2024 WL 5193809 (C.A.11) (Appellate Brief)
United States Court of Appeals, Eleventh Circuit.

4539 PINETREE, LLC, Plaintiff-Appellant,
v.
CERTAIN UNDERWRITERS AT LLOYD'S, London Subscribing to Policy Number B1180D160620/100NC, Defendants-Appellees.

No. 24-12713.
November 21, 2024.

On Appeal from the United States District Court for the Southern District of Florida
Case No. 1:21-cv-22901-JEM

Defendant-Appellees' Initial Brief

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*1 *JURISDICTIONAL STATEMENT*

The District Court and this Court have subject matter jurisdiction over this case because the parties are diverse and there is more than $75,000 at issue. 28 U.S.C. § 1332. In particular, the sole insurer subscribing to Policy No. B1180D160620/100NC is Brit UW Limited, which is organized under the laws of England and Wales, with its principal place of business there. Brit is a citizen of the United Kingdom. The sole member of 4539 Pinetree, LLC, which sought over $500,000, is Sarah Boymelgreen. Ms. Boymelgreen resides at the subject's property in Florida, and is a citizen of Florida for diversity purposes. The parties are completely diverse and there is at least $75,000 at issue.

This Court has appellate jurisdiction because 4539 Pinetree is appealing a final order granting Underwriters' Motion for Summary Judgment. 28 U.S.C. § 1291. The District Court issued the Order on July 19, 2024. [Order, App. Vol. 3 at 85-87]. 4539 Pinetree filed its Notice of Appeal on August 22, 2024. [Order, App. Vol. 3 at 85-87].

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in granting Underwriters' Motion to Strike the Expert Testimony of John Micali.

2. Whether the District Court abused its discretion in granting Underwriters' Motion to Strike the Affidavit and Expert Testimony of Rami Boaziz.

***2** 3. Whether the District Court properly granted summary judgment to Underwriters because 4539 Pinetree did not present any evidence of cause or the actual cash value of the property allegedly damaged during Hurricane Irma, which is the only measure of damages under the policy.

STATEMENT OF THE CASE

This coverage dispute involves a straight-forward application of the relevant policy and federal law. 4539 Pinetree LLC appeals the Southern District of Florida's exclusion of its expert witnesses based on their unreliability and 4539 Pinetree's failure to properly disclose witnesses pursuant to the District Court's scheduling order and in compliance with the Federal Rules of Civil Procedure. [Notice of Appeal, App. Vol. 3 at 91; Order, App. Vol 3 at 77-89]. The District Court was well within its broad discretion under this Court's precedent when it excluded 4539 Pinetree's experts. Specifically, the District Court held that 4539 Pinetree's disclosed causation expert was unreliable as he did not base his opinion on sufficient facts or data, and did not utilize a reliable methodology. [Order, App. Vol. 3 at 81-84]. The District Court also properly rejected 4539 Pinetree's attempt to introduce testimony of an undisclosed expert on the scope of its damages in response to Underwriters' summary judgement motion based upon 4539 Pinetree's failure to comply with the disclosure rules set out in Federal Rule of Civil Procedure 26. [Order, App. Vol 3 at 85-87].

***3** Without experts to testify as to the cause and extent of its alleged damages, 4539 Pinetree cannot satisfy its burden of proof under Florida law to show that a covered cause of loss damaged its property, and the recoverable amount of those damages. Accordingly, Underwriters were properly granted summary judgment. [Order, App. Vol 3 at 89]. Underwriters respectfully request that this Court affirm the District Court's rulings.

I. ***Statement of Facts and Procedural Posture***

A. The Policy

Underwriters subscribed to Certificate. No. B1180D160620/100NC, which was issued to 4539 Pinetree, LLC (“4539 Pinetree”) for the period October 14, 2016, to October 14, 2017 (the “Policy”). [Policy, App. Vol. 1 at 23-25]. The Policy provided certain “all-risk” property coverage for a residential property located at 4539 Pine Tree Drive, Miami Beach, Florida 33140 (the “Property”), subject to its terms, conditions, and exclusions. *Id*.

The Policy only provides coverage for direct physical damage to the Property that occurred during the Policy period. [Policy, App. Vol. 1 at 28, 34]. The Policy further provides a $2,000,000 limit of insurance for the Property's dwelling, subject to a $100,000 windstorm deductible. [Policy, App. Vol. 1 at 23-25]. In the event of a covered loss, 4539 Pinetree is only entitled to the actual cash value of any alleged damages, until the Property is repaired or replaced. [Policy, App. Vol. 1 at 39-40]. ***4** The Policy's valuation provision further provides that 4539 Pinetree may make a claim for actual cash value and replacement cost value if it notifies Underwriters of its intent to do so within 180 days. [Policy, App. Vol. 1 at 39-40].

B. The Claim and Investigation

4539 Pinetree submitted a claim in the summer of 2018 for damages allegedly resulting from Hurricane Irma. [Compl., App. Vol. 1 at 13]. Underwriters investigated and determined that the covered damages to the Property were below the Policy's $100,000 deductible. [App. Vol. 2 at 207-211]. Underwriters communicated their decision to 4539 Pinetree on November 8, 2018. [App. Vol. 1 at 168-172].

After more than a year and a half of no contact, 4539 Pinetree's public adjuster submitted a "Supplemental Claim" in excess of $600,000. [App. Vol. 1 at 173-174]. Upon receipt, Underwriters retained counsel and requested 4539 Pinetree provide more documentation and that its representative submit to an examination under oath ("EUO"). [App. Vol. 1 at 175-179]. Underwriters sent EUO letters on July 8, 2020, and November 4, 2020. [App. Vol. 1 at 175-184]. Upon receiving no response, Underwriters sent a final letter on January 14, 2021, informing 4539 Pinetree that, due to its non-response, Underwriters presumed it was not pursuing its claim. [App. Vol. 1 at 184-186]. Underwriters requested 4539 Pinetree contact them if it wished to continue pursuing its claim, and to provide Underwriters with dates for an EUO, ***5** as well as the requested documents. Again, 4539 Pinetree did not respond to Underwriters' closing letter. [App. Vol. 1 at 184-186].

C. The Litigation

Instead of responding, 4539 Pinetree filed a lawsuit in state court, claiming that the Property sustained damage during Hurricane Irma that was covered under the Policy. [SUMF, App. Vol. 1 at 127]. On March 15, 2021, Underwriters removed the lawsuit to this Court. [SUMF, App. Vol. 1 at 127]. After the close of discovery, Underwriters moved for summary judgment on January 19, 2022. *Id*. On February 1, 2022, less than one month later, 4539 Pinetree moved for voluntary dismissal without prejudice which the Court granted that same day. *Id*.

