No. 24-5384

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAILROAD BUSINESS PARK, LLC

Plaintiff and Appellant,

v.

TRAVELERS CASUALTY INSURANCE COMPANY

Defendant and Respondent.

Appeal from the United States District Court
for the Eastern District of California
Case No. 2:20-CV-02189-MCE-JDP
Honorable Morrison C. England, Jr.
Senior United States District Judge

APPELLANT'S OPENING BRIEF

KERLEY SCHAFFER LLP
Dylan L. Schaffer, SBN 153612
dylan@kslaw.us
1939 Harrison Street, Suite 900
Oakland, California 94612
Telephone: (510) 379-5801
Attorneys for Appellant

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INTRODUCTION

Railroad Business Park, LLC (RBP) owns a commercial building in Modesto, California. A series of violent storms in late 2019 tore holes in the roof. Resulting water intrusion led to extensive interior damage, including collapsed ceilings and ruined floors. Travelers Casualty Insurance Company (Travelers) insured RBP.

RBP's owner, Brian Osborne (Osborne), is a licensed contractor. After a tenant informed him of the damage, Osborne immediately photographed the roof. The photos show torn roofing material in multiple locations. The holes Osborne discovered did not exist before the storms. Also, there had been no water intrusion or damage to the building's interior before the storms. To prevent further interior damage, on the same day, Osborne hired an experienced roofer to repair the torn roofing.

The roofer inspected and confirmed the roof damage was due to wind; he reported about 270 square feet of torn away roofing material, explaining that high winds had resulted in separated roof joints in multiple locations—that was exactly what Osborne's

photographs depicted.

Once RBP notified Travelers of the loss, the carrier's obligation was to conduct a thorough and objective investigation, including as to causation and coverage.[1] Travelers' adjusters twice inspected the building in the days after the storms, the first time inspecting the roof and hearing from RBP's roofer regarding his observations and conclusions regarding causation, as well as from its customer, Osborne, who is a licensed contractor. Travelers conducted a follow-up inspection, this time adding a supervisor who specializes in site inspections.

After its two inspections, and with the approval of yet another manager, Travelers unreservedly afforded coverage under its "all-risk" policy, finding no policy limitation or exclusion applied. Travelers' stated conclusion was that the cause of the loss was wind damage to the roof.

Travelers paid the claim, but afforded less than $5,000 for repairs, an amount it later concluded was a small fraction of the

[1] 10 CCR §2695.7(d).

benefits due.

But while the carrier never doubted its coverage decision, and pursued no further investigation on the causation issue, it never paid another dime.

Having no reason to be concerned that Travelers would come to a contrary conclusion regarding causation, or rescind coverage, RBP retained no other experts to inspect the damage. Rather, RBP and its contractor-owner accepted Travelers' coverage position, which was consistent with the insured's observations, the photographs, and the opinion of his roofer, who had observed and documented the roof damage and concluded the damage was indeed due to wind.

Travelers' finding as to causation, and its coverage position, were also consistent with the admissible evidence RBP submitted in opposition to Travelers' dispositive motion: the location had indisputably suffered a series of violent wind and rainstorms, there were multiple visible holes in the roof that had not existed previously, damage to the interior of the building was sudden and extensive, and there had been no prior water intrusion to suggest

ongoing roof issues unrelated to the violent weather.

In the six years since its causation investigation and grant of coverage, Travelers has never reversed its coverage decision or denied any part of the loss. Travelers has never issued a reservation of rights letter opining that the extensive damage to RBP's building might not be the result of a covered wind loss. The insurer has never sent a denial letter for any part of the loss.

In the *claim,* likewise, after its adjuster and managers twice inspected the property, heard from Osborne and his roofer, reviewed photographs, found the loss was caused by wind damage to the roof, and afforded coverage, Travelers never revisited its causation investigation, for example, by hiring a roofer, engineer, or other consultant to further investigate causation.

A year after the December 2019 loss, RBP filed this lawsuit for insurance bad faith. (Vol.6-ER-1290 et seq.) But the suit was not due to a dispute over *coverage*. Rather, the basis of RBP's action was the carrier's failure to properly investigation and value the cost of repairs, and its extraordinary bad faith, malice and fraud in the

investigation and adjusting of the claim.[2]

RBP's complaint alleged RBP's property suffered a *covered wind loss*. (Vol.6-ER-1292.) In its answer filed in early 2021, *fourteen months after the loss*, Travelers did not take a contrary view, responding to the allegation by insisting that it was "without sufficient knowledge or information to admit or deny the allegations ...." (Vol.6-ER-1279.)

And, as is demonstrated below, through the next 18 months of litigation, including extensive written discovery, Travelers gave RBP no reason to believe it would defend on the ground that the loss was not *covered*.

Thirty months after the loss, in its initial expert disclosure, Travelers revealed the opinion of its retained litigation consultant, Axis, that RBP's roof did not fail due to wind. But in the year following the expert disclosures, the carrier neither amended its Answer, nor amended or supplemented its discovery responses.

Finally, in July 2023, now *forty-three months after the loss*,

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[2] Those facts are detailed below, Section II(C).

relying solely on the Axis litigation opinion, and ignoring extensive evidence contradicting that opinion, including the findings of *three of its own claim staff,* Travelers filed its dispositive motion which for the first time asserted the loss was not covered *as a matter of law.*

The lower court agreed, granting summary judgment on that basis. Its ruling is wrong:

- The lower court ignored myriad evidence supporting Travelers' causation findings and coverage decision *in the claim*, which stood for nearly four years.
- The ruling failed to account for Travelers' burden at trial to prove the loss was the result of an expressly excluded peril.
- The ruling depends on an unsupported mandate that despite Travelers' grant of coverage, in the event of a water loss resulting from wind damage to a roof, an insured is bound to offer expert opinion evidence regarding the cause of a loss, or risk summary judgment on the issue of coverage.
- Relatedly, the ruling ignores the fact that here, Travelers seems to have intentionally hidden its core defense for

most of the litigation, failing to amend its Answer or amend or supplement its discovery responses *after* disclosing its retained expert's opinions.

- And having invented an evidentiary hurdle that fails to account for Travelers' conduct in the claim and the litigation, the lower court baselessly declined to consider multiple forms of expert evidence sufficient to clear the new hurdle to trial its order imposes.

This Court should reverse.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1332. This Court has jurisdiction under 28 U.S.C. §1291. Railroad Business Park timely filed this appeal on August 26, 2024 (Vol.6-ER-1342), from judgment entered on August 2, 2024. (Vol.2-ER-14.)

ISSUE PRESENTED

Travelers covered RBP's loss. The carrier gave RBP no reason to obtain expert assistance regarding the cause of loss. In the litigation, Travelers hid its coverage defense until it moved for summary judgment. Myriad evidence and reasonable inferences from that

evidence contradicts Travelers' litigation expert's causation opinion, including opinions from three Travelers' claims staff, an experienced roofer, two contractors, photographs, and attendant circumstances including the absence of prior roof damage, the lack of prior water intrusion, and the extent of interior damage to the building.

As Travelers has the burden both in the dispositive proceeding, and at trial, to show the loss was not covered under its "all-risk" policy, there are numerous triable disputes on the issue of coverage. The lower court disagreed, entering judgment in favor of Travelers on the theory that there is no coverage as a matter of law.

Exercising its *de novo* review here, viewing the evidence in the light most favorable to RBP, and keeping in mind that Travelers has the burden both on summary judgment, and on the issue of coverage at trial, has Travelers demonstrated that no reasonable jury could find other than for the carrier on the issue of coverage?

STANDARD OF REVIEW

The Court reviews the lower court's grant of summary judgment *de novo,* viewing the evidence in the light most favorable to RBP, and "affirming summary judgment only where no genuine

issues of material fact exist."[3] The judge's function on summary judgment is not to weigh the evidence but to view it in the light most favorable to the non-moving party.[4] Because summary judgment is a "drastic device," cutting off a party's right to present its case to a jury, the moving party bears a "heavy burden" of demonstrating the absence of any triable issue of material fact.[5]

"All reasonable inferences must be drawn in the opposing party's favor both where the underlying facts are undisputed and where they are in controversy. At the summary judgment stage, the nonmovant's version of any disputed issue of fact is presumed correct."[6] Even when the basic facts are undisputed, if reasonable

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[3] *Edson v. Valleycare Health Sys.*, 21 Fed.Appx. 721, 722 (9th Cir. 2001).

[4] *Tolan v. Cotton*, 572 U.S. 650, 651 (2014).

[5] *Ambat v. City & Cnty. of San Francisco*, 757 F.3d 1017, 1031 (9th Cir. 2014).

[6] Rutter Group Practice Guide: Federal Civil Procedure Before Trial (Summary Judgment), ¶14:251, citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992), and *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009).

minds may differ on the inferences to be drawn from those facts, summary judgment should be denied.[7]

Where, as here, "the moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party."[8] To succeed Travelers must establish "beyond controversy every essential element of its" no-coverage claim.[9] RBP "can defeat summary judgment by demonstrating the evidence, taken as a whole, could lead a rational trier of fact to find in its favor."[10]

ARGUMENT

I. Travelers has Failed to Satisfy its Burden of Demonstrating

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[7] *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014), citing *Miller v. Glenn Miller Prods., Inc.,* 454 F.3d 975, 988 (9th Cir. 2006) ["where divergent ultimate inferences may reasonably be drawn from the undisputed facts."].

[8] *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986).

[9] *Southern Calif. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

[10] *Ibid.*

that No Reasonable Trier of Fact Could Find for RBP as to Coverage.

