

No. 22-1082

IN THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Crothersville Lighthouse Tabernacle Church, Inc.,
Plaintiff-Appellant,

v.

Church Mutual Insurance Co., S.I.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana,
New Albany Division
No. 4:20-cv-00153-TWP-DML
Hon. Tanya Walton Pratt, Judge

Lighthouse Tabernacle's Appellant's Brief

Josh S. Tatum
jtatum@psrb.com

Tonya J. Bond
tbond@psrb.com

Christopher E. Kozak
ckozak@psrb.com

PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, Indiana 46202-2415
(317) 637-0700

Attorneys for Plaintiff-Appellant Crothersville Lighthouse Tabernacle Church, Inc.

DISCLOSURE STATEMENT

Plaintiff-Appellant Crothersville Lighthouse Tabernacle Church, Inc. is a religious corporation organized under Indiana's Nonprofit Corporation Act. It is not owned by any parent corporation, and no publicly held company owns more than 10 percent of the church.

The law firm whose attorneys have appeared for the appellant in this appeal is Plews Shadley Racher & Braun LLP.

Law firms that previously appeared for the appellant but who no longer represent it are as follows: Smith Law Services, P.C. and Robert J. Arnold, P.C.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction because the appellant timely filed a notice of appeal from a final judgment issued by a district court with diversity jurisdiction.

I. The District Court's Jurisdiction

The district court proceeded under diversity jurisdiction under 28 U.S.C. § 1332(a)(1) based on the statement of Defendant-Appellee Church Mutual Insurance Company, S.I. ("Church Mutual") that the parties are citizens of different states. (Notice of Removal 1–2, ECF No. 1 at 1–2.) Plaintiff-Appellant Crothersville Lighthouse Tabernacle Church, Inc. ("Lighthouse Tabernacle") is a religious corporation organized under Indiana's Nonprofit Corporation Act, Ind. Code §§ 23-17-1-0.2 to -30-4, with its principal place of business in Jackson County, Indiana. (App. 19.) Lighthouse Tabernacle is therefore an Indiana citizen. 28 U.S.C. § 1332(c)(1).

Church Mutual's notice of removal states that it is "a stock insurance company organized and existing under the laws of the State of Wisconsin, with its principal place of business in Merrill, Wisconsin." (Notice of Removal 2, ECF No. 1 at 2.) It does not identify the statute under which it is organized. Wisconsin statutes do not appear to define *stock insurance company*, but Wis. Stat. § 644.02(1)(b) & (c) refer to *converted insurance company* and *converted life insurance company* to describe an insurance company converted "from a mutual insurance company," "from a service insurance corporation," or "from a mutual life insurance company" to "a stock insurance company." And Wis. Stat. § 644.07(1)(b) allows a converted insurance company to "continue to use the word 'mutual' in its name if the name includes the abbreviation 'SI' for stock insurer, or the words 'stock insurer.'" It therefore appears that although Church Mutual's name includes *mutual*, otherwise

suggesting a mutual company, it converted to a stock insurance company as governed by Wis. Stat. §§ 644.02–644.29.

II. The Court of Appeals’ Jurisdiction

The district court entered final judgment for Church Mutual on December 17, 2021. (App. 17.) Lighthouse Tabernacle timely filed its notice of appeal on January 18, 2022. (Doc. 1-1); 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1)(A). Under Fed. R. App. P. 26(a)(1)(A), the day of the judgment (December 17) is excluded, and time is computed from the next day (December 18). Thirty days from December 18, 2021, is January 17, 2022, a legal holiday (Martin Luther King, Jr.’s Birthday). Fed. R. App. P. 26(a)(6)(A). By rule, the Notice of Appeal became due on January 18, 2022, the next business day. Fed. R. App. P. 26(a)(1)(C).

The judgment from which Lighthouse Tabernacle appeals was entered by a district judge without the involvement of a magistrate judge. (App. 1–18.) It terminated all claims as to all parties. (*Id.*); *see* 7th Cir. R. 28(a)(2)–(3). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Lighthouse Tabernacle has a simple dispute with its insurer: how much does it cost to replace its church building, which was destroyed in a 2018 fire. Church Mutual concedes there a genuine dispute exists, but it sought summary judgment anyway, asserting that Lighthouse Tabernacle had not started repairs as soon as reasonably possible. Church Mutual's own actions, including repeated and unnecessary inspections of the building, caused the delay. But counsel below, since reprimanded and disciplined by multiple courts, failed to bring that to the district court's attention, instead attacking the inspectors' motives and generally ignoring the salient facts. The issue presented is

- I. Whether this Court should excuse Lighthouse Tabernacle's limited forfeiture and reverse in part when (a) plain error resulted from an incompetent lawyer's failure to make a dispositive argument and (b) affirming would create bad incentives for insurers and lawyers.

STATEMENT OF THE CASE

This is an insurance dispute arising out of a fire at Lighthouse Tabernacle's church building. Church Mutual concedes coverage. Church Mutual has paid the building's undisputed Actual Cash Value (about \$1.5 million). (App. 365.) But Lighthouse Tabernacle maintains Church Mutual owes Replacement Cost Value, which the church estimates at around \$2.2 million. (App. 358, 825.)

The policy pays for damage "at Replacement Cost (without deduction for depreciation) as of the time of the loss or damage" up to policy limits. (App. 439.) This is distinct from Actual Cash Value, which makes reductions "for deterioration and depreciation, including obsolescence." (App. 439.)

The policy puts two conditions on payment of Replacement Cost. (App. 438–39.) First, Church Mutual will not pay Replacement Cost "[u]ntil the lost or damaged property is actually repaired or replaced." (App. 439.) Second, it will not pay "[u]nless the repairs or replacement are made as soon as reasonably possible after the loss or damage." (*Id.*)

At the district court, Church Mutual argued it had "not been informed that repairs to the Church Building have been completed and more than 180 days have passed since the last payment made by Church Mutual." (App. 9, 336.) It did not point out that less than 180 days had passed between its last payment on March 24, 2020, and Lighthouse Tabernacle's complaint on June 2, 2020. (App. 19, 336.) The district court granted summary judgment to Church Mutual on that ground, reasoning that Lighthouse Tabernacle "was required to designate evidence showing Church Mutual's alleged breach or a piece of evidence showing that the amount paid out failed to comply with the Policy." (App. 13–14.) It had not designated this evidence.

This appeal followed, but the Court soon suspended Lighthouse Tabernacle’s counsel (Jason Smith) for incompetence in another appeal. (Doc. 15.) Lighthouse Tabernacle then retained the undersigned to pursue the appeal on its behalf.

I. A fire destroys Lighthouse Tabernacle’s building.

On June 3, 2018, Lighthouse Tabernacle’s building in Crothersville, Indiana, caught fire, causing significant damage. (App. 2, 356.) Lighthouse Tabernacle promptly put Church Mutual on notice and requested coverage. (*Id.*) Even though Church Mutual began its investigation the next day, it delayed completing its investigations for more than five months. (App. 2, 356–57, 359, 585–87.)

There was never any question that the policy covered the loss. Through Lighthouse Tabernacle’s public adjuster, Chris Tremaine, the church exercised its option to repair or replace the property (and thus recover full replacement costs) in writing on July 27, 2018. (App. 3, 357, 605.) On November 13, 2018, Lighthouse Tabernacle submitted a sworn proof of loss. (App. 4, 359, 565, 860.)

Between June 2018 and August 2019, the parties tried to establish the Actual Cash Value and Replacement Cost Value of the building by working together. (App. 357–58.) Tremaine consistently argued on behalf of Lighthouse Tabernacle that the cost to replace the building was around \$2.25 million. (App. 358, 825.) Church Mutual’s Replacement-Cost estimates (prepared by Simon Katz of Watchful Eye Companies, LLC) varied from around \$1.3 to \$1.73 million. (App. 357–58, 682, 756.) On November 27, 2018, Church Mutual sent Lighthouse Tabernacle a check for \$1.2 million, representing the undisputed cash value of the property while the parties continued to discuss Replacement Cost Value. (App. 359–60, 609.)

The main sticking point was over the cost of glue-laminated (or “glulam”) beams used in the sanctuary and front lobby. (App. 689.) Lighthouse Tabernacle’s concerns were twofold. First, Katz had priced the repairs using the cost of two

straight glulam beams, rather than the cost to replace four arched glulam beams and three inches of decking in the sanctuary. (App. 360–61, 591–603, 843–44.) Second, the church worried that Katz lacked any meaningful experience in the glulam business and substantially underestimated material and labor costs. (App. 567–68.) The delta between the Katz and Tremaine glulam estimates was about \$218,000. (App. 691.)

II. Lighthouse Tabernacle works to resolve disputes with Church Mutual and start repairs, but Church Mutual causes delays.

Tremaine memorialized his concerns about Katz’s estimates in writing to Church Mutual on April 1, 2019. (App. 591–603.) Four months passed without a substantive response. (App. 566–67.) On August 6, 2019, Tremaine wrote to Church Mutual again. (*Id.*) Among other things, he made two points: First, Lighthouse Tabernacle needed the valuation disputes resolved so it could “begin construction with a full understanding of the budget they have to work with.” (*Id.*) Second, Tremaine noted that the church had made a timely, written request to extend the default 180-day period for starting repairs but had received no response from Church Mutual. (App. 567.)

Church Mutual finally responded on August 13, 2019, but ignored the request to enlarge the 180-day period. (App. 32, 310, 566.) On August 26 it said it would hire an engineer to inspect the building and review Katz’s estimates. (App. 32, 310.) Tremaine reiterated that Lighthouse Tabernacle could not make any progress on repairs until the claim disputes were resolved. (App. 905.) Lighthouse Tabernacle also explained its concerns to Steve Gunn of Keeler-Webb Associates, the insurer’s appointed engineer, on October 2, 2019. (App. 906–07.) Gunn inspected the church on October 11, 2019. (App. 906.)

Three weeks passed, but neither Gunn nor his colleague, James McCann, had submitted a report. (App. 906.) On November 4, 2019, Lighthouse Tabernacle followed up with Gunn on its status and offered to provide more information, reminding Gunn he had promised to “get the report turned around quickly.” (*Id.*) It received no response. On November 21, 2019, Tremaine e-mailed Church Mutual, asking for an update. (App. 854.) He also told Church Mutual that Lighthouse Tabernacle “would like to proceed with demolition” and asked Church Mutual to “advise by week’s end if additional time and/or inspections will be needed by the carrier before proceeding.” (*Id.*)

Church Mutual did not respond. (*Id.*) Six days later, Lighthouse Tabernacle followed up, repeating its request for an update. (App. 853–54.) It also reiterated its request to “confirm that site inspections are complete,” so “the insured may proceed with demolition.” (App. 854.) On December 3, 2019, Church Mutual said it would check with the engineer about the delay but did not respond to the latter inquiry. (App. 853.) Lighthouse Tabernacle responded the same day, again asking Church Mutual to “please confirm site inspections are complete and the insured may proceed with demolition.” (App. 852.)