4539 Pinetree filed its Complaint in the case at hand on September 12, 2022, realleging a breach of contract claim against Underwriters. [Compl., App. Vol. 1 at 12-15]. The Court entered a Scheduling Order for discovery and expert disclosure deadlines on October 17, 2022. [Docket, App. Vol. 1 at 5]. 4539 Pinetree filed its Amended Expert Disclosure on May 17, 2023, disclosing John Micali of Allied Building Inspection Services Inc. as its causation expert and John Novak of Humble Warrior Inc. as its damages expert. [Expert Disclosure, App. Vol 2 at 4-6]. In support of its expert disclosures, 4539 Pinetree submitted an expert report written by Mr. Micali. [Expert Disclosure, App. Vol 2 at 7-86]. For Mr. Novak, however, 4539 ***6** Pinetree failed to provide a written report and instead submitted a mere estimate of damages to the property. [Expert Disclosure, App. Vol 2 at 87-107].

Underwriters deposed Mr. Micali on September 18, 2023. [Micali Dep., App. Vol. 2, 108-146]. Mr. Micali testified that the damages to 4539 Pinetree's Property, specifically to the roof, were caused by Hurricane Irma. *Id*. at 111. When asked how he determined that the cement roof tiles were uplifted during Hurricane Irma, Mr. Micali attempted to give the often-rejected testimony of "it is so because I said so" based solely on "a reasonable degree of professional certainty based on his experience." *Id*. at 114. When asked how he determined the amount of wind that would be required to uplift the roof tiles, Mr. Micali stated that he did not perform any calculations to determine the required wind speeds to lift the tiles. *Id*. When asked how many storms prior to Hurricane Irma had eighty-four mile-per-hour gusts, he stated that he did not have that information available to him. *Id*. at 115. When asked how he determined that the roof was damaged by Hurricane Irma and not some other storm, he stated that he came to that conclusion because he did not have any evidence that the damage preexisted the storm. *Id*. at 111. He also admitted; however, that he did not have any evidence of the condition of the Property prior to Hurricane Irma. *Id*. at 111-112. Indeed, Mr. Micali's opinion was not based on sufficient facts or data, was not the product of a reliable methodology, and was not helpful to the trier of fact.

***7** Underwriters noticed and subpoenaed Mr. Novak's deposition for November 10, 2023. [Novack Subpoena, App. Vol. 2 at 147-154]. Even though no objections were filed with the Court, Mr. Novak never appeared for his deposition. [Certificate of Non-Appearance, App. Vol. 2 at 155-163]. Underwriters moved to strike the testimony of Mr. Micali and Mr. Novak on December 15, 2023. [Mot. to Strike Micali, App. Vol. 2 at 164-180; Mot. to Strike Novack, *Id*. at 181-193]. Simultaneously, Underwriters moved for summary judgment based on 4539 Pinetree's lack of evidence and inability to meet their burden of proof to show that a covered cause of loss caused damage to its Property, and the actual cash value of the damages. [Mot. Summ. J., App. Vol. 1, at 103-121]. 4539 Pinetree concedes Mr. Novack was properly struck.

Without experts to support its case, 4539 Pinetree attempted to submit an affidavit of Rami Boaziz, the contractor who wrote 4539 Pinetree's estimate of damages, in response to Underwriters' summary judgment motion. [Notice of Filing Aff. of Boaziz;

App. Vol. 3, at 37-42]. Underwriters moved to strike the affidavit and testimony of Mr. Boaziz as an undisclosed expert and for 4539 Pinetree's failure to provide a written report. [Mot. to Strike Aff. of Boaziz; App. Vol. 3, at 43-54]. The District Court agreed and granted Underwriters' Motions to Strike and for summary judgment on July 18, 2024. [Order, App. Vol 3 at 77-89].

***8** Specifically, because 4539 Pinetree did not respond to Underwriters' Motion to Strike Mr. Novack's testimony, the District Court granted Underwriters' Motion to Strike by default. [Order, App. Vol. 3 at 84]. As to Mr. Micali, the District Court held that his opinion was unreliable, "providing nothing more than speculation and conclusory assumptions." [Order, App. Vol. 3 at 81-84]. Finally, as to Mr. Boaziz, the District Court held that failed to meet its burden to show an adequate justification for its failure to provide a written report under Rule 26 or for its failure to disclose him as an expert witness. [Order, App. Vol. 3 at 85-87]. The District Court also found that 4539 Pinetree failed to show a lack of harm to Underwriters as a result of these failures. *Id*. Without experts, 4539 Pinetree could not meet its burdens of proof in this case to show that a covered cause of loss caused damage to the Property and that the actual cash value of the alleged damage exceeded the Policy's $100,000 deductible. *Id*. at 89. Accordingly, the District Court granted Underwriters' Motion for Summary Judgment. *Id*. at 89. 4539 Pinetree disputes the District Court's rulings, resulting in this appeal. [Notice of Appeal, App. Vol. 3 at 91].

II. ***Appellate Standard of Review***

This Court reviews *de novo* a district court's grant of a motion for summary judgment. *Ellis v. England*, 432 F.3d 1321, 1325-26 (11th Cir. 2005). On summary judgment, Underwriters, as movants, must show that there is no genuine issue of material fact. *Id.*; *see also* ***9** *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Underwriters' burden is satisfied by showing that 4539 Pinetree does not have the necessary evidence to support its case. *Dietz v. Smithkline Beecham Corp.*, 598 F. 3d 812, 815 (11th Cir. 2010). Once Underwriters meet this burden, 4539 Pinetree must go beyond the pleadings and show there is a genuine issue of material fact based on admissible evidence. *Porter v. Ray*, 461 F. 3d 1315, 1321 (11th Cir. 2006). Summary judgment is particularly appropriate to resolve questions of insurance coverage. *Technical Coating Applicators, Inc. v. U.S. Fidelity and Guar. Co.*, 157 F.3d 843 (11th Cir. 1998). Here, the District Court granted summary judgment to Underwriters because 4539 Pinetree did not come forward with any admissible evidence creating an issue of fact as to whether its property was damaged by a covered cause of loss and the scope of its recoverable damages. [Order, App. Vol. 3 at 89].

A court of appeals must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony. *General Electric Co. v. Joiner*, 522 U.S. 136, 138-139 (1997). That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Thus, whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1340 (11th Cir. 2003); *see Joiner*, 522 U.S. at 143. This standard of review ***10** requires that this Court defer to the district court's ruling unless it is "manifestly erroneous." *Quiet Tech.,* 326 F.3d at 1340 (quoting *Joiner*, 522 U.S. at 142). Because the task of evaluating the reliability of expert testimony is uniquely entrusted to the district court under *Daubert*, an appellate court must give the district court "considerable leeway" in the execution of its duty. *Rink v. Cheminova, Inc.,* 400 F.3d 1286, 1291 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

4539 Pinetree's argument is twofold. First, it argues that the District Court abused its discretion in excluding its unreliable and undisclosed experts. Specifically, 4539 Pinetree argues that the District Court abused its discretion in finding that its disclosed causation expert, Mr. Micali, did not base his opinion on sufficient facts or data, did not use a reliable methodology, and that his opinion was inadmissible *ipse dixit* testimony. 4539 Pinetree also contends that the District Court abused its discretion for striking Mr. Boaziz, who was not timely or properly disclosed under the requirements of the Court's Scheduling Order or the Federal Rule of Civil Procedure 26. Second, 4539 Pinetree argues that the District Court improperly granted Underwriters' Motion for Summary Judgment based on 4539 Pinetree's lack of experts. Either way, 4539 Pinetree's case is dependent upon this Court finding that the District Court abused its discretion in excluding the experts. Because federal law gives broad leeway to trial courts in the decision to exclude ***11** experts, the District Court acted well within its discretion in striking the experts.

