened;
>
> c. Your interest (for example, "owner") and the interest, if any, of others in the damaged property;
>
> d. Details of any other insurance that may cover the loss;
>
> e. Changes in title or occupancy of the covered property during the terms of the policy;
>
> f. Specifications of damaged buildings and detailed repair estimates;
>
> g. Names of mortgages or anyone else having a lien, charge, or claim against the insured property;
>
> h. Details about who occupied any insured building at the time of loss and for what purpose; and
>
> i. The inventory of damaged personal property described in J.3 above.

44 C.F.R. pt. 61, app. A(1), art. VII(J)(4) (emphasis added).

Notably, under the SFIP, insurance companies can reject policyholders' proofs of loss in favor of their own adjusters' estimate of damages. *Id.* art. VII(J)(9). Where there is disagreement about the amount of flood damages or coverage, the SFIP allows policyholders to appeal to FEMA from any denial of their claims or to contest it in federal court. *See* 44 C.F.R. § 62.20; *id.* pt. 61, app. A(1), art. VII(R). However, to invoke either procedure for review of the denial of a flood insurance claim, a policyholder must have first filed a timely and compliant proof of loss. *See* 44 C.F.R. § 62.20; *id.* pt. 61, app. A(1), art. VII(R).

[1] On appeal, the parties dispute whether DeCosta's submissions to Allstate complied with the SFIP's proof-of-loss requirement such that he is eligible to both bring suit and recover under his policy.

Allstate argues that under the SFIP every "dollar sought must be supported by a proof of loss." Allstate paid DeCosta the amounts of money he claimed, signed, and swore to in four proof-of-loss forms. In doing so it did not, and as a matter of law could not, waive the requirement of a timely proof of loss for additional sums sought. DeCosta's failure to submit a signed proof of loss for the money he seeks to recover in this lawsuit bars his recovery.

DeCosta argues that he complied with his SFIP when he submitted Allstate's proof-of-loss forms as to the amounts paid, writing "undisputed" on each form, and simultaneously submitted a separate sixteen-page estimate from his adjuster, which listed total building damages of $212,071.32, albeit not signing and swearing to it. He claims that the submission of his adjuster's estimate, along with the completed proofs of loss, "preserv[ed] a claim for the value of loss in excess" of the $102,659.03 signed and sworn to in an executed ***83** proof-of-loss form. This argument fails as a matter of law.

DeCosta's SFIP is not an ordinary insurance policy; rather, his SFIP's provisions are also embodied in FEMA's codified regulations, *see McGair*, 693 F.3d at 96, and interpretation of DeCosta's SFIP is a matter of federal law, *id.* at 99. The SFIP states, "You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy." 44 C.F.R. pt. 61, app. A(1), art. VII(R). We have already held that federal law mandates strict compliance with the SFIP, including its proof-of-loss requirement. *McGair*, 693 F.3d at 100–01. So have other circuits. *See Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 175 (2d Cir.2012) (enforcing strict compliance with SFIP in accordance with its sister circuits that "have uniformly held that [SFIP's proof-of-loss requirement] must be strictly construed and enforced").

A number of reasons compel strict compliance with the SFIP terms even where a lesser form of compliance might suffice under state law governing other insurance disputes. As we have said,

> The NFIP is administered by [FEMA] and backed by the federal treasury, which is responsible for paying claims that exceed the revenue generated by premiums paid under policies issued pursuant to the program.... Thus, when private companies [in the WYO program issue SFIPs], they "act as fiscal agents of the United States, but they are not general agents.... In essence, the insurance companies serve as administrators for the federal program. It is the [g]overnment, not the companies, that pays the claims."

McGair, 693 F.3d at 95–96 (second omission in original) (citations omitted) (quoting *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 183–84 (2d Cir.2006)) (internal quotation marks omitted); *see also* 42 U.S.C. § 4017(a) (establishing the National Flood Insurance Fund, located in the Treasury, to make payments required to carry out the NFIP).

[2] Because the federal government is liable for claims brought under SFIPs issued by private insurers,[5] the Constitution mandates strict compliance with the SFIP. The Supreme Court has "recognized that the Appropriations Clause prohibits the judiciary from awarding claims against the United States that are not authorized by statute." *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391 (9th Cir.2000) (citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424, 434, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990)); *see* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

Here, "Congress, through a valid act of delegation to FEMA, has authorized payment of flood insurance funds to only those claimants that submit a timely sworn proof of loss." *Flick*, 205 F.3d at 394. As a result, it would "usurp Congress's exclusive power to appropriate money were ***84** [federal courts] to award an unauthorized money claim based on a theory of substantial compliance" with the SFIP's proof-of-loss requirement. *Id.* at 391.

[3] Enforcing strict compliance with the SFIP also arises from the doctrine of sovereign immunity. Given that it is the government's liability at stake in any suit against a WYO insurer, compliance with the proof-of-loss provision serves as a "condition[ ] precedent to a waiver by the federal government of its sovereign immunity." *Wagner v. Dir., Fed. Emergency Mgmt. Agency*, 847 F.2d 515, 518 (9th Cir.1988). As we have explained, "[i]t has long been established that the [government] is not subject to suit without a waiver of sovereign immunity, and that any such waiver is to be strictly construed." *Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 (1st Cir.1996). Where waiver depends on compliance with the terms of a federal insurance policy, it follows that the terms of that policy must also be strictly construed and enforced. *See Mancini v. Redland Ins. Co.*, 248 F.3d 729, 734–35 (8th Cir.2001).

In *Phelps v. Federal Emergency Management Agency*, 785 F.2d 13 (1st Cir.1986), we upheld strict compliance with the SFIP's written proof-of-loss requirement and refused to apply the equitable estoppel doctrine against the government although "elements of traditional estoppel [were] plainly present." *Id.* at 16–17, 19. "[C]onsiderations of sovereign immunity and constitutional grounds—[such as] the potential for interference with the separation of governmental powers"—motivated our refusal to apply

equitable estoppel against the government, "no matter how compelling the circumstances." *Id.* at 17.

[4] The need for uniformity in federal law also supports strict construction of the SFIP. Such uniformity provides clarity to the numerous insurance companies issuing the bulk of insurance policies under the NFIP, as well as the diverse jurisdictions inundated with flood insurance disputes in the aftermath of national disasters. Insurance companies and policyholders need clear rules to ensure a fast response to policyholders' claims after these disasters. Relatedly, we noted in *Phelps* that Congress established the NFIP because many factors made it uneconomical for private insurance companies to offer affordable flood insurance. 785 F.2d at 14; *see also* 42 U.S.C. § 4001(a), (b). "[A] rule of strict compliance ... avoid[s] disturbing the delicate balance, which FEMA has sought to strike, between the need to pay claims and the need to ensure the long term sustainability of the NFIP" in this economically fraught area. *Flick*, 205 F.3d at 396.

Strictly construing the SFIP's proof-of-loss provision, *see McGair*, 693 F.3d at 100–01, it is clear that DeCosta did not sign and swear to claiming $212,071.32 on a proof of loss, as required. Merely attaching his adjuster's estimate of damages to two executed proof-of-loss forms claiming a smaller amount does not comply. *See* 44 C.F.R. pt. 61, app. A(1), art. VII(J)(4). The law on this is clear, as we describe.

In *Mancini*, an insurance company sent the Mancinis a proof-of-loss form documenting their flood damages under the SFIP. 248 F.3d at 732. The Mancinis did not sign or notarize the proof of loss, but faxed it to their insurance company with a hand-printed cover sheet that included a note with their names on the bottom. *Id.* The insurance company conceded that the fax submission "contained the relevant information" but disputed whether it conformed to the SFIP's requirement of a statement of the amount claimed under the policy that is "*signed and sworn* by the insured." *Id.* at 734 (emphasis added). ***85** The Eighth Circuit held that the Mancinis did not comply with the SFIP's proof-of-loss provision, observing that their "signature does not appear on a statement by the Mancinis as to the amount they claimed under the policy." *Id.* Thus, they failed to sign and swear to the amount they sought to recover.

In *Evanoff v. Standard Fire Insurance Co.*, 534 F.3d 516, 520–21 (6th Cir.2008), the Sixth Circuit adopted the Eighth Circuit's reasoning in *Mancini*. It held that a policyholder failed to comply with the SFIP where he submitted all of the supporting documentation required in the proof-of-loss provision, along with a letter that contained his signature. *Id.* The *Evanoff* court explained that the policyholder was "required to do more than merely submit a set of figures together with a signed statement not rejecting or nullifying those figures. [He] had to submit a signed statement as to the amount claimed under the policy. [He] simply did not do so." *Id.* at 520 (quoting *Mancini*, 248 F.3d at 734–35) (internal quotation mark omitted).

Here, DeCosta's signature on Allstate's two proof-of-loss forms for building damages claims only the amounts listed in those forms. His policy made clear that these forms are provided only as a courtesy, warning policyholders that they are responsible for submitting a timely proof of loss if their insurer's adjuster does not supply them with a form.[6] 44 C.F.R. pt. 61, app. A(1), art. VII(J)(7).

While the SFIP does not require that a proof of loss follow any particular format, it "define[s] a proof of loss as a statement of the insured, not of some third party, and it does require that the insured sign and swear to that statement." *Mancini*, 248 F.3d at 734. That was not done here as to the sums claimed in the litigation. *See id.* at 735 ("[I]t is the insured, not the adjuster, who must swear to the proof of loss."); 44 C.F.R. Pt. 61, App. a(1), Art. VII(J)(5) (requiring policyholders to "use [their] own judgment concerning the amount of loss" when completing the proof of loss).

At oral argument, DeCosta's counsel explained that he was not arguing that equitable estoppel or waiver barred enforcement of the proof-of-loss requirement. Nor was he arguing that DeCosta substantially complied with the SFIP. Instead he asserted that the estimate claiming $212,071.32 in damages from DeCosta's adjuster satisfied the SFIP's proof-of-loss requirement under a stringent, strict construction standard because it was contemporaneously submitted with two proof-of-loss forms. He suggests this case is different from other cases finding noncompliance with the SFIP's proof-of-loss provisions because the adjuster's estimate of disputed damages accompanied timely, executed proof-of-loss forms as to undisputed amounts. Not so. It does not matter that the estimate from DeCosta's adjuster was submitted at the same time and along with compliant proof-of-loss forms claiming undisputed sums because, under the plain terms of the SFIP, DeCosta still had to *sign and swear* to the amount in that estimate, which he did not do.

As counsel for Allstate argued, the attestation serves the purpose of reducing ***86** fraud.[7] This is a common-sense conclusion drawn from the language of FEMA's model proof-of-loss form itself.[8]

Even if equitable considerations could play some role, we reject DeCosta's plaint of lack of notice.[9] The fact that Allstate provided DeCosta with two separate proof-of-loss forms for building damages and the cost of related depreciation, if anything, should have put DeCosta on additional notice that he needed to sign and swear to every dollar he claimed under the SFIP.

[5] "[W]here federal funds are implicated, *the person seeking those funds is obligated* to familiarize himself with the legal requirements for receipt of such funds." *McGair,* 693 F.3d at 100 (emphasis added) (quoting *Jacobson,* 672 F.3d at 175) (internal quotation marks omitted). Other circuits enforcing strict compliance with the SFIP have noted the Supreme Court's mandate: "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of the law." *Jacobson,* 672 F.3d at 175 (quoting *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.,* 467 U.S. 51, 63, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984)) (internal quotation mark omitted).

Thus, the district court erred as a matter of law in holding that DeCosta had filed a proof of loss that complied with his SFIP for the additional payment he seeks to recover.

B. *Waiver under the SFIP*

[6] In ruling on Allstate's second summary judgment motion, the district court noted in a footnote:

> Allstate also argues ... that Mr. DeCosta failed to preserve his claim for further damages above the amounts Allstate has already paid by failing to submit ***87** a signed proof of loss for such additional amounts as required by SFIP Art VII(J)(4) so therefore his claim is barred. *Because Allstate did pay on the allegedly improperly filed claim, the Court finds that this argument has been waived.*

This was also an error of law. To the extent that the district court considered all documents filed to relate to a single claim, and thereby reasoned that payment of the properly filed sums, as a portion of DeCosta's total "claim," could serve to waive any dispute as to the remainder, we reject this interpretation. Mere payment of claims properly submitted in a proof of loss does not waive objections to further sums not submitted as required by the SFIP's proof-of-loss provision. Even DeCosta agrees that Allstate did not waive the proof-of-loss requirement for the additional amount he seeks to recover in this suit.

FEMA must provide express written consent for Allstate to waive any of the requirements outlined in DeCosta's SFIP. The SFIP's waiver provision states, "[t]his policy cannot be changed nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy constitutes a waiver of any of our rights." 44 C.F.R. pt. 61, App. a(1), Art. VII(D).

[7] The SFIP's stringent waiver provision reflects the fact that private insurers are "fiscal agents of the United States," 42 U.S.C. § 4071(a)(1), as opposed to general agents. *See McGair,* 693 F.3d at 96. Thus, consistent with their duty to strictly enforce the SFIP, private insurance companies can "[vary] the terms of a policy only with FEMA's express written consent." *Jacobson,* 672 F.3d at 175. This circuit has previously enforced the written waiver requirement, noting that the SFIP "explicitly preclude[s] oral waiver or waiver by conduct." *Phelps,* 785 F.2d at 19. The district court's reasoning violates *Phelps.*

Where Allstate did pay claims for damaged personal property that DeCosta submitted in untimely proof-of-loss forms, Allstate solicited the required written waiver from FEMA before paying on those noncompliant proofs of loss. No such express written consent from FEMA waived the proof-of-loss requirement for the unsigned and unsworn estimate from DeCosta's adjuster.

As a result, DeCosta cannot sue to recover the difference between his adjuster's estimate and the amount of money that Allstate has already paid him for flood damages to his building. *See Phelps,* 785 F.2d at 19 ("[F]ailure to submit a written proof of loss, coupled with the absence of a waiver of this requirement by FEMA, constitutes a valid defense to recovery on the [flood] insurance policy."); 44 C.F.R. pt. 61, app. A(1), art. VII(R) (requiring that policyholders fully comply with SFIP before they file suit).

Because DeCosta's failure to comply with the SFIP bars any recovery under his policy, it is clear that the district court should not have ordered the parties to proceed to appraisal.

Given our resolution of this appeal, we need not address whether the parties' dispute over coverage issues precluded DeCosta from invoking the SFIP's appraisal clause. Nor need we decide whether the district court abused its discretion in denying Allstate discovery.

III.

Accordingly, we reverse with instructions that the district court enter summary judgment in Allstate's favor and vacate ***88** any orders that are inconsistent with this opinion. No costs are awarded.

Footnotes

* Of the District of Massachusetts, sitting by designation.

1 In "claim activity" notes documenting Allstate's adjusters' handling of DeCosta's claim, Soteros indicated that the inspection of DeCosta's property would only determine the scope of damages that the SFIP covers; resolution of any pricing disputes would require further documents, such as the receipts from repairs to the property.

2 FEMA offers three mechanisms that policyholders can use to dispute the handling of their flood insurance claims: 1) appeal to FEMA; 2) seek an appraisal if the dispute concerns "actual cash value" or "replacement cost" of damaged property; and 3) file suit in a United States District Court. *See* 44 C.F.R. § 62.20 (appeal to FEMA); 44 C.F.R. pt. 61, app. A(1), art. VII(P), (R) (appraisal and lawsuit, respectively).

3 Other cases involving federal flood insurance policies indicate that claims filed without a proof of loss can be "closed without payment consistent with the terms of the policy." *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 173 (2d Cir.2012) (internal quotation mark omitted).

4 DeCosta never pursued an appeal of Allstate's final claim determination to FEMA. Any such appeal must be filed within sixty days of the date of the decision being appealed, 44 C.F.R. § 62.20(e)(1), whereas a lawsuit can be filed as late as one year from the date of decision, *see* 44 C.F.R. pt. 61, app. A(1), art. VII(R). DeCosta sued Allstate on March 18, 2011, which is just over sixty days after Allstate issued its final payment to DeCosta.

5 It is not just a theoretical possibility that the government might incur liability for flood losses that exceed revenue from written premiums. *See* Felicity Barringer, Eric Lipton & Mary Williams Walsh, *Flood Insurance, Already Fragile, Faces New Stress*, N.Y. Times, Nov. 12, 2012, http://www.nytimes.com/2012/11/13/nyregion/federal-flood-insurance-program-faces-new-stress.html?pagewanted =all&_r=0 (documenting the "giant debt" that the NFIP owes the Treasury); Raymond Hernandez, *Congress Passes a $9.7 Billion Storm Relief Measure*, N.Y. Times, Jan. 4, 2013, http://www. nytimes.com/2013/01/05/nyregion/house-passes-9-7-billion-in-relief-for-hurricane-sandy-victims.html (reporting that Congress adopted a bill authorizing the NFIP to borrow $9.7 billion needed to pay claims caused by Hurricane Sandy and other disasters).

6 The model proof-of-loss form that FEMA published online leaves blank spaces for policyholders to indicate the "full cost of repair or replacement (Building and Contents)", as well as the "net amount claimed under the ... policy." Fed. Emergency Mgmt. Agency, *Proof of Loss* (Rev. Oct. 2010), *available at* http://www.fema.gov/media-library-data/20130726-1601-20490-7838/086_0_9_previously_ff81_42.pdf [hereinafter *Proof of Loss*].

7 The NFIP's Adjuster Claims Manual notifies adjusters that "[f]raud or misrepresentation is a continuing problem in the [NFIP]." Nat'l Flood Ins. Program, *Adjuster Claims Manual* x–1 (Rev. Jun. 2010), *available at* https://www.nfipservices.com/uploads/AdjusterClaimsManual.pdf. The Federal Bureau of Investigations has also examined flood insurance fraud, commenting that of the $80 billion in government funding that was appropriated to reconstruction after Hurricane Katrina, "it is estimated that [i]nsurance [f]raud ... accounted for as much as $6 billion." Fed. Bureau of Investigations, *Reports and Publications: Insurance Fraud*, http://www.fbi.gov/stats-services/publications/insurance-fraud (last visited Sep. 17, 2013).

8 FEMA's model proof-of-loss form warns policyholders in bold lettering that willfully making false answers or factual misrepresentations in a proof of loss is punishable by a fine or imprisonment. It also includes an attestation whereby policyholders "declare under penalty of perjury" that the information in their proof of loss is "true and correct." *Proof of Loss.*

9 The NFIP's Flood Insurance Claims Handbook was created by FEMA to explain the process of filing a flood insurance claim to policyholders. *See* NFIP Handbook. The handbook not only tells policyholders that they are the ones responsible for submitting a "signed" proof of loss, *see* NFIP Handbook at 6, but it also details the process for seeking additional damages beyond those sought in an initial claim, stating:

> If you notice additional damage to your Building Property or Personal Property after filing your claim, you may file a Supplemental Claim. This means, essentially, *that you must repeat the documentation and filing process for your original claim, including a Proof of Loss*—but only for the newly discovered damage.

NFIP Handbook at 7 (emphasis added). This explains that the insured must provide a signed proof of loss for every dollar sought. Allstate's adjusters' notes indicate that DeCosta was given this handbook at the first site visit to his insured property, and DeCosta does not say otherwise. The adjuster who visited DeCosta's property in response to his request for more building damages also discussed the handbook with him and confirmed that he had received it at the initial site visit.

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505 Fed.Appx. 389
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See
also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4.
(Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

GBP PARTNERS, LIMITED,
doing business as Gulfbrook Plaza
Shopping Center, Plaintiff–Appellant
v.
MARYLAND CASUALTY
COMPANY, Defendant–Appellee.

No. 11–20912. | Jan. 4, 2013.

Synopsis

Background: Insured brought state-court action against insurer, seeking coverage for damage to shopping center that was damaged by hurricane. Insurer removed action. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 2011 WL 8222606, granted summary judgment to insurer, and insured appealed.

Holdings: The Court of Appeals, Edith H. Jones, Circuit Judge, held that:

[1] shopping center's lost rents were not due to "suspension of operations" following hurricane; but

[2] genuine issues of material fact precluded summary judgment as to whether insurer was required to provide coverage for lost rents as necessary extra expenses;

[3] there was no evidence that shopping center's management fees following hurricane were due to suspension of operations or were necessary extra expenses;

[4] damage sustained by shopping center due to delays in replacement of roof was not covered; and

[5] window damage was not covered.

Affirmed in part, reversed in part, and remanded.

West Headnotes (8)

[1] Insurance
Loss of rent

Under Texas law, insured shopping center's lost rents were not due to "suspension of operations" following hurricane, as would give rise to coverage for lost rents under property-insurance policy's suspension-of-operations clause; "operations" were defined by policy as the "business activities occurring at [shopping center]," center's owner was in the business of owning and renting shopping center space, and operations never completely ceased because at least some of the center's tenants continued to pay rent after hurricane.

[2] Federal Civil Procedure
Insurance cases

Genuine issues of material fact existed as to whether rent abatements for insured shopping center's tenants after hurricane damaged center were a business necessity and were due to a loss covered under property-insurance policy, precluding summary judgment as to whether insurer was required to provide coverage for lost rents as necessary extra expenses.

[3] Federal Civil Procedure
Sufficiency of showing

Summary-judgment affidavit of limited partner did not conflict with his prior sworn deposition statements, and thus affidavit was admissible in determining whether rent abatements for tenants of limited partnership's insured shopping center after hurricane damaged center were covered as necessary extra expenses under property-insurance policy; affidavit stated limited partnership would have had to close the building due to the roof damage, and limited partner's

deposition testimony was that both electrical outage and roof damage affected center's operations.

[4] Insurance

Loss of rent

Under Texas law, rent abatement for tenant of insured shopping center following hurricane was continuation of center's informal policy, not due to suspension of operations or necessary extra expense to avoid suspension of operations, and thus lost rents due to abatement were not covered under property insurance policy's suspension-of-operations or necessary-extra-expense clauses.

[5] Insurance

Business Interruption; Lost Profits

Under Texas law, there was no evidence that insured shopping center's management fees following hurricane were due to suspension of operations or were extra expenses necessary to avoid suspension of operations, and thus fees were not recoverable under property-insurance policy's suspension-of-operations or necessary-extra-expense clauses.

[6] Insurance

Proximate Cause

Insurance

Acts of Insureds or Related Entities

Under Texas law, damage sustained by insured shopping center due to delays in replacement of roof following hurricane were caused by insured's own dilatory actions, including forgery of contractor's signature on check issued by insurer, and thus damage due to delays was not covered under property-insurance policy.

[7] Insurance

Wind

Insurance

Proximate Cause

Under Texas law, there was no evidence that damage to insured shopping center's windows was due to hurricane rather than non-covered event, and thus window damage was not covered under property-insurance policy.

[8] Federal Courts

Waiver of Error in Appellate Court

Insured waived arguments related to non-contractual issues on appeal of summary judgment for property insurer in action seeking coverage for damage to insured shopping center following hurricane, where insured failed to raise non-contractual issues on appeal. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:10–CV–4228.

Before JONES, GARZA, and PRADO, Circuit Judges.

Opinion

EDITH H. JONES, Circuit Judge: [*]

In September 2008, Hurricane Ike made landfall near Galveston, Texas, devastating most of the Texas coastline and becoming the costliest hurricane in Texas history. A shopping center owned by Appellant GBP Partners, Limited ("GBP") and insured by Appellee Maryland Casualty Company ("Maryland Casualty") was severely damaged by the storm. Maryland Casualty paid to replace the center's roof but denied other claims for coverage submitted by GBP, and GBP sued in Texas state court. The case was removed to the federal court for the Southern District of Texas, and the district court granted summary judgment to Maryland Casualty on all of

GBP's claims. GBP appeals the district court's decision. We AFFIRM in part and REVERSE and REMAND in part.

*391 BACKGROUND

After removing this case to federal court based on diversity of citizenship, Maryland Casualty filed a no-evidence motion for summary judgment, and the district court granted summary judgment in favor of the insurer on all issues.

GBP's business is to own and rent space in Gulfbrook Plaza. GBP has no employees. GBP Plaza L.L.C. is GBP's general partner. HSA Commercial Realty Services, L.L.C. (and, previously, a predecessor entity) (collectively, "HSA"), is a commercial property management company that manages Gulfbrook. Hardam Azad is a 19% limited partner in GBP, the 100% owner of GBP Plaza L.L.C., and a 90% owner of HSA.

Hurricane Ike struck Gulfbrook on September 13, 2008. GBP submitted a claim to Maryland Casualty, and after investigation Maryland Casualty paid GBP over $2,300,000 on its claim for roof damage. Maryland Casualty rejected claims for lost rents, management fees, additional roof damage, and window damage, however.

The roof damage and loss of electricity at Gulfbrook caused some of the tenants to close their stores for weeks after the hurricane. The shopping center itself was closed for about two weeks. Azad offered a twenty-five percent reduction in rent to Gulfbrook tenants for six months in an effort to encourage them to stay at Gulfbrook. Gulfbrook's largest tenant, Affordable Furniture, had not paid rent for sometime before the hurricane and did not pay rent afterward.

The damage to the roof required it to be completely replaced. Disputes between GBP and the roofing companies, disputes between GBP and Maryland Casualty, and delays by GBP in sending Maryland Casualty documents resulted in walk-offs by two roofing contractors and extended the roof replacement to over two years. Significantly, a dispute between GBP and its general contractor MRCO, Inc. ("MRCO") led MRCO to refuse to endorse a check from Maryland Casualty issued as jointly payable to both (as well as to GBP's lender and GBP's public adjuster). Azad forged MRCO's endorsement and deposited the check. After MRCO filed an affidavit of forgery with Maryland Casualty on April 5, 2010, Maryland Casualty indicated to GBP a desire to interplead funds in the future. GBP refused to execute a proof of loss while Maryland Casualty continued to consider interpleading the funds. Work stopped in early May after the second roofing company walked off the job. When GBP ultimately executed a proof of loss for approximately $1 million on June 29, 2010, Maryland Casualty issued a final check on July 26, 2010.

Well over two years after Hurricane Ike, GBP commissioned a storefront window damage report, which alleged that the damage was consistent with a "prolonged wind event" like a hurricane.

STANDARD OF REVIEW

We "review[ ] the district court's grant of summary judgment *de novo*, applying the same standards as the district court." *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir.2009). Summary judgment is warranted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* A motion for summary judgment cannot be defeated "by submitting an affidavit which directly contradicts, without explanation, [an affiant's] previous testimony." *Powell v. Dallas Morning News, L.P.*, 776 F.Supp.2d 240, 246–47 (N.D.Tex.2011).

Under controlling Texas law, GBP has the burden of establishing that each of its ***392** claims was covered under the Policy. *Markel Am. Ins. Co. v. Lennar Corp.*, 342 S.W.3d 704, 708–09 (Tex.App.-Houston, 2011, pet. filed). "When covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril." *Id.* at 709. A failure to establish the amount of loss attributable to covered peril—as opposed to uncovered peril—is fatal to recovery. *Id.*

As an insurance policy is a contract, the overall agreement must be evaluated to determine the purposes the parties had in mind at the time they formed the contract. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 841 (Tex.2010). "Terms in insurance contracts that are subject to more than one reasonable construction are interpreted in favor of coverage." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex.2010) (citation omitted). "However, courts should not strain to find an ambiguity, if, in doing so, they defeat the probable intentions of the parties, even though the insured may suffer an apparent harsh result as a consequence." *Quality Oilfield Prods., Inc.*

v. Mich. Mut. Ins. Co., 971 S.W.2d 635, 637 (Tex.App.-Houston, 1998).

DISCUSSION

On appeal, GBP challenges the district court's grant of summary judgment to Maryland Casualty on the following disputed claims. We reverse and remand in part the district court's decision in regard to lost rent. We affirm the denial of management fees, roof damage, and window damage.

I. Lost Rents

[1] GBP submitted a claim to Maryland Casualty for rents lost when tenants were offered a six-month rent abatement in an effort to retain them as tenants and for an anchor tenant that was not offered a rent abatement, but that nonetheless was unable to pay its rent and eventually closed. The district court held that GBP could not show a "suspension of operations," that the rent reductions would not qualify as "extra expense" because they were not "necessary costs," and that losses due to the loss of power were not covered. GBP argues on appeal that the closure of the shopping center qualified as a "suspension of operations," that no suspension of operations need be shown to recover "extra expense," and that the rent abatements were required to mitigate loss. Maryland Casualty reiterates the arguments accepted by the district court and argues that GBP failed to establish causation.

A. Suspension of Operations

The Policy states that Maryland Casualty "will pay for the actual loss of 'business income' [Gulfbrook] sustain[s] due to the necessary suspension of 'operations' during the 'period of restoration,' but not to exceed 12 consecutive months." (R. at 551.) "Operations" is defined by the Policy as the "business activities occurring at [Gulfbrook]." (R. at 563.) It is undisputed that GBP is in the business of owning and renting shopping center space. It is also undisputed that at least some of the tenants at Gulfbrook continued to pay rent, including one that continued to pay rent with no abatement. Under Texas law, a suspension of operations clause requires business to have completely ceased for some interval. *See, e.g., Apartment Movers of Am., Inc. v. One Beacon Lloyds*, No. 05–10354, 2006 WL 678675, at *1 (5th Cir. Mar. 16, 2006) (requiring complete interruption where the policy required a "necessary suspension of your operations"); ***393** *H & H Hospitality LLC v. Discover Specialty Ins. Co.*, No. H–10–1886, 2011 WL 6372825, at *3 (S.D.Tex. Dec. 20, 2011) (requiring complete interruption where the policy required a "necessary suspension of your 'operations' "); *Quality Oilfield Prods.*, 971 S.W.2d at 638–39 (requiring complete interruption where the policy required a "necessary interruption of business"). GBP never ceased its operations, nor has it proved or established a material question of fact as to whether there was a complete suspension of operations at the center.

B. Necessary Extra Expense

[2] The Policy also covers any "necessary 'extra expense' " GBP incurred "during the 'period of restoration' that [GBP] would not have incurred if there had been no direct physical loss of or damage to such property caused by or resulting from a Covered Cause of Loss." (R. at 551.) "Extra expense" is defined by the Policy as "necessary costs incurred to ... [a]void ... the suspension of business and continue 'operations.' " (R. at 563.) The "period of restoration" begins with "the date of the direct physical loss or damage caused by or resulting from any Covered Cause of Loss" and ends on the "date when the property ... should be repaired, rebuilt or replaced." (R. at 564.) The Policy covers not just extra expense associated with a suspension of operations but extra expense necessary to *avoid* the suspension of operations. GBP argues just such a purpose behind the rent abatements. [1] The rent abatements were, according to Azad's evidence, designed to prevent a possible closure of the entire shopping center caused by an exodus of tenants due to the hurricane damage. This created a genuine issue concerning the business necessity of the abatements. [2]

C. Covered Loss

[3] GBP must still establish that the extra expense was due to a covered loss. Power loss is not covered "if the failure occurs away" from Gulfbrook, "however caused." (R. at 546.) GBP did not submit any evidence of this type of power loss. GBP submitted an affidavit from Azad stating that even if the power had not failed, GBP would have had to close the building due to the roof damage. (R. at 1297.) Maryland Casualty argues that this affidavit conflicts with previous sworn statements Azad made during his deposition. On the contrary, Azad's later affidavit does not directly contradict his deposition testimony. Azad's affidavit is in agreement with his deposition testimony: both the electrical outage and the roof damage affected operations. [3]

GBP did not establish how long the shopping center or parts of it were closed beyond an admittedly unverifiable statement that individual tenants may have been closed between two and four weeks. (R. at 336.) Although GBP did not submit additional evidence in support, a sworn ***394** affidavit, especially given that it is undisputed that Gulfbrook sustained significant roof damage from Hurricane Ike, is sufficient to create a genuine dispute of material fact as to whether the extra expense was due to the roof damage. Similarly, Azad's affidavit is sufficient to establish a genuine dispute of material fact as to whether the roof damage was sufficient by itself to necessitate closing all or part of the shopping center, regardless of any power loss. Accordingly, we reverse and remand to the district court on the question whether the rent abatements were a "necessary extra expense" due to a "covered loss."

D. Affordable Furniture

[4] GBP did not submit evidence that it incurred an extra expense to avoid a suspension of operations tied to Affordable Furniture. GBP made no change to its informal policy regarding Affordable Furniture after Hurricane Ike. Rather, it continued its existing practice of allowing Affordable Furniture to pay rent late. Absent a suspension of operations or an expense tied to an attempt to avoid a suspension of operations, there is no covered loss. Accordingly, the district court correctly granted summary judgment to Maryland Casualty for lost rents from Affordable Furniture.

II. Management Fees

[5] As GBP had no employees, it paid HSA (and an HSA-predecessor company) to manage its properties. A new management agreement was signed on January 1, 2009, shortly after Hurricane Ike struck.[4] The new management agreement raised HSA's compensation for work on insurance claims from $75 to $100 an hour. (R. at 2012.) Maryland Casualty refused to pay GBP's claim for these fees, and the district court granted Maryland summary judgment on the basis that the Policy did not cover that type of work and the fees were not an extra expense because there was no suspension of operations. GBP argues that some of the fees fall within the component of business income coverage for "[c]ontinuing normal operating expenses" and some of the fees were a covered "extra expense." Maryland Casualty responds that the new agreement was not necessary to obtain the repairs or negotiate insurance matters, and the management fees are not a proper business income claim. We agree with Maryland Casualty.

First, the Policy only covers "[c]ontinuing normal operating expenses incurred," (R. at 562), if there is a suspension of operations. Because no suspension of operations occurred, the recurring management fees cannot be fully recoverable.

Second, GBP offered no evidence explaining what portion of the fees directly related to making emergency repairs and securing recovery from insurance claims or legal proceedings. As explained above, GBP can recover as extra expense *only* costs necessary to avoid a suspension of operations. Although its brief mentions "emergency repairs (necessary to protect the property or safety of tenants)" and that "management fees necessary to initiate and manage the repair process were incurred by GBP during the period of restoration and would not have been incurred had there been no property damage from a covered cause," (Appellant's Br. 17–18), GBP did not submit evidence tying fees directly to its efforts to prevent a suspension of operations due to an exodus of tenants, as opposed to non-covered costs. ***395** On the contrary, GBP references those management fees in conjunction with fees directly related to non-covered costs.[5]

III. Roof Damage

[6] Gulfbrook's roof sustained additional damage due to delays in its replacement. GBP was also unable to obtain a warranty on the new roof and sought recovery of the loss in warranty value. Maryland Casualty refused to pay for either. The district court agreed with Maryland Casualty that GBP caused the delay that led to the damage. The relevant facts are undisputed.

MRCO served as GBP's initial roof contractor. GBP fired MRCO on October 9, 2009 after a dispute. Maryland Casualty's third check to GBP for the roof claims was issued on October 6, 2009, and GBP apparently did not receive it until after firing MRCO. Like the first two checks, this check was jointly payable to GBP, MRCO, GBP's lender, and GBP's public adjuster. When MRCO refused to endorse the check, Azad forged MRCO's endorsement and deposited the check. MRCO provided an affidavit of forgery to Maryland Casualty on April 5, 2010, and Maryland Casualty informed GBP it would need to file an interpleader. Maryland Casualty ultimately never did so. GBP, GBP's public adjuster, and Maryland Casualty continued to work together, and Maryland Casualty sent GBP a proposed proof of loss on May 5, 2010. GBP's second roofing contractor walked off the job in early May of 2010. GBP did not execute a proof of loss until June

29, 2010. Maryland Casualty issued a check based on the proof of loss within the thirty-day time frame required under the Policy.

GBP argues that the additional damages to the roof resulted from those delays. Many of the delays were caused by GBP. GBP argues, however, that Maryland Casualty is nonetheless responsible for GBP's own dilatory actions because Maryland Casualty considered interpleading further payments after GBP's principal forged an endorsement on a check issued by Maryland Casualty, and GBP was thus justified in not executing a proof of loss to avoid an interpleader. Even interpreting the facts in the light most favorable to GBP as the non-movant, the district court correctly granted Maryland Casualty summary judgment on this issue. Also, because, by GBP's own admission, the loss of warranty value was caused by the delays to the roof replacement, the question of whether the loss warranty value would have otherwise been covered need not be reached. Maryland Casualty did not breach its payment obligation.

IV. Window Damage

[7] GBP's consultant did not inspect the windows at Gulfbrook until early 2011, ***396** and GBP did not file a proof of loss for the alleged window damage until June of 2011. Maryland Casualty then performed its own inspection and denied GBP's claim. The district court granted summary judgment for Maryland Casualty because GBP did not provide timely notice of loss or create a genuine issue that the damage to the windows was caused by Hurricane Ike rather than a non-covered peril. [6]

[8] Regardless of the timeliness of its notice, GBP's claim for window damage must fail because GBP did not offer evidence to establish what part of the damage to the windows was caused by Hurricane Ike as opposed to some other non-covered event. *Markel,* 342 S.W.3d at 709. Moreover, GBP has waived the argument by inadequately briefing the issue on appeal. *See* FED. R.APP. P. 28(a)(9)(A); *Beaumont,* 972 F.2d at 563. An allegation of allocation without further explanation than this: "the wear and tear, etc., are the part that did not require replacement; the hurricane damage is the part that did"—is insufficient as a matter of law. (Appellant's Reply Br. 9–10.) [7]

CONCLUSION

The district court did not err in granting summary judgment in favor of Maryland Casualty on any issue other than the rent abatements. Accordingly, we AFFIRM the judgment on all other issues and REVERSE and REMAND to the district court for further proceedings in connection with the rent abatement.

Parallel Citations

2013 WL 57905 (C.A.5 (Tex.))

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 The Policy only covers extra expense during the period of restoration. The period of restoration, though, is tied not to a suspension of operations but to the date of a covered loss.

2 Maryland Casualty cites no authority for its apparent proposition that such rent abatements must be contractually obligated.

3 Azad replied "Yes" when asked if Gulfbrook "suspended operations for two weeks due to the loss of electricity[.]" (R. at 335.) But in answering the very next question (regarding the exact period operations were suspended), Azad referenced a roof that was "totally compromised." *Id.* Shortly thereafter, Azad states that "even when [Gulfbrook's tenants] are open, they are continue [sic] to sustain damages because the roof is constantly leaking." *Id.* In his affidavit, Azad states that "[e]ven if portable electrical generators had been brought into the property, the roof damage itself caused a total suspension of operations." (R. at 1297.)

4 As owner of GBP's general partner and majority owner of HSA, Azad signed for both parties.

5 "[C]onsiderable time has been (and remains to be) expended on GBP's behalf to find, evaluate, hire, and oversee the public adjusters, contractors, attorneys, and others needed to work through the process of identifying and estimating the costs to repair the damage, compiling the information necessary to pursue the insurance claims, and conducting the repair work." (Appellant's Br. 17.)

GBP also fails to cite any authority in support of the proposition that the management fees are not an excluded "other consequential loss." *Contra Southeast Real Estate Invest. Corp. v. Nationwide Mut. Ins. Co.,* No. 1:07cv1197, 2008 WL 4939748, at *5 (S.D.Miss. Nov. 17, 2008) (holding that percentage management fees were " 'unquestionably' any other consequential loss"). The discussion in GBP's reply brief about consequential damages is inapposite because it deals entirely with damages from a breach, and GBP

does not allege that the management fees were incurred because of a breach of contract by Maryland Casualty. (Appellant's Reply Br. 6–7.)

6 The Policy excludes damage resulting from wear and tear, deterioration, hidden or latent defect, settling, cracking, shrinking expansion, continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more. (R. at 546–48.)

7 GBP raised a number of non-contractual issues to the district court and sought extra-contractual damages. The district court granted GBP summary judgment on all of these issues, and GBP chose not to argue them on appeal. Failure to raise an issue on appeal constitutes waiver of that argument. *United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir.2000); *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir.1993).

112 So.3d 547
District Court of Appeal of Florida,
Second District.

Terry HUNT, Appellant,
v.
STATE FARM FLORIDA
INSURANCE COMPANY, Appellee.

No. 2D11–6484. | April 5, 2013.
| Rehearing Denied May 23, 2013.

Synopsis

Background: Insured, who filed claim regarding damage caused by sinkhole, brought action against property insurer for bad faith. The Circuit Court, Pinellas County, John A. Schaefer, J., granted insurer's motion for summary judgment. Insured appealed.

Holdings: The District Court of Appeal, LaRose, J., held that:

[1] appraisal award satisfied favorable-resolution condition precedent for bringing bad-faith action, and

[2] statute governing contents of civil remedy notice of insurer violation (CRN) does not require the CRN to allege a specific cure amount.

Reversed and remanded.

West Headnotes (6)

[1] Insurance
Prerequisites for Claim of Breach or Bad Faith

Insurance
Duty to settle or pay

Appraisal award regarding insured's claim concerning property damage caused by sinkhole established validity of insured's claim and thus satisfied favorable-resolution condition precedent for bringing bad-faith action against property insurer. West's F.S.A. § 624.155(1)(b)(1).

1 Cases that cite this headnote

[2] Insurance
Prerequisites for Claim of Breach or Bad Faith

Judgment on a breach-of-contract action against an insurer is not the only way of obtaining a favorable resolution regarding liability and extent of damages, as condition precedent for bringing bad-faith action against insurer. West's F.S.A. § 624.155(1)(b)(1).

