No. 24-1161

United States Court of Appeals for the Eighth Circuit

HISCOX DEDICATED CORPORATE MEMBER LIMITED,

Plaintiff-Appellee,

v.

SUZAN E. TAYLOR,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Arkansas, Hot Springs Division
Case No. 6:18-cv-06100-SOH – Chief Judge Susan O. Hickey

BRIEF OF PLAINTIFF-APPELLEE HISCOX DEDICATED CORPORATE MEMBER LIMITED

Scott Stirling, *Counsel of Record*
Walker Wilcox Matousek LLP
One North Franklin Street, Suite 3200
Chicago, Illinois 60606
(312) 244-6754
sstirling@walkerwilcox.com

Attorney for Plaintiff-Appellee

SUMMARY OF THE CASE

This is a rescission and insurance coverage case under Arkansas law where the district court awarded summary judgment to plaintiff insurer Hiscox Dedicated Corporate Member Limited ("Hiscox") because it properly rescinded the defendant's homeowner's insurance policy based on defendant's material misrepresentation in the insurance application. Therefore, Hiscox did not owe coverage for a fire loss.

Defendant Suzan Taylor misrepresented that she had no foreclosures in the five years prior to her February 7, 2018 insurance application, when in fact a home she owned in Fairfield Bay, Arkansas was sold at a foreclosure sale on February 8, 2016. In contrast to the *initiation* of foreclosure proceedings at issue in the prior appeal, the *completed* foreclosure sale of a different property was required to be disclosed under either interpretation of "foreclosure" recognized as reasonable by this Court. Neither interpretation is favorable to the insured under the circumstances. Uncontroverted underwriter testimony establishes that Hiscox would not have issued the policy had Taylor disclosed the Fairfield Bay foreclosure; thus, no issue of fact exists as to materiality. Fifteen minutes of oral argument would be appropriate.

RULE 26.1 DISCLOSURE STATEMENT

Hiscox Dedicated Corporate Member Limited is a corporation organized under the laws of England and Wales. The direct parent company of Hiscox Dedicated Corporate Member Limited is Hiscox Syndicates Limited, which has a parent company of Hiscox Holdings Limited, which has an ultimate parent company of Hiscox, Ltd., which is publicly traded on the London Stock Exchange. No publicly held entity owns 10 percent or more of the stock or other ownership interest of Hiscox Dedicated Corporate Member Limited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES

1. Whether the district court correctly awarded the insurer summary judgment because the insured made a material misrepresentation or a "false statement; relating to insurance" in the insurance application by failing to disclose the foreclosure on the insured's Fairfield Bay property, which resulted in a foreclosure sale in 2016.

Apposite authority: *Hiscox Dedicated Corp. Member, Ltd. v. Taylor*, 53 F.4th 437 (8th Cir. 2022); *Nationwide Prop. & Cas. Ins. Co. v. Faircloth*, 845 F.3d 378 (8th Cir. 2016); *Hill v. State*, 253 Ark. 512, 522, 487 S.W.2d 624, 631 (1972).

2. In the alternative, whether the district court erred in ruling that the application questions of whether the insured had a judgment or lien in the last five years and whether the insured had "any losses, whether or not paid by insurance, during the last 3 years at this or any location" were ambiguous, and further whether the award of summary judgment should be affirmed based on the insured's failure to disclose a judgment against her and a prior loss.

Apposite authority: *Countryside Cas. Co. v. Orr*, 523 F.2d 870 (8th Cir. 1975); Ark. Code Ann. § 16-65-117; Ark. Code Ann. § 16-66-602.

STATEMENT OF THE CASE

Background: Hiscox is a United Kingdom corporation that is a capital provider to Hiscox Syndicate 33, which is an underwriting syndicate properly doing business within the Lloyd's of London insurance marketplace. (App. 1996-97; R. Doc. 137 at 2-3 ¶ 1.) Through its participation in Syndicate 33, Hiscox subscribed to Policy No. VSRD634943, originally in effect for the period February 8, 2018 to February 8, 2019, which was issued to defendant Suzan Taylor for the property located at 654 Springwood Road, Hot Springs, Arkansas. (App. 1997-98; R. Doc. 137 at 3-4 ¶¶ 2, 4.) Thus, Hiscox is one of the "Certain Underwriters at Lloyd's, London," who are the insurers for the policy, and any judgment as to Hiscox contractually binds the remaining underwriters subscribed to the policy. (App. 1997-98; R. Doc. 137 at 1-2 ¶¶ 2-3.)

Taylor utilized an independent retail insurance agent, Nicky Hodges of Smith & Company, as her agent to obtain insurance on the Hot Springs property in early 2018. (App. 1998-99; R. Doc. 137 at 4-5 ¶¶ 7-

8.) Hiscox utilized Burns & Wilcox, Ltd. ("Burns & Wilcox") as their coverholder for the Policy, as Hiscox granted Burns & Wilcox binding authority to underwrite and bind insurance on certain types of risks for Hiscox. (App. 1998; R. Doc. 137 at 4 ¶ 5.)

The Application: Hodges had Taylor complete an industry-standard ACORD application form, which was completed over the phone with Hodges asking Taylor each application question, and Taylor providing the answers over the phone. (App. 1998-99; R. Doc. 137 at 5-6 ¶¶ 10-12.) Upon completion of the draft application, Hodges emailed the draft application to Taylor on February 6, 2018, along with the insurance quote received from Burns & Wilcox, and instructed her to "review these for accuracy and let me know if there are any changes that need to be made." (App. 2000; R. Doc. 137 at 6 ¶ 13.) Taylor reviewed the draft application for accuracy, and confirmed to Hodges that the application "was all good," and Hodges then sent Taylor the completed application via email for her signature through the DocuSign online signature program, which Taylor signed on February 7, 2018. (App. 2000-01; R. Doc. 137 at 6-7 ¶¶ 14-20; *see* App. 1186-1214; R. Docs. 131-9 – 131-11.)

Hodges then submitted the completed and signed application on February 7, 2018 to Burns & Wilcox in order for Burns & Wilcox to issue the policy with an effective date of February 8, 2018. (App. 2001; R. Doc. 137 at 7 ¶ 20.)

The Arkansas Burns & Wilcox branch office first received the application from Taylor's agent, and an underwriter at that office, Alex Cowling, ensured that the necessary fields of the application had been completed. (App. 2025-26; R. Doc. 137-1 at 6-7 of 26.) Once Cowling received the completed application, he forwarded it to Burns & Wilcox's corporate office to underwrite the risk, including review of the risk for acceptability and eligibility and the decision of whether to offer coverage based on the application, issuance of a quote, and issuance of a policy. (*Id.*; App. 1003-05; R. Doc. 131-4 at 5-7 of 83.) The person responsible for the underwriting decisions at the Burns & Wilcox corporate office for this application was underwriting manager Danielle Alessandrini. (*Id.*)

Non-Disclosure of Fairfield Bay Foreclosure: The application included a question that asked: "Has applicant had a foreclosure, repossession, bankruptcy or filed for bankruptcy during the past five (5)

years?," to which Taylor responded "no." (App. 2007; R. Doc. 137 at 13 ¶¶ 39-40.)