Without experts, 4539 Pinetree cannot satisfy its burden of proof to show that a covered cause of loss damaged its property and the recoverable scope of those damages. Accordingly, the District Court properly granted Underwriters' Motion for Summary Judgment.

*1 *STATEMENT REGARDING ORAL ARGUMENT*

Appellees, Certain Underwriters at Lloyd's, London Subscribing to Policy No. B1180D160620/100NC ("Underwriters"), do not believe that oral argument is necessary. This appeal involves straightforward applications of *Daubert*, the Federal Rules of Civil Procedure, Florida law on burdens of proof in a breach of contract case, and the insurance policy's loss settlement condition, all of which this Court has considered and enforced many times.

For these reasons, Underwriters do not believe that oral argument would be helpful.

*11 *ARGUMENT*

I. *The District Court Properly Exercised Its Discretion in Granting Underwriters' Motion to Strike John Micali Because He Did Not Use a Reliable Methodology, Did Not Base His Opinion on Sufficient Facts or Data, and is Not Helpful to the Trier of Fact.*

The District Court did not abuse its discretion when it correctly applied Federal Rule of Civil Procedure 702 and *Daubert* to exclude Mr. Micali's expert testimony. Under Federal Rule of Evidence Rule 702, a testifying expert must be qualified by knowledge, skill, experience, training, or education, and his opinion must be (a) helpful to the trier of fact; (b) based on sufficient facts or data; (c) the product of reliable principles and methods; and (d) he must have reliably applied the principles and methods to the facts of the case. *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 597 (1993). Further, under *Daubert*, the District Court is the gatekeeper to exclude unreliable testimony. *Id*. 4539 Pinetree has the burden to prove by a preponderance of the evidence that the pertinent admissibility requirements are met. *Id*. at 592. Here, the District Court found that Mr. Micali's testimony was not based in sufficient facts or data, was not the product ***12** of an unreliable methodology, and was conclusory, speculative, *ipse dixit* testimony. [Order, App. Vol. 3 at 81-84]. As outlined below, the District Court was well within its discretion to exclude Mr. Micali.

A. The District Court Found Mr. Micali's Opinions Are Not Based On Sufficient Facts or Data.

As an initial matter, the District Court found that Mr. Micali's expert opinion that the roof of the subject Property was damaged by Hurricane Irma was not based on sufficient facts or data. Mr. Micali had no evidence of the condition of the Property before the storm short of one aerial photograph that he himself admitted was not close enough to determine whether any of the damages preexisted the storm. [Micali Dep., App. Vol. 2, 116-117]. This is particularly relevant here, where Underwriters' investigation determined that some of the damages to the Property were pre-existing damages. [App. Vol. 1 at 170-171]. 4539 Pinetree argues that it is the "industry standard" for an expert to inspect the Property without any knowledge of its prior condition. [Appellant's Br. at 9]. Even if the Court takes that statement as truth, that fact alone does not make the testimony admissible. 4539 Pinetree must still show that Mr. Micali based his opinion on sufficient facts or data, which it did not. *Daubert*, 509 U.S. at 597. The District Court further found that Mr. Micali also admitted he did not know what wind speeds would damage the Property's roof, nor did he have any information as to whether any other storms with wind speeds similar to Hurricane Irma had occurred since the roof of the Property ***13** was installed. [Micali Dep., App. Vol. 2 at 114, 115, 116, 118]. Additionally, Mr. Micali did not itemize or document any alleged damage to the roof, while nonetheless opining that the entire roof must be replaced. [Micali Dep., App. Vol. 2 at 119-120]. For these reasons, the District Court exercised its discretion to hold that Mr. Micali's opinion that the damages were the result of Hurricane Irma was not based on sufficient facts or data.

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B. The District Court Found Mr. Micali's Methodology was Unreliable.

Moreover, the District Court found that Mr. Micali did not use a reliable methodology to form his opinion. [Order, App. Vol. 3 at 81-84]. Under *Daubert*, the trial court must evaluate Mr. Micali's methodology to determine whether his opinions are scientifically sound. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Indeed, "*Daubert* mandates an exacting analysis of the proffered expert's methodology," meaning the Court must scrutinize the "reliability of a proffered expert's sources and methods." *Pleasant Valley Biofuels, LLC v. Sanchez-Medina*, No. 13-23046-CIV, 2014 WL 2855062, at *2 (S.D. Fla. June 23, 2014). *Chapman v. Proctor & Gamble Distributing*, 766 F.3d at 1306 (11th Cir. 2014), citing *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1336 (11th Cir. 2010). To assess an expert's methodology, the *Daubert* court identified the following non-exhaustive factors:

> (1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the theory or technique used by the expert has been subjected to peer review and publication; (3) whether there is ***14** a known or potential error rate of the methodology; and (4) whether the technique has been generally accepted in the relevant scientific community.

Chapman, 766 F.3d at 1305.

In its initial brief, 4539 Pinetree alludes to "the more flexible analysis as prescribed in *Daubert*." [Appellant's Br. at 8]. Underwriters posit that *Daubert* does not proscribe two separate tests, one more flexible than the other. Rather, *Daubert* provides the factors a trial court should use to analyze the reliability of an expert, while allowing trial courts sufficient discretion to determine which factors should be used to analyze the reliability of a particular expert. *Kumho*, 526 U.S. at 150 (finding that the *Daubert* factors may also be used in assessing the reliability of nonscientific expert testimony, dependent upon "the particular circumstances of the particular case, and that the list of specific factors neither necessarily nor exclusively applies to all experts or in every case). Nonetheless, "the focus must be solely on principles and methodology, not on the conclusions that they generate." *Chapman*, 766 F.3d at 1305 (no emphasis added) (internal quotations omitted). Courts recognize that "conclusions and methodology are not entirely distinct from one another," so "a judge is free to conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id*. at 1305-06.