A. Evidence Relating to Causation.

RBP is owned by Osborne, a licensed contractor. (Vol.4-ER-529.) Around the time Osborne's company bought the property a year before the loss (December 2018), Osborne and a roofer inspected the roof and found no issues. (Vol.4-ER-544, 557-558.) The roofer wrote a report confirming the roof had an estimated life of 3-5 years. (Vol.4-ER-617.) There was no water intrusion into the building between the time of purchase and the December 2019 loss at issue here. (Vol.4-ER-542.)

On December 6, 2019, Osborne's tenant, Heather Hill, discovered the ceilings of her unit collapsed and her floors soaked; the damage was sufficiently severe that she moved out and stopped paying rent that day. (Vol.3-ER-469-471.)

The same day Osborne, himself a contractor, inspected the roof and noticed four openings on the roof he had not previously observed, measuring between 6 and 12 inches. (Vol.4-ER-530-531.) Osborne observed that areas of the roof looked as if they had been

blown open by the wind. (Vol.4-ER-547, 563; Vol.5-ER-885.) Osborne first observed those openings on the date of loss. (Vol.4-ER-534.) He also took photos of the damage which appear to show wind-torn roofing material. (Vol.4-ER-547, 619-621.)

In his report to Travelers, Osborne described widespread water damage inside the building consistent with a sudden event, as opposed to slow intrusion due, for example, to roof maintenance issues. (Vol.4-ER-532-533.) Osborne pointed out the holes in the roof to Travelers' adjuster. (Vol.4-ER-547, 724.) Osborne told the adjuster the interior water damage resulted from wind damage to the roof. (Vol.4-ER-565.)

The day he found the damage Osborne hired Daniel Gutierrez to patch the roof. Gutierrez has been a roofer for 25 years and has inspected hundreds of roofs. (Vol.3-ER-490-491.) He testified there had been strong winds around the time he went to the property to make repairs. (Vol.3-ER-492.) Gutierrez reported parts of the roof had been displaced by wind; joints had become unglued due to wind. (Vol.3-ER-493-494.) He found three or more holes on the roof. (Vol.3-ER-496). The roof drains were in good condition, not clogged. (Vol.3-

ER-495.) There was no pooling of rain on the roof. (Vol.3-ER-495.)

During the claim Travelers hired no experts to investigate the issue of causation. (Vol.3-ER-505-506.) Instead, its adjuster, Ajay Kumar Mangal, conducted the causation investigation and made the initial coverage determination. (Vol.3-ER-500.) Mangal inspected the loss the day it was reported, December 6, 2019, and again with a site inspection supervisor on December 10, 2019. (Vol.5-ER-914-915, 917-918.)

On December 6th, Mangal walked the loss with Osborn and Guiterrez. (Vol.5-ER-918.) As Travelers' claim notes reflect, Gutierrez explained that wind had blown back about 270 square feet of roofing material back and allowed the water intrusion that led to the interior building damage. (Vol.5-ER-918.)

Mangal had investigated at least 20 membrane roofs like the one at issue here. (Vol.3-ER-516.) Based on those inspections he "made the determination that it was a covered loss." (Vol.3-ER-506.) Mangal had no need to investigate the scope of the related weather events as part of his coverage analysis because he lives in the area hit by the storms. (Vol.3-ER-84, Vol.3-ER-517.)

Travelers' claim notes, which it is required to maintain pursuant to California law,[11] reflect that Travelers concluded the loss was a covered wind claim,[12] never reserved rights as to coverage, never withdrew that coverage position, and never denied any portion of the claim. (Vol.5-ER-888-917; *see also* Vol.3-ER-508-509, 518-519.)

The lower court appears to have misunderstood this circumstance. For example, its order states that "Defendant's *decision to decline coverage* was proper." (Vol.1-ER-11 (emphasis added).) Likewise, the court wrote that "After Defendant *declined further coverage* for Plaintiff's claim, Plaintiff initiated this action for breach of the implied covenant of good faith and fair dealing." (Vol.1-ER-5 (emphasis added).)

These assertions are wrong, as the record reflects. Travelers can point to no communication (internal or with its customer), claim note, or testimony in this litigation that it ever declined or denied coverage. The opposite was always true — in the claim Travelers' file

[11] 10 CCR §2695.3.

[12] Vol.5-ER-917.

reflects that its own investigation found the roof damage caused by wind, and the claim covered under RBP's policy. That never changed.

Travelers' property field training manager Charles Eckstrom attended the second inspection on December 10, 2019. (Vol.3-ER-474, 475.) Eckstrom took the lead, confirming the loss was covered. (Vol.3-ER-462, 651.) Eckstrom reviewed and approved Travelers' repair estimate, which estimate reflected no concern about coverage. (Vol.3-ER-480.)

Mangal's unit manager was Dennis Sullivan. (Vol.2-ER-78, 79.) At the time of Sullivan's *January 2022 deposition*, RBP's loss was covered under the Travelers policy. (Vol.4-ER-589.) Sullivan admitted Travelers has no evidence to support the assertion that the damage to the roof preexisted the loss in December 2019. (Vol.4-ER-590.) He admitted payments on the claim were for a loss covered under the Travelers policy. (Vol.4-ER-596-597.) Sullivan admitted Travelers' reservation of rights letter was limited to elements of the claimed repairs to the interior Travelers concluded might not be payable under the policy; there was no reservation as to coverage itself.

(Vol.4-ER-84.)[13]

RBP's litigation expert Jay Rosenthal testified a series of strong windstorms hit the Modesto area in the days prior to the loss. (Vol.4-ER-602, 604.) The storms included a large amount of precipitation. (Vol.4-ER-602-603.)

RBP also retained Robert Bresee, a licensed contractor with decades of experience. (Vol.6-ER-1229-1232.) Bresee inspected the

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[13] The lower court's understanding of the Reservation of Rights letter is flawed. Its order states the letter was issued on December 20, 2019, ten days after the reinspection by Travelers. (Vol.5-ER-825.) The court's citation is to Travelers' Separate Statement, number 30. (Vol.5-ER-825.) That entry relies not on the reservation of rights letter itself, which Travelers did not put into the record in support of its motion, but instead to Travelers' claim notes. (Vol.5-ER-852, citing Vol.5-ER-914.) But the cited page of the notes has no reference to any such reservation of rights letter, let alone a description of the letter's contents or an indication the letter relates to *coverage*. Travelers' notes reference the letter at Vol.5-ER-913. But those notes contain no description of the letter. Most importantly, Travelers' claim notes lack any reference to a change of heart by Travelers as to its original causation finding or coverage decision. (Vol.5-ER-89-920.)

loss for two days, spending six-to-seven hours on each day. (Vol.2-ER-43.) His opinions were based on his inspection, review of historic roofing reports, photos, videos, communications with Osborne, depositions of the Travelers adjusters, Osborne's deposition, and other expert reports. (Vol.4-ER-614; Vol.6-ER-1227.)

As explained in detail below, at the time of Bresee's original expert report (June 2022), Travelers had never expressed the view, whether in the claim or in the lawsuit, that the cause of the loss was not wind, or that the claim was not or even *might* not be covered. Thus, unsurprisingly, Bresee's report said nothing about causation; it was instead focused on repair costs and the inadequacy of Travelers' investigation as relates to the scope of damage and repair costs.

The parties traded Rule 26 expert reports on June 6, 2022. (Vol.5-ER-1223.) Travelers disclosed as its retained litigation expert Axis Construction Consulting, which inspected the roof once, in April 2021, sixteen months after the loss, long after the complaint was filed in October of 2020. (Vol.5-ER-858.) Axis opined the roof damage was not caused by wind. (Vol.5-ER-1062.)

Under the lower court's scheduling order, RBP had thirty days

to offer a rebuttal opinion. As Travelers had covered the claim *the same day RBP reported the loss,* and had never hinted it had changed its mind on that issue, RBP had no reason to hire its own causation expert in the claim. Likewise, RBP had no reason to retain a causation expert in the lawsuit because, as is described below, Travelers' answer, and its responses to written discovery, never indicated Travelers would defend in reliance on the application of any policy limitation.

Thus, left with less than a month to rebut Travelers' new causation evidence, RBP looked to Bresee, its construction expert, to offer a rebuttal opinion.

Robert Bresee offered that rebuttal opinion, both in written form (Vol.4-ER-614-615) and in deposition. Bresee testified the roof failed due to wind damage. (Vol.3-ER-441, 442-443, 444.) He testified wind was the only possible cause of the damage he observed. (Vol.3-ER-442-443, Vol.2-ER-44-45.) He testified he has worked on losses "very similar to this. Wind that had damaged the roof and allowed water intrusion." (Vol.3-ER-443.) Consistent with the report of the roofer, Gutierrez, Bresee found no evidence of other potential causes

of water intrusion such as bad drainage or pooling. (Vol.2-ER-45-46.)

In addition to the materials listed above, Bresee relied for his rebuttal causation opinion on the reports of high winds, photographs of the damage, reports of the damage from Gutierrez and Osborne, and the quantity of water that intruded the building in such a short period of time. (Vol.3-ER-437-440; Vol.4-ER-614, 615.)

B. Evidence Relating to Travelers' Failure to Disclose its Coverage Defense.

In its complaint filed in October 2020, RBP alleged the damage to its building resulted from a covered wind loss. Specifically, the complaint alleges: "Strong storm winds damaged sections of the roof allowing water to penetrate and damage the Structure …." (Vol.6-ER-1292.) In its answer filed in January 2021, Travelers did not deny the allegation, instead responding that it is "without sufficient knowledge or information to admit or deny the allegations …." (Vol.6-ER-1279.)

