IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

KOKAK LLC D/B/A PROFESSIONAL VAULT STORAGE, Plaintiff, v. AUTO-OWNERS INSURANCE COMPANY, Defendant.	)	Case No.: 2:18-CV-177-TLS

AUTO-OWNERS INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This lawsuit involves property insurance coverage for alleged wind damage to a commercial building. Plaintiff Kokak LLC d/b/a Professional Vault Storage ("Kokak") owned the building. Auto-Owners Insurance Company ("Auto-Owners") issued a policy to Kokak in January 2016. Kokak made a claim under a policy issued to it by Auto-Owners. Kokak reported to Auto-Owners that a wind storm had damaged the roof of its commercial building. Auto-Owners initiated an investigation of the claim, prepared an estimate for repair, and paid Kokak $21,662.71 in actual cash value payments. After further investigation, Auto-Owners discovered damage existed prior to the claimed date of loss, and that no wind event sufficient to damage the building occurred at any time near the alleged date of loss, refused to pay for further property benefits. Kokak filed this lawsuit for breach of contract and bad faith.

Summary judgment in favor of Auto-Owners is warranted on all counts of Kokak's Complaint for the following reasons:

1. Kokak's lawsuit against Auto-Owners is barred because Kokak failed to file its lawsuit within two years after the loss as required by the contractual suit limitation condition in the Policy.

2. Kokak failed to provide Auto-Owners with timely notice of the Loss, a condition precedent to coverage.
3. Kokak failed to protect the building from further damage and failed to make timely temporary repairs after the Loss.
4. Coverage is excluded for damages resulting from Kokak's failure to protect the Building from further loss.
5. Kokak is not entitled to Replacement Cost Coverage because Kokak failed to repair the roof of the Building within two years as required by the Policy.
6. Coverage is excluded to the extent Kokak's damages were the result of normal wear and tear, deterioration of the roof, and/or faulty, inadequate or defective design, specifications, workmanship, materials or maintenance, which are expressly excluded.
7. The roof of Kokak's Building was not in compliance with City of Portage Building Code before the Loss, barring Kokak's claim for Ordinance or Law Coverage after the loss.
8. Kokak's bad faith claim is without merit as Auto-Owners had a reasonable basis upon which to deny coverage and did not act with ill will, malice, fraud or other actionable state of mind.

I. FACTUAL BACKGROUND

A. The Building

Kokak owns a commercial storage warehouse located at 1778 Laporte Street in Portage, Indiana (the "Building"). (***Exhibit "A"***, *¶13*). The Building as originally constructed in 1986 had a metal roof. (***Exhibit "H"***; ***Exhibit "H-1"***, *pp. 3, 18;* ***Exhibit "B"***, *21:6–9*). In 1996, an asphalt shingle roofing system was installed over the metal roof of the Building, which had a pitch of less than 2:12. (***Exhibit "H-1"***, *p. 27;* ***Exhibit "C"***, *35:6–8;* ***Exhibit "I"***; ***Exhibit "I-3"***, *p. 1*). This roof was on the Building at the time of the alleged loss. (***Exhibit "H-1"***, *p. 3*). Kokak did not have the Building inspected prior to its purchase. (***Exhibit "B"***, *17:17–19*). The Building has three occupants: Stash Construction ("Stash"), Kech Group, LLC ("Kech") and Kokak. (***Exhibit "C"***, *36:13–24*).

B. Kokak

Kokak was formed on October 29, 2014 by its members, Frederick A. Leaf ("Leaf") and Joshua J. Milton ("Milton"). (***Exhibit "C"***, *10:7–14;* ***Exhibit "D"***). Milton owns 25% of tenant

Stash, a roofing and restoration company. (***Exhibit "C"**, 8:12–24; **Exhibit "E"***). Milton is an estimator for Stash and considers himself an "expert" in construction estimation and general construction. (***Exhibit "C"**, 8:8–11, 19:16–25*). Leaf also works for Stash and has extensive training and experience adjusting catastrophic events having served as an adjuster for several insurance companies for ten years. (***Exhibit "B"**, 8:18–9:23, 9:24–12:19*).

C. <u>The Auto-Owners Policy[1] Issued In January, 2016</u>

On January 25, 2016, Auto-Owners issued a Tailored Protection Insurance Policy to Named Insured Kokak LLC d/b/a Professional Vault Storage, Policy Number 154602-09581585-15 ("Policy"), with effective dates from December 11, 2015 to December 11, 2016. (***Exhibit "A"**, ¶14; **Exhibit "F"**, p. 2*).[2] At the time of its application, Kokak did not report any problems with the roof of the Building. (***Exhibit "B"**, 47:16–21*). Kokak's agent requested the Policy have a retroactive effective date back to December 11, 2015. (***Exhibit "B"**, 14:23-15:4*).

D. <u>Underwriting Survey Inspection In February, 2016</u>

A little more than one month after the Auto-Owners Policy was issued, on February 29, 2016, a third-party vendor Verisk Insurance Solutions ("Verisk") performed an underwriting survey of the Building at Auto-Owners' request. (***Exhibit "G"**, ¶¶9–10; **Exhibit "H"**, **Exhibit "H-1"***). Brad Vander Woude of Verisk inspected the Building on February 29, 2016. (***Exhibit "C"**, 70:1–14; **Exhibit "H"**, ¶12; **Exhibit "H-1"**, p. 1*). Milton was present when Vander Woude inspected and took the photographs of the roof. (***Exhibit "C"**, 69:22-70:14*). During the

[1] The pertinent Policy provisions are set forth in the Argument sections that follow.

[2] The Policy included a Building and Personal Property Coverage Form containing a coverage grant and exclusions applicable to the Building. (***Exhibit "F"**, pp. 61–62, 67*). The Policy contained a "Loss Conditions" Section setting forth Kokak's "Duties In The Event Of Loss Or Damage". (***Exhibit "F"**, p. 69*). The "Causes of Loss – Special Form" contained pertinent policy definitions, exclusions and limitations applicable to the Building. (***Exhibit "F"**, pp. 84–88, 91-92).* The Policy contained an Ordinance or Law ("O&L") Coverage Endorsement. (***Exhibit "F"**, pp. 93–95*). The Policy also contained Commercial Property Conditions, including "Concealment, Misrepresentation or Fraud" with an amended endorsement, "Legal Action Against Us", and "Other Insurance" provisions. (***Exhibit "F"**, pp. 96–97, 137*).

inspection, Milton reported to Verisk that "[a]bout 1.5 weeks ago wind damaged some flashing and blew shingles off the north side of the building." (***Exhibit "C"***, *71:12–22;* ***Exhibit "H-1"***, *pp. 2*).

