2025 WL 2964707 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

Kimberly CUTCHALL; Michael Cutchall, Plaintiffs-Appellants,
v.
CHUBB LLOYD'S INSURANCE COMPANY OF TEXAS, Defendant-Appellee.

No. 25-20024.
October 10, 2025.

On Appeal from the United States District Court for the Southern District of Texas (Houston Division) Case #: 4-23-cv-3745, Honorable Lee Rosenthal

Opening Brief for Appellee

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*III *STATEMENT REGARDING ORAL ARGUMENT*

Defendant/Appellee Chubb Lloyd's Insurance Company of Texas disagrees with the Statement Regarding Oral Argument provided by Plaintiffs/Appellants Michael and Kimberly Cutchall. This matter does not involve novel questions of law or fact, nor does it require an *Erie* guess in order for resolution of the presented issues.

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*1 *JURISDICTIONAL STATEMENT*

Defendant/Appellee Chubb Lloyd's Insurance Company of Texas ("Chubb") does not dispute Plaintiffs/Appellants Michael and Kimberly Cutchall's ("Appellants") Jurisdictional Statement.

STANDARD OF REVIEW

Appellants do not identify the relevant standard of review in their brief. As such, Chubb provides the following standard of review pursuant to Fed.R.App.P. 28(b)(4).

This Court reviews a grant of summary judgment *de novo*. *See* *Harness v. Watson*, 47 F.4th 296, 303 (5th Cir. 2022) (citing *Petro Harvester Operating Co., L.L.C. v. Keith*, 954 F.3d 686, 691 (5th Cir. 2020)). Thus, this Court "appl[ies] the same standards as the district court." *Huskey v. Jones*, 45 F.4th 827, 830 (5th Cir. 2022) (quoting *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015)). Accordingly, "[a]ll 'evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant.'" *Harness*, 47 F.4th at 303 (quoting *Tradewinds Env't. Restoration, Inc. v. St. Tammany Park, LLC*, 578 F.3d 255, 258 (5th Cir. 2009) (citation omitted)). "Summary judgment is appropriate 'when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.'" *Id.*

***2** However, not all factual disputes rise to the level of a "genuine issue of material fact." When a party fails to show the existence of an element essential to that party's case, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

ISSUES PRESENTED

Appellants fail to state proper issues for appeal. As such, Chubb provides the following issues for consideration:

1. Did Judge Rosenthal correctly hold Appellants' evidence insufficient to raise a genuine issue of material fact regarding the date of loss where Appellants' evidence failed to identify any loss date with reasonable certainty and Appellants and their experts testified as to multiple potential loss dates outside the policy period?

Suggested answer: Yes. Evidence that does not identify a date of loss with reasonable certainty or exclude other dates of loss with reasonable certainty does ***3** nothing more than provide an "unconfirmed rumor of loss" that is insufficient to bring a claim within coverage.

2. Did Appellants waive their arguments regarding concurrent cause of loss by failing to raise them to Judge Rosenthal?

Suggested answer: Yes. Appellants waived their current arguments regarding concurrent causation.

3. Did Judge Rosenthal properly apply the doctrine of concurrent causation to impose the burden on Appellants to segregate their damages between covered and non-covered damages?

Suggested answer: Yes. When Appellants' evidence admits more than one cause of damage, Appellants must allocate damages between the different causes of loss. Appellants' failure to do so is fatal to their claim.

4. Did Judge Rosenthal correctly find that Appellants failed to segregate concurrent covered versus noncovered causes of loss?

Suggested answer: Yes. Appellants did not sustain their burden to segregate concurrent covered versus noncovered causes of loss.

5. Did Judge Rosenthal properly hold that Appellants failed to raise a genuine issue of material fact regarding "bad faith" when they failed to establish breach of contract and did not provide a controverting expert affidavit to counter Chubb's bad faith expert?

***4** Suggested answer: Yes. Appellants' bad faith claims fail in the absence of breach of contract, a bona fide coverage dispute present, and no controverting expert affidavit.

STATEMENT OF THE CASE

A. Appellants' Original Claims and Removal

Appellants own a home insured by Chubb for policy periods including May 29, 2021, to May 29, 2022. *See* ROA.843. Appellants filed their original petition in Texas state court on September 5, 2023. ROA.25. According to Appellants' Petition, "[o]n or about September 7, 2021, the [home] sustained extensive damage from a severe storm that passed through the Houston, Texas area." ROA.26. Hail from the storm allegedly damaged the property's roof and allowed water to penetrate into Appellants' attic, where it mixed with rat feces to become harmful "Category 3 Water." ROA.26; ROA.955; ROA.962-965. Allegedly, the "Category 3 Water" then flowed down into the home's three floors necessitating large scale interior repairs. *Id.*. Appellants contend that they reported a claim to Chubb on or about September 7, 2021, when they discovered musty odors and water stains inside their home. ROA.907; ROA.946.

Chubb adjusted the claim and paid the covered portion of the damage. ROA.908; ROA.1033-1037. [1] Appellants never cashed the claim payment check and ***5** filed suit in the district court of Harris County, Texas. ROA.25; ROA.908. Chubb removed the case to the United States District Court for the Southern District of Texas, Houston Division on October 4, 2023. ROA.12.

B. Appellants' Unconfirmed Rumors of Loss

Over the course of discovery in the case, Appellants and their experts repeatedly provided hopelessly contradictory evidence of the alleged date of loss. Through their pleadings, testimony and expert reports, Appellants presented at least five different dates of loss:

[See chart on next page]

Alleged Hailstorm Date	Source of Alleged Hailstorm Date
Unknown, but maybe "March or April of 2021," with the potential for more than one storm date.	March 22, 2024, Deposition of Appellant, Kimberly Cutchall. ROA.944-945.
Unknown, but maybe March 2021. Or maybe also January, February, or April 2021.	March 26, 2024, Deposition of Appellant Michael Cutchall. ROA.905-906.
May 18, 2021	March 31, 2022, Report and April 4, 2024 deposition testimony by Appellants' public adjuster, Nick Halliday. ROA.2046 (Report); ROA.956-958)(Deposition).
MAY 29, 2021	**DATE OF POLICY INCEPTION** ROA.843.
June 15, 2021	New affidavit from Mr. Halliday provided in response to Chubb's motion to exclude Appellants' experts and in response to Chubb's motion for summary judgment. ROA.2009.
August 16, 2021	May 7, 2024 Report and August 15, 2024 deposition testimony from Appellants' expert on causation and damages, Brandon Allen. ROA.1204 (Report); ROA.1194-1195 (Dep.).
September 7, 2021	Original Petition of Appellants, filed September 5, 2023. ROA.26. Appellants never amended their original petition. Also, Mr. Allen's report dated May 7, 2024. ROA.2565.