Taylor previously owned a home located at 102 Chelsea Court, Fairfield Bay, Arkansas, which she purchased in 2004. (App. 2011; R. Doc. 137 at 17 ¶ 52.) It is undisputed (and expressly admitted by Taylor in her response to Hiscox's statement of undisputed facts accompanying its motion for summary judgment) that the mortgagee, Bank of America, instituted foreclosure proceedings through the filing of a Notice of Default and Intention to Sell on September 8, 2015, and the property was sold in a foreclosure sale on February 8, 2016. (App. 2011-2012; R. Doc. 137 at 17-18 ¶ 53 (citing Notice of Default and Intention to Sell at R. Doc. 131-21 at MICKEL 0024-25 (App. 1268-69)).) However, Taylor failed to disclose this foreclosure on the application and instead answered "No" to the application question of whether she had a foreclosure in the past five years. (App. 2011; R. Doc. 137 at 17 ¶¶ 50-51.)

Underwriting employees at both Burns & Wilcox and Hiscox testified that they would not have issued the policy had Taylor disclosed this foreclosure, as the prior foreclosure would materially increase the risk

to an unacceptable level. (App. 892; R. Doc. 131 at 12 ¶ 55 (citing App. 954-55; R. Doc. 131-2 at 56-57 of 64 (Hiscox underwriter Robert Beere deposition testimony); App. 1042-1043, 1055-56; R. Doc. 131-4 at 44-45, 57-58 of 83 (Burns & Wilcox underwriting manager Danielle Alessandrini deposition testimony)).)

The existence of the Fairfield Bay foreclosure would materially increase the risk to be insured, as it indicates an insured in a weak financial position with an increased financial risk. (App. 954-56; R. Doc. 131-2 at 56-58 of 64; App. 1043; R. Doc. 131-4 at 45 of 83.) From an underwriting perspective, the existence of the foreclosure increases the underwriting risk because it suggests the insured may not care for the property up to the standard expected by the insurer (*Id.*) It indicates an insured that may be more likely claim under the policy in situations where an insurer would not ordinarily expect a financially healthy insured to do so. (*Id.*) It also increases the risk of an insured in financial jeopardy that may commit arson in an attempt to collect under the policy. (*Id.*)

Alessandrini, the Burns & Wilcox underwriter that analyzed Taylor's application for eligibility and acceptability and approved a quote for

coverage to Taylor based on the application, testified that due to the financial risk presented by a prior foreclosure, she would have declined this risk and would decline the risk "every single time" if the insured disclosed a prior foreclosure. (App. 1055-56; R. Doc. 131-4 at 47-58 of 83.)

Alternative Misrepresentations: Affirmance of the district court based on the non-disclosure of the Fairfield Bay foreclosure is dispositive to this appeal and the entire case. However, in the alternative, Hiscox raises two additional misrepresentations present in the record as grounds to affirm summary judgment: Taylor failed to disclose a judgment against her of $134,665.54 plus interest in favor of Deere Credit, Inc., and Taylor failed to disclose a 2016 burglary loss.[1]

[1] The district court made determinations of law that the application questions as to whether Taylor had a judgment or lien during the past five years and whether Taylor had "any losses, whether or not paid by insurance, during the last 3 years at this or any location" were ambiguous and therefore Hiscox was not entitled to summary judgment on these grounds. (*See* App. 2616-21; R. Doc. 201 at 21-26.) Hiscox raises these two misrepresentations on appeal as alternative grounds to affirm summary judgment. *See Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670–71 (8th Cir. 2013) (insurer's alternative argument precluding coverage separate from the basis of the district court's order properly raised without a cross-appeal because the insurer was attempting to "sustain the same judgment on a different basis in the

Hiscox does not raise in this appeal the district court's denial of summary judgment based on the non-disclosure of Taylor's non-renewal of a prior insurance policy as an alternate ground for affirmance of summary judgment, but reserves its claims as to this issue for trial should this case be remanded.[2]

Non-Disclosure of Deere Credit Judgment: The application included a question that asked: "Has applicant had a judgment or lien during the past five (5) years?," to which Taylor responded "no." (App. 2012; R. Doc. 137 at 18 ¶¶ 56-57.) However, at the time of the application, Taylor had a judgment of $134,665.54 plus interest in favor of Deere Credit, Inc. outstanding against her, and that judgment was

---

record," not attempting to enlarge its own rights or lessen the rights of the appellant).

[2] The district court determined that Hiscox was not entitled to summary judgment on the basis of Taylor's non-disclosure of a 2016 non-renewal of a prior insurance policy. (App. 2621-24; R. Doc. 201 at 26-29.) Unlike the non-disclosures of the judgment and prior burglary loss, the denial of summary judgment as to the non-renewal was not based on an issue of law; rather, the district court found there were issues of disputed fact for a jury to determine as to Hiscox's knowledge of the non-renewal and materiality. (*Id.*) Hiscox reserves this claim to be determined by a jury at trial in the event this case is remanded. Hiscox also reserves its claim based on Taylor's failure to disclose the property to be insured was listed for sale at the time of the application for trial. (*See* App. 8-9; R. Doc. 1 at 8-9.) This misrepresentation was not raised by the parties on summary judgment.

still outstanding as of Taylor's deposition on July 19, 2021. (App. 2013-14; R. Doc. 137 at 19-20 ¶¶ 58-63.) Taylor's judgment was authenticated and filed in the Circuit Court of Garland County, a Writ of Execution of $141,959.34 was obtained as of August 10, 2012, and as of March 12, 2013, the parties contemplated that Deere Credit, Inc. may seek a levy on specific property. (App. 2013-14; R. Doc. 137 at 19-20 ¶¶ 58-64.)

Had Taylor disclosed in the application the outstanding judgment against her, the insurer would not have issued the policy, as Burns & Wilcox would have submitted the application to Hiscox underwriters for review, and Hiscox would have declined to issue the policy due to the financial risks indicated by the outstanding judgment. (App. 893-94; R. Doc. 131 at 13-14 ¶ 65 (citing App. 1058, 1062-63, 1075-77; R. Doc. 131-4 at 60, 64-65, 77-79 (Burns & Wilcox underwriter deposition testimony); App. 956-58; R. Doc. 131-2 at 58-60 (Hiscox underwriter deposition testimony)).)

The Fire Loss and Investigation: On August 6, 2018, a fire occurred at the Hot Springs insured location, which burned the entire dwelling to the ground. (App. 2003; R. Doc. 137 ¶ 26.) The insurer proceeded to investigate the claim, including investigating several "red

flags" potentially indicative of arson such as the fire was a total loss, it was a relatively recently-issued policy, the cause of the fire was undetermined, the property was listed for sale and had been for some considerable time, and the home was the subject of a foreclosure. (App. 2004; R. Doc. 137 at 10 ¶¶ 27-29.) Following the investigation, Hiscox directed the Policy to be rescinded *ab initio* based on multiple misrepresentations in the application, and the third-party administrator issued a Notice of Rescission of Policy letter dated October 15, 2018. (App. 2006-07; R. Doc. 137 at 12-13 ¶¶ 36-37.) The letter alternatively denied coverage for the loss based on violation of the policy's Concealment or Fraud condition. (*Id.*)

Lawsuit: Hiscox filed this action seeking a declaratory judgment that it properly rescinded the policy based on material misrepresentations in the application, or in the alternative, that the claim was properly denied pursuant to the policy's Concealment or Fraud condition. (App. 1; R. Doc. 1.) Taylor filed counterclaims for breach of contract, bad faith, and improper rescission. (App. 155; R. Doc. 25.)

