IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

FORT STOCKTON INDEPENDENT SCHOOL DISTRICT	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:24-cv-00043-DC-DF**
	§	
LIBERTY MUTUAL FIRE INSURANCE COMPANY,	§	
	§	
	§	
Defendant.	§	

PLAINTIFF FORT STOCKTON INDEPENDENT SCHOOL DISTRICT'S RESPONSE TO DEFENDANT LIBERTY MUTUAL FIRE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Fort Stockton Independent School District ("Plaintiff" or the "FSISD") opposes Defendant, Liberty Mutual Fire Insurance Company's Motion for Summary Judgment for the following reasons:

I. INTRODUCTION

On October 10, 2022, a catastrophic hailstorm with large hail and lasting over 45 minutes damaged multiple campuses at Fort Stockton ISD. During the adjustment of the claim, Defendant, Liberty Mutual's expert consultants determined that the storm caused more than $12,200,000 in damage to FSISD's schools and other buildings, yet Liberty Mutual inexplicably only paid FSISD approximately $298,000 in January 2023.

Fort Stockton ISD filed this lawsuit in August 2024 alleging claims against Liberty Mutual for breach of contract and extra-contractual violations under the Texas Insurance Code. Liberty Mutual moves for summary judgement based exclusively on the opinions of experts they hired in

2025 long after this lawsuit was filed and ignores the contradictory evidence of the experts they hired during the claims process.[1]

Liberty Mutual's summary judgment on FSISD's breach of contract claim should be denied because there is substantial evidence that Liberty Mutual drastically underpaid FSISD for the hail damage caused by the October 2022 storm. Liberty Mutual's summary judgment on FSISD's extra-contractual claims should be denied because there is sufficient evidence that Liberty Mutual mismanaged the claim from the beginning and then blindly relied on biased information from the lawyer who became their defense counsel to underpay the claim instead of the overwhelming evidence from their claims adjuster and the experts Liberty Mutual hired to investigate the claim.

II. BACKGROUND FACTS

Defendant sold Fort Stockton ISD an all risk property insurance policy for the 2022-2023 school year with a $177,558,146 blanket policy limit that covered the schools and other buildings at eighteen locations.[2] It is undisputed that the policy covers FSISD's properties for hail damage, among other types of loss.[3] The policy had an endorsement that only covers *functional* damage to roofs surfaces and excludes *cosmetic* damage.[4] However, this endorsement did not apply to any other aspect of FSISD's structures and building components, including exteriors, HVAC systems and interiors.[5] For all building components, other than roof surfaces, the policy provided coverage for any "direct physical loss or damage" from hail.[6]

On October 10, 2022, a catastrophic hailstorm passed through Fort Stockton. Gil-Rey Madrid, FSISD's current superintendent, lived in Fort Stockton all of his life and never

[1] Specifically, pages 13-28 of Defendant's motion is a regurgitation of opinions from their litigation experts.
[2] Ex. A, Liberty Mutual Policy, at LIBERTY 5537-5543.
[3] Ex. H, Preston Dep., at 69:14-23.
[4] Ex. A, Liberty Mutual Policy, at LIBERTY 5601.
[5] Ex. H, Preston Dep., at 71:10-72:23.
[6] Ex. A, Liberty Mutual Policy, at LIBERTY 5538.

remembered a more severe storm.[7] The storm, which produced hail stones larger than 1.7 inches, lasted upwards of 40 minutes with constant pounding.[8] As a result of the damage, FSISD cancelled school the following day,[9] and the storm event was reported in the news as "Hailmageddon".[10]

Although they didn't know the magnitude of all the damage, FSISD's superintendent, Gabriel Zamora, reported damage to roofs, HVAC systems, exteriors and interiors at multiple campuses.[11] As a result of the reported damage, Defendant instructed the assigned adjuster from the beginning to hire an engineer and building consultant to help Defendant investigate the loss.[12]

Liberty Mutual assigned Christopher Alvarez, a general adjuster based in Sacramento, California, to adjust the claim. Although he has worked for Defendant or its predecessor for approximately 25 years, Alvarez only handled a handful of commercial claims in Texas before the FSISD claim.[13] Alvarez was responsible for investigating the loss and making the coverage and payment decisions for Defendant.[14] Since there is no dispute that hail damage is covered under Defendant's policy, Alvarez's sole responsibility was to determine how much damage was caused to FSISD's property from the October 10, 2022 hailstorm.[15]

Alvarez did not initially inspect the damage at FSISD himself. Instead, he hired DND Construction Services ("DND") and Donan Engineering ("Donan") to inspect FSISD's buildings on Defendant's behalf. Defendant approved a budget of over $68,000 for DND and $8400 for Donan to conduct their investigations and prepare reports.[16] DND was assigned to evaluate *all*

[7] Ex. I, Madrid Dep., 53:3-54:17.
[8] *Id.*; Ex. C, Liberty Mutual Communications, at LIBERTY 137; Ex. D, DND Reports, at LIBERTY 1157.
[9] Ex. I, Madrid Dep., at 53:22-54:11; Ex. P, at LIBERTY 123-128.
[10] Ex. P, News Reports, at LIBERTY 123-128.
[11] Ex. B, Liberty Mutual Log Notes, at LIBERTY 91.
[12] *Id.* at LIBERTY 90.
[13] Ex. G, Alvarez Dep., at 40:14-19.
[14] *Id.* at 8:14-21.
[15] *Id.* at 9:18-10:11.
[16] Ex. H, Preston Dep at 98:17-99:3.