MAY 29, 2022	**DATE OF POLICY EXPIRATION** ROA.843.
April 29, 2023	Report by Appellants' expert, Mr. Allen dated August 15, 2024. ROA.1090.

***6** Notably, three out of the five dates proposed by Plaintiffs ("March or April of 2021," May 18, 2021, and April 29, 2023) are not even within the Chubb policy period (May 29, 2021 to May 29, 2022).

***7 C. Appellants' Own Evidence Proves that their Claimed Interior Water Damage Resulted From Multiple Causes, Including Causes Which are Not Covered**

During the adjustment phase of the claim, Appellants claimed many problems with their home should be traced to a single hailstorm, and then claimed that the repair work would require a substantial rebuild of their property interior due to wide-spread interior water damage. ROA.948; ROA.955; ROA.962-965. During discovery in this case, Chubb learned that Appellants had retained two different experts prior to suit to opine on the cause of the damage to the home. Appellants never disclosed these experts to Chubb during the adjustment of their claim.

One of the undisclosed experts, Freedom 76, produced a report identifying a need to "provide and install nine (9) new O'Hagan vents and paint closely to match roof tile color" in order to:

to correct the ***inadequate ventilation of the attic currently, which is causing moisture to build up*** in the walls between the attic space and conditioned space of the home. ***The moisture buildup is causing water damage,*** as well as mold and mildew on the interior walls and ceilings.

ROA.1038. (Emphasis added).

Appellants' second undisclosed expert, Mold Inspection Sciences of Texas, produced a report that identified yet more causes of loss not related to any hailstorm, opining that Appellants' **"HVAC Problems" were "associated with" or the "suspected source" of "excessive condensation and/or high relative humidity"** within Appellants' home. ROA.1039-1042. (Emphasis added).

***8 D. After the Documents from Freedom 76 and Mold Inspection Sciences of Texas Came to Light, Appellants' Expert Abandoned His Opinions Regarding Interior Water Damage**

On August 15, 2024, Chubb deposed Mr. Brandon Allen, Appellants' expert on causation and damages. During this deposition, Mr. Allen abandoned all opinions related to alleged interior damage including the claim that water mixed with rat feces contaminated Appellants' property, and abandoned his original opinions as to the date of loss. ROA.1187-1188; ROA.1194. Instead, Mr. Allen testified that his opinions were limited to alleged roof damage, which he claimed required the replacement of Appellants' roof. ROA.1187-1188.

E. Appellants Sought a "Do Over" After Chubb filed its Motion for Summary Judgment

Chubb filed its Motion for Summary Judgment on September 14, 2024. ROA.790. Appellants responded in part by seeking to completely re-work their case to avoid these dispositive issues and derail Judge Rosenthal's scheduling order. The trial court denied these requests. [2]

***9 F. Judge Rosenthal Grants Chubb's Motion for Summary Judgment**

On December 31, 2024, Judge Rosenthal granted summary judgment in favor of Chubb dismissing the breach of contract claims because Appellants failed to provide evidence raising a dispute about whether the claim was covered and failed to distinguish between covered and uncovered damages. ROA.3800. Judge Rosenthal also dismissed the Appellants' extra-contractual claims related to common law bad faith, violations of Texas Insurance Code provisions under Tex. Ins. Code § 541.060 and violations of the Texas Deceptive Trade Practices Act. Judge Rosenthal dismissed Plaintiffs' "bad faith" claims, finding that Appellants failed to establish a breach of contract, failed to show anything beyond a "bona fide dispute" and failed to controvert Chubb's expert testimony. ROA.3817-3818.

SUMMARY OF THE ARGUMENT

Appellants' Evidence Fails to Establish a Date of Loss Within the Policy Period.

Under Texas law a claimant must provide sufficient information to show that a loss occurred within the time covered by an insurance policy. To satisfy this burden, a claimant must show the existence of a covered event during the policy period with reasonable certainty. Such evidence must also exclude with reasonable certainty the existence of other dates of loss. Evidence which does not meet this standard constitutes "unconfirmed rumors of loss" and will not satisfy this burden as a matter of law.

***10** Judge Rosenthal correctly reviewed Appellants' shifting and contradictory evidence to conclude that Appellants' evidence failed to raise a genuine issue of material fact regarding the date of loss and instead, at most, provided "unconfirmed rumors of loss" insufficient to discharge their burden of proof.

Appellants Waived Their Current Arguments Regarding Concurrent Cause of Loss and Abandoned Their Claims Concerning Interior Water Damage

Appellants failed to raise any of their current arguments concerning application of the doctrine of concurrent causation with Judge Rosenthal. Particularly, at the district court, Appellants argued only that the concurrent cause of loss doctrine should be pled as an affirmative defense and that Chubb failed to identify a provision in its Policy that required segregation. Appellants raise neither of these arguments in this appeal, choosing instead to raise 16 pages of new arguments not given to Judge Rosenthal for consideration. Because Appellants raise these issues for the first time on appeal, those arguments have been waived.

Appellants Failed to Segregate Concurrent Causes of Loss

Appellants alleged interior water damage due to water which entered their home as a result of hail damage to their roof. However, the undisputed evidence established that multiple causes of ongoing interior water damage existed, thus requiring Appellants, to segregate damages between covered and uncovered loss pursuant to the concurrent causation doctrine. Appellants provided no basis by ***11** which the interior water damage could be segregated among the various sources of water causing interior damage, and therefore failed to meet their burden of proof.

Appellants' Failure to Establish Breach of Contract, The Existence of a Bona Fide Dispute, and Appellants' Failure to Contradict Chubb's Expert are Fatal to Their Bad Faith Claims.

Judge Rosenthal correctly disposed of Appellants' bad faith and other extracontractual claims.

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPERLY ENTERED BECAUSE APPELLANTS' EVIDENCE FAILS TO MEET THEIR THRESHOLD BURDEN TO BRING A CLAIM WITHIN COVERAGE

A. Texas law requires that a claimant provide sufficient evidence to show that a covered injury occurred at a time covered by the applicable policy.

