UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARTURO BARONA, *Plaintiff,*	§	
v.	§	**C.A. NO. 4:24-cv-01393 (JURY)**
STATE FARM LLOYDS *Defendant.*	§	

PLAINTIFF ARTURO BARONA'S RESPONSE TO DEFENDANT'S MOTION TO SUMMARY JUDGMENT

TO THE HONORABLE JUDGE HANEN,

Plaintiff Arturo Barona in the above entitled and numbered cause, file their Response to Defendant State Farm Lloyds' Brief in Support of its Motion for Summary Judgment, in support thereof states as follows:

Introduction and Background

This case arises from a burst plumbing pipe during a severe freeze on December 24, 2022, which caused substantial water damage to Plaintiff Arturo Barona's commercial property in Houston. Mr. Barona promptly reported the loss to his insurer, Defendant State Farm Lloyds, on January 4, 2023. State Farm's adjuster inspected the damage on January 20, 2023. Just four days later, on January 24, 2023, State Farm denied the claim in writing, citing a policy exclusion for losses caused by "freezing" of plumbing because the heat had been turned off and the pipes not drained. At the time of the freeze, the building was unoccupied and under renovation, and Plaintiff had left the heat turned off while he was away for the holidays. Relying on this fact, State Farm took the position that the loss was not covered due to the frozen-plumbing exclusion.

Despite State Farm's denial, the undisputed evidence shows Plaintiff sustained a significant covered loss. A water pipe froze and burst during the winter storm, flooding the interior of the

building. Plaintiff engaged JP Remodeling & Construction to perform emergency remediation and repairs, incurring $33,150 in necessary repair costs. (See Exhibit 6 & 7, p5). These repairs restored the property to habitable condition by March 2023. Because the property could not be leased until repairs were complete, Plaintiff also lost rental income, estimated at approximately $1,800. In September 2023, after continued frustration with State Farm's stance, Plaintiff's counsel provided a statutory notice of claim and invoked the policy's appraisal clause to resolve the dispute over the amount of loss, attaching a detailed estimate from Vortex Consulting valuing the damages at $103,339.76. (See Exhibit 2, pp. 20-44). Rather than reconsider its denial, State Farm responded by demanding a second inspection (which occurred on October 31, 2023) and then reaffirmed its denial on November 9, 2023, expressly "standing on" the frozen-plumbing exclusion and claiming Plaintiff had waived any right to appraisal by completing repairs.

State Farm has now moved for summary judgment on all of Plaintiff's claims for breach of contract, violation of the Texas Insurance Code and DTPA, common-law bad faith, and fraud contending that (1) the policy's frozen-plumbing exclusion conclusively bars coverage, (2) Plaintiff waived the appraisal clause by repairing the property prior to demanding appraisal, (3) there is no evidence to support any statutory or extra-contractual violation, and (4) Plaintiff cannot establish damages or causation. As shown below, State Farm's motion ignores factual disputes and well-settled Texas law. The summary judgment record, when viewed in the required light most favorable to Plaintiff, demonstrates multiple genuine issues of material fact that preclude summary judgment. These issues include, inter alia: whether the frozen-plumbing exclusion applies under the circumstances or is rendered ambiguous by its "do your best to maintain heat" language, whether Plaintiff's post-loss repairs constituted a waiver of his appraisal rights, whether State Farm's denial was made in good faith or in violation of its statutory duties, and the extent of loss

and damages caused by the burst pipe. Summary judgment is appropriate only when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view all evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant.

Objections to Defendant's Summary Judgment Evidence

Plaintiff objects to the following portions of Defendant's summary judgment evidence as inadmissible under the Federal Rules of Evidence and respectfully requests the Court sustain these objections.

Wadas Declaration (Exhibit B)- Lack of Personal Knowledge and Improper Opinion Testimony: State Farm's motion relies on an unsworn declaration by Annette Wadas (identified as a Team Manager) to introduce various claim file notes and letters. Plaintiff objects that the Wadas declaration fails to demonstrate the affiant's personal knowledge or competency to testify about the matters stated. Additionally, to the extent Ms. Wadas offers conclusions regarding policy interpretation or coverage determinations, such testimony constitutes inadmissible legal opinion under Fed. R. Evid. 701. Any statement that the claim "is excluded under the policy" exceeds the scope of permissible lay testimony and should be stricken. Furthermore, Ms. Wadas lacks personal knowledge required under Fed. R. Evid. 602 regarding claim handling decisions, adjuster conclusions, or coverage determinations in which she did not directly participate. The Court should limit her testimony to matters within her direct, firsthand knowledge and exclude all legal conclusions and secondhand summaries of claim file activity.