Even though eighteen months to the day had passed since the fire, Church Mutual did not allow Lighthouse Tabernacle to finally proceed with demolition without risking its right to collect replacement costs. Instead, giving no direction to its policyholder, its adjuster wrote, “At this time neither I [n]or the insurance carrier can make any commitments as to the remaining claim until we have received the engineering report and it has been reviewed by the carrier.” (*Id.*) She added, “The insured may proceed as they see fit but with the understanding that the claim investigation and review is still in process and there is information yet to review that may affect the outcome of the claim.” (*Id.*)

After Lighthouse Tabernacle requested updates on December 9, 12, 13, 16, and 20, McCann’s engineering report finally came on December 23, 2019. (App. 362–64, 575–80.) The report agreed that Katz’s Watchful Eye quote was missing components. (App. 692.) It also generally agreed with Tremaine’s assessment of labor costs for the glulam installation. (App. 692–93.) But it rejected Tremaine’s assessment of the cost of materials. (*Id.*) McCann concluded that those costs were “inflated” because the engineers expected “basic skeleton building framing” to cost between \$20–40 per square foot and Tremaine’s estimate worked out to \$59.25 per square foot. (App. 691.) All in all, the engineer recommended that Church Mutual increase Katz’s estimate by over \$20,000, which Church Mutual did. (App. 363–64, 575, 693, 695.)

Perplexed by the estimates for materials, the same day it received the report, Lighthouse Tabernacle asked Church Mutual for McCann’s qualifications to draw his conclusions. (App. 574–75.) It especially sought McCann’s experience bidding and building “as contractor/vendor as it applies to glue beam and deck construction similar to the insured’s building.” (*Id.*)

Again, Church Mutual did not respond. (App. 573–74.) After three weeks, on January 14, 2020, Lighthouse Tabernacle followed up. (*Id.*) In doing so, it noted its concern that the policy’s two-year limitation for suing on the policy was approaching and that Lighthouse Tabernacle would like a tolling agreement to allow the claim disputes to get worked out. (*Id.*)

Two days later Church Mutual responded with a list of nine “various church projects” that “his firm” had worked on over the previous ten years. (App. 572.) It did not state which, if any, of these church projects involved glulam. (*Id.*) It did not specify whether McCann had worked on any of these or the separately mentioned “various non-church projects involving utilized glulam components.” (*Id.*) It did not

list any projects on which McCann or his firm worked as a contractor or vendor. (*Id.*) It did not respond to the request for a tolling agreement. (*Id.*)

Between February and March 2020, Lighthouse Tabernacle tried to get additional information from Church Mutual, so it could evaluate McCann's credibility even though he had no quote for the materials. (App. 570–72, 588–90.) On a conference call on March 11, 2020, Church Mutual's adjuster directed another representative to say that Church Mutual would not adjust the loss any further. (App. 589.) Lighthouse Tabernacle followed this call with a letter dated March 16, 2020, reiterating its objections to the McCann report and Church Mutual's refusal to provide substantial background information. (App. 364, 588–90.) It also reiterated its request for a tolling agreement and demanded an appraisal to resolve the dispute. (App. 570–71, 588–90.) Church Mutual's adjuster responded on March 24, 2020, expressing confusion about the need for a tolling agreement, despite Lighthouse Tabernacle's repeated reference to the two-year suit-limitations clause in the policy. (App. 570–74.)

III. Lighthouse Tabernacle sues, and the district court grants summary judgment to Church Mutual.

Unable to negotiate any longer without violating the policy's contractual limitations period, Lighthouse Tabernacle sued on June 2, 2020, for breach of contract and bad faith. (App. 7 (citing Compl. for Damages and Jury Trial Demand 4, ECF No. 1-2.) Church Mutual removed the case to federal court. (Notice of Removal 1, ECF No. 1 at 1.)

In the case-management plan, Church Mutual stated, "There is an issue of fact as to the damages that Plaintiff is entitled to recover" as a result of the fire. (App. 4–5.) It told the court that it planned to move for summary judgment on the

bad-faith claim. (Case Mgmt Plan 2, ECF No. 14 at 626.) But when the time came, Church Mutual sought summary judgment on all issues. (App. 319.)

In its brief Church Mutual included a two-paragraph argument asserting Lighthouse Tabernacle was not entitled to replacement cost because it had not started repairs “as soon as reasonably possible.” (App. 338–39.) It told the court the church “has not notified Church Mutual that i[t] has started, let alone completed, repairs to the Church Building.” (App. 339.) It noted that the loss occurred “over two years ago.” (*Id.*) It said nothing about the lengthy disputes and inspections that had occurred or the extended delays Church Mutual itself had caused. (*Id.*) The rest of its brief addressed matters not at issue in this appeal. (App. 339–50.)

Lighthouse Tabernacle, represented by attorney Jason M. Smith, filed an eight-page response. (App. 883–90.) Rather than engaging with the Replacement-Cost argument or citing to the record evidence showing Church Mutual caused the delay, his response attacked the credibility and motives of the various individuals involved. (*Id.*)

Smith’s summary-judgment brief contained one salient point: the various cost estimates were in conflict and needed to be resolved by a jury. (App. 888.) Under *Westfield Nat’l Ins. Co. v. Nakoa*, 963 N.E.2d 1126, 1130–31 (Ind. Ct. App. 2012), this is enough. But Smith did not provide the court with the *Nakao* standard. In reply Church Mutual conceded the valuation dispute but argued that it was irrelevant because Lighthouse Tabernacle had not started repairs as soon as reasonably possible. (App. 1003–05, 1008.)

The district court agreed. It noted that Smith’s brief “fails to challenge any factual assertions made by Church Mutual” in the manner required by the court’s local rules. (App. 1–2.) On replacement cost, it noted Church Mutual’s concession that there was a genuine dispute of fact about valuation. (App. 12.) But it granted summary judgment for Church Mutual anyway because Smith did not cite any

relevant evidence rebutting Church Mutual’s claim that repairs had not started as soon as reasonably possible. (App. 13–14.)

This holding not only ended the dispute over the cost of the glulam beams, it blocked Lighthouse Tabernacle from recovering any replacement cost for any part of the building, whether or not the parties had valuation disagreements. In other words, the dispute was no longer about just the \$218,000 difference between the parties’ glulam estimates—the dispute that prompted the lawsuit. Instead, the order allowed Church Mutual to withhold at least \$230,000 (the difference between Church Mutual’s \$1.5 million Actual Cash Value payment and its \$1.73 million Replacement Cost Value estimate). (App. 358, 365.) At most, the ruling deprived Lighthouse Tabernacle of around \$700,000—the difference between Church Mutual’s \$1.5 million Actual Cash Value payment and Lighthouse Tabernacle’s \$2.2 million Replacement Cost Value estimate. (*Id.*)

IV. This Court, among others, disciplines Lighthouse Tabernacle’s problematic counsel.

On April 4, 2022, this Court suspended Jason M. Smith from its bar for conduct that “falls well below the standards we expect from lawyers authorized to practice in our Court.” *U.S. v. Witkemper*, 27 F.4th 551, 555 (7th Cir. 2022) (ordering Smith to show cause); (Doc. 15 (noting suspension).) The Court was “troubled” by Smith’s inability to focus on the issues, to respond to his opponent’s arguments, or to appreciate the Court’s “questions about the trial evidence and standard governing our appellate review” *Witkemper*, 27 F.4th at 555.

Smith’s malpractice was not isolated. *Id.* In 2018, Smith defied an injunction by a state court, was held in contempt, and was sanctioned for it. *DuSablon v. Jackson Cnty. Bank*, 132 N.E.3d 69, 71 n.2 (Ind. Ct. App. 2019). In 2019, he appealed those unappealable orders, continued making the frivolous arguments,

and made unfounded accusations about the integrity of the trial judge. *Id.* The court dismissed the appeal for lack of jurisdiction, referred him to the disciplinary commission, and disregarded his “statement of facts” as not in compliance with the rules. *Id.* 71 & nn.2–3.

Smith did not get the message. In 2020, after being sanctioned for a frivolous removal petition, he kept lobbing “overheated, exaggerated, and unfounded accusations against [a party] and its counsel.” *Jackson Cnty. Bank v. Dusablon*, No. 1:18-cv-01346, 2020 WL 707844, *2 (S.D. Ind., Feb. 12, 2020). When challenged, he continued to peddle “irrelevant facts, erroneous theories, and excessive rhetoric.” *Id.* *2, 4–5 & n.2. The district court sanctioned him again, noting his “inability to advance any cogent, cohesive argument in support of his objections.” *Id.* *6.

Despite these admonitions, Smith continued this pattern. In 2021 his brief below again rested on personal attacks. (App. 883.) The district judge warned him that his briefing was not helpful and did not follow the rules. (App. 1–2.)

In January 2022, this Court heard argument in *U.S. v. Witkemper*, 27 F.4th 551, 555 (7th Cir. 2022). Judges Easterbrook, Scudder, and Kirsch pressed Smith about why he had ignored the controlling legal standard, the facts at trial, and the standard of review. *Id.* He “seemed surprised” by this and “had no response to the substance of the government’s position.” *Id.* The Court issued an opinion soon after, expressing grave concerns about “Smith’s fitness to practice before our Court.” *Id.* “Twice in as many months, Smith has pressed frivolous arguments with no realistic prospect of prevailing.” *Id.* The Court ordered him to show cause why he should not be suspended or disbarred. *Id.*

That was on February 28, 2022. *Id.* at 551. Three days earlier, the Indiana Supreme Court suspended him from practice for thirty days for his misconduct in the *DuSablon* appeal. *In re Jason M. Smith*, 20S-DI-577 at 2–6 (Ind. Feb. 25, 2022). Smith was undeterred. A few weeks after the order in *Witkemper*, he filed a brief in

this case that essentially repeated many tactics for which he had been (and was being) scolded, sanctioned, and suspended. (Doc. 13-1 at 1–10; Doc. 29-1 at 7–8.) The Court suspended him soon after, ordering Lighthouse Tabernacle to find new counsel. (Doc. 15.) After current counsel filed an appearance, the Court permitted them to file a new appellant’s brief and issued a new briefing schedule, ordering Lighthouse Tabernacle to file its brief and short appendix by November 28, 2022. (Doc. 26, 27, 28, 32 at 1.)