In *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 400 (Tex. 2016), the Texas Supreme Court ruled that "[i]n any insurance action, an insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy." *Id.* at 400. Thus, "[t]he insurer has neither a 'right' nor a burden to assert noncoverage of a risk or loss until the insured shows that the risk or loss is covered by the terms of the policy." *Id.* As part of its threshold burden of proving coverage, the insured must "establish that the injury or damage was incurred at a time covered by the policy." *Id. See also Superior Crude Gathering, Inc. v. Zurich Am. Ins. Co.*, 2014 Tex. App. LEXIS 8247, *14 (Tex. App.--Corpus Christi 2014, no pet.) ("[the Court] need not consider a policy's exclusions and other ***12** provisions unless and until the insured shows its claim comes within the policy's insuring agreement"); *Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004) (same); *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018) (same). *See also*, 21f-408f Appleman on Insurance Law & Practice Archive § 12903. Appellants failed to meet this burden.

B. Evidence That Presents an "Unconfirmed Rumor of Loss" Will Not Satisfy the Insured's Burden of Proof to Bring the Claim Within Coverage

This Court has addressed on several occasions the quantum and quality of evidence necessary to raise a genuine issue of material fact regarding when a loss occurred. In *New Hampshire Ins. Co. v. Martech USA*, 993 F.2d 1195 (5th Cir. 1993), the insured became aware of property damage during the policy period, but could provide no evidence as to when the damage actually occurred. *Id.* This Court held that the evidence did not preclude the possibility that the property was damaged before or after the relevant policy period. *Id.* This Court granted summary judgment to the insurer, holding "Proof that the claimed losses occurred during the policy period is an essential element of [the insured's] coverage claim on which it bears the burden of proof. Unconfirmed rumors of loss are insufficient to satisfy that burden." *Id.*

In *Stagliano v. Cincinnati Ins. Co.*, 633 Fed. Appx. 217 (5th Cir. 2015) this Court considered whether property was damaged by a certain hailstorm, and not by ***13** another storm occurring outside the policy period. *Id.* at 219. The insured attempted to prove that the damage occurred within the policy period by offering an expert's affidavit. *Id.* The expert could only allude to his credentials, a recitation of the hail damage observed, and a conclusory "subjective opinion" that the damage resulted from a hailstorm within the policy period. *Id.* This Court reaffirmed *Martech* and held that the affidavit was insufficient to create a fact issue because it presented "unconfirmed rumors of loss." *Id.*

Most recently, the Western District of Texas considered an insured trying to establish the timing of a claimed hail loss in *343 West Sunset, LLC v. Seneca Ins. Co.*, 2021 U.S. Dist. LEXIS 218459 (W.D. Tex. 2021), *adopted by, 343 West Sunset, LLC v. Seneca Ins. Co.*, 2021 U.S. Dist. LEXIS 218456 (W.D. Tex. 2021). In that case the fact witness the insured presented to establish that the loss fell within the policy period could not recall any particular storm and the insured's expert conceded that some of the damage could have been caused by another storm. *Id.* at *10. The Court held: "At most, all that is presented here are "unconfirmed rumors of loss" that do not raise a triable issue concerning whether any losses occurred during the coverage period."

Together, *Martech, Stagliano*, and *343 West Sunset* stand for the proposition that where the insured cannot identify with reasonable certainty when a hailstorm occurred and the insured's experts present only conflicting, conclusory, or ***14** incomplete information that does not place the loss within the policy period or address the possibility that the damage occurred outside the policy period, the insured's evidence is insufficient to meet the insured's burden of proving that the loss occurred during the policy period. Such evidence, which *Martech* characterized as "unconfirmed rumors of loss", cannot create a genuine issue of fact and therefore fails as a matter of law.

C. Judge Rosenthal correctly concluded that Appellants' evidence regarding the date of loss failed to raise a genuine issue of material fact.

As set forth above, ample authority informed Judge Rosenthal's decision in this case. Judge Rosenthal correctly held that Appellants' evidence concerning the existence of a hailstorm amounts to nothing more than the type of "unconfirmed rumors of loss" that were held to be insufficient to defeat a motion for summary judgment in *Martech, Stagliano*, and *343 West Sunset.* Appellants either provided contradictory dates as to the date of loss or could not identify one at all, and their own experts disagreed about the date of the storm. ROA.3813.

Although Appellants' initially claimed that the hailstorm in question occurred on September 7, 2021 and reiterated this date in their live petition. See, ROA.2565 and ROA.26. Appellants now posit that the date of the alleged hailstorm was June 15, 2021 based on the sham affidavit of their public adjuster, Mr. Halliday. ***15** ROA.2000; ROA.2009. Appellants' contend this statement discharges their burden to show a date of loss within the Policy period. This is incorrect.

First, Appellants' own deposition testimony contradicts Mr. Halliday and demonstrates the existence of other potential loss dates outside the Chubb policy period. During her deposition, Appellant Kimberly Cutchall admitted the following:
Q. I want to talk about this -- the storm itself now. Is that okay?

A. Sure.

Q. What was the date of the storm?

A. The date of our -- our claim is September. I believe that the -- the storm -- and you'll have to get -- I think you need to get clarification from Nick, 'cause I think he has -- excuse me, I think he has pinpointed the storm date.

Q. **Well, I'm asking you what the storm date is.**

A. I believe it was March or April of -- oh, you went away. Where did you go? Hold on. Oh, there you go. I believe it was March or April of 2021.

* * *

Q. I think that was trying to ask you if you recall storm damage or a storm occurring at your house in September of '21.
A. **I don't remember specifically. I don't know that the -- I don't think it happened in September. I think it was spring, but I don't have specific dates for you.**

Q. For the storm that occurred in March or April of '21, do you recall what time of day the storm happened?

A. I don't. I don't have any recollection of that.

* * *

Q. Is it possible that there was more than one storm that affected your house?
A. **I -- I have no idea. That would be big speculation on my part.**

Q. **So why is it speculating if it's your house?**

A. **I -- I have no idea.**

***16** ROA.944-ROA.945. (Emphasis added).

During his deposition, Appellant Michael Cutchall admitted the following:
Q. One of the allegations in the lawsuit against my client is that your home experienced damage from a storm that penetrated the roof and allowed water to come into the interior. Do you understand that, sir?