Claim File Excerpts (Exhibit B-1)- Authentication and Foundation Issues: Plaintiff objects that the internal claim file excerpts have not been properly authenticated as business records under Fed. R. Evid. 803(6). While Ms. Wadas's declaration attempts to provide foundation, she has not

established that these particular documents were made at or near the time of the events by someone with knowledge, kept in the regular course of business, or that it was the regular practice to make such records. See Fed. R. Evid. 803(6)(A)-(E). More critically, to the extent these excerpts contain adjuster opinions on causation, coverage, or policy interpretation (e.g., "damage due to freeze with no heat on means no coverage"), such statements constitute inadmissible lay opinion testimony under Fed. R. Evid. 701 or, alternatively, lack proper expert foundation under Fed. R. Evid. 702.

November 9, 2023 Denial Letter (Exhibit B-6)- Lack of Authentication: The November 9, 2023 letter referenced in Defendant's motion lacks proper authentication. Ms. Wadas's declaration does not address this document's authenticity, chain of custody, or business records foundation. Fed. R. Evid. 901(a). Without proper authentication, this document should be excluded from consideration.

Plaintiff respectfully requests the Court sustain these objections and consider only properly authenticated evidence with adequate foundation. Plaintiff does not object to the admission of these documents for the limited purpose of showing Defendant's position or the sequence of events, but objects to their consideration for the truth of any factual assertions or legal conclusions contained therein.

Summary Judgment Evidence

Exhibit 1- Oral Deposition of Arturo Barona (Oct. 10, 2024)

Mr. Barona testifies that the building was vacant for renovations, heat was turned off during a brief holiday absence, and he discovered the loss promptly. See page 18. He explains the timeline of the freeze, damage discovery, report to State Farm, and subsequent repairs. See page 27 to 32. This directly refutes State Farm’s claims that Plaintiff failed to comply with policy duties and supports Plaintiff’s reasonableness under the “do your best to maintain heat” language.

Exhibit 2- Vortex Consulting Estimate

Vortex Consulting inspected the property post-loss and prepared a professional estimate totaling $103,339.76 (page 20), along with photographs documenting the interior and plumbing damage. (page 21 to 44). This supports that a bona fide dispute exists regarding the amount of loss, justifying Plaintiff's invocation of the policy's appraisal clause and showing real, compensable damages.

Exhibit 3- Insurance Policy (Policy No. 90-GR-E796-8)

The policy includes the frozen plumbing exclusion, the appraisal clause, and Plaintiff's duties after loss. See page 18 & 19. It is used to establish the applicable coverage terms not for interpretation purposes beyond what is supported by admissible fact evidence. This exhibit is used to demonstrate that Plaintiff's invocation of appraisal (See page 32) complied with the contract and that State Farm cannot unilaterally deny appraisal rights.

Exhibit 4- Defendant's Response to Request for Production

This exhibit contains State Farm Lloyds' verified discovery responses, in which Defendant confirms the existence and production of its claim file (BARONA_000001–000842) and acknowledges possession of Plaintiff's Vortex Consulting estimate, JP Remodeling invoice, and appraisal demand letter. State Farm's production of these materials demonstrates that it had timely access to all documentation needed to properly evaluate the scope and cause of loss. These admissions directly undermine Defendant's assertion that there was no dispute as to amount of loss or that it lacked sufficient information to engage in appraisal. The exhibit also reinforces that Defendant's claim denial was not due to missing information, but rather due to its predetermined reliance on the frozen plumbing exclusion despite clear evidence of reasonable conduct by Plaintiff.

Exhibit 5- Appraisal Demand Letter (Dated September 8, 2023)

This formal notice outlines Plaintiff's request for appraisal, names his appraiser, and references the policy provisions. It demonstrates Plaintiff's intent to resolve the dispute over amount of loss without litigation and undermines State Farm's assertion that Plaintiff waived appraisal rights by completing repairs. Page 1. This document is central to preserving Plaintiff's contractual rights.