In its ninth affirmative defense, Travelers reprinted the policy limitation at issue here, indicating that "its liability, if any, under the Policy, is subject to the provisions ...." (Vol.6-ER-1279.) But given that

previously Travelers had indicated it lacked sufficient information to either admit or deny whether the damage was the result of a covered wind loss, it is not surprising that Travelers' ninth affirmative defense does *not allege an absence of coverage, on any ground*. Indeed, any such a defense is missing entirely from its answer.

In Travelers' interrogatories to RBP, Travelers asked nothing that would indicate it intended to defend in this case by reversing its causation findings and coverage decision that had remained unchanged in the claim. (Vol.6-ER-1305 et seq.)

But to ensure and confirm its understanding of Travelers' position in the lawsuit, RBP served an interrogatory asking Travelers to "state the complete factual basis for" its ninth affirmative defense. In its response of January 7, 2022, now a year since its answer, Travelers did not assert the damage to the roof was not caused by wind, or that the loss was not covered. Rather, the carrier again simply asserted that the policy contains the limitation. (Vol.6-ER-1319.) The response gave RBP no reason to believe Travelers had done an about face on coverage.

Plaintiffs' belt-and-suspenders strategy also including a

request that Travelers admit RBP suffered a covered loss under its policy. In its response of January 7, 2022, Travelers again hid the ball, giving RBP no reason to believe its coverage position had changed. It admitted "only that it made a payment for the loss reported by Plaintiff on December 6, 2019, based on the facts then known." (Vol.6-ER-1333.) Given that its causation expert, Axis, inspected in April 2021, it strains credulity to think that nine months later, when it answered the written discovery, Travelers was not aware of Axis findings and opinions.

In June 2022, Travelers served its expert disclosures, including the opinion of retained expert Axis that Travelers had been wrong—the roof damage was not caused by the ferocious storms that preceded the loss. (Vol.5-ER-1062 et seq.) Pursuant to the lower court's scheduling order, rebuttal reports were due thirty days hence, on July 7, 2022. (Vol.4-ER-614.)

More than thirteen months elapsed between Travelers' expert disclosures and its summary judgment motion in July 2023. *Eighteen* months had gone by since its discovery responses. But in those many months, Travelers neither amended its answer nor supplemented or

amended its discovery responses. The first time Travelers affirmatively adduced its view that the loss was not covered was in its July 2023 summary judgment filing, *forty-three months after the loss*.

C. The Parties Agree RBP has Satisfied its Minimal Initial Burden on the Issue of Coverage.

RBP purchased an "all-risk" policy from Travelers. The policy covers "RISKS OF DIRECT PHYSICAL LOSS" unless otherwise expressly limited or excluded.[14] Under such a policy, it is RBP's initial burden at trial to show a *loss*—meaning *damage—within the basic scope of coverage*.[15]

But as California courts have long held, "in an action upon an all-risks policy ... the insured does not have to prove that the peril

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[14] Vol.6-ER-1100-1101. *See* Croskey, et al., Rutter Group California Practice Guide: Insurance Litigation, ¶6:253, explaining "all risk" policies and related burdens.

[15] *Jordan v. Allstate Ins.*, 116 Cal.App.4th 1206, 1215 (2004); *see also Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 406 (1989) [Under "all risk" policy, the limits of coverage are defined by the *exclusions*].

proximately causing his loss was covered by the policy. This is because the policy covers all risks save for those risks specifically excluded by the policy."[16] The leading treatise describes the burden as "minimal."[17] In *Travelers Casualty and Surety Company v. Superior Court*,[18] California's Sixth District Court of Appeal read *Strubble* to hold that "under an all-risks homeowners policy [the insured] has *no burden of proof*. In effect, there is a presumption of coverage, which the insurer has the burden to rebut by proving that the claim falls within a specific policy exclusion."[19]

The "basic scope of coverage" here, as the policy provides, is a "direct physical loss."[20] The parties *agree* there was such a "direct physical loss" at RBP's property. For example, in the dispositive proceeding, Travelers did not dispute RBP's assertion that "the

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[16] *Strubble v. United Services Auto. Ass'n*, 35 Cal.App.3d 498, 504 (1973).

[17] Croskey, et al., Rutter Group California Practice Guide: Insurance Litigation, ¶6:253.1.

[18] 63 Cal.App.4th 1440 (1998).

[19] *Id.* at 1454-55 (emphasis added).

[20] Vol.6-ER-1100.

downstairs commercial tenant found her unit's ceiling collapsed and floor soaked with water" or that Osborne, RBP's owner, "found the structure saturated and physically damaged by water."[21] Under the authorities set forth, those admissions were such that RBP satisfied its minimal initial burden on the issue of coverage as a matter of law.[22]

D. As RBP has Satisfied its Initial Burden on Coverage, Travelers has the Burden to Prove that a Policy Limitation or Exclusion Applies.

As there is no dispute that RBP satisfied that initial coverage obligation, "the burden shifts to [Travelers] to prove the loss is

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[21] Vol.3-ER-309, 310.

[22] *Compare Gershkowitz v. State Farm Gen. Ins. Co.*, No. 2:21-CV—0165-SVW-E, 2021 WL 6752322, *6 (C.D. Cal. 2021) [insureds met burden as "water damage made the property unsatisfactory for future use and required extensive remediation work to repair."]; *see also Dardashti v. State Farm Gen. Ins. Co.,* No. 2:22-cv-2002-SVW-MRW, 2022 WL 17886024, *5 (C.D. Cal. 2022) [same].

excluded under the Policy."[23] The policy excepts from its all-risk coverage "damage to ... the 'interior of any building or structure' ..., caused by rain ... unless: (a) The building or structure first sustains damage by a Coverage Cause of Loss to its roof ... through which rain ... enters ...."[24]

Therefore, to prevail in its dispositive motion, its showing on summary judgment as to coverage "must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party."[25]

Below, although it never disputed the policy it sold RBP affords coverage for "all-risks" not expressly excluded, nor that RBP had satisfied its initial burden of showing a "direct physical loss" at the property, the carrier argued that the coverage burden does *not* shift

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[23] *Gershkowitz,* 2021 WL 6752322, at *7; *Jordan,* 116 Cal.App.4th at 1215; *see also Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 880 (1978) ["The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer."]; *Moayery v. State Farm Gen. Ins. Co.*, 2023 WL 8359856, *5 (C.D. Cal. 2023).

[24] Vol.6-ER-1101.

[25] *Calderone,* 799 F.2d at 259.

in the manner described above.[26]

In making that argument, the carrier cited none of the foregoing applicable state or federal authorities. Neither did Travelers account for California holdings which have broadly applied these rules respecting the parties' burdens to all carve-outs in all-risk property insurance policies, whether described as limitations, exceptions, or exclusions to coverage.[27] Finally, Travelers cited no

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[26] Vol.2-ER-16-18. For its part, the lower court chose not to decide the dispute over the burden of proof at trial, holding that it would make no difference because "Defendant has proffered the only admissible evidence going to causation." (Vol.1-ER-9.)

[27] *See Clemmer*, 22 Cal.3d at 880 ["burden of bringing itself within *any exculpatory clause contained in the policy* is on the insurer." (Emphasis added.)], overruled on other grounds by *Ryan v. Rosenfeld,* 3 Cal.5th 124 (2017); *see also Garvey*, 48 Cal.3d at 406 [California Supreme Court applies all-risk burden to policy which refers to coverage "except as otherwise excluded or limited."]; *Freedman v. State Farm Ins. Co.*, 173 Cal.App.4th 957, 959 (2009) [all-risk burdens apply except for "specified exceptions and exclusions."]; *Vardanyan v. AMCO Ins. Co.*, 243 Cal.App.4th 779, 797-98 (2015) [same]; *De Bruyn v. Super. Ct.*, 158 Cal.App.4th 1213, 1217 (2008) [same]; CACI 2303 [burden on insurer to demonstrate policy

case, from any jurisdiction, which holds that for the purpose of assigning burdens, the sort of policy limitation at issue here is treated differently than other sorts of exculpatory language in all-risk policies, however labelled.

Instead, Travelers relied on four disability insurance cases,[28] each of which contain the same holding: reviewing termination of disability benefits decisions, courts find that a mental illness restriction that applies to ongoing disability payments is not a policy exclusion because the carrier has *paid* the claim.[29] None of Travelers' cases involve the sort of "all-risk" coverage at issue here or consider or decide the burden issue.

The Court should reject Travelers' attempt to upend decades of settled law. Instead, it should find that Travelers is the moving

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exclusion applies]; CACI 2306 [in all risk policy, burden on insurer to demonstrate most important cause of the loss is excluded].

[28] Vol.2-ER-0018.

[29] *See, e.g., Hoffman v. Life Ins. Co. of N. Am.*, No. EDCV 13-2011-JGB (SPx), 2014 WL 7525482, at *5-6 (C.D. Cal. 2014), cited at Vol.2-ER-18.

party here and, having effectively conceded RBP has satisfied its initial coverage burden of establishing a "direct physical loss"—that is, by showing damage to the insured property—has the burden to demonstrate the application of the policy's coverage limitation.

In that circumstance, to prevail on summary judgment, Travelers must demonstrate that considering the evidence in the light most favorable to RBP, and drawing all reasonable inferences in favor of RBP, *no reasonable trier of fact could find other than for Travelers on the issue of coverage*. It has fallen far short of such a showing.