[3] Insurance
Prerequisites for Claim of Breach or Bad Faith

Arbitration award establishing the validity of an insured's claim satisfies the favorable-resolution condition precedent required to bring a bad-faith action against an insurer. West's F.S.A. § 624.155(1)(b)(1).

[4] Statutes
Exceptions, limitations, and conditions

Judiciary must use a degree of common sense in deciding whether the legislature's intent is sufficiently clear that the court may imply a qualifying phrase within a statute; if there is any reasonable concern that a reading other than a strict interpretation might not comport with the legislature's intent, the legislature should generally be required to amend the statute, if that is necessary to fulfill its actual intent.

[5] Insurance
Pleading

Statute governing contents of civil remedy notice of insurer violation (CRN) does not require the CRN to allege a specific cure amount. West's F.S.A. § 624.155(3)(b).

1 Cases that cite this headnote

[6] **Judgment**
Matters Affecting Right to Judgment
Pretrial Procedure
Time for motion; condition of cause

A claim brought prematurely is not subject to a summary judgment and should be dismissed as premature.

Attorneys and Law Firms

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Opinion

LaROSE, Judge.

Terry Hunt appeals a final summary judgment in favor of his insurer, State Farm, in his bad-faith lawsuit. The trial court erred in ruling that Mr. Hunt could not maintain a bad-faith claim without a breach-of-contract judgment against State Farm. The trial court also erred in ruling that the civil remedy notice provided under section 624.155, Florida Statutes (2006), was invalid for failure to include a definite cure amount. We reverse.

Mr. Hunt's home sustained sinkhole damage in July 2006. He filed a claim with State Farm. Mr. Hunt disagreed with State Farm's damages estimate. In April 2007, he sued State Farm and filed a civil ***549** remedy notice of insurer violation (CRN) pursuant to section 624.155. The Florida Department of Financial Services accepted the CRN on April 25, 2007, which began a sixty-day period in which State Farm could cure its alleged wrongful conduct. *See* § 624.155(3)(a). State Farm moved to dismiss Mr. Hunt's lawsuit and to require an appraisal. The trial court abated the lawsuit and granted the motion for appraisal.

In October 2008, a $162,571.61 appraisal award was entered in Mr. Hunt's favor. State Farm paid that amount. The trial court awarded Mr. Hunt attorney's fees in February 2010. *See* § 627.428, Fla. Stat. (2009); *Goff v. State Farm Fla. Ins. Co.*, 999 So.2d 684, 688 (Fla. 2d DCA 2008) (holding insurer's payment of appraisal award after insured files suit but before judgment is functional equivalent of confession of judgment, entitling insured to section 627.428 attorney's fees). Mr. Hunt voluntarily dismissed his lawsuit but subsequently filed this bad-faith action in the fall of 2010.[1] State Farm moved for summary judgment or, alternatively, dismissal, arguing that Mr. Hunt (1) had not obtained a judgment against State Farm in the first lawsuit and (2) had not specified a definite cure amount in his CRN.

The Appraisal Satisfied the Favorable Resolution Requirement

[1] **[2]** **[3]** The trial court ruled that a judgment against State Farm for breach of contract was a condition precedent to a bad-faith action. In *Blanchard v. State Farm Mutual Automobile Insurance Co.*, 575 So.2d 1289, 1291 (Fla.1991), the supreme court held that a bad-faith action cannot accrue until the underlying lawsuit seeking insurance benefits is resolved in the insured's favor:

> [A]n insured's underlying first-party action for insurance benefits against the insurer necessarily must be resolved favorably to the insured before the cause of action for bad faith in settlement negotiations can accrue.... Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle.

See also Vest v. Travelers Ins. Co., 753 So.2d 1270, 1276 (Fla.2000) ("[B]ringing a cause of action in court for violation of section 624.155(1)(b) 1 is premature until there is a determination of liability and extent of damages owed on the first-party insurance contract."). But, "[a] judgment on a breach of contract action is not the only way of obtaining a favorable resolution." *Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co.*, 100 So.3d 1155, 1158 (Fla. 4th DCA 2012). For example, "an arbitration award establishing the validity of an insured's claim satisfies the condition precedent required to bring a bad faith action." *Id.* (citing *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So.2d 1216 (Fla.2006)). Similarly, as in this case, an appraisal award establishes the validity of Mr. Hunt's claim[2] and satisfies this condition precedent. *See id.*

Cure Amount

The trial court's second justification for granting summary judgment was its finding that "[Mr. Hunt's] civil remedy notice ***550** is invalid because there is no definite 'cure' amount." Mr. Hunt argues that Florida law imposes no such requirement. The trial court's order relies on *Talat Enterprises, Inc. v. Aetna Casualty & Surety Co.*, 753 So.2d 1278 (Fla.2000), as support. *Talat* recites the unremarkable proposition that "for there to be a 'cure,' what ha[s] to be 'cured' is the non-payment of the contractual amount due the insured" and that "the remedy itself does not ripen if the insurer pays what is owed on the insurance policy during the cure period." *Id.* at 1284. *Talat* does not hold that the CRN must provide a specific cure amount.

[4] Section 624.155, Florida Statutes (2005), provides, in pertinent part, as follows:

> **624.155. Civil remedy**
>
> ....
>
> (3)(a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60–day time period shall not begin until a proper notice is filed.
>
> (b) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:
>
> 1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
>
> 2. The facts and circumstances giving rise to the violation.
>
> 3. The name of any individual involved in the violation.

On its face, the statute does not require a specific cure amount. We are hesitant to impose a requirement beyond that directed by the legislature. [3]

State Farm relies on two federal cases, *Longpoint Condominium Ass'n v. Allstate Insurance Co.*, No. 5:05CV45RHWCS, 2005 WL 1315810 (N.D.Fla.2005), and *316, Inc. v. Maryland Casualty Co.*, 625 F.Supp.2d 1187 (N.D.Fla.2008), for its argument that the CRN requires a specific cure amount. *Longpoint* states that the CRN must be "sufficient to apprise [the insurer] of the assertion that it ha[s] inadequately investigated the claim and failed to pay the [amount of the] demand." 2005 WL 1315810, at *2 n. 3. *Longpoint* does not hold that the CRN must include the amount of the demand. Similarly, *316* does not sweep as broadly as State Farm urges. Rather, *316* states:

> Of concern to me are the shortcomings in the Civil Remedy Notice and in the Plaintiff's pleadings. Plaintiff's Civil Remedy Notice was written in such general terms that it gave no actual notice of the specific actions that Defendant could have undertaken to cure it. Additionally, *Plaintiff has not stated in any of its pleadings the amount* it contended Defendant should have paid to avoid bad-faith litigation at the time the Notice was filed.

316, 625 F.Supp.2d at 1193–94 (emphasis added). We cannot discern from this language any intent to impose added content to the CRN.

***551** In *Vest*, the supreme court stated that the insured may submit a CRN before liability or damages have been determined; the insurer's appropriate response to the CRN is not dependent on such a determination. 753 So.2d at 1275. Rather the insurer must make a "good-faith evaluation of what is owed ... based upon proof of loss required by the policy and [the insurer's] expertise in advance of a determination by a court or arbitration." 753 So.2d at 1275–76. The court further explained that "[w]hat is owed on the contract is in turn governed by whether all conditions precedent for payment contained within the policy have been met." *Id.* at 1275.

[5] We also recognize the holdings of several federal court decisions that section 624.155(3)(b) does not require the CRN to allege a specific cure amount. *See, e.g.*, *King v. Gov't Emps. Ins. Co.*, No. 8:10–cv–977–T–30AEP, 2012 WL 4052271, at *7 (M.D.Fla. Sept. 13, 2012) (citing *Bullard Bldg. Condo. Ass'n v. Travelers Prop. Cas. Co. of Am.*, No. 8:08–cv–50–T–30MAP, 2009 WL 2423436, at *10 (M.D.Fla. Aug. 4, 2009); *Tropical Paradise Resorts, LLC v. Clarendon Am. Ins. Co.*, No. 08–60254–CIV, 2008 WL 3889577, at *3 (S.D.Fla.

August 20, 2008)). As is apparent from our discussion, we must agree.

[6] We reverse final summary judgment [4] and remand for further proceedings.

Reversed and remanded.

ALTENBERND and MORRIS, JJ., concur.

Parallel Citations

38 Fla. L. Weekly D774

Footnotes

1 Although Mr. Hunt has been paid the full appraisal award and attorney's fees, he is essentially seeking delay damages for the period between when the claim was paid and when he maintains it should have been paid.

2 *Cf. Goff*, 999 So.2d at 688 (holding payment of policy proceeds after suit is filed but before judgment has been rendered is equivalent of confession of judgment or verdict in insured's favor (citing *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 684–85 (Fla.2000))).

3 The judiciary must use a degree of common sense in deciding whether the legislature's intent is sufficiently clear that the court may imply a qualifying phrase within a statute. If there is any reasonable concern that a reading other than a strict interpretation might not comport with the legislature's intent, the legislature should generally be required to amend the statute, if that is necessary to fulfill its actual intent.

Doe v. Dep't of Health, 948 So.2d 803, 809 (Fla. 2d DCA 2006) (footnote omitted).

4 We note that "a claim brought prematurely is not subject to a summary judgment [and] should be dismissed as premature." *Vest*, 753 So.2d at 1276.

2013 WL 4829262
Only the Westlaw citation is currently available.
United States District Court,
N.D. Mississippi,
Delta Division.

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff
v.
Fred L. and Debbie BAPTIST; Wilshire Credit Corporation; and John Does A–C, Defendants.

Civil Action No. 2:12–CV–00097–SA–JMV. | Sept. 10, 2013.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

SHARION AYCOCK, District Judge.

***1** Presently before the Court is Plaintiff's Motion for Summary Judgment [40] seeking a declaratory judgment voiding an insurance policy purchased by Fred and Debbie Baptist. After reviewing the motion, responses, rules, and authorities, the Court finds the following:

FACTUAL AND PROCEDURAL BACKGROUND

Defendants Fred and Debbie Baptist ("Baptists") purchased a homeowner's policy from Plaintiff Nationwide Mutual Insurance Company ("Nationwide") on October 20, 2006. The policy covered the Baptists' home at 65 Bailey Road, Nesbitt, Mississippi, and the initial policy term was for a period of one year. On November 13, 2008, The Bank of New York purchased the Baptists' home at a foreclosure sale and thereafter attempted to remove the Baptists from the property. The Baptists attempted to have the foreclosure set aside by filing suit in federal court but were unsuccessful. *See Baptists v. The Bank of New York Mellon*, 2010 WL 1539973 (W .D.Tenn.2010). Despite the foreclosure, the policy was renewed four times following the expiration of the initial term in 2007.

On December 27 and 28, 2011, the insured property suffered significant damage from fire, and the Baptists filed a claim against their homeowner's policy. The Baptists had previously filed claims and received payments from Nationwide for incidents occurring on April 25, 2010 and May 4, 2010. Nationwide brought this action on June 6, 2012 seeking a judicial determination of the parties' rights and responsibilities with regard to the homeowner's policy. Nationwide then filed the present motion for summary judgment on June 7, 2013 asserting that no genuine issue of material fact exists and that Nationwide is entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is warranted under Rule 56(a) of the Federal Rules of Civil Procedure when the evidence reveals both that there is no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U .S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact ." *Id.* at 323, 106 S.Ct. 2548. The nonmoving party must then "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. 2548 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when ... both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). When such contradictory facts exist, the Court may "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing*

Prods., Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). However, conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir.2002); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir.1997); *Little*, 37 F.3d at 1075.

ANALYSIS AND DISCUSSION

***2** Nationwide argues that the Baptists had no insurable interest in the insured property after the foreclosure sale and therefore the Court should allow it to void their insurance policy as against public policy. In the alternative, Nationwide seeks relief from payment of the December 2011 claim due to the Baptists' allegedly material misrepresentation and an increased hazard following the foreclosure. In response, the Baptists argue that they had an insurable interest at the inception of the policy and maintained an insurable interest in the contents of the property, that there was no increased risk or hazard to the property, and that they made no misrepresentations to Nationwide. As the Court finds the policy at issue void due to the foreclosure of the insured property, the Court need not address the issues of increased hazard or material misrepresentation.

It is undisputed that the Baptists lost their home, the insured property, in 2008 due to foreclosure. As such, the Baptists ceased to have any interest in the property once it was purchased by The Bank of New York on November 13, 2008. "After a foreclosure sale, the debtor is divested of all legal and equitable interest in the foreclosed property." *Moore v. Marathon Asset Mgmt., LLC*, 973 So.2d 1017, 1021 (Miss.Ct.App.2008) (internal citations omitted); *Dean v. Simpson*, 235 Miss. 162, 170–71, 108 So.2d 546, 549 (Miss.1959) (no right of redemption survives foreclosure of mortgage and sale of land under Mississippi law). Though the Baptists filed suit in an attempt to have the foreclosure set aside, it is clear that they had no rights or interests in the property whatsoever after November 2008. Additionally, the Baptists allow that the only insurable interest in the property during the relevant times may belong to the 2008 purchaser. [1]

Mississippi law requires a purchaser of property insurance to have an insurable interest in the subject property at the time of purchase and at the time of loss. "Mississippi follows the general rule that in order to be entitled to proceeds from an insurance policy, the purchaser of the policy must have an insurable interest in the property or life insured." *Aetna Cas. & Sur. Co. v. Davidson*, 715 F.Supp. 775, 776 (S.D.Miss.1989) (citing *Southeastern Fid. Ins. Co. v. Gann*, 340 So.2d 429 (Miss.1976); *Nat'l Life & Acc. Ins. Co. v. Ball*, 157 Miss. 163, 127 So. 268 (Miss.1930)); *Rentrop v. Trustmark Nat'l Bank*, 2008 WL 4371375, *2 (S.D.Miss.2008) (citing *Estate of Murrell v. Quin*, 454 So.2d 437, 444 (Miss.1984)). "The reason for the rule requiring an interest in property upon which insurance is sought is to prevent the coverage from becoming a wagering contract contrary to public policy." *Southeastern Fid. Ins. Co.*, 340 So.2d at 434.

The Baptists argue that they had an insurable interest at the inception of the policy and that, even if they had no insurable interest in the property itself after the foreclosure, they at all times had an undisputed insurable interest its contents. In support of their position, they point to a Southern District case with a similar fact scenario in which the court denied the insurer's motion for summary judgment because of disputed factual issues regarding contents coverage. *State Farm Fire & Cas. Co. v. Ramsey*, 719 F.Supp. 1337 (S.D.Miss.1989). As is the case here, the defendant in *State Farm* had an undisputed insurable interest in the insured property at the time he purchased the relevant homeowner's policy but subsequently lost his interest as a result of foreclosure proceedings. *Id.* at 1339. Like the Baptists, the defendant continued to occupy the property despite the foreclosure until it was later destroyed by fire. *Id.* Despite the defendants' initial insurable interest, the Southern District found the defendants had no insurable interest in the property at the time of the claim and granted the insurer's motion for summary judgment as to coverage of the dwelling. *Id.* at 1341–42. However, the court found genuine issues of disputed fact existed as to the coverage of the property's contents and denied the motion as to that issue. *Id.* at 1344. The Baptists argue that their insurable interest in the contents of the property at issue in the case *sub judice* likewise prevents the Court from granting Nationwide's motion.

***3** Despite its similarities, the Court finds *State Farm* distinguishable. In that case, the purchase of the policy, foreclosure of the insured property, and claim for benefits all occurred within the original policy period. *Id.* at 1339. While the defendants had clearly lost their insurable interest to the dwelling, nothing had occurred to void the policy altogether or otherwise affect any potential contents coverage. The issue here, however, is whether the Baptists had a right to renew their homeowner's policy after they lost ownership of the

insured property. Nationwide contends they did not and that the policy is void *ab initio* in its entirety for each of the renewal periods following the foreclosure.

"[W]hen a contract is in contravention of public policy .... the individual interests of the immediate parties are subordinated to the superior concern of the public in general, so that .... there is nothing that the particular parties to the contract may do which will make it otherwise than it was *ab initio*—void as against public policy, and therefore nonenforceable by the courts." *Ball,* 127 So. at 268 (finding a life insurance policy unenforceable despite the insurer's collection of premiums and knowledge of insured's lack of insurable interest); *Estate of Murrell,* 454 So.2d at 444 ("[A]n insurable interest is not dependent upon payment of the premium.").

The application for insurance signed by Fred Baptist states in pertinent part, "I am applying for issuance of a policy of insurance and, at its expiration, for appropriate renewal policies issued by Nationwide Mutual Insurance Company and/or other members of the Nationwide group of insurance companies." The Baptists have failed to establish a genuine issue of material fact exists with respect to Nationwide's claim that they were ineligible for the renewal policies issued after the 2008 foreclosure. Indeed, the Baptists have not submitted any evidence of facts contradicting Nationwide's argument. As such, the Court finds the Baptists had no insurable interest in the subject property at the time the renewal policies were issued, the Baptists were therefore ineligible for such renewal policies, and consequently, the renewal policies are void.

CONCLUSION

Accordingly, the Court finds Defendants have failed to establish a genuine issue of material fact entitling them to a trial on the merits and as such, the Plaintiff's Motion for Summary Judgment [40] is GRANTED.[2] Additionally, as the Court finds the policy at issue to be void for the renewal periods after the 2008 foreclosure, Nationwide is entitled to recover all benefits paid for the two undisputed claims filed during those periods.

SO ORDERED.

Footnotes

1 "[I]t is foreseeable that the insurable interest in the home structure belonged to the 2008 purchaser (and his heirs and assigns)...." Def. Resp. at 6.

2 Plaintiff failed to serve Defendant Wilshire Credit Corporation in accordance with Federal Rule of Civil Procedure 4(m) despite two notices from the Court. As such, the Court hereby dismisses Plaintiff's claims against Wilshire Credit Corporation without prejudice.

2013 WL 1803609
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Houston (14th Dist.).

Arman A. SHAFIGHI, Appellant
v.
TEXAS FARMERS INSURANCE
COMPANY, Appellee.

No. 14–12–00082–CV. | April 30, 2013.

On Appeal from the 55th District Court, Harris County, Texas, Trial Court Cause No.2009–69062.

Attorneys and Law Firms

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Robert F. Scheihing, for Texas Farmers Insurance Company.

Panel consists of Chief Justice HEDGES and Justices BROWN and BUSBY.

Opinion

MEMORANDUM OPINION

J. BRETT BUSBY, Justice.

***1** Arman A. Shafighi sued Texas Farmers Insurance Company (Farmers) when it denied his claim for fire damage to his house. The trial court granted summary judgment to Farmers, concluding that Shafighi could not recover because he failed to participate in a sworn examination as part of Farmers' investigation. Because the insurance policy at issue permits Farmers to abate the case until Shafighi complies with the relevant policy provisions, but does not entitle it to summary judgment under these circumstances, we reverse and remand.

BACKGROUND

Farmers insured a house in Houston that Shafighi owned. When fire damaged the building, Shafighi sought to collect on his policy. The insurance policy assigned certain "duties after loss" to Shafighi, among which were "cooperat [ing] with [the insurer's] investigation" and "submit[ting] to examinations under oath."

Over approximately six months, Shafighi and Farmers unsuccessfully attempted to schedule Shafighi's examination under oath. The parties' correspondence states that Shafighi lived in California following the fire and feared returning to Houston because he believed the man responsible for burning his house would do him harm. Shafighi asked to conduct the examination in California; this was not acceptable to Farmers. Shafighi's lawyer eventually suggested a "telephonic statement," but Farmers believed proceeding telephonically would interfere with the exchange and identification of exhibits.

Notwithstanding the parties' inability to agree on a suitable examination location, Farmers scheduled two examinations in Houston. It is unclear from the record whether Shafighi agreed to these examinations, but it is undisputed that he did not attend them. Farmers also communicated to Shafighi's lawyer that it "t[ook] exception ... to" the untimely "proof-of-loss" form that Shafighi submitted. In a faxed letter, the insurer stated that, among other things, portions of the form were left blank and Shafighi "did not present a total amount being claimed."

Approximately six months after first contacting Shafighi for an examination, Farmers denied coverage. According to Farmers, the denial resulted from, among other things, Shafighi's "[f] ailure to provide his examination under oath" and "failure to provide a timely and sufficient inventory [of losses]."

Shafighi later sued Farmers, alleging several causes of action. Farmers moved for traditional summary judgment, arguing that Shafighi's failure to participate in an examination under oath and "submit[ ] a properly completed 'Proof of Loss' " [1] constituted the failure of conditions precedent to Farmers' performance, which relieved it of the obligation to pay Shafighi's claim. Shafighi's response argued that the reasonableness of his refusal to be examined in Houston raised fact questions precluding summary judgment.

The trial court granted summary judgment in a detailed order, concluding as a matter of law that the disputed facts

upon which Shafighi relied, even if true, "d[id] not amount to sufficient defense or excuse for failing to sit for an [examination]." Accordingly, the court found that Shafighi "failed to comply with a condition precedent to suit," and it granted Farmers summary judgment on that basis.

***2** In a motion for new trial, Shafighi pointed out that even if he failed to comply with the examination-under-oath requirement, under well-established Texas law, "[t]he insurer's proper remedy to enforce the examination under oath condition precedent is abatement rather than bar" (internal quotation marks and brackets omitted). The trial court denied the new trial motion, and Shafighi appealed the grant of summary judgment.

ANALYSIS

In his first and second issues on appeal, Shafighi argues that under the policy terms, the remedy for noncompliance with the examination-under-oath requirement is abatement until he complies, not summary judgment. Because the great weight of authority construes such provisions as supporting only abatement, we agree. We also reject Farmers' argument that Shafighi's failure to urge this interpretation of the policy when initially opposing summary judgment precludes us from adopting it on appeal. Finally, with respect to Shafighi's fourth issue, we conclude that the allegedly inadequate proof-of-loss form that Shafighi submitted does not entitle Farmers to summary judgment. For these reasons, the summary judgment must be reversed, and we need not reach Shafighi's other issues.

I. Standard of review

We review a trial court's order granting traditional summary judgment de novo. *Mid–Century Ins. Co. v. Ademaj,* 243 S.W.3d 618, 621 (Tex.2007). To be entitled to summary judgment, the movant must demonstrate that no genuine issues of material fact exist and that he is entitled to judgment as a matter of law. Tex.R. Civ. P. 166a(c). If the movant does so, the burden shifts to the non-movant to produce evidence sufficient to raise a fact issue. *Walker v. Harris,* 924 S.W.2d 375, 377 (Tex.1996). When reviewing a summary judgment motion, we cannot read between the lines or infer from the pleadings or evidence any grounds for summary judgment other than those expressly set forth before the trial court. *Olmstead v. Napoli,* 383 S.W.3d 650, 652 (Tex.App.-Houston [14th Dist.] 2012, no pet.)

II. Because the policy does not bar Shafighi's recovery for failure to comply with the examination-under-oath requirement, but merely allows Farmers to abate the case until Shafighi complies, the trial court erred in granting summary judgment.

Insurance policies are contracts, and we construe them using ordinary rules of contract interpretation. *Tanner v. Nationwide Mut. Fire Ins. Co.,* 289 S.W.3d 828, 831 (Tex.2009). Our cardinal concern is determining the parties' intent as reflected in the terms of the policy itself. *Id.* Accordingly, we give policy language its plain, ordinary meaning unless something else in the policy shows the parties intended a different, technical meaning. *Id.*

Here, the policy provides that, "as often as [Farmers] reasonably require[s]," the insured must "submit to examinations under oath." The parties agree that the policy's penalty for breach of the examination-under-oath requirement is as follows:

> ***3** No suit or action can be brought against us, our agents or our representatives unless there has been full compliance with all the terms of this policy. Action brought against us, our agents or our representatives must be started within two years and one day after the cause of action accrues.

Farmers construes this provision to mean that "failure to comply with the condition precedent of submitting to an Examination under Oath is a reasonable basis for denying an insured's claim." [2] Shafighi counters that such a provision forbids the insured from bringing suit prior to compliance, but it does not permit the insurer to deny coverage altogether. He argues that the only remedy available to Farmers is abatement, which it has not yet requested.

For the better part of a century, Texas courts have interpreted similarly phrased provisions as Shafighi suggests. These provisions mean that "[i]f the insured refuses to submit to the examination ... he only delays the time when he can recover on his policy." *Humphrey v. Nat'l Fire Ins. Co.,* 231 S.W. 750, 752 (Tex. Comm'n App.1921, judgm't adopted). Thus, "a failure or refusal to submit to examination after loss does not bar recovery, but merely suspends the right of recovery until the examination is complied with." *Phila. Underwriters'*

Agency of Fire Ins. Ass'n v. Driggers, 111 Tex. 392, 238 S.W. 633, 635 (Tex.1922). Because failure to comply merely "suspends the right of recovery," the insurer's remedy is to abate the case until it obtains the required compliance, not to deny coverage entirely.[3] *See id.; see also In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 565 (Tex.App.-Houston [14th Dist .] 2010, no pet.) ("An insurer's remedy to enforce a condition precedent in its policy is abatement of the case.").

In *Humphrey*, for example, the policy provided: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, [including examination under oath,] nor unless commenced within two years next after the fire." 231 S.W. at 752 (internal quotation marks omitted). The commission of appeals interpreted this provision to make examination a condition precedent to bringing suit. *See id.* Thus, the effect of failure to comply was "not to forfeit or avoid the policy and bar recovery on it, but to suspend the right of payment or recovery until the answers are given in compliance with the condition." *Id.* Failure to comply with the provision therefore supported "a plea in abatement, rather than one in bar." *Id.*

We have given the same effect to policies providing that " '[n]o suit or action on this policy for the recovery of any claim shall be sustainable ... unless all the requirements of this policy shall have been complied with.' " *In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d at 559, 564–65 (discussing appraisal provision). Other courts of appeals that have interpreted identical or substantially similar language agree. *State Farm Gen. Ins. Co. v. Lawlis*, 773 S.W.2d 948, 949 (Tex.App.-Beaumont 1989, no writ) (identical language); *In re Cypress Tex. Lloyds*, No. 13–11–00248–CV, 2011 WL 3631314, at * 10–*11 (Tex.App.-Corpus Christi Aug. 15, 2011, orig. proceding) (mem.op.) (phrase " '[n]o suit or action can be brought unless the policy provisions have been complied with' " meant "the remedy [for noncompliance with examination provision] is abatement of the case"). Federal district courts applying Texas law are also in accord. *See, e.g., Brown v. State Farm Lloyds*, No. V–10–63, 2012 WL 1077668, at * 3–* 4 (S.D.Tex. Mar.29, 2012); *Rossco Holdings, Inc. v. Lexington Ins. Co.*, No. H–09–CV–04047, 2011 WL 1363799, at *4 (S.D.Tex. Apr.11, 2011) ("[I]t is well-settled law in Texas that abatement rather than exclusion or barring of a claim is the insurer's appropriate remedy for enforcement of an insured's conditions precedent to coverage.").

***4** Farmers attempts to distinguish some of the above-cited cases, but it does not argue that the terms of this policy differ materially from the terms construed in those cases. Nor does it argue that abatement would be futile, a circumstance in which some authorities have rejected abatement as a remedy in other contexts. *Cf. Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 197 (Tex.2004) (Jefferson, J., concurring) (arguing that abatement was improper remedy when evidence established that it would accomplish nothing). Accordingly, we adhere to the well-established interpretation that failure to comply with such policy terms supports only an abatement.

For these reasons, we decline Farmers' invitation to follow *Perrotta v. Farmers Insurance Exchange*, 47 S.W.3d 569 (Tex.App.-Houston [1st Dist.] 2001, no pet.). In that case, an insured completed an examination under oath, but his failure to sign and swear to it violated policy provisions. *Id.* at 574. The court held that the insured's "breach of the policy precludes him from maintaining suit for breach of contract" and affirmed the grant of summary judgment for the insurer. *Id.* at 574–75.

Perrotta makes no mention of a "no-suit-until" or "no-suit-unless" provision like the ones discussed above. Perhaps the policy in Perrotta contained no such provision, or perhaps there was such a provision, but the court and the parties overlooked it. Whatever the reason, Perrotta did not address the policy language that controls our analysis here, so it does not support Farmers' position. The policy at issue here only entitles Farmers to an abatement, and the trial court erred by granting it summary judgment based on Shafighi's failure to comply with the examination-under-oath requirement.

III. Shafighi's failure to request abatement when opposing summary judgment below does not waive this construction of the policy.

Farmers also contends that Shafighi waived the construction of the policy we adopt above by failing to argue for it when opposing summary judgment in the trial court. We disagree.

Although the "answer or response [to a summary judgment] motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion," this rule does not "shift[ ] the burden of proof that exists in summary judgment proceedings." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). To the contrary, even if the non-movant fails to respond altogether, the movant must establish an entitlement to summary judgment as a matter of law. *Id.* In this way,

"[s]ummary judgments must stand on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right ." *Id.*

Here, the insurer moved for summary judgment based on the policy's examination-under-oath provision, which it contended excused its performance because Shafighi never submitted to an examination. As just discussed, however, Shafighi's alleged noncompliance did not excuse the insurer's performance entirely, but only prevented Shafighi from maintaining a lawsuit until he complied. Thus, the policy terms upon which Farmers relied for summary judgment only entitle it to an abatement. Shafighi's failure to identify this fact initially does not alter the contract's terms or otherwise supply the summary judgment proof lacking from Farmers' motion. *See Gary E. Patterson & Assocs. v. Holub*, 264 S.W.3d 180, 195 n. 6 (Tex.App.-Houston [1st Dist.] 2008, pet. denied) (failure to assert particular statutory construction in summary judgment response did not bar construction on appeal).

***5** Because Farmers never met its summary judgment burden, the burden never shifted to Shafighi and he was not required to explain the correct policy construction. *See City of Houston*, 589 S.W.2d at 678. We therefore reject Farmers' argument that Shafighi's failure to argue initially for a correct construction of the insurance policy precludes us from correctly construing it on appeal. Because the correct construction shows that Farmers is not entitled to summary judgment based on Shafighi's failure to comply with the examination requirement, we sustain Shafighi's first and second issues, reverse the summary judgment, and remand for further proceedings. [4]

IV. Shafighi's allegedly insufficient proof-of-loss statement does not entitle Farmers to summary judgment.

Turning to Shafighi's fourth issue, although Farmers arguably raised Shafighi's failure to provide a "sufficient" proof of loss as one of the grounds in its summary judgment motion, the trial court specified the basis for its decision and did not rule on this ground. As a result, although we may address this ground on appeal, we are not required to do so. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex.1996). Having decided to remand the case, however, we will address this ground in the interest of judicial economy. *See id.*

Based upon our review of the record, it appears that Farmers did not file the proof-of-loss form it believes to be insufficient as part of its summary judgment evidence. The only evidence of the form's alleged inadequacy is an unsworn fax from Farmers' lawyer to Shafighi's lawyer describing why Farmers "t [ook] exception" to certain parts of the proof of loss. Farmers' lawyer filed a sworn affidavit stating that he wrote the fax, but he did not swear to the truth of its contents. Farmers appears to argue that this proof established its entitlement to judgment as a matter of law. [5]

Even if we assume, without deciding, that Shafighi submitted an inadequate proof of loss, the proof-of-loss "duty" appears in the same contract section as the examination-under-oath "duty." As discussed above, the policy provides that the consequence of breaching either duty is that Shafighi cannot bring suit until he complies. Therefore, even assuming that Shafighi failed to comply, Farmers' remedy is not summary judgment but abatement. *In re Cont'l Cas. Co.*, 14–10–00709–CV, 2010 WL 3703664, at *5 (Tex.App.-Houston [14th Dist.] Sept. 23, 2010, orig. proceeding) (mem.op.) (where "[t]he insurance policy ... provides that all requirements precedent to coverage must be met before suit is filed," "insurer's remedy to enforce a condition precedent in its policy is abatement of the case"). We therefore reject Farmers' argument that flaws in Shafighi's proof-of-loss form can support summary judgment.

CONCLUSION

For these reasons, the trial court erred in granting Farmers summary judgment. We therefore reverse and remand for further proceedings.

Footnotes

1 Shafighi argues that Farmers' summary judgment motion failed to raise his allegedly insufficient proof of loss as a basis for summary judgment. For purposes of our analysis, we assume, without deciding, that the motion sufficed to raise this ground.

2 Farmers points to language from two cases addressing an insurer's remedy for the insured's failure to cooperate with defending a third-party claim. *See Universal Auto. Ins. Co. v. Culberson*, 126 Tex. 282, 86 S.W.2d 727, 728, 731 (Tex.1935) (insured "refused to co-operate with the company in making a full and fair defense of the action; and had colluded with [third party] in such manner as

to permit the judgment to go against [insured]”); *Empl'rs Liab. Assurance Corp. v. Mosley*, 460 S.W.2d 201 (Tex.Civ.App.-Houston [14th Dist.] 1970, no writ) (fact issues surrounding whether insured cooperated with investigation precluded summary judgment in third party's suit against insurer). These cases do not support Farmers' construction because neither turned upon a “no-suit-until” or “no-suit-unless” clause like the one at issue here.

3 We note that abatement to comply with a condition precedent does not permit a matter to linger on the docket forever. To the contrary, “it is well-settled law that, if a trial court discovers that the plaintiff has failed to correct a defect or impediment to suit after an abatement has been granted, the trial court may properly dismiss the plaintiff's case.” *3V, Inc. v. JTS Enterprises, Inc.*, 40 S.W.3d 533, 540 (Tex.App.-Houston [14th Dist.] 2000, no pet.).

4 Given this disposition, it is not necessary for us to reach Shafighi's third issue, in which he argues that a fact question regarding whether Farmers' terms for the examination were reasonable precludes summary judgment. We express no opinion on that issue. We also do not reach Shafighi's fifth issue, in which he argues that at minimum, summary judgment was improper on certain claims that he contends are independent of the parties' contractual obligations.

5 Farmers also argues that Shafighi may not oppose this summary judgment ground because his summary judgment response in the trial court failed to address it. We disagree for the reasons discussed in the previous section.

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2013 WL 3895043
Only the Westlaw citation is currently available.
United States District Court,
N.D. Mississippi,
Greenville Division.

Lee SIMMONS, et ux., and
Paula Simmons, Plaintiffs
v.
MISSISSIPPI FARM BUREAU CASUALTY INSURANCE COMPANY, Defendant.

Civil Action No. 4:12–CV–00063–GHD–JMV. | July 29, 2013.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION GRANTING PLAINTIFFS' MOTION TO REMAND

GLEN H. DAVIDSON, Senior District Judge.

***1** Presently before this Court is Plaintiffs' motion to remand the case to state court [7]. Upon due consideration, the Court finds that the motion is well taken.

A. Factual and Procedural Background

On May 18, 2012, Plaintiffs filed a complaint in the Circuit Court of Sunflower County, Mississippi, against Mississippi Farm Bureau Casualty Insurance Company ("Defendant") to recover for Defendant's alleged misrepresentations and failure to procure a flood insurance policy that would have covered flood damage to Plaintiffs' real property. Defendant timely removed this case on the basis of federal question jurisdiction and filed its answer and affirmative defenses [5]. Plaintiffs subsequently filed a motion to remand [7] the case to state court, Defendants filed a response, and Plaintiffs filed a reply. The matter is now ripe for review.

B. Standard of Review

The removal statute provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). A case may be remanded upon a motion filed within thirty days after the filing of the notice of removal on any defect except subject matter jurisdiction, which can be raised at any time by any party or *sua sponte* by the court. *See Wachovia Bank, N.A. v. PICC Prop. & Cas. Co.*, 328 F. App'x 946, 947 (5th Cir.2009). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Any "doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir.2000).

Federal diversity jurisdiction requires complete diversity between all plaintiffs and all defendants and an amount in controversy that exceeds $75,000.00. *See* 28 U.S.C. § 1332(a). In the case *sub judice*, there is no question that Plaintiffs and Defendant are Mississippi citizens for purposes of diversity jurisdiction, and thus, that diversity jurisdiction is not a removable basis. Thus, the sole issue before the Court is whether the Court has subject matter jurisdiction over this matter based on federal question jurisdiction. *See* 28 U.S.C. § 1331.

The party seeking removal bears the burden of demonstrating that a federal question exists. *Gutierrez v. Flores*, 543 F.3d 248 (5th Cir.2008). A federal question exists "if there appears on the face of the complaint some substantial, disputed question of federal law." *In re Hot–Hed, Inc.*, 477 F.3d 320 (5th Cir.2007) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). Whether a case is removable upon the basis of federal question jurisdiction is to be determined by the allegations of the plaintiff's "well-pleaded complaint" as of

the time of removal. *See, e.g., Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680 (5th Cir.2001); *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir.1995). Plaintiff is the master of his complaint, and he may avoid federal jurisdiction by exclusive reliance on state law. *Lorenz v. Tex. Workforce Com'n*, 211 F. App'x 242, 244 (5th Cir.2006) (per curiam). Thus, if, on its face, the plaintiff's complaint raises no issue of federal law, federal question jurisdiction is lacking. *Hart v. Bayer Corp.*, 199 F.3d 239, 244 (5th Cir.2000) (citing *Franchise Tax Bd.*, 463 U.S. at 10, 103 S.Ct. 2841, 77 L.Ed.2d 420).

***2** A plaintiff, however, cannot defeat removal of a federal claim by "artfully pleading" it as a state-law claim. *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 188 (5th Cir.2001) (citing *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998)). The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546 (5th Cir.2008) (citing *Rivet*, 522 U.S. at 475, 118 S.Ct. 921, 139 L.Ed.2d 912). Federal question jurisdiction exists when a state law is completely preempted because "there is, in short, no such thing as a state-law claim." *Id.* at 551 (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003)).

C. Discussion

Plaintiffs purchased flood insurance through the Federal Emergency Management Agency's ("FEMA's") Write Your Own ("WYO") flood insurance program under the National Flood Insurance Act (the "NFIA"). [1] "Federal law preempts state [-]law tort claims arising from *claims handling* by a WYO." *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir.2009) (quoting *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 390 (5th Cir.2005) (internal quotation marks omitted; emphasis added). However, "federal law does not preempt state-law *procurement-based claims*." *Id.* at 757 (emphasis added). The issue before this Court in the case *subjudice* is whether Plaintiffs' claims concern the handling or procurement of the flood insurance policy, and thus whether Plaintiffs' case is properly removed to this Court based on federal question jurisdiction.

The Fifth Circuit has explained the National Flood Insurance Program as follows:

> By enacting the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 *et seq.*, Congress established the Program to make flood insurance available on reasonable terms and to reduce fiscal pressure on federal flood relief efforts. FEMA administers the Program. [*See* 42 U.S.C. § 4011(a) (2006).] Within the Program, the WYO program allows private insurers to issue flood insurance policies in their own names. Under this framework, the federal government underwrites the policies and private WYO carriers perform significant administrative functions including "arrang[ing] for the adjustment, settlement, payment and defense of all claims arising from the policies." [*Gallup v. Omaha Prop. & Cas. Co.*, 434 F.3d 341, 342 (5th Cir.2005).] WYO carriers must issue policies containing the exact terms and conditions of [the Standard Flood Insurance Policy ("SFIP")] set forth in FEMA regulations. [*See* 44 C.F.R. §§ 61.4(b), 62.23(c)-(d) (2008) (mandating use of SFIP terms); 44 C.F.R. pt. 61, app. A(1) (setting forth SFIP terms).] Additionally, FEMA regulations govern the methods by which WYO carriers adjust and pay claims. [*C.E.R.1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 267 (3d Cir.2004) (citing 44 C.F.R. §§ 61.1–78.14).] Although WYO carriers play a large role, the government ultimately pays a WYO carrier's claims. [*See Gallup*, 434 F.3d at 342.] When claimants sue their WYO carriers for payment of a claim, carriers bear the defense costs, which are considered "part of the ... claim expense allowance", [44 C.F.R. § 62.23(i)(6) (2008)]; FEMA reimburses these costs. [*C.E.R.*, 386 F.3d at 270 & n. 9 (citing 42 U.S.C. § 4017(d)(1)) (noting that Congress reimburses costs, including defense costs, for adjustment and payment of claims).] Yet, if "litigation is grounded in actions by the [WYO] Company that are significantly outside the scope of this Arrangement, and/or involves issues of agent negligence," then such costs will not be reimbursable to the WYO carrier. [44 C.F.R. pt. 62, app. A, art. III(D)(3)(a).]

***3** *Grissom v. Lib. Mut. Fire Ins. Co.*, 678 F.3d 397, 399 (5th Cir .2012) (quoting *Campo*, 562 F.3d at 754).

In *Grissom*, the Fifth Circuit explained:

> The key factor to determine if an interaction with an insurer is "claims handling" is the status of the insured at the time of the interaction between the parties. If the individual is already covered and in the midst of a non-lapsed insurance policy,

> the interactions between the insurer and insured ... are "claims handling" subject to preemption.