Initial Summary Judgment: The district court awarded Hiscox summary judgment for the first time on October 7, 2021 on the basis that Taylor's failure to disclose foreclosure proceedings that had been initiated on the Hot Springs property to be insured was a material misrepresentation allowing rescission. (App. 2560-69; R. Doc. 144-145.) The order did not rule on the other misrepresentations raised on summary judgment. (*Id.*)

Appellate Reversal and Remand: On appeal, a panel of this Court reversed and remanded, holding "that the question asking Taylor whether she had 'had a foreclosure' was ambiguous and so her response *in the circumstances* was not a misrepresentation entitling Hiscox to rescind the policy." *Hiscox Dedicated Corp. Member, Ltd. v. Taylor*, 53 F.4th 437, 442 (8th Cir. 2022) ("*Hiscox I*") (emphasis added). The Court found there were two reasonable interpretations of "had a foreclosure" under the circumstances – initiation of foreclosure proceedings or completion of a foreclosure sale – and of the two interpretations there was "one favorable to the insured and the other favorable to the insurer." *Id.* at 439-40 (quoting *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556, 560 (2003)). Therefore, the Court applied

the interpretation favorable to the insured under the rules of insurance policy construction. *Hiscox I*, 53 F.4th at 442.

Although Hiscox raised other misrepresentations in the record as alternate grounds to affirm, the Court elected not to analyze the other misrepresentations (including the failure to disclose the Fairfield Bay foreclosure) and instead decided to "leave those matters to the district court to sort out in the first instance on remand." *Id.*

Interlocutory Order on Remand: On December 21, 2022, a week after the remand mandate reached the district court and just prior to Senior District Judge Robert Dawson's retirement, Judge Dawson issued an order denying the remainder of the summary judgment motions, including as to the four remaining misrepresentations Hiscox raised as grounds for summary judgment. (App. 2582-90; R. Doc. 151.) The order addressed the four remaining misrepresentations summarily and collectively, finding there "may be a genuine dispute of material fact" as to whether Hiscox knew about all the misrepresented matters through Hiscox's agent Burns & Wilcox, and also that there were issues of fact as to whether Hiscox would have declined to issue the policy if it known the pertinent facts. (App. 2589-90; R. Doc. 151 at 8-9.) Therefore,

the order found determinations of the remaining issues were "best left to a jury." (*Id.*)

Grant of Summary Judgment: Following Judge Dawson's retirement, the case was transferred to Chief Judge Hickey on January 4, 2023. (App. 2602; R. Doc. 201 at 7.) Prior to trial, Judge Hickey issued a comprehensive memorandum opinion and order that reevaluated and vacated Judge Dawson's prior interlocutory order that had denied summary judgment. (App. 2596-2628; R. Doc. 201.) The opinion granted Hiscox summary judgment based on Taylor's material misrepresentation and false statement relating to insurance in failing to disclose the completed foreclosure of the Fairfield Bay property. (*See* App. 2611-16, 2625-26; R. Doc. 201 at 16-21, 30-31.) It further denied Taylor's motions for summary judgment as moot and dismissed the counterclaims. (App. 2627-28; R. Doc. 201 at 32-33.)

With detailed legal and factual analysis, the district court disposed of Taylor's main argument that Taylor's failure to disclose the Fairfield Bay foreclosure was excused because Burns & Wilcox "knew about the foreclosure as early as August 2014" and such knowledge was imputed to Hiscox. (*See* App. 1472-77; R. Doc. 136 at 11-16; App. 2613-15; R. Doc.

201 at 180-20.) Taylor argued this knowledge was gained through an August 27, 2014 email sent to a Burns & Wilcox underwriter in the Arkansas branch office by Taylor's insurance agent. (App. 1472-73; R. Doc. 136 at 11-12; *see* App. 1796; R. Doc. 136-7 at 2.) The email sought to make a claim under Taylor's policy for the Fairfield Bay property, a policy that was not issued by Hiscox but by a different insurer. (*Id.*) The email indicated that the property was being foreclosed on and the mortgagee requested a hail claim to be made under Taylor's insurance policy for the Fairfield Bay home. (*Id.*)

The district court detailed the factual and legal insufficiency of Taylor's argument. Taylor improperly ignored the fact that the insurance policy she purchased for the Fairfield Bay home with a policy period of October 5, 2013 to October 5, 2014 was not with Hiscox, but rather an entirely different insurer, Syndicate 609. (R. Doc. 2613-14; R. Doc. 201 at 18-19; *see* App. 839; R. Doc. 130-6 at 173 (policy page identifying subscribing insurer).) Therefore, with regard to the Syndicate 609 policy covering the Fairfield Bay property, any purported knowledge gained by Burns & Wilcox during its work under that policy for that insurer was not gained within the scope of Burns & Wilcox's

agency for Hiscox. (App. 2613-14; R. Doc. 201 at 18-19.) Any such knowledge cannot be imputed to Hiscox as a matter of Arkansas agency law. (*See* App. 2607, 2613; R. Doc. 201 at 12, 18.)

The district court also correctly rejected Taylor's other various arguments. There is no question the failure to disclose the Fairfield Bay foreclosure was a misrepresentation. Despite now on appeal featuring an argument that the non-disclosure of the Fairfield Bay foreclosure was subjectively not a misrepresentation because Taylor did not remember details of the foreclosure, Taylor did not even try to advance such an argument as to the Fairfield Bay foreclosure in response to Hiscox's motion for summary judgment. (*See* App. 1463-65,1472-77; R. Doc. 136 at 2-4, 11-16.)

Instead, Taylor's only argument against summary judgment with regard to the non-disclosure of the Fairfield Bay foreclosure was that the misrepresentation was excused because of her claim that Hiscox had knowledge of the Fairfield Bay foreclosure. (*See id.*) Even though Taylor did not raise the argument that Taylor did not have sufficient awareness to make a misrepresentation in the district court, the opinion granting summary judgment established such an argument has

no basis under Arkansas law because a material misrepresentation need not be intentional for an insurer to properly rescind a policy under Arkansas law. (App. 2609; R. Doc. 201 at 14.)

While this Court on appeal found as to the Hot Springs property foreclosure proceedings that the term "foreclosure" had one interpretation that favored the insurer and another interpretation that favored the insured because there was no foreclosure sale completed of the Hot Springs property, the district court concluded that is clearly not the case as to the Fairfield Bay foreclosure. Foreclosure proceedings were initiated in 2015 and completed with a foreclosure sale in 2016. (App. 2614; R. Doc. 201 at 19.) "[E]ither reasonable reading of the word 'foreclosure' articulated by the Eighth Circuit would apply to the Fairfield Bay Property." (*Id.*) Therefore, the "only accurate answer under either reading of the question regarding foreclosures would be 'Yes.'" (*Id.*)

The district court determined materiality of the failure to disclose the Fairfield Bay foreclosure was clearly established through uncontroverted underwriter testimony that the policy would not have been issued if the foreclosure had been disclosed. (*See* App. 2615-16; R.

