

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

RAFAEL TREVINO,

Plaintiff,

VS.

NEXT INSURANCE US COMPANY §  
AND CHRISTOPHER ANTHONY §

Defendants.

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CIVIL ACTION NO. 4:25-cv-001356

**PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT NEXT INSURANCE U.S.  
COMPANY’S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

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**PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT NEXT INSURANCE U.S. COMPANY’S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

Plaintiff, Rafael Trevino (“Trevino” or “Plaintiff”), files this Response in Opposition to Defendant Next Insurance US Company’s Motion for Summary Judgment (the “Motion for Summary Judgment”) filed by Next Insurance U.S. Company (“Next Insurance”).

**OVERVIEW**

1. Next Insurance’s Motion for Summary Judgment is based upon two fundamental premises, both of which fail: First, Next Insurance claims that “[t]he Policy that governs this dispute [] provides no Building coverage whatsoever.”<sup>1</sup> The reality is that the Policy covers a substantial portion of the Plaintiff’s loss, and this is based on the strict terms of the Policy. The specific coverages in the Policy must be examined according to their terms; they cannot be oversimplified,<sup>2</sup> as Next Insurance does here, in an attempt to throw everything at the wall in a summary judgment motion, and see what sticks. However, Next Insurance (shockingly) never bothered to send an adjuster to inspect Mr. Trevino’s property to see what exactly was damaged.<sup>3</sup>

2. And Next Insurance didn’t just fail to inspect the property once – it failed to inspect the property twice – for either of the events that damaged Mr. Trevino’s property.<sup>4</sup> The insured property was stricken on May 16, 2024, and Mr. Trevino filed a claim with Next Insurance on May 20, 2024. Without

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<sup>1</sup> Motion for Summary Judgment [Dkt. 9] at 1.

<sup>2</sup> See, *infra*, text accompanying notes 23-32.

<sup>3</sup> “I reviewed the file on July 12, 2024 and concluded there was no coverage. Next [Insurance] did not inspect the Property; Plaintiff offered access on July 18, 2024, but was declined on July 22, 2024 due to no coverage.” Defendant Christopher Anthony’s Objections and Responses to Plaintiff’s First Set of Interrogatories, at 6, Ex. 1; Defendant Next Insurance US Company’s Objections and Responses to Plaintiff’s First Set of Interrogatories at 6, Ex. 2.

<sup>4</sup> See Motion for Summary Judgment [Dkt. 9] at 3 (“On May 16, 2024, a severe windstorm caused a tree to fall onto the roof, allegedly damaging the Property. Trevino submitted a claim with Next on or about May 20, 2024.”) & 4 (“On or about July 8, 2024, Hurricane Beryl hit the Houston area and allegedly caused additional damage to the subject property. Trevino then submitted another claim on July 11, 2024.”).

inspecting the property, Next Insurance issued a “verbal denial” **that same day**, on May 20, 2024.<sup>5</sup> Then the insured property was struck by Hurricane Beryl on July 8, 2024, and Mr. Trevino filed a second claim on July 11, 2024. Next Insurance denied the second claim **the next day**, July 12, 2024.<sup>6</sup> Next Insurance refused to inspect the property for either claim. Now that inspections have been done, however, coverage is clear from the very evidence and estimates of loss that Next Insurance files with its Motion.<sup>7</sup>

3. Second, the Motion for Summary Judgment asserts that an entry made by an adjuster in its claims file somehow does away with Mr. Trevino’s claim for lost Business Personal Property.<sup>8</sup> Instead of performing an inspection of the property to see what exactly was damaged, Next Insurance presents the excuse that it had difficulty communicating with Mr. Trevino because he is a Spanish speaker.<sup>9</sup> Exploiting this breakdown, Next Insurance now wants to claim that it relied upon Mr. Trevino’s own determination as to whether or not there was “Business Personal Property” as defined in the Policy.<sup>10</sup> The notes from the claims file even show that Mr. Trevino did not know how the insurance company should classify what “Business Personal Property” is under the Policy.<sup>11</sup> Needless to say, insured individuals are not the ones tasked with performing insurance claims inspections – insurance companies are.<sup>12</sup> But Next Insurance must

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<sup>5</sup> See Defendant Christopher Anthony’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6, Ex. 1; Defendant Next Insurance US Company’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6-7, Ex. 2.

<sup>6</sup> *Id.*

<sup>7</sup> See OCRG Consultant Group Xactimate® (June 27, 2024) [Dkt. 11-2].

<sup>8</sup> See Motion for Summary Judgment [Dkt. 9] at 3 (“Next employee, Eric Daughtry then telephoned Trevino, who primarily speaks Spanish, and verified that the reported loss involved only building elements and that Trevino stored no business property on-site (Ex. M; DEF 212-214, Ex. N ¶ 5; Ex. O ¶ 5).”).

<sup>9</sup> See Next Insurance Claims File [Dkt. 11-5] at 15 [DEF000218].

<sup>10</sup> See Next Insurance Claims File [Dkt. 11-5] at 14 [DEF000217], Ex. \_\_\_\_.

<sup>11</sup> See Next Insurance Claims File [Dkt. 11-5] at 11 (“[Mr. Trevino asked me what I think ‘business personal property’ means, and ‘how I would perceive that coverage as a business owner?’ I informed him that I would ask the company I am trying to get a policy from to provide examples or a clearer description of the definition of it so I can better understand it.”).

<sup>12</sup> This is the entire basis for the Texas Prompt Payment of Claims Act.

Not later than the 30th day after receiving a presuit notice given under Section 542A.003(a), a person to whom notice is given may send a written request to the claimant to inspect, photograph, or

hide from the Court the fact that it never did the first thing required in insurance coverage: Next Insurance never bothered to have one of its army of insurance adjusters simply drive to look at the tree that had crashed through Mr. Trevino's apartment complex unit to see what was damaged.

4. The Motion for Summary Judgment should be denied in its entirety.<sup>13</sup>

**CORRECTED: UNDISPUTED MATERIAL FACTS**

5. Next Insurance's section entitled, "Undisputed Material Facts" misrepresents some of the facts of this case. The following represents, at least in part, a correction.

