

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CARDINAL BUILDING MATERIALS., INC.,)	
)	
)	
Plaintiff,)	Case No. 4:20-cv-963
)	
vs.)	Jury Trial Demanded
)	
AMERISURE INSURANCE COMPANY,)	
)	
Defendants.)	

**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM IN OPPOSITION
TO THE DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT**

Plaintiff, Cardinal Building Materials, Inc. (“Cardinal”), by and through its counsel, files its Supplemental Memorandum in Opposition to the Defendant’s Motion for Summary Judgement, per the Court’s Order dated January 10, 2023. (Doc. 74).

I. Background

In 2013, a tornado struck and significantly damaged Cardinal’s property, a building supply warehouse and showroom. Cardinal made a claim to Amerisure Insurance Company (“Amerisure”), and Amerisure agreed that coverage was afforded for most, but not all, of the items claimed by Cardinal. Although Amerisure did not dispute coverage for the majority of Cardinal’s claim, it disputed the amount of loss claimed by Cardinal.

Cardinal acted as its own general contractor, overseeing the rebuild of its property by multiple subcontractors across many construction trades at a cost exceeding two million dollars. Amerisure agrees the building was damaged by the tornado, a covered peril, and extended coverage for the building repairs under three broad categories: roof repair, code upgrades, and the remaining building repairs (*i.e.* all repairs other than the roof and code upgrades). Because Cardinal acted as

its own general contractor, Cardinal is entitled to the overhead and profit that would have been paid to a general contractor. Amerisure's insurance adjuster (who is also Amerisure's damages expert) agrees that overhead is owed to Cardinal on some parts of the claims but not others, and includes profit on two line items. Amerisure's payment log also acknowledges that overhead and profit are due for some line items, but does not include it in most of its payments. Amerisure also extended coverage for Cardinal's damaged business personal property, but only paid it on an actual cash value basis despite Cardinal replacing it. Finally, some of Cardinal's inventory stored in its warehouse was damaged by the tornado, but Amerisure has fully denied coverage for the inventory and paid nothing for it.

II. Cardinal Provided All Documentation to Amerisure Prior to this Lawsuit.

All the documentation relied on in Cardinal's damage calculations was provided to Amerisure by Cardinal prior to the initiation of this lawsuit. In Amerisure's initial disclosures, these documents were labeled as "Exhibit 9 – Documents Provided by CBM to Amerisure (CBM 000001 – 000479)." (Doc 76.3). These documents were submitted again in support of Amerisure Motion for Summary Judgment. (Doc 58.3 and Doc 58.4). The first 326 pages of these disclosures are invoices showing the amounts Cardinal incurred for the work and are organized in chronological order of the restoration of the property. These are the same documents that Amerisure's insurance adjuster references in his statement of loss. (Doc. 60.11). Accordingly, Amerisure had all the documents and could have used them to assess the amount of loss if it chose to.

III. Damage Categories

As set forth in Cardinal's itemization of damages, there are a number of damage categories at issue in this case. Each is addressed below.

A. Roof

There should be no dispute over the roof because Cardinal does not claim any additional amounts for the roof beyond what Amerisure paid. Amerisure's adjuster, however, concluded that more was owed by Amerisure for other portions of the claim and attempted to setoff this admitted underpayment by contending that Amerisure overpaid for the roof. Amerisure's adjuster contends that Cardinal incurred only \$351,033.45 to replace the roof. (Doc. 60.11, p. 4). In calculating the amount incurred for the roof repair, Amerisure's adjuster only factored in the labor cost performed by Shay Roofing and not the cost of materials purchased by Cardinal from Crown C Supply. (Doc 76.1, CBM-000100, CBM-000101, CBM-000102, CBM-000103, CBM-000113, CBM-000114, CBM-000115, CBM-000133-135) The material cost was \$111,444.37 in addition to the labor. *Id.*

Based on this evidence and the legal arguments outlined in Cardinal's response to Amerisure's Motion for Summary Judgment, Amerisure is not entitled to a setoff and, at the very least, must pay the amounts its own adjuster has concluded are still owed for the building.

B. Building

In determining their respective positions on the amount of loss, both parties relied on a combination of estimates and invoices. Cardinal does not contend that it was underpaid for the roof or code upgrades. For the remainder of the building, however, Cardinal contends the amount of loss is \$1,287,108.20, which is the sum of the estimates and invoices for like-kind-and-quality repairs. Ultimately, Cardinal spent \$1,354,296.90 on building repairs (not including roof repairs and code upgrades). Because some of the actual repairs included upgrades, the claimed amount is less than the incurred amount.

