

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 SOUTHERN DIVISION

RANDALL SCOTT NELSON, and)	
MARION KAY NELSON,)	
)	
Plaintiffs,)	
)	
v.)	2:24-CV-01277-SGC
)	
FMIC MUTUAL)	
INSURANCE COMPANY,)	
)	
Defendant.)	

PLAINTIFF’S OPPOSITION TO DEFENDANT, FRANKENMUTH MUTUAL
 INSURANCE COMPANY’S, MOTION FOR SUMMARY JUDGMENT AND
 BRIEF IN SUPPORT OF OPPOSITION

COMES NOW Plaintiff, Randall Scott Nelson (hereinafter “Nelson”) and moves this Court to deny the Defendant, Frankenmuth Mutual Insurance Company’s (hereinafter "FMIC”) Motion for Summary Judgment and as grounds therefore, Nelson shows there are genuine issues of material fact in dispute and FMIC’s summary judgment is due to be denied. This opposition is based upon the pleadings filed with this Court, the evidentiary submissions in support of this opposition, and this brief in support thereof.

I. INTRODUCTION

FMIC denied Nelson’s insurance claim on his building and contents loss. FMIC’s denial amounts to a breach of contract and bad faith denial of claim. FMIC

denied Nelson's claim for loss due to a water pipe bursting on or about December 25/26, 2022, at Scott's Motorcycle Service, (hereinafter "Scott's"). The FMIC policy was renewed by Nelson on September 27, 2022, and was effective and in force until at the time of the loss made the basis of this lawsuit. Nelson is the named insured on the policy. The policy "description of premises" lists the occupancy as a convenience store/gasoline stores-full service – limited repair, which is erroneous. Nelson never ran a convenience store. FMIC's denied Nelson's claim on June 9, 2023, stating Scott's was vacant, the policy contained a vacancy exclusion, and as a result, coverage for the loss was excluded under the FMIC policy issued to Nelson. The insured building made the basis of this lawsuit was not vacant at the time the water loss occurred. Nelson had approximately eight (8) to fourteen (14) cameras in and outside the building for security purposes, and inside the building he had a customer's motorcycle, two (2) customer's ATVs, two (2) customer's engines, five (5) motorcylce/atv lifts, two (2) air compressors, three (3) welders, one (1) lathe, one (1) parts washer, two (2) work benches, one (1) oil evacuation system, approximately thirty thousand dollars (\$30,000) in special tools and diagnostic equipment, a desk, counter space for and stools for customers, torches, and parts. Nelson had all utilities on at Scott's and ran heating and air conditioning, had internet at Scott's, and had the telephone operable at Scott's. Nelson was in the building in

his work clothes, within thirty (30) days prior to the water loss. Scott's occupied the entire 4000 square foot building with its normal business items.

II. STATEMENT OF UNDISPUTED FACTS

Nelson lives with his wife, Maryann Kay Nelson, at 556 White Water Drive, Hayden, Alabama 35079. Nelson was required to sit for an examination under oath (hereinafter referred to as "EUO") by FMIC on March 28, 2023. Nelson was not represented by an attorney at the EUO. FMIC was represented by attorney Kori Clement at the EUO. See **Plaintiff's Exhibit 1, Examination Under Oath of Scott Nelson**, page 1, lines 5-19, page 2, lines 1-6, page 14, lines 14 through 21 (hereinafter "Ex. 1, 1:5-19, 2:1-6,14:14-21"). Nelson was 67 years old at the time of the EUO. Ex. 1, 16: 4-7.

Nelson owns Scott's which is located at 332 Decatur Highway, Gardendale, Alabama 35071. Scott's was started in 1993 and is a sole proprietorship. Ex. 1, 32: 8-9, 20-23.

