2024 WL 5274817 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Ronald COOPER; Shirley Cooper, Plaintiffs-Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY; John Does 1-10, Defendants-Appellees.

No. 24-60466.
December 27, 2024.

On Appeal from the United States District Court for the Southern District of Mississippi, Northern Division, USDC No. 3:23-cv-00100-DPJ-ASH

Brief of Appellee State Farm Fire and Casualty Company

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*II STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee State Farm Fire and Casualty Company ("Sate Farm") does not request oral argument. The legal issues and record presented are straightforward and governed by well-settled, binding precedent. As a result, oral argument would not be likely to aid the Court in resolving this appeal. *See* Fed. R. App. P. 34(a)(2).

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***1 JURISDICTIONAL STATEMENT**

The district court had original jurisdiction under 28 U.S.C. § 1332 because the Coopers asserted state law claims seeking damages in excess of $75,000 with no Appellee being a citizen of the forum state, as Adam Dilley was voluntarily dismissed. On August 28, 2024, the district court entered an Order granting State Farm Fire and Casualty Company's Motion for Summary Judgment. The Coopers filed their notice of appeal on September 10, 2024. This Court has jurisdiction under Rules 3 and 4 of the Federal Rules of Appellate Procedure.

***2 STATEMENT OF ISSUES PRESENTED**

I. Whether the district court properly found that the Coopers failed to genuinely dispute the facts showing that the sewage water that flooded their home originated from the City of Canton's main sewer line.

II. Whether the district court properly held that State Farm agent Adam Dilley lacked the requisite authority to amend the Coopers' coverage beyond the plain language which both parties concede is unambiguous.

*3 STATEMENT OF THE CASE

I. Statement of Facts

This appeal arises from an insurance coverage dispute. Appellants Ronald and Shirley Cooper (the "Coopers") contest the district court's finding that State Farm applied the appropriate policy limits on a claim that resulted from an overflow of sewage that spread throughout the first floor of the Coopers' home. This Court should affirm.

A. *The Coopers' Policy Limits*

The Coopers purchased Policy No. 24-BR-N912-0 (the "Policy") from State Farm Fire and Casualty Company ("State Farm") to cover their home at 108 Chantry Lane, Madison Mississippi.[1] The Policy included coverage for the Coopers' dwelling ("Coverage A") and the Coopers' personal property inside the dwelling ("Coverage B") (collectively, "Coverages A and B"):

SECTION I - LOSSES INSURED

COVERAGE A - DWELLING

We will pay for accidental direct physical loss to the property described in Coverage A, unless the loss is excluded or limited in **SECTION 1-LOSSES NOT INSURED** or otherwise excluded or limited in this policy. However, loss does not include and **we** will not pay for, any ***diminution in value.***

COVERAGE B - PERSONAL PROPERTY

We will pay for accidental direct physical loss to the property described in Coverage B caused by the following perils, unless the loss is excluded or limited in **SECTION I - LOSSES NOT INSURED** or ***4** otherwise excluded or limited in this policy. However, loss does not include and *we* will not pay for, any ***diminution in value.***

12. **Abrupt and accidental discharge or overflow** of water, steam, or sewage from within a plumbing, heating, air conditioning, or automatic fire protective sprinkler system, or from within a household appliance. This peril does not include loss:

a. to the system or appliance from which the water, steam, or sewage escaped;

b. caused by or resulting from:

(2) water or sewage from outside the ***residence premises*** plumbing system that enters through sewers or drains, or water that enters into and overflows from within a sump pump, sump pump well, or any other system designed to remove subsurface water that is drained from the foundation area;

SECTION I - LOSSES NOT INSURED

2. ***We*** will not pay for, under any part of this policy, any loss that would not have occurred in the absence of one or more of the following excluded events. ***We*** will not pay for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs abruptly or gradually, involves isolated or widespread damage, occurs on or off the ***residence premises,*** arises from any natural or external forces, or occurs as a result of any combination of these:

c. **Water,** meaning:

5** (7) water or sewage from outside the ***residence premises plumbing system that enters through sewers or drains, or water or sewage that enters into and overflows from within a sump pump, sump pump well, or any other system designed to remove subsurface water that is drained from the foundation area; [2]

The Coopers' Policy included a Back-Up of Sewer or Drain Endorsement ("BUSD" or "Endorsement") that limited the Coopers' coverage to a percentage of the Coopers' Coverage A limits as provided in the Policy's "Declarations" page. [3] The Endorsement served as additional insurance coverage in the event Coverages A and B were inapplicable. [4] The Coopers purchased the Endorsement because they understood that "if something happens ... with the city sewage and it comes into your house ..., it's good to just have." [5]

B. ***The Coopers' Home Floods***

On May 6, 2022, the Coopers left their home vacant for about four hours. [6] The Coopers did not leave on any running water during their absence, nor did they have any appliances in use other than their air conditioner. [7] None of the Coopers' plumbing fixtures were overflowing prior to their departure. [8] Upon return, however, ***6** the Coopers discovered that sewage water overflowed throughout their home's first floor, which is approximately 4,600 square feet. [9] Beginning from the main guest bathroom's shower drain, the sewage overflowed into the main guest bedroom and into the secondary guest bedroom; overflowed from the drain into the second guest bathroom; and flooded the keeping room, the family room, the kitchen, the laundry room, the pantry, the half bath, the hallways on that side of the home, and the garage. [10]

The Coopers placed bath towels, blankets, comforters, and "anything [else] to minimize" and "soak up" the sewage flooding the first floor of their home. [11] Mr. Cooper spoke with Jeremy of Hydra Plumbing ("Hydra") that same night. [12] Hydra walked Mr. Cooper through making an adjustment in the Coopers' tank to stop the sewage water from entering their home. [13] Despite several areas of the first floor being flooded, the Coopers' plumbing system tank located outside of the home remained full of sewage. [14] Hydra visited the Coopers' property the following day and determined that a union within the Coopers' plumbing system cracked. [15] Hydra ***7** replaced the broken union the same day. [16] The Coopers submitted a claim to State Farm for the damage caused by the sewage's overflow. [17]

C. ***State Farm's Investigation***

State Farm sent claims adjuster Adam Dilley ("Dilley") to the Coopers' home on or about May 10, 2022, to investigate the Coopers' claim. [18] The Coopers instructed 911 Restoration of Central Mississippi to begin mitigating the damage caused by

the sewage prior to Dilley's arrival. [19] Once Dilley arrived, he inspected the broken union and discussed the incident with the Coopers to determine the source of the damage, specifically whether the sewage that entered the Coopers' home originated from the City of Canton's (the "City") main sewer line. [20] Dilley then called Hydra for its opinion on the sewage's source, and Hydra conveyed that the sewage that entered the Coopers' home originated from outside of their premises because no water was running inside the home while the Coopers were away. [21] Based on the amount of damage to the home and professional opinions, Dilley informed the Coopers that their coverage could be limited to the BUSD limits, but he proffered sending another plumber to the Coopers' home for a second opinion. [22]