Amerisure paid \$785,076.55 for the building damage (not including roof or code upgrades), which is based on portions of various invoices and estimates combined with what appears to be

arbitrary amounts. Amerisure's adjuster provides two different itemizations of damages for the building. (Doc. 66.11, pp. 11-16). Both itemizations rely on an ARC mitigation invoice, a Shay Roofing estimate, an AirMasters proposal, a Murphy invoice, portions of an ARC invoice, some invoices from Rooftech Consulting, some invoices from Coffey Design Group, bids from Shay Roofing for the canopy repair, a proposal from C&R Mechanical, a portion of an adjuster estimate, and Schaeffer Electric invoices. (Doc. 60.11 and Doc. 76) The itemization prepared by Amerisure's adjuster titled "Statement of Loss" also includes a building permit from the City of Bridgeton, which is not referenced or paid for in the Payment Tracking Spreadsheet. (Doc. 60.11 pp. 12 and 15-16).

Comparing the itemizations further, the amounts of multiple line items do not match between Amerisure's two itemizations. For example, Amerisure's adjuster opined that the covered amount of loss related to the AirMasters proposal was \$73,361 before overhead, but Amerisure only paid \$55,020.75 for this line item. (Doc. 60.11, pp. 11 and 15). Similarly, Amerisure's adjuster contended that \$24,435.60 was owed (before overhead) for the Rooftech invoices, but Amerisure only paid \$21,505.10. (Doc. 60.11, pp. 11 and 15). Amerisure's adjuster also concluded that \$73,100 (before overhead) was owed for the C&R Mechanical proposal, but Amerisure only paid \$46,172.78. (Doc. 60.11, pp. 12 and 15). In total, when the roof line items are removed from both respective itemizations (\$644,804.32 for the roof in the Statement of Loss and \$497,218.91¹ for the roof in the Payment Tracking Spreadsheet), Amerisure's adjuster

¹ In the narrative portion of his report, the adjuster states that \$502,155.59 was paid for the roof (Doc. 60.11, p. 4) and Cardinal has interpreted Amerisure's payment letters as allocating \$505,503.49 for the roof. The more that was actually paid for the roof the larger the gap between the amount the adjuster concludes is owed for the building and the amount Amerisure actually paid.

concluded that \$861,297.40 was owed for the building, but only \$793,361.13 had been paid by Amerisure for the building.

Furthermore, the documents referenced by Amerisure in support of its itemizations do not actually support the amounts stated by Amerisure. For instance, Amerisure's two itemizations refer to Shaeffer Electric invoices in the amount of \$4,897.60 and \$30,000. (Doc. 60.11, pp. 12 and 16). But Cardinal submitted 23 separate invoices from Schaeffer totaling \$153,949.80. (Doc 76.1, CBM-000163, CBM-000179-186, CBM-000194-195, CBM-000219-220, CBM-000255-256, CBM-000258-261, CBM-000264, CBM-000267, CBM-000270, CBM-000274-275, CBM-00081). Likewise, Amerisure claims that it paid \$88,500 for interior work completed by MacKenzie Renovations but Cardinal paid MacKenzie Renovations was \$359,422.00 and no invoice exists in the amount of \$88,500. (Doc 60.11 pp. 15-16 and Doc 76.1, CBM-000086, CBM-000197-199).

For interior repairs, Amerisure uses an unidentified portion of a prior adjuster's estimate to support its amount of loss itemizations, stating that the line item for interior damage totals \$321,815.10, including overhead. (Doc. 60.11, pp. 12 and 16). This estimate was produced by Amerisure with its Rule 26 disclosures but does not appear to have been filed by Amerisure. *See* Exhibit 1. This line item does not appear to correlate to specific line items in Amerisure's estimate and so it is impossible to know what "interior repairs" Amerisure meant to include in the number. Furthermore, other than Amerisure simply picking the smallest number, there is no explanation for why a prior adjuster's estimate should be taken as the amount of loss for the interior damage rather than other invoices or estimates, particularly when Amerisure concedes that estimates and invoices from contractors should be used to set the damages for many other items.