Christine Jacobs was the FMIC corporate representative tendered for deposition in this case. **Plaintiff's Exhibit 2, Deposition of Christine Jacobs**, page 5, lines 16-19, (hereinafter "Ex. 2, 5:16-19"). FMIC renewed the insurance policy made the basis of this lawsuit on September 27, 2022, to the "named insured" Randall Scott Nelson, d/b/a/ Scotts Motorcycle Service, 332 Decatur Highway Gardendale, Alabama 35071. The policy location was 332 Decatur Highway,

Gardendale, Alabama. Ex 2., 24:21-23, 25:1-23, 26:1-19, 26:21-23, 27:1/9. with deposition exhibit bates stamped pages, 293-371, **Plaintiff's Exhibit 3**, FMIC policy. The policy term was effective through September 27, 2023. The policy lists the description of the premises under "Property Coverage" as a convenience store/gasoline stores-full service – limited repair. **Plaintiff's Exhibit 4**, Property Coverage, Description of Premises page of FMIC policy.

Scott's was temporarily closed to new business due to Mr. Nelson's health. Ex 1., 23:2-12. He had myasthenia gravis, which is intolerant of stress and heat, and it is treated with medication that may impair the immune system. Ex 1 114:4-16.

Nelson had a sign on the door at Scott's stating it was temporarily closed due to sickness. Ex. 1, 31:23-25, 32:1-3. **Plaintiff's Exhibit 5, Sign on door.** Nelson had the electricity, water, garbage and sewer active at Scott's at the time of the loss and tendered those bills for each to FMIC from 2021 to the present at his EUO. Nelson went to Scott's from time to time to check the building and to work on things. Ex.1,106:11-14, 107:18-25,108:8-22,142:12-16, 143:11-23, 144:13-16. Nelson had between 8 and 14 cameras up in and outside Scott's monitoring the building via internet. Ex. 1 153:10-17. A landline for Scott's was still maintained at the time of Nelson's examination under oath, (205) 608-0061. Ex 1, p. 130: 1-7. Nelson went to Scott's on December 26, 2022, after he noticed the internet was down because he had no video of the building. He found a burst water pipe when he arrived at the

building on December 26, 2022. Ex. 1, 136: 12-23, 137:3-6, 140:20-23. Nelson sent FMIC a video showing he had been to Scott's days before pipe burst. Ex. 1, 142:12-18. The heating and air was fully functional at the building at the time of the loss. Ex. 2, 43:13-15.

The loss at Scott's occurred on December 25 or 26, 2022, and Nelson's FMIC policy was in full force and effect at the time of the loss. Ex 1, 140:20-23, Ex. 2, 26:21-23, 27:1. Jacobs knew Nelson had inventory in the building known as Scott's which FMIC insured, as well as atvs, motorcycles, and he had the power on and ran heating and air at the building. Ex 2. 43:4-9. Jacobs reviewed videos of the building and knew Nelson was at Scott's in November and December of 2022 prior to the loss. Ex. 2, 43: 4-23, 44:1. Scott's building is approximately 4000 square feet and Scott's occupied the entire building at the time of the loss. The building was not vacant it had a shop, showroom, parts counter with customer seats, which were used at and for his business and contained:

- 1 Customer's Motorcycle
- 2 Customer's ATV
- 2 Customer's Engines
- 5 Lifts
- 2 Air Compressors
- 3 Welders
- 1 Lathe
- 1 Parts Washer
- 2 Work Benches
- 1 Oil Evacuation System
- \$115,000 worth of new parts and accessories
- 1 Desk Top Computer

1 Laptop Computer
3 Stools for Customer to sit at counter
20 ft Counter Space for customers
20 ft desk counter space with 2 work stools
1 Telephone and answering machine
Point of Sale software that renews every 90 days for pricing and parts lookup
\$30,000 in special tools, hand tools and diagnostic equipment
4000 PSI Pressure washer
12 Camera Security System
Slat wall parts display boards (800 Ft) where the parts were displayed
2 File Cabinets
Small refrigerator
Microwave
Coffee Maker
Water Heater
Tire Machine
Tire Balancer
Torches
Portable parts washer
4 Rolling toolboxes
Hydraulic press
Overhead crane
Exhaust fume system
Stereo and 4 speakers
4 Battery chargers
27 Assortment trays for nuts, bolts, screws, electrical connections
Shims
2 Boring bars
Cash Register with Approx \$137.00
Exhibit 6 , Affidavit of Scott Nelson, with attachments.