A. Yes.

Q. Can you tell me about the storm?

A. I really can't.

Q. Why not?

A. Well, we -- I -- do you live in Houston?

Q. Yes, sir.

A. Okay. So we're on the Gulf Coast. We - I mean, we have freezes, we have hurricanes, we have windstorms, so to -- I couldn't tell you what hurricane happened. So we just have, you know, significant weather. The only thing I know is that supposedly around the same time that this event happened with us, it happened to one of your general counsels in our same neighborhood. **So when it was and what storm it was and on what day it was, I honestly have no idea.**

Q. **Can you narrow it down to a month?**

A. **I've been told that they've narrowed it down to March. But I couldn't tell you what storms came through in March or April or February or January.**

Q. **March of 2021?**

A. **Yes.**

ROA.905-ROA.906. (Emphasis added).

Judge Rosenthal correctly found that Appellants' testimony was self-contradictory. ROA.3812. Appellants' testimony contradicts the September 7, 2021 date of loss which they reported and claimed as the basis of their petition. Appellants' testimony also contradicts the date of loss they now claim to be the ***17** "true" date of loss, June 15, 2021. Appellants' testimony also places the date of loss outside the current Policy, which incepted on May 29, 2021.

Second, Appellants' actual designated expert provided different dates of loss, some of which were outside the relevant policy coverage period. Appellants designated Mr. Allen to testify in accordance with his report. ROA.149-150; ROA.156. Mr. Allen's initial report identified the date of loss for Appellants as September 7, 2021, which coincided with the date identified in Appellants' petition, as opposed to the March/April 2021, or maybe earlier, dates found in Appellants' sworn testimony. ROA.156; ROA.2565. Nevertheless, minutes before Mr. Allen's deposition began, he withdrew all of his opinions other than

the existence of roof damage, and generated yet another report with a new date of loss - April 29, 2023 - including a new weather map and alleged hail size data. ROA.1090 The new date of loss was well outside the policy period and the new report opined regarding hail that was much smaller than Mr. Allen previously alleged. Compare ROA.265; ROA.2565 (2″ hail) and ROA.1092 (1.25″ hail).

Mr. Allen changed his opinion again when he generated yet another (past the designation deadline) report on the morning of deposition, which contained yet another date of loss: August 16, 2021. Crucially, Mr. Allen testified that August 16, 2021 was the key date for all of his opinions:
Q: So is it fair to say the hail loss that is the subject of your report and opinions allegedly occurred on August 16, 2021?

***18** A: Yes.

Q: **Since we've had some difficulty with that, I got to ask you, are you sure? Is the date of loss that you're claiming August 16, 2021?**

A: **Thankfully, yes. I'm confident.**

Q: Are you going to testify that any date other than August 16, 2021, was a hail loss that is the subject of your opinion?

A: No.

ROA.1194-1195. (Emphasis added). Mr. Allen also testified that there was likely hail damage which predated Appellants' current claim. ROA.1190-1191.

As Judge Rosenthal observed, despite being "confident" as to the August 16, 2021 date of loss, Mr. Allen conceded that a meteorologist (which Mr. Allen is not) "is the expert." ROA.3813. Judge Rosenthal found that Mr. Allen had thus qualified his own opinion to say that a meteorologist's opinion - like Chubb's meteorologist - was more trustworthy. ROA.3813. Chubb's meteorologist discredited August 16, 2021 as a possible date of a hailstorm. ROA.1312.

Third, Appellants' experts' confusion is only compounded by the testimony of Appellants' public adjuster, Mr. Halliday, who provided still different dates of loss than those which Appellants' now claim to be the true loss date. During the initial claim investigation and adjustment, Mr. Halliday's "Exterior Wind & Hail Damage Report" referenced only May 18, 2021 in connection with the wind and hail damage. ROA.2046. Notably, May 18, 2021 falls outside the coverage of the Policy at issue.

***19** During deposition, however, Mr. Halliday admitted his inability to stand behind a May 18, 2021 date of loss or any given date of loss:
Q. Does that section of your report mean that you were attributing alleged damage to the exterior to a storm on 5/18/21?

A. It's possible. I'm not a forensic meteorologist, and I was -- you know, I haven't spent 24/7/365 camped outside the outside of the Cutchall's residence, *so there's no way for **me** to know for sure.*

...

Q. So I just need to understand here. Are you saying that it is possible that the Cutchall's home was damaged on 5/18/21?

A. Possibly.

...

Q. Do you have any weather data or information that - that's more exact? You keep using the word "possibly." I'm - I'm trying to narrow down what you think is the important weather data.

A. I believe that NOAA, the United States Government, also logs a storm in April of '21 with hail, with one-and-a-half-inch hail that was recorded in Houston as well. ***But I can't say if it was, you know, was it April, was it May? I don't know. I - I'm being as fair as I can when I say, you know, either one's possible.***

Q. (BY MR. SCHULZ) Is it pos-possible that storms in both April and May caused damage to the Cutchall home?

A. ***I don't know.***

...

Q. But nobody can say for sure when the severe weather may have affected the Cutchall's home?

A. No one can say for sure, but you can make *educated guesses* that shortly thereafter, significant water damage to the interior of the home was discovered by the insured.

***20** ROA.956-ROA.958. Emphasis added. *See Huss v. Gayden*, 571 F.3d 442, 460 (5th Cir. 2009) ("Courts must be arbiters of truth, not junk science and guesswork.").

In response to Chubb's Motion for Summary Judgment, Appellants provided a new affidavit from Mr. Halliday. In this new affidavit, Mr. Halliday abandoned, without explanation, his prior report and deposition testimony and chose to identify the date of loss as June 15, 2021.[3] ROA.2000; ROA.2009. However, this does nothing more than further conflict with Appellants' own evidence.

Finally, a close reading of Mr. Halliday's assertions regarding the claimed June 15, 2021 date of loss shows that he does not opine that hail hit Appellants' home and damaged it on that date. Rather, he opined that, according to StormerSite, "there were six *reports* of hail in size up to one inch that *impacted the area* of the Cutchall property." ROA.2009. (Emphasis added). He also opined that, according to NOAA, "there were four reports of hail in size up to one inch that impacted the ***21** area of the Cutchall Property." *Id.* (Emphasis added). Such *reports* about the *area* definitely do not confirm that Appellants' home was damaged by hail on June 15, 2021 or otherwise during the policy period. In any event, the current claimed date of loss of June 15, 2021, was not identified by Mr. Halliday in either his initial report or his deposition. Compare ROA.2046 (Initial Report) and ROA.956-958 (Deposition).