E. Travelers Has Failed to Satisfy its Burden on Summary Judgment as to the Issue of Coverage.

1. There is More Than Sufficient Evidence of Wind Damage to the Roof to Justify a Trial on the Issue of Causation.

As the lower court observed, in support of its motion, Travelers relied solely on the opinion of its retained litigation expert that "the roof's failure was caused by deterioration over time instead of by wind." (Vol.1-ER-9.) The lower court then concluded that the

Axis report was the "only admissible evidence in the record .... Given that, there can be no coverage under the policy." (Vol.1-ER-11.)

But as we will demonstrate, viewing the facts in the light most favorable to RBP, drawing all reasonable inferences against Travelers, and viewing the weight of all evidence and each credibility determination in favor of RBP, that conclusion cannot withstand even casual scrutiny.

a. Comparison Case.

Before turning to the evidence, we consider a recent similar case in which the court concluded summary judgment was *not* warranted. In *Kim v. Mapfre Insurance Company,*[30] the insureds found standing water in their home, causing property and contents damage. A handyman fixed a failed bathroom supply the next day. The carrier sent an initial adjuster who, after investigating, extended coverage and determined the cost of repair; but the carrier also said it required more time to "assess the claim."[31] *During the claim,* the

[30] No. CV 19-4090 PSG (ASx), 2020 WL 2790011 (C.D. Cal. 2020).

[31] *Id.* at *1.

insurer then hired a second adjuster and a consultant, both of whom recommended that the carrier deny the claim on the basis that the loss had been ongoing for a long time, a policy exclusion.[32]

The district court denied the carrier's dispositive motion, which hung on the issue of coverage. Unlike Travelers here, Mapfre hired its causation consultant, made its causation finding, and issued its denial *in the claim*.[33] On summary judgment, the insureds relied on their own observations, the observations of their public adjuster, the assessment by Mapfre's first adjuster, and a report of their own litigation expert who criticized Mapfre's expert's findings, but does not appear to have expressed his own contrary causation opinion.[34]

Mapfre argued that the conclusions of its initial adjuster, who as here found the loss was covered and wrote a repair estimate,[35] should be ignored in favor of the findings of its later adjuster and

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[32] *Id.* at *2.

[33] *Id.* at *3.

[34] *Ibid*.

[35] *Id.* at *5.

expert.[36] But the court rejected the argument, holding that the original adjuster's findings were sufficient at least to create a triable dispute: as here, the adjuster inspected the loss close in time to its occurrence; as here, the adjuster's findings were consistent with the observations of the insureds and the circumstances of the loss.[37] Taken as a whole, the court concluded there were triable disputes on the issue of coverage.[38]

The three holdings in *Mapfre* relevant here are:

- The percipient observations of insureds and others, even if not litigation experts, are relevant to summary judgment on the issue of coverage;
- The carrier's expert opinion evidence—in *Mapfre* an opinion provided to the carrier *in the claim,* and which was the basis for a claim denial—does not alone settle the question of coverage, even absent a contrary expert

[36] *Id*. at *3.

[37] *Ibid*.

[38] *Ibid*.

opinion from the insureds; and

- Most importantly, when an insurer investigates and concludes a loss is covered, and that finding is consistent with the observations of the insured and others, that circumstance is sufficiently *material* to the coverage analysis to preclude summary judgment on the issue of coverage for the insurer.

It is not possible to square the ruling in *Mapfre* with the lower court's order here. As is set forth below, Travelers has not come close to demonstrating no reasonable trier of fact could find other than for Travelers on the issue of coverage.

b. A Reasonable Jury Could Find that Sudden Damage to the Interior of the Building Was the Result of Violent Storm Activity.

Start with the basic facts of the loss:

- It is undisputed that RBP's property suffered multiple intense storms in the few weeks before the loss, including in the days immediate preceding the loss. The lower court accepted RBP's expert testimony as to the *existence* of the

violent weather, including strong winds, at the relevant time.[39]

- Travelers' adjuster acknowledged as much, testifying he saw no reason to investigate the details of the weather events because he lives in the area and experienced the intense storms himself.
- Travelers' manager admitted the carrier has no evidence RBP's property had suffered water intrusion before this loss.
- He was right—there is no proof of prior roof leakage.
- A year before the loss, during the purchase inspection, Osborne and a licensed roofing contractor found no issues with the roof.
- The roofer gave the roof a 3-5-year lifespan.
- The undisputed evidence is that the first report of any water intrusion at RBP's building was on December 6, 2019, from RBP's tenant.

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[39] Vol.1-ER-10.

- The damage was sudden and extensive: the tenant reported the ceilings of her unit had collapsed and her floors were soaked; the damage drove her out of the unit that day.
- That scope of damage to the building's interior is inconsistent with the sort of slow leak that could result from a lack of maintenance or wear and tear described in the Axis report.
- When Osborne reported the loss to Travelers, he too described widespread, sudden damage to the building, again, inconsistent with Axis' findings.
- Travelers has admitted the loss involved substantial interior damage to the building that did not exist before December 6, 2019.
- Its adjuster, who is not a licensed contractor, wrote an estimate for less than $5,000, which is what Travelers paid. But both in the claim and in the lawsuit, Travelers had evidence that the scope of damage was much more than it acknowledged in its payments to, and communications

with, its customer.[40]

Of course, *neither* RBP nor Travelers has absolute *proof* of what happened on the roof. But the evidence RBP adduced in opposition to Travelers' summary judgment motion supports a jury finding that the storm events on the days leading up to the loss caused damage to the exterior of the building that was not observed previously, had not resulted in water intrusion previously, and suddenly led to substantial water intrusion and interior damage.

Putting this evidence together and considering it in the light most favorable to RBP, Travelers has failed to satisfy its burden of demonstrating no reasonable trier of fact could find other than for the carrier on the issue of coverage.

c. Adding to the Circumstances of the Loss, a Reasonable Jury Could Reasonably Rely on Percipient Observations of Experienced Building Professionals (Osborne and Guttierez) to Find that Damage to the

[40] *See infra,* Section II(C).

Interior of the Building Was the Result of Wind.

Now, making all credibility determinations in favor of RBP, consider the observations of the only two people who *saw* the damage to the roof in its original condition.

- Osborne is a licensed contractor.
- Following the storms, and the report of substantial interior water damage by Ms. Hill, the same day, Osborne found and photographed multiple openings on the roofing material between 6 and 12 inches.
- Osborne first observed the roof damage that day.
- Had the damage existed previously, it is logical that there would have been water intrusion earlier; but there was none.
- Osborne observed that the areas of the roof looked as if they had been blown open by wind.
- Photos he took of the damage before it was patched show wind-ripped and blown-back roofing material.
- Osborne pointed out the holes in the roof to Travelers'

adjuster and told the adjuster the interior water intrusion was the result of wind damage to the roof.

- Osborne's duty under the policy was to take all necessary steps to avoid further damage to the building.[41] Thus, after observing the damage to the roof, consistent with that obligation, he immediately hired a roofer, Gutierrez, to apply temporary patches where the holes in the roofing material had opened.
- Gutierrez, a roofer for 25 years, who has inspected hundreds of roofs, testified that the roof had been damaged by wind.
- There is no evidence Gutierrez knows how coverage under the Travelers policy works, so his observations as to causation were uniquely unbiased compared, say, to a retained litigation expert schooled on the significance of his causation findings to whether the loss would be covered.

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[41] Vol.6-ER-1125 [policyholder duty after loss is to "[t]ake all reasonable steps to preserve the Property from further damage …."

- Gutierrez was specific and certain: three or more holes had been created where joints in the roofing material had become unglued due to wind.
- Gutierrez told Travelers' adjuster that wind had blown back about 270 square feet of roofing material and allowed the water intrusion that resulted in interior damage to the building.
- Gutierrez testified that other possible causes—for example, clogged drains or pooling—did not account for the roof damage or interior water intrusion.

The only two people who saw the damage in its unpatched condition are building professionals. Gutierrez is unmistakably a roofing expert whose observations and opinions regarding causation are uniquely reliable because there is no evidence he knew or understood the relevant policy terms, and thus no evidence that his findings were in any way biased. Both Osborn and Gutierrez, who a court on summary judgment is duty-bound to believe, reported and testified the damage was due to wind.

When considered together with the circumstantial evidence of

a wind loss set forth above, and considering the evidence in the light most favorable to RBP, Travelers has failed to meet its burden of showing no reasonable jury could find other than for the carrier on the issue of coverage.

d. Adding to the Circumstances of the Loss, and the Observations of Two Experienced Building Professionals (Osborne and Guttierez), a Jury Could Rely on the Results of Travelers' Causation Investigation—Consistent with the Holding in *Kim v. Mapfre*—to Find that Damage to the Interior of the Building was Due to Wind.

The lower court faulted RBP for not offering admissible expert opinion evidence on the issue of causation. The holding is legally flawed for multiple reasons, as discussed *infra,* Sections I(E)(2) and (3). But also, the lower court's analysis is illogical.

RBP reported the damage to the interior of its building; that was its initial obligation under the policy. Under California law, after RBP satisfied that contractual duty, the burden shifted to Travelers to

conduct a thorough investigation as to cause, coverage, scope of damage, and benefits due.[42] In other words, having been notified that RBP's property was damaged, Travelers was bound by the contract and the law to apply its expertise in investigating and adjusting property losses.

And that is what Travelers did:

- Travelers' appointed adjuster Mangal, who has substantial experience investigating damage to membrane roofs of the kind involved here, to investigate the cause of loss and apply coverage.
- Mangal inspected on December 6, 2019, walking the loss with Osborne and Gutierrez, who both told him the damage to the roof was caused by wind.
- As Mangal noted in Travelers' file, Gutierrez explained that wind had blown back about 270 square feet of roof back and allowed the water intrusion that resulted in interior damage to the building.