SUMMARY OF ARGUMENT

Church Mutual played a major role in the delays it convinced the district court should allow it not to pay replacement cost. To begin repairs, Lighthouse Tabernacle first had to demolish its building, which would preclude any further investigation by Church Mutual. So it had to tread lightly and wait for Church Mutual’s permission to begin work. Well-established Indiana law prohibits insurers from benefitting from their own part in their policyholder’s delay. Had counsel below given the district court a minimal amount more, it could not have reached this result under Indiana law. This plain error deserves the Court’s action for several reasons.

First, reversal serves justice. Church Mutual cannot reasonably cry foul if it must pay a loss that it agrees is covered and for which it collected premiums. Nor can it legitimately complain about a delay for which its agents hold most of the blame. And although it did not affirmatively mislead the district court, it presented an incomplete picture on summary judgment. Without asking Church Mutual to litigate against itself, it bears at least partial responsibility for the error here and will suffer no injustice from a reversal. Insurers owe a duty of good faith to their policyholders. Taking advantage of its own delay and a bad opposing counsel

contradicts that principle. To some extent, affirming could encourage lawyers to use similar tactics hoping to get an easy win anytime they sense counsel for the other side suffers from incompetence.

Second, this appeal presents a question of law where, without the forfeiture, the Court would owe no deference to the district court. Church Mutual put this question before the district court, it made a full record on the subject, and the district court answered the question. Smith merely failed to direct the district court to evidence, already in the record, that precludes summary judgment. On top of it all, the district court has also suspended Smith—in an order signed by the same judge who presided over this case below. She would not likely see a reversal as insulting or unjust.

Third, Church Mutual accepted and invested premiums to cover this very loss. To hold otherwise creates a windfall for the insurer and encourages more bad behavior in its claims processes. In essence, Church Mutual capitalized on a policyholder, first by delaying and then by taking advantage of a bad lawyer. In court it made an argument should not have expected to win. It now seeks to preserve that victory against all the equities.

The rules of procedure exist to be followed. But they are not a parlor game. Fed. R. Civ. P. 1. “Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.” *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). In this case, justice can only be done by reversing in part the order below and remanding the case.

ARGUMENT

The substantive issue here would call for this Court to apply well-established principles of insurance coverage: an insurer’s own delay cannot excuse its

obligations under an insurance policy. Church Mutual's delays forced Lighthouse Tabernacle's hand to file this lawsuit. Yet the district court entered judgment allowing Church Mutual to benefit from its own actions and inaction.

Unfortunately, counsel below did not fully raise the dispositive argument in the district court. This Court will only consider a ground not raised in the district court to reverse in exceptional cases. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749 (7th Cir. 1993) (citing *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 445–48 (1993); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, 86 (1990); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)). The Supreme Court has largely left the courts of appeals to determine which questions a party may take up for the first time on appeal. *Diersen v. Chi. Car Exch.*, 110 F.3d 481, 485 (7th Cir. 1997) (quoting *Singleton*, 428 U.S. at 121 as quoted in *Sprosty v. Buchler*, 79 F.3d 635, 645 (7th Cir. 1996)). This case presents an appropriate situation in which the Court should excuse a technical forfeiture. The case involves well-established principles of law that should have carried the day. Had counsel below preserved the issue, this Court would consider the appeal under de novo, minimizing the danger of second-guessing the district court. And neither Church Mutual nor the district court would likely claim surprise by the substance of the merits.

Standard of Review

In general, the Court reviews a district court's order on summary judgment de novo, examining the record in a light most favorable to the nonmoving party. *Greenbank v. Great Am. Ins. Co.*, 47 F.4th 618, 624 (7th Cir. 2022). This case involves an argument not raised to the district court, which this Court retains "the power and the right to permit it to be raised for the first time" on appeal. *Amcast*, 2 F.3d at 749 (citing *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1306 n.7 (7th Cir. 1988); *Charlton v. U.S.*, 743 F.2d 557, 561 n.5 (7th Cir. 1984) (per curiam)). The Court has

overlooked forfeiture where the review standard would otherwise be de novo more than once. *Id.* It has also stated that it would reach a forfeited question where (1) exceptional circumstances exist, (2) substantial rights are affected, and (3) a miscarriage of justice would result if the Court did not reach the question. *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988).

This Court reviews forfeited arguments like these for plain error. *Amcast Indus.*, 2 F.3d at 749. Under that standard, the Court will reverse if it “find[s] an obvious (i.e., ‘plain’) error that affected the outcome of the [case] and seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *U.S. v. Harden*, 893 F.3d 434, 452 (7th Cir. 2018).

I. Church Mutual’s delays for inspections and haggling over cost caused the delay in starting repairs.

Church Mutual asked the district court to grant summary judgment based on the two-year delay after the loss. But it did not accept its own responsibility in that delay. When an insurer’s actions contribute to a policyholder’s delay in rebuilding after a loss, the insurer cannot enforce a timely rebuild. Here, Church Mutual prolonged the investigations process, did not give Lighthouse Tabernacle permission to move forward with demolition without risk of losing rights under the policy, and ignored its policyholder’s repeated requests for a tolling agreement. Had since-suspended counsel below made a basic showing of Church Mutual’s role in the delay, summary judgment should not have been granted.

A. Under Indiana law, an insurer cannot penalize the policyholder for delay resulting from the insurer’s actions.

In diversity cases, this Court applies state substantive law. *Med. Protective Co. v. Am. Int’l Specialty Lines Ins. Co.*, 911 F.3d 438, 445 (7th Cir. 2018). Here,

Indiana law applies. A fundamental rule of contracts in Indiana and elsewhere holds that “a party may not rely on the failure of a condition precedent to excuse performance where that party’s action or inaction caused the condition to be unfulfilled” *Hamlin v. Steward*, 622 N.E.2d 535, 540 (Ind. Ct. App. 1993) (holding that the maker of a note could not accuse the other party of breach when the maker failed to “make a reasonable and good faith effort to pay the Note”); *Ind. State Highway Comm’n v. Curtis*, 704 N.E.2d 1015, 1019 (Ind. 1998).

The “*Hamlin* doctrine,” otherwise known as the doctrine of prevention, rests on each party’s “implied obligation to make a reasonable and good faith effort” to satisfy conditions in its control. *Rogier v. Am. Testing & Eng’g Corp.*, 734 N.E.2d 606, 621 (Ind. Ct. App. 2000). It “prevents a party from acts of contractual sabotage or other acts in bad faith by a party that cause the failure of a condition.” *Curtis*, 704 N.E.2d at 1019. Indiana’s adoption of the doctrine dates nearly to the state’s founding. *McKee v. Miller*, 4 Blackf. 222, 224 (Ind. 1836).

The duty of good faith, though implied in all contracts, is particularly rigorous when applied to an insurance company’s performance. *Erie Ins. Co. v. Hickman*, 662 N.E.2d 525, 517–19 (Ind. 1993). Unlike in most contracts, the breach of that duty—if serious enough—amounts to a tort. *Id.* Even without any tort, the contract principles emanating from the implied contractual duty apply with full force. *E.g.*, *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 571 (7th Cir. 1997) (Indiana law) (holding that insurer’s earlier breach of the policy estopped it from relying on any policy defenses).

For that reason, Indiana law excuses a policyholder’s obligation to repair property where “the insurer’s actions hindered performance” of that condition. *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60, 65–66 (Ind. Ct. App. 2009). In *Pirtle*, the insurer refused to make any actual-cash-value payments for six months after a fire, despite Pirtle’s election of a replacement-cost option. *Id.* at 63–64, 66. By the

time the insurer made a payment, Pirtle had defaulted on his mortgage and “had little choice but to use the funds to satisfy the mortgage at a loss to the mortgage holder, which left nothing to start the repairs” *Id.* at 65.

Pirtle sued for breach and bad faith. *Id.* at 64. As here, the insurer sought summary judgment, arguing that Pirtle breached the policy by paying the lender rather than using the actual-cash-value funds to start repairs. *Id.* at 64–65. The trial court denied that motion, the jury found in Pirtle’s favor, and the Court of Appeals affirmed. *Id.*

In doing so, the court found the doctrine of prevention applicable. “Even where actual replacement is mandated, compliance may be excused by the insurer’s actions.” *Id.* at 65 (quoting 12A Couch on Insurance 3d § 176:59). Although it recognized the enforceability of the obligation to repair or replace, it held that the insurer’s actions excused Pirtle’s performance. *Id.* at 66–67. The insurer (1) waited to make actual-cash-value payments until Pirtle defaulted on his mortgage and (2) contested valuation issues instead of “advanc[ing] sums of money ... to assist in commencement of the rebuilding.” *Id.* at 67. Under those circumstances, the insurer could not accuse Pirtle of violating the repair-and-replace condition because its inaction prevented Pirtle from performing. *Id.*

Similarly, an insurer’s valuation disputes and delay in making payments can excuse delay in rebuilding. *Westfield Nat’l Ins. Co. v. Nakoia*, 963 N.E.2d 1126, 1130–31 (Ind. Ct. App. 2012). In *Nakoia*, the policyholder and its insurer had a \$150,000 disagreement about the value of the property. *Id.* The policyholder pressed for an appraisal, to which the insurer agreed without mentioning any obligation to repair or replace. *Id.* at 1132. The entire process of adjusting the claim took three years, after which the insurer denied replacement-cost coverage because the policyholder had not repaired the building. *Id.* The Court of Appeals refused to enforce that condition precedent, holding that the insurer’s silence—along with its

refusal to pay anything toward the property loss during those three years—barred it from relying on the replacement condition. *Id.* at 1133.