Appellants argue Judge Rosenthal had a focus "almost entirely on Chubb's evidence" and that she should not "weigh credibility disputes, or choose between competing experts." Appellants' Brief at 15. To the contrary, Judge Rosenthal reviewed the ample record showing that Appellants' assertions of the date of loss were hopelessly contradictory, unsupported, or - in the case of Appellants' deposition testimony - simply absent. Rather than identify a date of loss with reasonable certainty, as well as exclude other dates of loss with reasonable certainty, Appellants merely cherry-pick one out of many potential loss dates and do not even acknowledge, much less explain, why that date as opposed to the others, is correct.

Lastly, in an effort to avoid their failure to support a date of loss with any evidence, Appellants argue "there were two relevant policies that cover the time period at issue in this case... The first was effective from May 29, 2020 to May 29, 2021, and the second was effective from May 29, 2021 to May 29, 2022." Appellants' Brief at 3. Yet Appellants' petition alleged only a loss on September 7, ***22** 2021, implicating the latter policy period. In their Brief, Appellants tell this Court that the loss happened on June 15, 2021, which is also in the latter policy period. Appellants' Brief at 14. Finally, Appellants conceded that only one

policy period was in dispute by addressing the policy for the single period attached to Chubb's motion for summary judgment. ROA.1938. Appellants should not be permitted to move the goalposts for their "unconfirmed rumors of loss." Ultimately, Appellants' claims fail because of a total failure to support with evidence a date of loss within any policy period.

D. Appellants' Failure to Meet Their Threshold Burden of Proof Disposes of the Rest of their Appeal Issues

Martech, Stagliano and *343 West Sunset* require that a claimant be able to produce evidence identifying a date of loss with reasonable certainty and exclude other potential dates of loss with equal certainty. Appellants' evidence fails to meet this standard as Appellants presented evidence of no fewer than 5 different dates of loss in their depositions and reports, several of which were outside the relevant policy period. The Court should affirm Judge Rosenthal's decision holding that Appellants failed to provide evidence to establish a date of loss within the policy period.

Appellants' failure to present competent evidence showing a date of loss also disposes of their other appeal issues and their request for certified questions. Under *Seger, Fiess, and Lowen Valley*, a claimant's failure to bring a claim within coverage ***23** ends an inquiry without need to further review coverage terms and exclusions. Thus, in absence of proof of a date of loss, the Court need not reach questions of damage, including questions regarding the doctrine of concurrent causation. Thus, the Court should affirm the summary judgment.

II. APPELLANTS WAIVED THEIR ARGUMENTS REGARDING CONCURRENT CAUSES OF LOSS

Even though this Court does not need to reach the questions regarding the current causation doctrine, the Appellants' arguments regarding the doctrine nevertheless also fail.

Under the doctrine of concurrent causation, "[W]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Certain Underwriters at Lloyd's of London v. Lowen Valley View*, 892 F.3d 167, 170 (quoting *Lyons v. Millers Cas. Ins. Co. of Tex.*, 866 S.W.2d 597, 601 (Tex. 1993)). Judge Rosenthal correctly held that the Appellants failed to present such evidence, and thus holding there was a second independent reason for granting Chubb's motion for summary judgment.

Appellants now raise a host of new arguments regarding the application of concurrent causation that they did not raise below. Because Appellants raise those issues for the first time on appeal, those arguments have been waived. *See First United Pentecostal Church v. Church Mut. Ins. Co.*, 119 F.4th 417, 426 (5th Cir. 2024) ***24** ("'A party forfeits an argument by failing to raise it in the first instance in the district court--thus raising it for the first time on appeal.'"); *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) ("If a party wishes to preserve an argument for appeal, the party 'must press and not merely intimate the argument during the proceedings before the district court.'"); *Brinkmann v. Dallas Cnty. Sherrif Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (when an appellant fails to identify any error in the district court's analysis, it is the same as if the appellant had not appealed that judgment: "We will not raise and discuss legal issues that [a party] has failed to assert.").

Underscoring Appellants' waiver, the entire discussion of "concurrent cause of loss" by Appellant to Judge Rosenthal is confined to a single paragraph in the introduction section of Appellants' response to Chubb's motion for summary judgment:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE
IMAGE

ROA.1936. Not a single point raised on pages 16-32 of Appellants' brief can be found in their Response to Chubb's Motion for Summary Judgment. Indeed, in their current Appellants' Brief, Appellants do not even re-raise the arguments given to ***25** Judge Rosenthal in their Summary Judgment opposition. Thus, Appellants did not identify any error in Judge Rosenthal's

analysis and they further waived the issue of concurrent causation by not identifying and pressing their arguments as-briefed on appeal with Judge Rosenthal. *See First United*, 119 F.4th at 426; *Keelan*, 407 F.3d at 340; *Brinkmann*, 813 F.2d at 748.

Appellants also waived their concurrent causation argument by their expert abandoning opinions regarding interior water damage that are the basis of their concurrent causation argument. As discussed above, Appellants' retained expert, Mr. Allen, abandoned any intent to testify regarding interior damage to the Appellants' property before his testimony, thereby limiting Appellants to claims for roof damage only:
Q (Mr. Schulz) Your previous report included interior damages; did it not?

A (Mr. Allen): It did.

Q And you're no longer here to support or give testimony to opinions -- sorry. You're not here to give support or testimony in support of claimed interior damages, are you?

A I'm not.

* * *

Q Are you going to give opinions about alleged moisture penetration into the house from the roof, or just strictly damage to the roof?
A Strictly damage to the roof.

***26** ROA.1187-1188; ROA.1191.

To the extent that any of Appellants' concurrent cause of loss arguments relate to interior water damages, the Court should exclude consideration of same as those claims of loss were abandoned.

III. JUDGE ROSENTHAL DID NOT ERR IN HOLDING THAT THE APPELLANTS FAILED TO SEGREGATE COVERED AND NONCOVERED CAUSES OF INTERIOR WATER DAMAGE.

A. Appellants Failed To Segregate Damages

Assuming *arguendo* that Appellants did not waive or abandon their arguments regarding concurrent causation, their arguments nevertheless fail.

"The [concurrent causation] doctrine is not an affirmative defense or avoidance issue" that must be pled; instead it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App.--San Antonio 1999, pet. denied).