Doc. 201 at 20-21.) Uncontroverted underwriter testimony such as present here routinely establishes materiality at the summary judgment stage in rescission cases under Arkansas law. (App. 2609, 2615; R. Doc. 201 at 14, 20.)

Appeal: After losing a motion for reconsideration, Taylor filed this appeal and challenges only the district court's substantive determination that Hiscox is entitled to summary judgment based on Taylor's failure to disclose the Fairfield Bay foreclosure. (*See* Appellant Br. at 2-3.) Despite the limited substantive issue raised on appeal, Taylor leads her brief with various non-substantive attacks on Chief Judge Hickey's handling of the case after Judge Dawson's retirement. (*See, e.g.,* Appellant Br. at 4-8.) Taylor continues to state her displeasure with the district court throughout on discretionary case management issues such as the court's order timing, it's decision to reevaluate Judge Dawson's order *sua sponte*, it's declination to grant defendant's request for a hearing, that the court did not request renewed briefing, and denials of Taylor's motions to reconsider. However, none of these are issues in this appeal.

SUMMARY OF THE ARGUMENT

Defendant Suzan Taylor misrepresented that she had no foreclosures in the five years prior to her February 7, 2018 homeowner's insurance application, when in fact her home in Fairfield Bay, Arkansas was foreclosed on and sold at a foreclosure sale on February 8, 2016. Taylor now attempts to assert an argument that her non-disclosure of the Fairfield Bay foreclosure was not done intentionally and was a product of a bad memory or a misunderstanding of time. (*See* Appellant Br. at 13-15, 20-26.)

No such argument was made in response to Hiscox's motion for summary judgment. (*See* App. 1463-65,1472-77; R. Doc. 136 at 2-4, 11-16.) This new argument cannot be properly raised on appeal, especially given the factual nature of the argument, and therefore should not be considered. *See P & O Nedlloyd, Ltd. v. Sanderson Farms, Inc.*, 462 F.3d 1015, 1019 (8th Cir. 2006).

Regardless, this new featured argument that Taylor was somehow too confused as to the foreclosure that she was not required to disclose it is contrary to Arkansas law and the facts within the record. At her examination under oath, Taylor admitted that she knew the Fairfield

Bay home at 102 Chelsea Court had been foreclosed on. (App. 86, 93; R. Doc. 1-3 at 26:11-27:1, 56:5-9.)

Even if an applicant has an erroneous memory or mistaken belief as to the truth, that does not excuse the misrepresentation in the application under Arkansas law, as the insurance company may rescind coverage because of fraud ***or*** material misrepresentation." *Nationwide Mut. Fire Ins. Co. v. Citizens Bank & Tr. Co.*, 2014 Ark. 20, 4, 431 S.W.3d 292, 295 (2014) (emphasis added) (quoting *Ferrell v. Columbia Mut. Cas. Ins. Co.*, 816 S.W.2d 593, 595 (Ark. 1991)). Arkansas follows the general common law rule that "a material misrepresentation made on an application for an insurance policy and relied on by the insurance company will void the policy." *Farr v. Am. Nat'l Prop. & Cas. Co.*, 2015 Ark. App. 534, 6, 472 S.W.3d 137, 141 (2015). And the policy's Concealment and Fraud condition voids coverage when the insured makes a "false statement; relating to this insurance," which by its own terms does not require that the false statement be made intentionally. (*See* App. 2626; R. Doc. 201 at 31.)

Nothing in this Court's opinion in *Hiscox I* excuses Taylor from her obligation to disclose the Fairfield Bay foreclosure. In the first appeal in

this case, the Court determined that Taylor was not required to disclose another foreclosure proceeding that had been initiated on a separate property because that foreclosure had not been completed with a foreclosure sale. *Hiscox I*, 53 F.4th 437. The Court determined that "foreclosure" could have two reasonable interpretations: initiation of foreclosure proceedings or completion of a foreclosure sale. Under Arkansas insurance law, "where language used 'is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two interpretations, *one favorable to the insured and the other favorable to the insurer*, the former will be adopted.'" *Hiscox I*, 53 F.4th at 439 (emphasis added) (quoting *U.S. Fid. & Guar. Co. v. Cont'l Cas. Co.*, 353 Ark. 834, 120 S.W.3d 556, 560 (2003)). Given there was no foreclosure sale, the Court applied the definition favorable to the insured under the circumstances to mean completion of a foreclosure sale.

In contrast to the foreclosure involved in the prior appeal, the Fairfield Bay property was sold in a foreclosure sale on February 8, 2016. Therefore, consistent with *Hiscox I*, the district court correctly found under the circumstances the application unambiguously required disclosure: "[t]here is no uncertainty as to what Taylor's answer to the

foreclosure question should have been regarding the Fairfield Bay Property." (App. 2614; R. Doc. 201 at 19.) There is no interpretation favorable to the insured because the Fairfield Bay foreclosure meets both interpretations of "foreclosure."

Taylor's misrepresentation was correctly determined by the district court to be material because uncontroverted testimony by the insurer's underwriter and the insurer's underwriting agent, Burns & Wilcox, established the insurer would not have offered coverage had Taylor truthfully responded. *See Nationwide Prop. & Cas. Ins. Co. v. Faircloth*, 845 F.3d 378, 382 (8th Cir. 2016). Policy rescission was proper under Arkansas law and properly determined on summary judgment. *Morgan v. S. Farm Bureau Cas. Ins. Co.*, 88 Ark. App. 52, 56, 200 S.W.3d 469, 472 (2004).

Finally, defendant cannot escape summary judgment with any estoppel, waiver or materiality argument based on purported prior knowledge of the foreclosure of Hiscox. Taylor confusingly argues that Hiscox had knowledge of the Fairfield Bay foreclosure in 2018 when Taylor submitted her application because of an email a Burns & Wilcox underwriter received in 2014 (more than a year before foreclosure

proceedings were actually initiated) while working for a different insurer on a non-Hiscox policy for a property Hiscox did not insure. Even if this somehow could be considered "knowledge" of the foreclosure by Burns & Wilcox (it should not), under established agency law, the dealings of an insurer's agent with an insured when the agent was acting as the agent of a different insurer cannot serve as the basis for waiver or estoppel. *Cont'l Ins. Companies v. Stanley*, 263 Ark. 638, 644, 569 S.W.2d 653, 657 (1978).

Information learned by an agent may only be imputed to a principal if it was gained in the scope of the agency for that principal. Any work of Burns & Wilcox regarding the other insurer's policy obviously was not within the scope of Burns & Wilcox's agency for Hiscox, and therefore no "knowledge" could be imputed to Hiscox. *Hill v. State*, 253 Ark. 512, 522, 487 S.W.2d 624, 631 (1972).