**I. Undisputed: Mr. Trevino's Property Was Damaged in Two Covered Events and Next Insurance Denied Each Claim Within 24 Hours**

6. Next Insurance admits that there were two weather events that damaged Mr. Trevino's property. The insured property was stricken on May 16, 2024, and Mr. Trevino filed a claim with Next Insurance on May 20, 2024. Without inspecting the property, Next Insurance issued a "verbal denial" **that same day**, on May 20, 2024.<sup>14</sup> Then the insured property was struck by Hurricane Beryl on July 8, 2024, and Mr. Trevino filed a second claim on July 11, 2024. Next Insurance denied the second claim **the next day**, July 12, 2024.<sup>15</sup> Next Insurance refused to inspect the property for either claim.

7. Next Insurance also admits in its Motion for Summary Judgment that "there is no doubt

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evaluate, in a reasonable manner and at a reasonable time, the property that is the subject of the claim. If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the person receives the presuit notice.

TEX. INS. CODE §542A.004 (Inspection).

<sup>13</sup> All of this is before even considering the fact that, as movant, Next Insurance is required here to demonstrate that there is "no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. On the contrary, Next Insurance's motion shows that there is – without question – covered damages and that Next Insurance never bothered even to inspect them. It is essentially a motion for summary judgment that backfired. With regard to formatting, it should also be noted that Next Insurance's Motion for Summary Judgment does not comport with the briefing requirements set forth in the Local Rules for the U.S. District Court for the Southern District of Texas or Judge Kenneth M. Hoyt's Court Procedures.

<sup>14</sup> See Defendant Christopher Anthony's Objections and Responses to Plaintiff's First Set of Interrogatories No. 3 at 6, Ex. 1; Defendant Next Insurance US Company's Objections and Responses to Plaintiff's First Set of Interrogatories No. 3 at 6-7, Ex. 2.

<sup>15</sup> *Id.*

Plaintiff sustained damage to the building.”<sup>16</sup> The damage was not limited to “the building’s roof, sheathing, fascia, and structural members,” despite what Next Insurance represents in its Motion.<sup>17</sup> In its Property Loss Notice, Next Insurance states that “Hurricane Beryl damaged the roof, and interior and of insureds property[.] Call insured at ... ([Named Insured] speaks Spanish):”<sup>18</sup>

Intermediary	Insured
Policy Number NXTY7W3T3X-02-CP	RAFAEL TREVINO
Insurer Next Insurance US Company	Effective Date: 07/11/2024
<b>ADDITIONAL REMARKS</b>	
This Additional Remarks form is a schedule to ACORD form, Form Number: ACORD 1 (2009/02) Form Title: Property Loss Notice	
IBC from NI: Hurricane Beryl damaged the roof, and interior and of insureds property Call insured at (713) 530 - 5189 (Ni speaks spanish)	

It is undisputed that the interior of Mr. Trevino’s apartment was covered by the Policy as “Business Personal Property.”<sup>19</sup>

- (1) Property you own that is used in your business;
- (2) Property of others that is in your care, custody or control, except as otherwise provided in Loss Payment Property Loss Condition Paragraph **E.5.d.(3)(b)**;
- (3) Tenant’s improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
  - (a) Made a part of the building or structure you occupy but do not own; and
  - (b) You acquired or made at your expense but cannot legally remove;
- (4) Leased personal property which you have a contractual responsibility to insure, unless otherwise provided for under Paragraph **1.b.(2)**; and
- (5) Exterior building glass, if you are a tenant and no Limit Of Insurance is shown in the Declarations for Building property. The glass must be owned by you or in your care, custody or control.

Yet Next Insurance failed to determine what interior was damaged in order to properly adjust the claim.

<sup>16</sup> Motion for Summary Judgment [Dkt. 9] at 4.

<sup>17</sup> See Motion for Summary Judgment [Dkt. 9] at 1.

<sup>18</sup> Property Loss Notice [Dkt. 11-4] at 4 (emphasis added).

<sup>19</sup> Insurance Policy [Dkt. 10-1] at 8.



Next Insurance never bothered to ascertain what specific components and parts of the insured apartment comprised the undisputed “sustained damage.”<sup>20</sup> Instead, Next Insurance fraudulently tried to assign all of the damage as “structural” so as to avoid paying anything on the claim.

## **II. Undisputed: Next Insurance Was Asked by Plaintiff to Inspect the Loss, But Refused**

8. It is undisputed that Next Insurance never inspected the losses. To the extent there was any investigation whatsoever, it was a phone call and a “review[ of] the file.”<sup>21</sup> It is undisputed that Next Insurance did not do what insurance companies are always required to do everywhere – inspect the loss.<sup>22</sup>

(c) Inspection/Assessment	On May 20, 2024, investigation began with Eric Daughtry communicating via telephone conference with the Plaintiff. I later reviewed photographs of the damage on or about June 27, 2024.	I reviewed the file on July 12, 2024 and concluded there was no coverage. Next did not inspect the Property; Plaintiff offered access on July 18, 2024, but was declined on July 22, 2024 due to no coverage.
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In its Interrogatory Responses, Next Insurance lays it out clearly: “I reviewed the file on July 12, 2024.”<sup>23</sup> Mr. Trevino even asked the Next Insurance adjuster to come to the property on July 18, 2024, but Next Insurance refused.<sup>24</sup> The entire claim was denied after the adjuster “reviewed the file on July 12, 2024.”<sup>25</sup>

<sup>20</sup> Motion for Summary Judgment [Dkt. 9] at 4.

<sup>21</sup> See Defendant Christopher Anthony’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6, Ex. 1; Defendant Next Insurance US Company’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6-7, Ex. 2.

<sup>22</sup> See Defendant Christopher Anthony’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6, Ex. 1; Defendant Next Insurance US Company’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6-7, Ex. 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Defendant Christopher Anthony’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6, Ex. 1; Defendant Next Insurance US Company’s Objections and Responses to Plaintiff’s First Set of Interrogatories No. 3 at 6, Ex. 2.

### **III. Undisputed: Next Insurance Denied the Claim Based on a “Review of the File” – But There Was Nothing in the File to Review**

9. The problem with this is that there was nothing in the file to review. As a result, Next Insurance has not provided what insurance companies are required by law to provide after investigating – any photographs, inspection reports, field notes, measurements.<sup>26</sup>

**REQUEST FOR PRODUCTION NO. 12:** The field notes, measurements and file maintained by your employed or retained adjusters and engineers who physically inspected the subject property.

**RESPONSE:**

None. Defendant did not inspect the Property.