Verisk provided its report to Auto-Owners. (***Exhibit "G"***, *¶10;* ***Exhibit "H-1"***). The photographs taken at the inspection showed roof damage and deterioration on both the north and south slopes. (***Exhibit "B"***, *25:19–27:8, 29:8–11;* ***Exhibit "H-1"***, *pp. 33-34*). Kokak admits the damage to the roof present at the time of the February 29, 2016 inspection was sufficient to warrant making an immediate claim with Auto-Owners. (***Exhibit "B"***, *48:14–22*). Kokak further admits that once roof damage was discovered, it should be immediately addressed. (***Exhibit "B"***, *49:5–8*). Kokak did not repair the roof prior to May 1, 2016. (***Exhibit "B"***, *29:1–4*).

E. Kokak's Notice Of Loss To Auto-Owners

On or about June 2, 2016, Leaf contacted Auto-Owners and reported the Building sustained damage as a result of a wind event that occurred on or about May 1, 2016. (***Exhibit "B"***, *50:22–51:5;* ***Exhibit "G"***, *¶¶11-12*). Leaf reported the claim to Auto-Owners' adjuster Don Detering ("Detering"). (***Exhibit "B"***, *50:22–51:5;* ***Exhibit "G"***, *¶12*). Kokak reported portions of the asphalt shingle roof of the Building sustained damage due to 70 mph winds on May 1, 2016. (***Exhibit "C"***, *33:8–34:9, 56:22–57:8;* ***Exhibit "G"***, *¶12*). Kokak reported the damage was "sporadic" on both the north and south slopes of the roof. (***Exhibit "C"***, *33:19–24*).

On May 1, 2016, according to data collected in the area, the highest wind gusts were only 20 to 25 miles per hour. (***Exhibit "M"; Exhibit "M-2", pp. 9-10***).

F. Auto-Owners' Investigation Of The Loss

Following Kokak's notice, Auto-Owners contacted Hancock Claims Consultants ("Hancock") to investigate the loss. (***Exhibit "G"***, *¶14*). On June 6, 2016, Hancock inspected the Building and provided a report on the condition and damage to the Building to Auto-Owners.

(***Exhibit "A"***, *¶20;* ***Exhibit "G"***, *¶15;* ***Exhibit "J"***, *¶20;* ***Exhibit "K"***, *¶8;* ***Exhibit "K-2"***, *p.2*). Hancock found damage to a total of 186 shingles on the roof and that prior repairs were present to the north and south slopes of the roof. (***Exhibit "K-2"***, *pp. 19-20*). The Hancock report also noted non-storm related conditions such as blisters, nail pops, rotted roof decking and excessive weathering. (***Exhibit "K-2"***, *p. 20*). Between the February 29, 2016 underwriting inspection and the June 6, 2016 claims inspection, the damage remained on the roof and there was further deterioration to the roof. (***Exhibit "C"***, *92:5–14;* ***Exhibit "I-4"***, *pp. 2-3*).

G. Auto-Owners' Estimate Of Damage To Roof

On June 14, 2016, Auto-Owners completed an initial estimate for repair costs that provided a replacement cost value ("RCV") of $6,572.80 and an actual cash value ("ACV") of $4,501.16. (***Exhibit "G"***, *¶16;* ***Exhibit "G-4"***, *p. 3*). On June 14, 2016, Auto-Owners paid $5,572.80 an ACV payment to Kokak. (***Exhibit "G"***, *¶17;* ***Exhibit "G-5"***).

H. Kokak's Demands For Full Roof Replacement

On July 1, 2016, Kokak demanded Auto-Owners replace the entire roof. (***Exhibit "G"***, *¶18*). Kokak retained public adjuster Wade Tutt ("Tutt") of Neighborhood Adjusters, Inc. ("NAI") to assist with its claim. (***Exhibit "C"***, *68:1–3*). On August 24, 2016, Kokak informed Auto-Owners that it was represented by Tutt. (***Exhibit "G"***, *¶19*). Kokak authorized Tutt to speak to Auto-Owners on Kokak's behalf. (***Exhibit "C"***, *68:1–6*).

On October 5, 2016, Kokak submitted an estimate with an RCV of $382,377.92. (***Exhibit "G"***, *¶20;* ***Exhibit "G-6"***, *p. 8*). This estimate called for the shingle roof to be replaced with a brand new metal roof. (***Exhibit "G-6"***).

Auto-Owners engaged an engineering consultant, American Structurepoint, Inc. ("Structurepoint"), to conduct an inspection of the Loss. (***Exhibit "G"***, *¶22*). On December 30, 2016, a joint inspection was conducted with Structurepoint and Tutt to determine the level of

damage to the asphalt shingle roof and required repairs. (***Exhibit "G"***, *¶23;* ***Exhibit "I"***, *¶13;* ***Exhibit "I-2"***, *p. 1*).

After the inspection, Luke Johnson ("Johnson") of Structurepoint contacted City of Portage Building Commissioner, Doug Sweeney ("Sweeney"), to determine if the damaged areas of the roof could be repaired without replacing the entire roof. (***Exhibit "I-2"***, *p. 5*). On January 9, 2017, Sweeney confirmed the defective areas could be repaired without replacing the entire roof. (***Exhibit "I-2"***, *p. 5*). On January 11, 2017, Structurepoint provided Auto-Owners its report, which concluded a total roof replacement was not required. (***Exhibit "G"***, *¶24;* ***Exhibit "I-2"***, *p. 2*). Auto-Owners prepared a revised estimate based on the Structurepoint report. (***Exhibit "G"***, *¶25;* ***Exhibit "G-8"***, *p. 3*).