Id. at 401. "[I]nteractions between the insurer and an insured seeking payment for hurricane damage to his home," including those to recover for the insurer's denial of a flood insurance claim on the insured's policy, constitute claims handling. *Id.* at 400; *see Wright,* 415 F.3d at 385, 389–90. However, interactions between the insurer and an insured to recover for the insurer's alleged negligence during a lapse in policy coverage constitute procurement. *See Campo,* 562 F.3d at 752.

In *Campo,* the plaintiff had claimed that Allstate made negligent misrepresentations in violation of state law that caused the plaintiff not to reinstate his expired flood insurance policy prior to Hurricane Katrina destroying the plaintiff's home, and Allstate had argued that these claims were preempted under federal law because they concerned claims handling. *Id.* at 752, 755.[2] The Fifth Circuit held that the plaintiff's claims were related to policy procurement, not claims handling, and thus that plaintiff's claims were not preempted by federal law. *Id.* The Fifth Circuit reasoned that "[t]o the extent that this case involves handling of a 'claim,' it is merely a 'fictitious claim' in the sense that the act of filing a claim on an *expired* policy, i .e., a dormant policy, is equivalent to filing no claim at all" and thus that "Allstate ... by definition [was] incapable of *handling* any new claims based on post-expiration occurrences." *Id.* at 756 (emphasis in original). The Fifth Circuit found that the facts of the case indicated that the claim was procurement-related because Allstate's alleged misrepresentations occurred when the plaintiff's only relationship with Allstate was that of a former and a potential future policyholder and reasoned that "[t]o hold otherwise would permit insurers like Allstate to ensure unilaterally that disputes would be classified as preempted handling-related suits by simply acting as though they were handling claims when in fact none existed as a matter of law." *Id.* The Fifth Circuit explained its holding in a subsequent *per curiam* opinion on the bench ruling: "[B]ecause (1) [plaintiff's] policy had expired when he made his claim and (2) the SFIP provisions dealing with policy renewal did not address policy renewal with sufficient specificity to render [plaintiff's] claims handling-related, [plaintiff's] state-law claims relate to insurance procurement [and] are not preempted by federal law...." *Campo,* 440 F. App'x 298, 300 (5th Cir.2011) (per curiam). In *Grissom,* the Fifth Circuit distinguished *Campo* thus: "*Campo* 's clear holding [is] that the lapse in coverage turned what would otherwise be a renewal into the procurement of a new policy." *Grissom,* 678 F.3d at 401.

***4** In the case *sub judice,* Plaintiffs allege that they are not seeking coverage under the SFIP or recovery on the basis of a contract from National Flood Insurance Program funds, but are instead seeking tort damages from their insurance agent's own funds and/or its errors and omissions coverage funds for their agent's tortious conduct in failing to procure the specific coverage explicitly requested and represented to have been procured. Pls.' Mot. Remand [7] ¶ 9. The Court finds from a plain reading of Plaintiffs' complaint that Plaintiffs allege the following facts: **(1)** Plaintiffs had a longstanding fiduciary relationship with Defendant and Defendant's agent concerning insurance, Pls.' Compl. [2] ¶ 7; **(2)** based on this relationship, Plaintiffs sought flood insurance coverage from Defendant and Defendant's agent on real property Plaintiffs were about to purchase, *id.;* (3) Plaintiffs, Defendant, and Defendant's agent were all aware that flooding of the real property was imminent and that the threat of this flood was the reason for the insurance transaction, *id.* ¶ 10; (4) Plaintiffs submitted an application for the insurance and delivered the premium payment to Defendant's agent, *id.* ¶ 12; (5) Plaintiffs asked Defendant's agent to procure the flood insurance for them, *id.;* (6) Plaintiffs proceeded with the closing of the purchase of subject real property based on Defendant's and Defendant's agent's assurances of immediate flood damage coverage under the policy, *id.* ¶ 13; **(7)** Plaintiffs' subject real property suffered damages due to subsequent flooding, *id.* ¶ 16; **(8)** only after the flooding occurred did Plaintiffs receive a copy of the subject flood insurance policy, *id.* ¶ 15; **(9)** Plaintiffs subsequently filed a flood damage claim in accordance with the subject policy, *id.* ¶ 16; and **(10)** Plaintiffs were denied coverage for the property damages due to flooding, based on an exclusionary clause in the subject policy providing that the policy would not cover damage due to a flood already in progress at the time the policy term began, *id.* ¶ 17. Plaintiffs concede that the SFIP does not cover the flood damage sustained by their real property, as the damage was caused by a flood in progress at the time the SFIP term began; instead, Plaintiffs seek recovery under state-law theories of negligent misrepresentation and failure to procure the requested insurance policy. Pls.' Mot. Remand [7] ¶¶ 7, 9.

The Court finds that the alleged *misrepresentations* concerning flood insurance coverage occurred when Plaintiffs' only relationship with Defendant was that of potential future flood insurance policyholders, and further,

that Defendant's alleged misrepresentations were allegedly of a kind that could lull Plaintiffs into believing that they would receive immediate coverage for the flood damage under Defendant's policy, thus dissuading Plaintiffs from seeking flood insurance coverage elsewhere. *See Campo*, 562 F.3d at 756. The misrepresentation claim appears to fall within the "species of insurance procurement" claims referenced in *Campo*. *See id.* The failure-to-procure claim also appears to fall within this species of claims. In both claims, Plaintiffs do not seek recovery for any denial of coverage under the subject policy, but rather for the conduct of Defendant in the representations made about the policy and in the procurement of the subject policy. *See* Pls.' Compl. [2] ¶ 18. Such procurement-related claims sound in state law. *See Haggans v. State Farm Fire and Cas. Co.*, 803 So.2d 1249, 1252 (Miss.Ct.App.2002). Plaintiffs' alleged *reliance* on Defendant's alleged misrepresentations with respect to flood insurance coverage lasted throughout the initial application, delivery of premium payment, occurrence of flood damage, receipt of copy of policy, submission of claim pursuant to the policy, and denial of coverage under the policy. Although this is doubtless a close question of law, when compared with the holding in *Grissom*, for example, Plaintiffs in this case challenge alleged representations made by Defendant prior to the application of the policy and in the infancy of the procurement of flood damage protection: procurement-related-whereas the plaintiff in *Grissom* challenged the lack of information he received while he was already insured concerning his eligibility for additional flood insurance coverage: claims handling-related. *See Grissom*, 678 F.3d at 401. The Court finds that Plaintiffs' complaint does not present a federal question claim, but instead presents state-law tort claims that fall within the procurement-related SFIP claims not preempted by federal law, as the claims allege negligence on the part of Defendant. *See* 44 C.R.F. pt. 62, app. A, art. III(D)(3)(a) (noting that "litigation ... grounded in actions by the [WYO] Company that ... involve [ ] issues of agent negligence" are not within the scope of the NFIA); *see also Rhodes v. State Farm Fire and Cas. Co.*, Civil No. 1:08CV674–HSO–RHW, 2009 WL 563876, at *4–7 (S.D.Miss. Mar.4, 2009) (finding plaintiff bringing negligent misrepresentation claim related to procurement of SFIP and failure to procure claim, *inter alia*, had not attempted to plead a federal question claim). Because this Court does not have diversity jurisdiction over Plaintiffs' state-law claims due to lack of complete diversity of citizenship, the Court is devoid of jurisdiction to hear this case. Plaintiffs' case is properly in state court.

D. Conclusion

***5** For all the foregoing reasons, Plaintiffs' motion to remand to state court [7] is GRANTED, and the case is remanded to the Circuit Court of Sunflower County, Mississippi.

An order in accordance with this opinion shall issue this day.

Footnotes

1 The NFIA defines the term "Write Your Own" as "the cooperative undertaking between the insurance industry and the Federal Insurance Administration which allows participating property and casualty insurance companies to write and service standard flood insurance policies." *See* 42 U.S.C. § 4004(a)(5).

2 The Court notes that the handling/procurement distinction analysis is equally applicable in both the context of whether federal jurisdiction exists and whether the claims are preempted by federal law. *See id.* at 756 n. 33.

2013 WL 5394444
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NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

STATE FARM FIRE AND CASUALTY COMPANY
v.
Shawn BRECHBILL.

1111117. | Sept. 27, 2013.

Synopsis

Background: Homeowner brought action against homeowner's insurer following wind storm, alleging breach of contract, "normal" bad-faith failure to pay, and "abnormal" bad-faith failure to investigate. The Circuit Court, Morgan County, No. CV–10–900034, entered partial summary judgment in favor of insurer on claim for "normal" bad faith and entered judgment on jury verdict in favor of homeowner on breach of contract and "abnormal" bad faith failure to investigate. Insurer appealed adverse judgment on the "abnormal" bad-faith claim.

Holdings: The Supreme Court, Moore, C.J., held that:

[1] there is only one tort of bad-faith refusal to pay a claim, albeit with two methods of proof, and

[2] finding that insurer had a legitimate reason for denial of claim precluded insurer liability for bad faith refusal to investigate.

Reversed and remanded.

Moore, C.J., concurred specially and filed opinion.

Murdock, J., concurred specially and filed opinion.

Bryan, J., concurred in the result.

West Headnotes (13)

[1] Appeal and Error
Extent of Review Dependent on Nature of Decision Appealed from

Appeal and Error
Appeal from ruling on motion to direct verdict

Appeal and Error
Effect of evidence and inferences therefrom on direction of verdict

Appeal and Error
Judgment

Supreme Court's standard of review for a ruling on a judgment as a matter of law is materially indistinguishable from the standard by which the Court reviews a summary judgment; the Court must decide whether substantial evidence was presented to the jury, which, when viewed in the light most favorable to the nonmovant, would warrant a jury verdict in the movant's favor.

[2] Appeal and Error
Extent of Review Dependent on Nature of Decision Appealed from

In reviewing summary judgment, the Supreme Court utilizes the same standard as the trial court in determining whether the evidence before it made out a genuine issue of material and whether the movant was entitled to a judgment as a matter of law.

[3] Judgment
Presumptions and burden of proof

Judgment
Weight and sufficiency

When the movant seeking summary judgment makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Rules Civ.Proc., Rule 56(c).

[4] Judgment
Weight and sufficiency

Evidence is "substantial" for purposes of summary judgment if it is of such weight and

quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved. Rules Civ.Proc., Rule 56(c).

[5] Appeal and Error

Judgment

Appellate review of summary judgment is subject to the caveat that the reviewing court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.

[6] Insurance

Settlement Duties; Bad Faith

There is only one tort of bad-faith refusal to pay a claim, albeit with two methods of proof.

[7] Insurance

Settlement Duties; Bad Faith

The tort of bad-faith refusal to pay a claim has four elements: (1) a breach of insurance contract, (2) the refusal to pay claim, (3) the absence of arguable reason, (4) the insurer's knowledge of such absence, with a conditional fifth element: (5) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

[8] Insurance

Reasonableness of insurer's conduct in general

Regardless of whether the claim against insurer is a bad-faith refusal to pay or a bad-faith refusal to investigate, the tort of bad faith requires proof of the third element, i.e., absence of legitimate reason for denial.

[9] Insurance

Settlement Duties; Bad Faith

If a lawful basis for denial of a claim actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith.

[10] Insurance

Investigations and inspections

Trial court's finding that insurer had a legitimate reason for denial of insured's homeowner's claim precluded a finding of insurer liability for bad faith refusal to investigate a claim.

[11] Insurance

Reasonableness of insurer's conduct in general

Regardless of the imperfections of the insurer's investigation, the existence of a debatable reason for denying insurance claim at the time the claim was denied defeats a bad faith failure to pay the claim.

1 Cases that cite this headnote

[12] Insurance

Settlement Duties; Bad Faith

Insurance

Negligence and bad faith distinguished

"Bad faith" supporting claim for bad-faith refusal to pay an insurance claim is not simply bad judgment or negligence; it imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will.

[13] Insurance

Investigations and inspections

A bad-faith-refusal-to-investigate claim cannot survive where the trial court has expressly found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied.

Opinion

MOORE, Chief Justice.

***1** State Farm Fire and Casualty Company appeals from an adverse judgment entered on a jury verdict in the Morgan Circuit Court in favor of homeowner and policyholder Shawn Brechbill on his claim of "abnormal" bad-faith failure to investigate an insurance claim. We reverse the trial court's judgment and remand.

I. Facts and Procedural History

On September 7, 2007, Brechbill purchased a 3–story, 30–year–old house in Lacey Springs. One month before closing on the purchase, Brechbill hired Allan McCrispin of McCrispin, Inc., a home-inspection company, to inspect the house. McCrispin did not note any significant cracking around the interior door frames. McCrispin noted some floor squeaking, as is typical for wood floors in older homes, but he saw no evidence of long-term settling of the house.

On September 11, 2007, a State Farm employee inspected Brechbill's house to verify that it met State Farm's underwriting requirements. State Farm's underwriting file on Brechbill's house indicated "yes" to the following question: Does the "applicant dwelling meet all homeowner underwriting guide requirements?" The underwriting file also reported "no unrepaired damage." At all relevant times, Brechbill's home was insured by State Farm.

In his complaint, Brechbill alleged as follows:

> "On January 29, 2008, Brechbill's house suffered damage due to a windstorm. On that date, high winds struck the house. An anemometer on the roof measured wind speed at approximately 59 miles per hour. The winds damaged the roof and racked the structure of the residence causing interior walls to crack and buckle and other damage. Interior damage and damage to the shingle roof were visible after the event."

Brechbill described the events of the storm as follows. "It was literally shaking the house.... It was shaking the windows ... there was so much banging—there was banging and popping in the house.... The house was shaking so violently—I had a computer on the desk—the screen ... was shaking so bad it was actually walking across the desk." Brechbill also stated that "the house was rocking."

State Farm designated the windstorm that occurred on January 29, 2008, as a state-wide catastrophe due to the high number of insurance claims. State Farm's declaration of a "catastrophe" was based on the number of claims, not the severity of the claims. In north Alabama alone about 300 State Farm insurance claims were submitted.

Brechbill alleged that in the days after the windstorm he noticed that the wall between the master bedroom and the dressing room was buckled and displaced, that the floor squeaks had become widespread, that a door frame had become dislodged, and that cracking started to appear in the drywall. Brechbill also alleged that the cracks in the drywall were not present when he purchased the house or at any time before the January 29 windstorm. Brechbill alleged that immediately after the storm his house was noticeably more drafty and that interior blinds would move with the wind.

***2** On March 31, 2008, Brechbill submitted a claim to State Farm for payment based on the wind damage. State Farm insurance adjuster Keith Fry inspected Brechbill's house on April 21, 2008. Fry found exterior damage to the roof shingles and interior damage consisting of cracked drywall and separated door jams. Fry concluded the exterior damage to the roof shingles was covered by Brechbill's insurance policy and issued payment for roof repairs. Fry's inspection included a photograph of drywall cracking above a door casing. Fry suggested that State Farm retain an engineer to determine the cause of the interior damages.

State Farm retained Phillip Chapski of Cerny & Ivey Structural Engineers, Inc., who inspected Brechbill's residence on April 24, 2008. Chapski's report, dated May 5, 2008, described his inspection as an "engineering evaluation ... to assess the structural integrity of the residence." Brechbill was present during this investigation and provided Chapski with background information, which included floor drawings apparently prepared by Brechbill. Chapski's report states: "A visual inspection was performed only. There were no invasive or destructive materials investigations, or laboratory testing performed at the site.

This report is limited in scope and based on investigative information gathered before, during, and after the site investigation." Chapski evaluated whether "a wind storm affect[ed] the structural integrity of the residence and if not, what caused the damage." Chapski's report indicates he performed measurements "in the field" as part of his investigation.

From Chapski's visual inspection of the attic, he observed no cracking, misalignment, or apparent settlement or displacement of the wood-framing system supporting the roof structure. From his measurements and review of Brechbill's drawings, Chapski also concluded that the interior load-bearing walls of the residence were not properly aligned with one another, thus creating loading eccentricities and differential stresses and movements within the residence. Chapski observed cracking of the drywall between the master bedroom and dressing room and in the back bedroom, but he concluded that the cracking of the drywall was limited and not widespread.

Chapski's report featured the following conclusions:

> "1) The cracking of the [s]heetrock and the squeaking of the floors as noted and identified was caused by long-term movement and settlement of the residence. The long-term movement and settlement would have been considered normal and typically occurs as the residence ages and matures over time and [is] a function of a combination of factors influenced by the normal long-term aging, deterioration, and settlement of the building systems and local weather conditions, such as wind, rain, snow, and the freeze thaw cycle.
>
> "2) Another factor that influenced the long-term movement and settlement and the initial cracking was the design, framing, and construction methods used to construct the residence especially the layout of the floor systems above the first floor level. The tall and exposed exterior walls and the wood framing methods used to construct the interior walls stressed the wood framing and support systems resulting in visible cracking of certain interior sheetrock walls.
>
> ***3** "3) It is our opinion that the problems with the existing roof covering are considered long-term issues caused from a roof covering that had exceeded its useful life cycle.
>
> "4) It is our opinion that the squeaking floors most probably were an original construction issue.
>
> "5) It is our opinion that the reported moving or 'racking' and audible noises heard during the high winds was considered an expected occurrence given the location, size, layout, and construction of the residence. Over time, normal aging and wear will weaken the building systems exacerbating the problem."

Based on Chapski's findings, State Farm representative Heather Woods determined that the interior damage reported by Brechbill was not covered under Brechbill's homeowner's insurance policy. Woods sent a letter to Brechbill citing two reasons for State Farm's denial:

> "We do not insure for any loss to the property ... which ... occurs as a result of any combination of ... wear, tear, ... deterioration, inherent vice, latent defect ... settling, cracking, shrinking, bulging, or expansion of ... walls, floors, roofs, or ceilings.
>
> "We do not insure under any coverage for any loss consisting of ... defect, weakness, inadequacy, fault or unsoundness in: ... siting ... design, specifications, workmanship, construction, grading, compaction; materials used in construction or repair; or maintenance."

Woods also sent Chapski's report to Brechbill and told him he could get his own engineer to evaluate the interior damage.

Brechbill disagreed with Chapski's conclusions. According to Brechbill, Chapski did not verify any of the dimensions or measurements of the house during his investigation, nor did he directly access the attic, other than performing a visual inspection by sticking his head into the attic-access hole. On May 15, 2008, Brechbill called Chapski to discuss his conclusion that the interior damage was caused by long-term settling. Chapski told Brechbill that this was a typical situation where the damage had been there before the event but had gone unnoticed.

On May 28, 2008, Brechbill called Bert Myers, a State Farm representative, and explained his concern that Chapski had not based his opinion on the specific facts of the case and had ignored facts that the house did not have the issues he was complaining of just a few months before the windstorm. Myers disputed Brechbill's conclusions.

After Chapski's inspection, Brechbill had McCrispin, who had inspected the house at the time Brechbill purchased it,

inspect the house to "determine if items have/are changing over time in excess of expected values." As a result, McCrispin issued a second report in June 2008 in which he noted: "In looking at these areas there does appear to have been changes since the original inspection." McCrispin's second report identified four areas that had changed since his original inspection four months before the windstorm. On the main floor, the wall separating the living room and kitchen had some "give" in the floor boards "that appears to have increased since the original inspection." On the main floor, there was a crack at the bottom corner on the driveway-side window that was not present at the original inspection. Also on the main floor, McCrispin noted that "it appears the trim has popped free from the door frame." In the master dressing room, McCrispin noted a crack above the corner of the doorway. McCrispin did not notice any sign of the exterior siding buckling or moving. McCrispin's second report indicated that the "give" or sag in the floorboards near the wall separating the main-floor kitchen and living room was a result of original construction.

***4** On July 17, 2008, Brechbill met with State Farm representatives Myers and Woods and provided them with McCrispin's initial home-inspection report from 2007 and the follow-up report from June 2008. Myers indicated that Chapski would reassess the areas McCrispin had identified in his follow-up report. Woods asked Chapski to review Brechbill's concerns and McCrispin's second report and to consider five specific areas:

> "1. Plywood roof decking is moving and splitting causing a 5 to 6 ft. crack in roof and shingles. Nails are popping up out of the roofing system also.
>
> "2. Cracking/Buckling/Splitting above and below door and window frames. Master dressing room crack/buckle/split is one area in question.
>
> "3. Squeaking and softness of floors.
>
> "4. Movement and racking of the house frame.
>
> "5. Do you think the wind storm contributed to these damages?"

Chapski reviewed McCrispin's reports, completed a second inspection of Brechbill's residence, and submitted his second report to State Farm on July 29, 2008. His findings and conclusions remained the same. Chapski's second report contains the following statements regarding his subsequent research about wind-speed data gathered 10 miles from Brechbill's house.

> "Wind data was reviewed from the weather station at the Redstone Arsenal Airport. The Redstone Arsenal Airport was located approximately 10 miles from the subject site.... The wind data collected at the airport would be considered relevant with respect to the subject site and area. As documented from the published data generated at the airport for the time frame of January 28, 29, 30, and 31, 2008, the maximum wind velocity in wind gust recorded for the period researched was 33 miles per hour, which occurred on Tuesday January 29, 2008 at approximately 2:55 pm."

Chapski opined:

> "The conditions and damage[ ] as inspected and observed were not caused by the heavy winds that reportedly occurred on or about January 29, 2008. Documentation of the wind data as recorded at the Redstone Arsenal Airport indicated no strong winds or precipitation had occurred during that time frame in the general area. All recorded wind speeds were deemed normal and that no strong or damaging wind speeds had occurred."

Chapski's second report evaluated McCrispin's initial report as follows:

> "It was stated in the report that the siding was in generally good condition and that no current sign of buckling or movement was observed. In our opinion, this indicated that damaging movement or racking of the frame at the residence had not occurred...."

After discussing Chapski's second report with Brechbill, Heather Woods sent a second denial letter to Brechbill.

The second denial letter gives the same two reasons State Farm provided in the first denial letter. However, State Farm's second denial letter added a third reason for denying Brechbill's claim:

> "We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events ... Earth movement, meaning the sinking, rising, shifting, expanding, or contracting of earth ... Earth movement includes but is not limited to ... subsidence, erosion, or movement resulting from improper compaction, site selection or any other external forces. Earth movement also includes volcanic explosion or lava flow."

***5** In August 2008, Brechbill hired Dr. William Payne of Payne Home Inspections, Inc., to conduct an investigation of the structure. Payne also assessed Chapski's reports and State Farm's conclusions. Payne concluded generally that "[t]he conclusions from the consulting engineers are based on questionable logic and incomplete research." He explained:

> "Neither report from the consulting engineering firm addressed the conditions of the house on the date of the inspection. The conclusions of both reports relied on suppositions of the engineer not the conditions of the house at the time of his inspection.
>
> "The engineer assumed, without justification, the cracks to be in existence before the wind event.
>
> "The consulting engineer incorrectly assumed the damaged walls were load bearing.... The conclusions from the engineering firm based on the assumption the walls are load bearing are incorrect.
>
> "The wind speeds noted in the second report are based on a weather condition from a location that was not recording weather data at the time the event was occurring at your home.
>
> "The consulting firm made serious errors in inspecting the house and investigating the events surrounding the occurrence of damage to your house.
>
> "The consulting firm ignored relevant information from an independent source (Home Inspector) and from your measurements at the time of the event.
>
> "The unusual wind load caused excessive movement of the framing and caused the interior cosmetic damage to occur.... I believe the wind load of January 29, 2008, caused the connections between the framing members to fail. Because the connections no longer properly resist the applied horizontal loads, the house moves excessively."

On December 9, 2009, Brechbill sent State Farm the results of Payne's engineering report and a copy of a report Brechbill had himself prepared. Myers again met with Brechbill and forwarded the two new reports to Chapski for analysis and review. Chapski then prepared a third supplemental report of January 15, 2010, on causation of damage. Most of Chapski's original conclusions did not change. His observations about wind speed, however, did change. Chapski's third report found:

> "Based upon review of the information provided by Mr. Brechbill and review of other local meteorological data, it appears that the structure was affected by long-term winds in the range of 55 mph to 65 mph. Cerny & Ivey does not believe the 60 mph wind event was 'unusual' or that horizontal loads resulting from that wind were 'excessive.' "

On January 28, 2010, Brechbill sued State Farm, alleging breach of contract, "normal" bad-faith failure to pay, and "abnormal" bad-faith failure to investigate. After filing its answer, State Farm filed a motion for partial summary judgment on Brechbill's claims of "normal" bad-faith failure to pay and "abnormal" bad-faith failure to investigate. On October 7, 2010, the trial court granted State Farm's motion for a partial summary judgment as to Brechbill's claim for "normal" bad faith and denied State Farm's motion as to "abnormal" bad faith. The trial court's order reads in pertinent part:

> ***6** "It appears to the Court that Brechbill has presented no serious opposition to State Farm's argument that his normal bad faith claim is not supported by substantial evidence.

> He has created no genuine issue of material fact about whether or not State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim on August 7, 2008. State Farm is entitled to a judgment as a matter of law on Brechbill's normal bad faith claim."

As to the "abnormal" bad-faith claim, the trial court stated:

> "The Court cannot say with a reasonable degree of certainty, based on the record before it, that State Farm has carried its burden to make a prima facie showing that it marshaled all the facts necessary for it to make a good faith coverage determination as to Brechbill's interior damage claim; that it adequately investigated all areas of damage related to the claimed loss; that it adequately investigated whether or not the January 29, 2008 wind event caused the loss as claimed by Brechbill; that it properly and adequately investigated the condition of the interior of Brechbill's home before January 29, 2008, especially in view of its retained engineer's opinions that the interior damage had occurred over a long period of time and was caused by forces or construction practices that predated the claimed wind event; and that it properly subjected Brechbill's claim to a reasonable cognitive review or evaluation before denying the claim on August 7, 2008. In arriving at its foregoing conclusions, the Court finds that the Alabama Supreme Court's reasoning and holdings in *Jones* [*v. Alfa Mutual Insurance Co.*], 1 So.3d [23] at 34–37 [(2008)], are persuasive, if not controlling."

The trial court denied State Farm's motion to reconsider the denial of the summary judgment on the "abnormal" bad-faith claim. State Farm sought certification for a permissive appeal from the trial court, which the trial court also denied. In the order denying State Farm's request for a permissive appeal pursuant to Rule 5, Ala. R.App. P., the trial court observed, in pertinent part:

> "Until filing its Motion for Certification [for a permissive appeal], the defendant has not created an issue or presented an argument that the granting of a summary judgment on the plaintiff's 'normal' bad faith claim necessarily would require the Court to grant a summary judgment on the plaintiff's separate 'abnormal bad faith' claim. Moreover, it appears to be settled law that for a plaintiff to survive a motion for summary judgment on a 'normal' bad faith claim, his underlying breach of contract claim must be so strong that he would be entitled to a preverdict judgment as a matter of law. *Shelter Mut. Ins. Co. v. Barton*, 822 So.2d 1149 (Ala.2001). Because of the swearing match between the defendant's expert and the plaintiff's expert as to the cause of the plaintiff's interior damage to his home, the plaintiff in the case at bar would not be entitled to a preverdict judgment on his breach of contract claim as a matter of law. For this reason, the Court granted the defendant's Motion for Partial Summary Judgment as to the plaintiff's 'normal' bad faith claim.
>
> ***7** "In 'abnormal bad faith' cases, however, the predicate of a preverdict judgment as a matter of law on the plaintiff's breach of contract claim is not required. *White v. State Farm Fire & Cas. Co.*, 953 So.2d 340 (Ala.2006); *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968 (Ala.1998); *Jones v. Alfa Mut. Ins. Co.*, 1 So.3d 23 (Ala.2008). Given this distinction between the predicates for getting a 'normal' versus an 'abnormal' bad faith claim to a jury, the Court finds no controlling question of law on which there is substantial ground for a difference of opinion."

The trial began on November 14, 2011. At the close of Brechbill's case, State Farm moved unsuccessfully for a judgment as a matter of law. At the close of all the evidence, State Farm again filed a motion for judgment as a matter of law, which the trial court denied.

On November 22, 2011, the jury returned a verdict for Brechbill and awarded him $150,000 in compensatory damages on the breach-of-contract claim and $150,000 on the "abnormal" bad-faith-failure-to-investigate claim ($100,000 in compensatory damages and $50,000 in punitive damages). After the verdict, State Farm renewed its motion for a judgment as a matter of law and filed a motion for a new trial. State Farm's posttrial motions were denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. The trial court

thereafter entered an order purporting to deny State Farm's posttrial motions on March 26, 2012. On April 30, 2012, State Farm timely appealed the adverse judgment on the "abnormal" bad-faith claim but did not appeal the judgment on the breach-of-contract claim.

II. Standard of Review

[1] [2] [3] [4] [5] This Court's standard of review for a ruling on a judgment as a matter of law is " 'materially indistinguishable from the standard by which we review a summary judgment.' " *Webb Wheel Prods., Inc. v. Hanvey*, 922 So.2d 865, 870 (Ala.2005) (quoting *Hathcock v. Wood*, 815 So.2d 502, 506 (Ala.2001)). "We must decide whether substantial evidence was presented to the jury, which, when viewed in the light most favorable to [the nonmovant], would warrant a jury verdict in [the movant's] favor." 922 So.2d at 870. Our standard of review for a ruling on a summary-judgment motion is well settled:

> " ' "[W]e utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact," *Bussey v. John Deere Co.*, 531 So.2d 860, 862 (Ala.1988), and whether the movant was "entitled to a judgment as a matter of law." *Wright v. Wright*, 654 So.2d 542 (Ala.1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. *Bass v. SouthTrust Bank of Baldwin County*, 538 So.2d 794, 797–98 (Ala.1989). Evidence is "substantial" if it is of "such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *Wright*, 654 So.2d at 543 (quoting *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala.1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.' "

***8** *Preskitt v. Lyons*, 865 So.2d 424, 426–27 (Ala.2003) (quoting *Hobson v. American Cast Iron Pipe Co.*, 690 So.2d 341, 344 (Ala.1997)).

III. Analysis

The issue in this appeal is whether the trial court, after finding that State Farm had a reasonably legitimate or arguable reason for refusing to pay Brechbill's claim at the time of the August 7, 2008, denial, erroneously denied State Farm's motion for a judgment as a matter of law on Brechbill's claim of "abnormal" bad-faith failure to investigate, which we will refer to as the bad-faith-refusal-to-investigate claim. [1] When this Court in 1981 adopted the tort of bad faith in regard to the failure to pay an insurance claim, it held, "*an actionable tort* arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' " *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1, 7 (Ala.1981). This tort has four elements plus a conditional fifth element, as follows:

> "(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "(b) an intentional refusal to pay the insured's claim;
>
> "(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> "(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."

National Sec. Fire & Cas. Co. v. Bowen, 417 So.2d 179, 183 (Ala.1982).

State Farm argues that Brechbill's bad-faith-refusal-to-investigate claim cannot proceed as a matter of law because the trial court expressly found that State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim at the time of its denial. State Farm cites our holding in *Weaver v. Allstate Insurance Co.*, 574 So.2d 771, 774 (Ala.1990), as follows:

> "With regard to Weaver's allegation that Allstate intentionally failed to adequately investigate the accident, we agree with the trial court that no triable issue was presented on this issue, because we hold that Allstate's investigation established a legitimate

> or arguable reason for refusing to pay Weaver's claim, *which is all that is required.*"

(Emphasis added.) State Farm notes that bad faith is a single tort, not two torts: that is, bad-faith refusal to investigate is the last element in the original articulation of the tort of bad-faith refusal to pay.

Brechbill, however, argues that a bad-faith-refusal-to-investigate claim can proceed to the jury even when evidence of bad-faith refusal to pay is insufficient to survive a judgment as a matter of law, citing *Jones v. Alfa Mut. Ins. Co.*, 1 So.3d 23 (Ala.2008) (plurality opinion). Brechbill maintains, contrary to State Farm's assertion, that there are two types of bad-faith claims. He quotes *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968 (1998):

> ***9** "[A] plaintiff has two methods by which to establish a bad-faith refusal to pay an insurance claim: he or she can prove the requirements necessary to establish a 'normal' case, *or, failing that,* can prove that the insurer's failure to investigate at the time of the claim presentation procedure was intentionally or recklessly omissive."

Id. at 976 (emphasis added).

[6] **[7]** As a preliminary matter, we agree with State Farm that there is only *one* tort of bad-faith refusal to pay a claim, not two "types" of bad faith or two separate torts. Since *Chavers*, this Court has referred to this tort in the singular:

> "*[A]n actionable tort* arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' "

405 So.2d at 7. Even the quote from *Grissett* to which Brechbill refers discusses two methods "to establish *a bad-faith refusal to pay an insurance claim*," recognizing the singularity of the tort, albeit with different options for proof thereof. We have repeatedly held that the tort of bad-faith refusal to pay a claim has four elements—(a) a breach of insurance contract, (b) the refusal to pay claim, (c) the absence of arguable reason, (d) the insurer's knowledge of such absence—with a conditional fifth element: "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." *Bowen*, 417 So.2d at 183. Thus, for the tort of bad-faith refusal to pay, "[r]equirements (a) through (d) represent the 'normal' case. Requirement (e) represents the 'abnormal' case." *Grissett*, 732 So.2d at 976. But the tort has always been *one.*

[8] **[9]** Regardless of whether the claim is a bad-faith refusal to pay or a bad-faith refusal to investigate, the tort of bad faith requires proof of the third element, absence of legitimate reason for denial: "Of course, *if a lawful basis for denial actually exists,* the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith." *Barnes*, 405 So.2d at 924 (emphasis added). As we held in *Weaver*, where the "[insurer's] investigation established a legitimate or arguable reason for refusing to pay [the insured]'s claim, [that] is all that is required." 574 So.2d at 774. See also *Bowers v. State Farm Mut. Auto. Ins. Co.*, 460 So.2d 1288, 1290 (Ala.1984) ("[W]here a legitimate dispute exists as to liability, ... a tort action for bad faith refusal to pay a contractual claim will not lie.").

[10] In the present case, the trial court's order ruling on the motion for a partial summary judgment states:

> "Brechbill has presented no serious opposition to State Farm's argument that his normal bad faith claim is not supported by substantial evidence. *He has created no genuine issue of material fact about whether or not State Farm had a reasonably legitimate or arguable reason for refusing to pay the claim on August 7, 2008.*"

***10** (Emphasis added.) In its order denying State Farm's request for a permissive appeal, the trial court explained: "Because of the swearing match between the defendant's expert and the plaintiff's expert as to the cause of the plaintiff's interior damage to his home, the plaintiff in the case at bar would not be entitled to a preverdict judgment on his breach of contract claim as a matter of law." Because the trial court's ruling eliminated the third element of bad-faith refusal to pay, Brechbill's claim relying on the fifth element, i.e., that State Farm "intentionally failed to adequately investigate" the claim, must fail. *Weaver*, 574 So.2d at 774. The existence of an insurer's lawful basis for denying a claim is *a sufficient condition* for defeating a claim that relies upon the fifth

element of the insurer's intentional or reckless failure to investigate. The trial court's summary judgment on the third element of bad faith established the law of the case and should have foreclosed further litigation of that claim. *Belcher v. Queen*, 39 So.3d 1023, 1038 (Ala.2009).

The *Jones* case, relied upon by the trial court and Brechbill to permit the bad-faith-refusal-to-investigate claim to proceed, is distinguishable. In *Jones*, we affirmed a summary judgment for Alfa Mutual Insurance Company on the Joneses' "normal" bad-faith-refusal-to-pay claim and found that Alfa's structural engineer's "report creates a question of material fact that would preclude the Joneses from receiving a preverdict judgment as a matter of law on the underlying breach-of-contract claim." *Jones*, 1 So.3d at 34. We also concluded, in a portion of the decision joined by a plurality, that the following facts, taken as a whole, created a jury question on the bad-faith-refusal-to-investigate claim:

> "After Hurricane Opal, Alfa *never* investigated any records it had of the condition of the Joneses' house before the hurricane. The record reflects that Alfa *never* contacted a realtor who visited the Joneses' house three days before Hurricane Opal made landfall, even though, according to Harold Jones, Bradshaw had inquired about purchasing the Joneses' residence. Alfa *never* inquired of the Joneses as to who would have seen their house before Hurricane Opal and *never* attempted to interview anyone who may have visited the Joneses' house before Hurricane Opal. Alfa *never* considered its own 'rewrite' inspection of the Joneses' house, including photographs of the exterior of the house and *never* inquired of Sanders, its own employee, as to the condition of the Joneses' house when he conducted the 'rewrite' inspection, even though Sanders testified that he did not recall seeing any cracks in the interior or exterior walls of the Joneses' house when he conducted the 'rewrite' inspection three months before Hurricane Opal."

1 So.3d at 36–37. Likewise, Brechbill asserts that State Farm never considered "before and after" evidence from its own insurance agent, from real-estate agents, from the prior owner, and did not speak to McCrispin or anyone else who may have seen the house before the windstorm.

***11** In *Jones*, evidence for the insurer's denial was gathered *after* the denial was made, whereas here a debatable reason for State Farm's denials existed *at the time of the denials.* See, e.g., *Pyun v. Paul Revere Life Ins. Co.*, 768 F.Supp.2d 1157, 1171–72 (N.D.Ala.2011) (holding that because "Met Life had a reasonably debatable reason for denying Plaintiff's claim at the time of its denial of Plaintiff's claim.... [, it] is entitled to summary judgment on Plaintiffs extraordinary bad-faith claim").

[11] State Farm may or may not have perfectly investigated (or reinvestigated) Brechbill's claim to his satisfaction, but perfection is not the standard here. "Alabama law is clear: ... *regardless of the imperfections of [the insurer's] investigation*, the existence of a debatable reason for denying the claim at the time the claim was denied defeats a bad faith failure to pay the claim." *Weaver*, 574 So.2d at 775 (quoting *State Farm Fire & Cas. Co. v. Balmer*, 891 F.2d 874, 877 (11th Cir.1990)). This fact, present in *Weaver* and in the instant case, was nonexistent in *Jones.*

[12] **[13]** The facts before us do not rise to the level of bad faith, dishonesty, self-interest, or ill will inherent in bad-faith conduct. Even if State Farm improperly omitted some aspects of a complete investigation, "more than bad judgment or negligence is required in a bad-faith action." *Singleton v. State Farm Fire & Cas. Co.*, 928 So.2d 280, 287 (Ala.2005). "Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 924 (Ala.1981). A bad-faith-refusal-to-investigate claim cannot survive where the trial court has expressly found as a matter of law that the insurer had a reasonably legitimate or arguable reason for refusing to pay the claim at the time the claim was denied. Because State Farm repeatedly reviewed and reevaluated its own investigative facts as well as those provided by Brechbill, it is not liable for a tortious failure to investigate.

We reverse the judgment on the bad-faith-refusal-to-investigate claim and remand the case to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

STUART, BOLIN, PARKER, and MAIN, JJ., concur.

MOORE, C.J., and MURDOCK, J., concur specially.

BRYAN, J., concurs in the result.

MOORE, Chief Justice (concurring specially).

I. Introduction

This case exemplifies some of the confusion the tort of bad faith has created over the last 30 years for Alabama trial courts, for appellate courts, and for attorneys in general.

In *Lavoie v. Aetna Life & Casualty Co.*, 374 So.2d 310, 312 (Ala.1979) ("*Lavoie I* "), this Court stated that it would "not foreclose the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits," citing *Vincent v. Blue Cross–Blue Shield of Alabama, Inc.*, 373 So.2d 1054 (1979), and *Childs v. Mississippi Valley Title Insurance Co.*, 359 So.2d 1146 (1978).

***12** However, it was not until 1981 that this Court, according to Justice Reneau Almon in his dissent in *Chavers v. National Security Fire & Casualty Co.*, 405 So.2d 1, 15 (Ala.1981), with "zeal, ardor, and with iron determination, introduce[d][us] to Mr. Bad Faith" and recognized the intentional tort of bad faith for the breach of a contract by an insurance company. In *Chavers* this Court adopted the test proposed in the dissent in *Vincent* and held that

> "an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' "

405 So.2d at 7. The tort of bad faith is based upon the fact that " '[e]very contract contains an implied in law covenant of good faith and fair dealing' " and the " '[b]reach of [that] covenant provides the injured party with a tort action for "bad faith" notwithstanding that the acts complained of may also constitute a breach of contract.' " *Id.* at 4 (quoting *Childs*, 359 So.2d at 1152).

The next year in *National Savings Life Insurance Co. v. Dutton*, 419 So.2d 1357 (Ala.1982), Justice Richard ("Red") Jones distinguished "ordinary" bad-faith cases from "extreme" cases, which in time led to the phraseology of the "normal" bad-faith case versus the "abnormal" bad-faith case. 419 So.2d at 1363–1364 (Jones, J., concurring specially). Justice Champ Lyons in *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968, 976 (1998), defined the "abnormal" bad-faith case as follows:

> "The rule in 'abnormal' cases dispensed with the predicate of a preverdict [judgment as a matter of law] for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation. A defendant's knowledge or reckless disregard of the fact that it had no legitimate or reasonable basis for denying a claim may be inferred and imputed to an insurer when it has shown a reckless indifference to facts or proof submitted by the insured.
>
> "So, a plaintiff has two methods by which to establish a bad-faith refusal to pay an insurance claim: he or she can prove the requirements necessary to establish a 'normal' case, or, failing that, can prove that the insurer's failure to investigate at the time of the claim presentation procedure was intentionally or recklessly omissive."