Nelson had been at Scott's a lot tinkering around, working on trucks, transmissions, automobiles. He would go in and try to do jobs on personal things and his buddies things. Ex.1,143:11-21.

Nelson did not say Scott's was permanently closed. Ex 1., 130:13-15. Scott's office number was active and used at the time of the loss and (205)608-0061. Ex. 1, 130:1- 11. FMIC understands Scott's had many items in shop at the time of the water loss. Ex. 1, p. 141:17-20.

FMIC received Nelson's water loss claim on December 26, 2022, the first day Nelson had knowledge of the water damage. Ex. 2, 30:1-22. FMIC determined the loss was caused by a burst pipe. Ex. 2, 39:4-9. FMIC never made a written estimate for Nelson's damage to his building because they claim to have a coverage issue. Ex 2, 42:12-20. No contents estimate was made by FMIC. Ex. 2, 50:2-20. FMIC knew Nelson had atvs and motorcycles in the building and had power, heat and air on at the building. Ex. 2, 43:4-15. FMIC never performed an estimate on Nelsons' property damage. Ex. 2. 40:6-8.

FMIC paid nothing on Nelson's claim and coverage was denied on June 6, 2023 based on a claimed vacancy exclusion. Ex. 2, 46:1-22, 47:1-7, 49:4-9. **Plaintiff's Exhibit 7**, FMIC Declination Letter to Nelson, June 9, 2023.

FMIC states if Nelson did not have paying customers 60 days before loss, then the building was vacant. Ex. 2, p.53:20-23. Denial of the claim by FMIC was based on Nelson not performing customary operations according to FMIC's definition. Ex. 2, 57:3-6. Customary operations is not defined in the FMIC policy issued to Nelson.

Nelson's submitted a proof of loss claiming compensatory damages of loss of \$1,274,240.28. **Plaintiff's Exhibit 8, Proof of Loss dated May 24, 2023.** The FMIC attorney requested a proof of loss to make a final determination at the EUO. Ex. 1, 36:8-16. The attorney stated she realized he had numerous photos and videos and Nelson was going to send them to her, and she would review them. Ex. 1, 75:6-23.

Nelson had to pay the remediation company, To The Rescue, to examine and drill holes in the walls of the building to remove water as a result of the water loss. He gave the paid receipts and estimates for the work to Frankenmuth. See attached Frankenmuth bates stamped documents. The total I paid for this is evidenced by receipts that are attached and were provided to Frankenmuth for \$4, 148.66 and \$9580.21 on March 13 and March 30, 2023. Ex. 6 , Affidavit of Scott Nelson, with attachments.

All parts in the store were ruined by the water. This was \$114,119.28 worth of parts. Nelson provided Frankenmuth with a detailed itemization of all parts with the parts cost in a 404 page itemization of inventory. The total beginning listed on the last page of Exhibit 6e. Ex. 6 – Ex. 6e.

Nelson provided FMIC with a receipt from the City of Gardendale for to allow him to be able to conduct repairs on his building as his own contractor for some work as a result of the water loss since he had not been paid by Frankenmuth.

This amount was \$1,625.00. Nelson could not use the store or enter it safely after the loss because of Frankenmuth's failure to pay for the loss. Ex. 6 , Affidavit of Scott Nelson, with attachments.