I. Auto-Owners' Additional Payment On March 29, 2017

On March 29, 2017, Auto-Owners sent an additional $2,535.06 payment to Kokak to reflect the increased ACV of the Loss based upon updated information from Structurepoint. (***Exhibit "G"***, *¶26;* ***Exhibit "G-9"***).

J. Scope Of Repair Disputed

On April 6, 2017, Tutt advised Auto-Owners that Kokak disagreed with the amount of the Loss and was demanding Appraisal. (***Exhibit "G"***, *¶27;* ***Exhibit "G-10"***). On June 7, 2017, Auto-Owners issued a Reservation of Rights letter to Kokak advising that it had not received a Proof of Loss, a condition precedent to Appraisal, and again requested Kokak submit a Sworn Proof of Loss. (***Exhibit "G"***, *¶28;* ***Exhibit "G-11"***). On June 13, 2017, Sweeney emailed Kokak and Structurepoint clarifying the roof must be replaced because asphalt shingles cannot be installed on a roof with a pitch of less than 2:12. (***Exhibit "L"***, *p. 30*).

K. Sworn Proof Of Loss

Kokak did not submit a Sworn Proof of Loss within the sixty (60) day time period required by the Policy. (***Exhibit "G"***, *¶13*). On July 12, 2017, Tutt submitted Kokak's only Sworn Proof of Loss, which claimed a total of $479,775.00 in replacement cost of the damage including Kokak's second estimate for the cost to repair and/or replace the roof with a replacement cost value of $473,994.96, a $97,437.08 increase from the RCV in Kokak's initial estimate. (***Exhibit "G"***, *¶29;* ***Exhibit "G-12"***, ***Exhibit "L"***, *pp. 36, 39*). This estimate involved replacing the asphalt shingle roof with a top-of-the line metal roof system. (***Exhibit "G-12"***).

Kokak's Sworn Proof of Loss stated the date of loss was February 24, 2016. (***Exhibit "B"***, *38:1–6;* ***Exhibit "G"***, *¶29;* ***Exhibit "G-12"***, ***Exhibit "L"***, *p. 39)*. The Sworn Proof of Loss was signed by Leaf and notarized. (***Exhibit "B"***, *36:12–24;* ***Exhibit "G-13"***, ***Exhibit "L"***, *p. 39*). Milton admitted at his deposition in 2019, that when he prepared the Sworn Proof of Loss in 2017, he researched the date that the wind event occurred and whether a wind event occurred in February, 2016. (***Exhibit "C"***, *81:23–82:15*). In fact, significant winds yielding maximum gusts of 67 mph did occur on February 24, 2019. (***Exhibit "M-2"***, *p. 10*). Leaf confirmed at deposition that the representations in the Sworn Proof of Loss were true and accurate. (***Exhibit "B"***, *38:7–9*).

On August 22, 2017, Auto-Owners sent Kokak a revised Reservation of Rights letter advising it was unable to accept Kokak's Sworn Proof of Loss as incomplete and notifying Kokak that Auto-Owners had engaged an independent engineer to determine the scope of the repairs acceptable under the City of Portage Building Code. (***Exhibit "G"***, *¶30;* ***Exhibit "G-13"***, ***Exhibit "L"***, *pp. 27-29)*. On September 28, 2017, Structurepoint Engineer Charles Gasser ("Gasser") inspected the Building at Auto-Owners' request. (***Exhibit "G"***, *¶31;* ***Exhibit "I"***, *¶14*). On October 4, 2017, Gasser issued a report confirming only 186 shingles were damaged, and recommended the shingles and plywood be removed and replaced with an alternate lightweight

single-ply membrane retrofit roof system in compliance with minimum code requirements at a cost of $120,653.63.[3] (***Exhibit "I"***, *¶14;* ***Exhibit "I-3"***, *pp. 1–2;* ***Exhibit "I-4"***, *p. 5*).

L. Ordinance And Law Dispute

On October 6, 2017, Auto-Owners sent a Coverage Position letter to Kokak. (***Exhibit "G"***, *¶33;* ***Exhibit "G-15"***, *p. 1*). The coverage explanation letter explained that for Ordinance and Law Coverage to be paid under the Policy, the property must actually be repaired or replaced by Kokak, and that the repair or replacement must be completed within two years of the date of loss. (***Exhibit "G"***, *¶33;* ***Exhibit "G-15"***, *p. 4).* On November 19, 2017, Tutt wrote to Auto-Owners disputing with Auto-Owners' coverage position on O&L Coverage. (***Exhibit "G"***, *¶34;* ***Exhibit "G-16"***, *pp. 1–2;* ***Exhibit "L"***, *pp. 6-7*).

On January 19, 2018, Auto-Owners wrote to Kokak explaining its coverage position on O&L Coverage and enclosed an estimate for the replacement of the undamaged shingles that were on the roof at the time of the Loss. (***Exhibit "G"***, *¶35;* ***Exhibit "G-17"*** *and* ***Exhibit "L"***, *pp. 22-26;* ***Exhibit "G-18"***). In the letter, Auto-Owners explained that because no repairs or replacement had been completed, Auto-Owners could not owe more than the ACV of the undamaged shingles on the roof at the time of the Loss under O&L Coverage A – Undamaged Portion. (***Exhibit "G"***, *¶35;* ***Exhibit "G-17"*** *and* ***Exhibit "L"***, *p. 26*). The letter also informed Kokak that it was entitled to payments for the ACV provided in its enclosed estimate, which was $13,554.85. (***Exhibit "G"***, *¶35;* ***Exhibit "G-17"*** *and* ***Exhibit "L"***, *p. 26;* ***Exhibit "G-18"***, *p. 4*).

M. Appraisal Demand

On March 27, 2018, Tutt demanded appraisal on behalf of Kokak "[i]f Auto-Owners "does not make payment for the RCV of $479,775 less the deductible and previous payment." (***Exhibit***

[3] Due to coverage issues, Auto-Owners does not belief it owes this amount.