***8** On or about May 18, 2022, Richard Zimmerman of Wright Plumbing visited the Coopers' home at State Farm's request to inspect the plumbing system and determine the source of the sewage that had flooded the home. [23] As the Coopers are aware, their home has a pressurized sewage system which pushes sewage out of their grinder pump system and into the City's main sewer pipeline. [24] Zimmerman concluded that "[w]hen the union cracked and leaked in the pump chamber, it caused the city sewer, which is under pressure, to fill the pump chamber and ultimately back up into the house." [25] Zimmerman explained that because the Coopers did not have a second check valve (i.e., a "redundancy valve") installed "outside of the pump chamber" to prevent the backflow, the pressure could force the City's sewage to fill the Coopers' tank through the cracked union and push the City's sewage into the Coopers' home. [26] Mrs. Cooper confirmed Zimmerman's conclusion that they had no redundancy valve at the time of the incident. [27]

Canton Municipal Utilities ("CMU") visited the Coopers' home on the same day as the incident and concluded that "[t]he sewer problem at the above address was on the home owner [sic]" due to there being no issue with the City's main sewage line. [28] Mississippi Municipal Service Company ("MMSC") also concluded ***9** that the City's main sewer line "was not surged." [29] The pressure from the City's main line overtook the Cooper's grinder pump chamber system and ultimately flooded their home with the City's sewage when their pressurized system failed. [30]

After reviewing all the evidence and official reports, State Farm determined that the Coopers' BUSD limits applied because the sewage water that flooded their home originated from off premises. [31] State Farm paid the Coopers their Endorsement limits of $37,886.00 on June 7, 2022. [32] State Farm also refunded the Coopers' deductible of $7,993.00 for a total of $45,879.00. [33] Lastly, State Farm paid seven months of additional living expenses for the Coopers for a total of $36,920.43, [34] as the repair on the Coopers' home took approximately seven months to complete. [35]

II. Procedural Background

On December 30, 2022, the Coopers filed a lawsuit in the Circuit Court of Madison County, Mississippi against State Farm and Adam Dilley asserting claims for (1) breach of contract, (2) breach of the implied duty of good faith and fair dealing, (3) breach of fiduciary duty, (4) bad faith, (5) negligence, and (6) infliction of emotional distress. [36] State Farm removed on the grounds that the Coopers ***10** improperly joined Adam Dilley. [37] The Coopers did not move to remand but instead voluntarily dismissed Dilley from the lawsuit. [38]

On December 19, 2023, State Farm moved for summary judgment on all of the Coopers' claims asserted in their complaint. [39] State Farm specifically argued that the breach of contract claims must fail because the evidence supported that the sewage water that flooded the home originated from off premises - specifically the City's main sewer line - invoking the BUSD limits. [40] State Farm also sought summary judgment on the Coopers' claims concerning additional living expenses because it had paid the Coopers the appropriate amount. [41] State Farm further contended that because Dilley's alleged statements contradicted the Policy, the Coopers' negligence claims must fail. [42] Lastly, State Farm moved for the remaining claims to be dismissed because it had paid the Coopers the applicable and appropriate limits. [43]

On or about August 28, 2024, the district court granted State Farm summary judgment on all of the Coopers' claims. [44] The district court first found that the Coopers conceded their claims regarding the additional living expenses because the ***11** argument was "straightforward and uncontested," thereby constituting a concession of their claims. [45]

Before ruling on the remaining claims, the district court acknowledged that both the Coopers and State Farm construed the Policy to mean that the BUSD limits would apply if the sewage originated from outside of the Coopers' residence. [46] Finding this construction correct, the district court interpreted the Policy the same. [47]

Breach of Contract Claims

The district court agreed with State Farm's conclusion that the sewage originated from the City's main sewer line and granted summary judgment on the Coopers' breach of contract claims. [48] First, the district court identified Hydra's invoice that provided that the Coopers' union cracked and allowed "back flow *into the station.*" [49] It further acknowledged Dilley's testimony that Jeremy of Hydra concluded that the water that entered the Coopers' home originated from outside the Coopers' premises. [50] The district court further considered Wright Plumbing's conclusions from Zimmerman and Chris Wright ("Mr. Wright"). [51] In addition to finding that Zimmerman's conclusion aligned with Hydra's, the district court ***12** highlighted Mr. Wright's expert report, emphasizing Mr. Wright's conclusion that the broken union and pressurized sewage system could have forced the City's sewage from the main sewer line, into the Coopers' station, and ultimately into the Coopers' home. [52] Of important note was Chris Wright's opinion that it would be "impossible for sewer water from on-premises to have backed up into the home and flooded a portion of the first floor when no plumbing fixtures were in use." [53]

The Coopers presented insufficient evidence to satisfy their summary judgment burden. [54] The Coopers proffered State Farm's agent Brian Lindsay's ("Lindsay") statement that Coverages A and B applied to their claim, but the district court found this evidence inadequate to create a dispute regarding the sewage's source because Lindsay's statement "merely demonstrates Lindsay's misunderstanding about whether Coverage A applied if the plumbing failure was on premises" and does not help determine "that the water and sewage came from the Coopers' property rather than the City." [55] Neither did the district court find that Dilley's testimony attested that the sewage originated from the Coopers' plumbing system or "refute[d] State Farm's other evidence." [56]

***13** The district court further found the Coopers' proffer of Dorsey Pump's letter inadequate since Dorsey Pump shared Chris Wright's conclusion that the location of the crack would permit the City's sewage to fill the Coopers' tank and enter their home. [57] Likewise, the district court found MMSC's letter insufficient to "rebut Wright's expert opinion that the water and sewage came from the City." [58] Notably, the district court explained that the Coopers failed to satisfy the Federal Rules of Evidence Rule 702 standard for providing the "scientific, technical, or other specialized knowledge" required to explain causation due to the complexity of the Coopers' system as shown by the presented evidence, thereby failing to satisfy their burden to overcome summary judgment. [59]

Negligence Claims

The district court granted State Farm summary judgment on the Coopers' negligence claims because the evidence failed to show that Dilley possessed the requisite authority to alter the Coopers' coverage to contradict the Policy's plain and unambiguous language. [60] Though the Coopers failed to identify under which agency theory they pursued their negligence claims, the district court found the Coopers unsuccessful under either theory of actual or apparent authority. [61] The Coopers did ***14** not present evidence of actual authority, and the district court found that none of the evidence presented supported a theory that Dilley had apparent authority to amend the Policy's plain language. [62] Consequently, the district court concluded that the Coopers' reliance on Dilley's' alleged representations were unreasonable as a matter of law. [63] Of important note, the district court stated that an agent's representations cannot amend an unambiguous policy. [64]

Remaining Claims

State Farm moved to dismiss the Coopers' remaining claims in their complaint because the evidence showed that State Farm appropriately applied the BUSD limits. [65] Because the Coopers "never specifically address[ed] their other claims," the district court granted State Farm summary judgment on the Coopers' remaining claims. [66]

The Coopers filed this appeal, asserting that the district court erred in finding that they failed to genuinely dispute the sewage's source and failed to present evidence that Dilley had the requisite authority to amend the Policy and bind State Farm to his alleged representations. This Court should affirm.