This is not a novel or arcane rule. It has been part of the basic fabric of replacement-cost coverage for decades. *See, e.g.,* Johnny Parker, *Replacement Cost Coverage: A Legal Primer*, 34 Wake Forest L. Rev. 295, 321–25 (1999); Randy R. Koenders, *Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property*, 1 A.L.R. 5th 817, 855 (1992). It began, as many insurance rules do, in the Southern District of New York. *Zaitchick v. Am. Motorists Ins. Co.*, 554 F. Supp. 209, 216–17 (S.D.N.Y. 1982). Most jurisdictions, including Indiana, have found *Zaitchick’s* analysis persuasive.¹

Courts have recently clarified that the doctrine applies beyond cases of bad faith. *E.g., D&S Realty, Inc. v. Markel Ins. Co.*, 816 N.W.2d 1, 13–16 & n.33 (Neb. 2012) (characterizing *Pirtle* as following the contract doctrine of prevention, explaining that “[t]here was no determination that the insurer in [*Pirtle*] had acted in bad faith,” and adopting the prevention rule); *Ward*, 753 A.2d at 1219. They have also explained that in less extreme cases, the prevention doctrine at least “excuse[s] the policy’s procedural requirements, such as time restrictions,” even if it does not “entirely excuse the insured from its underlying obligation to repair the property” *Stephens & Stephens XII, LLC v. Fireman’s Fund Ins. Co.*, 231 Cal. App. 4th 1131, 1144–45 (1st Dist. 2014) (citing *D&S Realty* and *Smith v. Mich. Basic Prop. Ins. Ass’n*, 480 N.W.2d 864, 868 (Mich. 1992)); *Conrad Bros*, 640 N.W.2d at 240 (holding

¹ *Pollock v. Fire Ins. Exch.*, 423 N.W.2d 234, 236–37 (Mich. Ct. App. 1988); *State Farm Fire & Cas. Ins. Co. v. Miceli*, 518 N.E.2d 357, 362 (Ill. Ct. App. 1987); *Bailey v. Farmers’ Union Coop. Ins. Co.*, 498 N.W.2d 591, 598–99 (Neb. Ct. App. 1992); *Colum. Mut. Ins. Co. v. Sanford*, 920 S.W.2d 28, 30 (Ark. Ct. App. 1996); *Ward v. Merrimack Mut. Fire Ins. Co.*, 753 A.2d 1214, 1218–21 (N.J. App. Div. 2000); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 239–40 (Iowa 2001); *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 507–14 (6th Dist. 2008).

that in the absence of bad faith, the duty to repair was suspended, though not excused, while parties were resolving a coverage dispute).

The prevention doctrine, as adopted in *Pirtle* and *Nakoa*, bars Church Mutual from relying on the repair-or-replace condition here. At the very least, a reasonable jury could find that the obligation was suspended until the valuation dispute was resolved in the litigation below. *E.g.*, *Stephens & Stephens*, 231 Cal. App. 4th 1144–45; *Conrad Bros.*, 640 N.W.2d at 240. Although this is not a withholding-of-payment case, the same principles apply to Church Mutual’s affirmative actions, which had the same effect.

The loss occurred on June 3, 2018. (App. 302, 356.) Church Mutual’s original investigation took five months. (App. 359, 587.) It did not make any actual-cash-value payments until about a month after that. (App. 359–60, 609.) Almost immediately (App. 614) and for the next eight months, Lighthouse Tabernacle raised issues with Church Mutual’s replacement-cost estimates without receiving any substantive response. (App. 309, 566–68, 591.) It timely asked for an extension on the 180-day period for starting repairs. (App. 566–67.) Church Mutual did not (and does not) dispute the validity of these concerns, even though it still disagrees on the proper adjustments, because in August 2019 it brought in an engineer for a second opinion, the engineer agreed with several of Lighthouse Tabernacle’s objections, and Church Mutual adjusted the estimate accordingly. (App. 32–33, 310–11.)

That engineer did not inspect the building until October 2019, and he did not finish his report until December 2019. (App. 906, 364.) During this entire period, Lighthouse Tabernacle repeatedly told Church Mutual it wanted to start repairs, beginning with demolition, but could not do so because of the unresolved claim issues and because it needed Church Mutual’s permission to do so. (App. 362, 582–83, 852–54, 906.)

When Lighthouse Tabernacle got the engineer's report on December 23, 2019, it immediately raised a question about one remaining issue. (App. 574.) Church Mutual did not respond for almost a month, and even then, its response was incomplete. (App. 572–74.) In January and February 2020, Lighthouse Tabernacle asked for the missing information and for a tolling agreement because the contractual two-year limitations period was approaching. (App. 571–74.) The parties set a conference call to work out the issues in March 2020. (App. 588–89.) Lighthouse Tabernacle followed with a detailed letter demanding an appraisal and asking for a tolling agreement so that the appraisal can take place before the limitations period expired. (App. 364, 588–90.) Church Mutual designated an appraiser at the beginning of April 2020 but did not commit to a tolling agreement. (App. 562–64, 570.) At that point, Lighthouse Tabernacle had to sue or let the limitations period expire—barring its claim forever.

While Church Mutual allowed time to pass, Lighthouse Tabernacle diligently tried to start repairs. It promptly exercised its replacement-cost option in writing. (App. 357, 605.) It promptly submitted a proof of loss and estimates it considered fair. (App. 359, 565, 860.) It prompted the discussions necessary to resolve the valuation disagreements. (App. 566–68, 591–603.) It explicitly told Church Mutual that it could not start repairs without “a full understanding of the budget they have to work with,” and made multiple written requests for an extension of the 180-day rebuilding deadline. (App. 567, 905.) Church Mutual rarely responded to these inquiries.

When Church Mutual hired a second engineer to inspect the building in October 2019, Lighthouse Tabernacle gave him access to the property and did everything it could to (1) facilitate his review and (2) clearly explain Lighthouse Tabernacle's concerns. (App. 360–61, 844, 902, 905.) A month after the inspection

when the engineer's report had not yet come, Lighthouse Tabernacle repeatedly followed up about its status. (App. 362–63, 576–80, 582–83, 844, 852–54.)

These inquiries also repeatedly asked for permission to demolish the church and start repairs. (App. 362, 582–83, 844, 852–54.) Church Mutual responded, essentially, by telling Lighthouse Tabernacle to proceed at its own risk: it could demolish the building, but Church Mutual might still need more information. (App. 844–45, 852.) In light of this noncommittal response, Lighthouse Tabernacle waited, preferring “to hold on moving forward with demo until [Church Mutual] confirms that investigations are complete.” (App. 864.)

As in *Pirtle*, a reasonable jury could find that Church Mutual's conduct prevented Lighthouse Tabernacle from starting repairs. For the first six months after the loss, Church Mutual was doing its initial investigation and arranging for the initial actual-cash-value payment. (App. 359, 587.) It continued to exercise its contractual right to inspect the building for another year. (App. 364.) When asked, Church Mutual gave Lighthouse Tabernacle no assurance that it could demolish the building without impairing the disputed portion of its claim. (App. 844–45, 852.) As in *Nakoa*, Church Mutual's delay, coupled with its silent acquiescence in Lighthouse Tabernacle's requests to move forward, bar it from complaining now. 963 N.E.2d at 1132.

Even at this point, Lighthouse Tabernacle objected because the inspector had little experience completing glulam work. (App. 364, 570–75, 588–90.) As a result, his estimates significantly undervalued what was required, as evidenced by the quotes Lighthouse Tabernacle obtained from a company that actually does this work. (App. 364, 570–75, 588–90, 849.) A reasonable jury could conclude, as Lighthouse Tabernacle did, that more inspections were necessary. The disputes over that issue dragged on for the next six months, until Lighthouse Tabernacle had to either sue Church Mutual or write off the loss. (App. 562–64, 570–75, 588–90.)

Nakoa The prevailing rule across the country is clear: where the insurer's disagreement over coverage or value lead to outstanding claims disputes, the obligation to repair is suspended until the resolution of those disputes. 963 N.E.2d at 1131–33; *Conrad Bros*, 640 N.W.2d at 240; *Stephens & Stephens*, 231 Cal. App. 4th 1144–45.

In summary, for eighteen months following the loss, despite Lighthouse Tabernacle's clearly expressed desire to get moving, Church Mutual actively prevented Lighthouse Tabernacle from starting repairs. For the next six months, continued valuation disputes prevented Lighthouse Tabernacle from fixing a budget and starting the repair process. And at that point, Church Mutual's resistance to a tolling agreement required Lighthouse Tabernacle to commence litigation over the valuation issues. Under these circumstances, it is not reasonable to expect anyone to start demolition, since doing so would risk a spoliation claim.

Under Indiana law—and the law prevailing across the country—Church Mutual had no right to summary judgment on this point. *Harden*, 893 F.3d at 452. At the very least, a jury had to decide whether Church Mutual's actions were enough to excuse or suspend Lighthouse Tabernacle's obligation to perform. *Pirtle*, 911 N.E.2d at 63–64 (affirming denial of summary judgment and jury verdict finding performance excused); *D&S Realty*, 816 N.W.2d at 15–16 (holding that the existence and scope of prevention is a question of fact). The first prong of the plain-error standard—obvious error—is therefore satisfied.

B. The error affected the outcome because it involved the dispositive issue.

The error in applying the prevention doctrine caused the district court to award Church Mutual a total victory. It therefore prejudiced Lighthouse

Tabernacle, affecting the church’s “substantial rights.” *Harden*, 893 F.3d at 452; *U.S. v. Cook*, 970 F.3d 866, 881 (7th Cir. 2020).

Church Mutual does not dispute that a genuine issue of fact exists on how much it will cost to repair the church building. It conceded this point in its briefs but argued that it did not matter because of the delay in starting repairs. (App. 1008.) And the district court, in ruling on the motion, recognized that it could not grant summary judgment on the dollar cost of repairs. (App. 12.)

Had competent counsel raised the *Pirtle/Nakoa* argument, or at least cited the undisputed facts supporting it, the district court would have denied Church Mutual’s motion on this point. That establishes prejudice for purposes of plain-error review.

C. The district court’s judgment has profoundly negative effects on the fairness and integrity of the judicial system.

The final prong of the plain-error standard is that the error must have “seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Harden*, 893 F.3d at 452. That standard is met here because attorney incompetence is “inimical to the administration of justice.” *In re Snyder*, 472 U.S. 634, 645 (1985).

The courts have clearly and consistently concluded this particular lawyer provided little if any value to his clients. The Court still has the opportunity to allow this client to recover at relatively little cost to normal procedure. “Forfeiture is a sanction, and sanctions should be related to harm done or threatened.” *Amcast Indus.*, 2 F.3d at 749 (7th Cir. 1993). Turning away from the obvious error here would impose a sanction disproportionate to the harm caused.