"G"**, ¶36; **Exhibit "G-19"**, p. 1; **Exhibit "L"**, p. 18*). On April 20, 2018, Auto-Owners responded to Kokak's appraisal demand explaining that Auto-Owners' estimate complied with the requirements of the law per the recommendations in Structurepoint's Supplemental Expert Report. (Exhibit "G"**, ¶37; **Exhibit "G-20"** and **Exhibit "L"**, pp. 19-21; **Exhibit "I-3"**, p. 2*).

N. Payments Made By Auto-Owners

Auto-Owners issued payments to Kokak as a result of the wind damage to the Building:

1) On June 14, 2016, Auto-Owners issued Kokak an Actual Cash Value advance of $5,572.80 less Kokak's $1000.00 deductible for damage to Kokak's Building. (***Exhibit "G"**, ¶17; **Exhibit "G-5"***).
2) On March 29, 2017, Auto-Owners issued a supplemental Actual Cash Value advance payment of $2,535.06 for additional damage discovered to the Building. (***Exhibit "G"**, ¶26; **Exhibit "G-9"***).
3) On January 19, 2018, Auto-Owners issued a payment of $13,554.85 for Actual Cash Value of the present roof covering pursuant to O&L Coverage A. (***Exhibit "G"**, ¶35; **Exhibit "G-17")**.*

In total, Auto-Owners issued $21,662.71 in ACV payments for Kokak's claim. (***Exhibit "C"**, 93:14–16; **Exhibit "G"**, ¶38*). Kokak received the payments and cashed the checks, but has never taken action to permanently repair or replace the roof. (***Exhibit "C"**, 85:4–5, 93:17–19*).

O. Code Compliance

At the February 29, 2016 underwriting survey, Kokak reported to Verisk that in approximately 1996, the original metal roof of the Building was replaced with an asphalt shingle roofing system. (***Exhibit "H-1"**, p. 27*). The roof has a pitch of less than 2:12. (***Exhibit "B"**, 34:6–9; **Exhibit "C"**, 35:6–8*), ***Exhibit "K"**, ¶9*). In 1996, the building code in effect for the City of Portage was the code adopted by the State of Indiana. (***Exhibit "I-4"**, p. 3*).[4] In 1996, City of Portage building code did not permit asphalt shingles to be installed on roof slopes less than 2:12.

[4] Indiana adopted the Uniform Building Code, 1991 edition, second printing, published by the International Conference of Building Officials. (***Exhibit "I-3"**, p. 3*).

Id. A shingle roof is not the proper application for a roof with a pitch of less than 2:12. (***Exhibit "C"****, 41:3–6*).

On June 13, 2017, Sweeney, the Building Commissioner for the City of Portage, conducted an inspection of the Building and confirmed the roof pitch to be less than 2:12. (***Exhibit "L"****, p. 30*). On September 28, 2017, Gasser of Structurepoint conducted an inspection of the Building and confirmed the roof pitch to be less than 2:12. (***Exhibit "I"****, ¶14;* ***Exhibit "I-4"****, pp. 1, 3*). On November 19, 2017, Tutt represented to Auto-Owners that the City of Portage was enforcing its code that would require Kokak to demolish undamaged parts of the roof. (***Exhibit "G"****, ¶34;* ***Exhibit "G-16"***). This confirmed the asphalt shingle roofing system of the Building did not comply with City of Portage Building Code prior to the loss. (***Exhibit "G"****, ¶39;* ***Exhibit "I-4"****, p. 3*).

P. <u>The Lawsuit</u>

On April 27, 2018, Kokak filed its Complaint. (***Exhibit "A"***). Kokak's Complaint alleges the Building sustained a loss on May 1, 2016. (***Exhibit "A"****, ¶16*). Kokak sought to compel Auto-Owners to participate in the appraisal process; or alternatively, alleges Auto-Owners breached the terms of the Policy and its duty of good faith and fair dealing. (***Exhibit "A"****, ¶¶30–31, 44–46, 48–64*).

Q. <u>Bad Faith</u>

Auto-Owners did not make false material statements to Kokak or its representatives or exercise unfair economic leverage over Kokak in order to attempt to make it accept an unfounded settlement. (***Exhibit "G"****, ¶¶43, 44*). Auto-Owners had a rational and principled basis for its coverage positions on Kokak's claim, which decisions are supported by and based upon Auto-Owners' reasonable investigation, expert opinions of engineers and contractors, as well as the terms and conditions of the Policy. (***Exhibit "G"****, ¶45*). Auto-Owners did not act with ill will in

the investigation and adjustment of Kokak's claim and dealt with Kokak in good faith in an effort to timely and properly respond to its claim for coverage. (***Exhibit "G"***, *¶41, 42*).

II. LEGAL STANDARD

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). An issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"Insurance policies are governed by the same rules of construction as other contracts. The interpretation of an insurance policy is a question of law." *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006) (internal citation omitted). A court's "goal is to ascertain and enforce the parties' intent as manifested in the insurance contract." *Id*. A court construes the policy "as a whole" and "consider[s] all of the provisions of the contract and not just the individual words, phrases or paragraphs." *Id*. "We must accept an interpretation of the contract language that harmonizes the provisions rather than one that supports a conflicting version of the provisions." *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1274 (Ind. Ct. App. 2004). "If the language is clear and unambiguous, we give the language its plain and ordinary meaning." *Briles*, 858 N.E.2d at 213.

"Construction of a written contract is a question of law for which summary judgment is particularly appropriate." *Weidman v. Erie Ins. Grp.*, 745 N.E.2d 292, 297 (Ind. Ct. App. 2001).

An ambiguity is not created simply because the parties disagree about the proper definition of terms. *Niccum v. Niccum*, 734 N.E.2d 637, 639 (Ind. Ct. App. 2000). Under Indiana law, the insured must prove it is entitled to coverage under the applicable insurance policy. *Medical Assur. Co., Inc. v. Miller*, 779 F.Supp.2d 902, 908 (N.D. Ind. 2011) (applying Indiana law); *Inglis v. Life Ins. Co. of N. Am.*, 1:05-CV-1194RLYTAB, 2008 WL 2074123, at *9 (S.D. Ind. May 14, 2008) (applying Indiana law); *Alexander v. Erie Ins. Exch.*, 982 F.2d 1153, 1157 (7th Cir. 1993) (applying Indiana law).