Next Insurance failed to investigate in any substantive way whatsoever. It never did what was required to determine covered damages.<sup>27</sup>

**REQUEST FOR PRODUCTION NO. 11:** All reports, estimates and appraisals you prepared or commissioned concerning the Claim, including engineering reports, mold reports, and roofing repair reports.

**RESPONSE:**

Subject to and without waiving the objection, none. Defendant did not need to prepare any of the mentioned documents for these Claims because Defendant determined there was no coverage for Plaintiff's claimed damages.

Had Next Insurance conducted even the most rudimentary investigation, it would have realized that Mr. Trevino's damages are, indeed, covered.

<sup>26</sup> See Defendant Christopher Anthony's Objections and Responses to Plaintiff's First Set of Requests for Production No. 12 at 14, Ex. 1; See Defendant Next Insurance US Company's Objections and Responses to Plaintiff's First Set of Requests for Production No. 12 at 14, Ex. 2.

<sup>27</sup> See Defendant Christopher Anthony's Objections and Responses to Plaintiff's First Set of Requests for Production No. 11 at 13, Ex. 1; See Defendant Next Insurance US Company's Objections and Responses to Plaintiff's First Set of Requests for Production No. 11 at 13, Ex. 2.

**IV. Undisputed: Next Insurance Represented to Mr. Trevino That He Suffered “Only Building Damage” and the Policy Did Not Cover Any of It**

Next Insurance Company’s statements are so gratuitous and overly expansive that Next Insurance misrepresents the Policy itself.<sup>28</sup> There is no question that Mr. Trevino has coverage for “Business Personal Property” under the policy; this is undisputed. There is no question that Mr. Trevino has presented content damage. Next Insurance admits that “the OCRG Estimate lists content damage.”<sup>29</sup>

10. Under the Policy, Business Personal Property includes:<sup>30</sup>

**b.** Business Personal Property located in or on the buildings or structures at the described premises or in the open (or in a vehicle) within 100 feet of the buildings or structures or within 100 feet of the premises described in the Declarations, whichever distance is greater, including:

- (1)** Property you own that is used in your business;
- (2)** Property of others that is in your care, custody or control, except as otherwise provided in Loss Payment Property Loss Condition Paragraph **E.5.d.(3)(b)**;
- (3)** Tenant’s improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
  - (a)** Made a part of the building or structure you occupy but do not own; and
  - (b)** You acquired or made at your expense but cannot legally remove;
- (4)** Leased personal property which you have a contractual responsibility to insure, unless otherwise provided for under Paragraph **1.b.(2)**; and
- (5)** Exterior building glass, if you are a tenant and no Limit Of Insurance is shown in the Declarations for Building property. The glass must be owned by you or in your care, custody or control.

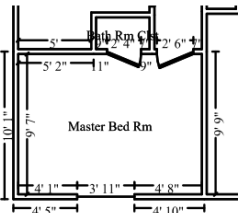
So this coverage is not even in dispute. And there is no question that Mr. Trevino and his Public Adjuster presented evidence of damaged property that clearly falls within these definitions. In the Xactimate® prepared by the Public Adjuster, Next Insurance was presented with (literally) pages and pages of documented damages to the insured apartment. Next Insurance was presented with damages to:

<sup>28</sup> See Tex. Ins. Code § 541.060 (Unfair Settlement Practices); see *infra* text accompanying notes 43-70.

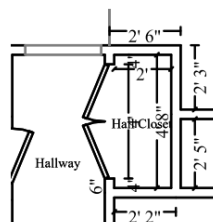
<sup>29</sup> Motion for Summary Judgment [Dkt. 9] at 4.

<sup>30</sup> Insurance Policy [Dkt. 10-1] at 8.

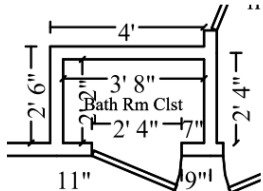
- **The Master Bedroom** of the insured apartment unit:<sup>31</sup>

Additional storm damage unit		
	<b>Master Bed Rm</b>	<b>Height: 8'</b>
	354.67 SF Walls	120.59 SF Ceiling
	475.26 SF Walls & Ceiling	120.59 SF Floor
	13.40 SY Flooring	44.33 LF Floor Perimeter
	44.33 LF Ceil. Perimeter	
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- **The Hall Closet** of the insured apartment unit:<sup>32</sup>

	<b>Hall Closet</b>	<b>Height: 8'</b>
	106.67 SF Walls	9.33 SF Ceiling
	116.00 SF Walls & Ceiling	9.33 SF Floor
	1.04 SY Flooring	13.33 LF Floor Perimeter
	13.33 LF Ceil. Perimeter	

- **Bath Rm Closet** of the insured apartment unit:<sup>33</sup>

	<b>Bath Rm Clst</b>	<b>Height: 8'</b>
	93.33 SF Walls	7.94 SF Ceiling
	101.28 SF Walls & Ceiling	7.94 SF Floor
	0.88 SY Flooring	11.67 LF Floor Perimeter
	11.67 LF Ceil. Perimeter	

- **Hot Water Heater (HWH) Closet** of the insured apartment unit:<sup>34</sup>

<sup>31</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 4.

<sup>32</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 5.

<sup>33</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 6.

<sup>34</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 7.

	<b>HWH</b>	<b>Height: 8'</b>
	64.00 SF Walls	4.00 SF Ceiling
	68.00 SF Walls & Ceiling	4.00 SF Floor
	0.44 SY Flooring	8.00 LF Floor Perimeter
	8.00 LF Ceil. Perimeter	

- **Bathroom** of the insured apartment unit:<sup>35</sup>

	<b>Bathroom</b>	<b>Height: 8'</b>
	262.67 SF Walls	51.31 SF Ceiling
	313.97 SF Walls & Ceiling	51.31 SF Floor
	5.70 SY Flooring	32.83 LF Floor Perimeter
	32.83 LF Ceil. Perimeter	

- **Second Bedroom** of the insured apartment unit:<sup>36</sup>

	<b>Bed Rm 2</b>	<b>Height: 8'</b>
	362.67 SF Walls	127.44 SF Ceiling
	490.11 SF Walls & Ceiling	127.44 SF Floor
	14.16 SY Flooring	45.33 LF Floor Perimeter
	45.33 LF Ceil. Perimeter	

- **Hallway** of the insured apartment unit:<sup>37</sup>

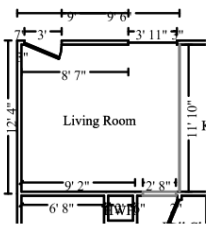
	<b>Hallway</b>	<b>Height: 8'</b>
	152.89 SF Walls	24.10 SF Ceiling
	176.99 SF Walls & Ceiling	24.10 SF Floor
	2.68 SY Flooring	18.67 LF Floor Perimeter
	21.33 LF Ceil. Perimeter	
<b>Missing Wall - Goes to Floor</b>	<b>2' 8" X 6' 8"</b>	<b>Opens into LIVING_ROOM</b>

<sup>35</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 7.