"Because an insured can recover only for covered events, the burden of segregating damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof." *Wallis*, 2 S.W.3d at 303; *see also Lowen Valley, LLC*, 892 F.3d at 170. The insured is also required to produce evidence that will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy. ***27** *Id.* Failure to segregate damages caused by covered and noncovered sources is fatal to recovery. *Id.*

The undisputed facts showed that there were multiple causes of interior water damage, some of which were excluded. Appellants seek to recover for damage to their roof allegedly caused by hail, and interior water damage allegedly caused when water penetrated the roof through hail-created damage. ROA.960-963. As noted by Judge Rosenthal, however, the evidence of concurrent causes of damage to the property interior due to water and moisture buildup - some of which are excluded - comes from Appellants' own retained consultants; namely, their HVAC and existing inadequate ventilation, both of which were causing ongoing build-up of interior moisture and damage. Freedom 76, the roofer retained by Appellants to assess and make repairs to their roof, described the problems and repair needs as follows:

"Provide and install nine (9) new O'Hagan vents and paint closely to match roof tile color. This is to correct the inadequate ventilation of the attic currently, which is causing moisture to build up in the walls between the attic space and conditioned space of the home. **The moisture buildup is causing water damage, as well as mold and mildew on the interior walls and ceilings."**

ROA.1038. Emphasis added.

Appellants also retained a mold remediation company to identify potential issues created by their HVAC system, Mold Inspection Sciences of Texas, who opined that Appellants suffered excessive condensation and/or high relative humidity associated with the HVAC systems. ROA.1039. Chubb's experts ***28** confirmed the findings of Appellants' consultants. ROA.939; ROA.1038-1042; ROA.1062.

The policy does not cover "wear and tear, deterioration or loss caused by any quality in property that causes it to destroy itself," "dampness of atmosphere," or "rats"). ROA.824. Appellants' own experts concluded that water damage resulted from these excluded causes. Even if Appellants could demonstrate the existence of a hailstorm that caused water to enter their property, under the doctrine of concurrent causation, Appellants still would have to provide the jury with a reasonable basis to segregate damage from that water from the damage caused by the excluded ongoing HVAC problems, and ventilation problems. Because Appellants fail to make this argument, much less provide a reasonable basis for such a segregation, Judge Rosenthal correctly held that Appellants failed to sustain their burden of proof and granted summary judgment.

Notably, in their brief, Appellants do not mention Freedom 76 or Mold Inspection Sciences of Texas, or their opinions, even once. Instead, Appellants contend that Mr. Halliday's sham affidavit suffices to rule out noncovered causes of loss. However, Mr. Halliday fails to mention, much less rule out, the sources of interior moisture and damage identified by Appellants' own experts. In deposition, Mr. Halliday conceded that he did nothing to rule out window leaks and HVAC issues as identified by Mold Inspection Sciences of Texas as causes of interior ***29** moisture buildup and damage. Mr. Halliday's affidavit also offers nothing to rebut or rule out the findings of Mold Inspection Sciences of Texas. See ROA.964 (Halliday deposition) and ROA.2000 (Halliday affidavit). Similarly, Mr. Halliday's affidavit does not address HVAC, insulation or ventilation as a cause of loss he purportedly ruled out. ROA.2000 (affidavit). In his latest affidavit, Mr. Halliday seems to simply pretend Appellants' other consultants do not exist, as he does not mention them at all, much less offer testimony which could satisfy Appellants' burden to segregate between the various source of water damage.

B. Appellants' Additional Arguments Should Be Rejected

Appellants raise several legally and factually baseless arguments in an attempt to avoid their obligation to segregate damages under the doctrine of concurrent causation.

Appellants first argue that because the policy issued by Chubb does not contain an "anti-concurrent cause of loss" clause, the "concurrent cause of loss" doctrine does not apply. In fact, applicable caselaw says the opposite. Under Texas law, the common law doctrine of concurrent cause of loss exists separate from and independent of any contractual concurrent cause provision. The doctrine exists by virtue of the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. *Wallis*, 2 S.W.3d at 303; *see also* ***30** *Comsys Info. Tech. Servs. v. Twin*

City Fire Ins. Co., 130 S.W.3d 181, 189 (Tex. App.--Houston [14th Dist.] 2003, pet. denied); *Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210 (Tex. App.--Dallas 2015, no pet.); *Kelly v. Travelers Lloyds of Tex. Ins. Co.*, 2007 Tex. App. LEXIS 1320 (Tex. App.-- Houston [14th Dist.] 2007, no pet.).

Apellants cite *JAW The Point, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015) to argue, without any actual analysis of that case, that because the Policy does not contain an anti-concurrent causation provision, the concurrent causation doctrine does not apply. That is not what *JAW The Point* held.

In *Dillon Gage Inc. of Dallas v. Certain Underwriters at Lloyd's*, 440 F.Supp.3d 587, (N.D. Tex. 2020), the court observed that the Texas Supreme Court clarified the common law concurrent causation doctrine in *JAW The Point, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015) as follows:

As the *JAW The Point* Court explained,
[W]hen "excluded and covered events combine to cause" a loss and "the two causes cannot be separated," concurrent causation exists and "the exclusion is triggered" such that the insurer has no duty to provide the requested coverage. But when a covered event and an excluded event "each independently cause" the loss, "separate and independent causation" exists, "and the insurer must provide coverage despite the exclusion."

Based on that reasoning, the *Dillon Gage* court continued:
But that common-law default can be confirmed or displaced by contract with an anti-concurrent-causation clause.

(Emphasis Added) Therefore, *JAW the Point* actually held that the concurrent ***31** causation doctrine is the "default," and an anti-concurrent causation clause only confirms or displaces it. Accordingly, the *Dillon Gage* court held:
[I] t is not true, as Dillon Gage suggests, that "[f]or an insurance policy exclusion to apply if it is *a* cause of the injury, regardless of whether there are other separate and independent causes, the policy must have, under Texas law, included an anti-concurrent-causation clause with respect to the exclusion. *See, e.g., JAW The Point, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex.2015)." **But *JAW The Pointe* said no such thing. Instead, the Courts look to anti-concurrent-causation clauses and give them meaning. And if there are no such clauses, they exclude coverage for concurrent causes but confirm coverage if there are separate and independent causes.**

Under *JAW The Pointe*, we need the bigger boat of common law analysis to determine whether the multiple causes were concurrent and excluded or separate/independent and covered.