hail damage to FSISD's property from the October 10, 2022 hailstorm.[17] DND conducted their inspections in October 2022 and sent a report to Alvarez on November 9, 2022 stating its directive was "to focus on damaged building materials, as presented during the site walks, and determine cost of damages as it relates to **the storm**"[18] (emphasis added). DND concluded that the hail damage to the FSISD property exceeded $5,300,000.[19] Defendant's corporate representative, James Preston, testified that DND's report was not shared with FSISD.[20]

Defendant's improper claims handling began when they hired Donan. Despite FSISD reporting widespread hail damage to all building components at multiple campuses, Alvarez instructed Donan to only inspect the roofs at FSISD —

> Scope of Work: Determine whether the **roof coverings** of the school district buildings are damaged by hail.[21]

This significant piece of information was not disclosed to FSISD.[22] More troubling, Defendant allowed Donan to send an unlicensed engineer-in-training (EIT), Christopher Griffis, to inspect FSISD's roofs.[23] Alvarez could not recall using an unlicensed engineer in any claim during his 25 years as an adjuster for Defendant.[24] Defendant's final error in the Donan assignment is that they didn't provide Donan with the cosmetic endorsement language in FSISD's policy so Donan could properly evaluate the roofs consistent with the terms of FSISD's policy.[25]

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[17] Ex. G, Alvarez Dep., at 126:21-127:1; 128:9-13
[18] Ex. D, DND Reports, at LIBERTY 1159.
[19] *Id.* at LIBERTY 1160-61.
[20] Ex. H, Preston Dep., at 101:24-102:12
[21] Ex. C, Liberty Mutual Communications, at LIBERTY 1394; *see also* Ex. E., Donan Report, at LIBERTY 1170.
[22] Ex. Preston Dep., 113:8-15.
[23] Ex. C, Liberty Mutual Communications, at LIBERTY 1394-1395. *See also* the Texas Board of Professional Engineers and Land Surveyors online roster at https://pels.texas.gov/roster/pesearch.html?ver=V062723##result-top showing Griffis was not licensed as professional engineer in the State of Texas until January 23, 2024.
[24] Ex. G, Alvarez Dep, at 113:21-114:1.
[25] Ex. H, Preston Dep., 113:21-115:10.

Griffis, the EIT, did as instructed and only inspected the FSISD roofs in November 2022. He sent a report to Alvarez on December 8, 2022, giving an opinion on the damage to the FSISD roofs but used his own definition of cosmetic versus functional damage as opposed to the language in the insurance policy.[26] Alvarez sent Griffis' erroneous report to DND and told them to ignore their own findings and write an estimate limited to the scope of roof repairs outlined in Griffis' report.[27] DND followed Defendant's instructions and prepared roof estimates tracking Griffis' limited scope of roof repairs.[28]

On January 17, 2023, Alvarez sent a letter to FSISD notifying them that he had concluded that the damage to FSISD's property from the October 10, 2022 hailstorm was approximately $613,000.[29] This figure was based on DND's roof estimates.[30] After applying depreciation and FSISD's deducible, Alvarez notified FSISD that he was making a $298,420.14 actual cash value (ACV) payment.[31] This payment only addressed damage to six buildings. The most problematic part of the letter was its omissions. Alvarez failed to inform FSISD that Defendant had limited the payment to FSISD's roofs and that they were applying the cosmetic limitation in the policy to the roofs.[32] These written disclosures are both requirements of the Texas Insurance Code.

At this point, Defendant had effectively completed its investigation. Liberty Mutual had no plans for any further investigation.[33] Alvarez had no plans to inspect the damage himself or send DND or Donan out for any additional inspections.[34] He also had no plans to hire any

[26] *Id.* at 118:1-119:22.
[27] Ex. C, Liberty Mutual Communications, at LIBERTY 1163-1167.
[28] Ex. H, Preston Dep., at 124:6-12.
[29] Ex. C, Liberty Mutual Communications, at LIBERTY 211-216.
[30] Ex. H, Preston Dep., at 125:5-24.
[31] Ex. C, Liberty Mutual Communications, at LIBERTY 211-216.
[32] Ex. H, Preston Dep., at 131:9-132:3.
[33] *Id.*, at 126:12-127:5.
[34] Ex. G, Alvarez Dep., at 148:2-150:20.

additional consultants.[35] FSISD was concerned about Defendant's investigation after getting Alvarez's payment letter. While they were not aware that Defendant limited the payment to functional damage on the roofs, FSISD did notice that Defendant had estimated almost no damage at the high school (less than $650), the largest building in the District.[36] Mr. Madrid specifically recalled that Defendant's estimate of damage to the high school was less than the damage to his own home from the storm.[37] At this point, FSISD felt they had given Defendant the opportunity to do the right thing in adjusting the claim, but Defendant failed. As a result, FSISD hired a public adjuster, James King of King Adjusting Services, to represent their interests and work with Defendant to come up with a proper assessment of the damage from the October 2022 storm.[38]