STANDARD OF REVIEW

An appellate court reviews a district court's award of summary judgment *de novo* to determine whether the record, viewed most favorably to the non-moving party, shows no issue of genuine material fact. *Brill as Tr. for Brill v. Mid-Century Ins. Co.*, 965 F.3d 656, 659 (8th

Cir. 2020). The appellate court is not bound by the rationale of the district court, and therefore may affirm summary judgment on any ground supported by the record, even on issues not decided by the district court. *Woodworth v. Hulshof*, 891 F.3d 1083, 1088 (8th Cir. 2018); *Hamner v. Burls*, 937 F.3d 1171, 1176 (8th Cir. 2019). "[A]n appellee may, without filing a cross-appeal, defend a judgment on any ground consistent with the record, even if rejected or ignored in the lower court." *Tiedeman v. Chi., Milwaukee, St. Paul & Pac. Railroad Co.*, 513 F.2d 1267, 1272 (8th Cir.1975).

ARGUMENT

I. Taylor's Failure to Disclose the Fairfield Bay Foreclosure Warrants Summary Judgment in Favor of Hiscox.

A. The Undisputed Facts Show Taylor Made a Material Misrepresentation Regarding the Fairfield Bay Foreclosure Allowing Rescission of the Policy Under Arkansas Law.

1. The Fairfield Bay Foreclosure is Unambiguously a "Foreclosure" that the Application Requires to be Disclosed under Any Interpretation.

No legitimate argument exists that the foreclosure on the Fairfield Bay property was not required to be disclosed in response to the question of whether the applicant "had a foreclosure … during the past five (5) years." The Fairfield Bay foreclosure meets both reasonable

interpretations of "foreclosure" identified by this Court in *Hiscox I* – the initiation of foreclosure proceedings or the completion of a foreclosure sale – as foreclosure proceedings were initiated on September 8, 2015 and the property was sold in a foreclosure sale on February 8, 2016. (App. 2011-2012; R. Doc. 137 at 17-18 ¶ 53 (citing Notice of Default and Intention to Sell at R. Doc. 131-21 at MICKEL 0024-25 (App. 1268-69)).)

Taylor half-heartedly argues that because *Hiscox I* found the term "foreclosure" was ambiguous as applied to the Hot Springs property foreclosure because there was no foreclosure sale, this ambiguity automatically means that she is excused from disclosing any "foreclosure," no matter the circumstances. (*See* Appellant Br. at 27-29.) In other words, because she successfully argued that "foreclosure" meant a foreclosure sale and she therefore was not required to disclose a property in foreclosure proceedings without a sale, then she is not required to disclose another foreclosure even when it meets her own definition of the term. The insured always wins, no matter the circumstances, even when every reasonable interpretation favors the insurer. This, of course, is not the law.

Under Arkansas law, a term is ambiguous when it is "fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the insurer." *Hiscox I*, 53 F.4th at 439 (quoting *U.S. Fid. & Guar. Co.*, 120 S.W.3d at 560). In such circumstances, a court will apply the interpretation favorable to the insured under the rules of construction. *Id.* However, "the terms of an insurance contract are not to be rewritten under the rule of strict construction against the company issuing it so as to bind the insurer to a risk which is plainly excluded and for which it was not paid." *Smith v. Shelter Mut. Ins. Co.*, 327 Ark. 208, 210, 937 S.W.2d 180, 182 (1997) (quoting *State Farm Fire & Cas. Co. v. Midgett*, 319 Ark. 435, 439, 892 S.W.2d 469, 471 (1995).)

Here it is abundantly clear that Fairfield Bay foreclosure was a "foreclosure" contemplated by the application under any definition, as it meets the very definition that Taylor successfully argued for in the previous appeal. Taylor cannot escape her own definition of the term.

Perhaps understanding the folly in logic of claiming ambiguity regarding a foreclosure that meets her own definition, on appeal Taylor asserts a new argument never previously raised. But this new argument is even farther-fetched and invents facts out of thin air.

Defendant ignores the record and reality by incredibly claiming "Ms. Taylor did not have a foreclosure on the Fairfield Bay Property – rather, she voluntarily surrendered the property to the mortgage company in lieu of foreclosure more than five years before applying for insurance." (Appellant Br. at 27.)

This argument is pure fiction, and it is confounding how it could even be made to this Court when considering that Taylor directly and unqualifiedly admitted in the response to Hiscox's statement of undisputed facts that foreclosure proceedings were initiated on the property on September 8, 2015 and the property was sold in a foreclosure sale on February 8, 2016. (*See* App. 2011-12 ¶¶ 52-53; R. Doc. 137 at 17-18.) The foreclosure documents are all present and unchallenged in the record, showing the mortgagee foreclosed on the home and took title from Taylor through a foreclosure sale. (*See* App. 1256-74; R. Doc. 131-21.) Her argument is that there was no foreclosure, and therefore Taylor would have only had a duty to disclose if the application specifically asked if she had a "voluntary surrender." (Appellant Br. at 29.) Fiction cannot create issues of material fact.

2. Appellant Cannot Properly Raise a New Argument First on Appeal that Taylor Lacked Awareness to Make a Misrepresentation as to the Fairfield Bay Property.

Taylor's feature argument is one never presented to the district court on summary judgment. Advanced under the guise that the district court weighed Taylor's credibility, defendant now argues on appeal that Taylor was essentially incapable of making a misrepresentation based on her state of mind. (*See* Appellant Br. at 20-27.) As might be expected given the undisputable facts regarding the occurrence and non-disclosure of the foreclosure, Taylor did not argue in opposition to Hiscox's motion for summary judgment that the non-disclosure of the Fairfield Bay foreclosure was not a misrepresentation. (*See* App. 1463-65,1472-77; R. Doc. 136 at 2-4, 11-16.)

This new argument cannot be properly raised on appeal, especially given the factual nature of the argument, and therefore should not be considered. *See P & O Nedlloyd, Ltd. v. Sanderson Farms, Inc.*, 462 F.3d 1015, 1019 (8th Cir. 2006) (new argument that there was a typographical error as to a term at issue in the contract between the parties could not be first raised on appeal, as courts ordinarily do not consider new arguments on appeal, especially when they require

additional factual development); *Henning v. Mainstreet Bank*, 538 F.3d 975, 979 (8th Cir. 2008) ("Ordinarily, we do not consider an argument raised for the first time on appeal. We consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result."); *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1020 (8th Cir. 2022) (in civil cases, the court of appeals will not consider arguments raised for the first time on appeal).

3. Taylor's New Argument That Her Mental State Prevented Her from Making a Misrepresentation Substantively Fails.

On the merits, Taylor's argument that she did not make any misrepresentation because she lacked an understanding about the Fairfield Bay foreclosure fails both legally and factually. The appellant's brief packages together various occasions where Taylor vaguely stated she believed she abandoned the property some non-specific period ago or she did not remember when things occurred. The argument improperly attempts to weaponize her uncertainty as affirmative evidence that somehow creates an issue of fact as to whether she made a misrepresentation. Such vague and non-specific testimony lacking

specific facts to create a genuine issue of fact are insufficient to avoid summary judgment. *See Holaway v. Stratasys, Inc.*, 771 F.3d 1057, 1060 (8th Cir. 2014).