Here, the District Court analyzed Mr. Micali's methodology, or lack thereof, and concluded that it was not reliable and that the analytical gap between the data ***15** and his conclusions is too large. [Order, App. Vol. 3 at 81-84]. The District Court specifically noted that Mr. Micali did not calculate or attempt to determine the wind speeds that would be required to uplift or damage the cement tiles on the roof, did not perform a search to determine whether any other storms with wind speeds similar to Hurricane Irma had occurred after the Property's roof was installed, and had no information regarding the condition of the roof prior to Hurricane Irma's passage. [Order, App. Vol. 3 at 81-84]. The District Court also noted Mr. Micali's testimony that he identified some previous repairs to the roof, but he could not determine whether they existed prior to Hurricane Irma. [Order, App. Vol. 3 at 83]. Without an analysis of the required wind speeds to cause the damage, a determination of whether there were any other potential causes of the damage to the Property, or any effort to itemize the alleged damages to the roof, Mr. Micali had no scientific basis for his conclusion that Hurricane Irma caused the damages to the Property. The District Court applied *Daubert* and its progeny to test the reliability of Mr. Micali's methodology and found the analytical gap between the available data and Mr. Micali's conclusions too large, rendering Mr. Micali's opinion unreliable as the product of an unreliable methodology. [Order, App. Vol. 3 at 81-84]. This finding was well within the District Court's discretion under *Daubert* and 4539 Pinetree has failed to show that finding to be "manifestly erroneous."

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***16 C. The District Court Found Mr. Micali's Opinion Was *Ipse Dixit* Testimony.**

Most significantly, the District Court found that Mr. Micali's opinion was inadmissible *ipse dixit* expert testimony. [Order, App. Vol. 3 at 84]. Indeed, factors [other than the *Daubert* factors] that courts may consider include whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *Joiner*, 522 U.S. at 146. "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id*; *Chapman*, 766 F.3d at 1305.

Mr. Micali's expert testimony amounts to nothing more than a subjective opinion that "it is so." Mr. Micali could not explain either why or how he came to his conclusions, nor could he provide more than a general assurance that his opinion, based on an eyeball test alone, is trustworthy. [Micali Dep., App. Vol. 2 at 115]. In his deposition, Mr. Micali testified multiple times that the basis for his opinions is his thirty years of experience. [Micali Dep., App. Vol. 2 at 112, 113, 115]. In other words, Mr. Micali opines that the damages to the Property are the result of Hurricane Irma because he says so. This is a textbook example of the type of *ipse dixit* testimony that the court in *Joiner* upheld the district court's exclusion of. *Joiner,* 522 U.S., at 146. The District Court did not abuse its discretion in excluding Mr. Micali's testimony on this basis.

***17 D. The District Court Found Mr. Micali's Opinion is Not Helpful to a Trier of Fact.**

Similarly, the District Court found that the speculative, conclusory, and *ipse dixit* nature of Mr. Micali's opinion renders it unhelpful for a trier of fact. [Order, App. Vol. 3 at 84]. The only issues in this breach of contract case are whether the subject Property was damaged by a covered cause of loss, and the scope or extent of the covered damages. Mr. Micali was retained by 4539 Pinetree to testify as to the cause of the damages to Property, but Mr. Micali cannot assist the trier of fact in determining the cause of the damages to 4539 Pinetree's Property because he cannot show, based on any reliable methodology or data, that the damages occurred by covered perils during Hurricane Irma.

Additionally, Mr. Micali's unreliable methodology renders his opinion regarding the roof damages irrelevant. Mr. Micali testified that his opinion on the damage to the roof is based, at least in part, on whether the percentage of the roof that was damaged exceeds twenty-five percent of the entire roof. [Micali Dep., App. Vol. 2 at 113]. Mr. Micali testified that the "twenty-five percent rule" is derived from the Florida Building Code which requires replacement of a roof exceeding this threshold of damages. *Id*. However, the Policy provides, at most, coverage for ten percent of the Coverage A limit of liability for the increased costs incurred due to the enforcement of any ordinance or law requiring or regulating the construction, ***18** demolition, remodeling, renovation or repair to covered property. [1] [Policy, App. Vol. 1 at 23-25]. Further, the Policy provides "We will pay no more than the actual cash value of the damage until actual repair or replacement is complete." [Policy, App. Vol. 1 at 39-40]. Here, not only has 4539 Pinetree not performed any repairs to the Property, but it no longer owns the Property, thus it cannot make the required repairs to the roof. Because 4539 Pinetree has not and cannot perform the repairs to the roof of the Property, the cost of replacing the entire roof based on the Florida Building Code is not recoverable under the Policy. Therefore, Mr. Micali's opinion based on the twenty-five percent rule does not speak to any recoverable damages and is irrelevant in this case.

Because his causation opinion is not based on any sufficient facts, data, or reliable methodology, and is conclusory *ipse dixit* testimony, it is not helpful to the trier of fact in determining the cause of the damages to the Property. Further, this *ipse dixit* testimony has the potential to be prejudicial to Underwriters as a jury may believe Mr. Micali solely based on his experience. Therefore, Mr. Micali's testimony is not helpful to the trier of fact and the District Court did not abuse its discretion by excluding it.

***19 E. 4539 Pinetree Cannot Show That The District Court's Exclusion of Mr. Micali's Testimony Was Manifestly Erroneous.**

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Ultimately, 4539 Pinetree cannot show that the District Court's exclusion of Mr. Micali was "manifestly erroneous." 4539 Pinetree takes issue with the factors used by the District Court to determine reliability, as well as the District Court's ultimate conclusions, but it cannot rationally argue that the District Court had no factual basis for its decision to exclude Mr. Micali as an expert. [2] Underwriters address 4539 Pinetree's arguments below.

4539 Pinetree argues that "Mr. Micali's expertise and numerous years in inspecting such intrusions and finding the cause of same makes him highly qualified to testify in this matter." [Appellant's Br. at 9]. Underwriters note that neither they nor the District Court questioned Mr. Micali's qualifications as an expert witness. Additionally, "although there is some overlap among the inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion, these are distinct concepts that courts and litigants must take care not to conflate." ***20** *Quiet Technologies DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1341 (11th Cir. 2003). Thus, for example, while an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability. *Quiet Tech.,* 326 F.3d at 1341.

4539 Pinetree cites to *Quiet Technologies* for the proposition that the District Court conflated the analysis between the question of admissibility of expert testimony and the credibility and persuasiveness of the testimony. [3] On the contrary, it is 4539 Pinetree who has conflated the analysis between qualifications and reliability, but regardless, this Court in *Quiet Technologies* was careful to emphasize that "[w]hile the Federal Rules of Evidence call upon the courts to serve as gatekeepers who independently evaluate the admissibility of expert opinion testimony, they rely upon the discretion of the trial courts - not the discretion of the courts of appeals." *Quiet Tech.,* 326 F.3d at 1346 (quoting *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 (3d Cir. 2002).

Ultimately, *Daubert* and its progeny are abundantly clear that the trial court has discretion to decide how an expert's reliability should be analyzed and whether an expert's testimony should be admitted. *Id*. A court of appeals is to give the trial ***21** court's decision deference unless the trial court's decision was "manifestly erroneous." *Quiet Tech.,* 326 F.3d at 1340; *Joiner*, 522 U.S. at 142. For all the reasons outlined above, the District Court had a factual basis for its decision to grant Underwriters' Motion to Strike John Micali, and this Court should defer to that decision.