732 So.2d at 976 (citations omitted).

In 1999, Justice Lyons explained these terms for the Court again: "[t]he 'unusual or extraordinary' case was then referred to as the 'abnormal' bad-faith case, and the 'directed-verdict-on-the-contract-claim' case was called the 'normal' bad-faith case." *State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293, 306 (Ala.1999).

Chief Justice Bo Torbert noted in *Chavers* that "[i]t will be interesting to follow the impact of the majority's views on the contractual relationship between the insurers and their insureds." *Chavers*, 405 So.2d at 14 (Torbert, C.J., dissenting).

***13** And throughout the years, Justices, including Chief Justice Torbert, Justice Hugh Maddox, and Justice Jones, did indeed watch with great interest that impact.

In 1984 Chief Justice Torbert, dissenting in *Aetna Life Insurance Co. v. Lavoie*, 470 So.2d 1060, 1079 (Ala.1984) ("*Lavoie II* "), explained:

> "Tort duties are difficult to judicially define or confine; ... the process becomes endless, with attempts to cover each fact situation specifically as it arises, ultimately causing more confusion than clarity, as the specific rules inevitably conflict."

In *Lavoie II,* Justice Maddox, also dissenting, stated that "the Court has expressed differing views on the standards to be used ... in determining when and under what circumstances the tort was established." 470 So.2d at 1088 (Maddox, J., dissenting).

Three years later, Justice Maddox noted in a special concurrence in *Aetna Life Insurance Co. v. Lavoie,* 505 So.2d 1050, 1058 (Ala.1987) ("*Lavoie III* "), that the Court has had "difficulty with this kind of claim from the beginning."

Justice Jones also expressed concern, shortly after the Court first recognized the tort of bad faith, that the two tiers of bad faith were confusing. He stated:

> "I think it is more confusing than helpful to discuss the requisite elements of punitive damages in a bad faith context in terms of either 'malice' on the one hand or 'wanton and reckless' on the other.... Language that implies a two-tier test is misleading and improper."

Continental Assurance Co. v. Kountz, 461 So.2d 802, 810 (Ala.1984) (Jones, J., concurring specially).

Justice Maddox, dissenting in that case, opined that the test for "normal" bad faith is much like a court having to say that although "obscenity" cannot be defined, "I know it when I see it." *Id.* at 811. (Maddox, J., dissenting). He charged the Court with "fail[ing] to give ... settled principles to guide ... in determining when, and under what circumstances, the tort can be established." *Id.*

Alabama's present version of the tort of bad faith remains at least as confusing and amorphous as when the Court recognized the tort in 1981. Such difficulties will always be present whenever the judiciary violates the separation-of-powers doctrine.

II. The Impact of Chavers

"The whole question of bad faith by insurance companies might be an issue more properly addressed by the legislature." *Lavoie II,* 470 So.2d at 1080 (Torbert, C.J., dissenting). " '[I]n our scheme of government, policy questions like this, [that] involve the heavily regulated insurance industry, should properly be addressed by the Legislature, but the Legislature has not acted.' " *Lavoie III,* 505 So.2d at 1058 (Maddox, J., concurring specially) (quoting his dissent in *Kountz,* 461 So.2d at 812). In *Lavoie III,* Justice Maddox stated:

> "[I]t is apparent that there are serious public policy considerations involved which are difficult for me, and I believe for this Court, to address.
>
> ***14** "The same public policy considerations which plagued me in *Chavers,* when the tort was recognized, continue to plague me.
>
> "....
>
> " '... [I]n our scheme of government, policy questions like this, especially since they involve the heavily regulated insurance industry, should properly be addressed by the Legislature, but the Legislature has not acted.' "

Id. at 1057–58. See also *Kountz,* 461 So.2d at 811–13(Maddox, J., dissenting) (same); and *Thomas v. Principal Fin. Group,* 566 So.2d 735, 751 (1990) (Maddox, J., concurring in part and dissenting in part) (same); *Independent Fire Ins. Co. v. Lunsford,* 621 So.2d 977, 982 (Ala.1993) (Maddox, J., concurring in part and dissenting in part) (same); and *Ex parte Simmons,* 791 So.2d 371, 382 (Ala.2000) (Maddox, J., concurring in the result) (same).

On October 2, 1981, this Court released both *Chavers* and *Gulf Atlantic Life Insurance Co. v. Barnes,* 405 So.2d 916 (1981). In *Chavers,* the Court recognized that it was making a "new" law, stating:

> "*[T]he law applicable to first party actions involving a direct claim by the insured is not so well settled....*
>
> "....
>
> "... Heretofore, we have reserved any ruling on this tort, 'necessarily awaiting the factual context of a live litigated

case for a more definitive statement of its elements and application.' "

Chavers, 405 So.2d at 5–6 (citation omitted) (emphasis added). *Chavers* recognized "the intentional tort of bad faith in first party insurance actions." *Id.* at 6. On the very same day, the *Barnes* opinion sought to "restate" the requirements,

> "*under Alabama law*, for establishment of the tort of bad faith refusal to pay a valid claim. The latest pronouncement by this Court on this question was made in *Chavers v. National Security Fire and Casualty Company*."

405 So.2d at 923. *Chavers* also cross-referenced *Barnes:* "[W]e have now by our opinion in this case, as well as in [*Barnes*,] delineated the tort of bad faith requisites with sufficient clarity to be helpful." 405 So.2d at 11.

Taking *Chavers* and *Barnes* together, this Court believed its recognition of the tort of bad faith was a pronouncement of Alabama law. The pronouncement of what a new tort law shall be for future application is a legislative act. "It has been well said, that, 'to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislation.' " *Alabama Life Ins. & Trust Co. v. Boykin*, 38 Ala. 510, 513 (1863). The Constitution bars the judiciary from exercising legislative powers, which are wholly vested in the legislative branch. This Court's attempt in *Barnes* and *Chavers* to recognize a new tort was an unconstitutional usurpation of legislative powers.

Chavers based its judicial legislation on what members of this Court believed public policy required. See *Chavers*, 405 So.2d at 6 ("[T]he inherent policy considerations mandat[e] our recognition of a redressable tort for intentional breach of good faith."). However, "[t]he Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not trod." *Cavalier Mfg., Inc. v. Jackson*, 823 So.2d 1237, 1248 (Ala.2001). "[T]he authority to declare public policy ... is reserved to the Legislature." *Ex parte State Farm Fire & Cas. Co.*, 764 So.2d 543, 547 (Ala.2000). Although the legislature may determine a need for action based upon public policy, the judiciary must be blind to the competing public-policy interests and conditions of insurer and insured, for "[j]ustice is blind, says the law, and in her judgment must see no man, color, race, or condition." *Jones v. State*, 21 Ala.App. 234, 236, 109 So. 189, 191 (1926).

***15** Those times when the legislature has not acted give the Court no mandate for judicial usurpation of legislative powers, even in areas of great public concern, such as an insurer's refusal to pay a legitimate claim. Thus, contrary to Justice Maddox's recommendation, the Court *cannot* and *should not* "fashion an appropriate remedy for every wrong, and should [not] do so if the legislative branch does not address the wrong." *Lavoie III*, 505 So.2d at 1060 (Maddox, J., concurring specially). "[T]he legislature is uniquely qualified to make those determinations." *Id.*

> "The job of making law belongs exclusively to the Legislature. The desire or need for action in a particular area of public policy cannot justify a court's intruding itself into the field of legislation in order to reach a desired result...."

Ex parte James, 836 So.2d 813, 876 (2002) (Moore, C.J., concurring in the result in part and dissenting in part). In the area of tort law, "[t]o enact a judge's public policy vision ... represents an attempt to have the judiciary act in a legislative capacity." 836 So.2d at 859. Legislative inaction simply does not grant the judiciary new powers either to engage in public-policy analysis or to create law. Perhaps an intentional breach of a contract for insurance should be punishable by an award of punitive damages, but that is a question that should be addressed by the legislature of this State, not the courts.

III. The Nature of Judicial Opinions

The members of the judiciary are often tempted to think judicial opinions create law, as if, by fiat, " 'out of the facts the law arises' ... created in the Supreme Court's laboratory with only an empty test tube." *Chavers*, 405 So.2d at 14 (Almon, J., dissenting). When the judiciary indulges this temptation, our government of laws is dismantled, replaced with a government of men, in violation of Art. III, § 43, of our Constitution. Blackstone explained, "*the law*, and the *opinion of the judge* are not always controvertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." 1 William Blackstone *Commentaries* *71. "[W]e may take it as a general rule, 'that the "decisions of courts of justice *are the evidence* of what is common law." ' " *Id.* (emphasis added). Again, "these judicial decisions *are the*

principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law." *Id.* at *69 (emphasis added).

Chancellor James Kent agreed: "The reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the common law." 1 James Kent *Commentaries on American Law* *465 (1826). As judges, we are "sworn to determine, not according to [our] own private judgment, but according to the known laws and customs of the land; *not delegated to pronounce a new law*, but to maintain and expound the old one." *Commentaries* *71 (emphasis added).

***16** Thus, our judicial opinions are *not law*, but rather *evidence of the law*. We issue opinions; we do not enact statutes. Judicial opinions are signposts. As signposts, judicial opinions may point later travelers the right direction to already existing law, or may point the wrong direction to previously nonexistent, judicially created "law." The judiciary should maintain correct signs but remove or replace signs that lead travelers astray. *Chavers* and *Barnes* did not point to existing Alabama law; those cases purported to create new law. Because of this, the opinions in *Chavers* and *Barnes* must not be confused with Alabama's tort law. The legislature never enacted the tort of bad faith, and this Court had no power to do so. *Chavers* and *Barnes* thus provide no authoritative evidence of tort law in Alabama. Consequently, the judicially legislated tort of bad-faith refusal to pay an insurance claim should not be recognized as part of Alabama law by this Court or any Alabama court. "For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined." *Commentaries* at *70. The tort of bad-faith refusal to pay an insurance claim is not simply bad law; it is not law at all.

IV. Conclusion

In 1998, Justice Maddox urged the Court to look "at the history of the establishment of the tort of bad-faith failure to pay an insurance claim," stating that "it very well may be appropriate for this Court, or for the Legislature, to reexamine the tort of bad-faith failure to pay." *Grissett*, 732 So.2d at 982, 984 (Maddox, J., concurring in the result); see also *Ex parte Simmons*, 791 So.2d 371, 382–83 (Ala.2000) (Maddox, J., concurring in the result) ("The fact that trial courts and this Court are still being presented with questions relating to when, and under what circumstances, a bad-faith cause of action can accrue, suggests that an alternative to the bad-faith cause of action would be more appropriate.").

Although the legitimacy of the judicially created tort of bad-faith refusal to pay was not challenged in this case, I believe that this Court's recognition of the tort as the law in Alabama was unconstitutional. I urge the Court to reexamine *Chavers*, to overrule it in an appropriate case, and to abolish this judicially legislated tort, leaving to the legislative branch the right to determine policy questions such as the intentional breach of an insurance contract by an insurance company.

MURDOCK, Justice (concurring specially).

As the main opinion notes, this Court in *National Security Fire & Casualty Co. v. Bowen*, 417 So.2d 179 (Ala.1982), stated the elements of a claim of "bad faith" in the following manner:

> " '(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> ***17** " '(b) an intentional refusal to pay the insured's claim;
>
> " '(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> " '(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> " '(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.' "

—— So.3d at —— (quoting *Bowen*, 417 So.2d at 183).

I do not understand element (c) of the tort of bad-faith refusal to pay an insurance claim as referring to an absence of a debatable reason in an absolute sense, but as referring to an absence from the insurer's decisional process of a debatable reason. See, e.g., *National Sav. Life Ins. Co. v. Dutton*, 419 So.2d 1357, 1362 (Ala.1982) ("Whether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision was made."); *Jones v. Alabama Farm Bureau Mut. Cas. Co.*, 507 So.2d 396, 400 (Ala.1986) (holding that an investigation conducted after the denial of a claim cannot have served as an arguable basis for denying the claim); and *National Ins. Ass'n*

v. Sockwell, 829 So.2d 111, 130 (Ala.2002) (noting that it is "an insurer's responsibility to marshal all of the pertinent facts with regard to its insured's claim before it refuse[s] to pay"). With this understanding, I agree with the main opinion that element (c) is an element of both "normal" and "abnormal" bad-faith claims. [2]

I do not intend hereby to express any opinion as to the holding in *Jones v. Alfa Mutual Insurance Co.*, 1 So.3d 23 (Ala.2008), or any basis for distinguishing this case from *Jones*.

Footnotes

1 Instead of the confusing terms "normal" and "abnormal" bad faith, this opinion will use the more descriptive terms "bad-faith refusal to pay" and "bad-faith refusal to investigate," respectively.

2 To understand element (c) in an absolute sense would be to ignore two facts. First, it would ignore the fact the "intentional refusal" required by element (b) is something more than the mere failure described in element (a) (the failure to pay a contractual obligation that is in fact owed); that this "something more" relates to the mind-set of the insurer in its decision-making process; and that element (c) speaks in reference to "that refusal" required by element (b), not to the mere "breach" required by element (a). Second, it would mean that, even when there is in fact no true basis for refusing to pay an insured's claim (as must always be true pursuant to element (a)), an insurer might by dumb luck avoid any liability for its bad-faith refusal to pay the insured's claim without even investigating if, in fact, there was "out there somewhere," although unknown to the insurer, an "arguable" reason for such a refusal.

112 So.3d 541
District Court of Appeal of Florida,
Third District.

1500 CORAL TOWERS CONDOMINIUM ASSOCIATION, INC., Appellant,
v.
CITIZENS PROPERTY INSURANCE CORPORATION, Appellee.

No. 3D12–132. | April 3, 2013.
| Rehearing Denied May 24, 2013.

Synopsis

Background: Insured, a condominium association, filed breach of contract suit against insurer, alleging that insurer had denied its claim brought under commercial-residential insurance policy after condominium properties sustained damage in hurricane. The Circuit Court, Miami–Dade County, Marc Schumacher, J., granted summary judgment to insurer. Insured appealed.

[Holding:] On rehearing, the District Court of Appeal held that insured's late notice of alleged loss to insurer, approximately five years after hurricane, prejudiced insurer.

Affirmed.

Attorneys and Law Firms

***542** Mager Lawyers and Scott A. Mager and Gerard A. Marino, Fort Lauderdale, for appellant.

Hinshaw & Culbertson and James H. Wyman, Fort Lauderdale, and Maureen G. Pearcy, for appellee.

Before WELLS, C.J., and SUAREZ and FERNANDEZ, JJ.

Opinion

ON MOTION FOR REHEARING

PER CURIAM.

We grant Citizens Property Insurance Corporation's motion for rehearing, withdraw our previous opinion issued February 6, 2013, and substitute the following opinion in its place:

1500 Coral Towers Condominium ("Coral Towers") appeals a final summary judgment in favor of Citizens Property Insurance Corporation ("Citizens") in a breach of contract action. We have reviewed, once again, the entire record as well as controlling case law and conclude that the trial court was correct in finding Citizens was presumed prejudiced by Coral Towers' late notice and, based on our *de novo* review, find that Coral Towers failed to overcome the presumption of prejudice. Therefore, we affirm the trial court's summary judgment in favor of Citizens.

At the time of Hurricane Wilma, in October 2005, Coral Towers was insured under a commercial-residential property insurance policy with Citizens. Approximately five years after Hurricane Wilma, on June 29, 2010, Coral Towers notified Citizens for the first time that the property had sustained damages as a result of Hurricane Wilma. Pursuant to the terms of the insurance policy, Citizens requested that Coral Towers submit a sworn proof of loss within sixty days. ***543** Coral Towers did not submit the proof of loss within sixty days. In October 2010, Coral Towers brought suit for breach of contract alleging that it had properly and timely notified Citizens of the damages it had sustained to the condominium properties as a result of Hurricane Wilma. It also alleged that Citizens had denied its claim. Citizens filed an answer and asserted affirmative defenses alleging that Coral Towers had failed to give prompt notice of the alleged loss and had breached the following policy provisions:

> **4. You[r] Duties After Loss.** In case of a loss to covered property, you must:
>
> a. Give prompt notice to us, or your producer, who is to give immediate notice to us.
>
> ....
>
> d. Send to us, within sixty (60) days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> (1) The time and cause of loss;
>
> (2) Your interest and that of all others in the Covered Property involved, and all liens on the covered property;
>
> (3) Other insurance which may cover the loss;

(4) Changes in titles or occupancy of the Covered Property during the term of the Policy;

(5) Specifications of damaged buildings and detailed repair estimates;

(6) The inventory of damaged and undamaged personal property described in Condition number 4.b., Your Duties After Loss.

Citizens also asserted as an affirmative defense that Coral Towers was barred from recovery because it had failed to comply with conditions precedent to filing the lawsuit under the following policy provision:

15. Suits Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within five (5) years from the date the loss occurs.

Three months after filing suit, Coral Towers provided the sworn proof of loss. The first opportunity Citizens had to inspect the property was in early August of 2010.

In discovery, Coral Towers admitted knowledge of the loss in November 2005, and that a roofer had repaired the elevator, roof, and surrounding walls in December 2005. The roof continued to leak and Coral Towers obtained estimates to replace the roof. The latter of the estimates was for $259,269.20. The reason Coral Towers alleged it did not notify Citizens immediately after Hurricane Wilma was because initially there was a question of whether the damages would exceed the policy deductible.

In September 2011, Citizens moved for summary judgment on grounds that Coral Towers was barred from recovery as a result of the failure to give prompt notice and failure to provide a sworn proof of loss within sixty days. Citizens alleged that it was prejudiced by the inability to investigate and evaluate the claim under the policy. Coral Towers maintained that the type of damages it had sustained appeared over time and would not have necessarily evidenced themselves within the first two years after the hurricane. The two issues addressed by the trial court and presented on appeal are whether Coral Towers' notice of loss was timely and, if not, whether Citizens was prejudiced by the late notice.

[1] We agree with the trial court that there is no factual dispute that Coral Towers failed to give timely notice of the loss. When an insurance contract contains a provision which applies to notice of the damage claim, an insured must give notice of the loss that implicates a potential claim without waiting for the full extent of the damages to become apparent. *Kendall Lakes Towers Condo. Ass'n v. Pacific Ins.* ***544** *Co.*, No. 10–24310–CIV, 2012 WL 266438 (S.D.Fla. Jan. 30, 2012); *see Clena Invs., Inc. v. XL Specialty Ins. Co.*, No. 10–CV–62028, 2012 WL 1004851 (S.D.Fla. March 26, 2012); *Gypsum Co. v. Travelers Indem. Co.*, 417 So.2d 254 (Fla.1982)(prejudice is assumed when the insured does not give notice of a possible claim); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782 (Fla. 3d DCA 1981). On facts similar to those before us, the Southern District of Florida has held that a condominium association is not entitled to wait until it determines on its own that the damages in question exceed the deductible under its insurance policy or until it ascertains the precise cause of the damage before giving notice of the loss or damage under the terms of the insurance contract. *Kendall Lakes*, 2012 WL 266438, at *4. In *Kendall Lakes*, the insured waited approximately four years to notify the insurance company of its claim caused by Hurricane Wilma because it believed the damage did not meet the policy deductible. After Hurricane Wilma, the Kendall Lakes Condominium Association had the roof repaired on its own, but the premises continued leaking and required periodic repairs. It was not until 2009, approximately four years after the damage occurred, that the association determined the problems were structural in nature, were, in fact, attributable to Hurricane Wilma, and submitted a claim. The Southern District held:

> As a result, Pacific was entitled to prompt notice of the loss following Hurricane Wilma, not, as occurred here, to notice more than four years later. There is no genuine factual dispute that Kendall Lakes did not provide timely notice and Pacific is entitled to judgment as a matter of law on this issue.

Kendall Lakes, 2012 WL 266438, at *4. Here, as in *Kendall Lakes*, there is no genuine factual dispute that Coral Towers failed to give timely notice as required by the Citizens policy in question. The reasons given by Coral Towers for the late notice do not excuse Coral Towers' failure to comply with the policy requirements of prompt notice. Therefore, we find the trial court was correct in finding that Citizens was prejudiced by the late notice.

[2] **[3]** The next question in this analysis is whether Coral Towers can overcome the presumption of prejudice to Citizens caused by the late notice. If not, summary judgment was appropriate. We find, based on yet another extensive review of the record and the case law, Coral Towers failed to overcome this presumption at the hearing for summary judgment. An insurer is prejudiced by untimely notice when the underlying purpose of the notice requirement is frustrated by late notice. 13 COUCH ON INSURANCE § 193.30 (3d ed. Supp. 2012). Failure to give timely notice creates a presumption that the insurer was prejudiced. *Id.*; *see, e.g. Ideal Mut. Ins. Co.*, 400 So.2d at 786. The insured may rebut the presumption of prejudice by alleging and showing that the late notice did not prejudice the insurer. *See Bankers Ins. Co. v. Macias*, 475 So.2d 1216 (Fla.1985); *Soronson v. State Farm Fla. Ins. Co.*, 96 So.3d 949 (Fla. 4th DCA 2012). In other words, once the presumption of prejudice exists, the burden shifts to the insured to show that the insurer was not prejudiced by the insured's late notice. *Soronson*, 96 So.3d at 953.

[4] **[5]** As in *Kendall Lakes*, Citizens alleges that the extended passage of time creates a very strong inference that Citizens' investigation and defenses have been diminished as a result of the late notice. Also, it alleges that the repairs made without first notifying Citizens hampered the monitoring of, and efforts to coordinate, mitigation of damages. Although the issue of whether an insured has overcome the presumption of prejudice caused by late notice is generally reserved for the trier of fact, it is appropriately raised on summary ***545** judgment where, as in this case, the insured fails to present evidence sufficient to rebut the presumption. *Soronson*, 96 So.3d at 953; *see also City Mgmt. Grp. Corp. v. Am. Reliance Ins. Co.*, 528 So.2d 1299, 1300 (Fla. 3d DCA 1988) (finding a presumption of prejudice to the insurer arose as a result of late notice, and there was nothing in the record to overcome this presumed prejudice or to raise genuine factual issues in relation to it).

The record fails to show any evidence or issue of fact presented by Coral Towers sufficient to overcome the presumption of prejudice resulting from its late notice to the insurer. The closest Coral Towers comes is a conclusory statement by one of its engineers that, in his opinion, the late notice did not prejudice Citizens. This is not the legally sufficient evidence required to overcome the presumption of prejudice. We affirm the trial court's grant of summary judgment in favor of Citizens. [1]

Affirmed.

Parallel Citations

38 Fla. L. Weekly D731

Footnotes

1 We do not find it necessary to address the issue raised by Citizens that it would also have been entitled to summary judgment on the separate ground that the insured allegedly failed to timely comply with Citizens' request of proof of loss.

110 So.3d 399
Supreme Court of Florida.

TIARA CONDOMINIUM ASSOCIATION, INC., etc., Appellant,
v.
MARSH & MCLENNAN COMPANIES, INC., etc., et al., Appellees.

No. SC10–1022. | March 7, 2013.

Synopsis

Background: Condominium association brought action against insurance broker, alleging breach of contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, negligence, and breach of fiduciary duty. The United States District Court for the Southern District of Florida, No. 08-80254-CV-DTKH, Daniel T.K. Hurley, J., granted summary judgment in favor of broker on all claims. Association appealed, and the Court of Appeals, 607 F.3d 742, Dubina, Chief Judge, affirmed in part and certified a question to the Florida Supreme Court.

[Holding:] The Supreme Court, Labarga, J., held that the economic loss rule applies only in the products liability context, receding from *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180; *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244; *Airport Rent-A-Car v. Prevost Car, Inc.*, 660 So.2d 628; *Moransais v. Heathman*, 744 So.2d 973; *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219; *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532.

Certified question answered.

Pariente, J., filed concurring opinion in which Lewis and Labarga, JJ., concurred.

Polston, C.J., filed dissenting opinion in which Canady, J., concurred.

Canady, J., filed dissenting opinion in which Polston, C.J., concurred.

West Headnotes (3)

[1] Torts
Economic loss doctrine

The "economic loss rule" is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.

29 Cases that cite this headnote

[2] Products Liability
Economic losses; damage to product itself

Torts
Economic loss doctrine

The economic loss rule applies only in the products liability context; receding from *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180; *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244; *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628; *Moransais v. Heathman*, 744 So.2d 973; *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219; *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532.

16 Cases that cite this headnote

[3] Courts
Decisions of Same Court or Co-Ordinate Court

Courts
Erroneous or injudicious decisions

The Supreme Court will depart from precedent when such departure is necessary to vindicate other principles of law or to remedy continued injustice; stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

***400** LABARGA, J.

This case is before the Court for review of a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that is determinative of a cause pending in that court and for which there appears to be no controlling precedent. We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const. In *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., Inc.*, 607 F.3d 742, 749 (11th Cir.2010), the Eleventh Circuit certified the following question to this Court:

> DOES AN INSURANCE BROKER PROVIDE A "PROFESSIONAL SERVICE" SUCH THAT THE INSURANCE BROKER IS UNABLE TO SUCCESSFULLY ASSERT THE ECONOMIC LOSS RULE AS A BAR TO TORT CLAIMS SEEKING ECONOMIC DAMAGES THAT ARISE FROM THE CONTRACTUAL RELATIONSHIP BETWEEN THE INSURANCE BROKER AND THE INSURED?

Because the question as certified by the Eleventh Circuit is premised on the continued applicability of the economic loss rule in cases involving contractual privity, we restate the certified question as follows:

> DOES THE ECONOMIC LOSS RULE BAR AN INSURED'S SUIT AGAINST AN INSURANCE BROKER WHERE THE PARTIES ARE IN CONTRACTUAL PRIVITY WITH ONE ANOTHER AND THE DAMAGES SOUGHT ARE SOLELY FOR ECONOMIC LOSSES?

We answer this question in the negative and hold that the application of the economic loss rule is limited to products liability cases. Therefore, we recede from prior case law to the extent that it is inconsistent with this holding. We begin by discussing the facts and procedural background of this case. We then turn to our analysis.

FACTS AND PROCEDURAL BACKGROUND

The facts of this case are set forth in the Eleventh Circuit Court of Appeals' opinion in *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., Inc.*, 607 F.3d 742 (11th Cir.2010). We summarize the facts here. Tiara Condominium Association (Tiara) retained Marsh & McLennan (Marsh) as its insurance broker. One of Marsh's responsibilities was to secure condominium insurance coverage. Marsh secured windstorm coverage through Citizens Property Insurance Corporation (Citizens), which issued a policy that contained a loss limit in an amount close to $50 million. In September 2004, Tiara's condominium sustained significant damage caused by hurricanes Frances and Jeanne. Tiara began the process of loss remediation. After being assured by Marsh that the loss limits coverage was per occurrence (meaning that Tiara would be entitled to almost $100 million rather than coverage in the aggregate, which would be half of that amount), Tiara proceeded with more expensive remediation efforts. However, when Tiara sought payment from Citizens, Citizens claimed that the loss limit was $50 million in the aggregate, not per occurrence. Eventually, Tiara and Citizens settled for approximately $89 million, but that amount was less than the more than $100 million spent by Tiara.

In October 2007, Tiara filed suit against Marsh, alleging (1) breach of contract, (2) negligent misrepresentation, (3) breach of the implied covenant of good faith and fair dealing, (4) negligence, and (5) breach of fiduciary duty. The trial court granted summary judgment in favor of Marsh on all claims and Tiara appealed to the Eleventh Circuit. The appeals court concluded that summary judgment was proper as to ***401** the breach of contract, negligent misrepresentation, and breach of implied covenant of good faith and fair dealing claims. [1] However, the appeals court did not affirm the summary judgment granted by the trial court on the negligence and breach of fiduciary duty claims, which were based on Tiara's allegations that Marsh was either negligent or breached its fiduciary duty by failing to advise Tiara of its complete insurance needs and by failing to advise Tiara of its belief

that Tiara was underinsured. As to these two claims, the appeals court certified a question to this Court to determine whether the economic loss rule prohibits recovery, or whether an insurance broker falls within the professional services exception that would allow Tiara to proceed with the claims. We turn now to a discussion of the economic loss rule.

ANALYSIS

Origin and Development of the Economic Loss Rule

"The exact origin of the economic loss rule is subject to some debate and its application and parameters are somewhat ill-defined." *Moransais v. Heathman*, 744 So.2d 973, 979 (Fla.1999). In its simplest form, we noted, the rule appeared initially in both state and federal courts in products liability type cases. *Id.* at 979. A historical review of the doctrine reveals that it was introduced to address attempts to apply tort remedies to traditional contract law damages. In *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So.2d 1244 (Fla.1993), we recognized the economic loss rule as "the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others." *Id.* at 1246 (quoting Sidney R. Barrett, Jr., *Recovery of Economic Loss in Tort for Construction Defects: A Critical Analysis*, 40 S.C.L.Rev. 891, 894 (1989)). We have defined economic loss as "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property." *Casa Clara*, 620 So.2d at 1246 (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L.Rev. 917, 918 (1966)). We further explained that economic loss

> includes "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages–Tort or Contract?*, 114 U. Pa. L.Rev. 539, 541 (1966). In other words, economic losses are "disappointed economic expectations," which are protected by contract law, rather than tort law. *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55, 58 (1988); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash.2d 406, 745 P.2d 1284 (1987).

Casa Clara, 620 So.2d at 1246.

[1] Simply put, the economic loss rule is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses. *Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 536 (Fla.2004). The rule has its roots in the products liability arena, and was primarily intended to limit actions in the products liability context.

***402** Despite its underpinnings in the products liability context, the economic loss rule has also been applied to circumstances when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract.

Contractual Privity Economic Loss Rule

"The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Am. Aviation*, 891 So.2d at 536 (citing *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So.2d 490, 494 (Fla. 3d DCA 1994) ("Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort."). When the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract. *Am. Aviation*, 891 So.2d at 536–37); *Weimar v. Yacht Club Point Estates, Inc.*, 223 So.2d 100, 103 (Fla. 4th DCA 1969) ("[N]o cause of action in tort can arise from a breach of a duty existing by virtue of contract.").

The contractual privity application of the economic loss rule is best exemplified by our decision in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla.1987). [2] There, AFM entered into an agreement with Southern Bell that included placing AFM's advertising in the yellow pages. *See id.* at 180. However, Southern Bell listed an incorrect phone number for AFM, causing AFM economic damages. *See id.* In asserting a claim for economic losses, AFM chose to proceed solely on a negligence theory in the trial court below

rather than base its theory of recovery on any agreement between the parties. *See id.* at 181. In determining that AFM could not recover economic losses based on a tort theory, this Court noted that AFM's contract with Southern Bell "defined the limitation of liability through bargaining, risk acceptance, and compensation." *Id.* Because AFM had not proved that Southern Bell committed a tort independent of the breach of contract, this Court concluded that AFM had no basis for recovery in negligence. *See id.*

Subsequently, in *American Aviation,* we recognized that despite the general prohibition against a recovery in tort for economic damages for parties in privity of contract, we have allowed it in torts committed independently of the contract breach, such as fraud in the inducement. *See* 891 So.2d at 537. For example, in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.,* 685 So.2d 1238 (Fla.1996), we stated:

> The economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action. Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from the acts that breached the contract. Fraudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract.

***403** *Am. Aviation,* 891 So.2d at 537 (quoting *HTP, Ltd.,* 685 So.2d at 1239 (citations omitted)). *See also PK Ventures, Inc. v. Raymond James & Assocs.,* 690 So.2d 1296 (Fla.1997) (economic loss rule did not preclude a cause of action by the buyer of commercial property against the seller's broker for negligent misrepresentation). [3]

Another situation in which this Court has determined that public policy dictates that liability not be limited to the terms of the contract involves cases such as those alleging neglect in providing professional services. *See, e.g., Moransais,* 744 So.2d at 983 ("While provisions of a contract may impact a legal dispute, including an action for professional services, the mere existence of such a contract should not serve per se to bar an action for professional malpractice.").

Products Liability Economic Loss Rule

Although the economic loss rule has, over time, been extended to the contractual privity context, the roots of the rule may be found in the products liability context. The products liability economic loss rule developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law. *Am. Aviation,* 891 So.2d at 537–38. As the theory of strict liability replaced the theory of implied warranties with regard to actions based on defective products that resulted in personal injury, the issue arose as to whether the courts should permit a cause of action in tort by one who suffered purely economic loss due to a defective product. *Id.* at 539. For those who were in contractual privity, actions based on breach of warranty continued as the viable method if the only damages were economic in nature. *Id.* But for those who were not in contractual privity and who sustained economic losses as a result of defective products, the question became what theory of recovery would be proper. *Id.*

The development of Florida's products liability economic loss rule can be traced to two cases: *Seely v. White Motor Co.,* 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145, 149 (1965), and *East River Steamship Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 871, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). In *Seely,* the California Supreme Court held that the doctrine of strict liability in tort had not supplanted causes of action for breach of express warranty. The court was confronted with a situation in which a plaintiff sought recovery for economic loss resulting from his purchase of a truck that failed to perform according to expectations. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149. The California Supreme Court agreed with the trial court that the defendant could recover the money he paid on the purchase price of the truck and for his lost profits on the basis of breach of express warranty, *see id.,* 45 Cal.Rptr. 17, 403 P.2d at 148, but rejected the argument that warranty law had been superseded by the doctrine of strict liability. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149. The court concluded that the strict liability doctrine was not intended to undermine the warranty provisions of sales or contract law, but was designed to govern the wholly separate and distinct problem of physical injuries caused by defective products. *See id.,* 45 Cal.Rptr. 17, 403 P.2d at 149–50.

The California Supreme Court recognized that the rules of warranty continued ***404** to function well in a commercial setting, allowing the manufacturer to determine the quality

of the product and the scope of its liability if the product failed to perform. The court reasoned that a manufacturer's liability under that theory would extend to all subsequent purchasers regardless of whether the manufacturer's promise regarding the fitness of the product was ever communicated to those purchasers. If the manufacturer were strictly liable for economic losses resulting from the failure of its product to perform as promised by the warranty, it would be liable not only to the initial purchaser, but to every consumer who subsequently obtained possession of the product. *See id.*, 45 Cal.Rptr. 17, 403 P.2d at 150.

In *East River,* the United States Supreme Court adopted the reasoning in *Seely* when it considered the issue of economic loss resulting from defective products in the context of admiralty. According to the Supreme Court, when the damage is to the product itself, "the injury suffered—the failure of the product to function properly—*is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.*" *Id. East River,* 476 U.S. at 868, 106 S.Ct. 2295 (emphasis supplied). The Court stated:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. *The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies.* In exchange, the purchaser pays less for the product.

Id. at 872–73, 106 S.Ct. 2295 (emphasis supplied) (footnote and citation omitted). Recognizing that extending strict products liability to cover economic damage would result in "contract law ... drown[ing] in a sea of tort," *id.* at 866, 106 S.Ct. 2295, the Supreme Court held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871, 106 S.Ct. 2295. Thus, from the outset, the focus of the economic loss rule was directed to damages resulting from defects in the product itself.

Relying on the reasoning in *Seely* and *East River,* this Court adopted the products liability economic loss rule, precluding recovery of economic damages in tort where there is no property damage or personal injury, in *Florida Power & Light Co. v. Westinghouse Elec. Corp.,* 510 So.2d 899 (Fla.1987), our seminal case on the applicability of the economic loss rule. Florida Power & Light (FPL) entered into contracts with Westinghouse in which Westinghouse agreed to design, manufacture, and furnish two nuclear steam supply systems, including six steam generators. FPL discovered leaks in all six generators. FPL brought suit, alleging that Westinghouse was liable for breach of express warranties in the contracts and for negligence, and sought damages for the cost of repair, revision, and inspection of the steam generators. *Id.* at 900.

In determining whether Florida law permitted FPL to recover the economic losses in tort without a claim for personal injury or separate property damage, this Court considered the policy issues supporting the application of a rule that limits tort recovery for economic losses when a product damages itself. *Id.* Concluding that warranty law was more appropriate than tort law for resolving economic losses in this context, the Court adopted the holding in *East River* that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product ***405** from injuring itself." *Florida Power,* 510 So.2d at 901 (quoting *East River,* 476 U.S. at 871, 106 S.Ct. 2295). Thus, as we reaffirmed in *American Aviation:*

> The economic loss rule adopted in *Florida Power* represents this Court's pronouncement that, notwithstanding the theory of strict liability adopted in *West,*[4] strict liability has not replaced warranty law as the remedy for frustrated economic expectations in the sale of goods. In exchange for eliminating the privity requirements of warranty law and *expanding* the tort liability for manufacturers of defective products which cause personal injury, we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself.

Am. Aviation, 891 So.2d at 541. We also noted that "the products liability economic loss rule articulated in *Seely* and *East River,* and adopted by this Court in *Florida Power,* applies even in the absence of privity of contract." *Id.* (citing *Airport Rent–A–Car, Inc. v. Prevost Car, Inc.,* 660 So.2d 628, 631 (Fla.1995) (holding cause of action for negligence against manufacturer of defective buses was barred by the economic loss rule notwithstanding absence of privity)); *see*

also Casa Clara, 620 So.2d at 1248 (holding cause of action against manufacturer of defective concrete was barred by the economic loss rule notwithstanding absence of privity).

Simply stated, "[t]he essence of the early holdings discussing the rule is to prohibit a party from suing in tort for purely economic losses to a product or object provided to another for consideration, the rationale being that in those cases 'contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.' " *Moransais,* 744 So.2d at 980 (citing *Florida Power,* 510 So.2d at 902). Such was the reasoning in *East River, Seely,* and ultimately, *Florida Power.*

An examination of the application of the economic loss rule in Florida from its inception to our ruling in *Florida Power,* reveals that this Court adhered strictly to the reasoning of *East River* and *Seely.* Subsequent to our ruling in *Florida Power,* however, we issued a number of rulings which, as aptly stated in *Moransais,* "appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent." *Moransais,* 744 So.2d at 980. For example, in *AFM,* as previously discussed, we extended the economic loss rule to preclude a negligence claim arising from breach of a service contract in a nonprofessional service context. *See AFM,* 515 So.2d at 181. We also noted in *Moransais,* that "[w]hile we continue to believe the outcome of [*AFM*] is sound, we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles." *Moransais,* 744 So.2d at 981.

In *Casa Clara,* we held that the economic loss rule barred a cause of action in tort for providing defective concrete where there was no personal injury or damage to property other than to the product itself.[5] ***406** *Casa Clara,* 620 So.2d at 1248. In *Airport Rent–A–Car,* we followed the reasoning in *Casa Clara* in holding the economic loss rule barred a cause of action for negligence against the manufacturer of defective buses where the only damage alleged was to the buses themselves. *Airport Rent–A–Car,* 660 So.2d at 630–31.

In *American Aviation,* in recognizing our history of unprincipled extension of the rule, we concluded that the economic loss rule should be expressly limited to the original rationale and intent of *Seely, East River,* and *Florida Power,* and held that a manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself. *Am. Aviation,* 891 So.2d at 542. "In other words, we reaffirm our recognition of the products liability economic loss rule." *Id.* at 543. Despite this recognition, we expressly noted that the "other property" exception to the products liability economic loss rule remained viable. *Id.* In addition to the "other property" exception, we also reaffirmed that in cases involving either privity of contract or products liability, the other exceptions to the economic loss rule that we have developed, such as for professional malpractice,[6] fraudulent inducement,[7] and negligent misrepresentation,[8] or free-standing statutory causes of action still apply.[9] *Am. Aviation,* 891 So.2d at 543. We expressly emphasized, "[t]hese exceptions remain untouched by our ruling today." *See id.*

Thus, despite our effort to roll back the economic loss rule to its products liability roots, we left untouched a number of exceptions which continue to extend the application of the rule beyond our original limited intent.

A Legacy of Unprincipled Expansion

For some time, as reflected by the foregoing discussion, this Court has been concerned with what it perceived as an over-expansion of the economic loss rule. We began expressing this concern in *Moransais,* where we noted our refusal to extend its application to actions based on fraudulent inducement and negligent representation cases. *Id.* at 981 (citing *PK Ventures* (negligent misrepresentation); *HTP* (fraudulent inducement)). We observed,

> the [economic loss] rule was primarily intended to limit actions in the product liability context, and its application should generally be limited to those contexts or situations where the policy considerations are substantially identical to those underlying the product liability-type analysis. We hesitate to speculate further on situations not actually before us. The rule, in any case, should not be invoked to bar well-established causes of actions in tort, such as professional malpractice.

Moransais, 744 So.2d at 983 (footnote omitted). Five years later, in *American Aviation,* we reaffirmed our concern with the over-expansion of the rule and again noted that the economic loss rule should be expressly limited. We emphasized this concern with the following statement:

> Several justices on this Court have supported expressly limiting the economic loss rule to its principled origins. In *Moransais,* Justice Wells stated "directly that it is [his] view that the economic ***407** loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product." *Moransais,* 744 So.2d at 984 (Wells, J., concurring). Two justices subsequently joined Justice Wells when he reiterated this position in *Comptech International, Inc. v. Milam Commerce Park, Ltd.,* 753 So.2d 1219 (Fla.1999). *See id.* at 1227 (Wells, J., concurring with an opinion in which Justices Lewis and Pariente joined).