Exhibit 6- JP Remodeling & Construction Invoice (dated January 12, 2023)

This invoice documents the post-freeze repairs performed by JP Remodeling & Construction to restore Plaintiff's commercial property after the December 24, 2022 plumbing failure. The repairs included demolition, plumbing, drywall, insulation, painting, floor painting, and material costs, totaling $33,150.00, which Plaintiff paid in full. (Also see Exhibit 7- page 5 & 11 and Exhibit 1- page 19 to 23 & 51).

Exhibit 7- Arturo Barona- Certificate Discovery Responses

Plaintiff's verified responses to State Farm's written discovery confirm key elements of his claims, including the timeline of the reported loss, the scope and amount of repairs, and the resulting rental income loss. Specifically, Plaintiff attested that repairs were completed for $33,150.00 (page 5) and that he lost $1,800.00 in rent (page 7) while the property was unusable. These responses are competent summary judgment evidence under Rule 56 and further substantiate Plaintiff's position on causation, damages, and compliance with post-loss duties under the policy. (Exhibit 1, 7, & 7).

Legal Arguments

Key Fact Disputes Precluding Summary Judgment: (1) Whether Plaintiff's conduct satisfied the policy's 'do your best to maintain heat' standard; (2) Whether Plaintiff intentionally waived appraisal rights through necessary mitigation efforts; (3) Whether State Farm conducted a reasonable investigation before denial; and (4) The extent and valuation of covered damages.

1. The "Frozen Plumbing" Exclusion does not Conclusively Bar Coverage Under the Facts of this Case

State Farm asserts that Plaintiff's claim is barred by the policy's frozen plumbing exclusion. The policy excludes losses caused by frozen pipes unless the insured either does their best to maintain heat in the building or drains and shuts off the water supply. (Exhibit 1, Page 18; Exhibit 7, p2). Importantly, he did not foresee the severity of the storm and returned promptly to address the situation. Whether Plaintiff "did his best" to maintain heat is a fact issue. The clause is undefined in the policy and is inherently ambiguous. In *State Farm Fire & Casualty Co. v. Reed*, 873 S.W.2d 698 (Tex. 1993), Texas Supreme Court addressed ambiguity in an insurance policy exclusion. The court held that if an exclusion is ambiguous, it must be strictly construed against the insurer and in favor of the insured. This reinforces the notion that unclear policy language should not be used to deny coverage. Here, Plaintiff Arturo did not abandon the property, made efforts to preserve it, and promptly reported the loss. (See Exhibit 7, page 2- confirming Plaintiff's post loss efforts and timeline) Here the policy language "do your best to maintain heat" is inherently ambiguous and must be left for the jury to interpret.

Plaintiff's Actions were Reasonable Under the Circumstances and Raise a Fact Question on the Exclusion's "Maintain Heat" Exception

The State Farm policy excludes coverage for water damage from plumbing freezing unless the insured "attempts to maintain heat" in the building or, if heat is not maintained, drains the equipment and shuts off the water supply. In other words, if the insured uses reasonable care to

keep the building heated, a freeze-related pipe burst would be covered despite the cold weather. This built-in exception reflects the parties' intent that coverage should exist so long as the policyholder exercised some level of precaution in the face of freezing conditions.

Texas courts have refused to apply similar "freezing" exclusions mechanically when the insured made genuine efforts to heat the property. For example, in *American National Property Casualty Company v. Fredrich Partners Ltd.,* No. 05-12-00647-cv (Tex. App.- Dallas 2013), a case involving the same "do your best to maintain heat" clause, the court held that the insured had satisfied the clause by providing some heat to part of the building, even though one unit was unheated. The insurer in that case argued no coverage because one area wasn't heated, but the court disagreed, finding that the insured *"*did its best to maintain heat in the building" by keeping the occupied unit heated, and thus the freeze exclusion did not apply. Here, Plaintiff admittedly did not leave any heat on. In *Fredrich,* the courts interpret and apply the "maintain heat" requirement in a practical, common-sense manner, focusing on whether the insured tried to avoid a freeze loss. Plaintiff's undisputed promptness in reporting the loss and mitigating damage further demonstrates he was not careless about the risk. At minimum, reasonable minds could differ on whether Plaintiff's conduct amounted to a failure to use "best efforts" to maintain heat. This precludes summary judgment. The Court should recall that any ambiguity or reasonable doubt in the exclusion's application must be resolved in favor of coverage. In *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998) ("When an exclusion is susceptible to more than one reasonable interpretation, we construe it in favor of the insured").