[42] 10 CCR §2695.7(d).

- Based on his inspection and investigation, including reports from Osborne and Gutierrez, and review of the photos, adjuster Mangal concluded the building had suffered a covered wind loss.
- Travelers' claim notes unmistakably reflect its conclusion, following the thorough and objective investigation required by law, that the damage to the interior of RBP's building was due to wind damage to the roof.
- Mangal returned a few days later with a "Property Field Training Manager." The two inspected the loss. Travelers maintained its causation findings and coverage decision.
- The manager of Mangal's unit, Dennis Sullivan, later confirmed Travelers' causation and coverage decisions.
- Sullivan testified in January 2022 that Travelers has no evidence to support the assertion that the damage to the roof observed in December 2019 was preexisting.
- Apparently satisfied with the investigation conducted by its adjuster and two managers, including two inspections close to the time of the loss, Travelers never revisited the

> causation issue in the claim—*i.e.,* it never hired any roofer or engineer to assist, it never issued a reservation of rights letter on the issue of causation, and it never denied any part of the claim.

Travelers trains its claims staff to investigate property claims and apply the terms of the insurance policies Travelers writes. Can it be, contrary to the *Kim v. Mapfre* court's holding, that a jury could not reasonably rely on the investigation and findings of the three separate claims employee Travelers itself depended on to investigate causation and determine coverage?

Such a rule would defy logic.

A jury could reasonably find, at a minimum, that three Travelers claims staff (a) inspected the roof close in time to the loss, in its recently-patched condition, (b) considered the best percipient evidence available—including the recent storms, extensive sudden damage, photographs, and views of both Osborne and Guttierez—and (c) afforded coverage.

Likewise, a jury reasonably could conclude that Travelers' causation investigation was complete and its findings reliable. For

example, Gutierrez saw the roof in its original, damaged state. As noted, there is no evidence Gutierrez is an insurance expert who knew that coverage for interior damage to the building would turn on the cause of the roof damage. There is no evidence Gutierrez was biased or otherwise motivated to make a false report to aid RBP. Instead, Gutierrez, a roofer with considerable experience, gave Mangal a concrete and reliable report of the wind damage to the roof. Mangal apparently accepted Gutierrez's opinion.

It is illogical to suggest a jury could not do the same—that is, to accept Gutierrez's report. But also, a reasonable jury could accept the findings of three Travelers claim staff that the percipient reports of wind damage to the roof by Osborne and Gutierrez, along with all of the loss circumstances described above, were a sound basis upon which to determine causation, and thus to afford coverage.

Thus, adding to the circumstances of the loss, and the observations and reports of Osborne and Gutierrez, a jury could reasonably rely on Travelers' coverage investigation—including two inspections and the agreement of three claims professionals—to find that the damage to the roof was caused by wind. As in *Kim v. Mapfre,*

so here. Travelers failed to meet its burden of showing no reasonable jury could find other than for the carrier on the issue of coverage.

e. Adding to the Circumstances of the Loss, and the Observations of the Two Experienced Building Professionals (Osborne and Guttierez), and Travelers' Findings After its Coverage Investigation, a Jury Could Rely on the Opinion of a Licensed Contractor Retained by RBP Primarily for the Purpose of Offering an Opinion About the Scope of Interior Damage and Cost of Repairs.

As of June 2022, when the parties exchanged expert reports, Travelers had never informed its customer that it had reconsidered its decision to cover the loss, whether in the claim, or in the litigation.

In the claim Travelers has never reserved rights, withdrawn its coverage decision, or denied any part of the claim on the basis that the loss was not covered.

In its Answer, Travelers did not assert the loss was not covered. And in its own interrogatories, and responses to interrogatories and requests for admission by RBP, again, Travelers never alleged or asserted a lack of coverage.

The dispute *in the claim*, the circumstances motivating the lawsuit, and the focus of the litigation, was the scope of damage, the cost of repairs, and Travelers' bad faith, malice, and fraud, in the claim, discussed *infra,* Section II(C).

Given the circumstances, it should not be surprising that RBP's contractor expert's initial report has nothing to say about causation. (Vol.6-ER-1227 et seq.) Given just thirty days to rebut the Axis opinion, RBP relied on Mr. Bresee. That reliance was justified.

Robert Bresee is among the most experienced and qualified contractor-experts in California. He has more than five decades of contracting experience. He has been qualified multiple times in state and federal courts on issues of causation, proper investigation, scope of damage, repair methodologies, repair costs, and the application of regulatory and industry standards to property losses. (Vol.6-ER-1229-1232.)

There is no valid basis to dispute his qualification or the admissibility of his rebuttal opinion:

- Bresee inspected the loss for two days, spending six-to-seven hours on each day.
- His opinions were based on his inspection, discussions with Osborne, review of historic roofing reports, photos of the damage, videos of the property, depositions of the Travelers adjusters, Osborne, and Gutierrez, and the quantity of water that intruded the building in a short period.
- Bresee's opinion was that the roof failed due to wind.
- Wind was the only possible cause of the damage he observed. He has worked on losses "very similar to this. Wind that had damaged the roof and allowed water intrusion." He saw no evidence of other potential causes such as bad drainage or pooling.

Below, RBP will address the question whether, in the unique circumstances here, such expert opinion testimony on causation is *mandatory* to avoid summary judgment in Travelers' favor. But in any

event, the lower court's refusal to put Bresee's causation opinion into the evidentiary mix in deciding if a reasonable jury could find that the roof was damaged by wind, is indefensible.

Bresee's opinion is sufficiently reliable to be admissible here because it is "'based on the knowledge and experience of [his] discipline.'"[43] As the *Raschkovsky* court noted, in an opinion reversing a summary judgment order in an insurance bad faith case on the ground that the lower court failed to consider the insured's expert opinion regarding the cause of a water loss: "While the opinions do not address every fact raised by Allstate's experts, this deficiency goes to weight, not admissibility."[44]

The lower court's refusal to take Bresee's opinion into account

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[43] *Raschkovsky v. Allstate Ins. Co.*, 696 Fed.Appx. 314, 314 (9th Cir. 2017), quoting *Pyramid Techs. Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 816 (9th Cir. 2014), and *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 368 n.14 (9th Cir. 2005).

[44] *Raschkovsky,* 696 Fed.Appx. at 314, citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010) ["Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion."].

in its summary judgment analysis is likewise irreconcilable with the *Kim v. Mapfre,* discussed *supra*. There, the insured's expert, Bissner, appeared for the sole purpose of pointing out flaws in the carrier's expert's report on the issue of the length of the water loss.[45] The insurer's attacks on Bissner are essentially identical to the flaws the district court here asserted regarding the Bresee findings.[46]

Mapfre rejected the insurer's argument that the findings could be ignored entirely, relying on expert qualifications remarkably similar to Bresee's: "While Bissner may not be a cause and origin expert …, he is a licensed California Building Contractor who has served as a forensic expert in more than 150 cases, including those involving insurance coverage disputes....Bissner also declares that he has personal knowledge of the damage based on his review of the photographs of the scene, as well as the Shackleford and Lander reports."[47]

Thus, especially when considered together with the

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[45] *Kim*, 2020 WL 2790011, at *3.

[46] *Ibid.*

[47] *Ibid.*

circumstances of the loss, the observations of Osborne and Gutierrez, and the findings as to causation by three members of Travelers' claim staff after an investigation close in time to the loss, a reasonable jury could rely on Bresee's expert opinion to conclude the roof was damaged by wind. Travelers has failed to meet its burden of showing no reasonable jury could find other than for the carrier on the issue of coverage.

f. Conclusion: If the Summary Judgment Standard is Fairly Applied to the Facts, Travelers has Failed to Meet its Burden to Show No Reasonable Jury Could Conclude From the Evidence and Fair Inferences that the Damage to the Roof was Caused by Wind.

To succeed in its dispositive motion, Travelers must convince this Court that "no reasonable trier of fact could find other than for the moving party." Put another way, it must establish "beyond controversy every essential element of its" no-coverage argument. Viewing the facts in the light most favorable to RBP, drawing each

reasonable inference against Travelers, and viewing the weight of all evidence and each credibility determination in RBP's favor, the carrier has fallen far short of meeting its burden to demonstrate that no reasonable jury could find other than for the carrier on the issue of coverage. Instead, properly applying the deferential standard, notwithstanding the opinion of Travelers' retained litigation expert, a reasonable jury could readily conclude the roof damage was caused by wind.

2. Where a Carrier Affords Coverage, and Rests on that Decision for Years Until Filing its Dispositive Motion, it is Illogical and Unfair to Require Competing Expert Opinion Testimony From an Insured to Avoid Summary Judgment on the Issue of Coverage.

In its summary judgment motion, Travelers argued that "[u]nder California law, when the matter at issue is one within the knowledge of experts only and not within the common knowledge of laypersons, the Plaintiff must produce expert opinion evidence to establish a *prima facie* case." (Vol.5-ER-831.) Although it cited no

California case containing such a holding, Travelers urged that the issue of causation here should be decided in its favor as a matter of law because RBP had failed to offer any such expert evidence. (Vol.5-ER-831-832.)

Without citation to any case, the lower court accepted Travelers' argument: "Causation in this case where there are no witnesses is beyond the scope of lay witness testimony." (Vol.1-ER-11.)

The ruling is wrong, especially in the unique circumstances of this case.

First, no decision from any California court, or in this Circuit, has held that the issue of causation as to all water losses, or as to water losses resulting from water intrusion through damaged roofs, requires such retained expert testimony to avoid summary judgment.