Am. Aviation, 891 So.2d at 542. Thus, in *Moransais, Comptech,* and *American Aviation,* this Court clearly expressed its desire to return the economic loss rule to its intended purpose—to limit actions in the products liability context. In each instance, however, we left intact a number of exceptions that continue the rule's unprincipled expansion. We simply did not go far enough.

[2] **[3]** Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability. The Court will depart from precedent as it does here "when such departure is 'necessary to vindicate other principles of law or to remedy continued injustice.' " *Allstate Indem. Co. v. Ruiz,* 899 So.2d 1121, 1131 (Fla.2005) (quoting *Haag v. State,* 591 So.2d 614, 618 (Fla.1992)). Stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice. *See Westgate Miami Beach, Ltd. v. Newport Operating Corp.,* 55 So.3d 567, 574 (Fla.2010). Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.

CONCLUSION

Because we now limit the application of the economic loss rule to cases involving products liability, it is not necessary for us to decide whether the economic loss rule exception for professionals applies to insurance brokers. Based on the foregoing, we answer the rephrased certified question in the negative and hold that the application of the economic loss rule is limited to products liability cases. Having answered the rephrased certified question, we return this case to the Eleventh Circuit Court of Appeals.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.

PARIENTE, J., concurs with an opinion, in which LEWIS and LABARGA, JJ., concur.

POLSTON, C.J., dissents with an opinion, in which CANADY, J., concurs.

CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.

PARIENTE, J., concurring.

I concur with the majority's principled conclusion that the economic loss rule is limited to the products liability context. I write to address Justice Canady's assertion in dissent that the Court's decision represents a "dramatic unsettling of Florida law," dissenting op. at 413 (Canady, J.), and to explain that the majority's conclusion is fully consistent with the development of this Court's jurisprudence on the applicability of the economic loss rule in Florida.

***408** The majority's conclusion that the economic loss rule is limited to the products liability context is not a departure from precedent, but instead simply represents the culmination of the Court's measured articulation of the economic loss rule's original intent. This view has been expressed various times, starting in *Moransais v. Heathman,* 744 So.2d 973 (Fla.1999), where Justice Wells stated his belief that "the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product" and that some of the Court's prior decisions had produced "confusion as to the rule's applicability." *Id.* at 984 (Wells, J., concurring). Justice Wells, joined by Justice Lewis and myself, similarly explained in *Comptech International,*

Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1227 (Fla.1999) (Wells, J., concurring), that "in order to clarify the application of the economic loss rule," the Court should "expressly state that its application is limited to product claims." Today, the Court has done so. This decision provides clear guidance to the lower courts as to the meaning of the economic loss rule in Florida and is both doctrinally principled and consistent with the trajectory of our prior precedent.

Our decision is neither a monumental upsetting of Florida law nor an expansion of tort law at the expense of contract principles. To the contrary, the majority merely clarifies that the economic loss rule was always intended to apply only to products liability cases. *See Indem. Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So.2d 532, 541 (Fla.2004) ("In exchange for eliminating the privity requirements of warranty law and *expanding* the tort liability for manufacturers of defective products which cause personal injury [by adopting strict products liability], we expressly limited tort liability with respect to defective products to injury caused to persons or damage caused to property other than the defective product itself."). This is because the rule itself acts merely as a specific articulation of the proper approach for those products liability cases in which contract principles, rather than tort principles, are best suited for resolving the claim. *See Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 901–02 (Fla.1987) (citing with approval several district courts of appeal cases holding that strict liability applies only where the plaintiff has suffered personal injury or damage to other property and explaining that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage").

The majority's conclusion that the economic loss rule is limited to the products liability context does not undermine Florida's contract law or provide for an expansion in viable tort claims. Basic common law principles already restrict the remedies available to parties who have specifically negotiated for those remedies, and, contrary to the assertions raised in dissent, our clarification of the economic loss rule's applicability does nothing to alter these common law concepts. For example, in order to bring a valid tort claim, a party still must demonstrate that all of the required elements for the cause of action are satisfied, including that the tort is independent of any breach of contract claim. *See Lewis v. Guthartz*, 428 So.2d 222, 224 (Fla.1982) (holding that there must be a tort "distinguishable from or independent of [the] breach of contract" in order for a party to bring a valid claim in tort based on a breach in a contractual relationship); *Elec. Sec. Sys. Corp. v. S. Bell Tel. & Tel. Co.*, 482 So.2d 518, 519 (Fla. 3d DCA 1986) ("[A] breach of contract, alone, cannot constitute a cause of action in tort.... It is only when the breach of contract is attended ***409** by some additional conduct which amounts to an independent tort that such breach can constitute negligence." (citations omitted)).

While the contractual privity form of the economic loss rule has provided a simple way to dismiss tort claims interconnected with breach of contract claims, it is neither a necessary nor a principled mechanism for doing so. Rather, these claims should be considered and dismissed as appropriate based on basic contractual principles—a proposition we reaffirmed in *American Aviation,* where we stated that "when the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss." *Am. Aviation,* 891 So.2d at 542. The majority's decision does not change this statement of law, but merely explains that it is common law principles of contract, rather than the economic loss rule, that produce this result.

The economic loss rule is not a long-standing common law rule that has always existed in our jurisprudence to define the parameters of cognizable contract and tort causes of action, but is instead a doctrine that arose in the torts context to serve a specific purpose—to curb potentially unbounded liability following the adoption of strict products liability. Indeed, we explicitly noted in *American Aviation* that "[t]he economic loss rule adopted in *Florida Power* represents this Court's pronouncement that, notwithstanding the theory of strict liability adopted in *West* [*v. Caterpillar Tractor Co.*, 336 So.2d 80, 92 (Fla.1976)], strict liability has not replaced warranty law as the remedy for frustrated economic expectations in the sale of goods." *Am. Aviation,* 891 So.2d at 541. Accordingly, I believe that limiting the rule to the specific context from which it developed is principled because it prevents unnecessary complexity in the law and restricts the rule's application to its "genuine, but limited, value in our damages law." *Id.* at 542 (quoting *Moransais,* 744 So.2d at 983). In other words, as we first recognized in *Moransais,* "fundamental contractual principles" already properly delineate the general boundary between contract law and tort law. *Moransais,* 744 So.2d at 981. Application of the economic loss rule to serve this function outside the products liability context simply allows for the possibility

of confusion, overuse, and the restriction of well-established common law remedies.

Indeed, this is exactly what has happened since we first adopted the economic loss rule in Florida. Over time, the rule has been inadvertently extended to cover situations outside the context of products liability. *See id.* at 980 ("Unfortunately, however, our subsequent holdings have appeared to expand the application of the rule beyond its principled origins and have contributed to applications of the rule by trial and appellate courts to situations well beyond our original intent."). Not only has this proved unworkable, as the majority aptly notes, but it is outside the original intent of the rule and, indeed, of our prior decisions. In my view, Justice Canady's assertion in dissent that the majority's conclusion "repudiates our case law," dissenting op. at 411 (Canady, J.), is not borne out by a close examination of the history of our economic loss rule cases.

We have repeatedly explained that the expansion of the economic loss rule beyond products liability to cover situations in which the parties are in privity of contract is best illustrated by *AFM Corp. v. Southern Bell Telephone & Telegraph Co.,* 515 So.2d 180, 181 (Fla.1987), where the Court held that there was "no basis for recovery in negligence" since the plaintiff could not ***410** prove that "a tort independent of the breach [of contract] itself was committed." The Court subsequently indicated, however, that its decision in *AFM* "may have been unnecessarily over-expansive" in its "reliance on the economic loss rule as opposed to fundamental contractual principles." *Moransais,* 744 So.2d at 981. In 2004, we receded from *AFM* "to the extent that it relied on the principles adopted by this Court in *Florida Power.*" *Am. Aviation,* 891 So.2d at 542. Therefore, since we essentially receded in *American Aviation* from this overexpansion of the rule, we need not specifically overrule any case today in order to explicitly clarify that the economic loss rule applies only to products liability cases.

Justice Canady points most recently to *Curd v. Mosaic Fertilizer, LLC,* 39 So.3d 1216 (Fla.2010), and *American Aviation,* as indicating that the contractual privity application of the economic loss rule is settled Florida law. While those two cases did list this application of the rule in reviewing its history, the contractual privity use of the economic loss rule was not at issue in either of those cases. *See Curd,* 39 So.3d at 1223; *Am. Aviation,* 891 So.2d at 541. *Curd* simply restated general language from *American Aviation,* and *American Aviation* used *AFM,* from which it later partially receded, to illustrate how the contractual privity form of the rule has been applied.

In the aftermath of *American Aviation,* which clearly stated an intent to "expressly limit[ ]" the economic loss rule, *American Aviation,* 891 So.2d at 542, it was no longer clear whether our decisions permitted application of the rule to situations involving contractual privity. We now eliminate once and for all any confusion in the application of the economic loss rule remaining since *Moransais* and clearly espouse Justice Wells' view that "the economic loss rule should be limited to cases involving a product which damages itself by reason of a defect in the product." *Moransais,* 744 So.2d at 984 (Wells, J., concurring). Far from upsetting firmly established principles, therefore, our decision resolves any ambiguity remaining from this line of cases and restores the economic loss rule to its principled roots. I concur fully in the majority's well-reasoned decision.

LEWIS and LABARGA, JJ., concur.

POLSTON, C.J., dissenting.

The Eleventh Circuit certified the following question:

> Does an insurance broker provide a "professional service" such that the insurance broker is unable to successfully assert the economic loss rule as a bar to tort claims seeking economic damages that arise from the contractual relationship between the insurance broker and the insured?

No. This Court's controlling precedent clearly answers the certified question in the negative. But without justification, the majority greatly expands the use of tort law at a cost to Florida's contract law. Now, there are tort claims and remedies available to contracting parties in addition to the contractual remedies which, because of the economic loss rule, were previously the only remedies available. [10]

***411** As noted in *Indemnity Insurance Co. of North America v. American Aviation, Inc.,* 891 So.2d 532, 537 (Fla.2004), tort claims involving professional services are not barred by the economic loss rule. But this Court in *Pierce v. AALL Insurance Inc.,* 531 So.2d 84 (Fla.1988), held that insurance agents are not considered "professional" for purposes of the professional malpractice statute of limitations. *Pierce's*

rationale concerning insurance agents applies with equal force to insurance brokers and requires the response to the Eleventh Circuit that insurance brokers do not provide professional services that would bar a defense under the economic loss rule.[11] That response is equally dictated by this Court's decision in *Garden v. Frier*, 602 So.2d 1273, 1275 (Fla.1992), when we further reduced the definition of a "professional" under the professional malpractice statute to those "vocation[s] requiring at a minimum a four-year college degree before licensing is possible in Florida." It is undisputed by the parties that a four-year college degree is not necessary to become licensed as an insurance broker.

Instead of simply answering the certified question that our cases clearly control, the majority obliterates the use of the doctrine when the parties are in contractual privity, greatly expanding tort claims and remedies available without deference to contract claims. Florida's contract law is seriously undermined by this decision.

Accordingly, I respectfully dissent.

CANADY, J., concurs.

CANADY, J., dissenting.

For many years, this Court has recognized the vital role of the economic loss rule in maintaining the boundary between tort law and contract law. With today's decision, the majority repudiates our case law and sets a new course for the expansion of tort law at the expense of contract law. I agree with Chief Justice Polston's view that "Florida's contract law is seriously undermined by this decision," dissenting op. at 411 (Polston, C.J.), and I accordingly dissent.

***412** Just two years ago, in *Curd v. Mosaic Fertilizer, LLC*, 39 So.3d 1216, 1223 (Fla.2010), the same majority that decides today's case joined in an opinion stating the general principle that "the economic loss rule in Florida is applicable" not only in the products liability context but also "where the parties are in contractual privity and one party seeks to recover damages in tort for matters arising out of the contract." The majority in *Curd* simply restated Florida law.

In *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, 536 (Fla.2004), we explained that the general "prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a contract from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." We recognized the rationale for the economic loss rule:

> Underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.

Id. at 536–37.

The holding in *American Aviation* was based on the negative answer to this Court's rephrased certified question: "Whether the economic loss doctrine bars a negligence action to recover purely economic loss in a case where the defendant is neither a manufacturer nor distributor of a product and there is *no privity of contract.*" *Id.* at 534 (emphasis added). By rephrasing the certified question in this manner, this Court emphasized the significance of the existence of privity of contract in determining whether the economic loss rule should be applied to bar a negligence action. This Court held as follows: "Because the defendant in this case is neither a manufacturer nor distributor of a product, and the parties *are not in privity of contract*, this negligence action is not barred by the economic loss rule." *Id.* (emphasis added).

Both *Curd* and *American Aviation* merely rearticulated the point we had made earlier in *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993), concerning the boundary between tort law and contract law:

> [E]conomic losses are disappointed economic expectations, which are

> protected by contract law, rather than tort law. This is the basic difference between contract law, which protects expectations, and tort law, which is determined by the duty owed to an injured party. For recovery in tort there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects.

(Citations omitted) (internal quotation marks omitted). And *Casa Clara* itself echoed the reasoning of *Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla.1987), that "contract principles [are] more appropriate than tort principles for [resolving] economic loss without an accompanying physical injury ***413** or property damage." *Casa Clara*, 620 So.2d at 1247 (quoting *Florida Power*, 510 So.2d at 902).

In *Florida Power*, 510 So.2d at 902, we rejected the invitation —in the products liability context—"to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public." In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180, 180 (Fla.1987), we then applied the reasoning of *Florida Power* to bar a claim for economic losses in tort by a purchaser of services where there was no claim for personal injury or property damage.

Our cases thus have repeatedly recognized the economic loss rule as a rule that prevents contract law from "drown[ing] in a sea of tort." *Casa Clara*, 620 So.2d at 1247 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)). [12] The basis for this rationale—which the Court has repeatedly elaborated—is not limited to the products liability context. The application of the economic loss rule in the context of other relationships based on contract is not "unprincipled." Majority op. at 406–07. The goal of preventing contract law from drowning in a sea of tort is as compelling in the broader context of contract-based relationships as it is in the product liability context. The majority articulates no explanation of why the economic loss rule is appropriately applied in the products liability context but is unworkable or unwise in that broader context.

The best the majority offers is some turgid and obscure dicta from *Moransais v. Heathman*, 744 So.2d 973 (Fla.1999), and criticism of the exceptions from the economic loss rule recognized in our case law. The fact that the economic loss rule is subject to certain recognized exceptions—exceptions that are based on specific policy considerations—does not undermine the integrity of the general rule or obliterate the purpose on which it is based. On the contrary, the exceptions are predicated on the validity of the general rule. In short, the majority has failed to justify this dramatic unsettling of Florida law.

The concurring opinion likewise fails to provide any reasoning to support the limitation on the scope of the economic loss rule imposed by today's decision. Totally absent from the concurrence is any discussion of how the rationale we have articulated for the economic loss rule can be reconciled with limiting the operation of the rule to products liability cases. Like the majority opinion, the concurring opinion effectively dismisses the reasoning in this Court's prior decisions as irrelevant.

The concurrence correctly recognizes that a minority of this Court has previously expressed the view concerning the limited scope of the economic loss rule that is ***414** today adopted by the Court. But a minority of the Court does not articulate the law of Florida. Nothing in those prior minority views provides a principled basis for rejecting the general application of the rationale articulated in our prior decisions.

The concurrence also relies on this Court's statements in *American Aviation* concerning our holding in *AFM*. But the concurrence's reliance on *American Aviation* to support departing from our precedent in *AFM* is unwarranted. I readily concede that confusion arose from this Court's declaration that it was receding from *AFM* "to the extent that it relied on the principles adopted" in *Westinghouse Electric. Am. Aviation*, 891 So.2d at 542. This statement is problematic for two salient reasons.

First, and most important, *American Aviation* itself predicated its holding and its formulation of the rephrased certified question on the significance of the existence of privity of contract. At the outset of the opinion, this Court stated: "We conclude that the 'economic loss doctrine' ... bars a negligence action to recover solely economic damages only in circumstances where the parties are either in *contractual privity* or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies." 891 So.2d at 534 (emphasis added). To the extent that the subsequent statement concerning *AFM* is

understood to suggest a repudiation of the "contractual privity economic loss rule," 891 So.2d at 537, the majority's opinion in *American Aviation* is self-repudiating and irredeemably incoherent.

Second, as the concurrence correctly observes, the facts in *American Aviation* did not involve a contractual relationship between the parties. Accordingly, *American Aviation* did not present a proper occasion for the Court to repudiate a prior holding, such as *AFM,* that specifically addressed the application of the economic loss rule to facts based on the existence of a contractual relationship. If the statement in *American Aviation* concerning *AFM* is anything, it is dicta.

With today's decision, we face the prospect of every breach of contract claim being accompanied by a tort claim. I strongly dissent from this decision. Based on the precedents explained in Chief Justice Polston's dissent, I would conclude that an insurance broker does not provide a professional service and thus is not precluded from asserting the economic loss rule as a bar to tort claims. I therefore would answer the certified question in the negative.

POLSTON, C.J., concurs.

Parallel Citations

38 Fla. L. Weekly S151

Footnotes

1 The Eleventh Circuit concluded that Marsh correctly interpreted the policy as containing a per-occurrence limit of liability. *See Tiara,* 607 F.3d at 747.

2 We later receded from *AFM* to the extent that it was unnecessarily expansive in its reliance on the economic loss rule as opposed to fundamental contractual principles. *See American Aviation,* 891 So.2d at 542.

3 In *Moransais,* in describing our refusal to apply our past liberal application of the economic loss rule in *PK Ventures* and *HTP, Ltd.,* we made the following observation: "More recently this Court has recognized the danger in an unprincipled extension of the rule, and we have declined to extend the economic loss rule to actions based on fraudulent inducement and negligent misrepresentation." 744 So.2d at 981.

4 In *West v. Caterpillar Tractor Co.,* 336 So.2d 80, 92 (Fla.1976), we adopted the theory of strict products liability in Florida.

5 Our opinion, however, was not unanimous, especially as to our characterization of "other property." We stated that tort law was designed to protect the interest of society as a whole by imposing a duty of reasonable care to prevent property damage or physical harm to others, whereas contract law operates to protect the economic expectations of the contracting parties when a "product" is the object of the contract. *Casa Clara,* 620 So.2d at 1246.

6 *See Moransais,* 744 So.2d at 983.

7 *See HTP, Ltd.,* 685 So.2d at 1239.

8 *See PK Ventures,* 690 So.2d at 1297.

9 *See Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.,* 753 So.2d 1219, 1221 (Fla.1999)

10 The following examples illustrate the type of cases that are now overruled by the majority's opinion and will make available a wide arsenal of tort claims previously barred by the economic loss rule. *See, e.g., Geico Cas. Co. v. Arce,* 333 Fed.Appx. 396, 398 (11th Cir.2009) (applying Florida law and barring civil conspiracy claim alleging failure to abide by contractual duty to defend); *Mount Sinai Med. Ctr. of Greater Miami, Inc. v. Heidrick & Struggles, Inc.,* 188 Fed.Appx. 966, 969 (11th Cir.2006) (applying Florida law and barring fraudulent misrepresentation claims alleging failure to provide correct information under the terms of a CEO search contract); *Royal Surplus Lines Ins. Co. v. Coachman Indus.,* 184 Fed.Appx. 894, 902 (11th Cir.2006) (applying Florida law and barring insurer's tort actions alleging insured's failure to provide information under the terms of a cooperation clause); *Cessna Aircraft Co. v. Avior Techs., Inc.,* 990 So.2d 532, 538 (Fla. 3d DCA 2008) (barring negligence claim against aircraft repair company for failed contracted-for repairs to aircraft); *Taylor v. Maness,* 941 So.2d 559, 564 (Fla. 3d DCA 2006) (barring cause of action alleging fraudulent failure to perform under the contract and sell real property to plaintiffs); *Straub Capital Corp. v. L. Frank Chopin, P.A.,* 724 So.2d 577, 579 (Fla. 4th DCA 1998) (barring action alleging negligent misrepresentation by a landlord after he failed to timely build and provide space to tenants under the terms of their contract); *Smith v. Bd. of Regents ex rel. Florida A & M Univ.,* 701 So.2d 348, 349 (Fla. 1st DCA 1997) (barring cause of action brought by university professor alleging negligence by the Board of Regents and his bank in potentially breaching their duties under employment and deposit contracts); *Hotels of Key Largo v. RHI Hotels,* 694 So.2d 74, 77 (Fla. 3d DCA 1997) (barring action alleging fraudulent failure to adequately provide increased reservations and hotel management services under the contract).

11 The services of Marsh & McLennan Companies certainly appear professional to me under the rationale given by Justice McDonald in his dissenting opinion in *Pierce:* "If the act is one which involves giving advice, using superior knowledge and training of a technical nature, or imparting instruction and recommendations in the learned arts then the act is one of a professional." 531 So.2d at 88 (McDonald, J., dissenting) (quoting *Pierce,* 513 So.2d at 161). But this definition was expressly rejected by the Court in *Pierce.*

12 The Restatement (Third) of Torts: Liability for Economic Harm (Tentative Draft No. 1) § 3 (April 4, 2012) states the general rule that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." The comments explaining this rule observe that "[i]f two parties have a contract, the argument for limiting tort claims between them is most powerful." *Id.* at cmt. a. The comments explain the rationale for the rule:

> When a dispute arises, the rule protects the bargain the parties have made against disruption by a tort suit. Seen from an earlier point in the life of a transaction, the rule allows parties to make dependable allocations of financial risk without fear that tort law will be used to undo them later. Viewed in the long run, the rule prevents the erosion of contract doctrines by the use of tort law to work around them. The rule also reduces the confusion that can result when a party brings suit on the same facts under contract and tort theories that are largely redundant in practical effect.

Id. at cmt. b.

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730 F.3d 466
United States Court of Appeals,
Fifth Circuit.

TMM INVESTMENTS, LIMITED.,
Plaintiff–Appellee–Cross Appellant
v.
OHIO CASUALTY INSURANCE COMPANY,
Defendant–Appellant–Cross Appellee.

No. 12–40635. | Sept. 17, 2013.

Synopsis

Background: Insured, the owner of a shopping center, brought action in state court against insurer seeking to have an appraisal award regarding hailstorm damage declared invalid. Following removal, the United States District Court for the Eastern District of Texas entered partial summary judgment for insured, set aside the appraisal award, found that insured was entitled to damages and attorney fees, and denied insurer's motion for new trial. Both parties appealed.

Holdings: The Court of Appeals, Prado, Circuit Judge, held that:

[1] umpire lacked authority to exclude heating, ventilation, and air-conditioning (HVAC) damages estimate from appraisal award;

[2] umpire's error in excluding HVAC damages estimate from appraisal award did not justify throwing out the entire appraisal award;

[3] appraisal panel did not exceed its authority in considering causation; and

[4] insurer fulfilled the terms of the insurance contract when it tendered the amount articulated in the appraisal award.

Reversed.

West Headnotes (11)

[1] Federal Courts
- Court Rendering Decision

Federal Courts
- Inferior state courts

Federal Courts
- Anticipating or predicting state decision

In a case removed to federal court on diversity grounds, to determine issues of state law, the Court of Appeals looks to final decisions of the state's highest court, and when there is no ruling by that court, then the Court of Appeals has the duty to determine as best it can what the state's highest court would decide; in making an *Erie* guess in the absence of a ruling from the state's highest court, the Court of Appeals may look to the decisions of intermediate appellate state courts for guidance.

[2] Insurance
- Effect; conclusiveness

Under Texas law, appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable.

[3] Insurance
- Award

Insurance
- Review

Under Texas law, every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof lies on the party seeking to avoid the award.

[4] Insurance
- Award

Under Texas law, an appraisal award will be upheld unless at least one of three circumstances exists: (1) the award was made without authority; (2) the award was the result of fraud, accident, or mistake; or (3) the award was not made in substantial compliance with the terms of the insurance contract.

1 Cases that cite this headnote

[5] Insurance

Effect; conclusiveness

Under Texas law, the effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court.

1 Cases that cite this headnote

[6] Insurance

Award

In determining damage to insured property caused by hailstorm, under Texas law, umpire lacked authority to exclude heating, ventilation, and air-conditioning (HVAC) damage estimate from appraisal award, where both appraisers appointed by the parties agreed as to how much damage the HVAC system sustained.

[7] Insurance

Award

Under Texas law, umpire's error in excluding heating, ventilation, and air-conditioning (HVAC) damage estimate from appraisal award, in determining damage to insured property caused by hailstorm, did not justify throwing out the entire appraisal award, since the award was otherwise unobjectionable, and umpire's minor mistake in excluding HVAC damages, despite both appraisers agreeing to how much damage the HVAC system sustained, should not frustrate parties' intent to be bound by the appraisal provision of their contract.

1 Cases that cite this headnote

[8] Insurance

Award

Under Texas law, appraisal panel did not exceed its authority in considering causation in determining damage to insured property from hailstorm, since appraisers merely distinguished damage caused by pre-existing conditions from damage caused by hailstorm.

1 Cases that cite this headnote

[9] Insurance

Award

Under Texas law, appraisal panels are within their rights when they consider whether damage was caused by a particular event or was instead the result of non-covered pre-existing perils like wear and tear.

1 Cases that cite this headnote

[10] Insurance

Questions of law or fact

Insurance

Appraisal

Under Texas insurance law, when different causes are alleged for a single injury to property, causation is a liability question for the courts; by contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability.

[11] Insurance

Award

Under Texas law, insurer fulfilled the terms of the insurance contract when it tendered the amount articulated in the appraisal award, since the appraisal award was not invalid, and, thus, insurer did not breach the insurance contract.

1 Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Eastern District of Texas.

Before JOLLY, DAVIS, and PRADO, Circuit Judges.

Opinion

EDWARD C. PRADO, Circuit Judge:

This appeal arises out of an insurance dispute between TMM Investments, Ltd. ("TMM"), which owned a shopping center, and Ohio Casualty Insurance Co. ("OCIC"), which insured the property. The property was damaged in a hailstorm, but the parties disagreed about the extent of the damage. An appraisal was conducted according to the terms of the insurance contract, but TMM was not pleased with the appraisal award and sued to have the award declared invalid. The district court set aside the appraisal award and had the case proceed to trial for liability and coverage determinations. An advisory jury assessed a damage award, and after a bench trial on the remaining issues, the district court delivered a number of findings of fact and conclusions of law, including that OCIC had breached the insurance contract and that TMM was entitled to damages, attorney's fees, and prejudgment interest. OCIC appeals the district court's order setting aside the appraisal award and the district court's findings of fact and conclusions of law. TMM appeals the district court's determination that TMM was entitled to only the actual cash value of the damage, rather than the replacement cost, and the district court's failure to award appellate attorney's fees. Because we find that the original appraisal award should not have been set aside, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

TMM owns a shopping center ("Liberty Square") in Texarkana, Texas, which was insured by OCIC under a policy that was ***469** in force from June 1, 2005 to June 1, 2006. According to TMM, the roof of the Liberty Square property was severely damaged when a hailstorm passed through the area on or around June 6, 2005. TMM notified OCIC of the damage around March 30, 2007. TMM conducted an assessment of the damage and estimated it to be between $654,796 and $955,910. OCIC's engineers, on the other hand, estimated the damage to be only around $17,949. OCIC made TMM a payment offer on the basis of that estimate. TMM filed a sworn proof of loss for $679,725.68 on April 9, 2008. Because the disparity between the parties' estimates was so great, TMM refused the payment offer and invoked the Appraisal Property Loss Conditions section of the insurance policy, which reads, in pertinent part:

> If we and you disagree on 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 and notify the other of the appraiser selected within 20 days of such demand. The two appraisers will select an umpire. If they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state separately the 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 as to the amount of loss.

The appraisal process initially encountered a number of delays, but ultimately TMM and OCIC appointed Clifford Crites and Mitchell Butler as their respective appraisers. Crites and Butler designated Gary Boyd to serve as umpire. In March 2009, Crites, Butler, and Boyd began their appraisals. On April 13, Butler sent Boyd and Crites an e-mail that read:

> Gentlemen,
>
> While I appreciate and do not question the [ ] directions, warnings and procedures quoted below from the various expert agencies, the insurance issue remains what was damage[d] by the storm/hail and what is the reason the moisture levels are what they are. It is my position that from the roofing stand point the old aluminum coating was scuffed and displaced by the storm. The membrane was not damaged. The water infiltration was not as a result of the storm and the subsequent interior water damage resulting from that infiltration is not covered under the policy. It is my understanding that the policy would only cover interior damage if there was not a covere[d] peril related opening(s) in the roof. I feel confident in my position on this matter but ask my client for confirmation and advi[c]e. Once I have the confirmation I will issue an estimate that cover[s] all item[s] I attribute to the storm and my recommended quantification of expense.

On July 15, citing concerns over the way the appraisal was being conducted, Crites resigned.

On July 29, 2009, Boyd issued an appraisal award, which Butler also signed, listing the "Replacement Cost" of the damage to Liberty Square as $73,014.83, and the "Actual Cash Value" of the loss as $49,632.63. The award contained line items for "Clean and coat modified [illegible] roof 188 sqs," "Repair & coat EFIS," and "Replace and paint aluminum shingles," but apparently the final figure was not inclusive of any estimate for damage to the roof membrane or to the skylights. Boyd, in drawing up the award, also chose to exclude damage to Liberty Square's heating, ventilation, and air-conditioning (HVAC) system because he did not believe the damage affected the unit's operation, even though Crites and Butler had both stated in their own appraisal awards that the HVAC system had sustained $2,794.80 ***470** worth of damage. At some point, OCIC tendered payment for the "Actual Cash Value" listed in the award Boyd issued, less the policy deductible. After TMM notified OCIC that the award had excluded the HVAC damage, OCIC sent TMM a check for $51,427.43, the amount of the appraisal award plus the agreed-upon $2,794.80 damage to the HVAC system. Because it took issue with the appraisal process and award, TMM refused the money.

TMM then sued OCIC in state court on August 21, 2009, seeking a declaratory judgment pursuant to the Texas Declaratory Judgments Act that the appraisal process was flawed and that the appraisal award should be set aside. TMM additionally alleged that OCIC had breached the terms of the insurance contract by failing "to pay any claim loss in a timely manner when liability and loss had become reasonably clear." [1] OCIC timely removed the case to federal court on diversity grounds. [2] *See* 28 U.S.C. § 1332(a) (2013). The parties took discovery, and Boyd, Butler, and Crites each gave sworn depositions. In his deposition, Butler testified that he believed some of the damage to Liberty Square's skylights had been caused by projectiles from inside the building such as bullets or rocks, rather than hail.

On January 31, 2011, OCIC moved for summary judgment. TMM in turn filed a cross-motion for partial summary judgment on February 1, 2011, arguing that the appraisal award should be set aside because the appraisers had erred in a number of ways. First, TMM argued that Boyd, the umpire, had exceeded his authority when he improperly excluded damage to Liberty Square's HVAC system. *See Fisch v. Transcon. Ins. Co.*, 356 S.W.2d 186, 189 (Tex.Civ.App.—Houston 1962, writ ref'd n.r.e.) ("[T]he umpire's power to act is conditioned upon a disagreement between the appraisers and the submission of their differences only to him...."). Second, TMM argued that Butler and Boyd, in considering whether it had been hail, or instead wind, improper installation, and deterioration that had caused the damage to Liberty Square's roof, had "improperly considered causation and coverage issues" in arriving at the appraisal award. [3] Third, TMM claimed that Boyd and Butler had ignored pertinent evidence in arriving at their appraisal award.

On March 25, 2011, the district court granted partial summary judgment for TMM, finding that the appraisal award was invalid and should be set aside. The district court agreed with TMM that the appraisal panel had exceeded the scope of its authority, first, because Boyd was not authorized to exclude the HVAC damage from the appraisal award, and second, because Butler and Boyd improperly considered causation and coverage issues when evaluating the damage to certain parts of the property, namely the roof membrane and skylights, citing *Wells v. Am. States Preferred Ins. Co.*, 919 S.W.2d 679, 685 (Tex.App.—Dallas 1996, writ denied). The court determined that "[t]he case [would] proceed to trial on matters of causation, liability, and damages[,]" because "[i]t ***471** would be inappropriate to remand this matter for a new appraisal determination."

The district court empaneled an advisory jury, which eventually found that it would cost $654,795.84 "to repair and replace Liberty Square Shopping Center property damaged by the hailstorms of June 6, 2005, November 27, 2005, and/or May 16, 2006." The district court then conducted a bench trial, and issued its findings of fact and conclusions of law on November 15, 2011. The court concluded that OCIC had breached the terms of the insurance policy and that TMM was entitled to "the actual cash value of the damage: $445,261.17," or sixty-eight percent of the replacement cost. The court also awarded TMM attorney's fees, court costs, expert fees, and prejudgment interest running from October 6, 2008. OCIC moved for a new trial, but the district court denied the motion. OCIC and TMM both timely appealed.

II. DISCUSSION

Both parties have raised a number of issues on appeal, many of which are contingent on the outcome of the dispute over the validity of the appraisal award. We hold that the appraisal

award was incorrect in that it excluded damage to the HVAC unit from the award, but that the rest of the award should remain unaffected by this determination. The appraisers did not exceed their authority when they considered causation issues, and therefore the appraisal award should not have been set aside. OCIC thus was only obligated to pay the amount articulated in the award, plus the cost of repair for the HVAC system. OCIC therefore fulfilled the terms of the insurance contract when it tendered the amount articulated in the award and the cost of the repair to the HVAC system to TMM, and the district court erred when it determined OCIC had breached the insurance contract. Accordingly, the district court's award of attorney's fees and prejudgment interest to TMM is also reversed. Because we hold that there was no breach of contract, the issues raised in TMM's cross-appeal are moot.

A. Standard of Review and Applicable Law

"We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Pierce v. Dep't of the U.S. Air Force*, 512 F.3d 184, 186 (5th Cir.2007). "[S]ummary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (internal quotation marks omitted).

[1] Because this case was removed to federal court on diversity grounds, Texas substantive law applies. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). "To determine issues of state law, we look to final decisions of the state's highest court, and when there is no ruling by that court, then we have the duty to determine as best we can what the state's highest court would decide." *Westlake Petrochems., L.L.C. v. United Polychem, Inc.*, 688 F.3d 232, 238 n. 5 (5th Cir.2012) (citation omitted). "In making an [*Erie*] guess in the absence of a ruling from the state's highest court, this Court may look to the decisions of intermediate appellate state courts for guidance." *Howe ex rel. Howe v. Scottsdale Ins. Co.*, 204 F.3d 624, 627 (5th Cir.2000) (citation omitted).

B. Analysis

[2] **[3]** **[4]** **[5]** "Because courts 'seek to implement the intention of the parties as expressed ***472** in the language of a contract,' it has long been the rule in Texas that 'appraisal awards made pursuant to the provisions of an insurance contract are binding and enforceable.' " *Richardson v. Allstate Tex. Lloyd's*, No. 05–06–00100–CV, 2007 WL 1990387, at *3 (Tex.App.—Dallas July 11, 2007, no pet.) (mem.op.) (alteration omitted) (quoting *Providence Lloyds Ins. Co. v. Crystal City Indep. Sch. Dist.*, 877 S.W.2d 872, 875 (Tex.App.—San Antonio 1994, no writ)); *see also Lundstrom v. United Servs. Auto. Ass'n*, 192 S.W.3d 78, 87 (Tex.App.—Houston [14th Dist.] 2006, pet. denied). Every reasonable presumption will be indulged to sustain an appraisal award, and the burden of proof lies on the party seeking to avoid the award. *Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 786 (Tex.App.—Houston [14th Dist.] 2004, no pet.); *Continental Ins. Co. v. Guerson*, 93 S.W.2d 591, 594 (Tex.Civ.App.—San Antonio 1936, writ dism'd). An appraisal award will be upheld unless at least one of three circumstances exists: (1) the award was made without authority; (2) the award was the result of fraud, accident, or mistake; or (3) the award was not made in substantial compliance with the terms of the contract. *Crystal City*, 877 S.W.2d at 875–76. "The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court." *Lundstrom*, 192 S.W.3d at 87.

1. Exclusion of the HVAC system damages

[6] The district court was correct in determining that the umpire had no authority to exclude the HVAC damages estimate from the appraisal award. Texas courts have clearly held that unless there is a discrepancy between the findings of the two appraisers appointed by the parties, there is no duty for the umpire to perform. *See Fisch*, 356 S.W.2d at 189–90 ("Since the umpire's power to act is conditioned upon a disagreement between the appraisers and the submission of their differences only to him, we are of the opinion that the award, which was signed by only one appraiser and the umpire who had no authority to act, is invalid."); *Crystal City*, 877 S.W.2d at 876 ("[A]n umpire, appointed to decide on matters of difference only, has no authority to pass on matters concerning which there was no difference between the appraisers." (quoting *Fisch*, 356 S.W.2d at 190)). Here, no party disputes that Butler and Crites agreed as to how much damage the HVAC system sustained. Boyd was thus without authority to strike it from the appraisal award.

[7] However, Boyd's error does not justify, on its own, throwing out the entire appraisal award. The district court had no occasion to decide the issue of what should be done in

the event the HVAC damages omission constituted the only error on the part of the appraisal panel, because it also found that the appraisal panel's consideration of causation rendered the appraisal invalid in its entirety. Because we find that the award is otherwise unobjectionable, *see infra* Part II.B. *2.*, we must determine if, given Boyd's error, the "valid" portion of the award should stand. While Texas courts have never addressed the issue, the related case law suggests that minor mistakes that do not taint the entire award should not frustrate the parties' intent to be bound by the appraisal provision of their contract.

In *Crystal City,* the trial court set aside an appraisal award because a section in the award listing damages agreed upon by the appraisers had been mislabeled. 877 S.W.2d at 876–77. The court of appeals, while acknowledging the error, nonetheless reinstated the award and noted that "[i]f the [umpire and the two other appraisers] ***473** are of one mind, or if any two of them are in accord as to value and loss, the appraisal award is a finality." *Id.* at 877–78 (citation omitted). A federal district court case interpreting Texas law also suggests that the acceptable portions of the award should continue to bind the parties. In *MLCSV10 v. Stateside Enterprises, Inc.,* the court explained, "To the extent the appraisal award implicitly determined that the ductwork damage was not covered ..., the plaintiffs have provided a sufficient basis for setting aside that part of the appraisal award. There is, however, no basis for setting aside the entire award or any other part of it." 866 F.Supp.2d 691, 707–08 (S.D.Tex.2012). The court went on to say in a footnote, "[A] finding that appraisers were biased would require setting aside the entire award. But as all parties admitted ..., there is no precedent that compels setting aside an entire appraisal award based on a finding that one part of the award was incomplete or implicitly determined a coverage issue." *Id.* at 708 n. 6. Here, there is no contention that Boyd lacked authority to speak on the numerous damage items that Butler and Crites disagreed about. We do not believe the omission of the HVAC damage from the award justifies ignoring the intent of the parties to have damages issues submitted to and decided by an appraisal panel. *Cf. State Farm Lloyds v. Johnson,* 290 S.W.3d 886, 895 (Tex.2009) ("Like any other contractual provision, appraisal clauses should be enforced."). We therefore uphold the remainder of the award. [4]

2. Whether the appraisal panel exceeded its authority in considering causation

[8] The district court, in its order setting aside the appraisal award, concluded that the appraisal panel had exceeded its authority in "attribut[ing] the roof membrane damage to improper installation and the skylight damage to rocks thrown from below." The district court relied primarily on a Texas Court of Appeals case, *Wells v. American States Preferred Insurance Co.,* 919 S.W.2d 679 (Tex.App.—Dallas 1996, writ denied), in coming to that conclusion. According to the district court, *Wells* "held that the appraisal panel's responsibility is simply to determine the value of property damage and that 'questions of what caused or did not cause the loss are questions to be decided by the court.' " (quoting *Wells,* 919 S.W.2d at 685). In *Wells,* the appraisal panel unanimously concluded that the claimant's house had suffered damage "due to foundation movement in the amount of $22,875.94[,]" but that the amount of damage attributable to a plumbing leak that had allegedly created the foundation movement—which the policy would have covered—was zero. 919 S.W.2d at 682. The trial court approved the appraisal award, but the appeals court reversed, concluding that "the appraisal section of [the policy] establishes an appraisal procedure to determine the dollar amount of the insured's loss only, and that it does not authorize or empower the appraisal panel created thereunder to determine what caused or did not cause that loss." *Id.* at 685. The appraisal award was therefore made without authority, and the court remanded the case to the trial court for a new trial. *Id.* at 686–87.

OCIC argues, however, that the district court did not take full account of a more recent Texas Supreme Court case that modifies the scheme established by *Wells.* That case, *State Farm Lloyds v. Johnson,* does indeed provide the controlling law on ***474** the issue of the scope of the appraisal panel's authority. 290 S.W.3d 886 (Tex.2009). In *Johnson,* the claimant alleged that her roof had been damaged in a hailstorm and filed a claim with her insurance company. *Id.* at 887. When the insurance company provided a much lower damage estimate than her claim requested, the claimant invoked the policy's appraisal provision. *Id.* at 887–88. The insurance company, however, argued that appraisal should not be required because the panel would necessarily have to decide issues of causation, not "amount of loss." *Id.* at 888. The claimant then filed suit seeking a declaratory judgment compelling appraisal. *Id.*

The Texas Supreme Court began by repeating the rule, established in earlier case law, that "*damage* questions [are] for appraisers and *liability* questions [are] for the courts[.]"