(Emphasis added). *Dillon Gage* was appealed to this Court and, on unrelated certified questions, to the Texas Supreme Court. Neither Court held, as Appellants here advocate, that the absence of anti-concurrent cause language in a policy abrogates the common law doctrine of concurrent causation. [4]

Appellants next argue that the concurrent cause doctrine only applies to concurrent, not independent causes, citing *Ironwood Bldg. II, Ltd. v. AXIS Surplus Ins. Co.*, 2020 WL 1234641 (W.D. Tex. 2020). *Ironwood*, however-- unlike this case--involved claims for damages caused by two separate storm events, not one, ***32** and involved an insurer trying to take an offset from a prior claim payment made by a different insurer under different policy terms. The key fact in *Ironwood* was that the roof allegedly did not leak after the first storm but did leak after the second storm, requiring replacement. *Ironwood* is therefore distinguishable from this case. Here the undisputed evidence shows that noncovered causes of loss were occurring at the same time as the hail damage that allegedly allowed water to penetrate the roof and causing the same damage to the interior of the property. Thus, the undisputed evidence in this case demonstrates that the causes of loss were concurrent in time and the claimed damages were the same. Appellants' claim that *Ironwood* precludes application of the concurrent cause doctrine when perils

are independent myopically focuses on the causes of loss only, rather than ask whether the separate causes of loss contribute to the same alleged damage, which is the fact pattern here.

Appellants' next few arguments each rehash the same assertion; namely that there was only one peril causing the water damage, not multiple perils. Appellants contend that some of the losses were "non-fortuitous", that a cause of loss was "roof deterioration," which allegedly cannot be a cause of loss, or that no fact-finder has held there are concurrent causes of loss.

Each of these arguments ignore the undisputed facts of the case, which are that ongoing sources of interior water damage existed which were, at a minimum, concurrent causes of the water damage which Appellants seek to lay solely at the ***33** feet of alleged water entering in the wake of an unspecified hail event. As Judge Rosenthal correctly concluded from the undisputed facts, existing defects in Appellants' home concurrently caused the interior water damage; namely, the inadequate attic ventilation and the HVAC, both of which caused water and moisture buildup inside the home. ROA.1038; ROA.1042; ROA.3813-3814. These are not "non-fortuitous" losses, or "deterioration", but instead non-covered or excluded causes of loss. Those causes of loss were ongoing at the time of any hailstorm, even if Appellants could identify a date of same. Thus, the doctrine of concurrent causation applies and Appellants' complaints about the doctrine of concurrent causation as applied to different fact patterns should be rejected.

In other cases like this one where testimony admits to the existence of a concurrent cause of loss, courts have held that the doctrine of concurrent causation may apply and summary judgment on that basis would be appropriate. See, *Shree Rama, LLC v. Mt. Hawley Ins. Co.*, 2023 WL 8643630, *2 (5th Cir. 2023); *Thompson v. State Farm Lloyds*, 2024 WL 4544783, *4 (S.D.Tex.2024); *Tchakarov v. Allstate Indem. Co.*, 2021 WL 4942193, *6 (N.D.Tex.2021). In each of these cases, just like Appellants did here, the evidence presented by a claimant demonstrated the existence of an excluded cause of loss separate from the event claimed to have caused damage. In each case, the reviewing court analyzed the facts under the doctrine of concurrent causation.

***34** Finally, Appellants argue that certain actions taken by Chubb defeat its motion for summary judgment. They first argue that Chubb's payment of an undisputed loss somehow demonstrates that their losses can be allocated. This is incorrect. Again, Appellants have the burden of proof, and as discussed above, they haven't met it. Additionally, this Court has repeatedly held that even in those cases where an insurer initially determines that some amount of covered damages exists, when a later report discredits that determination, the initial determination will not provide a basis for allocation. *Shree Rama, LLC*, 2023 WL 8643630, fn 1, (holding "An insurer's prior indication that a portion of a claim is undisputed does not relieve the insured of its burden to provide summary judgment evidence to allow the jury to segregate covered losses from non-covered losses.").

In addition, the contractual coverage of an insurance policy cannot be expanded by waiver or estoppel on the part of the insurer. *Tex. Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-603 (Tex.1988). See also, *Washington Nat'l Ins. Co. v. Craddock*, 130 Tex. 251, 109 S.W.2d 165, 165-166 (Tex.1937); see *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778-80 (Tex.2008) (discussing *McGuire* and *Craddock)*.

Finally, Appellants rely upon a purported June 2020 inspection to somehow establish that no water intrusion was ongoing at the time of the alleged hailstorm and that the residence had a "clean bill of health". Appellants contend that this "clean ***35** bill of health" prior to the loss negates the possibility that wear and tear and/or construction defects were concurrent causes of the water damage. Appellants combine this false impression with Mr. Halliday's sham affidavit testimony that he "ruled out all causes of loss" other than the unconfirmed June 2021 hailstorm.

Contrary to Appellants' characterization, the "clean bill of health" report [5] does not mention an absence of wear and tear or construction defects. Judge Rosenthal correctly found that the vague, imprecise statement that the property had a "clean bill of health" was insufficient to create a genuine issue of fact. [6] Further, as discussed *supra*, Mr. Halliday's affidavit is rife with both substantive and procedural defects, including his complete failure to consider, much less segregate, ***36** the causes of

loss noted by Appellants' other experts. Indeed, it was these other causes of interior damage that Judge Rosenthal relied upon in her opinion.

IV. CERTIFIED QUESTIONS ARE NOT REQUIRED TO RESOLVE THIS APPEAL

Appellants presented Judge Rosenthal with only the briefest of arguments regarding the doctrine of concurrent causation, citing no authority. Yet most of Appellants' brief is devoted to far-ranging fact-intensive arguments based on authorities that were not presented to Judge Rosenthal, seeking sweeping relief from this Court and certification of questions to the Texas Supreme Court. This is improper.

Further, in their request to certify questions, Appellants rely on the *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467 (5th Cir. 2021) and *Overstreet v. Allstate Veh. & Prop. Ins. Co.*, 34 F.4th 496 (5th Cir. 2022) decisions. In *Frymire*, the claimant alleged that a hailstorm caused sufficient damage to require a complete roof replacement, while the carrier contended that "wear and tear" was the true reason the roof should be replaced. This Court certified questions regarding how to deal with normal property degradation and whether a party needed to segregate normal degradation under the concurrent cause of loss doctrine. The *Frymire* facts are not present here, as the competing cause of loss was not normal degradation, but on-going, interior water damage caused by a faulty HVAC and inadequate interior ventilation. In *Overstreet*, this Court faced a similar fact pattern to *Frymire*. ***37** Specifically, the *Overstreet* claimant contended that hail damaged the roof of its building, but the claim was denied due to both pre-existing conditions and damage from a prior hailstorm. The *Overstreet* facts also are not present here. Instead, this matter presents the classic example of concurrent causes of loss as the interior water damage was the result of a separate loss which was contemporaneous to and combined with the alleged water entry due to a hailstorm. Texas law is clear on how the facts present in this case should be reviewed and considered.