2. Plaintiff did not Waive his Right to Appraisal by Making Repairs, and any Appraisal Impediment Results from State Farm's Own Actions

State Farm next argues that Plaintiff "waived" the policy's appraisal clause by completing repairs before invoking appraisal, rendering an award impossible. This argument misstates the law

and the facts. Appraisal is a favored mechanism in Texas insurance contracts, and waiver of appraisal is disfavored absent clear intentional conduct and prejudice. Texas courts define waiver as the "intentional relinquishment of a known right", and they require a showing that the party unequivocally intended to abandon the right or acted in a way inconsistent with it. Here, there is no evidence that Plaintiff intentionally gave up his appraisal rights. To the contrary, Plaintiff formally demanded appraisal in writing on September 8, 2023 to resolve the dispute over the amount of loss. (See Exhibit 5 & Exhibit 7, confirming Plaintiff's ongoing dispute over the amount of loss and his effort to resolve it). After submitting a comprehensive estimate by Vortex Consulting (Exhibit 2) and after Defendant had completed its inspection. (See Exhibit 7, page 6). Additionally, Defendant's RFP responses (Exhibit 4) confirm that it reviewed the estimate, invoice, and appraisal demand, and had access to all relevant documentation before reiterating its denial, undermining any claim of prejudice or waiver.

Appraisal clauses are enforceable unless waived intentionally and with prejudice. State Farm's waiver theory boils down to the fact that by the time Plaintiff demanded appraisal, the property had been repaired. But mere delay or mitigating damages does not establish waiver of appraisal. See *Rogers v. Nationwide General Insurance Co*., No. 4:17-cv- 00808, 2018 WL 3368713 (e.d. Tex. July 10, 2018), The court held that mere delay in invoking appraisal does not constitute waiver. The party opposing appraisal must show that the delay caused prejudice. The court stated: "It is well-settled under Texas law that a party's mere delay in seeking appraisal is not enough to find waiver of the right to appraisal; rather, in order to establish waiver of the right to appraisal, a party must show that an impasse was reached and that any failure to demand appraisal within a reasonable time prejudiced the opposing party."

Also, the policy's "Duties in the Event of Loss" required Plaintiff to mitigate damage and make reasonable temporary repairs as needed which he did. (See Exhibit 3, page 31). It would

undermine the very purpose of insurance if complying with one's duty to mitigate (by repairing damage to avoid further loss) voided one's right to an appraisal of the loss. There is no contractual provision stating that completing repairs forfeits appraisal rights, and State Farm points to none. In the absence of such a provision, the only basis for finding waiver would be the common-law test of intentional relinquishment plus prejudice, which, as shown, is not met here. Accordingly, as a matter of law and equity, Plaintiff did not waive appraisal. State Farm's motion to preempt Plaintiff's appraisal right should be denied.

3. Fact Issues Preclude Summary Judgment on Plaintiff's Texas Insurance Code and DTPA Claims (Bad Faith, Unfair Practices)

State Farm next asserts that Plaintiff's extra-contractual claims under Texas Insurance Code Chapter 541 and the DTPA must be dismissed because Plaintiff "has no right to benefits" under the policy (per the exclusion) and no evidence of an independent injury. Plaintiff's Insurance Code and DTPA claims remain viable and indeed are supported by substantial evidence of unreasonable claims handling.