II. *The District Court Properly Exercised Its Discretion to Grant Underwriters' Motion to Strike the Affidavit and Testimony of Rami Boaziz Because 4539 Pinetree Failed to Properly Disclose Its Expert or Provide an Expert Report.*

The District Court did not abuse its discretion in excluding the testimony and affidavit of Rami Boaziz. This is a straight-forward application of Federal Rule of Civil Procedure 26. It is not disputed that Mr. Novack, 4539 Pinetree's disclosed exert as to the scope or itemization of its damages, failed to appear for his properly noticed and subpoenaed deposition. [Certificate of Non-Appearance, App. Vol. 2 at 155-163]. 4539 Pinetree provided no explanation for this failure. Underwriters moved to strike Mr. Novack's testimony on this basis, and because 4539 Pinetree failed to provide a written report authored by Mr. Novak, and moved for summary judgment based, in part, on 4539 Pinetree's lack of expert testimony as to the scope of its alleged damages. Mot. to Strike Novack, App. Vol. 2 at 181-193]. 4539 Pinetree concedes the District Court properly struck Mr. Novak.

In a last-ditch effort to avoid summary judgment, 4539 Pinetree filed an Affidavit of Rami Boaziz in Opposition to Underwriters' Motion for Summary ***22** Judgment to provide undisclosed expert testimony as to its claimed damages. [Notice of Filing Aff. of Boaziz; App. Vol. 3, at 37-42]. Underwriters moved to strike the testimony and affidavit of Mr. Boaziz as undisclosed expert testimony and based on 4539 Pinetree's failure to provide a written report authored by Mr. Boaziz. [Mot. to Strike Aff. of Boaziz; App. Vol. 3, at 43-54]. The District Court agreed, and properly granted Underwriters' Motion to Strike, finding that Mr. Boaziz's affidavit and testimony were not properly disclosed, no written report was provided, and 4539 Pinetree failed to satisfy its burden to show that its failures were substantially justified or harmless. [Order, App. Vol 3 at 77-89].

A. The Affidavit and Testimony of Rami Boaziz Was Undisclosed Expert Testimony.

Whether 4539 Pinetree disclosed Mr. Boaziz as an expert witness cannot truly be disputed. The Court need look no further than 4539 Pinetree's expert disclosures, which only identified two experts, Mr. Micali and Mr. Novack. [Expert Disclosure, App. Vol 2 at 4-6]. Mr. Boaziz was not "disclosed" as an expert until after the close of discovery, after the time for expert disclosures, and after Underwriters' motions to exclude and for summary judgment were filed. [Notice of Filing Aff. of Boaziz; App. Vol. 3, at 37-42]. 4539 Pinetree argues that Mr. Boaziz's testimony was not undisclosed, as he was listed as a witness on 4539 Pinetree's Rule 26 disclosures. [Appellant's Br. at 18]. While it is true that Mr. Boaziz, 4539 Pinetree's public adjuster, was listed as a *fact* witness on 4539 Pinetree's Rule 26 disclosure, that fact ***23** does not excuse 4539 Pinetree's failure to disclose him as an *expert* witness, or its failure to disclose him on 4539 Pinetree's pre-trial expert disclosures, if it intended to introduce his purported expert testimony at any point in the case.

4539 Pinetree's position as to the testimony of Mr. Boaziz is curious. 4539 Pinetree argues that Mr. Boaziz's testimony was intended as fact testimony in rebuttal to Underwriters' Motion for Summary Judgment, while simultaneously arguing that the delay in classifying him as an expert was justified. [Appellant's Br. at 18]. 4539 Pinetree cannot eat its cake and have it too. If Mr. Boaziz's testimony and affidavit are fact witness testimony, then Underwriters' Motion for Summary Judgment was properly granted because 4539 Pinetree lacks an expert witness to satisfy its burden to show the scope or itemization of its recoverable damages. To the extent the affidavit and testimony of Mr. Boaziz are proffered as expert testimony to satisfy its burden of proof as to the scope or itemization of its loss to avoid summary judgment, that testimony was not properly disclosed as, even if Mr. Boaziz was disclosed as a potential *fact* witness, he was not disclosed as an *expert*, and no expert report was provided.

This is not a novel issue, as federal courts routinely strike late-disclosed or undisclosed experts. The Federal Rules of Civil Procedure require parties to make expert disclosures "at the times and in the sequence that the court orders." *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1411 (11th Cir. 2011). "Because the ***24** expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise, compliance with the requirements of Rule 26 is not merely aspirational." *Reese v. Herbert*, 527 F.3d 1253, 1266 (11th Cir. 2008). Rather, "[r]ule 26 imposes specific disclosure requirements upon any witness who is retained or specially employed to provide expert testimony in the case." *Prieto v. Malgor*, 361 F.3d 1313, 1317 (11th Cir. 2004) (internal quotations omitted). In particular, Rule 26 requires the parties to timely disclose experts with sufficiently detailed expert reports. *Romero v. Drummond Co*., 552 F.3d 1303, 1323-24 (11th Cir. 2008). This allows the parties to depose witnesses during the discovery period, evaluate the likely success of any dispositive motion, identify rebuttal witnesses, and prepare for trial. *Hewitt v. Liberty Mut. Group, Inc*., 268 F.R.D. 681 (M.D. Fla., May 27, 2010). 4539 Pinetree did not even attempt to comply with the Federal Rules requiring the timely disclosure of experts. For this reason alone, the District Court properly exercised its discretion in granting Underwriters' Motion to Exclude the Affidavit and Testimony of Rami Boaziz.

B. 4539 Pinetree's Failure to Comply With The Federal Rules and The Court's Scheduling Order is Not Substantially Justified.

4539 Pinetree does not seriously contest that Mr. Boaziz was not an expert requiring disclosure. Instead, 4539 Pinetree attempts to skirt the disclosure rules by arguing that its failures were substantially justified or harmless to Underwriters. [Appellant's Br. at 18-19]. Again, this is not a novel issue, and federal courts are ***25** well versed in determining when to exclude experts. Under Federal Rule of Civil Procedure 37(c)(1), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *King v. Akima Glob. Servs., LLC*, 323 F.R.D. 403, 408 (S.D. Fla. 2017). As a result, ***"[t]he sanction of exclusion is automatic and mandatory"*** when the party in violation cannot show its failure was substantially justified or harmless. *O'Brien v. NCL (Bahamas) Ltd*., No. 16-23284-CIV, 2017 WL 6949261 at *2 (S.D. Fla., Oct. 13, 2017) (emphasis added); *Pharma Supply, Inc. v. Stein*, No. 14-80374-CIV, 2015 WL 11422286 at *3 (S.D. Fla., June 5, 2015), aff'd, 671 F. Appx. 765 (11th Cir. 2016) (holding "[t]he presumptive result of such an untimely disclosure is the exclusion of late-disclosed witnesses or evidence"). 4539 Pinetree, as the non-disclosing party, bears the "burden of establishing that a failure to disclose was substantially justified or harmless." *Mitchell v. Ford Motor Co*., 318 Fed. Appx. 821, 825 (11th Cir. 2009) (internal quotation omitted). To determine whether the failure to disclose was

substantially justified or harmless, federal courts in Florida generally consider four factors: (1) the importance of the excluded testimony; (2) the explanation of the party for its failure to comply with the required disclosure; (3) the potential prejudice that would arise from allowing the testimony; and (4) the availability of a continuance to ***26** cure such prejudice. *Managed Care Sols., Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 1837724, at *4 (S.D. Fla. May 3, 2010).