Id. at 889. It quickly acknowledged, though, that "[t]he line between liability and damage questions may not always be clear [,]" *id.* at 890, and that "[c]ausation relates to both liability and damages because it is the connection between them[,]" *id.* at 891–92.

The court discussed both *Wells* and *Lundstrom v. United Services Automobile Ass'n,* a case somewhat at odds with *Wells,* in which the appeals court upheld an appraisal award that considered damages from an "initial wetting" but not damages from mold. *Id.* at 892; *see Lundstrom,* 192 S.W.3d at 89 ("The cases cited in *Wells* stand for the narrower proposition that appraisers exceed their authority when they engage in making the legal determination of what is or is not a covered loss based on their determination of what caused the loss or a portion of it."). The *Johnson* court reconciled these cases as follows:

> Appraisers can decide the cost of repairs in [the context of cases like *Wells*], but if they can also decide causation there would be no liability questions left for the courts. By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each before the courts can decide liability.... In [the context of cases like *Lundstrom*], courts can decide whether water or mold damage is covered, but if they can also decide the amount of damage caused by each, there would be no damage questions left for the appraisers. The same is true when the causation question involves separating loss due to a covered event from a property's pre-existing condition.... If State Farm is correct that appraisers can never allocate damages between covered and excluded perils [such as wear and tear], then appraisals can never assess hail damage unless a roof is brand new.

Johnson, 290 S.W.3d at 892–93. The court concluded that appraisal should be compelled, noting that "[a]ny appraisal necessarily includes some causation element, because settling the 'amount of loss' requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else." *Id.* at 893.

[9] At the very least, *Johnson* arguably establishes that appraisal panels are within their rights when they consider whether damage was caused by a particular event or was instead the result of non-covered pre-existing perils like wear and tear. Indeed, this is the way many subsequent cases have interpreted *Johnson's* guidance. *See, e.g., MLCSV10,* 866 F.Supp.2d at 705 ("Lochridge's causation evaluation involved no more than 'separating loss due to a covered event from a property's pre-existing condition.' " (quoting *Johnson,* 290 S.W.3d at 892)); *Essex Ins. Co. v. Helton,* 4:10–cv–2229, at *2 (S.D.Tex. Jan. 24, 2012) (slip op.) ("However, where there are different types of damage to different items of property, or ***475** where the property is not new and has suffered wear and tear, appraisers may have to decide causation in order to decide damages."). To the extent the appraisers merely distinguished damage caused by pre-existing conditions from damage caused by the storm, they were acting within their authority.

The district court appears to have concluded that *Johnson* required setting aside the appraisal award because "TMM contends the storm damaged the skylights, but [OCIC] contends rocks caused the damage.... TMM contends the storm damaged the roof membrane, but [OCIC] contends the roof membrane was damaged due to improper installation. The parties have alleged different causes for the same injuries." There are two principal problems with this conclusion. First, it is not entirely clear from the record what reasons Butler or Boyd had for excluding certain items from the award. TMM itself acknowledges that multiple causes of damage, including wear and tear, have been alleged. Its summary judgment motion stated, "Here, the moisture levels were allegedly caused by hail storm, wind storm and/or windstorm, improper installation and deterioration." If that is the case, *Johnson* appears to foreclose setting aside the appraisal award—it was entirely appropriate for the appraisers to consider whether damage was caused by these pre-existing conditions.

[10] Second, it appears the district court misapplied the law even if its statements about the reasons for Butler's and Boyd's exclusions are accurate. *Johnson* stated, "[W]hen different causes are alleged for a single injury to property, causation is a liability question for the courts.... By contrast, when different types of damage occur to different items of property, appraisers may have to decide the damage caused by each

before the courts can decide liability." *Johnson*, 290 S.W.3d at 892. Putting aside the question of why this distinction should matter, even according to the facts as the district court found them, this is a case of the second variety because damage is alleged to have occurred to the roof membrane *and* the skylights. Additionally, the closeness of the facts in *Johnson* to those at bar—both involved roofs damaged in part by hailstorms—militates in favor of arriving at a holding similar to the one arrived at by the *Johnson* court. Coupled with the requirement that we indulge "every reasonable presumption to sustain an appraisal award," *Johnson* appears to compel reversal of the district court's order setting aside the award in this case.

3. Claims related to breach of contract

[11] Because the appraisal award was not invalid, when OCIC tendered the amount articulated in the appraisal award plus an amount for the damage to the HVAC system, it fulfilled the terms of the insurance contract. *See Probus Props. v. Kirby*, 200 S.W.3d 258, 262 (Tex.App.—Dallas 2006, pet. ref'd) (explaining that tendering a check "suspends the obligation *until dishonor of the check or until it is paid or certified* " (emphasis added) (internal quotation marks omitted)). Because TMM thus did not bring a "valid claim" for breach of contract, it should not have been awarded attorney's fees, and we reverse the district court's determination to that effect. *See* Tex. Civ. Prac. & Rem.Code Ann. § 38.001(8) (2013). Similarly, because TMM was not a "prevailing party" in its breach of contract claim, we reverse the district court's award of costs to TMM. *See* Fed.R.Civ.P. 54(d); *Carter v. Gen. Motors Corp.*, 983 F.2d 40, 43 (5th Cir.1993) (explaining that "federal procedural law ordinarily governs the award of costs in diversity cases"). Because the claims in TMM's cross-appeal are uniformly related to the breach of contract found by the district court, we dismiss these claims as moot.

*476 III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's decision and REMAND the case so that the district court may reinstate the appraisal award, including the HVAC damage amount of $2794.80.

Footnotes

1 The complaint also contained claims for breach of fiduciary duty and violations of the Texas insurance code but TMM later agreed to reserve those issues for a separate trial, to be held once causation, damages, and coverage issues had been resolved.

2 The original complaint also included Boyd and Butler, who are Texas domiciliaries, as defendants, but TMM voluntarily dismissed all claims against them pursuant to a settlement agreement, creating complete diversity between the parties.

3 As with similar insurance policies, TMM's policy did not cover wear and tear.

4 The appraisal award amount *and* the HVAC damage amount were tendered to TMM, but it appears TMM never cashed the check. If this is the case, OCIC is obviously required to furnish that amount to TMM again.

121 So.3d 433
Supreme Court of Florida.

Amado TRINIDAD, Petitioner,
v.
FLORIDA PENINSULA INSURANCE COMPANY, Respondent.

No. SC11–1643. | July 3, 2013.

Synopsis

Background: Insured, whose home was damaged by fire, but who did not repair or contract to repair such damage, brought action against insurer, alleging breach of contract based on insurer's failure to pay costs for a general contractor's overhead and profit under replacement cost homeowner's insurance policy. The Circuit Court, Miami-Dade County, Barbara Areces, J., entered summary judgment for insurer, and insured appealed. The District Court of Appeal, 99 So.3d 502, affirmed and certified conflict.

Holdings: The Supreme Court, Pariente, J., held that:

[1] overhead and profit are included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs;

[2] insurers are not statutorily permitted to hold back any portion of the replacement cost payment, including costs for overhead and profit, contingent on the insured's actually repairing or replacing the property; and

[3] policy did not require insured to actually incur expenses for the repairs in order to be entitled to payment for costs of overhead and profit.

Quashed and remanded.

Polston, C.J., dissented and filed opinion, in which Canady, J., concurred.

West Headnotes (15)

[1] Insurance
Replacement
Insurance
Repair or Replacement

"Replacement cost" insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property.

[2] Insurance
Replacement
Insurance
Repair or Replacement

"Replacement cost" is measured by what it would cost to replace the damaged structure on the same premises.

1 Cases that cite this headnote

[3] Insurance
Replacement
Insurance
Valuation

Replacement cost policies provide greater coverage than actual cash value policies because depreciation is not excluded from replacement cost coverage, whereas it generally is excluded from actual cash value.

[4] Insurance
Replacement
Insurance
Repair or Replacement

Overhead and profit are included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs.

1 Cases that cite this headnote

[5] Insurance
Replacement

"Replacement cost" insurance is insurance on a property's depreciation.

[6] **Statutes**
Language and intent, will, purpose, or policy
Statutes
Plain Language; Plain, Ordinary, or Common Meaning

When construing a statute, the court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning.

1 Cases that cite this headnote

[7] **Statutes**
Purpose and intent; unambiguously expressed intent

Where a statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent.

[8] **Statutes**
Dictionaries

When considering the meaning of terms used in a statute, the court looks first to the terms' ordinary definitions, which may be derived from dictionaries.

[9] **Insurance**
Replacement
Insurance
Repair or Replacement

Under statute governing payment for loss for which a dwelling or personal property is insured on the basis of replacement costs, insurers are not permitted to hold back any portion of the replacement cost payment, including costs for a general contractor's overhead and profit where the insured is reasonably likely to need a general contractor for the repairs, contingent on the insured's actually repairing or replacing the property. West's F.S.A. § 627.7011.

2 Cases that cite this headnote

[10] **Statutes**
Statute as a Whole; Relation of Parts to Whole and to One Another
Statutes
Construing together; harmony

Courts are required to give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.

[11] **Insurance**
Plain, ordinary or popular sense of language

In interpreting an insurance contract, a court is bound by the plain meaning of the contract's text.

[12] **Insurance**
Construction or enforcement as written
Insurance
Plain, ordinary or popular sense of language

If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written.

[13] **Insurance**
Violation of statute
Insurance
Existing Law

Provisions in an insurance policy must be construed and applied to be in full compliance with the Florida Statutes.

[14] **Insurance**
Repair or Replacement

Homeowner's insurance policy, requiring payment of the replacement cost of the damaged property, did not require insured to actually incur expenses for the repairs in order to be entitled to payment for costs of overhead and profit where the insured would be reasonably likely to need a general contractor for repairs.

2 Cases that cite this headnote

[15] Insurance
Valuation

"Actual cash value" is defined as replacement cost minus depreciation.

Attorneys and Law Firms

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Adrian Neiman Arkin and Timothy H. Crutchfield of North Miami, FL, for Amicus Curiae United Policyholders.

Opinion

PARIENTE, J.

The issue in this case concerns the scope of replacement cost insurance coverage under the applicable provisions of the 2008 Florida Statutes. In *Trinidad v. Florida Peninsula Insurance Co.*, 99 So.3d 502, 504 (Fla. 3d DCA 2011), the Third District Court of Appeal concluded that Florida Peninsula Insurance Company was not required by either its replacement cost homeowner's insurance policy or the applicable provisions of section 627.7011, Florida Statutes (2008), to pay Amado Trinidad, its insured, costs for a general contractor's overhead and profit because Trinidad did not repair or contract to repair the damage to his home.[1] We accepted jurisdiction on the basis that the Third District's decision in *Trinidad* expressly and directly conflicts with the Second District Court of Appeal's decision in *Goff v. State Farm Florida Insurance Co.*, 999 So.2d 684 (Fla. 2d DCA 2008). *See* art. V, § 3(b)(3), Fla. Const.[2]

For the reasons more fully explained below, we hold that an insurer's required ***436** payment under a replacement cost policy includes overhead and profit, where the insured is reasonably likely to need a general contractor for the repairs, because the insured would be required to pay costs for a general contractor's overhead and profit for the completion of repairs in the same way the insured would have to pay other replacement costs he or she is reasonably likely to incur in repairing the property. Because section 627.7011, Florida Statutes (2008), and the replacement cost policy in this case, did not require the insured to actually repair the property as a condition precedent to the insurer's obligation to make payment, the insurer was not authorized to withhold, pending actual repair, its payment for replacement costs, which is measured by what it would cost the insured to repair or replace the damaged structure on the same premises if the insured were to do so. Accordingly, we quash the Third District's decision below, which impermissibly allowed Florida Peninsula to single out overhead and profit from other replacement costs and withhold payment for only those costs, and direct that this case be remanded to the trial court to determine whether Trinidad is reasonably likely to need a general contractor for the repairs that encompass his covered loss.

FACTS AND PROCEDURAL HISTORY

Trinidad filed a claim with his homeowner's insurance company, Florida Peninsula, for fire damage that occurred to his Miami home on February 11, 2008. Florida Peninsula admitted coverage pursuant to Trinidad's replacement cost policy and made a payment on the claim for completion of the repairs, even though Trinidad did not make repairs to the home or hire a general contractor to undertake the repairs. Florida Peninsula's payment, while including other costs that would be necessary to make the repairs, did not, however, include an amount for a general contractor's overhead and profit. Florida Peninsula asserted that it was entitled to withhold payment of overhead and profit until Trinidad actually incurred those particular expenses in repairing or contracting to repair the home.

Overhead and profit are costs included in repair estimates and paid to contractors pursuant to contracts for repairs. Specifically, overhead includes "fixed costs to run the contractor's business, such as salaries, rent, utilities, and licenses," and profit "is the amount the contractor expects to earn for his services." *Trinidad*, 99 So.3d at 502–03.

Trinidad's insurance contract with Florida Peninsula is a replacement cost policy. The relevant policy language provides that Florida Peninsula will pay for covered losses as follows:

> [A]t replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> (a) The limit of liability under this policy that applies to the building;
>
> (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) The necessary amount actually spent to repair or replace the damaged building.

***437** Trinidad filed a breach of contract lawsuit against Florida Peninsula, alleging that, like the other costs of repair Florida Peninsula paid despite Trinidad not completing any repairs to the home, Florida Peninsula was required to pay Trinidad costs for overhead and profit. In essence, Trinidad argued that Florida Peninsula could not single out overhead and profit from all other costs of the repair and withhold payment of just those portions of the loss until Trinidad actually incurred expenses for overhead and profit. Florida Peninsula responded by contending that it was not required by the policy or by the applicable provisions of the 2008 Florida Statutes to pay overhead and profit until Trinidad actually incurred those particular costs. The trial court granted summary judgment in favor of Florida Peninsula, finding that the policy language was unambiguous and that Florida Peninsula was not required to pay overhead and profit because those costs had not been "actually spent" in accordance with the terms of subsection (1)(c) of the policy.

Trinidad appealed to the Third District, which affirmed the trial court's summary judgment in favor of Florida Peninsula and held that "[t]he policy's unambiguous terms require Trinidad to either hire a contractor who charges for overhead and profit or to incur expenses for overhead and profit before Florida Peninsula is required to pay for such costs." *Trinidad,* 99 So.3d at 505. Since Trinidad "did neither," the Third District stated, "Florida Peninsula was not obligated under the policy to pay Trinidad for overhead and profit." *Id.*

The Third District reasoned that the policy "unambiguously provides that Florida Peninsula pay replacement costs or the costs Trinidad actually incurs or which he demonstrates he is likely to incur." *Id.* at 503–04. Explaining that "[n]ot all repairs require the services of a general contractor," the Third District concluded that under the terms of the policy, Florida Peninsula was required to pay only costs actually spent or costs Trinidad became contractually obligated to spend to repair the damage to his home. *Id.* at 504.

In addition, the Third District rejected Trinidad's assertion that section 627.7011(3), Florida Statutes (2008), which required the insurer to pay "replacement costs without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling," altered its analysis. *Trinidad,* 99 So.3d at 505 (quoting § 627.7011(3), Fla. Stat. (2008)). In determining that the statute did not mention payment for overhead and profit, but "only require[d] that replacement costs be paid without a holdback for depreciation," and did not "require payment of profit and overhead which have not been incurred nor are likely to be incurred," the Third District stated that "the statute's plain language precludes Trinidad's interpretation" because the court could not read any additional language or terms into the statute. *Id.*

ANALYSIS

This case presents a question of insurance policy interpretation and statutory construction. Because these are pure questions of law, this Court's review is de novo. *See Auto–Owners Ins. Co. v. Pozzi Window Co.,* 984 So.2d 1241, 1246 (Fla.2008); *Daniels v. Fla. Dep't of Health,* 898 So.2d 61, 64 (Fla.2005). In addition, de novo review is the appropriate standard governing this Court's analysis because the question presented for review was resolved on summary judgment. *See Fayad v. Clarendon Nat'l Ins. Co.,* 899 So.2d 1082, 1085 (Fla.2005).

***438** In its decision below, the Third District held that Florida Peninsula was not required to include overhead and profit costs in its loss settlement payment to Trinidad pursuant to a replacement cost insurance policy because Trinidad had not actually incurred those costs. *Trinidad,* 99 So.3d at 505. Trinidad contends that the Third District's conclusion was erroneous for two principal reasons. First, he asserts that the Third District erred in its interpretation of section 627.7011, which requires payment of replacement

costs without holdback of depreciation, whether or not the insured replaces or repairs the damaged property. Second, he argues that the Third District misconstrued his insurance policy with Florida Peninsula and that the policy requires Florida Peninsula to pay overhead and profit irrespective of whether those costs are actually incurred. We agree in both respects and conclude that the Third District erred by holding that overhead and profit are not included within the scope of replacement cost insurance until those costs are actually incurred.

We turn first to a discussion of replacement cost insurance and explain why we conclude that overhead and profit are considered replacement costs. We then address the effect of the applicable statute and the applicable policy language.

I. Replacement Cost Insurance

[1] **[2]** "Replacement cost insurance is designed to cover the difference between what property is actually worth and what it would cost to rebuild or repair that property." *State Farm Fire & Cas. Co. v. Patrick*, 647 So.2d 983, 983 (Fla. 3d DCA 1994). Replacement cost "is measured by what it would cost to replace the damaged structure on the same premises." *Davis v. Allstate Ins. Co.*, 781 So.2d 1143, 1144 (Fla. 3d DCA 2001) (quoting *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 627 N.Y.S.2d 185, 187 (1995)).

[3] In contrast to a replacement cost policy, actual cash value is generally defined as "fair market value" or "[r]eplacement cost minus normal depreciation," where depreciation is defined as a "decline in an asset's value because of use, wear, obsolescence, or age." *Black's Law Dictionary* 506, 1690 (9th ed. 2009); *see also Goff*, 999 So.2d at 689. In other words, replacement cost policies provide greater coverage than actual cash value policies because depreciation is not excluded from replacement cost coverage, whereas it generally is excluded from actual cash value. *See Goff*, 999 So.2d at 689.

[4] In *Goff*, the Second District concluded that overhead and profit are included in the scope of an actual cash value policy "where the insured is reasonably likely to need a general contractor for repairs." *Id.* The Second District correctly determined, in essence, that overhead and profit are like all other costs of a repair, such as labor and materials, the insured is reasonably likely to incur. *See id.* at 689–90 (citing *Branch v. Farmers Ins. Co.*, 55 P.3d 1023, 1027 (Okla.2002)). The Second District therefore held that a portion of overhead and profit, like a portion of all other costs, was included but could be depreciated in an actual cash value policy. *Id.* at 690.

[5] In contrast, in a replacement cost policy, an insurer's ability to depreciate is not relevant because replacement cost insurance is insurance on a property's depreciation. *See Patrick*, 647 So.2d at 983. However, under the view of replacement cost insurance advanced by Florida Peninsula, despite the fact that an insurer may be able to depreciate a *portion* of overhead and profit in an actual cash value policy (just as the insurer can depreciate a portion of other costs), an insurer would not be required to pay *any* overhead and profit ***439** in a replacement cost policy. This result, in which the insurer is required to provide less coverage in a replacement cost policy than in an actual cash value policy, would be anomalous because replacement cost insurance is specifically designed to provide greater coverage.

Because replacement cost insurance provides coverage based on the cost to repair or replace the damaged structure on the same premises, we conclude that overhead and profit necessarily must be included within the scope of a replacement cost policy where it is reasonably likely a general contractor would be needed for the repairs. Accordingly, overhead and profit are a necessary component of replacement costs, just as they are for actual cash value, because replacement cost insurance is intended to compensate the insured for what it would cost to repair or replace the damaged property.

Thus, we conclude that overhead and profit are included in the replacement cost of a covered loss when the insured is reasonably likely to need a general contractor for the repairs. We now determine if the applicable statute or policy permitted Florida Peninsula to withhold payment of those particular replacement costs until Trinidad actually incurred them. To answer this question, we first consider whether section 627.7011 provides authority to an insurer for not requiring payment of overhead and profit because those costs were not actually incurred.

II. Section 627.7011

[6] **[7]** **[8]** When construing a statute, this Court attempts to give effect to the Legislature's intent, looking first to the actual language used in the statute and its plain meaning. *See Daniels*, 898 So.2d at 64. "Where the statute's language is

clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent." *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So.3d 228, 234 (Fla.2009). "When considering the meaning of terms used in a statute, this Court looks first to the terms' ordinary definitions[, which] ... may be derived from dictionaries." *Metro. Cas. Ins. Co. v. Tepper*, 2 So.3d 209, 214 (Fla.2009).

[9] The 2008 version of section 627.7011, the applicable statutory provision for the period of time during which Trinidad incurred his loss, provided in relevant part as follows:

> (3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the *insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.*
>
> ....
>
> (6) This section does not prohibit an insurer from limiting its liability under a policy or endorsement providing that loss will be adjusted on the basis of replacement costs to the lesser of:
>
> (a) The limit of liability shown on the policy declarations page;
>
> (b) The *reasonable and necessary cost to repair* the damaged, destroyed, or stolen covered property; or
>
> (c) The *reasonable and necessary cost to replace* the damaged, destroyed, or stolen covered property.

§ 627.7011, Fla. Stat. (2008) (emphasis added). [3]

***440** Both Trinidad and Florida Peninsula assert that the plain language of section 627.7011, as it existed in 2008 at the time of Trinidad's covered loss, is clear, but they disagree about the effect of the statute on the issue in this case. Trinidad argues that, because section 627.7011(3) states that replacement costs must be paid regardless of whether the insured actually replaces or repairs the damaged property, insurers are not permitted to hold back any portion of the replacement cost payment contingent on the insured actually incurring a particular cost. Florida Peninsula contends, on the other hand, that the statute merely requires payment of replacement costs to be made without depreciation, and because it does not mention payment of overhead and profit that have not been incurred, the insurer is not obligated to pay those costs. The Third District accepted Florida Peninsula's interpretation of the statute. *See Trinidad*, 99 So.3d at 505 ("The statute only requires that replacement costs be paid without a holdback for depreciation. The statute does not require payment of profit and overhead which have not been incurred nor are likely to be incurred.").

We conclude that the Third District's statutory construction analysis was flawed. For property "insured on the basis of replacement costs," section 627.7011(3) has two primary objectives. First, the statute requires insurers to pay the replacement cost of a covered loss irrespective of whether the insured actually repairs or replaces the damaged property. Second, the statute requires that depreciation not be withheld pending the actual repair. In other words, pursuant to section 627.7011(3), it is immaterial in a replacement cost policy whether the damaged structure is replaced or repaired; that factor simply does not affect the statutory mandate as it would if payments were being made on an actual cash value basis.

Instead, the statute requires the insurer in all cases to pay the replacement costs of the covered loss, which, as we have explained, means what it would cost the insured to rebuild or repair the property if the insured decides to do so. Because we have concluded that overhead and profit are replacement costs where the insured is reasonably likely to need a general contractor for the repairs, it is clear that, as with other replacement costs, section 627.7011(3) does not permit an insurer to withhold overhead and profit pending actual repair.

[10] Requiring the insurer to pay overhead and profit regardless of whether the insured actually repairs the property is also consistent with section 627.7011(6), which provides that the insurer may limit its liability to the "reasonable and necessary cost" to repair or replace the damaged property. It is generally accepted that courts are required to "give full effect to all statutory provisions and construe related statutory provisions in harmony with one another." *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 199 (Fla.2007) (quoting *Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So.2d 891, 898 (Fla.2002)). Although section 627.7011(3) provides that an insurer must pay replacement costs, section 627.7011(6) provides that the insurer can limit its liability to those costs "reasonable and necessary" to the replacement or repair. Therefore, ***441** reading these two sections together provides that costs "reasonable and necessary" to the repair are included in the replacement costs

the insurer is statutorily required to pay, regardless of whether the property is repaired.

Accordingly, if the insured is unlikely to incur overhead and profit, section 627.7011(6) would allow the insurer to withhold payment of those costs consistent with section 627.7011(3) because they are not "reasonable and necessary" to the repair. *See* § 627.7011(6), Fla. Stat. (2008). This logically follows because, if the insured is not reasonably likely to incur overhead and profit in repairing the damaged property, then overhead and profit are not replacement costs of the insured's covered loss. On the other hand, if overhead and profit are going to be "reasonable and necessary" to the repair, section 627.7011(3) would mandate their payment as replacement costs.

Further, if overhead and profit were not included in the scope of replacement cost insurance where it is reasonably likely the insured will incur those costs, then no other repair costs, such as labor and materials, would be considered replacement costs. Simply put, overhead and profit are no different than any other costs of a repair that the insured is reasonably likely to incur, all of which are considered replacement costs and are not actually incurred until the repair is made—a requirement not imposed by section 627.7011. Such an interpretation of replacement cost insurance—that is, excluding all costs until they are actually incurred—would in actuality render the coverage meaningless.

We therefore hold that the Third District erred in concluding that section 627.7011 does not require the insurer to include overhead and profit in a payment based on replacement costs simply because overhead and profit have not been incurred. We turn next to a discussion of the applicable insurance policy and the Third District's construction of that policy, which is the second argument advanced by Trinidad in support of his position on appeal.

III. The Policy

[11] **[12]** **[13]** "In interpreting an insurance contract, we are bound by the plain meaning of the contract's text." *State Farm Mut. Auto. Ins. Co. v. Menendez*, 70 So.3d 566, 569 (Fla.2011). "If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written." *Id.* at 569–70 (quoting *Travelers Indem. Co. v. PCR, Inc.*, 889 So.2d 779, 785 (Fla.2004)). Further, provisions in an insurance policy must be construed and applied to be in full compliance with the Florida Statutes. *See, e.g., Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 896 (Fla.2003).

[14] Trinidad's homeowner's insurance policy with Florida Peninsula provides that Florida Peninsula will pay for covered losses, such as the loss at issue in this case, as follows:

> [A]t replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> (a) The limit of liability under this policy that applies to the building;
>
> ***442** (b) The replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) The necessary amount actually spent to repair or replace the damaged building.

In its decision, the Third District held that the policy, which "governs the outcome of this case," was unambiguous and excluded payment for overhead and profit unless those expenses were either incurred by the insured or reflected in a contract that binds the insured. *Trinidad*, 99 So.3d at 503. In support of this conclusion, the Third District explained that the policy language "specifically uses the words 'replacement cost' to cover situations where the insured does not hire a contractor and does not spend money to repair or replace the loss, and in the alternative, it provides for payment of money 'actually spent' when the property is actually repaired or replaced." *Id.* at 504. We conclude that the Third District erred in its interpretation of the policy language because it relied on the wrong subsection of the policy.

Despite the Third District's reliance on the "actually spent" language in subsection (1)(c) of the loss settlement provision in Trinidad's policy, Florida Peninsula's payment in this case was made pursuant to subsection (1)(b) of the policy—rather than subsection (1)(c)—because Trinidad did not actually spend any money to repair or replace the damaged

property. Florida Peninsula has itself acknowledged that its payment to Trinidad was made pursuant to this provision, stating in its brief filed in this Court that subsection (1)(b) of the policy, which governs payment of replacement costs when no repairs have been made, is the determinative policy provision, whereas subsection (1)(c) is an alternative method of calculating the payment amount when the insured has actually undertaken repairs.

In fact, Florida Peninsula paid Trinidad other costs for the repair even though, as with overhead and profit, Trinidad also did not actually spend any money for those costs. Indeed, if subsection (1)(c) of the policy, which requires payment only for the "necessary amount actually spent" on the repairs, was the applicable provision, Florida Peninsula would not have been required to pay Trinidad anything because Trinidad did not actually spend anything on repairs. An interpretation of the policy that permitted such an outcome would be contrary to section 627.7011, which requires payment of replacement costs regardless of whether the insured replaces or repairs the property, and would therefore be unenforceable. *See Kaklamanos,* 843 So.2d at 896.

Subsection (1)(b) of the policy is thus the relevant provision, and it requires Florida Peninsula to pay "[t]he replacement cost of that part of the building damaged for like construction and use on the same premises." Accordingly, the unambiguous terms of the policy state that Florida Peninsula will pay the replacement costs of the damaged property. Because the replacement costs of the covered loss include overhead and profit where the insured is reasonably likely to need a general contractor for repairs, the plain language of the policy clearly requires Florida Peninsula to pay overhead and profit if the insured is reasonably likely to need a general contractor. Neither the policy nor the 2008 version of the applicable Florida statute, as we have explained, permitted withholding any component of the replacement costs until the insured actually incurred expenses for the repairs.

Finally, we address and reject the Third District's reliance on *Goff* to determine that overhead and profit were not necessary ***443** elements of replacement cost coverage unless those costs were actually incurred. In fact, *Goff* supports the opposite conclusion.

In *Goff,* 999 So.2d at 689, the Second District concluded that overhead and profit are included in the definition of actual cash value where the insured is reasonably likely to need a general contractor for repairs. Consistent with the Second District's conclusion, the Third District in *Trinidad* recognized that, if Trinidad's policy provided for payment of his covered loss on an actual cash value basis, rather than based on replacement costs, Florida Peninsula would have been required to include overhead and profit when making actual cash value payments where it is reasonably likely that a general contractor would be needed for the repairs. *Trinidad,* 99 So.3d at 504.

[15] The result approved by the Third District—where overhead and profit are included in actual cash value but not in replacement cost insurance—is contrary to the coverage each type of insurance is designed to provide. As we have explained, actual cash value is defined as replacement cost minus depreciation. If overhead and profit are part of actual cash value, then those costs necessarily must be part of replacement cost insurance because replacement cost insurance encompasses actual cash value. While overhead and profit may, like other costs, be depreciable, as the Second District concluded in *Goff,* 999 So.2d at 689–90, depending on the applicable policy and statute, an insurer's ability to depreciate is irrelevant in a replacement cost policy like Trinidad's, which provides for payment "at replacement cost without deduction for depreciation."

Because the insurance policy in this case provides that Florida Peninsula will pay "[t]he replacement cost of that part of the building damaged for like construction and use on the same premises," Florida Peninsula was required by the policy's unambiguous terms to include overhead and profit in its payment for Trinidad's covered loss, assuming Trinidad establishes that he is reasonably likely to need a general contractor for the repairs. Accordingly, we hold that the Third District erred in concluding, based on the policy, that Florida Peninsula was not required to pay Trinidad overhead and profit because Trinidad had not actually incurred those costs.

CONCLUSION

For the reasons set forth above, we hold that replacement cost insurance includes overhead and profit where the insured is reasonably likely to need a general contractor for repairs. We therefore conclude that the Third District erred in determining both that the 2008 version of section 627.7011 and the insurance policy itself permitted Florida Peninsula to withhold payment of overhead and profit because Trinidad had not actually incurred those costs. Accordingly, we quash the Third District's decision and direct that this case be

remanded to the trial court to determine, consistent with this opinion, whether Trinidad is reasonably likely to need a general contractor for the repairs that encompass his covered loss.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

POLSTON, C.J., dissents with an opinion, in which CANADY, J., concurs.

POLSTON, C.J., dissenting.

Because *Trinidad v. Florida Peninsula Insurance Co.,* 99 So.3d 502 (Fla. 3d DCA 2011), does not expressly and directly conflict with *Goff v. State Farm Florida Insurance* ***444** *Co.,* 999 So.2d 684 (Fla. 2d DCA 2008), I would discharge this case for lack of jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

The express and direct conflict our constitution requires does not exist here. Here, the alleged conflict case, *Goff,* involves different facts and answers a different legal question than the decision on review. In *Goff,* the Second District examined an insurance policy that required the insurer to pay its insured "actual cash value at the time of loss." 999 So.2d at 686. The question of law before the court was "whether overhead and profit is depreciable in determining [the amount of the] actual cash value" payment owed. *Id.* at 689. After recognizing that "[a]ctual cash value includes overhead and profit where the insured is reasonably likely to need a general contractor for repairs," the Second District in *Goff* held that a portion of the overhead and profit could be withheld from the payment as depreciation. *Id.* at 689, 690.

In contrast, the decision on review, *Trinidad,* involves neither an actual cash value policy nor the depreciability of overhead and profit. Instead, in *Trinidad,* the Third District examined a replacement cost policy that allowed the insurer to pay the lesser of several costs following a loss, including "[t]he necessary amount actually spent to repair or replace the damaged building." 99 So.3d at 503. Specifically, the Third District considered whether the policy required the insured to incur or contract to incur expenses for overhead and profit before the insurer was obligated to pay for them and whether the insurance code permitted such a requirement. *Id.* at 503, 505. Based on the policy's "unambiguous terms," the Third District in *Trinidad* held that the insurer's obligation to pay overhead and profit was contingent upon the insured satisfying one of the contractual conditions and that the "plain language" of the insurance code did "not require payment of profit and overhead which have not been incurred nor are likely to be incurred." *Id.* at 505.

Instead of recognizing the differences in the decisions, the majority appears to extrapolate conflict between them based on how it would interpret *Goff* in light of the different set of facts in *Trinidad.* Specifically, relying on *Black's Law Dictionary's* definition of "actual cash value," the majority notes that a replacement cost policy—generally—is a superior product designed to provide greater benefits to the insured than an actual cash value policy. Majority op. at 438. Since the actual cash value payment in *Goff* included overhead and profit, the majority concludes that *Goff* also requires payment made under a replacement cost policy (like the policy in *Trinidad*) to include overhead and profit if the insured is reasonably likely to need a general contractor for the repairs. Majority op. at 438, 442–43. However, as explained above, this is not what *Goff* held. *Goff* held that a portion of the paid overhead and profit could be withheld as depreciation in making the actual cash value payment required by the specific insurance policy in that case. 999 So.2d at 690.

Simply put, express and direct conflict is a consequence of plain language, not judicial construction. Because the Third District said nothing in *Trinidad* that expressly and directly conflicts with the Second District's legally and factually distinguishable decision in *Goff,* I would find that review was improvidently granted and discharge this case for lack of jurisdiction. Therefore, I respectfully dissent.

CANADY, J., concurs.

Parallel Citations

38 Fla. L. Weekly S507

Footnotes

1 The 2008 version of section 627.7011 is the applicable version in this case because that is the version of the statute that was in effect when Trinidad incurred his loss. Section 627.7011, however, has since been amended, most recently in 2011. *See* ch.2011–39, § 19, Laws of Fla. Our analysis in this case therefore applies only to the version of the statute in effect in 2008.

2 United Policyholders, a nonprofit organization that provides information and advocates for insurance consumers, filed an amicus curiae brief in support of Trinidad.

3 Although the 2008 version of the statute is the relevant version governing our analysis in this case, section 627.7011 has since been amended to provide that the insurer must pay "at least the actual cash value of the insured loss, less any applicable deductible," except in the case of a "total loss of a dwelling," in which case "the insurer shall pay the replacement cost coverage without reservation or holdback of any depreciation in value." § 627.7011(3)(a), Fla. Stat. (2012). In the absence of a total loss, therefore, the insurer is no longer required, as it was under the terms of the 2008 version of the statute, to pay replacement costs without a holdback of any depreciation in value.

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118 So.3d 1203
Court of Appeal of Louisiana,
Fourth Circuit.

ORLEANS PARISH SCHOOL BOARD
v.
LEXINGTON INSURANCE COMPANY, et al.

No. 2012–CA–1686. | June 5, 2013.

Synopsis

Background: Insured school district brought action against commercial property insurer and excess insurers, seeking recovery for damages sustained to certain properties as a result of Hurricane Katrina. The District Court, Orleans Parish, No. 2006–07342, Division "L–6", Kern A. Reese, J., entered partial summary judgment in favor of insurers. Insured appealed.

Holdings: The Court of Appeal, Rosemary Ledet, J., held that:

[1] the phrase "increased construction costs" in ordinance or law endorsement was not ambiguous;

[2] ordinance or law endorsement did not provide coverage for increased construction costs under doctrine of frustration of performance;

[3] insurers did not waive the policy requirement to repair or rebuild within two years in order to obtain coverage under ordinance or law endorsement;

[4] insurers were not estopped from relying on the two-year period to repair or rebuild for coverage under ordinance or law endorsement; and

[5] trial court did not abuse its discretion by granting summary judgment when discovery was not complete.

Affirmed.

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(Court composed of Chief Judge JAMES F. McKAY, III, Judge ROLAND L. BELSOME, Judge ROSEMARY LEDET).

Opinion

ROSEMARY LEDET, Judge.

****1** This is a Hurricane Katrina, commercial property insurance coverage dispute. The sole issue presented is whether the trial court erred in granting a partial motion ***1207** for summary judgment, finding no coverage for increased construction costs under the "Ordinance or Law" endorsement of the policies at issue. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

[1] When Hurricane Katrina struck the New Orleans area, the Orleans Parish School Board ("OPSB") was responsible for overseeing the operations of approximately 126 public schools in the area. Hurricane Katrina significantly damaged the OPSB's properties. "This litigation began when OPSB filed a lawsuit against its commercial property insurer [Lexington Insurance Company] on August 9, 2006, seeking recovery for damages sustained to certain insured properties as a result of Hurricane Katrina's August 29, 2005 landfall and its aftermath." *Orleans Parish School Bd. v. Lexington Ins. Co.*, 11–0009, pp. 1–2 (La.App. 4 Cir. 10/5/11), 76 So.3d 592, 593–94. [1] "As of the time of filing of the original petition, ****2** OPSB claimed to have received only half of the policy limits on its primary commercial property policy [$25

million]." *Id.* The OPSB subsequently amended its petition to join as defendants its four excess commercial property insurers—Essex Insurance Company, Clarendon Insurance Company, Westchester Surplus Lines Insurance Company, and RSUI Indemnity Company. [2] The terms of the Lexington policy apply to the Excess Insurers' policies because the Excess Insurers' policies are all following-form policies. [3] The coverage the Defendant Insurers provided to the OPSB was structured on the following four levels: [4]

On November 30, 2011, the Excess Insurers filed motions for partial summary ***1208** judgment on the issue of increased construction cost under the "Ordinance or Law" Endorsement. [5] The motions sought the dismissal of any ****3** claim for ordinance or law coverage for the cost of code upgrades not actually incurred by the OPSB before August 29, 2007—two years after Hurricane Katrina. The Excess Insurers pointed out that coverage for code upgrades, if any, would arise under the increased cost to repair provision (Section A(2)) of the Ordinance or Law endorsement in Lexington's policy, quoted below. The endorsement, however, includes a two-year limitation for such coverage, which the Excess Insurers contended expired on August 29, 2007. The Excess Insurers further contended that to the extent any code upgrades were not actually performed by the OPSB by August 29, 2007, there was a failure to satisfy a condition precedent to recovering under the policies.

The pertinent policy provisions regarding Ordinance or Law coverage (also referred to as "Code Upgrade" coverage) are set forth in the Lexington primary policy, which includes both an exclusion of such coverage and an endorsement adding back limited coverage. As noted, the excess policies follow the terms of the primary policy for purposes relevant to the issue presented in this case.

The exclusion is set forth in a "CAUSES OF LOSS—SPECIAL FORM" of Lexington's policy, which provides:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. Ordinance or Law
>
> ****4** The enforcement of any ordinance or law:
>
> 1) Regulating the construction, use or repair of any property; or
>
> 2) Requiring the tearing down of any property, including the cost of removing its debris. [6]

The endorsement adding back limited coverage is entitled an "Ordinance or Law" endorsement, numbered as "ENDORSEMENT # 002," and labeled as CP0405 (ed. 07/88); it provides:

> A. If a Covered Cause of Loss occurs to covered Building property, we will pay:
>
> * * *
>
> 2. The increased cost to repair, rebuild or construct the property caused by enforcement of building, zoning or land use ordinance or law. If the property is repaired or rebuilt, it must be intended for similar occupancy as the current property, unless otherwise required by zoning or land use ordinance law.
>
> * * *
>
> ***1209** C. We will not pay for increased construction costs under this endorsement:
>
> 1. Until the property is actually repaired or replaced at the same premises or elsewhere; and
>
> 2. Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed 2 years. We may extend this period in writing during the 2 years. [7]

In support of their respective motions, the Excess Insurers introduced evidence of the Lexington policy and their respective policies. They also ****5** introduced affidavits of representatives of the Defendant Insurers attesting that at no time within the two-year period after Hurricane Katrina (August 29, 2005 to August 29, 2007) did any of the Defendant Insurers extend in writing the two-year limitation period set forth in the Ordinance or Law Endorsement. Illustrative, RSUI's representative, Michael Koski, Vice President Commercial Property Claims, attested:

> 6. In the event of a covered loss to covered building property, the Ordinance or Law Coverage endorsement [Endorsement # 002, CP0405] expressly states that we

will not pay for increased construction costs under the endorsement until the property is actually repaired or replaced at the same premises or elsewhere, and, unless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. The endorsement also states that RSUI may extend this period in writing during the two year period;

7. At no time within the two year period after Hurricane Katrina occurred (August 29, 2005), did RSUI extend, in writing, the period of time within which the coverage for increased construction costs may be incurred as described in Section C(2) of the Ordinance or Law Coverage endorsement.