Attorney incompetence is well-established as an excuse for the failure to present an argument, even if it cannot alone prompt a court to review forfeitures in

a civil case. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986) (holding that ineffective counsel is an excuse for a criminal defendant’s failure to make an argument at trial). Those holdings—though in the criminal context—recognize that incompetent counsel is no counsel at all, and thus defeats the purpose of our adversarial system. *Id.*

The aim of the civil system, like the criminal system, is to determine the truth through the adversarial process. *Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979). Where the parties retain attorneys, the courts “rely on lawyers to identify the pertinent facts and law.” *In re Cont’l Cas. Co.*, 29 F.3d 292, 295 (7th Cir. 1994). The Court still assumes that “the Truth will best emerge from the combat of the lawyers.” *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1215 (Cudahy, J., concurring and dissenting). Because bad lawyering can lead to judgments supported by neither truth nor reason, the Court “is naturally reluctant to penalize litigants for the delicts of their attorneys.” *In re Gubbins*, 890 F.2d 30, 31 (7th Cir. 1989).

The Court has described these consequences as “serious,” even without any conviction or death sentence. *Hardy v. City Optical, Inc.*, 39 F.3d 765, 771 (7th Cir. 1994). The Court may decline to alter the outcome because the rules of the adversarial system, including the forfeiture rules, exist to “provid[e] incentives to collect information and thoroughly prepare for litigation.” *Appleton Papers, Inc. v. Env’tl Prot. Agency*, 702 F.3d 1018, 1024–25 (7th Cir. 2012); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–57 (2006). If the rules are not enforced, the adversarial system collapses, just as it does when one side’s lawyer is so bad, he is functionally no lawyer at all. *Sanchez-Llamas*, 548 U.S. at 356–57.

II. Reversing the judgment will advance the administration of justice.

This case does not exemplify the reasons this Court has previously articulated in support of the general forfeiture rule, including surprise to the opposing party and imposing repetitive burdens on district courts. Although the Court normally does not consider forfeited arguments, it excuses forfeiture where “justice demands more flexibility.” *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 545 (7th Cir. 2014) (quotations omitted). The Court has not established any fixed rules for when justice requires flexibility. *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (en banc). But it has articulated a few guideposts: It will apply plain-error review if (1) “exceptional circumstances” exist where (2) “substantial rights are affected” and (3) “a miscarriage of justice will occur if plain error review is not applied.” *Walsh v. Alight Sols., LLC*, 44 F.4th 716, 724 (7th Cir. 2022) (quoting *Henry*, 969 F.3d at 786)).

The Court has exercised its “power of lenity” when the “failure to present a ground to the district court has caused no one—not the district judge, not us, not the appellee—any harm of which the law ought to take note.” *Amcast*, 2 F.3d at 749. *Amcast* also involved a question of law, “as to which the district judge’s view, while it would no doubt be interesting, could have no effect on our review.” *Id.* at 750. The opposing party “had—and it took—a full opportunity to respond.” *Id.* at 749. On those facts, “[t]here w[ould] be no better time to resolve the issue than now.” *Id.* at 750.

As in *Amcast* no harm will come to anyone if the Court reaches the merits here. Similar to *Amcast* and *Rosser*, this case involves a question of law, normally reviewed de novo, and Church Mutual has every opportunity to respond.

A. Church Mutual has no reasonable claim of surprise or prejudice and affirming the judgment will send the wrong message to lawyers and insurers.

This Court has pointed out that courts generally do not consider arguments first presented on appeal because of “the inequity borne by the non-erring party when he is forced to incur the expense of a new trial occasioned by his opponent’s error.” *Deppe*, 863 F.2d at 1361. The “inequity” generally means the harm to the appellee of being “surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.” *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). But in some cases, “injustice [i]s more likely to be caused than avoided by deciding the issue without [the forfeiting party]’s having had an opportunity to be heard.” *Id.* at 121.

First, Church Mutual cannot claim surprise here. It, not Lighthouse Tabernacle, put the replacement-cost issue before the court. It did so with full knowledge that the facts did not warrant summary judgment. (App. 338–39.) Church Mutual’s own designated evidence contains sufficient facts needed to deny that portion of its motion. (App. 710–1273.) Yet the only facts Church Mutual mentioned in its two-paragraph argument were (a) the date of the loss, (b) its actual-cash-value payment, and (c) that no one had started repairs even though two years had passed, saying the delay “clearly” did not satisfy “as soon as reasonably possible after the loss or damage.” (App. 338–40.)

As explained above, Church Mutual’s representation to the district court omitted many facts Church Mutual knew about and never disputed. For the first eighteen months after the loss, Lighthouse Tabernacle had an irrefutable excuse for holding off on repairs: Church Mutual was inspecting the property (slowly). Lighthouse Tabernacle would have breached the policy’s inspection clause by starting demolition without Church Mutual’s blessing. For the next six months, the

parties disputed cost and estimates, which might have required another inspection of the fire-damaged building. The dispute also prevented the budgeting and contracting needed to start repairs. With knowledge of these facts, Church Mutual did not include in its briefing facts showing it caused much of the delay. Instead, it suggested to the district court that Lighthouse Tabernacle “clearly” had no justification to decline to start repairs for two years. (App. 338–39.)

Although Smith had an obligation to rebut this argument, Church Mutual also had an obligation to refrain from making it. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992) (observing that parties have an obligation not to seek summary judgment when they know there is a genuine dispute of fact). That makes this case very different from those where the prevailing party is “surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.” *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 812 (7th Cir. 1988) (quoting *Singleton*, 428 U.S. at 120).

Church Mutual should not be surprised by any of this. It put the matter at issue. It had all the opportunity it could have asked for, and it is mostly its own designated evidence—not some new evidence yet to be found—that bars summary judgment on this defense. *SEC v. Yang*, 795 F.3d 674, 679 (7th Cir. 2015) (relying on plaintiff’s failure to develop a record to decline plain-error review of an issue); *Jackson v. Parker*, 627 F.3d 634, 640 (7th Cir. 2010) (same); *Int’l Travelers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215, 224–25 (7th Cir. 1981) (same). As a result, the first main justification for withholding plain-error review does not apply.

Second, affirming would create bad incentives for insurers. An insurer relying on this case’s precedent could learn the lesson that delaying the claims process can result in a windfall. Church Mutual’s lengthy delays, the policy’s two-year limitations period, warnings about bearing the risk of starting demolition and rebuilding, and the insurer’s ignoring requests for a tolling agreement, forced its

policyholder's hand into filing this suit. All these combined to deprive Lighthouse Tabernacle of the appraisal process under the policy, also prejudicing it during the litigation.

The Court should not encourage such strategies. By reversing, the Court can avoid injustice to Lighthouse Tabernacle without undermining the deterrent effect of the forfeiture rules. And it can emphasize to parties that they must still tell the whole truth, even when faced with incompetent adversaries. They must resist the temptation to win by sleight of hand, rather than by facts or law.

B. Reversing will not improperly second-guess or otherwise insult the district court's work on this case.

The Court has also worked to avoid imposing district judges with the burden of deciding cases again based on facts or arguments not presented to them. *Packer v. Trs. of the Univ. of Ind. Sch. of Med.*, 800 F.3d 843, 849 (7th Cir. 2015). Without special justifications, doing this “undermine[s] the essential function of the district court,” which is to build a record and find facts. *Boyers*, 848 F.2d at 812. This is particularly true where the district court “had no opportunity to decide” the question argued on appeal. *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir. 1977). In cases in which “the parties have developed no factual record,” the appellate court lacks “a prior heat-tested decision” to review. *Int'l Travelers Cheque*, 660 F.2d at 224 (quotations omitted). For several reasons, these considerations are not persuasive here.

First, the posture of this case is simpler than most plain-error appeals. Church Mutual sought summary judgment. (App. 317–18.) Lighthouse Tabernacle opposed the motion, but it did not cross-move on any grounds. (App. 883–91.) The district court ruled on that issue, incorrectly given all the facts in light of well-established law, holding that there was no genuine issue of fact on one of Church

Mutual’s dispositive defenses and entitled it to judgment as a matter of law. (App. 1–16.)

Thus, although the precise argument or facts were not articulated below, the district court passed upon the issue at the center of this appeal—at Church Mutual’s request. Appellate courts often relax the forfeiture rules to “permit[] review of an issue not pressed so long as it has been passed upon” in the lower court. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotations omitted); *In re Boomgarden*, 780 F.2d 657, 662 (7th Cir. 1985). The forfeiture here is small, unlike the typical plain-error case, when a party “essentially argues an entirely different case on appeal” and thus makes it “unfair to both the [appellee] and the district judge” to reverse. *Packer*, 800 F.3d at 849.

The issue on appeal involves a narrow question the district court had in mind but lacked adequate advocacy to decide properly. The district court also had nearly all the key information presented in Church Mutual’s Statement of Facts Not in Dispute. (App. 326–36.) It lacked only Lighthouse Tabernacle’s repeated pleas for extensions needed as the parties negotiated the replacement cost, Church Mutual’s ignoring those pleas, and Lighthouse Tabernacle’s continuous following up when Church Mutual failed to make progress on its inspections or respond to multiple requests to allow rebuilding to begin. But it had the basic timeline of those communications, which it would have found had counsel below pointed the court to the appropriate page numbers within Church Mutual’s designated evidence.

Additionally, Lighthouse Tabernacle asks for reversal on a fraction of the issues decided below. It does not ask the district court to duplicate work or retry a case, and the Court owes no deference to it on the ultimate issue presented. The district court passed directly on the question presented, and it fully heard Church Mutual on the subject—indeed, Church Mutual invited the court to rule on this issue.

Second, without the forfeiture, this Court would review that order de novo. *Greenbank v. Great Am. Ins. Co.*, 47 F.4th 618, 624 (7th Cir. 2022). It neither finds facts nor judges credibility, but simply compares the record evidence to the claim or defense on which judgment is sought. *See id.* Because Indiana law governs this policy, any legal questions about the policy’s meaning or application are answered as a matter of law—either the policy is unambiguous in one party’s favor, or it is ambiguous (and the policyholder prevails). *USA Gymnastics, Inc. v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 512 (7th Cir. 2022) (Indiana law).

More importantly, the district court generally cannot grant summary judgment by default. Fed. R. Civ. P. 56(e)(3); *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1992). Although the district court need not comb the record—and although Rule 56(e)(3) does not automatically revive forfeited legal arguments—this principle makes it more appropriate to examine whether “it is apparent from the record that there are contested issues of material fact.” *Cooper*, 969 F.2d at 371.