***15 SUMMARY OF THE ARGUMENT**

The Coopers failed to satisfy their burden in responding to an adequately supported motion summary judgment. The Coopers concede that the Policy applies BUSD limits to damage incurred from sewage originating outside of their plumbing system. Yet, the Coopers continuously fail to present any evidence that refutes the various professional conclusions that the sewage that flooded their home originated from the City's main sewer line. That the cracked union which permitted the City's sewage to enter their home existed on their premises is irrelevant, as the Policy's plain language excludes damage from water originating from outside of the Coopers' plumbing system.

Furthermore, because the Policy is unambiguous, any reliance on alleged representations that contradicted the Policy's terms was unreasonable as a matter of law. Nonetheless, the Coopers still failed to establish that claims adjuster Adam Dilley had the requisite legal authority to extend their Policy's coverage. Therefore, summary judgment was warranted on each of the Coopers' claims, and this Court should affirm.

STANDARD OF REVIEW

"This [C]ourt reviews a district court's grant of summary judgment de novo, applying the same standard as the district court." [67] Summary judgment is appropriate ***16** when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [68] "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party." [69] "Summary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." [70] When a plaintiff is unable to offer sufficient evidence of an essential element of her claim, it "necessarily renders all other facts immaterial" and warrants a grant of summary judgment. [71]

"Since the court's jurisdictional grant is based upon diversity of citizenship, and since the factual backdrop of this dispute occurred in Mississippi, this [C]ourt applies the substantive law of Mississippi to this dispute." [72]

ARGUMENT

I. This Court should affirm that the record only supports that the sewage originated from the City's main pipeline, as concluded by each professional that investigated the Coopers' system.

In their second subheading, the Coopers frame the issue regarding State Farm's application of the BUSD limits as an issue of "whether the backup was caused by a failure on the premises or was a sewage backup outside the premises." [73] ***17** This characterization ignores the Policy's plain language. The Policy clearly states that Coverages A and B will not cover damages incurred from water if the water causing the damage originated from outside the premises. [74] If the water that caused the damage originated from outside the premises, then the BUSD limits would apply. [75] The district court agreed with this interpretation, adopting the view of the court in *Durrett v. Nationwide Property & Casualty Insurance Co.* [76], which construed a similar provision:

This language unambiguously turns on whether the water ... comes from outside the dwelling's plumbing system. In other words, the plumbing system failure causing the backup could occur inside or outside the dwelling's plumbing system, **but the water or water-borne material must come from outside the dwelling's plumbing system.** [77]

The Coopers conceded this interpretation and continue to concede it on appeal by once again failing to address the issue. [78] Therefore, the proper issue is whether the Coopers create a genuine dispute of fact regarding the sewage's source to determine the applicable coverage. They do not.

***18** The Coopers failed to genuinely dispute the unanimous conclusion that the sewage that flooded over half of their home's first floor originated from the City's main sewer line. The Federal Rules of Evidence permit expert testimony for issues that require "scientific, technical, or other specialized knowledge." [79] It is common practice for Mississippi district courts to require expert testimony to determine causation of an insured's alleged damage. [80] After reviewing "the MMSC letter and other evidence," the district court found that the record "reveals that opinions about the sewage source require scientific, technical, or other specialized knowledge within the scope of Rule 702." [81] This Court should find the same and affirm the district court's ruling that the Coopers failed to present evidence that would genuinely dispute the professionals' conclusions that the sewage water's source was the City's main sewer line.

19 A. *The Coopers failed to present any evidence that genuinely disputes the conclusion that the sewage originated from off premises.

The record contains no evidence that genuinely disputes the unanimous conclusion that the sewage that flooded the Coopers' home originated from the City's main line. The Coopers' plumbing system "uses a pressurized or forced sewer main system to expel its sewer water." [82] State Farm's designated expert, Chris Wright of Wright Plumbing, explained the operation of a pressurized sewage system:

Each plumbing fixture in the home (i.e. commode, sink, shower, etc.) connects to its own PVC pipe that drains the used water. Each commode PVC pipe connects to a four-inch (4″) central PVC pipe that receives the drained used water from the commode and leads the water outside of the home and into a lift station/grinder pump station in the yard located adjacent to the home. The 4-inch drainpipe stubs into a sealed pump chamber in which there is a pump designed to grind up paper and solids and pump all the water with ground up paper and solids out to the subdivision's forced main line through a one and one quarter inch (1 ¼″) PVC pipe. (*See* picture below of the grinder pump in the yard.)
Typically, for pressurized sewer applications like the one located at the subject property, a redundancy valve is installed on the home's outgoing sewage pipeline between the lift station/grinder pump tank in the yard and the tie-in to the subdivision's main line, usually out near the street. This redundancy valve at the location of the subdivision's sewage system tie-in for each individual home prevents common sewer water/subdivision sewer water from being pumped back into the homeowners' pump chamber. **Notably, there is no redundancy valve in the system at *20 this home at the subdivision tie-in as I confirmed on my personal inspection.** [83]

Mr. Wright further explained that when a home's grinder pump station becomes compromised, like the Coopers' did in this case, sewage from the City's main line "quickly fills the pump chamber under pressure and relieves the pressure in the pump chamber by going up the home's central four-inch (4″) gravity pipe," which then "results in flooding the home with sewage water, which is what happened in this case **when the pipe cracked above the manufacturer's check valve."** [84] The amount of sewage that flooded the home further supports that the sewage originated from the City's line when no water was running in the home. [85] Even with the air conditioner producing water while the Coopers' were away, Mr. Wright highlighted that the amount of sewage that flooded the Coopers' home exceeded the capacity that could be held in the Coopers' plumbing system. [86] Mr. Wright's conclusion aligned with Zimmerman's report, which declared that the crack in the grinder pump station and lack of a redundancy valve permitted the City's sewage to enter the Coopers' home through the cracked grinder pump. [87]

***21** What is more, Hydra inspected the Coopers' system the day after the incident and found that the grinder pump cracked. [88] Dilley, in his attempt to determine the appropriate coverage, spoke with Hydra and testified that Hydra told him that the water had to enter the Coopers' home from outside of their premises because no water was running in the home when the flooding began while the Coopers were away. [89]

Likewise, Dorsey inspected the Coopers' grinder pump system on July 8, 2022, approximately two months after the sewage flooded the Coopers' home. In his letter, he concluded that **"[i]f a crack occurred in the PVC pipe just before the check valve,** this would render the check valve useless and allow backflow of wastewater into your home, **which [the Coopers] believe to be the case in this situation."** [90] Dorsey's explanation as to how the City's sewage could have entered the Coopers' home mirrors Chris Wright's. Dorsey's letter even states that the Coopers agreed with the determination that the cracked grinder pump permitted sewage to be forced into their home. Therefore, the record evidence only supports the conclusion that no genuine dispute exists regarding the sewage's source, which was the City's main sewer line.