James King immediately contacted Alvarez and pointed out a number of problems with Defendant's investigation.[39] As a result, Alvarez agreed to set up a joint inspection with King Alvarez, representatives of DND and Griffis from Donan. The joint inspection took place on February 22 and 23, 2023. King left the inspection feeling a spirit of cooperation between the two sides.[40] Alvarez, DND and Griffis did not challenge any of the missed damage he pointed out to them,[41] and at the end of the joint inspection, Alvarez instructed DND to update their estimates with exterior damage and roof damage (other than the metal roofs).[42] Alvarez also agreed to hire an HVAC contractor, HVACi, to evaluate the hail damage to the HVAC systems at FSISD. The plan was for the parties to work off of the HVACi estimate and DND updated estimates to hopefully reach a resolution.[43]

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[35] Ex. G, Alvarez Dep., at 153:13-20.
[36] Ex. C, Liberty Mutual Communications, at LIBERTY 211-216.
[37] Ex. I, Madrid Dep., at 123:6-124:18.
[38] *Id.*, at 125:6-25.
[39] Ex. C, Liberty Mutual Communications, at LIBERTY 508-509.
[40] Ex. J, King Dep., at 66:11:23; 81:6-15.
[41] *Id.*, at 48:5-16; 86:19-22
[42] *Id.*, at 43:16-44:3, 48:17-49:19.
[43] *Id.*, at 46:25-47:5.

This plan took a dramatic turn in late March 2023. On approximately March 28, 2023, Alvarez and other employees of Defendant had a conversation with Steve Badger, who later became Liberty Mutual's counsel in this litigation.[44] During the conversation, Mr. Badger disclosed that he had represented two insurance companies in litigation against FSISD arising out of damage from a 2012 and 2015 hailstorm. He also disclosed information about other prior hail claims made by FSISD.[45] This information changed the entire trajectory of Defendant's investigation. Two days after Defendant's conversation with Mr. Badger and based on the information he shared about prior claims, Defendant opened a fraud or special investigations unit (SIU) claim and classified FSISD's October 10, 2022 claim as "suspicious."[46] The spirit of cooperation was clearly over.[47] In addition to opening an SIU investigation, Defendant sent FSISD multiple letters asking for information about prior repairs and prior claims and asking for a sworn proof of loss statement for the damage from the October 2022 storm.[48] After waiting six months for Defendant to properly investigate the loss, FSISD now had to hire their own experts, do their investigation and prepare their own estimates of damage.

King, on behalf of FSISD, responded to Defendant's multiple requests for information. He sent Defendant satellite images showing that all of the non-metal roofs except one had been replaced since the last significant hailstorm in 2015. He also provided Defendant with the roof warranties from the manufacturer, Durolast. Finally, he provided Defendant with the name of the roofing contractor, Roofs, Inc., that had performed the majority of roof replacements at FSISD.[49]

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[44] Ex. H, Preston Dep., at 142:21-143:24.
[45] Ex. G, Alvarez Dep., at 189:13-25.
[46] Ex. B, Liberty Mutual Log Notes, at LIBERTY 51-52; Ex. H, Preston Dep., 152:23-153:3.
[47] Ex. J, King Dep., at 43:16-44:10, 64:15-5, 66:11:23, 81:6-24.
[48] Ex. C, Liberty Mutual Communications, LIBERTY 145-146 and 3697-3700.
[49] *Id.*, at LIBERTY 2288-2297; Ex. G, Alvarez Dep., 207:7-22.

Defendant didn't reach out to either of these companies to inquire about prior roof repairs or replacements.[50]

After talking to and getting biased information from Mr. Badger, Defendant blindly concluded that FSISD had unrepaired old hail damage to multiple properties.[51] This is the conclusion that Defendant *wanted* to reach despite the overwhelming evidence to the contrary. In fact, it is clear that Defendant was not even interested in trying to determine if there was any unrepaired old hail damage at FSISD's properties. After talking to Mr. Badger, Defendant didn't perform any investigation of potential old versus new hail damage at FSISD. Specifically, they didn't reach out to DND, Donan Engineering or HVACi or ask them if they saw old or unrepaired hail damage during their multiple inspections.[52] Defendant also didn't hire any new consultants to evaluate old versus new hail damage at FSISD.[53] Defendant also didn't perform any comparative analysis after obtaining the prior claims files. None of their consultants, and no one internally, attempted to compare the damage from the October 2022 storm to the pictures and information in the prior claim files.[54] The most troubling aspect of Defendant's investigation is that they ignored the inspection and conclusion reached by their own adjuster, Alvarez. Defendant knew that Alvarez never saw any old hail damage during his on-site inspection.

> Q: When you were out there in February of 2023, and you had inspected all of the roofs at Fort Stockton ISD, correct?
>
> A: That was presented to us, yes.
>
> Q: Right. **You didn't identify any prior hail damage during your inspection, did you?**
>
> * * *

[50] Ex. H, Preston Dep., 172:8-22.
[51] Ex. C, Liberty Mutual Communications, at LIBERTY 3697-3700.
[52] Ex. H, Preston Dep., 153:11-154:18.
[53] Ex. G, Alvarez Dep., at 234:20-235:7.
[54] Ex. H, Preston Dep., at 189:4-190:22.