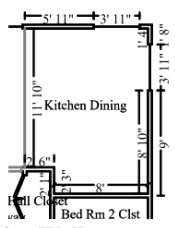
<sup>36</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 8.

<sup>37</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 9.

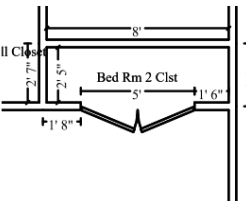
- **Living Room** of the insured apartment unit:<sup>38</sup>

 <p>Living Room</p> <p>Missing Wall - Goes to Floor</p> <p>Missing Wall</p>	<b>Living Room</b>		<b>Height: 8'</b>
	280.76 SF Walls 431.44 SF Walls & Ceiling 16.74 SY Flooring 37.32 LF Ceil. Perimeter	150.68 SF Ceiling 150.68 SF Floor 34.65 LF Floor Perimeter	2' 8" X 6' 8" 11' 9 13/16" X 8' Opens into HALLWAY Opens into KITCHEN_DINI

- **Kitchen Dining** of the insured apartment unit:<sup>39</sup>

 <p>Kitchen Dining</p> <p>Missing Wall</p>	<b>Kitchen Dining</b>		<b>Height: 8'</b>
	298.54 SF Walls 440.63 SF Walls & Ceiling 15.79 SY Flooring 37.32 LF Ceil. Perimeter	142.09 SF Ceiling 142.09 SF Floor 37.32 LF Floor Perimeter	11' 9 13/16" X 8' Opens into LIVING_ROOM

- **Second Bedroom Closet (Bed Rm 2 Clst)** of the insured apartment unit:<sup>40</sup>

 <p>Bed Rm 2 Clst</p> <p>Missing Wall</p>	<b>Bed Rm 2 Clst</b>		<b>Height: 8'</b>
	166.67 SF Walls 186.00 SF Walls & Ceiling 2.15 SY Flooring 20.83 LF Ceil. Perimeter	19.33 SF Ceiling 19.33 SF Floor 20.83 LF Floor Perimeter	

All of these inspected, analyzed, measured and calculated damages were presented to Next Insurance. The fact that there is coverage can even be determined from its own Motion for Summary Judgment.

<sup>38</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at10.

<sup>39</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at10.

<sup>40</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at11.

## **ARGUMENT**

### **I. Defendants Are Not Entitled to Summary Judgment on Any Claims**

11. Plaintiff has proffered uncontroverted evidence of covered damages, and the burden of proof is on Defendant to show that these damages are somehow not covered.<sup>41</sup> During the summary judgment stage, the standard is that Next Insurance must demonstrate not only that the Coverage Provision does not apply, *but that there is no genuine issue of material fact that it does not apply*.<sup>42</sup> Next Insurance has utterly failed to meet this burden.

#### **A. Mr. Trevino Has Proven Covered Damages Under the Business Personal Property Coverage**

12. Next Insurance does not dispute that the Business Personal Property coverage applies.<sup>43</sup> It is also undisputed that this coverage includes:<sup>44</sup>

- b.** Business Personal Property located in or on the buildings or structures at the described premises or in the open (or in a vehicle) within 100 feet of the buildings or structures or within 100 feet of the premises described in the Declarations, whichever distance is greater, including:

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<sup>41</sup> See Fed. R. Civ. P. 56.

<sup>42</sup> "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' FED. R. CIV. P. 56(a)." *Gonzalez v. Resendez*, 22-40597, 2023 WL 5346061 (5th Cir. Aug 18, 2023).

In deciding a motion for summary judgment, a court "view[s] the evidence and draw[s] reasonable inferences in the light most favorable to the nonmoving party." *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015) (quoting *Cox*, 755 F.3d at 233); *Maddox v. Townsend & Sons, Inc.*, 639 F.3d 214, 216 (5th Cir. 2011). Before it can determine that there is no genuine issue for trial, a court must be satisfied that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

*Hartfield v. Hill*, Civil No. 1:16-cv-156-HSO-JCG, 2017 WL 1948834 (S.D. Miss. May 05, 2017).

<sup>43</sup> See Motion for Summary Judgment [Dkt. 9] at 2 (referring to Business Personal Property as "the single category of property the Policy does insure").

<sup>44</sup> See Next Insurance Policy [Dkt. 10-1] at 7-8.

- (1) Property you own that is used in your business;
- (2) Property of others that is in your care, custody or control, except as otherwise provided in Loss Payment Property Loss Condition Paragraph **E.5.d.(3)(b)**;
- (3) Tenant's improvements and betterments. Improvements and betterments are fixtures, alterations, installations or additions:
  - (a) Made a part of the building or structure you occupy but do not own; and
  - (b) You acquired or made at your expense but cannot legally remove;
- (4) Leased personal property which you have a contractual responsibility to insure, unless otherwise provided for under Paragraph **1.b.(2)**; and
- (5) Exterior building glass, if you are a tenant and no Limit Of Insurance is shown in the Declarations for Building property. The glass must be owned by you or in your care, custody or control.

The interior of the insured Apartment #6 is Plaintiff's Business Personal Property. Under the above definition, it is considered "Business Personal Property located in or on the buildings or structures at the described premises or in the open (or in a vehicle) within 100 feet of the buildings or structures or within 100 feet of the premises described in the Declarations."<sup>45</sup> This includes, but is not limited to, "Property that [Plaintiff] own[s] that is used in [his] business."<sup>46</sup> It also constitutes "Tenant's improvements and betterments, Improvements and betterments are fixtures, alterations, installations or additions" inside the insured Apartment unit.<sup>47</sup>

13. Plaintiff's Public Adjuster conducted the proper inspection and investigation of the claim and provided Next Insurance with an Xactimate®.<sup>48</sup> In that document, Plaintiff has proven that 10 rooms within the apartment were damaged. The evidence of damages to Plaintiff's Business Personal Property is appended to the Motion for Summary Judgment:

- The Master Bedroom suffered at least \$5,376.30 in damages, including damage to contents,

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* The ownership of the "building or structure" is immaterial, as Plaintiff occupies the leased premises, and they are specifically listed in the Declarations.