In opposing the motions for summary judgment, the OPSB contended that there were at least four genuine issues of material fact, which it enumerated as follows: (i) whether the Defendant Insurers' repeated extensions granted to the OPSB during the claims process included the two-year limitation period; (ii) whether the Defendant Insurers' actions constituted a waiver of the two-year limitation period; (iii) whether the Excess Insurers should be estopped from raising the two-year limitation period; and (iv) whether the two-year limitation period was an impossible condition that should not be enforced. The OPSB further contended that summary judgment was premature since discovery was incomplete.

In support of its impossible condition argument, the OPSB introduced an affidavit of its Chief Financial Officer, Stanley C. Smith, who attested:

****6** • I have personal knowledge of the financial status of the School Board before and after Hurricane Katrina.

• I have personal knowledge of the efforts of the Orleans Parish School Board to get schools up and running after Hurricane Katrina and have knowledge of the financial and non financial challenges which needed to be overcome to get schools open within ***1210** the first two years after Hurricane Katrina and to the present.

• The Orleans Parish School Board was unable to get 100% of its properties repaired or rebuilt within the two years after Hurricane Katrina. Principally, among the reasons for our inability to repair or rebuild all the properties was its lack of finances to repair such a large number of properties. It also took substantial time and effort to access all of the properties after Hurricane Katrina and then determine which properties had to be rebuilt or repaired, and where the needs of the children would be post Katrina.

• The time for obtaining necessary funds, complying with Louisiana administrative law to get approval to rebuild or repair schools, perform due diligence with construction companies, issue contracts, in addition to the necessary construction time (which often included delays) made completing repairs and/or rebuilding all of the OPSB properties within 2 years after Hurricane Katrina impossible.

In support of its waiver argument, the OPSB introduced reservation of rights letters from two of the Excess Insurers, Essex and RSUI. In those letters, the Ordinance or Law Exclusion is quoted; the Ordinance or Law Endorsement is mentioned, but not quoted. The two-year limitation period is not mentioned in those letters.

In support of its estoppel argument, the OPSB introduced a series of correspondence documenting the written agreements between the parties to extend both the discovery deadline in this litigation and the policy deadline for filing a proof of loss.[8] Almost all of the correspondence was written after the expiration of ****7** the two-year limitation period. The two-year limitation period is not mentioned in any of the correspondence.

At the December 15, 2011 motions hearing, the trial court compared the two-year limitation period to a prescriptive period. Granting the motion, the trial court found the endorsement to be "clear and unambiguous," reasoning as follows:

[I]t is what it is, and Section C–2 of the ordinance covers law under the policy, says "we may extend this period in writing during the two years." The opposite of that is we may not. If they have definitively said no, I don't know if we'd be having this discussion. It wasn't so, I guess that's why we are. But it is what it is. The policy says what it says, it's clear and unambiguous.

I grant the motion.

On January 10, 2012, the trial court rendered its judgment finding that "any claim by the OPSB for increased construction costs be and the same are hereby dismissed to the extent that the repairs or replacement were not made by August 29, 2007 (2 years from the date of the loss)." The trial court declared that "there is no just reason for delay

on this coverage issue," and it designated its judgment as a "final partial summary judgment as to the issue of coverage under the Ordinance or Law Coverage endorsement." *See* La. C.C.P. art. 1915 B. No written reasons were provided for the judgment.

The OPSB filed a motion for new trial. In its motion, the OPSB raised the following four issues: (i) whether the two-year limitation is null and unenforceable under ***1211** La. C.C. art. 1769 (providing that "[a] suspensive condition that is unlawful or impossible makes the obligation null"), and La. C.C. art. 1770 (providing that "[a] suspensive condition that depends solely on the whim of the obligor makes the obligation null"); (ii) whether the two-year limitation period should be regarded as fulfilled due to the Defendant Insurers' hindering the ability of the OPSB to ****8** comply with the two-year limitation period pursuant to La. C.C. art. 1772 (providing that "[a] condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment"); (iii) whether the policy as written is ambiguous in its interpretation and meaning; and (iv) whether there was "good cause" for a new trial.

On April 16, 2012, the trial court denied the OPSB's motion for new trial. In so doing, the trial court provided the following reasons for judgment:

> The Court, after oral arguments, at the signing of the Judgment, and now, finds that this provision of the policy is unambiguous. The Louisiana Supreme Court held, "the determination of whether a contract is clear or unambiguous is a question of law." *Cadwallader v. Allstate Ins. Co.*, 848 So.2d 577, 580 (La.6/27/2003). Further, when the terms of a policy are unambiguous, the "courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation." *Id.* The Lexington policy, and thus the Westchester and RSUI policies, clearly does not provide coverage under this endorsement beyond the two year time frame.

The instant appeal followed.

DISCUSSION

The standard of review of a trial court's ruling granting a motion for summary judgment, pursuant to La. C.C.P. arts. 966 and 967 and the jurisprudence, is well-settled and can be summarized as follows:

> Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. This standard of review requires the appellate court to look at the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiffs [sic] cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial ****9** on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court.
>
> The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish these ends. The code provides that where [as in the instant case] the party moving for summary judgment will not bear the burden of proof at trial, their burden does not require them to negate all essential elements of the adverse party's claim, but rather to point out to the court that an absence of factual support exists for one ***1212** or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial, no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. The adverse party cannot rest on the mere allegations or denials of his pleadings when a motion for summary judgment is made and supported by affidavits, but is required to present evidence establishing that material facts are still at issue.
>
> *Teter v. Apollo Marine Specialities, Inc.*, 12–1525, pp. 6–7 (La.App. 4 Cir. 4/10/13), 115 So.3d 590, 597 (quoting *Johnson v. Loyola University of New Orleans*, 11–1785, pp. 7–8 (La.App. 4 Cir. 8/8/12), 98 So.3d 918, 923–24); *see also McGowan v. Housing Authority of New Orleans*, 12–1418, p. 12 (La.App. 4 Cir. 3/27/13), 113 So.3d 1143, 1148 (quoting *Johnson*, 11–1785 at pp. 7–8, 98 So.3d at 923–24).

[2] **[3]** Whether an insurance policy provides for, or precludes, coverage as a matter of law is an issue that can be resolved within the framework of a motion for summary judgment. *Sumner v. Mathes*, 10–0438, p. 6 (La.App. 4 Cir. 11/24/10), 52 So.3d 931, 935. Generally, the interpretation of an insurance policy is a question of law. *Armenia Coffee Corp. v. American National Fire Ins. Co.*, 06–0409, p. 6 (La.App. 4 Cir. 11/21/06), 946 So.2d 249, 253. Likewise, the ****10** determination of whether a contract is clear or ambiguous is a question of law. *Cadwalladerv. Allstate Ins. Co.*, 02–1637, p. 4 (La.6/27/03), 848 So.2d 577, 580. On the other hand, when a contract is determined to be ambiguous, an issue of material fact exists; and the matter is not ripe for summary judgment. *Johnson v. Orleans Parish School Bd.*, 10–1388, p. 11 (La.App. 4 Cir. 12/20/11), 80 So.3d 1175, 1183 (citation omitted).

[4] **[5]** **[6]** **[7]** **[8]** **[9]** **[10]** In analyzing insurance policies, the following elementary legal principles apply:

- An insurance policy is a contract between the parties and should be construed by using the general rules of interpretation of contracts set forth in the Civil Code.
- The parties' intent as reflected by the words in the policy determine the extent of coverage. Such intent is to be determined in accordance with the general, ordinary, plain and popular meaning of the words used in the policy, unless the words have acquired a technical meaning. LSA–C.C. Art.2047.
- An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion.
- Absent a conflict with statutory provisions or public policy, insurers, like other individuals, are entitled to limit their liability and to impose and to enforce reasonable conditions upon the policy obligations they contractually assume.
- [I]f the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written. LSA–C.C. Art.2046 (providing that when the words of a contract are clear, no further interpretation may be made to determine the parties' intent).
- When the language of an insurance policy is clear, courts lack the authority to change or alter its terms under the guise of interpretation. The determination of whether a contract is clear or ambiguous is a question of law.

***1213** ****11** *Louisiana Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 93–0911 (La.1/14/94), 630 So.2d 759, 763–64 (citations omitted).

On appeal, the OPSB's sole assignment of error is whether "[t]he trial court erred in its finding that the OPSB's claims for 'increased construction costs' are dismissed with prejudice to the extent that the repairs or replacements of damaged properties were not made by August 29, 2007 (2 years from the date of loss)." The OPSB contends that there are four undisputed facts, which it enumerates as follows:

> First, during the two year period (and indeed until 2011), the Defendant Insurers repeatedly granted the OPSB extensions of time to submit proofs of loss for the catastrophic damages it sustained as a result of Hurricane Katrina and its aftermath.
>
> Second, the Defendant Insurers' own adjusters did not complete their inspections and estimates until sometime after May 2006, and then repriced their estimates in 2007, the same year the Defendants Insurers now claim OPSB should have repaired or replaced all of its buildings.
>
> Third, the Defendant Insurers only tendered $25 million (of the $200 million combined policy limits) to the OPSB within the two years after the loss even though their own adjusters' initial net assessments of loss for the OPSB hurricane (non-flood) damages exceeded $82 million, and the OPSB submitted repair invoices for $71 million.
>
> Fourth, the Defendant Insurers failed to raise the two year repair condition in their reservation of rights letters and pleadings until after the two years lapsed thereby leading the OPSB into believing it would not be enforced.

The OPSB contends that these undisputed facts render summary judgment improper because there are genuine issues of material fact. Alternatively, it contends that application of the law to these facts leads to the conclusion that the two-year limitation period is unenforceable.

For purposes of this discussion, we subdivide the OPSB's arguments into the following four categories: (i) ambiguous policy language, (ii) unenforceable ****12** conditional

obligation, (iii) equitable principles of waiver and estoppel, and (iv) prematurity. We separately address each category.

(i) ambiguous policy language

The OPSB contends that the provisions of the Ordinance or Law Endorsement are ambiguous. The OPSB does not contend that the endorsement language "repairs or replacement" or "not to exceed two years" is ambiguous; rather, it contends that the endorsement language, tracked in the trial court's judgment, "increased construction costs" is ambiguous. According to the OPSB, because the phrase "increased construction costs" is not defined in the endorsement itself or anywhere else in the policies, it will have to speculate as to the meaning of the phrase. The OPSB thus contends the phrase is ambiguous, that this ambiguity implicates the rule of strict construction against the insurer, and that this ambiguity renders the granting of summary judgment inappropriate.

RSUI counters that simply because the OPSB expresses confusion does not render the policy language ambiguous. RSUI cites the principle that in order for policy language to be ambiguous, and thus invoke the rule of strict construction against an insurer, it must be susceptible to two or more reasonable interpretations. *Zeitoun v. Orleans Parish School Bd.*, 09–1130, p. 5 (La.App. 4 Cir. 3/3/10), 33 So.3d 361, 365 (noting that "for the rule of strict construction to apply, the insurance policy must not only be susceptible to two or more interpretations, ***1214** but each of the alternative interpretations must be reasonable."). RSUI points out that the OPSB failed to provide two differing, reasonable interpretations of the phrase "increased construction costs." RSUI additionally points out that even assuming, *arguendo*, any ambiguity exists in the phrase "increased construction costs," it ****13** would not affect the two-year limitation period, which the trial court found is unambiguous.

[11] **[12]** Although the phrase "increased construction costs" is not defined in the policy itself, this fact alone does not make the endorsement ambiguous; rather, this fact requires a court give the words and phrases their generally prevailing meaning. *Cadwallader*, 02–1637 at p. 4, 848 So.2d at 580; *see also American Deposit Ins. Co. v. Myles*, 00–2457, p. 7 (La.4/25/01), 783 So.2d 1282, 1287. "Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning." *McGuire v. American Southern Home Ins. Co.*, 07–0810, p. 3 (La.App. 4 Cir. 10/10/07), 969 So.2d 681, 684 (citing La. C.C. art.2047; *Cadwallader*, 02–1637 at p. 3, 848 So.2d at 580; and *Carbon v. Allstate Ins. Co.*, 97–3085, p. 4 (La.10/20/98), 719 So.2d 437, 439–40). "The rule that words in an insurance policy must be given their reasonable and ordinary interpretation applies notwithstanding the rule of construction against the insurer." 2 COUCH ON INS. § 22:15. Applying these principles, we find, as RSUI contends, that there is nothing ambiguous in the phrase "increased construction costs."

(ii) unenforceable conditional obligation

The OPSB next contends that regardless of whether the two-year limitation period is unambiguous, it is an unenforceable suspensive condition under the Civil Code articles governing conditional obligations. The OPSB characterizes the two-year limitation period to repair or replace as a suspensive condition under La. C.C. art. 1767, which provides that "[i]f the obligation may not be enforced until the ****14** uncertain event occurs, the condition is suspensive."[9] The OPSB maintains that the two-year limitation period to repair or replace is conditional because the payment of claims for "increased construction costs" depends upon the repair, replacement, or both, of the properties. It maintains that the two-year limitation period is suspensive because the payment of claims for "increased construction costs" cannot be enforced until the repair or replacement is made. RSUI does not dispute the characterization of the two-year limitation period as a suspensive condition.[10]

The OPSB's argument that the suspensive condition is unenforceable can be divided into two parts. First, it contends that RSUI should not be allowed to benefit from a policy provision that contains an impossible suspensive condition dependent solely on the Defendant Insurers' whim. La. C.C. arts. 1769 and 1770. Second, it contends that since the Defendant Insurers were at fault for the OPSB's inability to repair all of its properties within the two-year limitation period (thereby complying with the contract provision), the contract provision should be deemed fulfilled. ***1215** La. C.C. art 1772. We separately address each of these arguments.

Articles 1769 and 1770

The OPSB's first argument is that the Defendant Insurers' improper claims handling procedures made it impossible for it to comply with the two-year limitation period. The OPSB thus characterizes the two-year period as an unenforceable, impossible condition under Article 1769. The OPSB also contends that the two-year limitation period was dependent

solely on the Defendant **15 Insurers' whim to make appropriate tenders and therefore is unenforceable under Article 1770.

RSUI counters that the OPSB misconstrues Articles 1769 and 1770. According to RSUI, the impossible suspensive condition and the whim-based suspensive condition would nullify any obligation of the Defendant Insurers to pay the increased cost of construction, not the suspensive condition. In support of this construction, RSUI quotes the language of Articles 1769 and 1770, which respectively provide that an impossible suspensive condition "makes the obligation null" and that a suspensive condition dependent solely on an obligor's whim "makes the obligation null."

Contrary to the OPSB's contention, we find that neither Article 1769 nor Article 1770 apply in this case.

[13] [14] [15] Although an impossible condition is one contemplating the occurrence of an event that cannot take place, "Civil Code [Article 1769] is concerned with absolute impossibility." *Hamilton v. Anco Insulation, Inc.*, 02–0221, p. 10 (La.App. 1 Cir. 2/14/03), 844 So.2d 893, 899–900 (finding policy condition that a claim for "bodily injury by disease" be made within thirty-six months of the policy's expiration was impossible under the facts of the case involving a mesothelioma victim, but was not an impossible condition in all cases as required by La. C.C. art. 1769). An impossible condition, under Article 1769, is not simply one that is impossible under the facts of a given case; rather, it is one that is impossible in all cases. *Id.* Stated otherwise, "impossible conditions, as contemplated in La. C.C. art. 1769, are those in which 'no one can bring about the events of which they consist.' " *Hamilton*, 02–0221 at p. 10, 844 So.2d at 899–900 (quoting 5 Saúl Litvinoff, La. Civ. L. Treatise, THE LAW OF OBLIGATIONS § 5.5 p. 75 (2nd ed.2001)). Thus, **16 the two-year limitation period, even assuming *arguendo* it was impossible in this Hurricane Katrina case, is not an impossible condition under Article 1769.

[16] Nor is the Defendant Insurers' obligation to tender amounts due under their policies dependent solely on their whim. Whim means "[a] passing fancy, an impulse." Bryan A. Garner, BLACK'S LAW DICTIONARY 1627 (8th ed.2004). The comments to Article 1770 state that "[a]n event which is left to the obligor's whim is one whose occurrence depends entirely on his will, such as his wishing or not wishing something." La. C.C. art. 1770, Official Comment (d). The Defendant Insurers' obligation to pay under their policies is not solely dependent on their whim; it is governed by the insurance contracts.

Article 1772

The second part of the OPSB's unenforceable conditional obligation argument is that since the Defendant Insurers were at fault for the OPSB's inability to repair all of its properties within the two-year limitation period (thereby complying with the contract provision), the contract provision should be deemed fulfilled under La. C.C. art. 1772. As noted, Article 1772 provides that "[a] condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment." *1216 La. C.C. art. 1772. Article 1772 is analogous to the common law prevention of performance doctrine, which is defined as "[t]he principle that each contracting party has an implied duty to not do anything that prevents the other party from performing its obligation." Bryan A. Garner, BLACK'S LAW DICTIONARY 1226 (8th ed.2004); *see also In re Crutcher–Tufts Resources, Inc.*, 504 F.3d 535, 542 (5th Cir.2007) (referring to "frustration" of performance of obligation under La. C.C. art. 1772).

**17 Although the OPSB raised the impossibility argument in opposing the motions for summary judgment, it did not raise the issue of the Defendant Insurers' alleged fault under Article 1772 until it filed its motion for new trial. [11] According to the OPSB, the Defendant Insurers' fault is their bad faith in failing to properly adjust the OPSB's claims and failing to tender adequate amounts under the policies for the property damage sustained.

In support of the bad faith argument, the OPSB cites La. R.S. 22:1892, which requires that insurers initiate loss adjustment for catastrophic property damage claims within thirty days of notification and make a written offer to settle property damage claims within thirty days of receiving satisfactory proof of loss. [12] Although the OPSB did not file a complete proof of loss until 2011, it contends that "satisfactory proof of loss" was received by the Defendant Insurers when their representatives walked through all of the OPSB's properties shortly after Hurricane Katrina. The OPSB cites *Louisiana Bag Co. v. Audubon Indem. Co.*, 08–0453, p. 24 (La.12/2/08), 999 So.2d 1104, 1119–20 (La.2008), for the proposition that "an insurer's requirement that it receive its form of proof of loss before payment is **18 insufficient to create probable cause to delay payment. To allow an insurer to do so would frustrate the intent and purpose of La. R.S. § 22:658 as it

would allow the insurer to be solely in control of when proof of loss is received." *Id.*

The OPSB cites the affidavit of Mr. Smith, its Chief Financial Officer, as establishing that it lacked sufficient funds to make the repairs or replacements during the two-year limitation period. According to the OPSB, its lack of sufficient funds was further evidenced by the almost $71 million in repair invoices (which did not include repairs for all properties) it submitted to the Defendant Insurers in May 2007, just a few months before the end of the two-year limitation period. The OPSB points out that despite being presented with these figures, the Defendant Insurers tendered only $25 million (out of a total coverage of $200 million) within the two-year limitation period. The OPSB further points out that "[b]ecause the Defendant Insurers failed to make tenders under their policies, the OPSB was forced to file ***1217** suit for breach of contract and bad faith and had to delay restoration efforts." The OPSB thus contends that it established fault—bad faith—on the part of the Defendant Insurers and that the suspensive condition should be deemed fulfilled under Article 1772.

In further support of its position, the OPSB cites a trio of out-of-state cases for the proposition that when an insurance company prevents an insured's compliance with a condition precedent (suspensive condition) to receive additional coverage, the insured is excused from performing that condition precedent. *Pollock v. Fire Ins. Exchange,* 167 Mich.App. 415, 423 N.W.2d 234 (1988); *Zaitchick v. American Motorists Ins. Co.,* 554 F.Supp. 209, 211 (D.C.N.Y.1982); and *Dickler v. CIGNA Property and Cas. Co.,* 957 F.2d 1088 (3d Cir.1992). By analogy, the OPSB contends that the Defendant Insurers should not be allowed to benefit from ****19** their own bad faith in failing to make timely tenders under their policies and withholding funds.

RSUI counters that under the policies a proof of loss was a prerequisite for any payment obligation of the insurers. It emphasizes that the OPSB sought extensions of the deadline to file a proof of loss and that it failed to file a full proof of loss until the trial court ordered it to do so in 2011. It contends that the OPSB's reliance on the *Louisiana Bag* case is misplaced; the Louisiana Supreme Court in the *Louisiana Bag* case simply held that an insurer must pay amounts "over which reasonable minds could not differ." *Louisiana Bag,* 08–0453 at p. 16, 999 So.2d at 1116. RSUI further counters that the trio of out-of-state cases on which the OPSB relies is distinguishable. According to RSUI, those cases simply establish that "an insurer must actively prevent compliance with policy provisions before an additional award is justified." RSUI contends that the OPSB failed to provide any facts that would justify either analogizing to those out-of-state cases or establishing that the Defendant Insurers were at fault under Article 1772. RSUI emphasizes that the OPSB itself delayed resolution of its claims by repeatedly seeking extensions of both the time to file a proof of loss and the discovery deadlines in this litigation. RSUI further emphasizes the OPSB's failure to seek an extension of the two-year limitation period.

RSUI still further emphasizes that Mr. Smith's affidavit neither mentions nor addresses any fault on the part of the Defendant Insurers in causing the delay in completing the repairs or replacements. Instead, his affidavit states that there were multiple "financial and non-financial challenges which needed to be overcome to get schools open within the first two years after Hurricane Katrina," including determining "where the needs of the children would be post Katrina." The affidavit ****20** expressly enumerates the following reasons why the OPSB believed that completing repairs and replacements within two years following Hurricane Katrina was impossible: "[t]he time for obtaining necessary funds, complying with Louisiana administrative law to get approval to rebuild or repair schools, perform due diligence with construction companies, issue contracts, in addition to the necessary construction time (which often included delays)."

RSUI points out that in the event the OPSB determined that it was impossible to repair or replace its properties within the two-year period, a mechanism was available to it under the policy—request a written extension of the two-year limitation period before the period elapsed. RSUI further points out that the OPSB requested and obtained numerous extensions of the proof of loss and discovery deadlines; however, the OPSB never requested an ***1218** extension of the two-year limitation period. The OPSB's failure to request an extension, RSUI contends, belies its contention of fault on the part of the Defendant Insurers in hindering its ability to comply with the requirements of the Ordinance and Law Endorsement. We agree.

[17] The OPSB's reliance on bad faith jurisprudence, such as *Louisiana Bag* case, and the trio of out-of-state cases is misplaced. The Supreme Court in the *Louisiana Bag* case held that "an insurer need not pay a disputed amount in a claim for which there are substantial, reasonable and legitimate questions as to the extent of the insurer's liability or of the

insured's loss." *Louisiana Bag*, 08–0453 at p. 16, 999 So.2d at 1116. The *Louisiana Bag* case thus stands simply for the position that penalties are appropriate when an insurer fails to pay the undisputed amount due. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 585 (5th Cir.2011).

****21** As a commentator points out, the trio of out-of-state cases on which the OPSB relies is factually similar in the following respect:

> Courts typically excuse performance if the insurer wrongfully withholds payment of the actual cash value proceeds and engages in conduct that: (1) manifests a callous disregard of the insured's rights under the policy; (2) is extreme or outrageous and designed to deprive the insured of its rights under the policy; or (3) manifests an absence of good faith. Ultimately, whether performance of the condition precedent is excused depends upon whether the insurer acted in good faith during the claims process.

Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L.Rev. 295, 323 (1999).

[18] Both the *Louisiana Bag* case and the trio of out-of-state cases address the issue of an insurer's bad faith during the claims process. The gist of the OPSB's argument is that there is a genuine issue of material fact in this case regarding the Defendant Insurers' alleged fault—bad faith—and that summary judgment was therefore inappropriately granted. Addressing this argument, the trial court at the hearing on the motion for new trial noted that the OPSB was requesting that it "reform the contract and nullify that provision [the suspensive condition]." The trial court further noted that this argument was premised on the Defendant Insurers' failure to tender sufficient funds. In its reasons for judgment, the trial court noted that the "OPSB claims, however, that Westchester and RSUI are at fault for the OPSB's inability to repair all of its properties within the two year time period thereby complying with the contract provision, and because of that, the contract provision should be deemed fulfilled." Finding the policy language clear and unambiguous, the trial court denied the motion for new trial and thereby implicitly rejected the OPSB's reliance on Article 1772 to excuse compliance with the suspensive condition. We find no error in the trial court's ruling.

****22** The application of the prevention of performance doctrine to excuse an insured from the clear and unambiguous requirement of repairing or replacing as a condition precedent to recovery under the policy has been rejected by other courts. *See Florida Ins. Guar. Ass'n v. Somerset Homeowners Ass'n., Inc.*, 83 So.3d 850, 852 (Fla.App. 4 Dist.2011) (citing *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 Fed.Appx. 659 (11th Cir.2010)). As the *Buckley* court explained:

> "Applying the doctrine of prevention of performance in this case would impermissibly rewrite the insurance contract on the equitable theory that it would be too costly for Buckley Towers to comply with the terms of the agreement.... [C]ourts are not free to rewrite the terms of an insurance contract and ***1219** where a policy provision 'is clear and unambiguous, it should be enforced according to its terms.' "

Somerset Homeowners, 83 So.3d at 852 (quoting *Buckley*, 395 Fed.Appx. at 663 (quoting *Acosta, Inc. v. Nat'l. Union Fire Ins. Co.*, 39 So.3d 565, 573 (Fla. 1st DCA 2010))). As noted, the trial court in this case gave similar reasons for implicitly rejecting the OPSB's reliance on Article 1772 (the doctrine of prevention of performance). We find no error in the trial court's ruling. We thus find the OPSB's reliance on Article 1772 (the doctrine of frustration of performance) misplaced.

(iii) equitable principles of waiver and estoppel

[19] The OPSB next contends that the trial court erred in granting summary judgment because genuine issues of material fact exist as to "whether the Defendant Insurers extended the two-year period OR should be estopped and/or waived their right to enforce the two-year period." The record reflects that the Defendant Insurers, through their affidavits, established that they never extended the two-year limitation period. The OPSB presented no evidence to the contrary. Nonetheless, as the OPSB contends, under the equitable principles of waiver and ****23** estoppel, the conduct of the parties may modify the coverage provided by the policy. 15 William Shelby McKenzie, H. Alston Johnson, III, La. Civ. L. Treatise, INSURANCE LAW & PRACTICE § 1:5 (4th ed.2012). We separately address each of the equitable theories of waiver and estoppel.

Waiver

The waiver theory was extensively reviewed by this court in *Arceneaux v. Amstar Corp.*, 06–1592 (La.App. 4 Cir. 10/31/07), 969 So.2d 755. This court noted that the two seminal Louisiana Supreme Court cases on waiver are *Tate v. Charles Aguillard Ins. & Real Estate, Inc.*, 508 So.2d 1371 (La.1987); and *Steptore v. Masco Constr. Co.*, 93–2064 (La.8/18/94), 643 So.2d 1213. *Arceneaux*, 06–1592, p. 10, 969 So.2d at 765. We further noted that the Supreme Court in *Tate* extensively reviewed the out-of-state jurisprudence on waiver; rejected the then-majority view that "waiver cannot be invoked to broaden coverage to include risks not included or expressly excluded from the insurance contract," *Id.;* and held that " 'the best view is that waiver may apply to any provision of an insurance contract under which the insurer knowingly and voluntarily elects to relinquish his right, power or privilege to avoid liability, even though the effect may bring within coverage risks originally excluded or not covered.' " *Id.* (quoting *Tate*, 508 So.2d at 1375).[13] We further ***1220** noted that the ****24** Supreme Court in the *Tate* case nevertheless cautioned that " 'reliable proof of such knowing and voluntary waiver is necessary and the burden of producing it, as in the proof of obligations, generally falls on the party who demands performance.' " *Id.*

In *Steptore*, the Supreme Court reaffirmed the principle it set forth in *Tate* that any policy provision can be waived; and it further defined the proof required to establish a waiver by enumerating the following four elements of waiver: (1) an existing legal right; (2) knowledge of the existence of that right; and (3) either (a) an actual intention to relinquish the right, or (b) conduct so inconsistent with the intent to enforce the right so as to induce a reasonable belief that the right has been relinquished. *Arceneaux*, 06–1592, p. 14, 969 So.2d at 767 (citing *Steptore*, 93–2064 at p. 4, 643 So.2d at 1216).

The OPSB contends that the Defendant Insurers waived their right to raise the two-year limitation period because they failed to raise it in either their reservation of rights letters or their original answers that they filed within the two-year period. The OPSB further contends that the two-year limitation period is an affirmative defense that under La. C.C.P. art. 1005 is required to be specifically pleaded in a defendant's answer. The OPSB still further contends that the ****25** requirement of specifically pleading an affirmative defense is not satisfied by pleading an insurance policy "in extenso." *Dixie Savings and Loan Ass'n v. Pitre*, 99–154, pp. 23–24 (La.App. 5 Cir. 7/27/99), 751 So.2d 911, 924–25.

The OPSB argues that the Defendant Insurers' failure to specifically mention the two-year limitation period in their original answers, which tracked the language of their reservation of rights letters, resulted in a waiver of their right to assert the two-year condition. The OPSB further argues that since the Defendants Insurers cited only the title to the Ordinance or Law Endorsement in their original answers and reservation of rights letters, they "denied all coverage for ordinance or law which is a clear misrepresentation of the policy coverages, or a failure to divulge pertinent facts, such as the fact that Ordinance or Law coverage was added back to the policy by endorsement (with conditions)."

RSUI responds that the OPSB's contention is not that the Defendant Insurers failed to cite the applicable endorsement provision in their reservation of rights letters and original answers; rather the OPSB's contention is that they failed to "quote the applicable provision rather than citing it and providing the number of the applicable endorsement form." RSUI argues that this contention is without merit. RSUI further argues that the Defendant Insurers pleaded the Ordinance or Law ***1221** Endorsement as an affirmative defense and raised it in their reservation of rights letters; hence, there was no waiver. We agree.

In the March 28, 2006 reservation of rights letter, RSUI's Vice President, Mr. Koski, advised the OPSB that it had been investigating the OPSB's claim "under a complete reservation of rights" and that "one or more of the following provisions may be applicable to the loss." The listed provisions that followed included both the Ordinance or Law Exclusion and the Ordinance or Law ****26** Endorsement. The Ordinance or Law Exclusion was quoted, but the Ordinance or Law Exclusion was referenced as follows: "ENDORSEMENT # 002–ORDINANCE OR LAW COVERAGE." RSUI's letter closed with the following statement: "Please be further advised that RSUI does not waive any provision or stipulation of the policy or waive any right or defense under that policy whether or not identified above. RSUI reserves all of its rights under the policy and applicable law."[14]

In their original answers and affirmative defense, filed in January 2007, the Defendant Insurers quoted the Ordinance or Law Exclusion in full, but only cited the Ordinance or Law Endorsement by title and number.[15] In their original answers they averred that "[a]ll or some of the damages for which the plaintiff seeks recovery may be excluded, restricted or limited from coverage under the primary policy's Ordinance or Law coverage as set forth in Endorsement # 002 [Form bearing

the following identifiers: CPO404(Ed. 07/88); LX1086].” In their subsequent answers and affirmative defenses, which were filed in response to the OPSB's November 2009 Second Amended and Supplemental Petition and thus after the two-year period elapsed, the Defendant Insurers quoted in full the Ordinance or Law Endorsement, including the two-year limitation period.

[20] **[21]** ****27** Contrary to the OPSB's contention, the Defendant Insurers expressly reserved their rights in their reservation of rights letters that were sent to the OPSB before the expiration of the two-year period. “A prompt reservation of rights letter serves the purpose of negating the inference of a voluntary relinquishment of a known right to contest coverage.” *Arceneaux*, 06–1592 at p. 16, 969 So.2d at 768 (citing Robert Keeton, *Insurance Law* § 6.6 (1971)). In both their reservation of rights letters and original answers, the Defendant Insurers cited the pertinent provision —the Ordinance or Law Endorsement—by title, endorsement number, form number, and relevant endorsement heading. The Defendant Insurers, as RSUI contends, thereby fairly apprised the OPSB of their intent to rely on the ***1222** Ordinance or Law Endorsement. *See River Bend Capital, LLC v. Lloyd's of London*, 10–1317, p. 5 (La.App. 4 Cir. 4/13/11), 63 So.3d 1092, 1097 (finding insurer effectively communicated that the doctrine of accord and satisfaction would be asserted as a defense despite its failure to include the magic words “accord and satisfaction”).

[22] **[23]** **[24]** Nor do we find persuasive the OPSB's contention that the Defendant Insurers had a duty to inform them of the two-year limitation period. “An insured cannot, absent a statute to the contrary, ordinarily avoid a limitations provision on the grounds of not having been advised of its existence by the insurer.” 2 Allan Windt, INSURANCE CLAIMS & DISPUTES, REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS, § 9.5 (5th ed.2007) (citing *Stephens v. Audubon Ins. Co.*, 27,658 (La.App. 2 Cir. 12/6/95), 665 So.2d 683, 686). An insured is presumed to know the contents of its policy. *Id.; see* also *Isidore Newman School v. J. Everett Eaves, Inc.*, 09–2161, pp. 8–9 (La.7/6/10), 42 So.3d 352, 357. “Any feigned ignorance of the policy's endorsements and ****28** exclusions does not affect their validity.” *Piligra v. America's Best Value Inn*, 10–254, p. 13 (La.App. 3 Cir. 10/6/10), 49 So.3d 479, 487–88. An insured thus cannot “blame the insurance company for his or her own failure to read the policy.” *Windt, supra.* The OPSB's reliance on the waiver doctrine is thus misplaced.

Estoppel

[25] To establish an estoppel claim, a party is required to prove the following three elements: “(1) A representation by conduct or work; (2) justifiable reliance thereon; and (3) a change of position to one's detriment because of the reliance on such representation.” *Case v. Louisiana Medical Mut. Ins. Co.*, 624 So.2d 1285, 1290 (La.App. 3rd Cir.1993); see *also South Central Bell Telephone v. Rouse Company of Louisiana*, 590 So.2d 801, 804 (La.App. 4th Cir.1991) (citation omitted). [16]

The OPSB's estoppel argument is based on the series of correspondence documenting the written agreements between the parties to extend the policy deadline for filing a proof of loss and the discovery deadline in this suit. The OPSB contends that it relied on these extensions and that it believed these extensions included all time limitations under its policy. RSUI counters that the series of correspondence on which the OPSB relies related to providing papers—the proof of claim required under the policy and the discovery responses in this litigation. RSUI further counters that the OPSB presented no evidence that the Defendant Insurers made any representations supporting the OPSB's position.

[26] **[27]** ****29** As noted, the Defendant Insurers presented affidavits in support of their motions for summary judgment establishing that the Defendant Insurers never granted a written an extension of the two-year limitation period. The OPSB, as RSUI contends, failed to present ***1223** any evidence that the Defendant Insurers made any representations that any of the insurers were extending the two-year limitation period. Moreover, such an extension was required by the policy to be in writing. Neither granting an extension of time to provide discovery responses nor granting an extension of time to file a proof of loss can reasonably be equated with an extension of the two-year limitation period for repairs or replacement under the policy. *See L.T. v. Chandler*, 40,417, p. 7 (La.App. 2 Cir. 12/14/05), 917 So.2d 753, 758 (rejecting estoppel claim given that “[n]o representation was made to the plaintiffs that there definitely was insurance coverage for all claims made”); *Case*, 624 So.2d at 1287. Estoppel is disfavored in Louisiana law and “rarely applied.” *Id.* This is not one of the rare cases in which estoppel should be applied.

In sum, we find the OPSB's reliance on the equitable theories of waiver and estoppel misplaced.

(iv) prematurity

The OPSB contends, as it did before the trial court, that the motion for summary judgment was decided prematurely. The OPSB maintains that the trial court erred by deciding the motion for summary judgment because important discovery was not completed. In support, the OPSB cites La. C.C.P. art. 966 C(*l*), which provides that summary judgment should only be considered "[a]fter adequate discovery or a case is set for trial."

[28] Construing Article 966, this court has held that "while parties must be given fair opportunity to carry out discovery and present their claim, there is no absolute ****30** right to delay action on motion for summary judgment until discovery is complete." *Thomas v. North 40 Land Development, Inc.*, 04–0610, p. 31 (La.App. 4 Cir. 1/26/05), 894 So.2d 1160, 1179 (quoting *Butzman v. Louisiana Power and Light Co.*, 96–2073, p. 4 (La.App. 4 Cir. 4/30/97), 694 So.2d 514, 517). Similarly, construing article 966, the Louisiana Supreme Court has held that "[t]he only requirement is that the parties be given a fair opportunity to present their claim. Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Simoneaux v. E.I. du Pont de Nemours and Co.*, 483 So.2d 908, 912–13 (La.1986).

[29] When the words of an insurance contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent (La.C.C. art.2046); and additional discovery cannot change the result. *See Hamilton v. Willis*, 09–0370, p. 3 (La.App. 4 Cir. 11/4/09), 24 So.3d 946, 948 (rejecting argument that summary judgment was premature, noting that "[a]dditional discovery cannot change the motorsports exclusion, which we find to be clear and unambiguous and not leading to absurd consequences"); *River Bend Capital*, 10–1317 at p. 5, 63 So.3d at 1096 (holding that "[f]urther discovery ... is unnecessary where the language is clear and unambiguous as here"). Such is the case here. Thus, we find no abuse of discretion in the trial court's finding that summary judgment was appropriate at this procedural juncture.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED

Parallel Citations

296 Ed. Law Rep. 707, 2012-1686 (La.App. 4 Cir. 6/5/13)

Footnotes

1 This case was removed to federal court, but was remanded to state court. *Orleans Parish School Bd. v. Lexington Ins. Co.*, 2007 WL 1558640 (E.D.La.2007) (*unpub.*). The Louisiana Department of Education, the Board of Elementary and Secondary Education, and the Recovery School District intervened in the suit. There have been multiple prior appeals to this court in this case. *See Orleans Parish School Bd. v. Lexington Ins. Co.*, 11–0009 (La.App. 4 Cir. 10/5/11), 76 So.3d 592; *Orleans Parish School Bd. v. Lexington Ins. Co.*, 11–1753 (La.App. 4 Cir. 6/13/12), 95 So.3d 1205; and *Orleans Parish School Bd. v. Lexington Ins. Co.*, 11–1720 (La.App. 4 Cir. 8/22/12), 99 So.3d 723.

2 For ease of discussion, the four excess insurers are referred to in this opinion as the "Excess Insurers," and all five insurers are referred to collectively as the "Defendant Insurers."

3 A following-form policy is defined as "[a]n insurance policy that adopts the terms and conditions of another insurance policy." Bryan A. Garner, *Black's Law Dictionary*, 821 (8th ed.2004); *see Rivere v. Heroman*, 96–1568, p. 2 (La.App. 4 Cir. 2/5/97), 688 So.2d 1293, 1294. Unless there is an express exception to the form of the underlying policy, the excess insurer under a following-form policy is governed by the underlying policy's terms. *Toston v. Nat'l. Union Fire Ins. Co. of La.*, 41,567, p. 5 (La.App. 2 Cir. 11/3/06), 942 So.2d 1204, 1207.

4 The insurance policies at issue were in effect between May 1, 2005, and May 1, 2006.

Primary:	$50 million per occurrence—Lexington;
First Excess Layer:	$25 million per occurrence (from $50 million to $75 million)—shared between Clarendon (60% of up to $25 million or $15 million) and Essex (40% of up to $25 million or $10 million) per occurrence;
Second Excess Layer:	$25 million per occurrence (from $75 million to $100 million)—Westchester; and
Third Layer:	$ 100 million per occurrence (from $ 100 million to $200 million)—RSUI.

5 Two motions for summary judgment were filed. Clarendon filed its own motion and the other three Excess Insurers filed a joint motion. Before the instant motions for summary judgment were filed, Lexington settled its claim and was dismissed from the suit. Subsequent to the hearing on the motions for summary judgment, two of the four excess insurers, Essex and Clarendon, settled their claims. Before this appeal was lodged, another of the excess insurers, Westchester, settled its claim. RSUI is the only remaining defendant, and it is the sole appellee. Nonetheless, this appeal affects, and the OPSB seeks a ruling on, "all layers of coverage as the excess polices are 'follow form' policies, which means the excess policies follow the terms, conditions, and definitions of coverage and recover stated in the primary policy, and coverage under the excess policies for increased costs of construction is also limited to two years from the date of loss."

6 This provision is referred to in this opinion as the "Ordinance or Law Exclusion."

7 This provision is referred to in this opinion as the "Ordinance or Law Endorsement." The Lexington policy provided that "A SUBLIMIT OF 25% OF THE COVERED LOSS OR $5,000,000., WHICHEVER IS GREATER SHALL APPLY SEPARATELY TO DEBRIS REMOVAL AND DEMOLITION & INCREASED COSTS OF CONSTRUCTION (DICC), AND LAW & ORDINANCE." As the OPSB points out, this additional coverage is limited to $50 million (25% of $200 million).