First, there is no question that the testimony is important, since 4539 Pinetree has the burden of showing that there was direct physical damage to the Property during the policy period that was caused by a covered cause of loss, and an itemization of those damages, which they can only meet through expert testimony. *Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-CV-23362-KMM, 2018 WL 3412974, at *8-9 (S.D. Fla. June 11, 2018). In fact, while striking untimely disclosed experts in a similar case, the District Court noted that "it is a known fact in cases such as this that expert witnesses are essential to establish the extent of damage caused by a windstorm." *Young v. Lexington Ins. Co.*, 269 F.R.D. 692, 694 (S.D. Fla. 2010).

Second, 4539 Pinetree's conclusory statement that its delay in classifying Mr. Boaziz as an expert is substantially justified is baseless. To date, 4539 Pinetree has made no attempt to explain its failure to properly disclose the witness. 4539 Pinetree refers to some vague "circumstances" allegedly causing its disclosed itemization expert to fail to appear for his deposition and fail to provide a written report; however, even in its Appellants' Brief, 4539 Pinetree does not elaborate on these "circumstances" nor has it provided any explanation at all as to the late disclosure, much less one that would constitute a "justification" for the failure. [Appellant's Br. at 18, 4].

***27** Even assuming that 4539 Pinetree had offered some explanation for failing to comply with the Court's deadline, which, again, it has not, federal courts routinely find that administrative or operational mishaps do not excuse a failure to comply with disclosure deadlines. *See Gomez v. Pagan*, No. 13-21811-CIV, 2014 WL 11878588 at *2 (S.D. Fla., July 1, 2014) (finding "Plaintiff clarifies that the delay in complying with Rule 26 is due to an office calendaring mistake, which is not a justification to miss a court ordered deadline"); *O'Brien*, 2017 WL 6949261 at *6 (finding late disclosure unjustified where plaintiff "overlooked" the time in which expert disclosures were due). See also *Eitzen Chem. (USA) LLC v. Carib Petroleum*, No. 10-23512-CIV, 2011 WL 13213314 at *1 (S.D. Fla., Nov. 30, 2011).

Third, 4539 Pinetree argues that because Underwriters were aware of Mr. Boaziz and the relevance of his testimony to the case, they had plenty of time to conduct discovery as to Mr. Boaziz, and therefore could not have been harmed by 4539 Pinetree's failure to disclose him as an expert. This is simply not true, and even if it was, it does not excuse 4539 Pinetree's failure to comply with the federal rules. The fact that Underwriters had the opportunity to conduct discovery related to Mr. Boaziz as a *fact* witness does not mean that they were not harmed by 4539 Pinetree's failure to disclose him as an *expert* witness. The line of questioning for a fact witness differs significantly from the line of questioning for an expert witness, as a fact witness would be deposed regarding his observations only, whereas an ***28** expert witness would be deposed regarding his qualifications, methodology, conclusions, and ultimate opinion. Similarly, Underwriters were not given the opportunity to conduct expert discovery as to Mr. Boaziz, which is significantly different from fact discovery.

Moreover, at the deposition of John Micali, Underwriters' counsel specifically asked 4539 Pinetree's counsel which of its disclosed experts would be testifying as to the scope of damages to the Property. [Micali Dep., App. Vol. 2 at 110]. This clarification was necessary because 4539 Pinetree's expert disclosures listed Mr. Micali as testifying to both the cause and extent of the damages. [Expert Disclosure, App. Vol 2 at 4-6]. 4539 Pinetree's counsel represented that Mr. Micali was the causation expert and Mr. Novack was the damages expert. [Micali Dep., App. Vol. 2 at 110]. At no time did 4539 Pinetree's counsel indicate Mr. Boaziz would provide expert testimony on damages. Based on 4539 Pinetree's expert disclosures and the representations made by 4539 Pinetree's counsel, Underwriters were informed that Mr. Novack was the damages expert and conducted discovery accordingly. Underwriters had no reason to believe that Boaziz would be called as an expert. Therefore, 4539 Pinetree's assertion that Underwriters should not have been surprised by Mr. Boaziz's testimony is simply false.

Finally, in the same vein, a continuance would have only prejudiced Underwriters further. 4539 Pinetree argues that exclusion of the untimely and ***29** undisclosed expert was too harsh of a remedy, and that the District Court should have allowed it

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to cure its failures as there was a less-severe alternative available. Notably, 4539 Pinetree does not describe what "less severe alternative" was available. To the extent 4539 Pinetree argues that the District Court should have not ruled on Underwriters' summary judgment motion and reopened discovery, the District Court properly held that this would have unduly prejudiced Underwriters and further delayed the already extended pending trial date. [Order, App. Vol 3 at 85-87]. More importantly, 4539 Pinetree could have filed a motion for a continuance and disclosed Mr. Boaziz immediately after its disclosed expert failed to appear for his deposition, but it chose not to do so.

Instead, 4539 Pinetree waited to attempt to introduce Mr. Boaziz's purported expert testimony until January 9, 2024, in response to Underwriters' summary judgment motion, almost two months after the Court's previously extended deadline for completing expert discovery and only three months before the scheduled trial. [Appellant's Br. at 18]. The District Court's ruling is consistent with cases in the Southern District of Florida where experts are struck when the discovery is "so belated" that there is not sufficient time in the discovery period to depose them. *Dyett v. N. Broward Hosp. Dist.*, No. 03-60804-CIV, 2004 WL 5320630 at *1 (S.D. Fla., Jan. 21, 2004); *Managed Care,* No. 09-60351-CIV, 2010 WL 1837724, at *4. In *Dyett*, the Southern District of Florida struck an expert that was disclosed during ***30** the discovery period, but with insufficient time left to depose him. *Dyett,* No. 03-60804-CIV, 2004 WL 5320630 at *1. 4539 Pinetree did not disclose Mr. Boaziz as an expert until long after the expiration of the discovery period, and after Underwriters' Motions to Strike and for summary judgment were filed. [Notice of Filing Aff. of Boaziz; App. Vol. 3, at 37-42]. 4539 Pinetree cannot seriously contest that it failed to disclose Mr. Boaziz as an expert in the time required by the District Court's deadlines.