A: **Me personally, no.**

Q: And you walked the – you did the inspection in February 2023 with Mr. Griffis from Donan and Mr. Bowman from DND?

A: Correct

Q: And during that inspection, joint inspection that the three of you, neither Mr. Griffis or Mr. Bowman pointed out prior hail damage to you on the Fort Stockton ISD roofs that you inspected, correct?

A: I - - I don't recall.

Q: If they had pointed out prior hail damage on any of the roofs, that would be something that you would document somewhere in your file, wouldn't you?

* * *

A: I would think we would document that.[55]

During the claim, Alvarez hired DND and HVACi to estimate the hail damage to the FSISD property from the October 10, 2022 storm.[56] These two consultants collectively determined that the cost to repair the hail damage to FSISD property from the October 10, 2022 storm was in excess of $12,200,000.[57] Specifically, DND concluded that the damage to the buildings, with the exception of the HVAC systems, was at least $9,699,200.[58] HVACi concluded that the cost to repair or replace 541 HVAC units damaged by the hailstorm was $2,595,913.[59] Defendant ignored these reports and estimates and instead wrote FSISD on May 2, 2023 informing them that they would not be making any further payments on the claim.[60]

As a result of Defendant's conduct, FSISD hired their own consultants to evaluate the hail damage to their properties from the October 10, 2022 storm. Specifically, they hired their own

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[55] Ex. G, Alvarez Dep., at 217:11-218:7 (Objections omitted).
[56] *Id.*, at 126:21-127:1; 199:21-200:24; Ex. D; Def. Ex. R, Bowman Dep., 27:20-28:6, 29:12-25 (LIBERTY MSJ 1653); Def. Ex. Q, VanNess Dep., at 10:14:20 (LIBERTY MSJ 1599).
[57] Ex. H, Preston Dep., at 197:16-24.
[58] Ex. D, DND Reports; Ex. H, Preston Dep., at 138:23-139:7.
[59] Ex. F, HVACi Report, at LIBERTY 1699-1701; Def. Ex. Q, VanNess Dep 17:23-18:6, 19:2-8 (LIBERTY MSJ 1601)
[60] Ex. C, Liberty Mutual Communications, at LIBERTY 3698.

engineer from Orlo Forensics, who retained additional experts to assist with the investigation, and their own building consultant, Art Boutin. Collectively, FSISD's two experts identified the damage solely from the October 10, 2022 hailstorm and determined the reasonable and necessary cost to repair all damage from the storm as of October 2022 was $19,921,032.54.[61]

FSISD provided a copy of Mr. Boutin's estimate to Defendant on May 22, 2024.[62] FSISD followed up by providing Defendant with a sworn proof of loss based on Boutin's estimate in July 2024.[63]

Defendant proved that their request for an estimate and proof of loss from FSISD in March 2023 was only a ruse. Neither document changed Defendant's coverage and payment decisions.[64] In fact, Defendant essentially ignored FSISD's estimate and proof of loss. They didn't request a reinspection of any of the properties after receiving the documents.[65] Nor did Defendant ask anyone inside or outside the company to compare FSISD's estimate to the damages found by Defendant's experts.[66]

Throughout the claims handling, Defendant showed that it would not consider any evidence from their own adjuster, their own experts or FSISD. Instead, they chose to rely *exclusively* on biased and unsubstantiated information (not evidence) that FSISD had unrepaired old hail damage on their campuses. Plaintiff was left with no alternative but to file this lawsuit on August 13, 2024.

III. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

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[61] Ex. O-2, at Boutin 995-1030; *see also* Def. Ex. L.
[62] Ex. C, at LIBERTY 5348-5352.
[63] *See* Def. Ex. K., at LIBERTY MSJ 1057.
[64] Ex. H, Preston Dep., at 203:6-11, 206:5-9.
[65] *Id.*, at 203:12-23, 206:10-14.
[66] *Id.*, at 204:15-23, 206:15-21.

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

"A federal court sitting in diversity applies the substantive law . . . of the forum state." *Barrett v. Tallon*, 30 F.3d 1296, 1300 (10th Cir. 1994). The burden of establishing that summary judgment is appropriate lies with the movant. *Trainor v. Apollo Metal Specialities, Inc*., 318 F.3d 976, 979 (10th Cir. 2002). When applying this standard, the Court views the evidence in the light most favorable to the non-moving party. *Belhomme v. Widnall*, 127 F.3d 1214, 1216 (10th Cir. 1997). In fact, "[A]ll that is required [to overcome summary judgment] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). "Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). Defendant Liberty Mutual has not met its burden on summary judgment, and Plaintiff has presented sufficient evidence to support the genuine dispute of material fact.

B. FSISD has Raised a Fact Issue on Its Breach of Contract Claim

The concurrent causation issue only exists where a covered cause of loss and an excluded loss combined to create a loss – that is not the case here. *See Generation Trade, Inc. v. Ohio Sec. Ins. Co.,* No. 3:18-CV-0434-K, 2019 WL 3716427, at *4 (N.D. Tex. Aug. 6, 2019) ("[T]he doctrine of concurrent causation is just the 'rule which embodies the basic principle that insureds are entitled to recover only that which is covered under their policy.'"). Defendant does not allege that two losses, one covered and one excluded, caused the damage at FSISD at the same time. Instead, Defendant contends that the hail damage at the FSISD properties existed prior to the

October 10, 2022 storm. Thus, the only issue is whether the October 10, 2022 storm caused the hail damage at FSISD.