Since the decisions in *Frymire* and *Overstreet*, this Court has applied the common law doctrine of concurrent causation in other cases, such as *Mitchell v. Praetorian Ins. Co.*, 2025 U.S. App. LEXIS 6803, *6 (5th Cir. Mar. 24, 2025). In *Praetorian*, this Court held that the doctrine of concurrent causation applied when interior water damages were caused by covered wind and excluded improper tarping and spillover from a bathtub. The claimant's estimate of repairs did not address causation, so there was uncontroverted evidence that covered and noncovered caused of loss caused the interior water damage. Freedom 76 and Mold Inspection Sciences of Texas provided uncontroverted evidence in this case, so this Court can follow *Mitchell* and apply the doctrine here, if it reaches the issue at all.

*38 V. JUDGE ROSENTHAL PROPERLY HELD THAT APPELLANTS FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO THEIR BAD FAITH CLAIMS

Appellants argue that Judge Rosenthal erred in granting summary judgment regarding the extra-contractual claims. This is wrong because Appellants cannot establish breach of contract. In addition, contrary to Appellants' argument, there is zero factual evidence that Chubb "deliberately structured its property inspections to reach a predetermined conclusion." Appellants fail to provide any facts or expert evidence to support this claim. An expert opinion is required to establish extra-contractual claims under Texas law. *See Farris v. State Farm Lloyds*, 2021 U.S. Dist. LEXIS 19455, *11 (S.D. Tex. 2021); *Hart v. State Farm Lloyds*, 2024 U.S. Dist. LEXIS 14062, *11 (N.D. Tex. 2024).

Appellants' arguments also fail because, as confirmed by Chubb's own claim handling expert, Chubb properly investigated and adjusted the claim. As correctly held by Judge Rosenthal, at most there is a bona fide coverage dispute which precludes bad faith. This is abundantly clear from Appellants' own evidence concerning conflicting dates of loss and ongoing water intrusion at the home.

CONCLUSION

The district court correctly held that, as a matter of law, Appellants failed to demonstrate an entitlement to coverage for Appellants' claim beyond amounts already paid by Chubb. Appellants waived their remaining arguments. Even if those ***39** arguments were not waived, Judge Rosenthal's opinion withstands scrutiny as Appellants' concurrent causes of loss fit neatly within the established parameters of the existing case law. For these reasons, the lower court's decision should be affirmed.

Respectfully submitted,

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Footnotes

1 Appellants' policy does not cover loss caused by “wear and tear, deterioration or any quality in property that causes it to damage or destroy itself” or “dampness of atmosphere, extremes of temperature.” ROA.824; ROA.852. Appellants' policy also does not cover loss caused by “rats, mice, termites, moths or other insects.” *Id.* Through its investigation and adjustment of the claim that included the assistance of a professional engineer, Chubb determined that Appellants' home was damaged as “a result of several different causes of loss including a hail event prior to 2020, roof distress unrelated to wind or hail, as built defects, changes in temperature between the interior and attic space, prior plumbing leaks, and localized movement.” ROA.1034-1035. In particular, Chubb's investigation determined that Appellants' HVAC system and inadequate insulation in the attic were causing excessive moisture in the home. ROA.939; ROA.1062.

2 Among other tactics, Appellants sought a motion for continuance of the summary judgment and leave to designate new experts on September 16, 2024. ROA.1701. Judge Rosenthal denied this motion on September 18, 2024, due to Appellants' “lack of diligence” in pursuing discovery and lack of good cause for additional delay. ROA.1744. Appellants then filed a renewed motion for continuance on September 24, 2024, which Judge Rosenthal denied after a hearing

on October 4, 2024. ROA.1750; ROA.1926. Appellants next filed a motion for leave to amend the scheduling order (also asking that Appellants be allowed a new expert) on October 7, 2024. ROA.3459. Judge Rosenthal also denied this request for relief, again based upon lack of diligence and prejudice to Chubb. ROA.3800; ROA.3808.

3 Mr. Halliday's affidavit neglects to mention, much less explain, that the date conflicts with his original report or his sworn deposition testimony. As such, the evidence on which Appellants now rely is nothing more than a sham affidavit that should not even be considered. *Alberton v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir.1984) (nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony); *see also Robison v. Cont'l Cas. Co.*, 2022 U.S. Dist. LEXIS 21837 (E.D. Tex. 2022) (disallowing sham affidavit where affiant previously testified that he did not know alleged facts; if a party who has been examined at length in deposition could raise a fact issue simply by submitting an affidavit contradicting his prior testimony, this would greatly diminish the utility of summary judgment). In addition, Mr. Halliday's affidavit constitutes an undisclosed expert report submitted after the close of discovery and should also not be considered for that reason. Compare ROA.149 (Appellants' Expert Designation) and ROA.2000 (Halliday Affidavit).

4 *See also Landmark Am. Ins. Co. v. Port Royal Condominium Owners Ass'n*, 2022 WL 4287651, *13 (S.D. Tex. 2022); *Methodist Hospitals of Dallas v. Affiliated FM Ins. Co.*, 521 F. Supp.3d 633, 639 (N.D. Tex. 2021).

5 Appellants are actually referring to a two-page "Agent Worksheet" within a larger "Home Assessment.". ROA.1970-1999. This document does not provide evidence the home had a "clean bill of health" nor is there any evidence anywhere to suggest it. Rather, the document is a "Home Assessment" described as "Virtual" ROA.1985. Since the Home Assessment was virtual, it could not have resulted in a "clean bill of health." The Home Assessment also has a section called "Photographs of Your Home" stating "A selection of photographs taken during our visit to your home is presented on the following pages." *Id.* The following page is *blank*, demonstrating there was no such inspection that could certify a "clean bill of health." As to "Home Restorations" for "Roofing,", the Home Assessment states: "None or Unknown." ROA.1978. Thus, the "Agent Worksheet" is hardly evidence that there was not ongoing water intrusion as established by Appellants' experts or that the roof was of any particular condition.

6 In addition, after reviewing Appellants' pest control records and other information, Chubb's pest control expert Alan Snyder opined that Appellants' home had a "long-term rat infestation. [Appellants] had a rat infestation from at least 2013 through the date [of] the claim that was September 7, 2021... [Appellants] knew or should have known of the rat feces in the attic." ROA.1379. Thus, Appellants cannot now be heard that their home had a "clean bill of health."

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