Nelson gave FMIC an estimate for repairs from To the Rescue for \$33,627.58 but he had to do the work with friends. He could not pay To the Rescue for the work at the building. Nelson had an estimate he provided FMIC from Mold & Mildew for \$257,880.00 for cleaning of parts due to the water loss. He could not pay to have this work done. Nelson had another estimate from To The Rescue for restoration and remediation work for \$48,968.25. He had to do this myself. He could not afford to pay To The Rescue. Ex. 6 , Affidavit of Scott Nelson, with attachments.

Nelson gave FMIC an estimate from Mold & Mildew Solutions for work as a result of the water loss in the amount of \$7,600.00 for them to determine where the mold problems existed in the building. Nelson ultimately paid them \$2,836.00 because he could not afford to pay the \$7,600.00. Ex. 6 , Affidavit of Scott Nelson, with attachments.

Nelson paid Service Tech to remove existing duct work as a result of the water loss. Nelson paid an electrician to replace a main panel for \$850.00 that was damaged in the water loss. Ex. 6 , Affidavit of Scott Nelson, with attachments.

Nelson paid Contex for storage while he attempted to repair the building in the amount of approximately \$4,000.00. Nelson and friends cleaned the building and Nelson claims the work was valued at \$35,000.00. He performed electrical work, with parts and wiring at the building as a result of the in the amount of approximately \$29,00.00. Nelson and friends removed wet ceiling and walls and the value of the work was in the approximate amount of \$56,000.00. Ex. 6, Affidavit of Scott Nelson, with attachments.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate if the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. Witter v. Delta Airlines, Inc., 138 F.3d 1366, 1369 (11th Cir. 1998). In deciding a motion for summary judgment, the Judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are left to the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Id. at 255. The Court must view the evidence in inferences from the evidence in the

light most favorable to the non-movant. Jean-Baptiste v. Gutierrez, 627 F. 3d. 816, 820 (11 Cir. 2010).

IV. LEGAL ANALYSIS

a. Policy Interpretation:

The insurance policy issued by FMIC to Nelson made the basis of this lawsuit was issued and delivered in Alabama and insured real and personal property in the state of Alabama. The Plaintiff agrees with the Defendant's assessment of in its' brief that Alabama law applies to the interpretation of this policy made the basis of this lawsuit. Ex parte Owen, 437 So.2d 476, 481 (Ala 1983).

The issue of whether an insurance contract is ambiguous or unambiguous is a question of law for the Court to decide. In determining whether an ambiguity exists in the insurance contract, a Court should apply the common interpretation of the language alleged to be ambiguous; this means that the terms of the insurance policy should be given a rational and practical consideration when construing an insurance contract. The Court cannot consider the language in the insurance policy in isolation but must consider the policy as a whole. Nationwide Ins. Co. v. Rhodes 870 So.2d 695,696-697 (Ala. 2003).

b. Policy Vacancy Provision

The FMIC policy issued to Nelson contains a vacancy provision that states as follows:

“6. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant’s interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lease or sublessee and used by the lessee or sublessee to conduct its customary operations; and/or

(ii) Used by the building owner to conduct **customary operations**.

2. Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

1. We will not pay for any loss or damage caused by any of the following, even if they are Covered Causes of Loss:

(a) Vandalism;

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

Ex. 3, Bates stamped page FIC 0315.

Whether or not Nelsons's building was vacant turns on whether or not the policy is issued to the owner or general lessee of a building. Such building is vacant unless at least 31% of the square footage of the building is rented to a lessee or sublessee to **conduct customary operations**. Emphasis added. This is not the case because this building was not rented to a lessee or sublessee. The vacancy turns on whether or not the building was used by the building owner to conduct customary operations. Customary operations is not defined in the FMIC policy at issue.