***22** The Coopers once more proffer statements from Dilley and Lindsay regarding the applicable coverage to dispute the unanimous conclusion from the professionals who personally inspected the Coopers' system that the sewage originated from

the City's main line.[91] However, as the district court explained, neither Lindsay's nor Dilley's statements pertain to the sewage's source, as neither of their alleged statements referenced the sewage originating from the Coopers' system. Lindsay's misstatement that Coverages A and B apply ***due to the location of the crack in the Coopers' grinder pump station*** "merely demonstrates Lindsay's misunderstanding about whether Coverage A applied if the plumbing failure was on premises."[92] Conversely, the Coopers contend that Dilley suggesting that the Coopers "make a claim on the City" creates a genuine dispute regarding the sewage's source because the City found "there was no evidence of a backup."[93] However, this statement is irrelevant, as the issue is not whether a backup on the City's line occurred. As explained herein, the Policy requires determining if the sewage originated from outside the Coopers' premises. Wright, Hydra, and Dorsey all concluded that the crack in the Coopers' system provided an avenue for the City's sewage to enter the Coopers' home.[94] Nothing in the record negates Chris Wright's conclusion that the ***23** pressure forced the City's sewage through the cracked union, filled the Coopers' tank with the City's sewage, and forced the sewage into the Coopers' home through their plumbing fixtures.[95]

The Coopers further rely on Dorsey's statement that the Coopers' grinder pump had no wear and tear or sign of deterioration to create a dispute regarding the sewage's source.[96] This observation is also irrelevant because Dorsey inspected the grinder pump two months *after* Hydra repaired it.[97] Likewise, a city ordinance requiring a redundancy valve has no bearing on the Policy's interpretation, as the Policy does not contemplate an ordinance for applicable coverage.

Accordingly, this Court should find that the Coopers failed to present evidence that genuinely disputes the unanimous conclusion from the two plumbers and grinder pump specialist who personally inspected the Coopers' system that the sewage that flooded their home originated from outside of their premises. Consequently, the BUSD limits apply, and the district court's grant of summary judgment should be affirmed.

***24 II. The district court properly held that the Coopers failed to genuinely dispute that Adam Dilley had no authority to extend the Coopers' coverage beyond the applicable BUSD limits.**

The record is clear that Adam Dilley had no authority to alter the terms of the Coopers' Policy, which unambiguously provided that the BUSD limits cover damage incurred from sewage that originated from outside of the premises. As the district court iterated, "[a]n agent's oral representations can modify the policy *only if* it is ambiguous; when the contractual language is plain, there can be no modification."[98] The Coopers have never argued that the Policy's language regarding the BUSD coverage and its application is ambiguous. In fact, by failing to dispute State Farm's assertion that the Policy's language is unambiguous, the Coopers conceded any argument to the contrary before the district court.[99] Accordingly, the Coopers have waived the issue and cannot assert it on appeal.[100]

Regardless of conceding that the Policy is unambiguous, the Coopers still seek reversal of the district court's holding that State Farm is not bound to pay beyond the applicable BUSD coverage per the Policy's plain language. Specifically, the ***25** Coopers rehash the issue of whether Adam Dilley's alleged representations - which contradicted the Policy's clear, plain language - amended the Policy's terms and made State Farm liable beyond the applicable BUSD limits. This Court, however, should affirm the district court's ruling that the Coopers created no genuine dispute regarding Dilley's lack of authority to amend the Policy's terms and extend their coverage.

A. The record does not support that State Farm permitted Dilley to create coverage beyond the Policy's terms.

The Coopers failed to present evidence that supports that Dilley had actual or apparent authority to alter the terms of the Policy and bind State Farm to coverage beyond the BUSD's limits. "Under Mississippi law, [an insurer] is a principal which is bound by the actions of its agent [ ] within the scope of that agent's real or apparent authority."[101] "Actual authority, also termed

express or direct authority, is the authority actually conferred by the principal." [102] Akin to their district court briefing, "[t]he Coopers never state whether they pursue their claim under actual or apparent authority." [103] The Coopers do not assert that Dilley received actual authority from State Farm to amend the Policy's Coverages A and B to include damages from sewage originating from outside the Coopers' premises, nor can they as the record ***26** contains no evidence showing State Farm granted such authority. Therefore, should this Court find that an agent's representations can modify an unambiguous policy, the only remaining agency theory under which the Coopers could seek relief is apparent authority.

Apparent authority only exists where three elements are satisfied: "(1) acts or conduct on the part of the principal indicating the agent's authority; (2) reasonable reliance on those acts; and (3) a detrimental change in position as a result of such reliance." [104] "First, the Coopers have offered no arguments suggesting apparent authority." [105] Rather, the Coopers have blanketly declared that a jury could find that State Farm was bound by Dilley's alleged representations. [106] This Court should affirm the district court's finding that the Coopers fatally failed to satisfy the requirement that they reasonably relied on Dilley's alleged representations.

The record only supports that the Coopers had actual knowledge of the possibility that the BUSD limits could apply contingent upon the sewage's source. Specifically, the Coopers' own Statement of the Case concedes that Dilley explained to the Coopers that the BUSD limits could apply based on the source of the sewage. [107] Mrs. Cooper even testified in her deposition that the Coopers purchased ***27** the BUSD coverage because "with the city sewage and it comes into your house or whatever, it's just good to have." [108] These facts only support the conclusion that the Coopers had notice that the plain language of the Policy determined coverage based on the sewage's source - an issue that continued to be investigated beyond Dilley's visit. [109] "And even if the Coopers lacked that actual knowledge, '[w]hether the policy was read or not, [ ] constructive knowledge of its contents is imputed to the policyholder.'" [110]

As discussed herein, the Coopers do not contest that the plain language of the Policy unambiguously states that the BUSD limits, not Coverages A and B, apply to damage resulting from sewage water originating from outside the Coopers' premises. Mississippi law is firm, and the district court agreed, that "a party's reliance on representations by an insurance agent that contradict the policy language is unreasonable." [111] The Coopers' reliance on Dilley's alleged representations that their claim would be covered by Coverages A and B is unreasonable as a matter of law. [112] Consequently, the Coopers cannot satisfy the requirement of reasonably ***28** relying on Dilley's alleged misrepresentations to establish apparent authority to amend the Policy.