These realities mitigate one of the strongest equities against plain-error review: putting the prevailing party through “the expense of a new trial occasioned by his opponent’s error.” *Deppe*, 863 F.2d at 1361. Neither Church Mutual nor the district court will be put through any duplicative exercises, let alone a second trial. Church Mutual is barred from asserting this replacement-cost defense as a matter of law, and even if not, a genuine dispute of material fact “is apparent from the record” that Church Mutual submitted in support of its motion. *Cooper*, 969 F.2d at 371. The district court’s contrary order is erroneous, and it should simply be reversed in relevant part—not vacated and remanded for a do-over.

In many respects, then, this case resembles *Amcast*. 2 F.3d 746. There, the Court exercised its “power of lenity” because doing so would not cause “any harm of which the law ought to take note” to the district court, to the appellee, or to this

Court *Id.* at 749. The appellee had a full opportunity to respond in its brief. *Id.* The case involved a pure issue of law, “as to which the district judge’s view, while it would no doubt be interesting, could have no effect on our review.” *Id.* at 749–50. And the Court could see “no better time to resolve the issue” than now. *Id.* at 750.

The Court did the same in *Rosser v. Chrysler Corp.*, excusing the appellant’s failure to make an argument in opposition to a motion to dismiss where the district court’s decision “was erroneous as a matter of law.” 864 F.2d 1299, 1306 n.7 (7th Cir. 1988) ; *Charlton v. U.S.*, 743 F.2d 557, 561 n.5 (7th Cir. 1984) (same, in FTCA lawsuit). In another, the Court took judicial notice of federal judicial records not cited below and enjoined a party who “ha[d] all but besieged the federal courts for the past several years” with frivolous litigation. *Green v. Warden*, 699 F.2d 364, 369 (7th Cir. 1983).

As in *Amcast*, *Rosser*, and *Charlton*, reversing will not cause injustice to anyone. Church Mutual will have a full brief to respond, based on evidence that it put into the record. It will be able to do so on a matter of law where this Court owes no deference to the district court.

Third, little chance exists that reversal will force the district court to endure a trial, rather than a settlement conference. For the last full year of data without pandemic interference, only one percent of all insurance cases went to trial (bench and jury combined), across the whole country. *Federal Judicial Caseload Statistics*, Tbl. C-4, Row 109, Administrative Office of the U.S. Courts (Mar. 31, 2019). And the economic value of this dispute is around \$700,000—preventing a trial from being feasible for either party. Some sort of settlement is nearly inevitable.

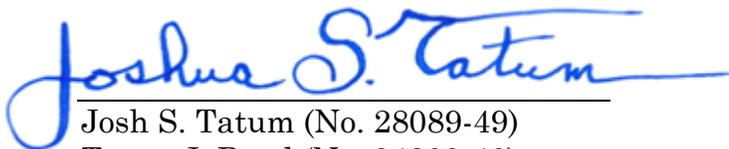
Finally, reversing will not be surprising, unjust, or insulting to the district court. Judge Pratt, who issued the order on appeal, was also the judge who suspended Smith from the bar of the Southern District of Indiana soon after this Court suspended him from its own. *In re Jason M. Smith*, No. 1:22-mc-00017-TWP-

DLP, ECF No. 4 at 1–5 (S.D. Ind., Apr. 4, 2022). Her order also recognizes, on the first page, that Smith’s filing was deficient and unhelpful. (App. 2.) A judgment reversing part of this order (because the interests of justice otherwise require it) will not likely instill resentment or frustration in the court below. To the contrary, it is likely to be seen as one of those minor inconveniences the bench and bar endure as part of the pursuit of justice.

CONCLUSION

The Court should reverse in part the district court’s order granting summary judgment to Church Mutual (App. 1–16) and remand the case for further proceedings.

Respectfully submitted,



Josh S. Tatum (No. 28089-49)

Tonya J. Bond (No. 24802-49)

Christopher E. Kozak (No. 35554-49)

PLEWS SHADLEY RACHER & BRAUN LLP

1346 North Delaware Street

Indianapolis, Indiana 46202-2415

Phone: (317) 637-0700

Fax: (317) 637-0710

jtatum@psrb.com

Attorneys for Plaintiff-Appellant Crothersville Lighthouse Tabernacle Church, Inc.

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

This document complies with the type-volume limit of 7th Cir. R. 32(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) it contains 9,817 words.

This document complies with the typeface requirements of Fed. R. App. P. 27(d)(1), 32(a)(5) and 7th Cir. R. 32(b) and the type-style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO (Version 2210) in 12-point Century Schoolbook.



CIRCUIT RULE 30(D) STATEMENT

In compliance with Circuit Rule 30(d), I certify that the following Short Appendix contains all materials required by Circuit Rule 30(a).²

Joshua S. Tatum

² For its main appendix, Lighthouse Tabernacle relies on the four volumes previously filed by its earlier counsel at Docs. 13-2, 13-3, 13-4, and 13-5.

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¹ For its main appendix, Lighthouse Tabernacle relies on the four volumes previously filed by its earlier counsel at Docs. 13-2, 13-3, 13-4, and 13-5.

² Doc. 13-2

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION**

CROTHERSVILLE LIGHTHOUSE)	
TABERNACLE CHURCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:20-cv-00153-TWP-DML
)	
CHURCH MUTUAL INSURANCE COMPANY,)	
S.I.,)	
)	
Defendant.)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a Motion for Summary Judgment filed by Defendant Church Mutual Insurance Company, S.I. ("Church Mutual"). ([Filing No. 28.](#)) Plaintiff Crothersville Lighthouse Tabernacle Church, Inc. ("Lighthouse Tabernacle") initiated this action alleging that Church Mutual breached its insurance contract with Lighthouse Tabernacle by failing to pay out the required amount following a fire. Church Mutual seeks summary judgment on Lighthouse Tabernacle's breach of contract claim, bad faith claim and request for punitive damages. For the following reasons, the Court **grants** Church Mutual's Motion.

I. BACKGROUND

As required by Federal Rule of Civil Procedure 56, the facts are cited in the light most favorable to Lighthouse Tabernacle. *See Cervantes v. Ardagh Grp.*, 914 F.3d 560, 564 (7th Cir. 2019). However, pursuant S.D. Ind. Local R. 56-1(b), Lighthouse Tabernacle's response should have included a section labeled "Statement of Material Facts in Dispute" that identified the potentially determinative facts and factual disputes that Lighthouse Tabernacle contends demonstrate a dispute of fact precluding summary judgment. Lighthouse Tabernacle did not include this section, so to the claim that it fails to challenge any factual assertions made by Church

Mutual, the Court accepts those facts as admitted without controversy. *See Hinterberger v. City of Indianapolis*, 966 F.3d 523, 527-29 (7th Cir. 2020); *see also* S.D. Ind. L.R. 56-1(f). While this does not alter the standard for assessing a Rule 56 motion, it does "reduc[e] the pool" from which the facts and inferences relative to such a motion may be drawn. *Smith v. Severn*, 129 F.3d 419, 426 (7th Cir. 1997).

Located in Crothersville, Indiana, Lighthouse Tabernacle is a midsize, Apostolic Pentecostal church that first constructed its primary church building (the "Church Building") in 1975. ([Filing No. 1-2 at ¶¶ 1, 5-6.](#)) Lighthouse Tabernacle is led by Paster Jerry Miles ("Pastor Miles") and serves a congregation of approximately 200 members. *Id.* at ¶¶ 7-8. The Church Building was originally built by members of the congregation and underwent remodeling in 2012. *Id.* at ¶ 12. One of the distinguishing features of the Church Building were several arched glue laminated beams, known as glue lam or glulam beams, in the sanctuary. *Id.* at ¶ 11.

In the early hours of June 3, 2018, the Church Building caught fire. *Id.* at ¶ 10. The fire damaged the sanctuary, offices, classrooms, and baptismal area. ([Filing No. 30-1 at ¶ 5.](#)) On the date of the fire, the Church Building was insured under a policy issued by Church Mutual under policy number 0085870-21-038185 (the "Policy"). ([Filing No. 29 at 4.](#)) The Policy included property coverage with a limit of \$2,346,000.00 for Blanket Buildings & Personal Property Owned by Lighthouse Tabernacle with a property deductible of \$2,500.00 for each occurrence.

On the date of the fire, Pastor Miles contacted Church Mutual to notify them of the fire and to begin investigating and processing Lighthouse Tabernacle's claim. ([Filing No. 1-2 at ¶ 20.](#)) The following day, Church Mutual sent Lighthouse Tabernacle two letters acknowledging receipt of the claim and informing Lighthouse Tabernacle that it was beginning its investigation. ([Filing No. 29 at 8.](#)) The letters listed George Ben Hodges ("Hodges") as the assigned Property Field Adjuster

and York Specialized Loss Adjusting Division ("YSLAD") as the organization investigating the claim. *Id.* Kelly Ross ("Ross") of YSLAD was assigned to investigate the claim. *Id.* On the same day, Church Mutual issued a \$25,000 advance payment to Lighthouse Tabernacle. *Id.*

On July 3, 2018, Hodges sent Lighthouse Tabernacle a letter notifying it that Church Mutual needed an additional 30 days to complete its investigation. ([Filing No. 30-1 at ¶ 8.](#)) A few weeks later, Chris Tremaine of Tremaine Enterprises, Inc. ("Tremaine") sent a letter to Church Mutual notifying it that Lighthouse Tabernacle had retained Tremaine as its public adjuster. *Id.* at ¶ 9. In the letter, Tremaine requested specific documents from Church Mutual and expressed that Lighthouse Tabernacle "intends to exercise the replacement cost options as it relates to this claim." *Id.* Three days later, on July 30, 2018, Church Mutual sent another letter to Lighthouse Tabernacle notifying them that they needed another additional 30 days to complete the investigation. *Id.* at ¶ 10.