Similarly, summary judgment is appropriate for claims of bad faith against an insurance company. *See, e.g., Allstate Ins. Co. v. Fields*, 885 N.E.2d 728 (Ind. Ct. App. 2008) (finding that as a matter of law the insurer did not act in bad faith and was entitled to summary judgment); *Wilson v. Am. Family Mut. Auto. Ins. Co.*, 683 F.Supp.2d 886, 892 (S.D. Ind. 2010) (holding that summary judgment on a bad faith claim was appropriate because undisputed facts demonstrated insurer had "a rational, principled basis for evaluating" insured's claim).

III. ARGUMENT

A. Kokak's Lawsuit Is Barred Due To Kokak's Failure To File This Lawsuit Within Two Years After The Loss As Required By Policy's Two-Year Contractual Limitations Period.

The storm damage occurred in February, 2016 or earlier, not in May 2016. Kokak's lawsuit was untimely filed. Kokak filed suit on April 27, 2018. Kokak's Policy contains specific conditions precedent that must be met before a lawsuit may be filed against Auto-Owners:

COMMERCIAL PROPERTY CONDITIONS

***

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all of the terms of this Coverage Part; and

> **2.** The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

(*Exhibit "F", p. 96*). The Policy required Kokak bring its lawsuit within two (2) years of the date the loss occurred. (***Exhibit "C"**, 53:10–14*). The Sworn Proof of Loss Kokak submitted to Auto-Owners and its deposition testimony attests the Loss occurred on February 24, 2016. (***Exhibit "B"**, 38:1–6; **Exhibit "G-12"**, **Exhibit "L"**, p. 39*). Kokak did not file its lawsuit until April 27, 2018, more than two years after the February 24, 2016 date set forth in its Proof of Loss. (***Exhibit "A"; Exhibit "G-12"**, **Exhibit "L"**, p. 39*).

Kokak's claim is barred by the limitations period in the Policy's Legal Action Against Us condition, which requires Kokak to comply with all terms and conditions of the Policy before filing suit against Auto-Owners. Kokak failed to comply with all terms and conditions of the Policy because it did not bring its lawsuit within two years of the date of the Loss. *See Shifrin v. Liberty Mut. Ins.*, 991 F.Supp.2d 1022 (S.D. Ind. 2014).

In *Shifrin*, the court concluded that the insureds' failure to repair their roof after a loss constituted a breach of their policy's "Your Duties After Loss" provision. 991 F.Supp.2d at 1035–36. The court reasoned that "[t]he [p]olicy provided that repairing the roof was the [insureds'] responsibility, not [the insurer's]." *Id*. at 1035. The court noted that the insureds "never took the necessary action to replace the roof, instead arguing that tarps were adequate to prevent further damage ." *Id*. The court concluded that since the insureds had violated the policy's "Your Duties After Loss" provision by failing to repair the roof, the insureds could not sue the insurer under the policy's "Suit Against Us" provision, which provided that "no action can be brought unless the policy provisions have been complied with and the action is started within two years after the date of loss." *Id*. at 1036; *see also Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871, 875 (Ind. Ct. App. 1998). *Shifrin* is applicable here. Under *Shifrin*, Kokak's lawsuit is barred because Kokak failed

to comply with the Policy's terms and conditions. Further, Kokak's lawsuit is barred pursuant to the Legal Action Against Us provision due to Kokak's failure to comply with the Policy's two-year contractual limitations period. This failure is dispositive and requires summary judgment in favor of Auto-Owners.

B. Kokak Failed to Provide Timely Notice Of The Loss To Auto-Owners.

Kokak admittedly failed to comply with Policy requirements to give prompt notice after a loss violating a condition precedent to coverage. The Policy provides:

> **3. Duties In The Event Of Loss Or Damage**
>
> ***
>
> **(2)** Give us prompt notice of the loss or damage. Include a description of the property involved.
>
> **(3)** As soon as possible, give us a description of how, when and where the loss or damage occurred.

(***Exhibit "F"****, p. 69*).

In Indiana, notice provisions in an insurance policy are valid and enforceable. *See e.g.*, *Miller v. Dilts*, 463 N.E.2d 257, 265 (Ind. 1984); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267 (Ind. 2009); *P.R. Mallory & Co., Inc. v. Am. Cas. Co. of Reading, P.A.*, 920 N.E.2d 736 (Ind. Ct. App. 2010); *Travelers Ins. Cos. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. 2011). Delay in providing notice can obstruct an insurer's investigation of the circumstances surrounding a claim; accordingly, an unreasonable delay in notice creates a rebuttable presumption that the insurer has been prejudiced. *Id*. If prejudice is established, the insurer is relieved of its obligations under the policy. *Sheehan Constr. Co. v. Cont'l Cas. Co.*, 938 N.E.2d 685, 689 (Ind. 2010). An insurer's denial of coverage on other grounds does not rebut the presumption of prejudice from late notice by the insured. *Tri-Etch, Inc. v. Cincinnati Ins Co.*, 909 N.E.2d 997, 1105 (Ind. 2009).

In the first-party property damage claim context, even short delays of a matter of days or weeks are unreasonable where the policy requires notice be given "as soon as practicable." *See e.g., Myers v. Cigna Property & Cas. Ins. Co.*, 953 F.Supp. 551, 556–57 (S.D.N.Y. 1997) (two-month delay between the insured's discovery of damage and notice was unreasonable under the policy's notice provision); *Pandora Indus., Inc. v. St. Paul Surplus Lines Ins. Co.*, 188 A.D.2d 277, 277 (N.Y. App. Div. 1992) (insured's failure to notify its insurer until thirty-one (31) days after damage did not comply with the policy's requirement that the insured notify the insurer "as soon as practicable"); *Republic N.Y. Corp. v. Am. Home Assur. Co.*, 125 A.D.2d 247, 248–49 (N.Y. App. Div. 1986) (determining that the insured failed to notify its insurer of damage "as soon as practicable" when the insured did not give notice until forty-five (45) days after damage to windows); *Ideal Mut. Ins. Co. v. Waldrep*, 400 So.2d 782, 785–86 (Fla. Ct. App. 1981) (insured did not notify insurer of loss "as soon as practicable" when notice was not given until six (6) weeks after loss of aircraft was discovered); *Deese v. Hartford Acc. and Indem. Co.*, 205 So.2d 328, 329 (Fla. Ct. App. 1967) (insured did not notify its insurer "as soon as practicable" when insured gave notice four (4) weeks after motor vehicle accident).