In order to meet the segregation requirement under Texas law, it is not necessary for FSISD to allocate the damage from the October 2022 storm event and any other sources with mathematical certainty, nor is it necessary to specifically eliminate all non-covered damage from the repair estimate. Rather, to defeat the motion for summary judgment, FSISD must simply provide sufficient *evidence* that would allow a jury to *reasonably* allocate damage. *Id*. at 477 (citing *McKillip*, 469 S.W.2d at 162). A party may meet its burden of proof with evidence demonstrating that its loss came *entirely* from a covered cause or by offering evidence by which a jury may "reasonably segregate covered and non-covered losses." *See Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971) (emphasis added) (McKillip's action failed because he did not offer proof of the direct effect of wind, a covered peril, on the insured property or offer an estimate of the damage caused by wind action independent of other causes.). In other words, so long as there is *some evidence* that the damages sought are *solely* attributable to a covered loss, the policy holder has met the requisite burden. *Advanced Indicator and Manufacturing, Inc. v. Acadia Ins. Co*., 50 F.4th 469, 476-77 (5th Cir. 2022).

1. FSISD Presents Evidence That All Damages Are Caused by a Covered Peril and Has Segregated Damages

FSISD can satisfy its burden by presenting its retained testifying expert, Patrick T. Snowden, P.E. ("Snowden") of Orlo Forensics LLC, who prepared a scope of recommended repairs and/or replacements of FSISD's properties for hail damage solely attributable to the

October 10, 2022 storm.[67] Defendant's motion ignores these facts and only cherry picks discreet portions of Snowden's deposition and report to attempt to support its motion.

Snowden and his team, including two additional licensed professional engineers, Travis Pechacek and Matthew Papik, performed a visual inspection of FSISD's properties over a period of 19 days from October 16, 2023 to November 30, 2023.[68] In order to reach his conclusions, Snowden identified not only hail damage, but also looked for and separated out pre-storm and non-hail related conditions to the structures and building components, including prior repairs or replacements, normal wear and tear, and "alternative causes of damage that can often be misattributed to hailstone impact," including blisters, footfall and mechanical damage.[69] Snowden found widespread "damage consistent with impacts from hailstones" at all campus locations including damage to the exterior elements -- exterior mounted appurtenances, gutters, HVAC equipment, and mechanical housings -- and varying degrees of damage to the roofing systems with coincident spatter, indicating the hail impact was recent.[70]

Snowden and his team performed a number of investigatory activities, including the quantification of damage (e.g., the size of hail impacts and number of hail hits within a quantifiable area of a roofing assembly), photogrammetry, impedance scanning, water testing and drone flights.[71] They also cut core samples from the flat membrane roofs to test for moisture

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[67] Doc. 9, Plaintiff's Expert Disclosures; Def. Ex. O, Snowden Dep., at 43:12-25 (emphasis added) (LIBERTYMSJ 1287); Ex. K, Declaration of Patrick T. Snowden at ¶¶ 5, 10-11; Ex. K-2 Snowden Report, at Orlo 1669-1674, 1686-1697.
[68] Def. Ex. O, Snowden Dep., at 30:17-31:4 (LIBERTYMSJ 1284); Ex. K-2 Snowden Report, at Orlo 1643.
[69] Ex. K-2 Snowden Report, at Orlo 1669-1675; Ex. K, Declaration of Patrick T. Snowden at ¶ 5.
[70] Ex. K-2 Snowden Report, at Orlo 1664-1667, 1668-1685; Ex. E, Donan Report, at LIBERTY 1184-1185, indicating spatter is present between 6 and 24 months after an event.
[71] Def. Ex. O, Snowden Dep., at 37:5-38:25 (LIBERTYMSJ 1285-1286); Ex. K-2 Snowden Report, at Orlo 1664-166-1685.

water/intrusion, and to better understand the composition of the roofing system(s) to determine the reasonable and necessary scope of repairs or replacements required by the building code.[72]

Snowden then conducted a search of historical weather data to further assist in his determination of the most likely date that the damage occurred. First, he researched the Storm Events Database (SED) operated by the National Oceanic and Atmospheric Administration (NOAA) for significant hail events in Fort Stockton occurring over the past 20 years.[73] Then, after confirming there was more than one significant event, with May 4, 2015 being the most recent significant occurrence prior to October 2022, Snowden retained John Choquette, the lead meteorologist at HailTrace, to "better understand the nature of the hailstorms that occurred proximate to 10/10/2022 event and to assess the capabilities of the storms relative to each to damage the subject properties."[74]

Choquette's findings and opinions, which are made within a reasonable degree of meteorological certainty, indicate the October 2022 hail storm produced the largest maximum size hail, in diameter, at every FSISD property location since the May 4, 2015 storm, with the exception of the Middle School having a max hail size of 1.75 inches on July 7, 2016.[75] However, Snowden was able to disregard the July 7, 2016 storm as causing damage to the Middle School because FSISD installed new roofs at the Middle School in 2017.[76] Snowden then correlated his onsite observations, including the size of hail spatter and indentations with characteristics indicating recency, with the weather data provided by Choquette to confirm the damage was attributable solely to the October 10, 2022 storm event.