The cases on which the Coopers rely do not support that Adam Dilley had the requisite authority to amend the Policy's plain unambiguous language. The Coopers once again cite *Hewett-Williams & Williams C. Co. v. Capital Fire I. Co.* [113] to support their argument that Dilley had the requisite authority to extend their coverage beyond the applicable BUSD limits. [114] To reiterate the district court: An insurer's vice president conducting his own investigation and approving an agent's adjustment "is different from saying the adjuster had actual (or even apparent) authority to extend coverage beyond the policy, and the Coopers offer neither evidence nor argument that State Farm expressly approved Dilley's purported statements." [115] The facts of *Fidelity-Phenix Fire Insurance Company v. Redmond* [116] are equally distinguishable. There, the Redmond agent issued an insurance policy despite knowing that the insured did not satisfy the requisite conditions for the purchased coverage. [117] Here, Dilley did not issue the Coopers' Policy. He merely adjusted their claim in accordance with the Policy that they already purchased. Dilley also notified the Coopers that their coverage could be limited to the BUSD ***29** Endorsement depending on the sewage's source, which the evidence supports to be the City's main sewer line.

Nothing supports the theory that Dilley had apparent authority to extend the Coopers' coverage. "Dilley's alleged statements ... cannot create coverage where none exists." [118] Therefore, this Court should find that the Coopers failed to genuinely dispute

that Dilley had authority to bind State Farm to coverage beyond the applicable BUSD limits and affirm the district court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, Appellee State Farm Fire and Casualty Company respectfully requests that this Court affirm the district court's decision.

Appellee further requests that all costs be taxed against Appellants and that this Court award Appellee any other relief to which it may be entitled at law or in equity. Fed. R. App. P. 39(a)(4).

Dated: December 27, 2024

Respectfully submitted,

STATE FARM FIRE AND CASUALTY

COMPANY, Appellee

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Footnotes

1 ROA.316.

2 ROA.344; ROA.346-47.

3 ROA.369.

4 *Id.*

5 ROA.576:14-20.

6 ROA.394:4-18; ROA.395:10-13.

7 ROA.394:23-24; ROA.395:1-6.

8 ROA.394:19-22.

9 ROA.406:4-11.

10 ROA.430:6-17; ROA.431:1-25; ROA.432:1-16.

11 ROA.397:16-21.

12 ROA.398:11-23, ROA.399:1-25; ROA.400:1.

13 *Id.*

14 ROA.400:2-4.

15 ROA.440:6-14; ROA.64.

16 ROA.441:16-23; ROA.64.

17 ROA.495:5-8; ROA.372.

18 ROA.558:6-10.

19 ROA.485:22-25; ROA.486:1.

20 ROA.713:2-14.

21 ROA.713:15-20.

22 ROA.713:21-25; ROA.714:1-3; ROA.605:1-15.

23 ROA.608.

24 ROA.608; ROA.386:14-25.

25 ROA.608.

26 *Id.*

27 ROA.512:21-25.

28 ROA.62.

29 ROA.63.

30 ROA.618.

31 ROA. 152-56.

32 ROA.515:15-17; ROA.601-02.

33 ROA.516:18-22; ROA.601-02.

34 ROA.596:14-20; ROA.601-02.

35 ROA.597:1-3.

36 ROA. 15-42.

37 ROA.8-13.

38 ROA.265-67.

39 ROA.311-12.

40 ROA.662.

41 ROA.675.

42 ROA.676.

43 ROA.677.

44 ROA.785.

45 ROA.792.

46 ROA.793.

47 *Id.*

48 ROA.800.

49 ROA.796 (emphasis included).

50 *Id.*

51 ROA.797.

52 *Id.*

53 *Id.*

54 ROA.800.

55 ROA.798.

56 *Id.*

57 ROA.798-99.

58 ROA.799.

59 ROA.800.

60 ROA.803.

61 ROA.801.

62 ROA.802.

63 *Id.*

64 ROA.803.

65 ROA.677.

66 ROA.803.

67 *State Farm Fire & Cas. Co. v. Flowers*, 854 F.3d 842, 844 (5th Cir. 2017).

68 Fed. R. Civ. P. 56(a).

69 *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 759 (5th Cir. 2002).

70 *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012).

71 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

72 *Deramus v. Jackson Nat. Life Ins. Co.*, 92 F.3d 274, 275 (5th Cir. 1996).

73 Appellant's Br. at 22.

74 ROA.344-346, 348-349.

75 ROA.369.

76 No. A-14-CA-167, 2015 WL 1564783, at *11 (W.D. Tex. Apr. 7, 2015); ROA.795.

77 *Id.* (emphasis added).

78 ROA.795 (finding the Coopers conceded by failing to address the issue of interpretation and ambiguity); *see also Criner v. Tex.-N.M. Power Co.*, 470 F. App'x 364, 368 (5th Cir. 2012) ("[i]f a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (internal citations omitted).

79 Fed. R. Evid. 702.

80 *Parker v. State Farm Fire & Cas. Co.*, No. 2:22-CV-45- HSO-BWR, 2023 WL 4425599, at *4 (S.D. Miss. May 22, 2023) (finding certain issues, including "what caused Plaintiff's property damage and whether that cause is 'covered' under the policy," required expert testimony); *O'Neil v. Allstate Prop. & Cas. Ins. Co.*, No. 5:17-CV-70-KS-MTP, 2018 WL 4001978 at *5, 2018 U.S. Dist. LEXIS 238715 at *12-13 (S.D. Miss. June 25, 2018) ("[T]estimony regarding the causation of structural damage of this sort [i.e., property and foundation damages allegedly caused by a lightning storm or subsequent attempts to repair] exceeds the scope of permissible opinion testimony for lay witnesses because it requires specialized or technical knowledge, experience, or training."); *Palmer v. Sun Coast Contracting Servs., Inc.*, No. 1:15cv34-HSO-JCG, 2017 WL 3222009, at *2, 2017 U.S. Dist. LEXIS 118165, at *5 (S.D. Miss. July 27, 2017) ("Plaintiffs offer no legal authority to support their position that they themselves as lay witnesses are qualified to offer opinions on causation as it pertains to [alleged mold, mildew, or termite damage] ... because it is clearly based on scientific, technical, or other specialized knowledge within the scope of Rule 702.").