The insured has the burden to prove compliance with the policy's notice requirements. *See Miller*, 463 N.E.2d at 264. The notice provision must be performed within a reasonable time. *See Miller*, 463 N.E.2d at 265. The terms "immediately" and "as soon as practicable" in a notice condition mean within a reasonable time. *Miller*, 463 N.E.2d at 265; *P.R. Mallory & Co., Inc.*, 920 N.E.2d at 750-51. When the facts of a case are undisputed, what constitutes reasonable notice is a question of law. *P.R. Mallory*, 920 N.E.2d at 751.

The roof sustained damage prior to February 29, 2016. However, Kokak did not provide Auto-Owners with notice until June 2, 2016, nearly four (4) months later. Kokak also did not

provide Auto-Owners with an inventory of the damaged shingles until Auto-Owners conducted its own inspection on June 6, 2016. (***Exhibit "C"**, 50:1–16; **Exhibit "G"**, ¶ 15*). Kokak admits the damage to the roof in February 2016 was sufficient to constitute a claim and that it would have been reasonable to make an immediate claim for damage after the storm damage occurred in or before February 2016:

> Q Okay. If your brother-in-law was present when the inspection was made on February 29, 2016, the photographs I showed you, do you know why he or Kokak didn't make a claim at that time for damage to the roof?
>
> **A I have no idea why.**
>
> Q Okay. As you sit here today, do you believe it would have been reasonable for him to make an immediate claim for roof damage?
>
> **A I'm assuming.**
>
> Q Okay. You've been an adjustor. You certainly agree with me that damage of the type depicted in those February photographs would constitute a claim to be made?
>
> **A Potentially, yeah.**

(***Exhibit "B"**, 48:8–22*). Kokak failed to comply with the notice condition precedent to coverage because its notice to Auto-Owners was untimely. Kokak's four (4) month delay in notifying Auto-Owners of its Loss was unreasonable as a matter of law.

C. Kokak Failed To Comply With The Policy's "Duties In The Event Of Loss Or Damage" Provision, A Condition Precedent To Coverage

Kokak was required by the Policy to take all reasonable steps to protect the Building from further damage after a loss. (***Exhibit "C"**, 45:24–46:9*). Kokak was also required to submit a proof of loss within sixty (60) days after Auto-Owners' request. (***Exhibit "F"**, p. 69*). Kokak failed to comply with these conditions, which negates coverage. The "Duties In The Event Of Loss Or Damage" Section provides in pertinent part:

> **3. Duties In The Event Of Loss Or Damage**
>
> **a.** You must see that the following are done in the event of loss or damage to Covered Property.
>
> ****

> **(4)** Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim. This will not increase the Limit of Insurance. However, we will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. Also, if feasible, set the damaged property aside and in the best possible order for examination.

(***Exhibit "F"****, p. 69*).

In *Shifrin, supra*, the court held the insureds' failure to repair their roof after a tornado constituted a breach of the policy's "Your Duties After Loss" provision and negated all coverage. 991 F.Supp.2d 1022, 1035–36 (S.D. Ind. 2014), *aff'd* 592 Fed. Appx. 512 (7th Cir. 2014). The court reasoned that:

> [t]he Policy provided that repairing the roof was the [insureds'] responsibility, not [the insurer's]." *Id*. at 1035. The court noted that the insureds: "never took the necessary action to replace the roof, instead arguing that the tarps were adequate to prevent further damage . . . ." *Id*. "The [insureds'] refusal to repair the roof, even after [the insurer] repeatedly warned them that the Policy required them do so . . . is really the crux of this case.

Id. at 1035. The court found the insureds' failure to repair their roof constituted a breach of the policy, precluding the insureds from bringing a lawsuit against the insurer. *Id*. at 1035–36.

As in *Shifrin*, Kokak failed to repair the Building and protect it from further damage after a wind loss. Kokak refused to repair the roof even after Auto-Owners warned it that the Policy required it to do so. Kokak never took the necessary action to replace the roof or protect the Building from further damage; therefore, Kokak breached the Policy's "Duties In The Event Of Loss Or Damage" provision. Kokak only performed emergency repairs and never took further action necessary to replace the roof. (***Exhibit "C"****, 46:23–47:13*). Because Kokak's failure to repair the roof and protect the Building constitutes a breach of the Policy's "Duties In The Event

Of Loss" provision, Kokak's lawsuit is barred by the "Legal Action Against Us" provision due to Kokak's failure to comply with the Policy's terms and conditions.

D. <u>The Policy Excludes Coverage For Damage Resulting From Kokak's Failure To Protect Its Building After The Wind Event.</u>

Coverage is excluded due to Kokak's failure to protect the Building after the wind event. The Policy excludes damages caused by or resulting from the neglect of an insured to save and preserve the property resulting in further damage:

> **B. EXCLUSIONS**
>
> ***
>
> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> ***
>
> **m.** Neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss.

(***Exhibit "F"**, p. 87*). Coverage is excluded due to Kokak's failure to use all reasonable means to protect the property from further damage after the February 24, 2016 date reported in Kokak's Proof of Loss.

E. <u>Kokak Cannot Recover Replacement Cost Due To Its Failure To Repair The Roof Within A Reasonable Time.</u>

1. <u>Replacement Cost Coverage Generally</u>

Auto-Owners paid Kokak a total of $21,662.71 in ACV payments for the Loss. (***Exhibit "G"**, ¶ 38*). "Replacement Cost" is listed in the "Optional Coverages" section of the Policy. The "Optional Coverages" section of the Policy provides Auto-Owners will not pay on a Replacement Cost basis: (1) "[u]ntil the lost or damaged property is actually repaired or replaced; and (2) [u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage." (***Exhibit "F"**, p. 73*). The repairs have not been made. This time is not reasonable as a

matter of law. Lack of resolution of the claim is not legal justification. *Shifrin*, *supra.*, 991 F.Supp.2d at 1035-1036.