[72] Ex. K-2 Snowden Report, at Orlo 1647, 1651, 1654, 1658-1659, 1671-1672.
[73] *Id.*, at 1640.
[74] Def. Ex. O, Snowden Dep., at 38:7-12 (LIBERTYMSJ 1286); Ex. M, Declaration of John Choquette; Ex. M-2, Choquette Reports; Ex. K-2 Snowden Report, at Orlo 1640.
[75] *Id.*; Ex. M, Declaration of John Choquette, ¶¶ 9-10.
[76] Def. Ex. O, Snowden Dep., 83:8-84:11 (LIBERTYMSJ 1297).

Further, Snowden researched subsequent weather data associated with a storm event occurring on October 4, 2023, and was able to rule out the October 4, 2023 storm causing damage to the FSISD properties, with the exception of the District Complex Housing,[77] because that storm traveled through a different part of town, spatter observed by Snowden and his team was not fresh enough to correspond with occurring 12 days before their onsite inspections, and there was no report of damage from FSISD staff or personnel for the October 2023 storm.[78]

In reaching some of his opinions for this case, Snowden retained Stolk Labs, an independent laboratory that specializes in metallurgical failure analysis.[79] Snowden and his team extracted metal roof panel samples from Midland College, Fort Stockton High School, Apache Elementary School, Fort Stockton Middle School, Fort Stockton Intermediate School, Alamo Elementary School and Bus Barn and Warehouse Receiving Area containing hail dents having characteristics of occurring on October 10, 2022 storm, as evidence by coincident spatter and the size of the indentation, and sent the panels to Stolk Labs for analysis.[80] Stolk Labs concluded, within a reasonable degree of materials science and metallurgical engineering certainty, that the metal roofs sampled at Midland College, Fort Stockton High School, Fort Stockton Middle School, Intermediate School, and the Bus Barn and Warehouse Receiving Area sustained damages to the metal finish/coating, which was determined to be functional damage and documented in Snowden's report.[81]

Lastly, Snowden reviewed a series of documents and photographs including the Donan report, Liberty Mutual's cosmetic damage exclusion, and FSISD's records and receipts, including

[77] Def. Ex. O, Snowden Dep., at 118:11-120:18 (LIBERTYMSJ 1306).
[78] Ex. K-2 Snowden Report, at Orlo 1642.
[79] Ex. L, Declaration of Douglas Allan Stolk, P.E., ¶¶ 3-4.
[80] Ex. K-2 Snowden Report, at Orlo 1675-1681; Def. Ex. O, Snowden Dep., at 48:23-49:24 (LIBERTYMSJ 1288).
[81] Ex. L Declaration of Douglas Allan Stolk, P.E., ¶ 9; Ex. L-2, Stolk Reports; Ex. K-2 Snowden Report, at Orlo 1675-1681, 1687-1697.

pay apps and contractor warranties, for repairs FSISD made to its roofs after the May 2015 hail storm event.[82] In addition to Stolk Labs and Choquette, Snowden retained Mike Jacobs with Jacobs Service to prepare an estimate of the reasonable and necessary cost of repairs for the hail damage Snowden and Jacobs observed to the HVAC equipment solely due to the October 10, 2022 storm.[83] Jacobs attended multiple site visits between October 23, 2023 and November 3, 2023, photographed and documented hail damage to the HVAC and related systems and wrote an estimate of the reasonable and necessary cost of repairs at $2,649,817.40,[84] which is very similar to the estimate written by HVACi during Defendant's claim handling.

In addition to Orlo Forensics, Plaintiff also hired Art Boutin, a building consultant and cost expert.[85] Boutin performed a visual and tactile inspection of the FSISD properties to confirm the damage claimed was consistent with and had characteristics of hail occurring on October 10, 2022. Boutin then prepared an estimate of the reasonable and necessary cost of repair from the October 10, 2022 storm in a detailed, 290-line-item estimate of damage based on the scope of the reasonable and necessary repairs developed and recommended by Snowden and Jacobs.[86] Consistent with insurance industry standards, Boutin used a program called Xactimate to write an estimate regarding the reasonable and necessary cost to repair the damages caused solely by the October 2022 storm at issue and utilized a price list from October 2022 to reflect pricing as of the date the damage or loss occurred for the geographic region where the FSISD properties are located.[87]

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[82] Def. Ex. O, Snowden Dep., 23:18-22 (LIBERTYMSJ 1282), 45:15-24 (LIBERTYMSJ 1287), 59:6-18 (LIBERTYMSJ 1291).
[83] *Id.*, at 68:15-73:6 (LIBERTYMSJ 1293-1294); Ex. N, Declaration of Michael Dean Jacobs, ¶¶ 3-5. Ex. N-2, Jacobs Estimate and Inventory List.
[84] Ex. N, Declaration of Michael Dean Jacobs, ¶ 5; Ex. N-2, Jacobs Estimate and Inventory List.
[85] *See* Doc. 9, Plaintiff's Expert Disclosures; Ex. O, Declaration of Arthur Herbert Boutin.
[86] *Id.* at ¶5; Ex. O-2, at Boutin 1018-1019.
[87] Ex. O, Declaration of Arthur Herbert Boutin, ¶¶ 2, 9; Ex. O-2.