For the purposes of the policy made the basis of this suit, it must be determined if Nelson used the building for customary operations, which is not defined by the policy. A general rule of Alabama law, an insurance contract is construed strongest against the party who framed it. The contract will be construed strictly against the insurer and liberally in favor of the insured. Ambiguous provisions of an insurance policy will be construed most strongly against the insurer and in favor of the insured. Tyler v. Insurance Co. of North America, Ala. 331 So. 2d 641, 644 (Ala. 1976). Whether at the time of the water loss Nelson's building was used for customary operations by Nelson is a question for the jury. National Sec. Fire & Cas. Co. v. James, 358 So2d. 737,738-739 (Ala.Civ.App.1978) citing Continental Ins. Co. v. Dunning, 249 Ky. 234, (1933).

Since customary operations is not defined in the policy the same is ambiguous. Nelson was using the building to conduct customary operations. At the time of the water loss Nelson maintained all utilities at the building including electricity, water, sewer, and gas. He also had internet at the building to monitor the building with cameras. The front door sign at the time of the loss indicated that the business was temporarily closed. Plaintiff's Exhibit 5, Sign on door. Nelson went to the building on a regular basis. Nelson had the following objects in the building for his business purposes:

- 1 Customer's Motorcycle
- 2 Customer's ATV
- 2 Customer's Engines
- 5 Lifts
- 2 Air Compressors
- 3 Welders
- 1 Lathe
- 1 Parts Washer
- 2 Work Benches
- 1 Oil Evacuation System
- \$115,000.00 worth of new parts and accessories
- 1 Desk Top Computer
- 1 Laptop Computer
- 3 Stools for Customer to sit at counter
- 20 ft Counter Space for customers
- 20 ft desk counter space with 2 work stools
- 1 Telephone and answering machine
- Point of Sale software that renews every 90 days for pricing and parts lookup
- \$30,000 in special tools, hand tools and diagnostic equipment
- 4000 PSI Pressure washer
- 12 Camera Security System
- Slat wall parts display boards (800 Ft) where the parts were displayed
- 2 File Cabinets

Small refrigerator
Microwave
Coffee Maker
Water Heater
Tire Machine
Tire Balancer
Torches
Portable parts washer
4 Rolling tool boxes
Hydraulic press
Overhead crane
Exhaust fume system
Stereo and 4 speakers
4 Battery chargers
27 Assortment trays for nuts, bolts, screws, electrical connections
Shims
2 Boring bars
Cash Register with Approx \$137.00

Ex. 6, Affidavit of S. Nelson.

The building was certainly not vacant. The terms (“vacant”) and (“unoccupied”) are to be understood as commonly accepted in the insurance industry and by the general public; “vacant” means empty, without inanimate objects, containing nothing; “unoccupied” means without occupants or inanimate objects; a dwelling is “unoccupied” when it is ceased to be used by a place of abode or residence by people. National Sec. Fire & Cas. Co. at 739. “Vacant” or “unoccupied” in a policy is a question of law for the Court. Whether at the time of a fire the dwelling is vacant or unoccupied as those definitions are defined by the Court is a question of fact for the jury. The evidence in its strongest tendencies will be imputed most favorably for the Plaintiff. Id. at 739.

The substantial evidence shows Scott's was conducting customary operations, and the interpretation of customary operations is a question of fact for the trier of fact to determine and when the evidence is viewed in the light most favorable to the Plaintiff, this Court must determine there are genuine issues of material fact in dispute for the jury to decide and deny summary judgment. If the insurance company had desired to have customary operations of a building owner defined, it would have defined the same.

Nelson occupied the entire 4000 square foot building with animate objects for his customary business operations. FMIC erroneously argues that the building was less than 31% occupied as the building was full of parts, tools, and motor vehicles for Scott's operations. All utilities were on and being used, and he had internet on at the building using cameras to monitor it, as well as having the business telephone line in use and functioning. Scott's building was never vacant. A vacant building does not have all this functioning with a fully stocked building of parts, and objects as set forth above.