<sup>48</sup> Xactimate ® by OCRG Consultant Group, L.L.C. [Dkt. 11-2] at 5-12.



interior drywall, sealing, paint, and baseboards.<sup>49</sup>

- The Hall Closet suffered \$1,344.30 in damages, including damage to painting, vinyl tile, light fixtures, baseboards, and doors.<sup>50</sup>
- The Bathroom Closet suffered \$1,220.87 in damages, including damage to painting, vinyl tile, light fixtures, baseboards, and doors.<sup>51</sup>
- The Hot Water Heater and its interior housing suffered \$1,088.92 in damages, including painting, vinyl tile, light fixtures, baseboards, and doors.<sup>52</sup>
- The Bathroom suffered \$4,754.03 in damages, including damage to painting, bathtub and bathroom tile, light fixtures, and baseboards.<sup>53</sup>
- The Second Bedroom (Bedroom 2) suffered \$5,171.20 in damages, including damages to contents, insulation, window sill, walls, ceiling, a HVAC register, and vinyl tile.<sup>54</sup>
- The Hallway suffered \$1,920.26 in damages, including damages to drywall, ceiling, paint, and vinyl tile.<sup>55</sup>
- The Living Room suffered \$4,9624.21 in damages, including damages to drywall, a window sill, and vinyl tile. *See Xactimate®* [Dkt. 11-2] at 10.
- The Kitchen and Dining Room suffered \$4,955.28 in damages, including damages to drywall, ceiling paint, a window sill, and vinyl tile. *See Xactimate®* [Dkt. 11-2] at 11.
- The Second Bedroom Closet suffered \$1,956.59 in damages, including damages to a light fixture, folding door, and vinyl tile. *See Xactimate®* [Dkt. 11-2] at 12.

Since Next Insurance does not dispute Mr. Trevino's Business Personal Property coverage, it owes damages, including statutory interest, for these and other losses.

## **B. Next Insurance Has Committed Texas Insurance Code Violations**

14. Texas Insurance Code §541.060 prohibits Next Insurance from falsely representing to Mr.

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<sup>49</sup> *See Xactimate®* [Dkt. 11-2] at 5.

<sup>50</sup> *See Xactimate®* [Dkt. 11-2] at 5-6.

<sup>51</sup> *See Xactimate®* [Dkt. 11-2] at 6.

<sup>52</sup> *See Xactimate®* [Dkt. 11-2] at 7.

<sup>53</sup> *See Xactimate®* [Dkt. 11-2] at 8.

<sup>54</sup> *See Xactimate®* [Dkt. 11-2] at 8-9.

<sup>55</sup> *See OCRG Consultant Group, L.L.C. Xactimate®* [Dkt. 11-2] at 9.

Trevino that these damages are not covered:

Sec. 541.060. UNFAIR SETTLEMENT PRACTICES. (a) It is an ... unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

- (1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
- (2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:
  - (A) a claim with respect to which the insurer's liability has become reasonably clear; or
  - (B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;
- (3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

15. First, under Subsection (1), Next Insurance has misrepresented both the material facts regarding what was damaged as well as whether it was covered or not under the Business Personal Property Coverage. Second, under Subsection (2), Next Insurance denying the claim on the same day it was filed is a demonstrates its failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of Plaintiff's claims. Third, by denying coverage the same day without any inspection, Next Insurance has failed to provide a prompt and reasonable explanation for its denial.

## **II. Next Insurance Fails to Provide Any Valid Basis for Refusing to Pay the Claim**

16. Next Insurance nowhere disputes these damages. Nowhere has Next Insurance ever cited to any exclusion from coverage.<sup>56</sup> Instead, Next Insurance presents the excuse that it had difficulty

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<sup>56</sup> See, e.g., Correspondence from Next Insurance to Rafael Trevino (May 20, 2024) [Dkt. 10-2]; Correspondence from Next Insurance to Rafael Trevino (May 20, 2024) [Dkt. 10-2].

communicating with Mr. Trevino because he is a Spanish speaker.<sup>57</sup> Exploiting this breakdown, Next Insurance now wants to claim that it relied upon Mr. Trevino's own determination as to whether or not there was "Business Personal Property" as defined in the Policy.<sup>58</sup> The notes from the claims file show that Mr. Trevino did not know how the insurance company was determining what was "Business Personal Property" under the Policy.<sup>59</sup> He asked the adjuster for Next Insurance how to categorize his damages. Then he asked the adjuster to come to inspect the property and make the determination himself.<sup>60</sup> Needless to say, insureds are not the ones who perform insurance claims inspections – insurance companies and their adjusters are.<sup>61</sup> But Next Insurance must hide from the Court the fact that it never did the first thing required in insurance coverage: Next Insurance never bothered to have one of its adjusters simply drive to look at the tree that had crashed through Mr. Trevino's apartment complex unit. Next Insurance never sent an adjuster to inspect the damaged property to see if it was "Business Personal Property."

**A. Next Insurance Falsely Claims that Mr. Trevino "Admitted He Had No BPP"**

17. In response to the Business Personal Property claim, Next Insurance says that "Even though the OCRG Estimate lists content damage, Plaintiff admitted he had no BPP located at the Property[.]"<sup>62</sup> But

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<sup>57</sup>See Next Insurance Claims File [Dkt. 11-5] at 16 [DEF000218].

<sup>58</sup> See Next Insurance Claims File [Dkt. 11-5] at 15 [DEF000217].

<sup>59</sup> See Next Insurance Claims File [Dkt. 11-5] at 11 [DEF000213] ("[Mr. Trevino asked me what I think 'business personal property' means, and 'how I would perceive that coverage as a business owner?' I informed him that I would ask the company I am trying to get a policy from to provide examples or a clearer description of the definition of it so I can better understand it.>").