8 The Lexington policy provides that "[t]he Insured shall complete and sign a sworn proof of loss within ninety (90) days after the occurrence of a loss (unless such period be extended by the written agreement of the Company)." The policy further provides that "[a]ll adjusted claims shall be due and payable thirty (30) days after the presentation and acceptance of satisfactory proof(s)."

9 A suspensive condition is the equivalent of the common law condition precedent. *Southern States Masonry, Inc. v. J.A. Jones Const. Co.*, 507 So.2d 198, 204, n. 15 (La.1987) (citation omitted).

10 The two-year limitation period also falls under La. C.C. art. 1773, which provides that "[i]f the condition is that an event shall occur within a fixed time and that time elapses without the occurrence of the event, the condition is considered to have failed."

11 On appeal, the OPSB filed a motion to supplement the record with evidence it offered in support of its motion for new trial. This court denied the motion to supplement. *See Blount v. Exxon Corp.*, 395 So.2d 355, 358 (La.App. 1st Cir.1981) (noting that "until a new trial is granted, [new evidence] attached to plaintiff-appellant's motion for a new trial are not before this court and form no part of the record on appeal."); *see also* 2 Judge Steven R. Plotkin and Mary Beth Akin, LA. PRAC. CIV. PROC., Article 966 (2012) (noting that "[a]n appellate court may not consider evidence that was not before the trial court when it reviews the granting of a motion for summary judgment.").

12 La. R.S. 22:1892 A provides:

> (3) ... In the case of catastrophic loss, the insurer shall initiate loss adjustment of a property damage claim within thirty days after notification of loss by the claimant....
>
> (4) All insurers shall make a written offer to settle any property damage claim, including a third-party claim, within thirty days after receipt of satisfactory proofs of loss of that claim.

13 Given that Louisiana law differs from other states (including Mississippi) on this point, the OPSB contends that RSUI's reliance on *Edgewood Manor Apartment Homes LLC v. RSUI Indem. Co.*, 782 F.Supp.2d 716 (E.D.Wis.2011), is misplaced. In *Edgewood*, which involved the same Ordinance or Law Endorsement as this case, the federal district court, applying Mississippi law, held that RSUI's failure to raise the two-year limitation period did not result in the waiver of that defense, reasoning:

> Plaintiffs' only worthy argument is that RSUI failed to note this two-year deadline in its letters rejecting any future obligations if Southland sold the property, thus waiving this point. But the argument is not persuasive. Under Mississippi law, "[w]aiver is the voluntary relinquishment of known right." But the waiver doctrine cannot be used to create coverage or expand existing coverage to risks that are expressly excluded by a policy. RSUI did not relinquish voluntarily any right under the two-year clause for code upgrades. Neither Steber's March 12, 2008, letter nor Murphy's July 29, 2008, letter mentioned the two-year time limit. Those letters reserved all other rights under the RSUI Policy, whether or not mentioned at that time, and stated that any failure to raise other terms and conditions of the RSUI Policy in the letters "should not be deemed a waiver of RSUI Indemnity Company's right to do so in the future should circumstances warrant."
>
> No express waiver or voluntary relinquishment of the two-year time limit was made. And in light of RSUI's reservation of rights under other provisions of the RSUI Policy, no implied waiver may be found and no reasonable jury would conclude otherwise. Moreover, the doctrine of waiver cannot be used to extend coverage to increased costs that occur outside the period delimited by the policy. Thus, summary judgment will be denied to plaintiffs and granted in defendant's favor on the issue of code upgrade proceeds.

Edgewood, 782 F.Supp.2d at 729–30 (citations omitted).

RSUI cites *Edgewood* only for the proposition that even if it had failed to raise the two-year limitation period it would not have waived the defense. Since RSUI did raise the two-year limitation period in this case, we find it unnecessary to determine whether, as the OPSB contends, *Edgewood* is distinguishable.

14 Essex's reservation of rights letter included similar language; in addition, it stated: "Please be advised that neither Mr. Beaver nor other representatives of the Essex Insurance Company have the right to waive any of the Policy provisions or determine any coverage position."

15 The OPSB points out that four of the five Defendant Insurers were represented by the same counsel and filed answers containing the same language. As the OPSB notes, these insurers' original answers tracked the language of their reservation of rights letters. The fifth insurer, Clarendon, included the following language in its original answer:

> Plaintiff's claims herein are limited by the terms and conditions of the insurance policy issued by Clarendon and all of its endorsements which are attached in full to this answer and expressly incorporated into the answer as if copied herein in extenso. Plaintiff's claims are diminished and/or barred by the other insurance provisions of the Clarendon policy.

Moreover, Clarendon adopted "the affirmative defenses of each and every similarly situated defendant."

16 The Louisiana Legislature codified a form of equitable estoppel in La. C.C. art.1967. *Lakeland Anesthesia, Inc. v. United Healthcare of Louisiana, Inc.*, 03–1662, p. 18 (La.App. 4 Cir. 3/17/04), 871 So.2d 380, 393 (citing *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir.2000) (noting that detrimental reliance is one of the elements required for the usual application of equitable estoppel)). Article 1967 provides that "[a] party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying." La. C.C. art.1967.

110 So.3d 110
District Court of Appeal of Florida,
Fourth District.

Roy JOSSFOLK, Appellant,
v.
UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Appellee.

No. 4D12–443. | March 20, 2013.

Synopsis

Background: Insured brought declaratory-judgment action against property insurer, asserting that insurer was required to participate in appraisal for ordinance and law coverage concerning insured's roof, which was damaged during hurricane. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Carol–Lisa Phillips, J., granted insurer's motion for summary judgment. Insured appealed.

Holdings: The District Court of Appeal, Warner, J., held that:

[1] formal procedures of Arbitration Code did not apply to property insurance policy's appraisal process;

[2] insured had right to appraisal regarding ordinance and law coverage once city required compliance with current ordinances to complete repairs; and

[3] genuine issue of material fact as to how much of roof would need to be replaced precluded summary judgment.

Reversed and remanded.

Attorneys and Law Firms

***111** Michael R. Seward of Ligman Martin, P.L., Miami, for appellant.

Michelle Diverio, Anthony J. Tinelli and Evelyn Cobos of Lyndecker Diaz, Miami, for appellee.

Opinion

WARNER, J.

[1] The appellant challenges a final summary judgment in favor of his insurance company in a declaratory judgment action in which he contended that he was entitled to an appraisal of "Ordinance and Law" coverage based on roof damage caused by a hurricane. "Ordinance and Law" is the cost of bringing any structure (here, the roof) into compliance with applicable ordinances or laws. [1] The insurance company contended that in a prior proceeding all of the appellant's damages had been appraised. We reverse the trial court's summary judgment, because the prior proceeding had not appraised Ordinance and Law coverage, nor could it because none had been incurred at the time of the appraisal.

Appellant Jossfolk submitted a claim to his insurance company, appellee, United Property & Casualty Insurance Company ("United"), alleging that his insured property was damaged in Hurricane Wilma. United found no wind related damages but paid for other damages. Jossfolk disputed the amount and requested that the claim be submitted to appraisal. Each party appointed an appraiser, and the two selected a neutral appraiser. The neutral appraiser submitted a proposed appraisal for ***112** damages but excluded roof repair. Jossfolk's appraiser objected to the proposed award because it did not include Ordinance and Law coverage for replacement of the roof, which Jossfolk's appraiser believed was necessary, based upon his belief that the building department would not allow for any repair of the roof without meeting the current code. The neutral appraiser ultimately increased the award on other damages and allowed for the removal and replacement of two squares of concrete tile roof (220 square feet). The award stated that "Ordinance and Law" was "**not appraised.**" United made payment to Jossfolk for the amount of the award.

Jossfolk's contractor then applied to the City of Weston ("the City") for a roofing repair permit in which he claimed 1359 square feet or about 34% of the roof area needed repair. The roofing repair permit was rejected by the City because the repair exceeded the area allowed by the building code of 25% of the total roof area which could be repaired without requiring replacement of the entire roof system to conform to the current code.

Thereafter, Jossfolk's representative requested United to pay for the entire roof repair under Ordinance and Law coverage. United responded that "this claim was settled in appraisal on April 27, 2009 in which the *umpire rejected your request for law and ordinance.*" (Emphasis supplied). As a result, Jossfolk filed a Declaratory Judgment action, seeking a ruling

that United must participate in an appraisal for Ordinance and Law coverage. United answered and moved for summary judgment arguing in its motion that the prior appraisal did not include loss for Ordinance and Law coverage; therefore, Jossfolk was not entitled to an appraisal. The trial court granted the motion for summary judgment without making a declaration of Jossfolk's rights. He appeals.

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The standard of review is *de novo*. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000).

[2] Although United argued that the arbitration code should apply to this appraisal process, *Allstate Insurance Co. v. Suarez*, 833 So.2d 762 (Fla.2002), holds that appraisal clause was not an agreement to arbitrate, and the formal procedures of the Arbitration Code are inapplicable. Thus, we reject United's contention that the only way Jossfolk can challenge the arbitration award is through section 682.13(1), Florida Statutes,[2] within the Arbitration Code. *See also Citizens Prop. Ins. Corp. v. Cuban–Hebrew Congregation* ***113** *of Miami, Inc.*, 5 So.3d 709, 712 (Fla. 3d DCA 2009) (citing *Suarez*, 833 So.2d at 763–66) ("The Florida Supreme Court has held that the Florida Arbitration Code is not applicable to appraisal cases.").

[3] While United argued that the appraisers denied Ordinance and Law coverage, we conclude that it is clear from the award, as the appraisers stated, Ordinance and Law coverage was "not appraised." This is consistent with *Ceballo v. Citizens Property Insurance Corp.*, 967 So.2d 811 (Fla.2007), which is determinative of this issue. The Ceballos lost their home to a fire, and Citizens paid the face value of the policy. The Ceballos then sought payment under a supplemental coverage for Ordinance and Law. The parties agreed that the Ceballos were entitled to recover under this supplemental coverage but disagreed as to whether they had to first show an actual loss in order to recover under that provision. The Third District found that there had to be actually incurred expenses in order for them to recover. The Supreme Court agreed: the Ceballos had received the face value for the loss of their home, but that loss did not affect their obligation to show that they incurred an additional loss in order to recover under the supplemental coverage. As the supreme court noted, " 'to incur' means to become liable for the expense, but not necessarily to have actually expended it." 967 So.2d at 815.

Ceballo supports Jossfolk's contention that Ordinance and Law is not recoverable until it is incurred and thus could not have been appraised at the time of the original appraisal. Here, at the time of the original appraisal, Jossfolk had not applied for repairs of the roof. Thus, he had not incurred or become liable for any additional expense until the City had required compliance with current ordinances in order to complete repairs. It was at that point, according to *Ceballo* that Jossfolk incurred additional loss, for which he had the right to an appraisal.

[4] United also argues that Ordinance and Law coverage is not implicated, because the appraisers allowed for only two square feet of tile replacement, which was considerably less than the 25% of total area which would trigger the City's requirement that the entire roof be replaced to current ordinance standards. This was not a ground argued by United in its motion for summary judgment. Nevertheless, Jossfolk offered an affidavit from its general contractor stating that the City would require replacement because the original roof tiles were no longer made and could not be replaced. Thus, the evidence did not conclusively refute the factual issues in this case.

For these reasons, we reverse the final summary judgment and remand for further proceedings.

CIKLIN, J., and BLANC, PETER, Associate Judge, concur.

Parallel Citations

38 Fla. L. Weekly D649

Footnotes

1 "Ordinance and Law" coverage was explained in *Citizens Property Insurance Corp. v. Mallett*, 7 So.3d 552, 554 n. 1 (Fla. 1st DCA 2009):

> [L]aw and ordinance coverage under the policy provides reimbursement for up to 25% of dwelling policy limits for increased repairs and replacement costs incurred by the insured to comply with the requirements of the applicable laws and ordinances regulating construction or repair of property. *See, e.g.*, § 627.7011(1)(b), Fla. Stat. (2004).

2 Section 682.13(1) provides:

(1) Upon application of a party, the court shall vacate an award when:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.

(d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.

(e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

2013 WL 1284389
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Christopher JAKUBOWSKI, Plaintiff,
v.
FEDERAL EMERGENCY
MANAGEMENT AGENCY, Defendant.

No. 2:12–CV–02202 CCC. | March 27, 2013.

Attorneys and Law Firms

Frank P. Winston, Lerner Arnold & Winston, LLP, New York, NY, for Plaintiff.

Kristin Lynn Vassallo, Office of the U.S. Attorney, Newark, NJ, for Defendant.

Opinion

OPINION

JOSEPH A. DICKSON, U.S.M.J.

***1** This matter comes before the Court upon cross-motion by plaintiff Christopher Jakubowski ("Plaintiff") to (i) amend the complaint pursuant to Fed.R.Civ.P. 15(a) to add two additional causes of action; and (ii) to stay this action pending the parties' participation in an appraisal process. Pursuant to Rule 78 of the Federal Rules of Civil Procedure, no oral argument was heard. Upon consideration of the parties' submissions, and for the reasons stated below, Plaintiff's cross-motion: (i) to amend the complaint to add an additional breach of contract claim (Second Cause of Action for Breach of Contract) is GRANTED; (ii) to amend the complaint to add a declaratory judgment claim (Third Cause of Action for Declaratory Judgment) is DENIED; and (iii) to stay the action pending an appraisal is DENIED.

I. *BACKGROUND.*

This dispute arises out of a flood insurance policy issued to Plaintiff by defendant the Federal Emergency Management Agency ("FEMA"). Plaintiff is the named insured for property located at 358 River Drive in Garfield, New Jersey (the "Property"). (Br. Supp. Cross–Motion 1, ECF No. 11–23). The Property was directly insured by FEMA under a Standard Flood Insurance Policy ("SFIP") with a policy limit of $250,000 in building coverage only, and a $5,000 deductible (the "Policy"). (Opp. Br. 6, ECF No. 20). Plaintiff alleged that on August 28, 2011, the Property was substantially damaged as a result of the flooding caused by Tropical Storm/[H]urricane Irene. (Proposed Am. Compl. ¶ 12, ECF No. 11–2). On August 29, 2011, FEMA was notified of the loss. (Opp. Br. 6, ECF No. 20).

A. *Investigation of the Property and Assessment of the Loss.*

On October 11, 2011, James A. Valentine ("Valentine"), an independent adjuster retained by FEMA to adjust the claim related to the Property, issued a final report assessing the actual cash value of Plaintiff's loss at $77,578.37, after the $5,000 deductible. (Opp. Br. 12, ECF No. 20). Plaintiff alleged that during one of the site visits, Valentine informed Plaintiff that he could hire his own engineer, which Plaintiff elected to do. (Decl. Christopher Jakubowski ("Plaintiff's Decl.") ¶ 12, ECF No. 11–21). On October 12, 2011, FEMA issued Plaintiff an advanced payment in the amount of $15,000. (Opp. Br. 12, ECF No. 20).

Plaintiff retained A.A. Yorizzo ("Yorizzo") of J–Con Inc. ("J–Con") to inspect the property and prepare an estimate of extent of flood damage to the Property. (*Id.* at ¶ 18). The estimate prepared by J–Con, dated October 25, 2011, assessed the amount of damages to the Property at significantly higher than the report prepared by Valentine, specifically $215,115.00, excluding structural items. (Decl. Alison Jakubowski ("A. Jakubowski Decl.") Ex. C, ECF No. 11–8).

B. *The Proof of Loss.*

On November 21, 2011, with the assistance of J–Con, Plaintiff executed a proof of loss (the "Proof of Loss"), which is a document required by the Policy to be filed within sixty days after the loss. (Opp. Br. 4, ECF No. 20). A proof of loss is a statement as to the amount an insured is claiming under its policy, signed and sworn by the insured, that provides specific information including a description of the loss and detailed repair estimates. (*Id.*). In light of the discrepancy between the reports prepared by Valentine and J–Con, and because Plaintiff was required to submit a proof of loss within 60 days, Plaintiff filed the Proof of Loss identifying the "undisputed" amount of his loss as $75,138.99. (Opp. Br. 12, ECF no. 20). However, Plaintiff explicitly indicated that this amount

reflected the "undisputed amount only," and reserved the right to amend the claim and supplement and/or amend the Proof of Loss. (*Id.*).

***2** On November 28, 2011, FEMA issued Plaintiff a second check in the amount of $62,587.37, for a total of $77,587.37 in flood claim payment—which was the amount identified in Valentine's report. (*Id.*). Plaintiff conceded that it never filed an additional sworn proof of loss document with respect to the disputed portion of its claim, although, as set forth below, he continued to negotiate with FEMA regarding his ultimate recovery.

C. *The Appraisal Clause.*

Simultaneous with filing the Proof of Loss, Plaintiff also demanded that FEMA participate in an appraisal process pursuant to the Policy.

The Policy provided, in relevant part, as follows:

> P. Appraisal. If you and we fail to agree on the actual cash value or, if applicable, replacement cost of your damaged property to settle upon the amount of loss, then either may demand appraisal of the loss. In this event, you and we will each choose a competent and impartial appraiser within 20 days after receiving a written request from the other.

(emphasis added) (the "Appraisal Clause"). (Br. Supp. Cross–Motion Amend 3, ECF No. 11–23).

Plaintiff sent two letters to Valentine demanding an appraisal. In one letter, Plaintiff stated: "Please be advised that I the insured pursuant to the terms and conditions of the insurance policy have elected to go to appraisal." (A. Jakubowski Decl., Ex. H); (*see also* Am. Compl. ¶¶ 18, 22). In the second letter, Plaintiff stated: "Due to the fact that both parties could not reach an agreement and we have selected to go to appraisal we now request the full undisputed amount of money to be released." (A. Jakubowski Decl., Ex H).

Plaintiff alleged he and his wife followed-up with Valentine on numerous occasions regarding the status of their demand for appraisal and Proof of Loss. (Plaintiff's Decl. ¶¶ 23–28, ECF No. 11–21). Plaintiff also forwarded the Proof of Loss and demand for appraisal directly to FEMA. (*Id.* at ¶ 29). In mid-December, a FEMA representative allegedly informed Plaintiff that FEMA could not accept the values that J–Con submitted in its report, and requested Plaintiff to obtain estimates directly from the trades that would be performing the work. (*Id.*). The FEMA representative allegedly also requested that Plaintiff submit an outline of the differences between the J–Con estimate and the Valentine estimate, both in terms of the scope of work and price differentials. (*Id.* at ¶ 31). On December 24, 2011, Plaintiff submitted to FEMA several quotes from the trades that were going to perform the work on the Property, as well as an explanation from J–Con regarding the differences between its and Valentine's estimates. (*Id.* at ¶ 32).

On January 24, 2012, FEMA Claims Examiner Stacy Olsen sent Plaintiff a letter explaining why FEMA denied Plaintiff's request for payment on certain damages and, with respect to Plaintiff's request for an appraisal, stating:

> At this time we must deny your request for Appraisal under the [SFIP] because your request is premature. Appraisal is only for determining the AVC of the loss, and not to determine the scope of covered damage. We need a list of items that are covered by the flood policy that you feel were left out of the settlement, and the documentation of prices that you believe are not sufficient to repair or replace[ ] the flood damages items ... We cannot determine whether you and we agree upon the Actual Cash Value of your claim until you have identified the items in dispute and we've had a chance to evaluate the same; because of this, we cannot yet determine whether or not Appraisal is appropriate. For the reason, the [SFIP] requires that we deny your request for Appraisal.

***3** (Opp. Br. 8, ECF No. 20).

D. *Plaintiff's Proposed Amended Complaint.*

On April 11, 2012, Plaintiff filed a complaint asserting a single cause of action for breach of contract based on FEMA's failure to pay the full amount of loss allegedly due under the Policy. (Compl., ECF No. 1). On July 10, 2012, FEMA filed

a motion to dismiss the complaint pursuant to Rule 12(b)(1) and 12(b)(6), or, in the alternative, for summary judgment pursuant to Rule 56. On August 21, 2012, in response to FEMA's motion, Plaintiff filed a cross-motion to amend the complaint and to stay the action so that the parties could participate in the appraisal process. With respect to the cross-motion to amend, Plaintiff's pleading seeks to assert two new claims: (1) a second cause of action for breach of contract based on FEMA's alleged repudiation of the contract, which purportedly occurred when FEMA "failed to participate in [the] appraisal process"; and (2) a cause of action seeking a declaratory judgment concerning Plaintiff's and FEMA's rights and obligations pursuant to the Appraisal Clause. (Proposed Am. Compl. ¶¶ 21–36). [1]

FEMA opposed the cross-motion to amend on the grounds that the proposed causes of action are subject dismissal. Specifically, FEMA argued that Plaintiff's proposed breach of contract claim is futile because Plaintiff failed to file a proof of loss for the amount at issue in this action, namely an amount greater than the $77,587.37 FEMA already paid, which exceeds the amount claimed on Plaintiff's Proof of Loss. Also, FEMA argued that Plaintiff may not proceed with a claim for declaratory judgment because the relief sought in such claim is redundant of Plaintiff's breach of contract claims.

In response, Plaintiff conceded that it only filed one Proof of Loss with respect to the "undisputed" portion of its claim. However, Plaintiff argued that FEMA's failure to timely engage in the appraisal process constituted a repudiation of the Policy and excused Plaintiff from further compliance with the Policy's provisions, including filing a proof of loss with respect to the disputed portion of its claim.

As such, this Court must determine whether Plaintiff should be permitted to amend its Complaint to assert the proposed causes of action, or whether these claims are subject to dismissal.

II. *STANDARD OF REVIEW.*

Fed.R.Civ.P. 15(a) allows a party to amend its pleadings by leave of court when justice so require. Rule 15(a) provides that after a responsive pleading has been filed:

> [A] party may amend its pleading only with the opposing party's written consent or the courts leave. The court should freely give leave when justice so requires.

Fed.R.Civ.P. 15(a)(2).

The grant or denial of leave to amend under Rule 15(a) is a matter "committed to the sound discretion of the district court." *Arab African Int'l Bank v. Epstein,* 10 F.3d 168, 174 (3d Cir.1993). The Third Circuit adopted a liberal approach to the amendment of pleadings under Rule 15 to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.,* 921 F.2d 484, 487 (3d Cir.1990) (internal citation omitted). The burden is generally on the party opposing the amendment to demonstrate why the amendment should not be permitted. *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

***4** Leave to amend a pleading may be denied where the court finds: (1) undue delay; (2) undue prejudice to the non-moving party; (3) bad faith or dilatory motive; or (4) futility of amendment. *Shane v. Fauver,* 213 F.3d 113, 115 (3d Cir.2000).

A proposed amendment may be denied based on futility if it "would fail to state a claim upon which relief could be granted." *Shane v. Fauver,* 213 F.3d at 115. Thus, "[i]n assessing 'futility' the District Court applies the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* To survive dismissal under Rule 12(b)(6), a complaint "must contain sufficient factual matter accepted as true to 'state a claim to relief that is plausible on its face." ' *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). In deciding a motion to dismiss pursuant to Rule 12(b)(6), a court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the non-moving party. *See Phillips v. County of Allegheny,* 515 F .3d 225, 234 (3d Cir.2008). For a complaint to survive dismissal under Rule 12(b)(6), it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." ' *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The defendant bears the burden of showing that no claim has been presented." *Hedges v. United States,* 404 F.3d 744, 750 (3d Cir.2005).

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice

of what the ... claim is and the grounds upon which it rests." ' *Twombly*, 127 S.Ct. at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Twombly*, 127 S.Ct. at 1964–65. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 1965 (internal citations omitted).

In light of *Iqbal*, district courts should conduct a two-part analysis when evaluating a motion to dismiss for failure to state a claim:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions.
>
> Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

***5** *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir.2009) (quoting *Iqbal*, 129 S.Ct. at 1949–50).

III. *DISCUSSION.*

This action is in its infancy. No answer has been filed, and FEMA's motion to dismiss the complaint was administratively terminated by the Court without prejudice pending resolution of the instant cross-motion for leave to amend, at which point defendant may re-file its motion to dismiss. Discovery has not commenced and the Complaint has not previously been amended. The parties do not argue, and the Court does not find, the existence of undue delay, unfair prejudice, or dilatory motive as a basis to deny leave to amend the Complaint. Rather, the issue for this Court is whether Plaintiff's proposed claims are futile.

A. *Proposed Second Cause of Action for Breach of Contract.*

The Court finds that Plaintiff's proposed breach of contract claim—which alleges that FEMA's failure to respond to Plaintiff's demand for appraisal within twenty days as required by the Policy constituted a repudiation and breach of the Policy—raises certain legal and factual questions that prevent this Court from finding that the proposed claim fails to state a claim upon which relief can be granted. Specifically, this Court rejects the notion that this case implicates a simple scope of coverage issue. Rather, there are disputed issues of fact regarding valuation—and valuation is an appropriate subject for appraisal under the Policy.

Plaintiff's argument is that FEMA repudiated the Policy by refusing to participate in the appraisal process *prior to* the date that Plaintiff would have otherwise been required to file a proof of loss with respect to the disputed portion of its claim. Plaintiff argued that as a direct result of this repudiation, it was relieved of its obligation to file a proof of loss before instituting this action. Plaintiff points to *Studio Farms Ltd. v. Standard Fire Ins. Co.*, 369 F.3d 376 (4th Cir.2004) in support of its argument. There, the Fourth Circuit held that the doctrine of repudiation can apply to an SFIP. *Id.* at 382 ("We therefore agree with [plaintiff] that, if [defendant's] refusal to provide building coverage under the SFIP amounted a repudiation of its policy for flood insurance, [plaintiff's] failure to file a proof of loss was not dispositive of its claim."). The Fourth Circuit remanded the action to the district court for a determination whether the insurer's conduct amounted to a repudiation. (*Id.* at 383). Given that repudiation may apply in the context of an SFIP, which would potentially nullify the effects of Plaintiff's failure to file an additional proof of loss, the Court cannot determine that Plaintiff's proposed breach of contract claim is futile.

The Court is not unmindful of the multitude of cases requiring strict compliance with the proof of loss requirement. *Suopys v. Omaha Prop. and Cas.*, 404 F.3d 805, 810 (3d Cir.2003); *Dawkins v. Witt*, 318 F.3d 606, 612 (4th Cir.2003); *Sanz v. United States Sec. Ins. Co.*, 328 F.3d 1314, 1318 (11th Cir.2003); *Mancini v. Redland Ins. Co.*, 248 F.3d 729, 733–34 (8th Cir.2001). However, the Court rejects FEMA's contention that the issue in this case purely relates to scope of work, which is not subject to the appraisal process, rather than valuation, which is a proper subject for appraisal. The parties' written communications make clear that the issue of the actual cash value of the loss, as memorialized on the Proof of Loss, was in dispute. The Court acknowledges the fact that Plaintiff has already been paid the full amount of the undisputed portion, and indeed more, claimed on the Proof of Loss—a fact which often results in dismissal of a claim. *Messa v. Omaha Prop. & Cas. Inc. Co.*, 122 F.Supp.2d 523,

530 (D.N.J.2000) ("Plaintiff's failure to submit a proof of loss statement ... for an amount in excess of that already paid by [the insurer] represents a complete failure to comply with the federal regulations and the terms of the SFIP"); *see also Miller v. Selective Ins. Co. of America*, No. 08–2296 (RBK/AMD), 2009 WL 5033952, *1, *4 (D.N.J. Dec.15, 2009); *Sutor v. Fed. Emergecy Mgmt. Agency*, No. 06–1371, 2009 WL 4268457, *1, *5 n. 4 (E.D.Pa.2009); *Howell v. State Farm Ins. Co.*, 540 F.Supp.2d 621, 627 (D.Md.2008); *Sodi II, LLC v. Selective Ins. Co. of America*, No. 06–2573(JAP), 2008 WL 141204, *1, *4 (D.N.J. Jan.11, 2008). Nevertheless, in light of the possibility that the doctrine of repudiation may have excused Plaintiff's failure to supplement its Proof of Loss and/or file a new proof of loss, the proposed breach of contract claim is not futile. [2]

***6** As such, Plaintiff's cross-motion to amend the Complaint to assert a Second Cause of Action for Breach of Contract is hereby GRANTED.

B. ***Proposed Third Cause of Action for Declaratory Judgment.***

Finally, the Court must determine whether Plaintiff's declaratory judgment count should be permitted or denied as redundant of its breach of contract claims.

Plaintiff's proposed declaratory judgment claim seeks a "judicial declaration ... to establish plaintiff['s] and defendant['s] rights and obligations pursuant to the appraisal provision of the Policy." (Proposed Am. Compl. ¶ 35, ECF No. 11–2). FEMA opposed the cross-motion to amend arguing that the claim was futile and that the relief sought in the claim was repetitive of Plaintiff's breach of contract claims. The Court agrees.

Plaintiff did not dispute FEMA's assertion that, in the context of a flood insurance suit a plaintiff may not bring a declaratory judgment claim unless there is a continuing controversy between the parties that will not be resolved by the existing cause of action. (Opp. Br. 19, ECF No. 20) (citing *Scritchfield v. Mutual of Omaha Ins. Co.*, 341 F.Supp.2d 675 (E.D.Tex.2004). The Court agrees with FEMA's argument that although Plaintiff alleged that the declaratory judgment count is necessary to determine to rights and obligations of the parties with respect to the appraisal process, this result will occur as a consequence of the Court resolving the breach of contract claims. Plaintiff has not alleged any other aspect of the Policy and/or Appraisal Clause that is in dispute and, therefore, its proposed declaratory judgment claim is redundant. *See Aldens, Inc. v. Packel*, 524 F.2d 38, 51–52 (3d Cir.1975); *John Evans Sons, Inc. v. Majik–Ironers, Inc.* 95 F.R.D. 186 (E.D.Pa.1982).

Plaintiff's cross-motion to amend the complaint to add a third cause of action for declaratory relief is DENIED.

IV. ***CONCLUSION.***

Plaintiff's cross-motion to amend the Complaint to assert an additional breach of contract claim for repudiation is granted. Plaintiff shall be permitted to amend its Complaint to assert an additional breach of contract claim for repudiation in the form set forth as the Second Cause of Action for Breach of Contract of the proposed amended counterclaim (ECF No. 11–2).

In addition, Plaintiff's cross-motion to amend the Complaint to assert a declaratory judgment claim is denied.

Finally, Plaintiff's cross-motion to stay this action pending the parties' participation in an appraisal process is denied.

SO ORDERED

Footnotes

1 Plaintiff also moved for the Court to stay this action pending an appraisal. The decision of whether to stay an action rests in the discretion of the trial court. *EDM Office Services, Inc. v. Hartford Lloyds Ins. Co.*, CIV.A. H–10–3754, 2011 WL 2619069, *1, *7 (S.D.Tex. July 1, 2011) ("While [a] trial court has no discretion to deny the appraisal, the court does have some discretion as to the timing of the appraisal.) (citations omitted). The taking of discovery, which will be allowed, should clarify any issues relating to which claims—namely, scope of work versus valuation claims—are subject to appraisal. In light of these considerations, the Court declines to issue a stay and denies Plaintiff's cross-motion to stay.

2 Furthermore, FEMA's invitation for Plaintiff to secure his own engineer and submit supporting information regarding price differentials raises questions concerning FEMA's understanding of the status of the Proof of Loss.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

DON WOLFE	§	
	§	
V.	§	CIVIL ACTION NO. G-10-578
	§	
AMERICAN BANKERS INSURANCE	§	
COMPANY OF FLORIDA	§	

OPINION AND ORDER

I now issue this Opinion and Order denying the "Motion for Summary Judgment" of Defendant, American Bankers Insurance Company of Florida (American Bankers).

Since this case is before me with the consent of the Parties, a recitation of the relevant facts seems unnecessary; the Parties and the Court are completely familiar with the almost undisputed pertinent facts in this case.

After carefully considering the facts, the language of the applicable regulations and the SFIP, the Parties' numerous submissions and arguments, and the relevant case law, I have concluded that Judge Feldman's Opinion in Qader v. FEMA, 543 F.Supp. 2d 558, 561-62 (E.D. La. 2008), is correct.[1] The one-year filing period begins to run when FEMA or its fiscal agent denies a claim that is based upon the insured's sworn proof of loss, not from the date a claim is denied based upon an adjuster's report. Until the insured submits a sworn proof of loss, there is no "statement of the amount (the insured) is claiming under the policy." Moreover, the filing of

[1] American Bankers argues that Judge Feldman repudiated this opinion in O'Connel v. Allstate Insurance Co., Civil Action No. 07-3316 (E.D. La. November 5, 2008), but I have personally conferred with Judge Feldman and he assures me he has not. In O'Connel, Judge Feldman found that Plaintiff's case was time-barred because, unlike Mr. Qader, she "never filed a formal proof-of-loss statement as required by federal regulations" and the language of the SFIP.

a proof of loss is a condition precedent to filing suit. Gowland v. Aetna Insurance Co., 143 F.3d 951, 954 (5th Cir. 1998) In attempting to reconcile the language of the regulations and the SFIP, I have concluded that the mailing of a pre-proof of loss notice letter of disallowance by a claims examiner, which informs the insured that he may file suit "within one-year of the date of this letter," does not trigger the one-year filing period in § 4072 or Article VII(R) of the SFIP. In this case American Bankers formally denied the Plaintiff's proof of loss on September 2, 2009. Plaintiff filed suit on August 3, 2010. I, therefore, find that the Plaintiff's lawsuit was timely filed.

I further find that the "earth movement" coverage issue presents a genuine issue of material fact which, albeit weak, precludes summary judgment.

Although I believe that equitable tolling is available in cases involving the National Flood Insurance Program, since I have determined that the Plaintiffs' suit was timely filed, I need not address equitable tolling in this matter.

For the foregoing reasons, it is **ORDERED** that the Motion for Summary Judgment (Instrument no. 22) of Defendant, American Bankers, is **DENIED**.

DONE at Galveston, Texas, this 1st day of March, 2013.

John R. Froeschner
United States Magistrate Judge

U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

W-13069

November 21, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the National Flood Insurance Program (NFIP) Direct Servicing Agent

FROM: James A. Sadler, CPCU, AIC
Director of Claims
National Flood Insurance Program

SUBJECT: **Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)**

Questions have been presented to FEMA concerning how the granting of the extension of the Proof of Loss deadline for National Flood Insurance Program (NFIP) policyholders damaged by Meteorological Event Sandy (ME Sandy) established by FEMA by regulation in the Standard Flood Insurance Policy (SFIP) interplays with the 1-year statute of limitations for an insured to bring a lawsuit established by Congress in 42 U.S.C. § 4072. FEMA is providing this Bulletin as an explanation to insurers of how the extended Proof of Loss deadline interacts with the 1-year statute of limitations established by statute. A brief review of the factual background is provided to put FEMA's guidance in context.

The SFIP is itself a Federal regulation promulgated by FEMA, which has three forms. The Dwelling form is found at 44 C.F.R. § 61, Appendix A(1); the General Property form is found in Appendix A(2); and the Residential Condominium Building Association Policy (RCBAP) form is found in Appendix A(3). In these regulations, FEMA established the 60-day Proof of Loss deadline. See Section VII(J) of the Dwelling and General Property forms and Section VIII(J) of the RCBAP form. The Associate Administrator of the Federal Insurance and Mitigation Administration (FIMA, a division of FEMA) has the authority to grant waivers of and extend the Proof of Loss deadline pursuant to 44 C.F.R. § 61.13(d). See also 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(D), and Appendix A(3), Section VIII(D).

Congress, in enacting the National Flood Insurance Act of 1968, as amended, (42 U.S.C. § 4001, *et seq.*) enacted a 1-year statute of limitations for an NFIP policyholder to bring a lawsuit after denial/disallowance or the partial denial/disallowance of the policyholder's claim. See 42 U.S.C. §

4072. This 1-year statute of limitations was incorporated into the SFIP by FEMA. See 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(R), and Appendix A(3), Section VIII(R).
On November 12, 2012, FEMA issued Bulletin w-12092. Bulletin w-12092 did several things, but two items are primarily relevant for this Bulletin.

First, Bulletin w-12092 granted a limited waiver of the Proof of Loss requirement to allow payment of an undisputed amount based solely on an adjuster's report and insurer's approval without the SFIP-required Proof of Loss. In the event the insured disagreed with the payment received, the policyholder was (and is) required to send a Proof of Loss meeting the requirements of the SFIP with documentation supporting the additional amounts sought.

Second, Bulletin w-12092 waived the 60-day deadline to submit the SFIP-required Proof of Loss and granted a 1-year extension from the date of loss to send the Proof of Loss for the additional dollar amount(s) sought to the insurer. The insurer then evaluates the Proof of Loss and documentation and may pay the entire amount, partially pay and partially disallow/deny the amount, or entirely disallow/deny the amount sought for the items submitted in the Proof of Loss. The denial or disallowance, in whole or in part, must be in writing from the insurer. The insurer's letter should clearly state it is denial or disallowance and alert the insured of the remedies available, including litigation within 1 year from the date of the letter.

More recently, in FEMA Bulletin w-13060a, FEMA issued an additional extension of the Proof of Loss deadline, allowing an additional 6 months for an insured to submit the SFIP-required Proof of Loss with supporting documentation for any additional amounts sought. In total, FEMA extended the Proof of Loss deadline from 60 days to 1 ½ years for ME Sandy. This is an unprecedented action by FEMA that reflects FEMA's commitment to facilitating the ability of individuals insured by the NFIP to seek payment.

Unlike the SFIP Proof of Loss deadline, which is a regulation created by FEMA, FEMA cannot extend the time limit for NFIP-insureds to bring a lawsuit. The applicable time limit to file a lawsuit was set by statute, not FEMA. Although FEMA has the administrative authority to extend the Proof of Loss deadline it established by regulation, FEMA lacks the authority to extend the time limit to file a lawsuit established by statute. This statute of limitations has never been extended.

It is important to understand that the Proof of Loss is not the claim. The claim is the assertion by the insured that they are entitled to be paid for a covered loss under their SFIP (i.e., the demand for money). An NFIP policyholder whose insured property is damaged by an event such as ME Sandy only has one claim arising from that event, regardless of the number of Proofs of Loss that the insured may submit in support of that claim.

Even in the instance of an Increased Cost of Compliance (ICC) claim under Coverage D of the SFIP (which is not an indemnity claim because the coverage is not triggered by the physical loss from the flood but by a determination by the NFIP community that the building has been substantially damaged and must be brought up to the community's current floodplain management guidelines),

there is only one claim that arises from that substantial damage determination regardless of the number of Proofs of Loss submitted by the insured.

The SFIP sets forth the process that the insured has to follow in supporting his or her claim in the General Conditions section of each form of the SFIP (which is Section VII for the Dwelling and General Property SFIP forms and Section VIII for the Residential Condominium Building Association Policy or "RCBAP" SFIP form). For example, Section VII(J)(1) of the SFIP requires prompt written notice of the loss. Also, Section VII(J)(4) and its subparts set forth what information must be included for the Proof of Loss (which is the policyholder's statement of the amount of money demanded and submitted in support of their claim) and indicate that it must be sent within 60 days after the loss.

NFIP court rulings hold that if the insured does not comply with "all" of the terms and conditions of the SFIP prior to filing a lawsuit (including the Proof of Loss requirements), then the necessary conditions for the insured to be able to bring a lawsuit have not been met. What this means is that, in those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. This situation will typically arise when the insurer has determined that the insured has not suffered a "direct physical loss by or from flood" and there is no coverage under the SFIP. For example, if the insurer has determined that flood waters did not reach the insured building, a denial letter will be sent because there is no insured loss and no coverage under the SFIP.

In any event, FEMA requires NFIP insurers to continue to work with their insureds. The Program can pay additional amounts if properly supported, even if the formal Proof of Loss deadline has passed. FEMA does this through the granting of the insured's request of an individual waiver of the Proof of Loss deadline through the insurance company. The NFIP makes every possible effort to insure that a proper claims payment and resolution of the claim are achieved in every instance.

The limited waiver and extension of the Proof of Loss deadline recognizes the difficulties insureds damaged by ME Sandy experienced evaluating damage and supporting their flood insurance claim. The typical dispute arises after an insured has received payment based on an adjuster's report and the insurer's approval and later believes there is additional uncompensated damage. The 1 year to sue typically will not be triggered until the required Proof of Loss for the additional amount sought is submitted and there is a complete or partial disallowance/denial of the amount sought. However, as discussed above, there are instances when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured. Even in those claims where a denial letter was issued within the first 6 months after ME Sandy, the insured still had a full year from the date of that denial letter to collect all required documentation, file the proof of loss, and then file a lawsuit if such is believed necessary.

The extended time to file the Proof of Loss is an effective mechanism that allows insureds to fully present their claims. For the majority of claims, disputes will not arise until after the submission of the Proof of Loss and formal denial of the amount sought. While FEMA does the most it can to assist NFIP insureds, it cannot and does not waive or extend the applicable statute of limitations.

Conclusion:

We ask for your full support. Any questions or comments should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at Russell.Tinsley@fema.dhs.gov.

cc: Vendors, IBHS, and Government Technical Representative