When the above evidence is construed in the light most favorable to Nelson this Court must find that genuine issues of material fact exist from which a reasonable jury of fair-minded persons could find the building was not vacant for more than 60 days prior to the loss and Nelson carried on customary operations although he did not have paying customers at the time of the loss. Nelson maintained

all tools, cash register, a phone line, supplies and motorized customer vehicles/motorcycles/atvs to conduct this customary business practices. He removed nothing from the building prior to the loss made the basis of this lawsuit. Ex. 6, Affidavit of S. Nelson. His sign on the front door of the building said he was only temporarily closed. FMIC does not address the fact that Nelson had the building full of objects used for his business, that he had all utilities on, that he had parts, tools, motorcycles and atvs of customers in the building at the time of the water pipe bursting, Nelson monitored the building with cameras, had internet at the building and he had the business phone line active for customers. All normal and customary fixtures were in the building. The Plaintiff has presented substantial evidence of material facts when construed in the light most favorable to him, a fair-minded jury could find that he was carrying on customary operations at the building and the same was not vacant, This is a question for the jury to determine. A burst pipe is specifically covered under the policy, and the building was not vacant as set forth above.

c. Breach of Contract claim

To prove a breach of insurance contract, the plaintiff must show “(1) the existence of a valid contract binding the parties in the action, (2) his own performance under the contract, (3) the defendant's nonperformance, and (4) damages.” State Farm Fire & Cas. Ins. Co. v. Slade, 747 So.2d 293, 303 (Ala.1999).

Valid Contract/nonperformance. Nelson adopts all prior arguments and facts above as if set forth verbatim in this section in support of and regarding the policy vacancy and customary operations arguments. Nelson has herein set forth genuine issues of material fact when construed in the light most favorable to him to support denial of summary judgment on his breach of contract claim, supporting his assertion with material facts that he did have coverage under the FMIC policy made the basis of this lawsuit and the same was not excluded. The building was never been vacated by Nelson, and in fact he maintained all business operation tools, products and vehicles as set forth above at the time of loss. Coverage is not precluded as forth above, and summary judgment is due to be denied as the Defendant only argues that the breach of contract claim fails because Nelson cannot show coverage exists. Coverage is a question to be determined by a jury. It is undeniable that FMIC has not paid any amounts for Nelson's loss because it denied his coverage on the basis of an exclusion to the requirement to pay on the loss under the policy.

Damages. Nelson can certainly prove his damages. Nelson has offered evidence that he has paid for repairs at his building and has to make repairs himself with friends as a result of FMIC's denial of his claim. Nelson was granted a permit from the City of Gardendale to be his own contractor so he could make repairs he could otherwise not afford. That cost to the City of Gardendale was \$1,625.00

See attached receipt from City of Gardendale for me to be able to conduct repairs on my building as my own contractor for some work as a result of the water loss since I had not been paid by Frankenmuth. This amount was \$1,625.00. I could not use the store or enter it safely after the loss because of Frankenmuth's failure to pay for the loss.

Nelson had to pay the remediation company, To The Rescue, to examine and drill holes in the walls of the building to remove water as a result of the water loss. He gave the paid receipts and estimates for the work to Frankenmuth. See attached Frankenmuth bates stamped documents. The total I paid for this is evidenced by receipts that are attached and were provided to Frankenmuth for \$4, 148.66 and \$9580.21 on March 13 and March 30, 2023. Ex. 6 , Affidavit of Scott Nelson, with attachments.

All parts in the store were ruined by the water. This was \$114,119.28 worth of parts. Nelson provided Frankenmuth with a detailed itemization of all parts with the parts cost in a 404 page itemization of inventory. The total beginning listed on the last page of Exhibit 6e. Ex. 6 – Ex. 6e.

Nelson provided FMIC with a receipt from the City of Gardendale for to allow him to be able to conduct repairs on his building as his own contractor for some work as a result of the water loss since he had not been paid by Frankenmuth. This amount was \$1,625.00. Nelson could not use the store or enter it safely after

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Nelson paid Contex for storage while he attempted to repair the building in the amount of approximately \$4,000.00. Nelson and friends cleaned the building and Nelson claims the work was valued at \$35,000.00. He performed

electrical work, with parts and wiring at the building as a result of the in the amount of approximately \$29,00.00. Nelson and friends removed wet ceiling and walls and the value of the work was in the approximate amount of \$56,000.00. Ex. 6 , Affidavit of Scott Nelson, with attachments.