Even if it was possible to determine what lines items were included in the \$321,815.10, the payment tracking spreadsheet shows that Amerisure reduced the 321,815.10 by the \$30,000 it paid for Schaeffer's electrical work and \$88,500 it paid for work performed by MacKenzie Renovations. (Doc 60.11 pp. 15) This \$118,500 is offset in the in the payment section but not the amount of loss section. (Doc 60.11 pp. 11 - 16). Amerisure contends that even though the amounts used to calculate the total have increased, the total doesn't, which is not mathematically possible.

The problem with Amerisure's approach is that its adjuster estimate only valued the electrical work at the \$22,637.00 despite Amerisure actually valuing the electrical work at the \$30,000 it paid. (Doc. 60.11 pp. 15-16). In other words, Amerisure should have substituted its actual electrical work valuation amount (\$30,000) in place of the lower amount listed in its adjuster estimate (\$22,637). This would have raised the overall "interior repair" line item to \$329,178. If the \$30,000 payment was set off against the increased estimate, it would have given dollar-for-dollar credit to Amerisure for the amount Amerisure allocated to electrical work and the amount it actually paid for electrical work. But Amerisure didn't do this.

Instead, Amerisure applied a \$30,000 set off against the \$22,637 amount of loss. Despite Amerisure acknowledging the amount of loss is \$30,000, Amerisure's math shows as an overpayment of \$7,363, effectible setting the amount of loss for the electrical work at \$22,637 and reducing the amount of loss of other non-electrical work contained in the "interior repairs" number by \$7,363. Amerisure cannot acknowledge that its adjuster underestimated an item, pay the higher amount it contends is the right amount and then setoff the lower, undervalued estimate by the higher payment.

This same accounting error occurs with MacKenzie Renovations, but on a larger scale. Under the same payment, Amerisure credits itself for the \$88,500 that it paid for interior work

completed by MacKenzie Renovations. It is unclear how Amerisure determined that this was the correct amount because Cardinal actually incurred \$359,422.00 for Mackenzie Renovations work and there are no invoices for \$88,500 from MacKenzie Renovations. (Doc 60.11, Doc 76.1, CBM-000086, CBM-000197-199). Amerisure again applies an offset for the total amount it claims it paid without adjusting the internal amounts used to reach the \$321,815.10 sum for the interior work. Although it is not clear what specific line items from its adjuster estimate should be replaced with the \$88,500 for Mackenzie Renovation's work, at least some of the 88,500 is allocated to framing. Amerisure's adjuster estimate however, only includes \$454 for framing. (Exhibit 1 pp. 58). The overall inadequacy of the "interior repair" number is also demonstrated by the fact that it is lower than just the actual Mackenzie Renovation amount incurred by Cardinal. (Doc 60.11, Doc 76.1, CBM-000086, CBM-000197-199).

The discrepancies between Amerisure's two itemizations of damages is enough to establish that there are material issues of fact regarding the extent of building damages. Furthermore, there is no legal or factual basis for why the amalgam of invoices and estimates relied on by Amerisure to support either of its damages calculations is superior to the collection of invoices and estimates that support Cardinal's damages calculations. This is especially true given Amerisure's decision to rely on only pieces of some of the estimates or some, but not all, of similar invoices from the same subcontractor. Overall, both Amerisure and Cardinal support their respective damages calculations with similar types of evidence, which a jury should weigh and decide as a matter of fact.

C. Code Upgrades

There is no dispute regarding code upgrades. Although Cardinal incurred a small amount more on code upgrades than what Amerisure paid, the policy's limit for this coverage prevents any further payment for this category of damages.

D. Overhead

As conceded by Amerisure's adjuster it "was originally agreed, that since the insured will be serving as the general contractor, it was approved for 10% overhead to be added." (Doc. 60.11, p. 7). The adjuster's statement of loss recommends payment of multiple line items with 10% overhead added. (Doc. 60.11, p. 11-12). Nevertheless, the adjuster's Payment Tracking Spreadsheet shows multiple payments made without overhead included. (Doc. 60.11, p. 15-16). Based on Cardinal acting as its own general contractor and based on the concession by Amerisure's adjuster, Cardinal is entitled to 10% overhead on whatever building damages it ultimately is awarded in this case. *See also Riggins v. Am. Family Mut. Ins. Co.*, 217 F. Supp. 3d 1017, 1022 (W.D. Mo. 2016)

E. Profit

Similar to overhead, Cardinal is entitled to 10% contractor's "profit" because it acted as its own general contractor. *See id.* Unlike overhead, Amerisure's adjuster contends that "the 10% profit" was not approved to be added by Amerisure. (Doc. 60.11, p. 7). Although the adjuster claims Amerisure should not have to pay profit, his Payment Tracking Spreadsheet shows that Amerisure did, in fact, acknowledge coverage for "O&P," the abbreviation for "Overhead & Profit." (Doc. 60.11, p. 15). Cardinal is entitled to 10% contractor's profit on any building damages.