The facts and evidence cited herein demonstrate that FSISD has met its burden to segregate damage and determine the reasonable and necessary repairs to the District buildings caused solely by the October 10, 2022 storm event. Defendant argues that FSISD's claims fail because of the opinions and conclusions offered by its *litigation* experts, but Defendant's expert opinions do not mean that FSISD has not met its burden, and Defendant's Motion for Summary Judgment should be denied.

2. FSISD Has Sufficient Evidence of "Direct Physical Loss or Damage" to the Metal Roofs that is Not Cosmetic

In Texas, insurance policy interpretation is a question of law for the court to decide, not a question of fact for the jury. *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 470 (Tex.App.—Houston [1st Dist.] 2015, pet. denied). "The language in an agreement is to be given its plain grammatical meaning unless to do so would defeat the parties' intent." *Ochoa v. Allstate Vehicle & Prop. Ins. Co.*, No. CV M-23-425, 2025 WL 725747, at *3 (S.D. Tex. Feb. 17, 2025), report and recommendation adopted, No. 7:23-CV-00425, 2025 WL 723027 (S.D. Tex. Mar. 6, 2025) (quoting *DeWitt Cnty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999)).

The initial burden rests on the insured. *Century Sur. Co. v. Hardscape Const. Specialties Inc.*, 578 F.3d 262, 265 (5th Cir. 2009). The burden of establishing an exclusion to coverage rests upon the insurer. *Id.* If the insurer meets its burden, the burden shifts back to the insured to show the claim does not fall within the exclusion or that it comes within an exception to the exclusion. *Id.*

The policy in this case covers **direct physical loss** or **damage** to **covered property** caused by hail.[88] The issue presented by Defendant's Motion for Summary Judgement is

[88] Ex. A, Liberty Mutual Policy, at LIBERTY 5538.

whether the Cosmetic Damage Exclusion Endorsement applies to the "metal roofing systems" at FSISD's properties.[89] The exclusion states that Liberty Mutual will not pay for –

> "*cosmetic loss or damage* to any *roof surface* caused by **wind** and/or **hail** . . . For the purpose of this endorsement, cosmetic loss or damage means marring, putting or other superficial damage that alters the physical appearance, but does not prevent the roof from continuing to function as a barrier to entrance of the elements to the same extent as it did before the cosmetic damage occurred."[90]

The question then is whether the hail damage from the October 2022 storm to FSISD's metal roofs at Midland College, Fort Stockton High School, Fort Stockton Middle School, and the Bus Barn and Warehouse Receiving Areas is merely cosmetic (excluding it from coverage) or rather functional damage (an exception to the exclusion).[91]

Whether damage to a roof is cosmetic or functional is an issue of fact. *Ochoa v. Allstate Vehicle & Prop. Ins. Co.*, No. CV M-23-425, 2025 WL 725747, at *5 (S.D. Tex. Feb. 17, 2025), report and recommendation adopted, No. 7:23-CV-00425, 2025 WL 723027 (S.D. Tex. Mar. 6, 2025) (citing *Horton v. Allstate Vehicle & Prop. Ins. Co.*, No. 22-20533, 2023 WL 7549507, at *1 (5th Cir. Nov. 13, 2023) ("the record before us demonstrates a triable issue of fact, i.e., whether the damage to Horton's roof was cosmetic or functional"); see also *W. 82nd Storage Zone*, 2021 WL 12300170, at *9 (collecting cases and concluding that "[a]t the summary-judgment stage, if there is conflicting summary-judgment evidence regarding whether damage is cosmetic or functional, summary judgment is inappropriate"; holding, among other things, that hail damage which resulted in the roof having a diminished ability to shed water may be functional damage).

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[89] *See* Doc. 39, Def. Motion, at p. 29. Defendant only moves for summary judgment regarding the metal roofs. Defendant does not move for summary judgment regarding any other roofing system of the FSISD properties.
[90] Ex. A, Liberty Mutual Policy, at LIBERTY 5601.
[91] Ex. Ex. K, Declaration of Patrick T. Snowden, at ¶ 11, pp. 5, 7; Ex. K-2, Snowden Report at Orlo 690-691, 695. Snowden determined the metal roofs at Apache Elementary School and Alamo Elementary School were only cosmetically damaged by hail from the October 2022 storm, and did not include them in his scope of repairs.

In *Ochoa*, the Court determined that "cosmetic" does not mean there must be a leak to the interior for there to be functional damage to a metal roof. In *Ochoa*, the Plaintiff's experts offered evidence that the observed hail damage to the metal roof panels . . . "caused functional damage to the water tightness of the seams and the roof's water shedding capability" and the indentations from hail includes "decreased water shedding capability of the roof." The Court held this evidence was sufficient to raise a genuine issue of material fact for trial and denied summary judgment for the insurer. *Ochoa*, 2025 WL 725747, at *5 (S.D. Tex. Feb. 17, 2025), report and recommendation adopted, No. 7:23-CV-00425, 2025 WL 723027 (S.D. Tex. Mar. 6, 2025).