This case demonstrates why such a requirement makes no sense. The owner of RBP is himself a licensed contractor, just like Travelers' paid expert from Axis. He testified that the damage was caused by wind. Guttierez, the roofing contractor, is a specialist. He testified that the damage was caused by wind. Their conclusions

were ratified by the claims staff Travelers sent to examine the damage, both of whom are experts. With this evidence in the record, there was no need for any paid "expert" testimony to rebut the Axis opinion. The jury should be permitted to weigh for itself which evidence it finds the more persuasive.

Second, even if this Court were to find that such a mandate exists, it would be profoundly unfair to apply it here for the first time to end RBP's effort to obtain benefits to fix its building, and to make up for the harm caused by Travelers' bad faith, malice, and fraud in the claim.

Had Travelers so much as *hinted* in the days and months after the loss that it questioned whether the roof had been torn up by wind, or doubted coverage on any basis, RBP would have timely retained one or more specialty consultants to investigate and offer opinion evidence on the causation issue.

But apart from the opinions of its contractor-owner and the experienced roofer who mended the roof, RBP had no reason to do so because Travelers found the cause of the loss was wind damage to the roof, covered the loss, and at no time in the claim, or for years

into this litigation, suggested its causation findings and coverage decision would not stand.

As Travelers is sure to remind the Court, coverage cannot be established by estoppel—its decision to lead RBP down the garden path on the issue of coverage *for years* is highly relevant to its bad faith and malice, but that conduct does not control on the issue of coverage.[48]

But the question raised by the evidentiary mandate imposed by the lower court is different, namely, whether such a rule should be applied for the first time in the unusual circumstances of this case, *i.e.,* where three Travelers claims staff investigated causation, and afforded coverage, where those decisions remained undisturbed for the full length of the claim, and where the first time the insurer took a contrary view was its dispositive motion, four years after the fact.

The court in *Kim v. Mapfre* concluded otherwise. The coverage

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[48] Were the law to the contrary, this would be an ideal case for application of such an equitable finding, and upon review of Travelers' dispositive motion, RBP would have sought to amend its complaint to assert such estoppel.

dispute there—the length of a plumbing line failure—is no different than the cause of the roof damage here; both could be subjects of expert opinion evidence. In *Kim,* the carrier's first adjuster afforded coverage. Its second adjuster and claim consultant found otherwise. The insureds had a retained litigation expert, but his opinions were limited to criticisms of the insurer's expert's findings; unlike Bresee, here, the expert apparently offered no opinion on the causation issue. But the court nevertheless denied summary judgment.

This Court should reach the same conclusion.

If the sort of expert-opinion mandate required by the lower court is accepted, going forward all insureds will have little choice but to spend thousands of dollars in every claim to avoid the possibility of a later bait-and-switch by their insurer. That is neither a favorable nor workable rule. But certainly, given the circumstances here, it should not be applied for the first time to permit Travelers to avoid liability as a matter of law.

3. Even if the Expert Opinion Mandate Applies, Summary Judgment is Inappropriate.

Even if the Court accepts the lower court's ruling that an

insured must have expert evidence of causation, summary judgment is inappropriate because the court overlooked three sources of reliable expert proof:

- The Bresee findings, as discussed above, which, taken together with the other claim circumstances and reports, cannot fairly be ignored altogether.
- The percipient reports of Gutierrez and Osborne which, as is argued above, Travelers apparently thought sufficiently reliable in the claim to have extended coverage in reliance on them.
- And the conclusions of three of Travelers' claims staff, after two inspections, review of photos, discussions with the customer and roofer, who are the only witnesses to have seen the roof in its unpatched state immediately after the loss.

Given the many sources of evidence from which a jury could conclude that the roof damage was the result of wind, the lower court's attempt to squeeze this case behind its new bright line rule should not stand. Viewing the evidence in the light most favorable to

RBP, Travelers lone opinion from its litigation expert, which arrived thirty months after a loss the carrier covered and never *un*covered, is insufficient to demonstrate that no reasonable trier of fact could find other than for Travelers.

4. Travelers' Failure to Timely Disclose its Coverage Defense Should Preclude its Causation Argument on Summary Judgment.

Travelers did not reveal its about-face on causation at any point in the claim. It did not assert the defense in its answer. It evinced no intention to assert a coverage defense in its written discovery requests. In its responses to interrogatories and requests for admission in January 2022, more than two years after the loss, Travelers said nothing to indicate it would defend here based on disputed coverage. And in the eighteen months between those responses and its dispositive motion, although it revealed the Axis report, Travelers neither amended its answer, nor supplemented its discovery, to assert a coverage defense.

Court have long been skeptical of such gamesmanship and are empowered to insist that litigants disclose their litigation theories

before asserting them in dispositive motion papers.

Here Travelers misconduct is two-fold:

First, in its *de novo* review here, the court can and should decline to consider the causation/coverage basis for Travelers' summary judgment motion because, although the insurer was repeatedly asked to show its cards, and had years to do so, it failed to disclose its no-coverage theory until its summary judgment motion.[49]

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[49] *Karoun Dairies, Inc. v. Karlacti, Inc.*, No. 08cv1521 AJB (WVG), 2014 WL 3340917, at *4 (S.D. Cal. 2014) [where the failure to raise a defense is prejudicial, reliance on the defense on summary judgment may be barred]; *Boeing Co. v. KB Yuzhnoye*, No. CV 13-00730-AB (AJWx), 2015 WL 13841572, at *21 (C.D. Cal. 2015) [failure to amend answer to timely fully disclose affirmative defense bars reliance on the defense on summary judgment]; *Hadley v. Kellogg Sales Co*., No. 16-CV-04955-LHK, 2019 WL 3804661, at *11 (N.D. Cal. 2019) [same]; *California Inst. of Tech. v. Broadcom Ltd.*, No. CV 16-3714-GW (AGRx), 2019 WL 8807748, at *3 (C.D. Cal. 2019) [litigant barred from asserting a new theory on summary judgment even where the theory has been revealed in discovery]; *City of Lincoln v. Cnty. of Placer*, 668 F.Supp.3d 1079, 1093 (E.D. Cal. 2023) [disallowing undisclosed

Second, the court can decline to consider the *evidence* Travelers relies on to support its coverage theory on summary judgment due to the carriers' violation of its duty to supplement its discovery responses for *eighteen months* between its responses in January 2022, and its motion in July 2023.[50]

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immunity defense at summary judgment stage]; *Flores v. Am. Airlines Inc.*, No. CV-18-04175-PHX-MTL, 2020 WL 6585535, at *3 (D. Ariz. 2020) [litigant precluded from adding a new theory of liability on summary judgment].

[50] A party has a duty to supplement or correct earlier interrogatory answers upon learning that the earlier answers were "in some material respect … incomplete or incorrect" when made or are no longer true. Fed.R.Civ.P. 26(e)(1)(A). Parties are expected to supplement and/or correct their disclosures promptly when required under that Rule, without the need for a request from opposing counsel or an order from the court. *Oracle USA, Inc., v. SAP AG*, 264 F.R.D. 541, 544 (N.D. Cal. 2009). Federal Rule of Civil Procedure mandates that a party's failure to comply with its Rule 26(e)(1) obligations results in that party being precluded from "use [of] that information ... to supply evidence on a motion, at a hearing or at trial, unless the failure was substantially justified or is harmless." *Silvia v. EA Technical Servs., Inc.*, No. 15-cv-04677-JSC, 2018 WL

The requested relief would hardly be unjust here. While under California law Travelers' conduct in the claim cannot establish coverage by way of estoppel, it should be obvious RBP relied on the coverage decision to its detriment. Specifically, the insured followed Travelers' lead on the causation issue, and thus did not hire its own specialty consultant close in time to the loss to address the matter. That is because it understood from December 2019 until at the earliest, the disclosure of the Axis report in June 2022, that all parties agreed the roof damage was caused by wind.

In June 2022, upon reviewing the Axis report, RBP was left with less than a month to plug that evidentiary hole. Given those circumstances, and Travelers' failure to reveal its plan to defend based on its no coverage argument, the Court would be more than justified to exercise its discretion in its *de novo* review here to decline to consider the coverage defense or the supporting evidence.

1366622, at *5 (N.D. Cal.2018), citing Fed.R.Civ.P. 37(c)(1). Rule 37(c)(1) is "self-executing" and "automatic." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

II. Travelers Failed to Justify Summary Judgment as to RBP's Bad Faith Cause of Action or its Claim for Punitive Damages.

Travelers argued below that even if there are triable disputes as to coverage, it is entitled to summary judgment, or partial summary judgment, because (a) it acted reasonably as a matter of law (Vol.5-ER-832 et seq.), and (b) there is insufficient proof of fraud, malice, or oppression to justify trial of RBP's punitive damages claim. (Vol.5-ER-837 et seq.) The lower court never reached these issues.

If in its *de novo* review here the Court finds triable disputes on the issue of coverage, the Court would of course be entitled to decide the remaining issues in the first instance.[51] RBP will therefore address Travelers' remaining arguments for summary judgment. Trial on RBP's bad faith and punitive damages claims is justified.

A. The Relevant Standard: Bad Faith

At the heart of an insured's cause of action for violation of the implied covenant of good faith and fair dealing (*i.e.,* bad faith) is an

[51] *Uzun v. City of Santa Monica*, 54 F.4th 595 (9th Cir. 2022).

allegation of *unreasonableness.* Bad faith is proven where a carrier *unreasonably failed to pay* or *unreasonably delayed paying* policy benefits (CACI 2331), *or* where the insurer *unreasonably* failed to conduct a thorough and objective investigation of all bases of the claim (CACI 2332).