A. Under Menchaca, Plaintiff's Entitlement to Policy Benefits Allows Recovery of those Benefits as Statutory Damages for Bad Faith

The Texas Supreme Court in *USAA Tex. Lloyds Co. v. Menchaca,* 545 S.W.3d 479, 489-91 (Tex. 2018) reaffirmed the principle that an insured who establishes a right to receive policy benefits can recover those benefits as "actual damages" under the Insurance Code if the insurer's statutory violation caused the loss of benefits. This is sometimes called the "benefit of the bargain" rule, tracing back to *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988). In other words, if State Farm's wrongful denial of a covered claim was effectuated by violating Chapter 541 (for example, by failing to conduct a reasonable investigation or misrepresenting the policy scope), then the amount of benefits wrongfully withheld is recoverable as damages under the

Insurance Code, even if those same benefits also constitute contract damages. *Menchaca* made clear that an insured does not need to prove an "independent injury" separate from the loss of policy benefits in order to recover under Chapter 541 or the DTPA, the loss of contract benefits caused by the insurer's statutory violations is itself the compensable damage. Only if the insured has no contractual right to benefits (and no other injury) do the extra-contractual claims fail as a matter of law.

State Farm improperly leans on *Menchaca's* general rule that "if the policy does not provide the insured a right to receive benefits, the insured cannot recover policy benefits as damages for an insurer's statutory violation." Plaintiff does not dispute that rule- but it simply doesn't apply once there is a fact issue on coverage. State Farm cannot assume away coverage and, on that basis, escape all bad-faith liability. Instead, this Court must follow the conditional rules from *Menchaca*: If the jury finds that State Farm breached the policy and owes benefits, the jury can also find that State Farm's failure to pay was accompanied by unfair or deceptive acts, in which case those benefits (along with possible additional damages for knowing misconduct) can be awarded under the Insurance Code and DTPA. This is exactly the *Vail* scenario that *Menchaca* explicitly preserved. Here, Plaintiff has alleged and produced evidence of multiple Chapter 541 violations- e.g., failing to attempt in good faith to effectuate a prompt, fair settlement of a claim when liability was reasonably clear (Tex. Ins. Code § 541.060(a)(2)), and refusing to pay a claim without conducting a reasonable investigation (§ 541.060(a)(7)). If the jury believes that the exclusion did not clearly apply (making coverage at least reasonably clear) yet State Farm summarily denied the claim anyway, that could be found an unfair settlement practice. Likewise, the cursory nature of State Farm's investigation (one quick inspection and denial letter within 20 days of notice) supports a finding that State Farm failed to adequately investigate the loss in good faith.

B. Even Aside from Coverage, There Is Evidence of Bad Faith and Unreasonable Investigation Creating a Fact Issue

Here are key facts a reasonable jury could view as evidence of unreasonable or bad-faith conduct by State Farm (in violation of Tex. Ins. Code § 541.060 and the DTPA):

Hasty Denial Without Full Inquiry: State Farm denied the claim just days after its first inspection, issuing the denial letter on January 24, 2023. The letter tersely cited the lack of heat as the reason for denial. There is no indication State Farm gave any consideration to whether Plaintiff had attempted to maintain heat or whether the policy wording "do your best" might afford him some leeway. In other words, State Farm treated the matter as an open-and-shut exclusion without interviewing Plaintiff in detail or exploring any extenuating circumstances. A juror could find that this rush to denial violated the insurer's duty to conduct a reasonable, fair investigation before denying a claim. See Tex. Ins. Code § 541.060(a)(7) (unfair practice to refuse to pay without conducting a reasonable investigation).

Failure to Communicate or Advise: The claim file reveals no evidence that State Farm ever advised Plaintiff during the adjustment that he could or should take steps to document the damage or preserve evidence for further evaluation. Instead, by denying coverage outright, State Farm effectively froze Plaintiff out of the process. When Plaintiff, through counsel, resurfaced with a settlement demand and appraisal invocation in September 2023, State Farm's reaction was not to negotiate or reconsider, but to stand firm on its prior denial. (See Exhibit 7, page 8). This is further supported by Exhibit 4, which shows Defendant acknowledged receipt of the very documents it now dismisses including the estimate and repair invoice but failed to reevaluate the claim. A jury could view this as failure to attempt a fair settlement when liability became reasonably clear, especially after Plaintiff provided a professional estimate of the loss. Tex. Ins. Code §

541.060(a)(2). Rather than acknowledging the severity of the loss or any ambiguity in the exclusion, State Farm doubled down, thus forcing needless litigation.