Similarly, a continuance would not have cured the prejudice. At the time 4539 Pinetree sought to introduce Mr. Boaziz, the deadlines to disclose and conduct expert discovery had long passed, Underwriters had already spent significant time and effort in filing their Motion for Summary Judgment, and motions to strike experts, and the trial was only three months away. The District Court had already continued the trial, and further continuance would have undoubtedly interfered with the scheduled trial period and extended the litigation for months. Further, granting a continuance at that time would only punish Underwriters for adhering to the Court's deadlines and absolve 4539 Pinetree of ignoring the same deadlines, sending a message that the Court's deadlines are optional and that ignoring them carries no consequences. To allow 4539 Pinetree to introduce a late-disclosed expert at that point would have been highly prejudicial to Underwriters. For these reasons, 4539 Pinetree cannot show that its failure to comply with the Federal Rules and the ***31** District Court's Scheduling Order were substantially justified or harmless, and the District Court's exclusion was warranted under this Court's precedent and was not too harsh. This is especially true where 4539 Pinetree had previously filed suit and voluntarily dismissed the case while Underwriters' summary judgment motion was pending.

C. 4539 Pinetree Did Not Provide A Written Report Authored and Signed By Mr. Boaziz.

Even if 4539 Pinetree could somehow show that its failure to timely disclose Mr. Boaziz as an expert witness, the District Court was still within its discretion to exclude the testimony because Mr. Boaziz did not produce a report. To date, no expert report has been provided. The "disclosure of expert testimony within the meaning of [Rule 26] contemplates not only the identification of the expert, but also the provision of [the expert's] written report." *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1361 (11th Cir. 2008). For a retained expert's written report to conform with Rule 26, it must contain specific information, including a complete statement of all the opinions and reasons for them, the data and other information considered, any exhibits, the witnesses' qualifications, the witness's testifying history, and a statement of his or her compensation. Fed. R. Civ. P. 26(a)(2)(B)(i-vi). In addition, the report must be "prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B). Only a report containing information that, at least in part, speaks to all of these categories will satisfy this Rule's requirements. ***32** *See Salinas*, 650 F.3d 1402, 1409 (11th Cir. 2011); *Eitzen Chem*., 2011 WL 13213314 at *1. 4539 Pinetree did not even attempt to comply with these requirements.

In short, 4539 Pinetree's attempt to identify a new expert witness in response to a summary judgment motion and ignore even the most basic requirements of the District Court's scheduling order and the federal rules warrant consequences. For these reasons, the District Court did not abuse its discretion in excluding the affidavit and testimony of Mr. Boaziz.

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III. *The District Court Properly Granted Underwriters' Motion for Summary Judgment Because 4539 Pinetree Failed to Satisfy Its Burden of Proof to Show The Cause and Scope of Its Recoverable Damages.*

A. 4539 Pinetree Cannot Satisfy Its Burden of Proof to Provide Expert Testimony as to The Cause and Scope of Its Alleged Damages.

4539 Pinetree simply cannot meet its burden of proof as to its breach of contract claim. More specifically, 4539 Pinetree cannot come forward with evidence to create a genuine issue of material fact that the Property sustained covered damages exceeding the deductible. Under Florida law, this is a two-step process. First, 4539 Pinetree must come forward with an itemization (or scope) of the alleged damages claimed. Second, once it makes this showing, 4539 Pinetree must come forward with evidence of the cause of the claimed damages. 4539 Pinetree can do neither.

Indeed, "[a]n insured claiming under an all-risks policy has the burden of proving that the insured property suffered a loss while the policy was in effect." ***33** *Mama Jo's Inc. v. Sparta Ins. Co.,* 823 F. App'x 868, 878 (11th Cir. 2020). Florida courts have specifically rejected the idea that Underwriters, as the insurer, must cover all "losses." *Fayad v. Clarendon National Ins. Co.,* 899 So. 2d 1082, 1086 (Fla. 2005). Rather, all-risk policies "cover all ***fortuitous losses*** or damages other than those resulting from willful misconduct or fraudulent acts." *Id.* at 1085 (emphasis added). Therefore, to succeed in this action, 4539 Pinetree must prove that a fortuitous event during the Policy period caused direct physical damage to the Property. *Peek v. American Integrity Ins. Co. of Florida,* 181 So. 3d 508, 510 (Fla. 2nd DCA 2015); *Mama Jo's, Inc. v. Sparta Ins. Co.,* No. 17-CV-23362-KMM, 2018 WL 3412974, at *8-9 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020) ("Plaintiff carries the burden of proving causation to show that there was a direct physical loss and thus coverage under the Policy").

Specifically, Florida law requires insureds to produce a qualified expert witness to testify as to what "caused" direct physical damage to property during the policy period. *Peek,* 181 So. 3d at 509; *Mama Jo's,* No. 17-cv-23362, 2018 WL 3412974 at *8-9. Without expert testimony on the crucial issue of causation, the insured cannot satisfy its initial burden of proof and cannot succeed on its breach of contract action as a matter of law. *See Mama Jo's,* 2018 WL 3412974 at *8-9. In other words, without an expert, an insured cannot show that a fortuitous event caused damage.

***34** Both federal and Florida courts have found that insureds must produce admissible expert testimony as to the causation of direct physical damage to the property. *Peek,* 181 So. 3d at 510; *Mama Jo's,* 2018 WL 3412974, at *8-9. In *Mama Jo's, Inc.,* this Court affirmed the district court's grant of summary judgment to the insurer because the insured could not produce admissible expert testimony showing that a covered cause of loss caused direct physical damage to the property during the policy period. In that case, the district court excluded the testimony of the insured's expert witnesses because, as here, his testimony was unreliable as *ipse dixit* opinions not based on a reliable methodology. *Mama Jo's, Inc.,* 2018 WL 3412974, at *20-25.

4539 Pinetree cannot meet its burden. As outlined above, 4539 Pinetree has no experts can testify at trial or create a genuine issue of material fact to avoid summary judgment. As discussed in depth above, Mr. Micali's testimony is inadmissible because it employs an unreliable methodology, was not based on sufficient facts or data, and is conclusory, *ipse dixit* testimony. Mr. Boaziz's testimony is not admissible because he was not properly disclosed under Federal Rule of Civil Procedure 26. Therefore, 4539 Pinetree has no admissible testimony to meet its burden of proof in this case. Further, although this Court reviews the grant of summary judgment *de novo*, it reviews the exclusion of experts for abuse of discretion. *Quiet Tech.,* 326 F.3d at 1346. The District Court had a factual basis for ***35** its decision to exclude 4539 Pinetree's expert, and thus did not abuse its discretion under *Daubert* when it excluded the unreliable testimony of 4539 Pinetree's causation expert, John Micali.