2. Replacement Cost Caused By Ordinance Or Law

The O&L Coverage Endorsement provides that Coverage C – Increased Cost of Construction Coverage will not be paid: "(1) [u]ntil the property is actually repaired or replaced, at the same or another premises; and (2) [u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage, not to exceed two years. (***Exhibit "F"**, p. 95*). Here, it is undisputed the roof was not repaired or replaced within two years.

Courts have strictly construed the condition precedent that an insured actually repair or replace the property before receiving replacement cost coverage. *See Bourazak v. N. River Ins. Co.*, 379 F.2d 530, 532 (7th Cir. 1967) (complaint dismissed due to insured failure satisfy condition precedent to actually repair or replace property); *West Suburban Bank of Darien v. Badger Mut. Ins. Co.*, 947 F. Supp. 333, 336–37 (N.D. Ill. 1996) (enforcing provision in policy providing that replacement cost coverage does not apply until damaged property is repaired or replaced absent evidence indicating otherwise).

Kokak admits it did not repair the roof within two years of the date of the Loss. (***Exhibit "C"**, 84:12–18*). Kokak has not repaired or replaced its roof despite receiving ACV payments that could be used as "seed money" to replace the existing roof. *See Nahmias Realty, Inc. v. Cohen*, 484 N.E.2d 617, 623 (Ind. Ct. App. 1985). Kokak admits that it could have acquired the money to make the repairs to the roof through a loan. (***Exhibit "C"**, 85:4–20*).

F. Kokak's Damages Are Excluded Because They Were Caused By Wear And Tear, Deterioration Of The Roof Or Faulty Construction

The Policy contains an express exclusion that Auto-Owners will not pay for loss or damage due to normal wear and tear or deterioration of the roof:

> **2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> ***
>
> **d.** **(1)** Wear and tear;
>
> **(2)** Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself.
>
> ***
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** However, if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> ***
>
> **c.** Faulty, inadequate or defective:
>
> **(1)** Planning, zoning, development, surveying, siting;
>
> **(2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> **(3)** Materials used in repair, construction, renovation or remodeling; or
>
> **(4)** Maintenance
>
> of part or all of any property on or off the described premises.

(**Exhibit "F"**, pp. 84, 86–87).

There was substantial pre-existing wear and tear and deterioration to the roof. (**Exhibit "I-2"**, pp. 1–2; **Exhibit "I-3"**, pp. 1-2; **Exhibit "I-4"**, pp. 1–4; **Exhibit "K-2"**, p. 20). The Hancock Report found "Non-storm related conditions" such as "Blisters, nail pops, roof decking rotted/poor condition, excessive weathering." (**Exhibit "K-2"**, p. 20). Structurepoint opined the roof system was significantly deteriorated from long-term moisture exposure along the north and south eves as well as in other isolated locations. (***Exhibit "I-2"***, *p. 2;* ***Exhibit "I-3"***, *pp. 1-2*). Structurepoint concluded the "deterioration would have occurred over a long period of time (beginning long before the reported date of loss), and was not the result of any wind damage on or around the reported date of loss." (***Exhibit "I-3"***, *p. 2*).

Indiana courts will apply these exclusions when the "wear and tear, marring, scratching or deterioration" caused, contributed to or aggravated the damages. *See Erie Ins. Exch. v. Sams,* 20 N.E.3d 182 (Ind. Ct. App. 2014). Because the roof damage was caused by wear and tear and deterioration over a long period of time, as opposed to a single wind event, coverage is excluded for the roof damage. Moreover, because the roof did not comply with then-existing building code requirements when the asphalt shingle roof system was installed over the metal roof, coverage is barred by the exclusion for damage caused by faulty, inadequate or defective design, construction or remodeling of the roof.

G. Kokak Is Not Entitled To Ordinance And Law Coverage Because The Roof Did Not Comply With Building Code Requirements Prior To The Loss.

Kokak is not entitled to Ordinance and Law ("O&L) Coverage because the asphalt shingle roof did not comply with Building Code requirements when the roof was installed prior to the alleged loss. Because the pitch was less than 2:12, an asphalt roof could not be used. Kokak's demand for a new roof which does satisfy the Code improperly seeks to shift code compliance costs to Auto-Owners. The Policy's O&L Coverage Endorsement provides in pertinent part as follows:

> **ORDINANCE OR LAW COVERAGE**
>
> This endorsement modifies insurance provided under the following:
>
> BUILDING AND PERSONAL PROPERTY COVERAGE FORM
>
> ***
>
> **H.** Under this endorsement we will not pay for loss due to any ordinance or law that:
>
> **1.** You were required to comply with before the loss, even if the building was undamaged; and
>
> **2.** You failed to comply with.
>
> ***

(**Exhibit "F"**, pp. 93–95).

Courts construing similar policy language have agreed the limitation applies to building codes that were in effect at the time the structure was built, or which had come into effect at some point thereafter but prior to the loss. *See e.g., Celebrate Windsor, Inc. v. Harleysville Worcester Ins. Co.*, 3:05CV282 (MRK), 2006 WL 1169816 (D. Conn. May 2, 2006); *Rock-N-Rolls Auto Salon, Inc. v. U.S. Fid. & Guar. Co.*, A-6150-04T2, 2006 WL 1675699 (N.J. Super. App. Div. June 20, 2006) (unpublished). The purpose of the requirement is to require the insurer to pay for code-required upgrades required of the insured after a loss only if the building complied with the applicable code when constructed or renovated.