Because the "linchpin of a bad faith claim is that the denial of coverage was unreasonable...[w]here there is a *genuine issue* as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute."[52]

At the heart of Travelers' dispositive motion on the issue of bad faith is its claim that, at a minimum, there was such a *genuine issue.* But under the foundational California case,[53] the *genuine issue* or *genuine dispute* defense should rarely deprive litigants of a jury trial. An insurer seeking summary judgment in reliance on the

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[52] *McCoy v. Progressive W. Ins. Co.*, 171 Cal.App.4th 785, 793 (2009) (emphasis in original).

[53] *Wilson v. 21st Century Ins. Co.*, 42 Cal.4th 713 (2007).

existence of a "genuine dispute" must demonstrate that "it is ... *indisputable* that the basis for [its] denial of benefits was reasonable—for example, *where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law*. On the other hand, an insurer is not entitled to judgment as a matter of law where, *viewing the facts in the light most favorable to the plaintiff,* a jury could conclude that the insurer acted unreasonably."[54]

As the California Supreme Court concluded: "In the insurance bad faith context, a dispute is not 'legitimate' unless it is founded on a basis that is reasonable under *all the circumstances*."[55] A "*genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds...."[56] Evidence of any failure to investigate is bad faith.[57]

Finally, violation by an insurer of California's statutes and

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[54] *Id.* at 724 (emphases added).

[55] *Ibid.* (Emphasis added).

[56] *Id.* at 723.

[57] CACI 2332; *Wilson,* 42 Cal.4th at 723.

regulations that apply to the investigation and adjusting of property claims is evidence a jury can rely on to find a carrier acted unreasonably.[58] Such rules require that Travelers:

i. conduct a full, fair, and thorough investigation;[59]

ii. diligently pay benefits owed, sufficient to restore the property to its condition prior to the loss and allow for repairs to be made in a manner which meets accepted trade standards for good and workmanlike construction, rather than offer its customer a settlement that is unreasonably low;[60]

iii. neither conceal nor misrepresent material facts, along with the affirmative obligation to disclose all benefits, coverages, and policy provisions that *may* apply to the claim;[61]

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[58] *Rattan v. United Servs. Auto. Ass'n*, 84 Cal.App.4th 715, 724 (2000).

[59] CACI 2332; 10 CCR §2695.7(d) .

[60] CACI 2331; 10 CCR §§2695.7(b), (d), 2695.9(c)(2).

[61] CACI 2337(a); Ins. Code §790.03(h)(1); 10 CCR §2695.4(a); 10 CCR §2695.4(b).

iv. not ignore evidence that supports coverage;[62]

v. upon receipt from the insured of a licensed contractor's estimate for repair of the loss, do one of the following: (1) pay the difference between the estimate and amounts the insurer already paid, (2) provide the insured with the name of contractor willing to do the repair for the amount the insurer offered, or (3) adjust the estimate and provide the adjusted copy to the insured;[63] and

vi. effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, and not compel its insureds to file lawsuits to recover policy benefits due.[64]

In its opposition to Travelers' motion, RBP submitted admissible evidence of a violation of each of these rules, which violations a reasonable jury could rely on to find Travelers acted

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[62] *Wilson,* 42 Cal.4th at 720-21.

[63] 10 CCR §2695.9(d)(1)-(3).

[64] Ins. Code §790.03(h)(5), (6).

unreasonably and with malice in its investigation and adjusting of RBP's claim.

B. The Relevant Standard: Punitive Damages.

For a *jury* award of punitive damages, there must be clear and convincing evidence of fraud, malice, or oppression.[65] In the summary judgment context, California courts have acknowledged the significance of the heightened standard of proof at trial: in ruling on the summary judgment motion, "the judge must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden[.]"[66]

To prove malice under California law, it is not necessary to show that the defendant had personal animosity toward the plaintiff or acted out of "evil" motives; it is enough that the insurer intended the consequences that were substantially certain to result from his or her conduct.[67] Under the applicable CACI jury instruction, and in the

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[65] Civ. Code §3294(a).

[66] *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 254-55 (1986).

[67] *See Schroeder v. Auto Driveaway Co.*, 11 Cal.3d 908, 922 (1974).

context of an insurance claim, malice is present where an insurer intentionally deprives its insureds of her rights under the policy.[68] "Punitive damages are likewise appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy."[69] "[A]ll that is required is that the fraud must equate to the conduct which gives rise to liability—in this case bad faith."[70] Punitive damages are also appropriate when an insurer has been "recklessly indifferent to the rights of the insured[.]"[71]

C. The Evidence.

After RBP reported the loss on December 6, 2019, Travelers assigned adjuster Mangal to handle the claim. (Vol.3-ER-516; Vol.5-ER-501, 919, 927-929.) Mangal inspected the loss that same day,

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[68] *See* CACI No. 3946 ["'Malice' means defendant acted with intent to cause injury."]; *Jordan,* 148 Cal.App.4th at 1080 [same].

[69] *Food Pro Intern., Inc. v. Farmers Ins. Exch.*, 169 Cal.App.4th 976, 994 (2008).

[70] *Notrica v. State Comp. Ins. Fund,* 70 Cal.App.4th 911, 947–48 (1999); CACI No. 3945.

[71] *Food Pro Intern., Inc.,* 169 Cal.App.4th at 995.

accompanied by Osborn and Gutierrez. (Vol.5-ER-918.)

In an early display of bad faith and malice, Mangal warned Osborn that if Osborn sought a claim payment of $5,000 or higher, Travelers would investigate him for insurance fraud. (Vol.4-ER-566, 567, 568, 569, 570, 572.) That is exactly what happened.

Although its duty was to carry out a thorough, objective, and fair investigation, the *same day* Travelers sent RBP a settlement letter attaching an "estimate" Mangal prepared, which afforded a total of $4,909 to repair the damage sustained to the roof and interior, just below the amount Mangal warned Osborne would risk an accusation of criminal insurance fraud. (Vol.3-ER-507-508; Vol.4-ER-623.)

Unbeknownst to Osborne, none of the adjusters or supervisors who handled Travelers' investigation of the scope of damage or cost of repairs have licenses or backgrounds in construction. (Vol.3-ER-481, 499, 500.) Yet Travelers never consulted with or retained a licensed contractor or any other licensed professional to investigate the scope of the damage or the cost of repairs. (Vol.3-ER-480, 505, 506, 523.)

Mangal's investigation was the *opposite* of thorough. He had no moisture meter; neither did he obtain other measurements to determine the scope of the water intrusion. (Vol.3-ER-510; Vol.4-ER-571.) Travelers' "settlement" letter omitted benefits for lost rents and failed to satisfy the carrier's duty to advise RBP of its right to such benefits going forward. (Vol.5-ER-936.) The letter omitted any advisement that RBP would be entitled to *any* future benefits, including for example the right to reimbursement for actual repair costs pursuant to Insurance Code §2051.5(a)(a).[72] (Vol.5-ER-936.)

Osborn, an experienced contractor, knew $4900 was not going to fix his property or make up for his lost rents. He retained a public adjuster, David DeTinne, who requested that Travelers reopen the claim and reinspect the loss. (Vol.3-ER-459; Vol.5-ER-915, 949, 958, 959.)

On December 10, 2019, Mangal reinspected the property

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[72] The statute provides that upon completion of repairs "the insurer shall pay the difference between the actual cash value payment made and the full replacement cost reasonably paid to replace the damaged property, up to the limits stated in the policy."

along with Charles Eckstrom, Travelers' property field training manager. (Vol.3-ER-474-475; Vol.5-ER-865, 886, 914-915, 965-966.) Osborn and DeTinne walked the loss with them, pointing out various scope items Mangal had omitted from his original estimate. (Vol.4-ER-574, 575.)

Eckstrom confirmed seeing the new scope items. (Vol.3-ER-476.) The Travelers adjusters again had no moisture meter and took no measurements to determine the extent of water intrusion. (Vol.3-ER-478, 479; Vol.4-ER-574.) Mangal and Eckstrom also confirmed coverage, *i.e.,* that wind caused the roof damage which led to the water intrusion. (Vol.3-ER-462; Vol.4-ER-651.)

After the second inspection, unbeknownst to RBP, Mangal admitted internally that he had missed damage not included in his less-than-$5,000 estimate, including: multiple office interior walls, exterior walls/insulation, wet flooring in the breakroom, FCV peeling, damaged underlayment, replacement of buckling subfloor under the main office, replacement of carpet throughout, and replacement of all top floor baseboards. (Vol.5-ER-914, 915.)

On December 12, 2019, again without notifying RBP, Mangal

created a second estimate reflecting this additional damage, totaling $25,577, a more than five-fold increase in repair benefits. (Vol.3-ER-479; Vol.4-ER-529, 669.)

Eckstrom, the supervising site inspector, who had agreed with Mangal on the coverage decision, instructed Mangal to add thirty-two square feet of ceiling tile to the estimate. (Vol.3-ER-479; Vol.4-ER-657, 658.) The additional damage was undisputed by Travelers. (Vol.3-ER-482.) But the carrier never shared its revised estimate with its customer during the claim, as the law required it to do, or paid the additional more than $20,688 in undisputed repair benefits. (Vol.4-ER-724, 728.)

On December 11, 2019, Travelers sent its vendor, Servicemaster, to inspect the property and estimate the cost of mitigation, further confirmation that Travelers had determined that the loss was covered. (Vol.3-ER-476, 477, 502, 503; Vol.4-ER-578.) Servicemaster estimated mitigation would cost another $3,917. (Vol.4-ER-580, 581, 582, 583, 680.) Travelers received the estimate but paid nothing. (Vol.4-ER-724, 728.) Travelers also omitted its own vendor's mitigation estimate from its claim file, conduct a jury could

conclude was intentional. (Vol.5-ER-936-947.)