Because of a lack of evidence to support the argument in any concrete way, the brief largely relies not on testimony of Taylor or any other evidence, but instead block quotes a passage from an attorney-drafted answer as evidence. (*See* Appellant Br. at 23.) "If the evidence submitted by the non-moving party is merely colorable or is not significantly probative, summary judgment may be granted." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401–02 (8th Cir. 1995). Mere allegations in a pleading are not evidentiary and are insufficient to create genuine issues of fact to avoid summary judgment. *Weger v. City of Ladue*, 500 F.3d 710, 728 (8th Cir. 2007). "When theories are properly raised and challenged in the district court, the party opposing summary judgment may not rest on the allegations in its pleadings; it 'must set forth specific facts showing that there is a genuine issue for trial.'" *United of Omaha Life Ins. Co. v. Honea*, 458 F.3d 788, 791 (8th Cir. 2006) (quoting Fed. R. Civ. P. 56(e)).

While Taylor's testimony at her examination under oath and deposition certainly was often vague, non-specific, and reliant on answers that she did not know or remember certain facts, it is clear that she did understand that she had a foreclosure. At her examination under oath just weeks after the loss, Taylor admitted that she knew the Fairfield Bay home at 102 Chelsea Court had been foreclosed on. (App. 86, 93; R. Doc. 1-3 at 26:11-27:1, 56:5-9.) At her deposition around three years later, Taylor conceded that she assumed the Fairfield Bay property had been foreclosed on. (App. 1150; R. Doc. 131-6 at 22 of 46.)

Additionally, in a footnote to the appellant's brief, Taylor concedes that the story in her answer about relinquishing the property in 2011 could not in reality be true given that she obtained insurance for the property with a non-Hiscox insurer for a policy period of October 5, 2013 to October 5, 2014, which was within five years of the February 7, 2018 application. (Appellant Br. at 13 n. 11; R. Doc. 136-6 at 4 of 60.) Additionally, to the extent the 2014 email to Burns & Wilcox that mentioned the property was being foreclosed on could considered knowledge of the foreclosure, it was Taylor's agent acting within the scope of her agency to Taylor who provided the information. Therefore,

knowledge of Taylor's insurance agent gained while working on behalf of Taylor is imputed to Taylor.

Finally, as a matter of law, fraudulent intent is not necessary to allow an insurer to rescind a policy; rather a policy may be rescinded for fraud *or* material misrepresentation. *Nationwide Mut. Fire Ins. Co. v. Citizens Bank & Tr. Co.*, 2014 Ark. 20, 4, 431 S.W.3d 292, 295 (2014). If for material misrepresentation, the insured's good faith is irrelevant. *Twin City Bank v. Verex Assur. Inc.*, 733 F. Supp. 67, 71 (E.D. Ark. 1990). *See also Platte River Ins. Co. v. Baptist Health*, No. 4:07CV0036SWW, 2009 WL 2015102, at *15 (E.D. Ark. Apr. 17, 2009) ("The insurance company has no duty to investigate the accuracy of the facts set forth in the application and the good faith or lack of knowledge by the insured of the misrepresentations is irrelevant"); *M.F.A. Mut. Ins. Co. v. Dixon*, 243 F. Supp. 806, 816 (W.D. Ark. 1965) ("a material misrepresentation of fact in an application which substantially affects the risk renders the policy voidable at the election of the insurer without respect to the good faith or lack of it on the part of the insured in making representations").

In *Life & Cas. Ins. Co. of Tenn. v. Smith*, 245 Ark. 934, 938, 436 S.W.2d 97, 99 (1969), the Arkansas Supreme Court agreed with the insurance treatise Couch on Insurance, which stated that if the "misrepresented matter was material to or increased the risk, it is immaterial and irrelevant that the insured had acted in good faith without any bad motive or intent to deceive." *Id.* (quoting COUCH ON INSURANCE 2d, § 35:24). *See also* COUCH ON INSURANCE 3d, § 31:81, Misrepresentation ("a misrepresentation cannot constitute the basis for avoidance of a policy unless it is material to the risk, but if it is, the fact that the misrepresentation was made innocently and in good faith is of no moment"). Taylor's non-descript and vague testimony as to her understanding of the details of the foreclosure cannot prevent her non-disclosure of the Fairfield Bay foreclosure from being a material misrepresentation.

B. Hiscox Did Not Have "Knowledge" of the Fairfield Bay Foreclosure, and Therefore Taylor's Misrepresentation Cannot Be Excused.

Taylor heavily relies on the argument that Brad Grounds, a former underwriter at the Burns & Wilcox Arkansas branch office, obtained "knowledge" of the Fairfield Bay foreclosure in 2014 (even though it is

undisputed that foreclosure proceedings were not initiated until the next year) while he was working for a different insurer on a different policy for a property Hiscox did not insure. The email from Taylor's insurance agent noted that Bank of America was foreclosing on the home and requested she make a hail claim under Taylor's policy. (App. 1472-73; R. Doc. 136 at 11-12; *see* App. 1796; R. Doc. 136-7 at 2.) As explained below, as a matter of settled Arkansas agency law, any purported knowledge of the foreclosure gained in the scope of Burns & Wilcox's agency for a different insurer, Syndicate 609, on a policy where Hiscox was not an insurer, cannot be imputed to Hiscox at any time, much less during the evaluation of Taylor's application for a new Hiscox policy nearly four years later.

To begin with, Grounds could not have obtained actual knowledge of the foreclosure because the representation by Taylor's insurance agent that the property was being foreclosed on as of 2014 was inaccurate. Foreclosure proceedings were not initiated until September 8, 2015 and the property was sold in a foreclosure sale on February 8, 2016. (App. 2011-2012; R. Doc. 137 at 17-18 ¶ 53.) Further, Grounds had no involvement with the 2018 Taylor application and policy, as he no

longer worked for Burns & Wilcox when Taylor applied for the new Hiscox policy.

The Burns & Wilcox underwriter that did evaluate the application and approve the offer of coverage, Danielle Alessandrini, did not know of the foreclosure when she reviewed the application. (*See* App. 1003-05, 1021-30, 1034-38, 1044-49, 1067-70; R. Doc. 131-4.) Moreover, an insurer is entitled to rely on the answers in an application as true and has no duty to investigate the answers, even if information contrary to the representations of the application is located in the insurer's own files. *Countryside Cas. Co. v. Orr*, 523 F.2d 870, 873 (8th Cir. 1975). "Underwriters may strike a balance between gathering endless volumes of detailed information, on the one hand, and limiting initial information requests so as to be accessible and easy to work with, on the other. As such, insurers and underwriters are entitled to rely upon the responses and information provided by potential insureds and to presume the insured has provided responses that are true and complete." *Cedar Hill Hardware & Const. Supply, Inc. v. Ins. Corp. of Hannover*, 563 F.3d 329, 349 (8th Cir. 2009) (Missouri law).