In *Celebrate Windsor*, a canopy of an outdoor performing arts center developed tears and collapsed because of ice and snow wind loads. A claim was made for the cost to re-engineer the canopy to make it code compliant. *Celebrate Windsor*, 2006 WL 1169816 at *1. The policy contained a limitation that the company "will not pay any costs due to an ordinance or law that: (a) you were required to comply with before the loss even when the building was undamaged; and (b) you failed to comply with." *Id.* at *4. The only expert to testify at trial about the cause of the canopy collapse determined that the canopy failed after having experienced snow loads and wind pressure that "were 'substantially less severe' than the minimum tolerance required by the State Building Code for the design of the canopy." *Id.* at *16. The court found that because the structure had not complied with then-existing building code, the policy did not cover added costs necessary for re-engineering or reconstructing the facility to comply with the building codes since those codes were the same in effect when the structure was built. *See id.* at *17. The court concluded:

> [T]he Court has little difficulty concluding based upon the testimony of witnesses and the documentary evidence submitted that [the expert's] proposal calls for an upgraded and differently configured structure than previously existed at the site and that the substantial changes [the expert] proposed were designed to ensure that the structure complied with building code regulations and design criteria that the original [canopy] structure should have complied with but unfortunately did not. In short, [the expert's] proposal does not merely replace the existing structure; rather, it contains

> additional, albeit unquantified, costs that are directly attributable to re-designing and re-constructing the structure to remedy design defects that existed in the original structure.

Id. at *17.

Kokak's Building did not comply with City of Portage Building Code from the time the roof was installed in 1996 until the time that the Loss occurred. It is undisputed that Kokak's roof has a pitch of less than 2:12. (***Exhibit "C"**, 35:6–8*). Kokak reported that the asphalt shingle roof was installed in 1996. (***Exhibit "H-1"**, p. 27*). While Kokak claims Auto-Owners should pay for the complete replacement of the roof due to the City of Portage's enforcement of an ordinance or law requiring it to demolish undamaged parts of the roof, the Building did not comply with the applicable building codes in when the shingle roof was installed prior to the Loss. (***Exhibit "G"**, ¶ 34; **Exhibit "G-16"**, pp. 1–2; **Exhibit "L"**, pp. 6-7*). The code in effect and adopted by the City of Portage when the roof was installed prohibited the use of asphalt shingles on roofs with a pitch lower than 2:12. (***Exhibit "I-4"**, p. 3*).

H. <u>Auto-Owners Did Not Act In Bad Faith</u>

There is no admissible evidence to support a finding of bad faith against Auto-Owners as alleged by Kokak. (**Exhibit "A"**, ¶¶ 36–64). "Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured." *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993). The Indiana Supreme Court has acknowledged:

> The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Id.

"Indiana courts have repeatedly emphasized that insurers are not liable for breach of their duty of fair dealing simply by disputing the value of a claim." *Michel v. Am. Family Mut. Ins. Co.*, 2010 WL 3039506, at *5 (N.D. Ind. 2010). "Valuing a claim is not an exact science; insurers are free to make reasonable attempts to value a claim so long as there is a 'rational, principled basis for doing.'" *Id*. (quoting *Hickman*, 622 N.E.2d at 520). "[A] good faith dispute about the amount of a valid claim or about whether the insured has a valid claim at all will not supply the grounds for a recovery in tort for the breach of the obligation to exercise good faith." *Hickman,* 622 N.E.2d at 520. "That insurance companies may, in good faith, dispute claims, has long been the rule in Indiana." *Id*.

"Proof of bad faith exists when there is 'clear and convincing evidence' which establishes the insurer had knowledge that there was no legitimate basis to deny liability. A finding of bad faith requires evidence of a state of mind of 'conscious wrongdoing' including 'dishonest purpose, moral obliquity, furtive design, or ill will.'" *Thorne v. Member Select Ins. Co.*, 899 F.Supp.2d 820, 826 (N.D. Ind. 2012) (internal citation omitted). To "succeed on a bad faith claim at trial, a plaintiff must produce evidence establishing that there was no reasonable basis to deny the claim and that the insurer knew that there was no reasonable basis." *Id*. at 827. An insurer's denial of coverage based upon an expert's opinion is not bad faith. *Sadler v. Auto-Owners Ins. Co.*, 904 N.E.2d 665, 672–73 (Ind. Ct. App. 2009) (affirming summary judgment in favor of insurer where experts disagreed as to timing of loss).

The designated evidence demonstrates Auto-Owners acted in good faith in its handling of Kokak's claim. Following Kokak's notice of the Loss, Auto-Owners promptly dispatched a claims consultant to the Building to investigate the Loss within days. (***Exhibit "G"***, ¶¶ *14-16*). Auto-Owners also engaged multiple engineers to inspect the Building. (***Exhibit "G"***, ¶¶ *22-24, 31-32*).

Additionally, Auto-Owners promptly advanced property damage payments. Auto-Owners made an initial payment to Kokak twelve (12) days after being notified of the Loss, and subsequently issued two (2) additional advance payments to Kokak for property damage to the Building. (***Exhibit "G"***, *¶¶ 17, 26, 36;* ***Exhibit "G-5"***; ***Exhibit "G-9"***; ***Exhibit "G-17"***). Auto-Owners' disagreement with Kokak as to the value of the damage or as to coverage does not constitute bad faith as a matter of law. Auto-Owners had rational and reasonable bases for its position based upon policy language, scientific experts and physical evidence at the scene.

To prevail, Kokak must demonstrate Auto-Owners acted with "conscious wrongdoing" and must show Auto-Owners had no rational basis for its position. There is no such evidence. In fact, the designated evidence proves that Auto-Owners acted in good faith while timely, properly and diligently investigating Kokak's claims. Auto-Owners satisfied its obligation of good faith and fair dealing to Kokak. Because the designated evidence negates the elements of Kokak's bad faith claim, summary judgment as a matter of law should be entered in favor of Auto-Owners on Plaintiff's claim of bad faith.[5]

IV. CONCLUSION

For these reasons, Auto-Owners respectfully requests this Court grant summary judgment in favor of Auto-Owners and against Kokak on all counts of Kokak's Complaint.

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[5] Although Kokak has not expressly requested punitive damages in its Complaint, there is no basis for awarding punitive damages against Auto-Owners. There is no clear and convincing evidence that Auto-Owners acted with malice, fraud, gross negligence or oppressiveness that was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing. *Hickman*, 622 N.E.2d at 520 (quoting *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137–38 (Ind. 1988)). "[T]he mere finding by a preponderance of the evidence that the insurer committed the tort will not, standing alone, justify the imposition of punitive damages." *Hickman*, 622 N.E.2d at 520. All the evidence is to the contrary.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ ECF system, which sent notification of such filing to the following:

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