Likely the omission was related to Servicemaster's observations of even more damage to the building that Travelers had missed, including damage to second floor ceilings, walls floors and subfloors of multiple rooms; first floor ceiling damage; and microbial growth on various surfaces. (Vol.4-ER-579.)

Consistent with its previous conduct, Travelers again neither shared news of this additional scope of repair with its customer nor made any additional payment for this scope of damage identified by *its own licensed vendor.* (Vol.4-ER-724, 728.)

On December 12, 2019, Mangal made good on his threat, in an act of pure malice, referring not only Osborne, but also his public adjuster DeTinne, to Travelers' fraud department ("Special Investigations Unit" or SIU). (Vol.5-ER-865-866, 914, 994-996.) Lacking the even the slightest proof of insurance fraud, Mangal's reason for the referral was that the "Claimant [was] overly persistent." (Vol.5-ER-914.)

On December 17, 2019, Travelers' fraud team sought to obtain a recorded statement from Osborn. (Vol.5-ER-1000, 1001.) As was his

right, Osborne declined, insisting that the company proceed with an Examination Under Oath (EUO) that would afford him a measure of protection pursuant to Insurance Code §2071.1, including the right to be represented by counsel. (Vol.5-ER-977-980, 1001.)

On March 19, 2020, still lacking any evidence of fraud, Travelers' fraud team reported both Osborn and DeTinne to the California Department of Insurance's (CDI) fraud division, as well as the National Insurance Crime Bureau (NICB), based on a "lack of cooperation." The proffered lack of cooperation was the insured's lawful, valid, and altogether justified decision to insist that his interrogation proceed by EUO rather than a recorded statement, at which he would not be entitled to representation or afforded the various other rights set forth in §2071.1. (Vol.3-ER-524; Vol.4-ER-704.)

Indeed, Travelers has admitted its CDI and NICB referrals were improper because (a) the policy did not require Osborne to provide any recorded statement, and (b) the only proper reason to refer insureds to state/national agencies is for suspicion of fraud, not lack of cooperation. (Vol.3-ER-522; Vol.4-ER-692.)

On December 12, 2019, DeTinne requested all Claim-Related Documents (CRD) from Travelers under Insurance Code §2071. (Vol.4-ER-714-715.) In its response, Travelers fraudulently withheld the estimates described above which identify additional damage, and undisputed benefits due, namely Mangal's revised estimate, Eckstrom's revisions, and the Servicemaster scope of damage and estimate. (Vol.4-ER-724, 728; Vol.5-ER-865, 912, 931, 1007, 1089.)

On June 19, 2020, RBP's lawyer in the EUO renewed the request for CRD in advance of the upcoming examination. (Vol.4-ER-720,721.) Travelers again failed provide the documents showing Travelers had itself arrived at a much-increased scope and cost of repairs, and had been informed by its vendor of an additional increased scope and cost of repairs. (Vol.4-ER-724, 728, 734.)

On June 28, 2020, RBP submitted a partial proof of loss, attaching an estimate for repair from the only licensed general contractor to offer any repair opinion in the claim, Garrett & Son, for $690,704.94. (Vol.4-ER-535; Vol.5-ER-865, 946-947.) Travelers never identified any contractor who could restore the property to its pre-loss condition for less than $5,000; Garrett & Son confirmed its

estimate was the amount required to do the work (Vol.3-ER-485, 486.)

Upon receipt of the competing estimate, Travelers was required by 10 CCR §§2695.9(d) to either (a) pay the amount in the estimate, less prior payments, (b) provide the insured the name of a contractor willing to perform the same scope of necessary work for Travelers' estimate of less than $5,000, or (c) provide a written adjustment of the Garrett & Sons estimate, agreeing or disagreeing with various scope items, and paying for any agreed upon scope items. (Vol.4-ER-725, 728.)

Travelers simply ignored its legal obligation, along with its customer's estimate. The insurer never sought a reinspection with the contractor to go over the estimate, or ever tried to contact Garrett & Sons to discuss any differences. (Vol.3-ER-487; Vol.5-ER-889-920.) Travelers simply sat on its hands and waited to get sued. (Vol.3-504; Vol.4-ER-594-595.)

In the litigation, for the first time, Travelers retained a construction expert with a building license. Given the information in Travelers' file that it withheld from its customer for years, it should

not be surprising that its expert came in at *twelve times* the amount Travelers paid in the claim, estimating the loss at $61,154. (Vol.5-ER-1077-1082.) Still, Travelers paid no additional money for repairs.

In addition, Travelers confirmed RBP has coverage for lost rents. (Vol.4-ER-591.) Travelers received proof of lost rents in the claim, including details regarding the lease agreement, on November 4, 2021. (Vol.3-ER-468; Vol.4-ER-537, 538, 539, 560, 561, 562.) Travelers never paid a dime for this coverage. (Vol.4-ER-536, 591.)

D. There are Myriad Triable Disputes as Relates to Travelers' Bad Faith, Malice, Oppression, and Fraud.

There are a host of factual disputes for a jury to resolve as relates to the issue of Travelers' reasonableness, as well as the carrier's fraud, malice, and oppression. Travelers has failed to satisfy the California standard for application of the "genuine issue" rule on summary judgment, namely, that its claim investigation and adjusting was *indisputably reasonable*, such that the issue of reasonableness should be taken from the jury.

To start, given that Travelers never had a licensed or qualified building professional investigate the loss, and *Travelers' own*

litigation consultant measured the scope of damage and cost of repair at more than twelve times the amount the carrier paid in the claim, a jury could readily conclude Travelers failed to carry out a competent investigation, alone enough to require a trial on the issue of bad faith.[73]

Instead, a jury will readily conclude that faced with a claim far more expensive than its adjuster initially found, the carrier acted with utter malice by initiating a baseless fraud investigation and criminal referral against its customer and his representative. Travelers has admitted the fraud referral had no justification. A jury will find the referral was an exercise in malice.

But things go from bad to much worse for the carrier from here.

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[73] 10 CCR §2695.7(d); CACI 2332; *see also Maslo v. Ameriprise Auto & Home Ins.*, 227 Cal.App.4th 626 (2014) (citing *Wilson,* 42 Cal.4th at 723 [holding that in the absence of a thorough investigation, there can be no *genuine dispute* as to a carrier's reasonableness]; CACI 2332 [California form jury instruction on bad faith founded on a carrier's failure to investigate].

Travelers hid evidence in its file of a vastly increased scope of damage and cost of repair—resulting both from its internal investigation and from information received from its vendor. The carrier neither shared the information, as it was affirmatively obligated to do under California law. Nor did the carrier conduct a further investigation to confirm its original $5,000 payment, or pay additional undisputed benefits based on these increased scopes of work necessitated by the loss *Travelers itself found was covered under the policy.*

Travelers violated California law by failing, upon request, to provide all Claim-Related Documents in response to *two* separate requests by RBP's representatives. Instead, aware that it had the internal and vendor scopes in its file and was on the hook for at least tens of thousands of additional dollars in repair benefits, a jury could find Travelers intentionally failed to share those documents to avoid the additional indemnity. Travelers knew for years that there were tens of thousands of dollars of undisputed benefits due for repairs but paid nothing.

Having failed to competently investigate and relied on its fraud

department as a pretext to harass its customer and delay a valid claim, a jury will also find that Travelers violated California law and acted with malice when it received RBP's estimate from a local, licensed contractor, but undertook no follow up investigation and failed to pay or adjust the estimate.

That refusal to pay or adjust RBP's contractor's estimate amounts not only to an unreasonable failure to pay repair benefits, it comprises the following violations of California law: (a) Travelers failed to respond to the proof of loss within 40 days, as required under 10 CCR §2695.7(b), and (b) the carrier failed to comply with the requirements of 10 CCR §2695.9(d)(1)-(3).

Finally, Travelers never disclosed RBP's right to loss of rents under the Policy even though it had information proving RBP's entitlement to such benefits and the amount due. It paid nothing, explained nothing, and sent no written denial in reliance on any policy exclusion. Travelers simply *disappeared* RBP's right under the policy to benefits for lost rents.

Ultimately, due to its bad faith, fraud, and malice, Travelers left RBP with no choice but to retain counsel and file this lawsuit to

obtain repair and loss of rents benefits, conduct that itself is evidence of its bad faith and malice.[74]

There is far more than sufficient evidence of bad faith, malice, and fraud, to justify a jury trial on the bad faith cause of action and claim for exemplary damages.

CONCLUSION

For the reasons set forth, this Court should reverse.

Date: October 21, 2024 Kerley Schaffer LLP

/s/ Dylan L. Schaffer
Dylan L. Schaffer
Attorneys for Appellant

[74] Ins. Code §790.03(h)(5), (6).

STATEMENT OF RELATED CASES

Appellant is aware of no related cases.

Date: October 21, 2024 Kerley Schaffer LLP

/s/ Dylan L. Schaffer
Dylan L. Schaffer
Attorneys for Appellant

CERTIFICATE OF SERVICE

Attorney Dylan Schaffer certifies that on October 21, 2024, APPELLANT'S OPENING BRIEF was filed electronically with the Ninth Circuit Court of Appeals which in turn will electronically serve notification of such filing to all counsel of record.

Date: October 21, 2024 Kerley Schaffer LLP

/s/ Dylan L. Schaffer
Dylan L. Schaffer
Attorneys for Appellant