As determined by the district court, any knowledge Grounds or anyone else at Burns & Wilcox may have gained during their work for any other insurer cannot be imputed to Hiscox as a matter of law. The district court correctly rejected the imputed knowledge argument. Citing *Hill v. State*, 253 Ark. 512, 522, 487 S.W.2d 624, 631 (1972), the district court noted that the rule that an agent's knowledge is only imputed to the principal if such knowledge was obtained in the scope of the agency is so strong that even the knowledge of a corporate director may not be imputed to the corporation unless that knowledge was gained while acting officially as a member of the board. (App. 2607; R. Doc. 201 at 12.)

This rule applies equally in the insurance context, as the dealings of an insurer's agent with an insured when the agent was acting as the agent of a different insurer cannot serve as the basis for waiver or estoppel. *Cont'l Ins. Companies v. Stanley*, 569 S.W.2d 653, 657 (Ark. 1978). If insurance law is different than the steadfast rule in *Hill*, defendant fails to explain why insurance cases cited by defendant regarding imputation of knowledge of an agent state that only knowledge obtained within the scope of the agency is imputed. *See*

Callicott v. Dixie Life & Acc. Ins. Co., 198 Ark. 69, 127 S.W.2d 620, 622 (1939) ("Knowledge of the agent of the insurer, ***obtained while performing the duties of his agency in receiving applications and delivering policies***, is imputed to the insurer.") (emphasis added); *Supreme Forest Woodmen Circle v. Sneed*, 190 Ark. 112, 77 S.W.2d 636, 637 (1935) (same).

The case Taylor largely relies on, *Kansas City Fire & Marine Ins. Co. v. Kellum*, 221 Ark. 487, 490, 254 S.W.2d 50, 51 (1953), is also consistent with the district court's holding that only knowledge obtained within the scope of the agency is imputed to the principal. In that case, an employee of a bank who was also a general agent of an insurance company provided an insurance policy and a mortgage on the truck "[a]t the same time and as part of the same transaction" where he was acting as general agent for the insurer. *Id.* at 51. The jury instruction by the court that Taylor claims does not require knowledge as the insurer's agent says just the opposite: "the failure of the plaintiff to disclose that mortgage in the policy would render the policy void, unless you should find by a preponderance of the evidence that the defendant's agent ***at the time of the writing of the policy*** knew of the

Horn mortgage ***as agent for the company*** … ." *Id.* (emphasis added). The opinion goes on to state the very rule of law that defendant somehow argues *Kellum* rejects: "Knowledge of the agent of the insurer, ***obtained while performing the duties of his agency in receiving applications and delivering policies***, is imputed to the insurer." *Id.* at 52 (emphasis added) (quoting *Callicott*, 127 S.W.2d at 622).

Kellum merely shows that when an insured provides information to a general agent of an insurer while the agent is acting within the scope of the agency of the insurer, even if the agent is working on behalf of another simultaneously, that knowledge may be imputed to the insurer. The knowledge of the mortgage was obtained within the scope of the agency for the insurer because the insured obtained the mortgage and the policy simultaneously in the same transaction. *See id.* at 52 (quoting the rule that when an insurer relies on a breach of warranty, "the insured may by parol evidence show that when he applied for the policy he informed the insurance company's agent that the property was mortgaged."). In *Kellum*, while applying for insurance, the proposed insured informed the insurer's agent of the mortgage. This case is

nothing like *Kellum* as it is undisputed Taylor did not inform Burns & Wilcox of the foreclosure when she applied for the Hiscox policy.

C. Underwriter Testimony Established Materiality of the Misrepresentation as a Matter of Law.

An insurer may rescind an insurance policy *ab initio* if it would not have issued the same coverage if the insured had not made the misrepresentation. *Faircloth*, 845 F.3d at 382. Arkansas courts frequently allow rescission by insurers of policies when misrepresentations in the application were discovered during the investigation of a fire loss. In *Caldwell v. Columbia Mut. Ins. Co.*, 2015 Ark. App. 719, *2 (2015), the court allowed the insurer to rescind when it determined during an examination under oath of the insured that the insured's statement that the property was less than five acres was a misrepresentation. *See id.* No causal connection between the misrepresentation and the loss is required in order to rescind. *Farr v. Am. Nat'l Prop. & Cas. Co.*, 472 S.W.3d 137, 141 (Ark. App. 2015).

To prove a misrepresentation is "material" under Arkansas law, the insurer must show that the knowledge of the misrepresented fact would have caused the insurer "to decline to issue the policy." *Platte River Ins. Co. v. Baptist Health*, 4:07CV0036SWW, 2009 WL 2015102, at *15 (E.D.

Ark. Apr. 17, 2009). "The materiality of the misrepresentation goes to whether or not the insurer, with knowledge of the true facts, would have accepted the risk and issued the policy." Materiality is most often shown by underwriter testimony that they would not have issued the policy if not for the misrepresentation. *See Caldwell*, 2015 Ark. App. 719 at *3 (materiality established through underwriter testimony that truthful answer in application would have disqualified the property from homeowner's insurance).

"The insurer bears the burden of showing that had it known of the misrepresented facts, "the circumstances were such that it would not have issued the present coverage." *Faircloth*, 845 F.3d at 382 (underwriter testimony that insured could have obtained a business but not a personal policy if the application was correct was sufficient to establish materiality) (quoting *Brooks v. Town & Country Mut. Ins. Co.*, 741 S.W.2d 264, 265 (Ark. 1987).

When an insurer's underwriter provides testimony that the insurer would not have issued the policy if not for the misrepresentation, such evidence is sufficient to establish materiality on summary judgment unless the insured submits competent contrary evidence that the

insurer would have issued the same policy regardless of the answer in the application. *Faircloth*, 845 F.3d at 383.

That is exactly what occurred here, as Danielle Alessandrini, the Burns & Wilcox underwriter that was responsible for evaluating the application and determining whether to offer Taylor coverage, testified that she would have declined to offer coverage to Taylor in this instance and would decline to offer coverage "every single time" when an applicant discloses a foreclosure given the financial risks associated with such an insured. (App. 1055-56; R. Doc. 131-4 at 47-58 of 83.) Likewise, Hiscox's underwriter Robert Beere testified that if the application were referred to him, he would have declined the risk given the increased risks that correspond with insuring someone who has been in such financial difficulty that they had a foreclosure. (App. 954-56; R. Doc. 131-2 at 56-58 of 64; App. 1043.)

D. The Non-Disclosure of the Foreclosure Voids Coverage Under the Policy's Concealment or Fraud Condition as a False Statement Relating to Insurance.

The district court correctly determined that Taylor breached the policy's Concealment or Fraud condition, as Taylor clearly made a false statement relating to the insurance when she failed to disclose the

foreclosure. In addition to common law rescission, a misrepresentation in the application is a "false statement; relating to insurance" which allows voidance of the policy under the Concealment or Fraud condition. (*See* App. 2003; R. Doc. 137 at 9 ¶ 25.) Application of this provision also allows summary judgment. *See Merechka v. Vigilant Ins. Co.*, 26 F.4th 776 (8th Cir. 2022); *Liberty Mut. Fire Ins. Co. v. Scott*, 486 F.3d 418, 423 (8th Cir. 2007).