81 ROA.800 (internal citations omitted).

82 ROA.611 (emphasis added).

83 ROA.612-14 (emphasis added).

84 ROA.615 (emphasis added).

85 ROA.614-15.

86 *Id.*

87 ROA.608; ROA.618.

88 ROA.438:1-7.

89 ROA.713:15-21.

90 ROA.157 (emphasis added).

91 Appellants' Br. at 23.

92 ROA.798.

93 Appellants' Br. at 23.

94 ROA.618; ROA.157; ROA.149.

95 ROA.618.

96 Appellants' Br. at 23.

97 ROA.519:15-22; ROA.798-799.

98 ROA.803 (quoting *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 438 (5th Cir. 2007) (citing *Am. States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 555 (5th Cir. 1998)) (emphasis added).

99 *See* ROA.792, n. 3 (quoting *Taylor v. Greenville Pub. Sch. Dist.*, No. 4:18-CV-093 MPM-JMV, 2019 WL 2995918, at *1 (N.D. Miss. July 9, 2019)) ("[T]o the extent that plaintiff failed to address the arguments which [Defendants] raised in their briefing, those arguments are properly considered to be conceded.").

100 *Criner*, 470 F. App'x at 368 ("[i]f a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.").

101 *Barhonovich v. Am. Nat. Ins. Co.*, 947 F.2d 775, 777 (5th Cir. 1991) (citing *Ford v. Lamar Life Ins. Co.*, 513 So. 2d 880, 888 (Miss. 1987)).

102 *Durant Healthcare, LLC v. Garrette*, 362 So. 3d 64, 77 (Miss. Ct. App. 2022).

103 ROA.801.

104 *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 439 (5th Cir. 2007).

105 ROA.802.

106 Appellants' Br. at 22.

107 Appellants' Br. at 10.

108 ROA.576:14-17.

109 *See Barhonovich*, 947 F.2d at 778 ("In Mississippi, a person such as [plaintiff] who knows he is dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of the agent's authority.").

110 ROA.802 (quoting *Leonard*, 499 F.3d at 438).

111 *Leonard*, 499 F.3d at 438 (citing *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 464 (5th Cir. 2003)).

112 *Id.*

113 188 F.2d 241, 244 (5th Cir. 1951).

114 Appellants' Br. at 21.

115 ROA.801 (citing *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010)); *Hewett-Williams*, 188 F.2d at 243-44.

116 111 So. 366 (Miss. 1934).

117 *Id.* at 367.

118 ROA.803.

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2024 WL 4919755 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Ronald COOPER and Shirley Cooper, Appellants,
STATE FARM FIRE AND CASUALTY, Appellant.

No. 24-60466.
November 27, 2024.

Appeal from the United States District Court for the Southern District of Mississippi, Northern Division, No. 3:23-cv-100-DPJ-FKB

Brief of Appellants Ronald Cooper and Shirley Cooper

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*III *STATEMENT REGARDING ORAL ARGUMENT*

Appellants do not request oral argument in this case.

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*v *TABLE OF AUTHORITIES*

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*vii *JURISDICTIONAL STATEMENT*

Ronald Cooper and Sherry Cooper are appealing from the August 28, 2024, final judgment granting summary judgment for State Farm. ROA.805, RE.10. They timely filed a Notice of Appeal dated September 10, 2024. ROA.806, RE.8. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

*viii *STATEMENT OF ISSUES*

1. The district court erred in finding that Dilley's representations did not bind State Farm.

2. There was a material issue of fact regarding whether the backup was caused by a failure on the premises or was a sewage backup outside the premises. The district court erred in granting summary judgment on this basis.

*9 *STATEMENT OF THE CASE*

The Coopers own a home in Madison, Mississippi, insured by State Farm. On May 6, 2002, they left their house at 4:00 p.m. for choir practice. When they returned at 11:00 p.m., they discovered there was sewage backup in one of the home's downstairs showers. The sewage ended up covering approximately one-half of the 2,400 square feet of the first floor of the house. The Coopers called Hydra Plumbing which came the next day and determined that a joint had busted allowing backflow into the house. ROA.440.

The Coopers notified State Farm which sent out adjuster Adam Dilley to assess the damage on May 9, 2022. Dilley testified that when he was first apprised of the claim, he called the Coopers and arranged to see the house immediately because it sounded pretty urgent. ROA.709. Before going to the home, though, he reviewed their policy of insurance. ROA.708. When Dilley got to the house, a crew from 911 Restoration was there doing mitigation work in a first floor bedroom, bathroom and maybe a hallway. ROA.710. A crew from 1-800-Packouts was wrapping up furniture. Dilley said that this was nothing out of the ordinary. ROA.710. The contract of insurance requires the homeowner mitigate to prevent ***10** further damage and the workers in the house were doing standard mitigation. ROA.712. Mrs. Cooper stated that before Dilley got to the home, she had called State Farm and State Farm told her she was doing the right thing by having work done right away to start mitigation. ROA.486. In fact, State Farm wanted to know if the work had already started given the toxic nature of the damage. ROA.487.

Dilley and Mr. Cooper then looked at the grinder pump system to try to determine the source of the water damage to determine coverage. Mr. Cooper explained that there had been a blinking light on there and they called Hydra out a couple of days before. They were gone for the evening, returned home after several hours and found water coming up from their drains. Mr. Cooper had photos on his phone. Dilley then called the Hydra Plumbing representative Jeremy to determine what he found when he showed up and Jeremy explained that the water had to come from off of the premises as no water was running in the house

at the time. ROA.713. Dilley explained to the Coopers that there was coverage but it could possibly be under backup sewer coverage [1] versus Coverage A; [2] the former had a dollar limit. ROA.713-714.

***11** During that first visit to the house, Dilley did a walk-through of the property during which he was giving comments as to what was water damaged. ROA.716. "I was pointing out what's damaged. It was fairly obvious," Dilley stated. ROA.717. As far as Dilley can remember, the only area about which he disagreed with the Coopers regarding remediation was a closet in the main bathroom. Dilley told the Coppers that there was no water damage there and Mr. Cooper disagreed. ROA.718. When they got to an area outside of the kitchen, Dilley noted that it needed to be addressed as well. It was the only area needing mitigation that the crews had not yet started on but water was soaking up the floors in the cabinets. ROA.719. Dilley explained that water was soaking up in the cabinets, pressboard, and they were swollen. Richard and Mary of 911 Restoration were standing around and he pointed it out to them. "I left it up to the mitigation company, but I pointed out that it's damaged and would probably need to come out," Dilley stated. ROA.719-720.