This Court has also routinely upheld the exclusion of witnesses and documents on summary judgment where the non-movant failed to comply with the initial disclosure requirements in Fed. R. Civ. Pro. 26(a)(1). *See Rigby v. Philip Morris USA Inc.,* 717 Fed. App'x 834, 835 (11th Cir. 2017) (affirming summary judgment and holding that the district court did not abuse discretion by excluding affidavits, without which there were no disputed material facts precluding summary judgment). Where 4539 Pinetree

did not properly disclose its expert pursuant to the District Court's scheduling order and Rule 26, the Court must preclude 4539 Pinetree from attempting to use affidavits from those same experts in order to avoid summary judgment.

Without experts to support its case, 4539 Pinetree simply cannot meet its initial burden of proof that direct physical damage occurred during the Policy period. The District Court properly granted summary judgment.

B. 4539 Pinetree Cannot Satisfy Its Burden of Proof to Show Its Recoverable Damages Exceed the Policy's $100,000 Deductible.

Even if 4539 Pinetree could somehow overcome the myriad of issues with its experts, it still failed to show that its recoverable damages exceed the Policy's substantial $100,000 deductible. ***36** *Sunflower Condo. Ass'n, Inc. v. Everest Nat'l Ins. Co.*, No. 19-CIV-80743-RAR, 2020 WL 5757085, at *6 (S.D. Fla. Sept. 28, 2020) (holding "grant of partial summary judgment simply establishes that [the insured] is only entitled to recover damages, if any, in excess of the Policy's hurricane deductibles."); *Citizens Property Insurance Corporation v. Manning*, 966 So. 2d 486 (Fla. 1st DCA 2007) (holding the insured has the threshold burden of showing the loss exceeds the policy's deductible and the failure to meet that burden was fatal to the insured's claim). Under the Policy, 4539 Pinetree may recover either: (1) the actual cash value ("ACV"), which is the replacement cost of the actually damaged property, less depreciation; (2) the actual repair costs or the estimated replacement cost value ("RCV"), whichever is less; or (3) it can make a claim based on both ACV and RCV if it notifies Underwriters of its intent to do so within 180 days of the property damage. [Policy, App. Vol. 1 at 39-40]. These are the only measures of damages available for 4539 Pinetree. *See CMR Constr. & Roofing, LLC v. Empire Indem. Ins. Co.*, 843 F. App'x 189, 192 (11th Cir. 2021).

As to RCV, 4539 Pinetree is not entitled to replacement costs until repairs or replacement is complete. This Court recently reiterated that, to recover replacement costs under this type of insurance contract, the insured must actually complete repairs. *Metal Products Co., LLC*, 2022 WL 104618 (11th Cir., Jan. 11, 2022), at *2 (finding that where the insured made no repairs, the insurer was not obligated to pay the replacement cost value of the property). *See also* ***37** *CMR Constr.*, 843 F. App'x at 192 (finding exact same policy language "means that [the insurer] was not obligated to pay [the insured] the replacement cost value until [the insured] had actually made the repairs and incurred the costs of doing so"); *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, 395 F. App'x 659, 663 (11th Cir. 2010) (finding "Florida courts have upheld similar contracts that expressly require repair before claiming RCV damages"). Therefore, 4539 Pinetree cannot recover RCV unless it actually repairs the alleged damage and does so as soon as reasonably possible after the loss or damage. There is no evidence that 4539 Pinetree made any repairs to the Property. Even more, Underwriters maintain that 4539 Pinetree can never repair the Property because it sold the Property without making the repairs. For these reasons, Underwriters could not have breached the insurance contract by not paying replacement costs where no repairs have been made.

Because RCV is unavailable, the only remaining measure of damages is ACV. The Policy and Florida law provide that ACV is the replacement costs of the actually damaged items, less the applicable depreciation at the time of the loss. *See Buckley Towers*, 395 F. App'x at 666 (holding "depreciation is necessarily part of actual cash value damages"); *Grand Reserve of Columbus, LLC v. Prop.-Owners Ins. Co.*, 721 F. App'x 886, 889 (11th Cir. 2018) (holding "[a]ctual cash value is determined simply by subtracting depreciation from the figure for replacement value"). Here, there is no evidence in the record that 4539 Pinetree ever sought ACV during the life ***38** of the claim and has no admissible ACV evidence. Therefore, it cannot rely on any alleged ACV damages to prove its damages exceed the Policy's applicable deductible. *See Sunflower Condo.*, 2020 WL 5757085, at *6.

Moreover, the Eleventh Circuit's precedent articulates that an insured cannot recover ACV damages where it "did not and does not seek actual cash value" during the life of the claim nor in any subsequent lawsuit. *See CMR Constr. & Roofing, LLC*, 843 F. App'x at 193. *See also Metal Products*, 2022 WL 104618 at *3 (finding that the insured had demanded only replacement cost damages and provided an estimate for replacement cost damages, and thus, the insured could not change the nature of its demand for payment by later asserting that its estimate contained both ACV and RCV amounts). Here, 4539 Pinetree cannot come forward with any admissible evidence that it ever sought ACV damages, because no such evidence exists. This Court

has previously found that an insurer cannot breach the contract in failing to pay ACV that was never sought. *Id*. The same result applies here.

In sum, 4539 Pinetree cannot come forward with any admissible evidence of completed repairs necessary to recover RCV under the Policy. 4539 Pinetree also cannot come forward with any evidence that it ever sought ACV damages, and indeed, has no ACV evidence. Based on this Court's precedent in *CMR Construction* and *Metal Products, Inc.*, which are nearly identical to the issues here, the District Court properly granted summary judgment.

*39 *CONCLUSION*

For the reasons outlined herein, the District Court properly granted summary judgment to Underwriters and this Court should affirm.

Footnotes

1 The Policy provides a limitation of liability of USD 2,000,000 for Coverage A: Dwelling. [Policy, App. Vol. 1 at 23-25].

2 4539 Pinetree cites to *Navelski v. Int'l Paper Co.*, and states that this Court "overturned a lower court's order excluding an expert witness' testimony." [Appellant's Br. at 10]. *Navelski* is a case from the Middle District of Florida, not from the Eleventh Circuit, and as such it is not binding on this Court or the Southern District. Further, *Navelski* did not overturn any lower court's exclusion of expert witnesses. *Navelski v. Int'l Paper Co.,* 771 F. App'x 949, 950 (11th Cir. 2019).

3 Underwriters note that 4539 Pinetree states that this Court in *Quiet Tech.* found "that [the district court] abused its discretion by excluding an expert witness." [Appellant's Br. at 11]. On the contrary, this Court in *Quiet Tech.* found no abuse of discretion in the district court's *admission* of an expert's testimony. *Quiet Tech*. 326 F.3d at 1342. This serves to prove Underwriters' point, that the district court has wide discretion in determining the admissibility of expert witnesses. *Id*. at 1346.

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