F. Extra Expenses

Cardinal incurred some expenses to quickly get its business operational following the tornado and eliminate its business interruption loss (a loss which Amerisure would have been obligated to cover). Amerisure correctly paid these costs under the extra expense coverage and Cardinal does not seek any additional amount for this category of damages.

G. Inventory

There are not competing itemizations of damages for the damaged inventory. Rather, Amerisure contends that the inventory was either not damaged or, even if the inventory was damaged by the storm, it was obsolete and therefore not covered. Cardinal's representative observed damage to the inventory caused by the storm. (Doc. 59-14, transcript p. 145:20-146:1; (DOC 68) ¶ 18). The inventory also was not obsolete. (Doc. 68 ¶ 17-19). Amerisure does not dispute these positions with evidence and, even if it did, it would only create a fact issue.

H. Business Personal Property

There is no dispute between Cardinal and Amerisure regarding the value of Cardinal's damaged business personal property because Amerisure valued the property at \$70,883.35 on a Replacement Cost Value basis and Cardinal does not dispute this. (Doc. 54, p. 25; Doc. 60-11, p. 8; (DOC 68) ¶ 16). Rather, the issue is that Amerisure continues to hold back depreciation on the business personal property claim even though it was insured on a Replacement Cost Value basis and Cardinal has replaced its damaged personal property at a cost in excess of the replacement value assigned by Amerisure. (Doc. 59-14, transcript p. 159:3-7; (DOC 68) ¶ 16). The \$31,832.45 of depreciation held back by Amerisure is due to Cardinal.

IV. Vexatious Refusal Claim

Amerisure is holding back money that it owes its insured, Cardinal, under the policy, as acknowledged by its own adjuster. Cardinal is seeking attorneys' fees from Amerisure based on its vexatious refusal to pay all the funds owed on this claim. Amerisure, through its expert has identified multiple areas that Amerisure underpaid on this claim. Amerisure has refused to pay these amounts by claiming it is entitled to a set off for the overpayment of the roof. However, Amerisure's adjuster overlooked the cost of the roofing materials purchased from Crown C Supply and is therefore, at best, applying a greater set off than it is entitled to.

Amerisure has also refused to release the recoverable depreciation for Cardinal's business personal property. The parties reached an agreement that the total value of that portion of the claim was \$70,883.35 but Amerisure only paid \$39,050.90.² Mr. Halpern's affidavit confirms that Cardinal spent more than the agreed upon amount replacing its property and is therefore entitled to the recoverable depreciation of \$31,832.45. (Doc 68.1 ¶16). Despite agreement as to the total amount of the loss and confirmation that the amount agreed upon has been exceeded, Amerisure still refuses to pay the remaining balance. Cardinal wished to inquire why Amerisure believed it could withhold additional funds that its own claim adjuster calculated were due. This and other matters pertaining to the claim are still pending in motions surrounding Amerisure's corporate representative's deposition. (Doc. 50 and Doc. 51).

V. Conclusion

Both Amerisure and Cardinal rely on a similar mix of documentation to articulate and support their respective damages calculation. The difference in the estimate and invoices relied on

² Amerisure's expert claims that the agreed upon amount was \$74,486.47 because it includes temporary storage provided for by ARC. CMB-000052.

by each party are the foundation of the central factual dispute in this case, making summary judgment inappropriate. Further, even based on Amerisure's own numbers and documents, more is owed on the claim. Ultimately, a jury should weigh the evidence and decide the total amount of the loss. Accordingly, the Defendant's motion should be denied.

Respectfully Submitted,

HERMAN & WELLS, P.A.

/s/ Jason A. Herman
Jason A. Herman, *Pro Hac Vice*
5701 Park Blvd. N.
Pinellas Park, FL 33781
(727) 821-2195 (phone)
(877) 395-1574 (fax)
Jason@hermanwells.com

And

THE CAGLE LAW FIRM

By: /s/ Zane T. Cagle
Zane T. Cagle,
500 North Broadway, Suite 1605
St. Louis, MO 63102
Phone: (314) 241-1700
Fax: (314) 241-1738
E-Mail: zane@caglellc.com
Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2023, I electronically filed the above and foregoing with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Jason A. Herman
Attorney