II. In the Alternative, Summary Judgment May Be Affirmed Based on Taylor's Failure to Disclose a Judgment Against Her and a Prior Burglary Loss.

A. The Application Unambiguously Required Disclosure of the Deere Credit Judgment and Lien.

Taylor had an outstanding judgment against her of $134,665.54 plus interest at the time of the application; yet, she did not disclose any judgment in response to the question of whether she had a judgment or lien during the last five years. The district court found that this question was ambiguous under the circumstances of this case, finding that the question's timing could require only judgments entered within the last five years, or it could mean an applicant had a judgment or lien outstanding against them in the last five years. (App. 2616-18; R. Doc. At 21-23.)

However, the district court erred in finding this application question ambiguous. The very nature of a judgment is that it follows the judgment debtor until it is released, satisfied, or expires. The application question asks whether the application "had a judgment or lien" in the last five years; it does not ask if the applicant had a judgment *entered* against her in the last five years. Further, the use of the word "during" in the application question, indicates that a judgment or lien is something that is ongoing during a period, not a single instance.

Taylor argued (and the district court agreed) that the judgment did not need to be disclosed because it was initially entered more than five years before the application, even though it was still outstanding and subject to collection. A judgment against a person is not a moment in time; rather, it follows that person until the judgment is satisfied, released, or expires. *See* Ark. Code Ann. § 16-65-117. Notably, the district court did not consider the full question of whether the applicant had a "judgment *or lien*." That is significant because a judgment registered in Arkansas is a lien on the real estate owned by the defendant. *See* Ark. Code Ann. § 16-65-117.

In Arkansas, judgments remain effective for 10 years from the date they are rendered. Ark. Code Ann. § 16-65-501; ARKANSAS CIVIL PRAC. & PROC. § 31:8, Satisfaction, survival, and revival, (5th ed.). A foreign judgment authenticated and filed in an Arkansas court thereafter enforced as an Arkansas judgment. Ark. Code Ann. § 16-66-602; ARKANSAS CIVIL PRAC. & PROC. § 33:10 Foreign judgments, (5th ed.).

Here, Taylor's judgment was authenticated and filed in the Circuit Court of Garland County, a Writ of Execution of $141,959.34 was obtained as of August 10, 2012, and as of March 12, 2013, the parties contemplated that Deere Credit, Inc. may seek a levy on specific property. (App. 2013-14-71; R. Doc. 137 at 19-20 ¶¶ 58-64.) Taylor had a judgment in January 2012 when it was entered in Texas; she had a judgment in March 2013 when she was forced to file a Schedule of Property in Arkansas; and she had a judgment in 2018 when she submitted the Application. There is no doubt she had a judgment "during the past five (5) years."

As the Hiscox and Burns & Wilcox underwriters testified the policy would not have been issued if the judgment was disclosed, this is also a material misrepresentation that is sufficient grounds to affirm the

judgment of the district court. (App. 893-94; R. Doc. 131 at 13-14 ¶ 65 (citing App. 1058, 1062-64, 1075-77; R. Doc. 131-4 at 60, 64-65, 77-79 (Burns & Wilcox underwriter deposition testimony); App. 956-58; R. Doc. 131-2 at 58-60 (Hiscox underwriter deposition testimony)).)

B. The Burglary Loss was Material to the Risk and Specifically Requested by the Application Even Though Insurance Did Not Pay the Loss.

The application question seeking the insured identify prior losses, in the context of an applicant seeking property insurance coverage, goes to great lengths to avoid ambiguity and encompass any loss suffered by the insured "whether or not paid by insurance, during the last 3 years at this or any location." It is hard to fathom how a burglary where an intruder cut through a wall of a home and stole personal property within the home is not a "loss" in the context of that question.

Taylor asserted various excuses for her failure to disclose the 2016 burglary loss, including 1) the loss was reported to Burns & Wilcox on a prior policy, so the insurer should have known about the loss despite her failure to disclose it in the application; 2) that it was somehow not a "loss" because it was a theft; and 3) it was not a "loss, whether or not

paid by insurance" because the claim was ultimately withdrawn without any payment by the insurer.

First, the argument that "Burns & Wilcox knew about it" years before due to their involvement with a prior policy is no excuse for the reasons described above regarding the Fairfield Bay foreclosure inasmuch as an insurer has no duty to investigate an application answer, even as to information that may be found within the insurer's own files. Burns & Wilcox was entitled to rely on the answers in the Application as truthful. *Orr*, 523 F.2d at 873. Second, Taylor's assertion that a "loss" does not include a burglary or theft is hard to understand. Prior to the 2016 incident, Taylor had an intact wall and possession of personal property. After the incident, she had a hole in her wall where the burglar cut through and no longer had possession of the personal property that was stolen. It is hard to fathom how that is not a "loss." Theft losses are common types of "loss" in property insurance. *See, e.g., Allstate Ins. Co. v. Martens*, 5 Ark. App. 157, 159, 633 S.W.2d 715, 716 (1982) (analyzing whether "theft loss" was covered under policy); *O'Daniel v. NAU Country Ins. Co.*, 427 F.3d 1058, 1060 (8th Cir. 2005) (theft loss was not covered due to exclusion in policy).

Third, Taylor's argument that the fact that the claim was withdrawn excused her from disclosing the burglary as a loss is answered by the application question itself: "any losses, *whether or not paid by insurance*, during the last 3 years at this or any location." (App. 2014-15; R. Doc. 137 at 20-21 ¶ 66.) The fact that the claim was withdrawn does not erase the fact that there was still a loss, and that loss was required to be disclosed on the application.

This misrepresentation is material, as the listing of the loss would have caused Burns & Wilcox to include a premium surcharge to account for the additional loss. (App. 894; R. Doc. 131 at 14 ¶ 70 (citing App. 2050-54; R. Doc. 131-4 at 52-56 (Burns & Wilcox underwriter deposition testimony); App. 941-51; R. Doc. 131-2 at 43-46, 50-52 (Hiscox underwriter deposition testimony)).) Materiality is established if a truthful answer would have caused the insurer to write the policy on different terms, even if it would still write the policy. *Faircloth*, 845 F.3d at 382.

CONCLUSION

For the reasons stated above, Hiscox respectfully requests this Court affirm the judgment of the district court.

Dated: June 13, 2024 Respectfully submitted,

/s/ Scott Stirling

Scott Stirling, *Counsel of Record*
Walker Wilcox Matousek LLP
One North Franklin Street, Suite 3200
Chicago, Illinois 60606
(312) 244-6700
sstirling@walkerwilcox.com

Attorney for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,397 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.

The electronic version of this brief has been scanned for viruses and it is virus-free.

Dated: June 13, 2024 Respectfully submitted,

/s/ Scott Stirling

Scott Stirling, *Counsel of Record*
Walker Wilcox Matousek LLP
One North Franklin Street, Suite 3200
Chicago, Illinois 60606
(312) 244-6700
sstirling@walkerwilcox.com

Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Consistent with Circuit Rule 28(A)(d), 10 paper copies of the foregoing brief will be sent to the clerk's office, and one paper copy will be sent to counsel for appellant.

/s/ Scott Stirling