<sup>60</sup> See *id.*

<sup>61</sup> This is the entire basis for the Texas Prompt Payment of Claims Act.

Not later than the 30th day after receiving a presuit notice given under Section 542A.003(a), a person to whom notice is given may send a written request to the claimant to inspect, photograph, or evaluate, in a reasonable manner and at a reasonable time, the property that is the subject of the claim. If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the person receives the presuit notice.

TEX. INS. CODE §542A.004 (Inspection).

<sup>62</sup> Motion for Summary Judgment [Dkt. 9] at 4.

this is not a valid defense to reasonably inspecting, investigating, and promptly paying the claim.

18. First, the statement is blatantly false: Plaintiff has **never** asserted that he has no Business Personal Property Claim. Plaintiff brought suit and Next Insurance cites to the pleadings on file with this Court through which he is seeking damages under his Business Personal Property coverage.

19. Second, Next Insurance has proffered no admissible evidence that Mr. Trevino ever stated such a thing. Both of the purported affidavits that Next Insurance submits contain hearsay within hearsay, as both affiants are relating what Mr. Trevino purportedly stated in a conversation he had with a third-party, a Spanish speaker. Plaintiff objects to the proffer of these documents and moves that they be stricken.

20. Third, for Next Insurance to seek summary judgment on the grounds that Plaintiff no longer seeks recovery, it would have to present to the Court a release. Next Insurance cannot simply assert that Plaintiff does not want to pursue a claim or does not believe he has a claim. For the claim to go away, there must be a legal release of claims. There is nothing like that in this case.

21. Fourth, by claiming that Mr. Trevino “admitted” something, Next Insurance is doing nothing but creating a fact issue as to what exactly was stated. Mr. Trevino adamantly states that he has never stated that he had no Business Personal Property at the insured location.<sup>63</sup> He has never released any claims against Next Insurance. He stands by the claims he has filed in this lawsuit and seeks to recover any and all damages under the Policy.

### **1. Next Insurance’s Assertion That Mr. Trevino Admitted Anything is False**

22. The statement Next Insurance makes is blatantly false: Plaintiff has **never** asserted that he has no Business Personal Property Claim. Plaintiff has **never** asserted that he had no Business Personal Property at the insured location. Plaintiff requested that adjusters for Next Insurance inspect the damages to determine whether or not the loss included Business Personal Property. And Plaintiff has **never** asserted

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<sup>63</sup> See Affidavit of Rafael Trevino, Ex. 3.

anything other than he seeks to recover any and all damages under the Policy.<sup>64</sup>

## **2. The Claims File Reveals Next Insurance Trying to Force the Plaintiff to Inspect and Adjust the Claim Himself**

23. The notes from the claims file show that Mr. Trevino did not know how the insurance company was determining what was “Business Personal Property” under the Policy.<sup>65</sup> The claims file evidences the confusion the Plaintiff suffered as to what constitutes “Business Personal Property:”

[Mr. Trevino] asked me what I think “business personal property[“] means and “how I would perceive that coverage as a business owner?” I informed him that [“]I would ask the company I am trying to get a policy from to provide examples or a clearer description of the definition of it so I can better understand it”<sup>66</sup>

“Ask[ing] the company” would be asking Next Insurance. All that Next Insurance had to do was send a licensed insurance adjuster to inspect the damages to see what constitutes “Business Personal Property.” Needless to say, trying to force Mr. Trevino to do that – and then using his lack of expertise against him – constitutes bad faith. Insured individuals are not the ones who perform insurance claims inspections and determine what is “Business Personal Property” – insurance companies and their adjusters are.<sup>67</sup> For Next Insurance to move for summary judgment on this basis is nothing short of specious.

## **3. Next Insurance Has Proffered No Valid Evidence That Plaintiff Ever Opined on What Damages Constitutes “Business Personal Property”**

24. Next Insurance has proffered no valid evidence that “Plaintiff [purportedly] admitted he had

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<sup>64</sup> See Affidavit of Rafael Trevino, Ex. 3.

<sup>65</sup> See Next Insurance Claims File [Dkt. 11-5] at 11.

<sup>66</sup> *Id.*

<sup>67</sup> This is the entire basis for the Texas Prompt Payment of Claims Act. See Tex. Ins. Code § 541.001, *et seq.*

Not later than the 30th day after receiving a presuit notice given under Section 542A.003(a), a person to whom notice is given may send a written request to the claimant to inspect, photograph, or evaluate, in a reasonable manner and at a reasonable time, the property that is the subject of the claim. If reasonably possible, the inspection, photography, and evaluation must be completed not later than the 60th day after the date the person receives the presuit notice.

TEX. INS. CODE §542A.004 (Inspection).

no BPP located at the Property.”<sup>68</sup> Any entry in the claims file purporting to contain a third-party statement is undeniably hearsay within hearsay and not subject to any identifiable exception. Both of the purported affidavits that Next Insurance submits contain hearsay within hearsay. Neither of the purported affiants actually had the conversation at issue with Mr. Trevino; rather, they are relating the conversation he had with the unidentified “Spanish Speaker” that was brought in to bridge the gap in communications.

25. First, Christopher Anthony states that “Next Advocate Eric Daughtry assisted communicating with Mr. Trevino via telephone because Mr. Trevino speaks Spanish.”<sup>69</sup> So he admits that he did not understand what was being communicated. Next, Eric Daughtry states that, “[a]t Mr. Trevino’s request, I arranged for a Spanish-language follow up.”<sup>70</sup> Once an actual Spanish speaker is involved, however, there is no reference any more as to whether Mr. Trevino maintained was “Business Personal Property” at the insured location.<sup>71</sup>

26. The only reference to whether or not Mr. Trevino maintained “Business Personal Property” is from Christopher Anthony, who admits that he does not speak Spanish. Both affiants are relating what Mr. Trevino purportedly stated in a conversation he had with a third-party, a Spanish speaker. Plaintiff objects to the proffer of these documents and moves herein that they be stricken from consideration of this motion.

### **B. A Purported “Admission” Does Not Release Mr. Trevino’s Claims**

27. Nor would a single statement by the Plaintiff be sufficient to deny the claim. For Next Insurance to seek summary judgment on the grounds that Plaintiff “admitted he had no BPP,” it would require more than just that statement – it would require a release of the claims. Next Insurance cannot simply

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<sup>68</sup> Motion for Summary Judgment [Dkt. 9] at 4.