Richard Lee Sims of 911 Restoration stated that during the walk through on May 9, 2022, Dilley approved the following: removal of baseboards, base shoes, and wood flooring on the dining room and entry; removal of baseboards, base shoe, 2 foot flood cut, and wood flooring in the hallway leading to the bedroom to the left; removal of baseboards removal ***12** of baseboards, base shoe, 2 foot flood cut, wood flooring, vanity, cabinetry, and toilet in half bath; removal of baseboards, 2 foot flood cut, and wood flooring pantry (s), as well as all shelving; removal of baseboards, 2 foot flood cut, and wood flooring in keeping room; removal of baseboard, cabinetry while saving hardware items, granite countertops and hardwood floor, full height cabinetry and oven with microwave in kitchen; hallway to back bedrooms, 2 foot flood cut in hallway and bedrooms, all hardwood flooring in closets and bedrooms to the left and right respectively; removal of ceiling height built in cabinets that were sewage category 3 contaminated; removal of ceramic tile in bathroom, 2 foot flood cut in garage along one wall category 3 contamination, removal of toilet and vanity with granite countertop, glass door to shower and approximately 12-14 inches of ceramic tile from sewage backup; hallway to stairwell closet off hardwood flooring including closet and hallway base and shoe; Master bedroom all base and shoe and hardwood flooring 2 foot cut on 1 wall; master bathroom removal of footed tub and wood casing; also approval of master shower tile; and treatment and drying of all square footage of demolition area. ROA.728. Sims explained that Dilley never mentioned to him that there were any coverage issues. ROA.728.

***13** At the end of the tour, Dilley explained that based on his initial analysis that the claim looked like it was a backup and sewer claim but he thought it was best that they retain a third party plumber to give them diagnostics on where and what caused their water damage. ROA.713-714; ROA. 721. Dilley then contacted plumber Chris Wright at Wright Plumbing to determine the origin of the backup. ROA.722. He concluded that "the water came from off premises due to lack of a check valve. Or something along those lines." ROA.723.

In June of 2022, Dilley became a claims manager and was replaced as the adjuster on the Cooper claim with Brian Lindsey of Pilot Catastrophe Services, Inc., an independent adjusting firm. ROA.725. On June 23rd of 2022, Lindsay wrote that the investigation of the Coopers' claim was concluded and that Canton Municipal Utilities confirmed that the burst pipe was located on the Cooper's property, and installation of a check valve to prevent backflow would not have been the responsibility of CMU. The claim would be covered under Coverage A as overflow. ROA.726, 731 Dilley admitted that this was contrary to the conclusion that he had reached. ROA.437. That very evening, however, Brian Lindsey called the Coopers and left a voice mail stating that, after further review, the claim would be approved as a backed up sewage claim. ROA.732. In a letter dated June ***14** 24, 2022, Lindsay wrote to the Coopers that the "cause of this sewage entering your home was reported to be a combination of your grinder pump system failing due to wear and deterioration, and lack of a check valve between your grinder pump and the city sewer line." ROA.733. Therefore, the damage was not covered under the policy's Coverage A but rather by the Back-Up Sewer or Drain Endorsement the limits of which were $45,879.00. ROA.733.

Dilley, however, also told the Coopers that this was just the start of the process and that if they could get a letter from Canton Municipal Utilities stating that it was not a sewage backup issue then State Farm would move on to their A, B and C coverage.

ROA.536. The Coopers proceeded to make a claim on Canton Municipal Utilities for damages due to a backed-up sewer. CMU responded that there was no sewage backup that would account for the sewage surge. ROA.428.

The Coopers also hired Scottie Dorsey of Dorsey Pump & Lawn to inspect the grinder pump. He examined it on July 8, 2022, and opined that there was no obvious wear or deterioration of the grinder pump system or the surrounding PVC pipe connections. "[T]he grinder pump system appears to be in adequate working order at this time." ROA.621. The grinder station included a check-valve within it. ROA.621. While there was ***15** no check valve between the grinder pump and the city tap, there is no requirement that one be placed there. ROA.621.

State Farm moved for summary judgment arguing that the damage was covered by the Back-up of Sewer of Drain provision and that nothing that the adjuster did changed that. ROA.311. The Coopers opposed the motion. ROA.688.

The trial court granted summary judgment for State Farm. ROA.785, RE.11. In its ruling, the court noted that the property damage dispute was controlled by the origin of the sewage water. COA.793. Sewage and water within the plumbing system were addressed under Coverages A and B - Dwelling and Personal Property. COA.793. Additional coverage, though, was provided under a "Back-up of Sewer or Drain" provision. ROA.795. The district court found that State Farm was able to show that the sewage was the result of a defect within the Coopers' plumbing system rather than a back-up of the city's line and that the Coopers' evidence to the contrary did not make out a material factual dispute. ROA.799. As for the argument that the Coopers relied to their detriment on Dilley's statements while inspecting the damage, the district court found that there was no evidence that Dilley had the authority to make any statements that contradicted the policy language. ROA.801.

***16** *SUMMARY OF ARGUMENT*

The Coopers contended that the adjuster sent by State Farm approve the work being done by two remediators on the property and thereby binding State Farm to pay for the work. There was evidence on this issue sufficient to make out a jury question.

The same is true with regard to the coverage issue. State Farm itself went back and forth on which policy provision provided coverage and the Coopers had evidence to support their argument that coverage was provided under overages A and B - Dwelling and Personal Property rather than the BUSD endorsement.

ARGUMENT

Standard of review:

The United States Supreme Court has held that Rule 56 of the Federal Rules of Civil Procedures mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an essential element of that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

***17** Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). This standard provides that the mere existence of some factual dispute will not defeat a motion for summary judgment. See *Krim v. Banc Texas Group, Inc.*, 989 F.2d 1435, 1442((5th Cir. 1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). Rather, Rule 56 mandates that the fact dispute be genuine and material. *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313, 314 (5th Cir. 1995). The substantive law determines which facts are material, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986), and the Court must view these facts and the inferences to be drawn from them in the light most favorable to the opposing the motion. *Matsushita Elec. Indus. Co, Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *United*

States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); *Kelley v. Price Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993), cert. denied, 510 U.S. 10433 (1994); *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

***18** The party moving for summary judgment bears the initial burden of showing an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. 317 at 322-27. Once this burden has been met, the non-moving party can resist the motion for summary judgment by making a positive showing that a genuine dispute of material fact does indeed exist that it consists of more than bare allegations in briefs and pleadings. *Anderson*, 477 U.S. at 250. The non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 325. "This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Once the parties have submitted evidence of contradictory facts, justifiable inferences are to be drawn in the light most favorable to the non-movant. *Anderson*, 477 U.S. at 255.