Use of Appraisal as a Sword and Shield: State Farm's conduct surrounding the appraisal demand is also suspect. When Plaintiff invoked appraisal, State Farm responded by objecting on grounds of "waiver". But notably, State Farm did not move to compel appraisal or otherwise actually want an appraisal, it wanted to avoid appraisal and stick to its denial. A jury should conclude that State Farm acted in bad faith by using Plaintiff's necessary repairs (done to mitigate damage) as a pretext to deny him contractual rights (appraisal), all in service of avoiding payment. This could be seen as a violation of the prompt payment and fair settlement provisions (Tex. Ins. Code §§ 542.003, 541.060) essentially, State Farm chose to prolong the dispute and leverage a technical argument rather than engage in any fair evaluation of the claim.

Knowing or Intentional Violations: There is evidence from which a jury could infer that State Farm's handling was done "knowingly", a prerequisite for additional DTPA/Insurance Code damages. Tex. Ins. Code § 541.152(b); Tex. Bus. & Com. Code § 17.50(b)(1). State Farm is one of the largest insurers in Texas and presumably knows the standards for denying claims on exclusions. The ambiguity in the "do your best" clause was certainly known or should have been known to State Farm's claims personnel, yet there is no indication State Farm gave Plaintiff the benefit of the doubt. Instead, State Farm took a hardline approach that maximized its own financial interest. Furthermore, even after Plaintiff presented new information (the Vortex estimate and an appraisal demand), State Farm persisted in denial without any adjustment of its position or any payment of the undisputed portion of the loss (for instance, even if coverage were in question, the cost to tear out and access the broken pipe might be covered under some policy provisions, or other ensuing loss).

State Farm argues that because no benefits are owed, Plaintiff has "no damages" and thus no bad faith claim. This is incorrect both legally and factually. Legally, as explained, if benefits are owed, their non-payment is the damage. Factually, Plaintiff has suffered damages beyond just the policy benefits: he had to pay for repairs out-of-pocket (incurring financing costs or lost use of funds), he lost rental income during the period of delay, and he has endured the time, hassle, and expense of pursuing the claim and now this lawsuit. Finally, the Court should recall that issues of insurer bad faith and whether the insurer had a reasonable basis to deny a claim are generally questions for the jury, not the judge, especially when there is evidence on both sides. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54- 55 (Tex. 1997) (bad faith becomes question of law only if, viewing the facts most favorably to the insured, a reasonable insurer could not have denied the claim). Given the evidence outlined above, a reasonable jury could find that State Farm lacked a reasonable basis and failed to act as a prudent insurer would. Therefore, summary judgment on Plaintiff's bad faith, Insurance Code, and DTPA claims would be improper.

4. Plaintiff Has Provided Ample Evidence of Loss, Damages, and Causation to Create Fact Issues

State Farm improperly stated that Plaintiff has "no evidence" of his damages or of causation. This assertion is plainly contradicted by the summary judgment record. Plaintiff himself, through testimony (Exhibit 1) and documents, has provided detailed evidence of the loss occurrence, the resulting damage, and the costs to repair, as well as consequential losses (Exhibit 2, 3, 4, & 5).

Occurrence and Cause: It is uncontroverted that a water pipe froze and burst on December 24, 2022, flooding Plaintiff's property. Plaintiff testified to discovering water damage and the circumstances of the freeze. State Farm's records also confirm the date of loss and that the cause was a frozen plumbing rupture. There is thus direct evidence of causation: a winter freeze caused

the pipe burst, which in turn caused water damage to the building. No contrary causation theory (such as wear and tear or prior leakage) has been advanced by State Farm. Indeed, in denying the claim, State Farm implicitly acknowledged the cause of damage was the freeze- otherwise it would not rely on the freeze exclusion. Therefore, causation is firmly established by the evidence (and even admitted in part by State Farm). To the extent any dispute exists, it would only be whether Plaintiff's lack of heat was a contributing factor, but again that is part of the same causal chain which is not in dispute. In short, but for the severe freeze, the pipe would not have burst, and the loss would not have occurred, satisfying any applicable causation standard.