<sup>69</sup> Affidavit of Christopher Anthony [Dkt. 13] at 1.

<sup>70</sup> Affidavit of Eric Daughtry [Dkt. 14] at 2.

<sup>71</sup> *See id.*

assert that Plaintiff “admitted” something, and the claim goes away. For the claim to go away, there must be a legal release of claims. There is nothing like that in this case.

28. In reality, by claiming that Mr. Trevino “admitted” something, Next Insurance is doing nothing but creating a fact issue as to what exactly was stated. Mr. Trevino adamantly states that he has never stated that he had no Business Personal Property at the insured location.<sup>72</sup> He has never released any claims against Next Insurance. He stands by the claims he has filed in this lawsuit and seeks to recover any and all damages under the Policy.<sup>73</sup>

### **III. Next Insurance Company Fails to Address Ambiguity in the Building Coverage Provisions**

29. Next Insurance insists that there is no Building Coverage, but the Policy is ambiguous. The Policy can be interpreted to cover damage to the Building structure. Although such a finding is not necessary to defeat Next Insurance’s Motion for Summary Judgment – as it is undisputed that the Business Personal Property coverage is effective for the losses above – this Court should consider it nevertheless.

#### **A. The Definition of “Covered Property” is Ambiguous and Subject to More Than One Reasonable Interpretation**

30. Reading the Policy as a whole, it is perfectly reasonable to read it as providing the Plaintiff with coverage for the structure as well. The question of coverage always starts with the Coverage language. Here, the Coverage Language states: “We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations.”<sup>74</sup>

31. The Declarations list “Premise Number 001” and “Building Number 001,” and there is no dispute that this relates to 13939 Renault Street, Apt. 6, Houston, TX 77015.”<sup>75</sup>

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<sup>72</sup> See Affidavit of Rafael Trevino, Ex. 3.

<sup>73</sup> See Affidavit of Rafael Trevino, Ex. 3.

<sup>74</sup> See Next Insurance Policy [Dkt. 10-1] at 1.

<sup>75</sup> See Next Insurance Policy [Dkt. 10-1] at 1.

Premise Information		
Premise Number	Building Number	Premise Address
001	001	13939 Renault St Apt 6, Houston, TX 77015

Accordingly, the “Covered Property” for which the Plaintiff’s direct physical losses and damages are covered is “13939 Renault Street, Apt. 6, Houston, Texas 77015.”<sup>76</sup> This includes all aspects of the exterior Building, structure, roofing and components.

32. Defendant asserts that there is no “Building Coverage” because the Policy lists various limits in different locations, and an entry in the table cell for “Building Limit of Insurance” was deliberately left blank. However, a closer reading reveals that the adjacent cells clearly and unquestionably identify a “Premise Number,” a “Building Number,” and a “Building Limit – Automatic Annual Increase Percentage.” There would be no reason for Next Insurance to determine what the Building is and provide a Premise Number unless there was coverage for these structures. There would be no reason for Next Insurance to include these items under the Section for “Property Coverage Limits of Insurance” unless this is “Covered Property” in the original Coverage Language.<sup>77</sup>

33. There is no dispute that the “Premise Number,” a “Building Number,” and a “Building Limit – Automatic Annual Increase Percentage” all apply to the only “Building” or “Premise” identified in the Policy, and that is the “Building” and “Premise” located at 13939 Renault Street, Apt. 6, Houston, Texas 77015.<sup>78</sup>

<sup>76</sup> Motion for Summary Judgment [Dkt. 9] at 3. Defendant admits in its Motion that “[t]he insured property is located at 13939 Renault Street, Apt. 6, Houston, Texas 77015.” *Id.*

<sup>77</sup> See Next Insurance Policy [Dkt. 10-1] at 1.

<sup>78</sup> See Next Insurance Policy [Dkt. 10-1] at 1.



Property Coverage Limits of Insurance							
Premise Number	Building Number	Building Limit of Insurance	Business Personal Property Limit of Insurance	Actual Cash Value of Building Option (Yes or No)	Seasonal Increase Percentage - Business Personal Property	Building Limit- Automatic Annual Increase (Percentage)	Equipment Breakdown Limit of Insurance
001	001		\$32,670.00		25%	12%	\$32,670.00

If there was no insurance coverage for the “Building” or the “Premise,” then these cells would not be completed and would not be specifically identifying the Plaintiff’s damaged property at 1939 Renault Street, Apt. 6, Houston, Texas 77015.” However, that is exactly what you see here.

34. Therefore, Defendant’s insurance policy is ambiguous as to what actual defined property is covered. Under settled Texas law, this ambiguity must be interpreted in favor of the insured. It cannot be a basis for defeating coverage. “It is settled law in Texas that we must construe insurance policies in favor of the insured when ambiguity exists, and we must strictly construe exceptions and words of limitation in favor of the insured.”<sup>79</sup>

If there are repugnant conditions in a policy we must interpret the contract in favor of the insured to prevent forfeiture, defeat, or diminution of coverage if possible. This holds true even if the insurer's position appears to be more reasonable than the one offered by the insured. *Glover v. National Insurance Underwriters*, 545 S.W.2d at 755; see also, *Continental Casualty Co. v. Warren*, 152 Tex. 164, 254 S.W.2d 762, 763 (1953) (when language in policy is subject to more than one reasonable construction, court must apply interpretation which favors insured and permits recovery).<sup>80</sup>

**B. US Next Relies On An Exclusionary Clause Within the Paragraph that Defines “Covered Property”**

35. In seeking to defeat coverage afforded under the Coverage Language, US Next relies upon

<sup>79</sup> *INA of Texas v. Leonard*, 714 S.W.2d 414 (Tex. App. – San Antonio 1986, no writ)(internal citations omitted).

<sup>80</sup> *Id.*

a clause that excludes coverage.<sup>81</sup> It results in the “forfeiture, defeat, or diminution of coverage.”<sup>82</sup> First, the paragraph contains boilerplate language; it was never explicitly agreed upon by the parties. Unlike the Declarations page, it is dead language that follows pages after the terms that specify what property is covered and where.