Nelson's submitted a proof of loss claiming compensatory damages of loss of \$1,274,240.28. Ex. 8, Proof of Loss dated May 24, 2023. All parts in the store were ruined by the water. This was \$114,119.28 worth of parts. Nelson provided Frankenmuth with a detailed itemization of all parts with the parts cost in a 404 page itemization of inventory. The total beginning listed on the last page of Exhibit 6e. Ex. 6 – Ex. 6e, total parts loss list. In the insurance context, the Alabama Supreme Court has stated that, at trial, “the plaintiff has the burden of offering evidence tending to show[,] to the degree required, the amount of damages allegedly suffered.” Johnson v. Harrison, 404 So.2d 337,340, (Ala. 1981) At trial, an insured cannot merely present evidence that he “suffered a loss to his business”; he must provide “evidence as to the amount of such damage.” *Id.*; *see also* Nat. Sec. Fire & Cas. Co. v. Minchew, 372 So.2d 324, 326 (Ala. Civ. App. 1978). All above claimed losses are admissible losses to be offered at trial and to be rebutted by the Defendant. Many of the above losses have already been incurred and paid by Nelson. Nelson has set forth substantial evidence of material fact of which fair minded jurors construing the fact in the light most favorable to Nelson could find that he has

proven damages to support his breach of contract claim. Nelson has performed much of the work to repair losses to his building as set forth above and in his affidavit and he has valued the losses, after being permitted to act as his own contractor to perform repairs. Ex. 6, w attachments. This case not analogous to *Frankenmuth v. Five Points* case cited in the Defendant's brief. *Frankenmuth Mut. Ins. Co. v. Five Points West Shopping City, LLC*, 2022 WL 949888 (N.D.Ala. March 29, 2022). Nelson swore to his damages in his proof of loss and in his affidavit. He was forced to perform many of the repairs set forth above and can certainly testify to the loss of his parts which are set forth in detail in his list giving a cost for each part in the 404 page itemized inventory he submitted to FMIC. Nelson bases his testimony on some of his actual cost for repair as well. All costs and losses have been previously disclosed to FMIC. Nelson has provided admissible evidence of its damage, creating a genuine issue of material fact as to his damages wherein fair-minded jurors could find for Nelson on his damages claims.

D. Bad Faith

FMIC does not dispute that it failed to fairly investigate his claim as FMIC never even attempted to estimate the building loss and did not estimate the contents/personal property loss because it asserted it did not have to do so because Nelson had no coverage. Nelson's damages as to the building were not even estimated, nor was his the personal property loss for all the parts and inventory in

his building that were damaged at the time of the water loss. Based on all the facts set forth herein above, FMIC had no arguable or debatable reason to fail to properly investigate Nelson's claim.

V. CONCLUSION

Nelson has shown there are genuine issues of material fact in dispute and FMIC's summary judgment is due to be denied on Nelson's contract claim and on his bad faith claim based on the foregoing.

/s/ R. Leland Lesley
R. Leland Lesley (LES008)
Attorney for Plaintiff

R. Leland Lesley
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A Professional Legal Corporation
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Birmingham, Alabama 35209
(205) 870-1986
lee@lesleylawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that I have this the 10th day of September, 2025, I filed the foregoing electronically using the e-file system which will send notification of such filing to the following and/or placed a copy in the U.S. Mail, postage prepaid and properly addressed to:

Kori L. Clement
Klasing, Williamson, & Burke P.C.,
100 Concourse Parkway
Suite 275, East Tower
Birmingham, Alabama 35244

/s/ R. Leland Lesley