During June 2018, Church Mutual retained Simon Katz ("Katz") of Watchful Eye Companies, LLC to work as a building consultant. *Id.* at ¶ 11. Katz completed an original estimate in June 2018 that was later revised in August 2018. *Id.* According to Katz's August 2018 estimate, the estimated replacement cost to rebuild the Church Building was \$1,384,241.32. *Id.* at ¶ 12. In response, Tremaine provided an estimate on September 20, 2018, which estimated the cost of rebuilding the Church Building at \$2,247,999.99. *Id.* at ¶ 17. As part of his estimate, Tremaine contacted Glue Lam Erectors, Inc. ("GLE") and obtained a proposed budget for installing the glue lam beams and wood decking. *Id.* at ¶ 18. GLE proposed a budget of \$370,303.00 for reconstructing the sanctuary ceiling. ([Filing No. 30-2 at ¶ 10.](#)) The proposed budget from GLE, however, also stated, "Please understand we will need an Architect and Structural Engineer to complete Design Documents before we can offer a firm price." *Id.*

On October 11, 2018, after working with Tremaine and Lighthouse Tabernacle, Ross revised Katz's August 2018 estimate for the Church Building to reflect a replacement cost of \$1,557,266.26 and an actual cash value of \$1,385,162.98. *Id.* at ¶ 11. The following day, Church Mutual sent Lighthouse Tabernacle, via Tremaine, an advance payment in the amount of \$125,000.00. ([Filing No. 30-1 at ¶ 20.](#)) At the end of the month, on October 29, 2018, Church Mutual sent another letter to Tremaine notifying it that Church Mutual needed an additional 15 days to complete its investigation. *Id.* at ¶ 21. On that same day, Church Mutual also sent Lighthouse Tabernacle another letter that included the actual cash value of Lighthouse Tabernacle's business personal property in the amount of \$111,630.44. *Id.* at ¶ 22. The letter sent with the payment stated that the replacement cost value of Lighthouse Tabernacle's business personal property was \$174,423.81 less recoverable withholding of \$60,293.37. *Id.* The letter also stated the following:

Your policy provides replacement cost coverage. This payment is based on the actual cash value less your deductible. To recover the withholding, repairs and replacement should be completed within 180 days. If you are unable to complete the repairs and replacement within 180 days, notify me. Your receipts will be used to determine the amount of withholding that is recoverable. The full amount of recoverable withholding outlined above may not be available to you if your total costs are less than the estimated replacement value loss.

Id.

On November 13, 2018, Marie Desotell ("Desotell"), on Tremaine's behalf, sent Hodges and Ross an email with Lighthouse Tabernacle's proof of loss for a replacement cost of \$1,731,690.07 and an actual cash value claim of \$1,235,162.98 for the Church Building and Lighthouse Tabernacle's business personal property. *Id.* at ¶ 23. Several weeks later, on December 5, 2018, Church Mutual sent Lighthouse Tabernacle a check in the amount of \$1,235,162.98 representing the undisputed actual cash value of the cost to repair or replace the Church Building.

Id. at ¶ 24. The letter included with the check included the previously referenced paragraph regarding the 180-day time frame for recovering the withholding. *Id.*

In February 2019, Katz revised his estimate. *Id.* at ¶ 13. The estimate included estimated costs for glue lam beams from Rigidply Rafters Inc. ("Rigidply"). *Id.* at ¶ 15. Also included in the estimate was the cost for wood decking ceiling and the labor cost for installation of the glue lam beams and wood decking, including staining, and the cost of delivery of the glue lam beams. *Id.* at ¶ 16. According to the estimate, the cost to rebuild the Church Building was \$1,726,963.75. *Id.* at ¶ 14.

In response to Katz's revised estimate, Tremaine raised several issues. *Id.* at ¶ 25. Specifically, he was concerned that the quote obtained from Rigidply was for fabrication of two straight glue lam beams, and not the fabrication, installation, and transportation of four arched glue lam beams and decking. *Id.*

At the end of July 2019, Church Mutual sent Tremaine a check for \$8,791.53 for Lighthouse Tabernacle's business extra expenses. *Id.* at ¶ 26. The following month, in response to Tremaine's concerns over the Rigidply quote, Church Mutual emailed Tremaine that it was going to hire an engineer to inspect the Church Building and provide an estimate. *Id.* at ¶ 27. Church Mutual hired James McCann ("McCann") of Keeler-Webb Associates as the engineer. *Id.* at ¶ 28. On August 6, 2019, Tremaine sent Ross and Hodges an email with Lighthouse Tabernacle's "proof of loss for the subject claim." *Id.* at ¶ 29. The email stated that the estimate included GLE's proposal and stated the following:

Please accept this proof of loss as a demand for payment as the Church can no longer patiently wait for the carrier to make any additional determinations. Please have payment made based upon this proof of loss delivered to our office by Friday, August 16, 2019 or provide a line item denial supporting the carrier's position.

Id. The proof of loss attached to the email specifically provided the following: (1) an actual cash value of "TBD"; (2) the whole loss and damage known to date (which included the dwelling and contents) as \$2,353,982.90; and (3) the amount claimed by Lighthouse Tabernacle under the Policy as \$2,353,982.90. ([Filing No. 30-3 at 7.](#)) On August 13, 2019, in response to the proof of loss submitted by Tremaine, Hodges emailed stating that the proof of loss was rejected as being incomplete as "the building and content loss is not broken out, the deductible is not included, and the ACV is not included and the amounts are not agreed to." ([Filing No. 30-1 at ¶ 30.](#))

On October 7, 2019, Church Mutual sent Lighthouse Tabernacle two checks totaling \$167,637.66: one in the amount of \$166,429.19 representing additional payment of the undisputed actual cash value of damages to the Church Building and another in the amount of \$1,208.47 representing the balance of the policy limit for business extra expenses. *Id.* at ¶ 32. The letter sent with the check set out how the payment was determined:

The Replacement Cost Value:	\$1,911,387.56
Less Recoverable Withholding:	\$238,164.95
Minus Prior Payments:	\$1,505,584.95
Minus Deductible:	Absorbed
Payment Amount:	\$167,637.66

Id. Like other letters including payments, the letter included the paragraph regarding the 180-day time frame for recovering the withholding. *Id.*

Throughout November and December 2019, the parties corresponded back and forth regarding the status of the engineer's report. *Id.* at ¶¶ 33-40. On December 23, 2019, Hodges sent an email to Desotell and Tremaine with the engineer's report ("McCann's Report") attached. *Id.* at ¶ 42. In the same email, Hodges stated that he had asked Ross to revise the estimate based on the engineer's findings. *Id.* Lighthouse Tabernacle and Tremaine responded by raising issues with McCann's Report. *Id.* at ¶ 43. Specifically, the complaints included concerns over not

acknowledging GLE's proposed budget, not relying on a bid or estimate for a glue lam vendor, and concerns over McCann's and Katz's qualifications. *Id.*

On March 16, 2020, Tremaine sent Hodges and Ross a letter on Lighthouse Tabernacle's behalf requesting an appraisal to resolve the dispute regarding the amount of the loss. *Id.* at ¶ 44. On March 24, 2020, Church Mutual sent Lighthouse Tabernacle a check in the amount of \$20,207.00 which represented the difference between the actual cash value of the damage to the Church Building as estimated by McCann less the amount that had been previously paid. *Id.* at ¶ 45. The following week, in response to Tremaine's email, Church Mutual notified Lighthouse Tabernacle of the name of its appraiser to assist with the dispute of the amount of loss. *Id.* at ¶ 46.

On June 3, 2020, Lighthouse Tabernacle filed this lawsuit in state court alleging breach of contract, bad faith, and requesting actual and punitive damages from Church Mutual. ([Filing No. 1-2 at 4.](#)) The matter was later removed to this federal court. ([Filing No. 1.](#))

II. SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante*, 555 F.3d at 584 (citation omitted). The moving party bears the burden of showing the absence of genuine issues of material fact.

Lewis v. Wilkie, 909 F.3d 858, 866 (7th Cir. 2018). If the moving party carries its burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250.

"However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaromonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

III. DISCUSSION

Lighthouse Tabernacle asserts in its Complaint that Church Mutual breached the Policy, did so in bad faith, and that Lighthouse Tabernacle is entitled to both actual and punitive damages. ([Filing No. 1-2.](#)) Church Mutual moves for summary judgment on all claims, maintaining that

each of Lighthouse Tabernacle's claims fail as a matter of law. ([Filing No. 28.](#)) The Court will address each claim in turn.

A. Breach of Contract Claim

Church Mutual first argues that it has provided all required benefits under the Policy and, at the same time, did not breach any provision of the Policy. ([Filing No. 29 at 20.](#)) Under Indiana law, an insurance policy is subject to the same rules of interpretation and construction as other contracts. *Cotton v. Auto-Owners Ins. Co.*, 937 N.E.2d 414, 416 (Ind. Ct. App. 2010). When interpreting an insurance policy, "we give plain and ordinary meaning to the language that is clear and unambiguous." *United Farm Family Mut. Ins. Co. v. Matheny*, 114 N.E.3d 880, 885 (Ind. Ct. App. 2018), *trans. denied*, 124 N.E.3d 40 (Ind. 2019). The contract language is unambiguous if "reasonable persons could not honestly differ as to its meaning." *Id.* To that end, the Court looks to see "if policy language is susceptible to more than one interpretation." *Id.*

Under Church Mutual's interpretation of the Policy, Lighthouse Tabernacle is not entitled to replacement cost benefits. The Policy states that Church Mutual "will not pay on a Replacement Costs basis . . . (1) until the lost or damaged property is actually repaired or replaced; and (2) unless the repairs are made as soon as reasonably possible under the loss or damage." ([Filing No. 30-1.](#)) Church Mutual argues that prior to the initiation of this litigation, it had paid Lighthouse Tabernacle the "Actual Cash Value" of the cost to repair or replace the Church Building in the amount of \$1,571,799.17. ([Filing No. 29 at 20-21.](#)) Church Mutual further contends that Lighthouse Tabernacle has not notified it of repairs either being started or completed. ([Filing No. 30-1 at ¶ 50.](#)) Because Lighthouse Tabernacle has not repaired or rebuilt the Church Building "as soon as reasonably possible after the loss or damage," based on the terms of the Policy, Lighthouse

Tabernacle "is not entitled to recover the Replacement Cost benefits under the Policy." ([Filing No. 29 at 21.](#))

Church Mutual also argues that Lighthouse Tabernacle is not entitled to additional actual cash value benefits. *Id.* Under the Policy, Lighthouse Tabernacle is required to send Church Mutual "a signed, sworn proof of loss containing the information we request to investigate the claim . . . within 60 days after our request." ([Filing No. 30-1.](#)) Church Mutual received two sworn proofs of loss for damage to the Church Building. ([Filing No. 29 at 21.](#)) The first was received on November 13, 2018. *Id.* In response, Church Mutual sent Lighthouse Tabernacle a check for \$1,235,162.98 on December 5, 2018, which reflected the "undisputed Actual Cash Value of the cost to repair or replace the Church Building as reflected in the November 13, 2018 proof of loss." *Id.* The second proof of loss was dated August 5, 2019 and contained a "Replacement Cost Value" but no "Actual Cost Value." *Id.* Because of this omission, Church Mutual rejected the second proof of loss on August 13, 2019. *Id.* Church Mutual argues that as it has not received any other sworn proof of loss, Lighthouse Tabernacle has not established that it is entitled to any additional "Actual Cash Value" benefits under the Policy. *Id.* at 21-22.