Property Damages and Repair Costs: Plaintiff produced the JP Remodeling & Construction invoice for $33,150 (Exhibit 6 & 7) which itemizes the post-freeze repairs completed. In deposition, Plaintiff authenticated that invoice and confirmed that $33,150 was paid to JP Remodeling (Exhibit 7, page 5) for the work needed to restore the property after the freeze. He further confirmed that those repairs addressed all the damage caused by the burst pipe. Thus, there is documentary and testimonial evidence of the amount it cost to fix the property. That is a classic measure of property damage: the reasonable cost of repairs necessary to restore the property to its pre-loss condition. Additionally, Plaintiff, through a public adjuster (Vortex Consulting), provided a comprehensive estimate showing the scope of damage. This Vortex estimate, totaling $103,339.76, provides further evidence of the magnitude of the loss. While State Farm may dispute the discrepancy between the contractor's actual cost and the PA's estimate, that simply creates a fact issue for the trier of fact or for resolution via appraisal. It does not negate the existence of evidence; to the contrary, it shows Plaintiff has evidence from multiple sources quantifying his damages. Notably, the Vortex estimate (Exhibit 2) and appraisal notice (Exhibit 5) prompted State

Farm to re-inspect the property, implicitly acknowledging that the estimate constituted evidence worth evaluating.

Consequential Loss (Lost Rent): Plaintiff has also claimed and evidenced a loss of rental income due to the damage. The building could not be leased to new tenants until repairs were finished in March 2023, and even then, it took until June 2023 to secure a tenant (partly due to the downtime). In answers to interrogatories (Exhibit 7), Plaintiff quantified that he "missed out on $1,800.00 in rent" because the property was unusable during repairs. Indeed, once the property was leased in June 2023, the tenant's rent was $1,800 per month, which supports Plaintiff's valuation of the lost rent during the approximately one-month delay in marketing caused by the repairs. While the lost rent amount is modest, it is supported by evidence (Plaintiff's sworn interrogatory answer (Exhibit 7) and deposition testimony (Exhibit 1) and is recoverable under the policy's coverage (Exhibit 3) for lost rental income or as consequential damages resulting from the insurer's breach (if proven). At minimum, it is a fact issue.

Prompt Payment Act Interest: Furthermore, if coverage is established, Texas's Prompt Payment of Claims Act (Chapter 542) entitles Plaintiff to statutory interest (plus attorney's fees) for the delay in payment. State Farm received all items necessary to determine the claim by (at the latest) January 24, 2023 when it denied the claim, yet it has paid nothing. The clock on prompt payment penalties thus ran and continues to run. Exhibit 7 further confirms the timeline of events and Plaintiff's compliance with post-loss duties, supporting his eligibility for interest under Tex. Ins. Code § 542.060. (Exhibit 1, p.32)

This is another component of damages (distinct from policy benefits) that flows automatically from State Farm's failure to timely pay a covered claim. See Tex. Ins. Code § 542.060. While interest is not itself an "injury" to be separately proven, it is a statutory damage that Plaintiff will

be entitled to if he shows the claim was wrongfully denied. State Farm's motion ignores this aspect entirely. Ultimately, the evidence of loss, causation, and damages is more than sufficient to raise genuine fact issues. The freeze occurred and caused damage, therefore causation established. Repairs were done at a certain cost, property damage quantified. Plaintiff lost some rent and consequential damage shown. The existence of these facts is not in serious doubt; only their interpretation and the legal effect (coverage) is disputed, which has argued is for the jury. Therefore, State Farm's no-evidence challenges must be rejected.

Conclusion

At the threshold, this case presents a classic fact question regarding the application of an ambiguous policy exclusion. The policy's 'frozen plumbing' exclusion contains an exception for insureds who 'do your best to maintain heat', language that is inherently ambiguous and creates a genuine issue of material fact regarding Plaintiff's conduct. Under settled Texas law, ambiguous exclusions must be construed against the insurer, and close questions regarding coverage go to the jury, not the Court on summary judgment.

For the foregoing reasons, genuine disputes of material fact preclude summary judgment on all claims. Plaintiff respectfully requests that the Court DENY Defendant's Motion for Summary Judgment in its entirety and allow this matter to proceed to trial on the merits.

Dated: May 27, 2025

Respectfully submitted,
/s/ Eric B. Dick
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CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and correct copy of the foregoing instrument was served on all counsel of record via electronic transmission.

/s/ Eric B. Dick
Eric B. Dick