Even if the standards of Rule 56 are met, a court may deny a motion for summary judgment if, in its discretion, it determines that "a better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 257; *Veillon v. Exploration Services, Inc.*, 875 F.2d 1197, 1200 (5th Cir. 1989). On appeal, the standard of review of the district court's grant of summary judgment is ***19** de novo. *Davidson v. Fairchild Controls Corp.*, 882 F.3d 180, 184 (5th Cir. 2018).

1. The district court erred in finding that Dilley's representations did not bind State Farm.

The district court granted summary judgment for State Farm on the claim that adjuster Dilley's approval of the work being done bound State Farm to cover it. The court held that the Coopers needed to show that Dilley had the authority, actual or apparent, to contradict the policy provisions. ROA.801.

As the district court noted, a policy holder seeking to recover based on an agent' apparent authority must show 1) acts or conduct of the principal indicating the agent's authority; 2) reasonable reliance on these acts; and 3) detrimental reliance. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 439 (5th Cir. 2007). ROA.801-802. In *Leonard*, the Fifth Circuit stated,
Somewhat tautologically, the Mississippi Supreme Court has explained that "[a]pparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880, 888 (Miss.1987).

Leonard, 499 F.3d at 439.

***20** Dilley did a walk-through of the Coopers' house on May 9, 2022. At that time, there were two companies on the premises doing work to mitigate the damages caused by the sewer water that backed up into the Cooper home. As Dilley admitted, the policy of insurance requires homeowners to mitigate damages. Evidence from Mrs. Cooper, Dilley, and Richard Sims of 911 support the Plaintiffs' theory that Dilley authorized the expenditures and thereby bound State Farm to pay for them. The Coopers put forth evidence State Farm sent their adjuster Dilley to the house as soon as practicable and that he 6 walked through the house, told the Coopers that there was coverage, and approved of all the remediation work that was being done on the premises by two different contractors. ROA.728, -729,733.

The Supreme Court of Mississippi has traditionally applied the general laws of agency to relationships arising out of the issuance and adjustment of insurance contracts. *McPherson v. McLendon*, 221 So.2d 75, 78 (Miss.1969)

"Under the law of agency, 'a principal is bound by the actions of its agent within the scope of that agent's real or apparent authority.' " *Andrew Jackson Life Ins. Co., v. Williams*, 566 So. 2d 1172, 1180 (Miss. 1990) (quoting *Ford v. Lamar Life Ins.*

Co., 513 So. 2d 880, 888 (Miss. 1987)). In ***21** other words, the acts of an agent like Dilley may be imputed to the agent's principal like State Farm.

Actual authority may be either express or implied in nature. Apparent authority arises when "the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he assumes to have." *McPherson*, *supra, at 78*. "A principal, having clothed his agent with the semblance of authority, will not be permitted, after others have been led to act in reliance of the appearances thus produced, to deny, to the prejudice of such others, what he had theretofore tacitly affirmed as to the agent's powers." *Id*.

"An adjuster sent to investigate a loss has apparent authority to act in settlement of the claim and to agree on the amount of the loss." 4 Couch on Ins. § 53:29. Where an adjuster for an insurance company approves an expenditure and the insured relies upon that authorization, the insurer is bound by the adjuster's actions. *Hewett-Williams & Williams C. Co. v. Capital Fire I. Co.*, 188 F.2d 241, 244 (5th Cir. 1951) citing *Fidelity-Phenix Fire Insurance Company v. Redmond*, 144 Miss. 749, 111 So. 366 (1934) ("Generally agents of insurance companies authorized to contract for risks, receive or collect premiums and deliver policies may confer upon a clerk or ***22** subordinate authority to execute the same powers, the service not being of a personal nature.").

When the facts are in dispute, it is for the jury to determine whether a given person or entity was an agent of the insurer or acting within its scope of authority. Couch on Insurance 2d, (Rev.ed) § 26:29;

Williams v. Lafayette Ins. Co., 640 F.Supp. 686, 688 (N.D. Miss. 1986).

In this case, there is evidence that would allow a jury to find that Dilley authorized the expenditures to mediate the damage to the Coopers' home and that State Farm was bound by his authorization even were it to exceed the amount allowed under the contract. In other words, a jury could find that Dilley bound State Farm for removal and repair work regardless of whether it finds that coverage was proper under Provision A or the BackUp Sewer or Drain Endorsement.

2. There was a material issue of fact regarding whether the backup was caused by a failure on the premises or was a sewage backup outside the premises. The district court erred in granting summary judgment on this basis.

State Farm determined that the Coopers were covered under a sewage backup provision rather than under the more generous parameters of Provision A. Its expert, Christopher Wright, opined that the sewage backup ***23** was caused by a back-up from off premises since there was no one at home when it occurred thereby making it impossible for a backup on premises to have happened. ROA.618.

> The combination of the lack of redundancy valve, the location of the break in the grinder pump chamber pipe, and the amount of sewage seen in the photographs attached hereto as Exhibit A, as discussed herein, confirms my conclusion that the sewage that flooded the Coopers' home on May 6, 2022, derived from the City's main sewer line off premises.

ROA.618. State Farm moved for summary judgment on that basis and the district court found for State Farm.

However, there is evidence whereby a jury could disagree with State Farm's conclusion. First of all, there's the fact that Lindsay's initial determination that coverage for the damage lay under Provision A. ROA.726, 731. He wrote, "Your claim will be covered under Cov. A as overflow." ROA.731. And even after State Farm concluded differently that it was not covered under Provision A, Dilley told the Coopers to make a claim on the City of Canton for the alleged sewage back up which the Coopers did and the City denied the claim finding there was no evidence of a backup. ROA.738-739.

State Farm's own evidence is far from conclusive as to how the backup occurred. Then there's the pump expert, Scottie Dorsey, hired by the ***24** Coopers who inspected the grinder pump and found nothing amiss including the check valve inside of the pump. He also opined that there is no requirement for a check valve between the pump and the city tap. ROA.739.

All in all, this was sufficient to make out a question of material fact with regard to the coverage making summary judgment improper. *Minter v. Great Am. Ins. Co. of New York*, 423 F.3d 460, 474 (5th Cir. 2005).

The Coopers had evidence that the sewage backup they experienced did not come from outside the premises as evidenced by the investigation done by CMU. Given these conflicting facts, a jury could find for the Coopers on their coverage claim.

CONCLUSION

The grant of summary judgment for State Farm was erroneous. The Coopers had evidence as to both the issue of Dilley's authority when he approved the work being done at the Cooper home as well as on the coverage issue to make out questions of material fact requiring that summary judgment be denied.

RESPECTFULLY SUBMITTED,

SHIRLEY COOPER, PLAINTIFF

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Footnotes

1 Also known as the Back-Up Sewer or Drain Endorsement or BUSD. See ROA.736.

2 ROA.734.