36. Second, the paragraph simply and solely describes what “Covered Property includes” – it cannot and should be interpreted to undo the actual Coverage Language in the policy. As noted, the actual Coverage provision in the policy states: “We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations.”<sup>83</sup>

37. Third, if indeed the exclusionary clause contained in the paragraph is given effect, then the burden of proof for showing that it applies falls on the insurer. And, despite filing affidavits and hundreds of pages of exhibits, the Defendant has failed to produce a single shred of evidence that the exclusionary phrase, “depending upon whether a Limit of Insurance is shown in the Declarations” even applies. Under settled Texas law, the burden of proof falls upon the insurer to prove that an exclusion applies to eliminate coverage.

At trial, the insurer has the burden of proof to show an exclusion to coverage applies. See TEX. INS.CODE ANN. § 554.002 (Vernon 2005); *Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc.*, 56 S.W.3d 313, 319 (Tex. App.-Houston [1st Dist.] 2001, pet. denied) (citing former statute replaced by current version now found in subject-matter codification of the Insurance Code).<sup>84</sup>

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<sup>81</sup> See Next Insurance Policy [Dkt. 10-1] at 7, 13-14.

<sup>82</sup> *Id.*

<sup>83</sup> See Next Insurance Policy [Dkt. 10-1] at 7.

<sup>84</sup> *Arrellano v. State Farm Fire and Cas. Co.*, 191 S.W.3d 852 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2006, no pet.); see TEX. INS. CODE § 554.002. Burden of Proof and Pleading (“In a suit to recover under an insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer or health maintenance organization constitutes an avoidance or an affirmative defense.”).

Defendant has failed to provide any evidence.<sup>85</sup> Having failed to do so, Defendant's Motion for Summary Judgment should be denied. The reasonable interpretation favoring the Plaintiff insured should be adopted.

**IV. Defendant Is Not Entitled to Summary Judgment on Mr. Trevino's Extra-Contractual Claims**

**A. As Plaintiff's Contractual Claims Defeat Defendant's Motion for Summary Judgment, So Do Plaintiff's Extra-Contractual Claims**

38. Since Plaintiff's contractual claims defeat Defendant's Motion for Summary Judgment, so do Plaintiff's extra-contractual claims defeat Defendant's Motion for Summary Judgment.<sup>86</sup> Plaintiff has proffered unrefuted evidence of the Defendant's breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code and violations of the Texas Deceptive Trade Practices-Consumer Protection Act, and other causes of action.<sup>87</sup>

39. Nor is there anything in Defendant's paragraphs of re-hashed facts that refutes the fact that Next Insurance denied both of the Plaintiff's claims within 24 hours and refused to conduct any investigation whatsoever.<sup>88</sup> So Next Insurance files pages of immaterial facts that repeat over and over.<sup>89</sup> However, none of this addresses the Defendant's utter lack of investigation, its pre-determined denial issued within 24 hours of the claims being filed, and its misrepresenting material facts and coverage provisions to its insured, Mr. Trevino.<sup>90</sup>

**B. Defendant's Attempt to Invoke the Bona Fide Dispute Rule Fails**

40. When an insurance company fails to conduct a reasonable investigation of its insured's

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<sup>85</sup> See Affidavit of Christopher Anthony [Dkt. 13] at 1-2; Affidavit of Eric Daughtry [Dkt. 14] at 1-2.

<sup>86</sup> See Motion for Summary Judgment [Dkt. 9] at 14-16.

<sup>87</sup> See *supra*, text accompanying notes 12-70.

<sup>88</sup> See *Id.* at 15-16.

<sup>89</sup> See Motion for Summary Judgment [Dkt. 9] at 13-18.

<sup>90</sup> See *supra*, text accompanying notes 12-70.

claim, the bona fide dispute rule does not apply, and any motion for summary judgment must be denied.<sup>91</sup> In *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997), the Court clarified that an insurer breaches the common law duty of good faith and fair dealing when it denies a claim even though it “knew or should have known that it was reasonably clear that the claim was covered.”<sup>92</sup>

41. Importantly, the Court also recognized in *Giles* that common law bad faith liability is not limited to failure to attempt to resolve a claim in good faith once liability is reasonably clear. *See id.* at 56 n.5. The Court pointed out that “[a]n insurer will not escape liability merely by failing to investigate a claim so that it can contend that liability was never reasonably clear.”<sup>93</sup> Instead, the Court “reaffirm[ed] that an insurance company may also breach its duty of good faith and fair dealing by failing to reasonably investigate a claim.” *Giles*, 950 S.W.2d at 56 n.5; *see also Simmons*, 963 S.W.2d at 45 (finding that evidence of insurer’s “outcome-oriented investigation” supported bad faith verdict).

42. Thus, *Giles*, 950 S.W.2d at 56 & n.5, stands for the proposition that an insurer breaches the common law duty of good faith and fair dealing, *i.e.*, acts in bad faith, when it denies a claim for which its liability was reasonably clear *or* fails to conduct a reasonable investigation of a claim.<sup>94</sup>

### **PRAYER FOR RELIEF**

43. Plaintiff respectfully requests that the Court deny Defendant’s Motion for Summary Judgment in its entirety, and any such other relief to which he is justly entitled.

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<sup>91</sup> *State Farm Mut. Auto. Ass’n v. Cook*, 591 S.W.3d 677, 680 (Tex. App.—San Antonio 2019, no pet.) (citing *Giles*, 950 S.W.2d at 56); *see Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, No. 3:07-CV-924, 2011 WL 3163605, at \*3 (N.D. Tex. July 27, 2011)

<sup>92</sup> *Universe Life Insurance Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997); *see Nicolau*, 951 S.W.2d at 448 (recognizing that the prior standard imposed common law bad faith when an insurer denied a claim “with no reasonable basis”).

<sup>93</sup> *Id.*; *see also State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) (citations omitted) (“an insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial”).

<sup>94</sup> *See United Servs. Auto. Ass’n v. Croft*, 175 S.W.3d 457, 451 (Tex. App.—Dallas 2005, no pet.) (“An insurer does not act in bad faith where a reasonable investigation reveals the claim is questionable.”); *see also Lyons*, 866 S.W.2d at 601 (observing that whether an insurer acted in bad faith is a fact issue that focuses not on whether the claim was covered but on the reasonableness of the insurer’s claims handling).

Respectfully submitted,

*/s/ George B. Murr*

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**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument was forwarded to counsel of record, pursuant to the applicable Local Rules and the Federal Rules of Civil Procedure.

*/s/ George B. Murr*

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George B. Murr