Finally, Church Mutual argues that it has not breached any terms of the Policy and Lighthouse Tabernacle has not identified any provision of the Policy that Church Mutual has not complied with. *Id.* at 22. Church Mutual based its determination of the cost to rebuild the Church Building "initially on the estimate of a contractor that was willing [to] rebuild the building for the amount of its estimate and, after [Lighthouse Tabernacle] questioned the estimate, on the estimate of an engineer." *Id.* Church Mutual asserts that the Policy does not require that it use a specific vendor to determine the cost to rebuilding the Church Building, including the ceiling. *Id.* Its estimate from the contractor was based on a bid from a manufacturer of glue lam beams. *Id.* While

Lighthouse Tabernacle argues that the budget proposal from GLE should have been accepted, Church Mutual points out that nothing in the Policy required it to accept GLE's proposal, and the proposal itself recognized the need for consultation with an engineer or an architect before a firm price could be provided. *Id.* at 22-23. Pursuant to the Policy, it has made all payments owed to date and, thus, Church Mutual argues that it is entitled to summary judgment.

In response, Lighthouse Tabernacle makes three arguments. The first questions the credibility of Ross' and Hodges' supporting affidavits based on Lighthouse Tabernacle's understanding that Steven M. Gunn would be conducting and writing the engineering report, not McCann. ([Filing No. 41 at 5.](#)) According to Lighthouse Tabernacle, "[t]he concealed transfer of this obligation to McCann, without ever notifying the same, seriously undermines the credibility of Ross and Hodges and will likely undermine the credibility of McCann also. *Id.* at 5-6.

Lighthouse Tabernacle's second argument is that a factual conflict remains about the cost estimates because Church Mutual has failed to include any testimony from an expert witness. *Id.* at 6. Lighthouse Tabernacle argues that "the dispute between these reports is evidence in the record and requires a jury to determine which is accurate." *Id.*

Finally, Lighthouse Tabernacle contends that Katz worked not as a "building consultant" but rather was an "independent adjuster" under Indiana law. *Id.* at 6-7. Lighthouse Tabernacle argues that Katz was not licensed and that his communications with Hodges and Ross show a conflict of interest. *Id.*

In reply, Church Mutual argues that Lighthouse's argument regarding Dunn versus McCann serving as engineer is both illogical and factually unsupported. ([Filing No. 48 at 5.](#)) Church Mutual points out that when Tremaine provided Pastor Miles' contact information, he referenced either Dunn or McCann contacting him. ([Filing No. 42-2.](#)) Additionally, when Gunn

responded, he copied McCann on the email. *Id.* But even if Lighthouse Tabernacle did not know the identity of the engineer who would be conducting the inspection, Church Mutual asserts, it does not create a genuine issue of material fact relevant to Church Mutual's basis for summary judgment or whether it acted reasonably in retaining an engineer to inspect the property and assist in the determination of the cost to repair or replace the Church Building. ([Filing No. 48 at 5.](#))

Church Mutual also contends that Lighthouse Tabernacle's claim regarding the need for expert testimony is unnecessary. *Id.* at 6. While Church Mutual agrees that a question of fact exists regarding which of the three estimates is accurate, it argues that determination of the accuracy is unnecessary based on the grounds for which Church Mutual seeks summary judgment. *Id.*

Finally, Church Mutual argues that Lighthouse Tabernacle's argument regarding Katz serving as an "independent adjustor" fails because Lighthouse Tabernacle failed to cite to or designate any evidence to support its claim. *Id.* Additionally, Church Mutual contends that the evidence it designated shows that Katz "was retained as a building consultant, and [Lighthouse Tabernacle] has failed to cite or designate any evidence to show that Katz took any action other than to inspect the site, obtain relevant information and prepare estimates of the cost to repair or replace the Church Building." *Id.*

After reviewing the designated evidence in favor of Lighthouse Tabernacle, the Court agrees with Church Mutual. While failing to directly address the arguments Church Mutual made in support of its motion for summary judgment, Lighthouse Tabernacle has also failed to support most of its arguments and defenses with any citations to designated evidence or analysis of case law. The party opposing summary judgment has an affirmative duty to demonstrate, through specific factual allegations, that there is a genuine issue of material fact. *Hemsworth*, 476 F.3d at

490. *See Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (Summary judgment is "not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events."). Except for citing several emails between the parties regarding the engineer's budget estimate, Lighthouse Tabernacle failed to designate or cite to a single piece of evidence that would support its claim that Church Mutual breached the Policy. ([Filing No. 41 at 3-5.](#))

Throughout its response, Lighthouse Tabernacle makes statements disputing the evidence cited by Church Mutual, questioning the credibility of witnesses' testimony, or stating inferences can be drawn from the evidence or testimony. *Id.* at 5. The problem, however, is that none of these arguments are either fully explained or supported by designated evidence. Lighthouse Tabernacle cannot meet its burden by merely stating its disagreement with Church Mutual's arguments. *See Sink*, 900 F. Supp. at 1072 ("The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence."). And in addition to a lack of supporting factual evidence, Lighthouse Mutual fails to cite to any case law supporting any of its arguments except a few cases discussing the summary judgment standard. ([Filing No. 41 at 2-3.](#)) It is well-established under Seventh Circuit law that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority are waived (even those arguments that raise constitutional issues)". *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

The designated evidence fails to show that Church Mutual either breached the Policy or failed to pay Lighthouse Tabernacle the required benefits under the Policy. Under the explicit terms of the Policy, Church Mutual has paid the "Actual Cash Value" of the cost to repair or replace the Church Building in the amount of \$1,571,799.17. If Lighthouse Tabernacle wanted to seek

the "Replacement Cost," it was required to repair or replace the Church Building and do so "as soon as reasonably possible under the loss or damage." ([Filing No. 30-1.](#)) At the summary judgment stage, if Lighthouse Tabernacle believed that it had either received the wrong reimbursement amount or that Church Mutual breached the Policy, it was required to designate evidence showing Church Mutual's alleged breach or a piece of evidence showing that the amount paid out failed to comply with the Policy. Lighthouse Tabernacle has not done this; thus, summary judgment on the breach of contract claim is **granted**.

B. Bad Faith Claim

Church Mutual next argues that it is entitled to summary judgment on Lighthouse Tabernacle's bad faith claim because there is no evidence to support the allegation. Indiana law recognizes that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured. *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993). Breach of contract or poor judgment on the part of the insurance company is insufficient to establish the independent tort of bad faith. *Id.* at 519-20. "[T]he element of conscious wrongdoing must also be present." *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728, 732 (Ind. Ct. App. 2008). Wrongdoing sufficient to sustain a bad faith claim can be demonstrated with "evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will." *Id.*

Church Mutual has met its initial burden in its motion for summary judgment by pointing out the lack of evidence supporting Lighthouse Tabernacle's bad faith claim. Church Mutual did not refuse to pay the necessary cost of construction, based its estimate on a bid from a manufacturer of glue lam beams, timely paid the undisputed portion of the claim, and did not use false information to obtain lower bids. ([Filing No. 29 at 27-31.](#)) In response, Lighthouse Tabernacle

once again cites no evidence or case law to support its claim. It merely states that the communications cited by Church Mutual "could very well be interpreted" as bad faith.

The Court again agrees with Church Mutual. Lighthouse Tabernacle has neither designated nor cited any evidence that would support a finding of bad faith. The designated evidence before this Court does not indicate any conscious wrongdoing on the part of Church Mutual. Summary judgment on Lighthouse Tabernacle's bad faith claim is **granted**.

C. Punitive Damages

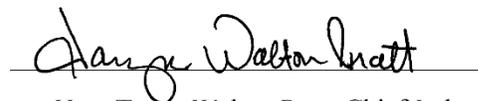
Finally, Church Mutual argues that it is entitled to summary judgment on Lighthouse Tabernacle's claim seeking punitive damages. ([Filing No. 29 at 32.](#)) As stated above, all of Lighthouse Tabernacle's claims have been dismissed and it no longer has a basis for seeking punitive damages. Additionally, Lighthouse Tabernacle failed to either argue or address punitive damages in its response brief. For both reasons, summary judgment as to punitive damages is **granted**.

IV. CONCLUSION

For the reasons discussed above, Defendant Church Mutual Insurance, S.I.'s Motion for Summary Judgment, ([Filing No. 28](#)), is **GRANTED**. Plaintiff Crothersville Lighthouse Tabernacle Church, Inc.'s claims are **dismissed** on summary judgment, the trial and final pretrial conference are hereby **VACATED**, and final judgment will issue under separate order.

SO ORDERED.

Date: 12/17/2021



Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

DISTRIBUTION:

Jason M. Smith
SMITH LAW SERVICES, P.C.
jason.smith@smithlawservices.com

John B. Drummy
KIGHTLINGER & GRAY, LLP (Indianapolis)
jdrummy@k-glaw.com

Todd D. Small
KIGHTLINGER & GRAY, LLP (Indianapolis)
tsmall@k-glaw.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION**

CROTHERSVILLE LIGHTHOUSE)
TABERNACLE CHURCH, INC.,)
)
Plaintiff,)
)
v.)
)
CHURCH MUTUAL INSURANCE COMPANY,)
S.I.,)
)
Defendant.)

No. 4:20-cv-00153-TWP-DML

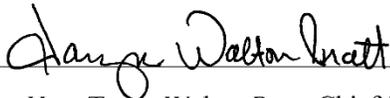
FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

Judgment is entered in favor of Defendant Church Mutual Insurance Company, S.I., and against Plaintiff Crothersville Lighthouse Tabernacle Church, Inc. This action is **TERMINATED**.

SO ORDERED.

Date: 12/17/2021


Hon. Tanya Walton Pratt, Chief Judge
United States District Court
Southern District of Indiana

Roger A.G. Sharpe, Clerk

BY: 
Deputy Clerk, U.S. District Court

Distribution:

John B. Drummy
KIGHTLINGER & GRAY, LLP (Indianapolis)
jdrummy@k-glaw.com

Todd D. Small
KIGHTLINGER & GRAY, LLP (Indianapolis)
tsmall@k-glaw.com

Jason M. Smith
SMITH LAW SERVICES, P.C.
jason.smith@smithlawservices.com