In another case analyzing a similar cosmetic endorsement, *Arthur v. Liberty Mutual*, the Court held that "whether hail strikes to the [metal] roof face breached the roof finish . . . is relevant to the resolution of Liberty's assertion that the cosmetic exclusion applies," and is a fact question for the jury. *Arthur v. Liberty Mut. Pers. Ins. Co.*, No. SA-21-CV-00602-FB, 2022 WL 17824520, at *5 (W.D. Tex. Dec. 20, 2022), report and recommendation adopted, No. SA-21-CA-602-FB, 2023 WL 2557392 (W.D. Tex. Feb. 3, 2023). The plaintiffs' expert's inability to "estimate the precise depreciation of the life of Plaintiffs' roof does not undermine the genuine dispute at issue – whether the damage to the roof is limited to its purely physical appearance or whether the damage resulted in a failure of the to perform its intended function to keep out the elements," and the Court further held that "Plaintiffs do not need to present evidence of active water intrusion to raise a fact issue on this question." *Id.*

Here, as evidenced by Stolk Lab's laboratory testing and analysis of the metal roof panels from Midland College, Fort Stockton High School, Fort Stockton Middle School, Intermediate School and the Bus Barn and Warehouse Receiving Area,[92] <u>there was an actual</u>

[92] Ex. K, Declaration of Patrick T. Snowden, at ¶ 11, pp. 3-7; Ex. K-2, Snowden Report at Orlo 1674-1681; Ex. L, Declaration of Douglas Allan Stolk, P.E., at ¶ 9; Ex. L-2; Def. Ex. O, Snowden Dep., at 45:8-47-19.

change in the insured property – specifically, the hail impacts have physically changed the condition of the metal roofs in such a way that this hail-caused damage ***already*** has caused premature degradation of the roofs and ***already*** has shortened the roofs' service life as the coating, a crucial component of the barrier to the elements, was damaged by impacts from hailstones.[93] Consequently, the metal roofs already have experienced direct physical loss or damage caused by the October 2022 storm event, which requires removal and replacement. Stated another way, the hail-caused damage to the roofs at issue is not cosmetic damage as defined by the Policy exclusion because the damage "prevents the roof[s] from continuing to function as a barrier to entrance of the elements to the same extent as [they] did before damage occurred." Accordingly, the Policy provides coverage for the damage to the metal roofs at issue. Thus, Plaintiff's expert witnesses have provided sufficient evidence to support the genuine dispute of material fact as to whether the damage to the metal roofs at issue is the type of damage covered by the Policy, and Defendant's motion must be denied.

In the alternative, like in *Ochoa* and *Arthur*, whether the hail damage to the metal roofs in this case at Midland College, Fort Stockton High School, Fort Stockton Middle School, and the Bus Barn and Warehouse Receiving Area is merely cosmetic is a fact issue for the jury to decide and Defendant's motion must be denied.

C. Plaintiff is Entitled to Recover Replacement Cost Value benefits.

After materially breaching the contract by underpaying for some damage and denying most of it, Defendant now attempts to prevent Plaintiff from fully recovering on a replacement cost basis and to limit Plaintiff's recovery to the actual cash value of the covered damage to its *roofing systems* by invoking a repair condition precedent within the Valuation Provision of the policy.

[93] Ex. K, Declaration of Patrick T. Snowden, at ¶ 11, pp. 3-7; Ex. K-2, Snowden Report at Orlo 1674-1681; Ex. L, Declaration of Douglas Allan Stolk, P.E., at ¶ 9; Def. Ex. O, Snowden Dep., at 46:17-47-19 (LIBERTY MSJ 1288).

Defendant's contention that Plaintiff is unable to recover RCV benefits for the damage to the *roofing systems* because repairs have not been made to District property within two (2) years after the October 2022 storm is misplaced.[94]

Texas case law is crystal clear: when coverage is in dispute and the carrier has denied coverage, it may not leverage its own bad behavior to limit the insured's recovery in litigation. On this issue, Defendant fails to acknowledge the breadth of the applicable case law and, other than citing the policy's Valuation Provision, no authority or case law for its argument.

It is a well-accepted principle of Texas contract law that when one party to a contract commits a material breach of that contract, the other party is excused from further performance. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (citing *State Farm Lloyds v. Fuentes*, 597 S.W.3d 925, 933 (Tex.App.—Houston [14th Dist.] 2020)); *Atrium Medical Center, LP v. Houston Red C LLC*, 546 S.W.3d 305, 312 (Tex. App.—Houston [14th Dist.] 2017), *aff'd*, 595 S.W.3d 188 (Tex. 2020)). The materiality of a breach is generally a question for the trier of fact, but "may be decided as a matter of law ... if reasonable jurors could reach only one verdict." *Id.*; *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017) (per curiam).

In determining whether a breach is material, courts consider the extent to which the non-breaching party will be "deprived of the benefit it reasonably could have anticipated had the breach not occurred." *Bartush-Schnitzius,* 518 S.W.3d at 436. Here, Defendant's breach is material because it deprived Plaintiff of the coverage benefits it reasonably anticipated as the insured of an RCV policy suffering a covered loss within the policy period. Defendant's coverage position

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[94] *See* Def. Motion, at p. 39. Defendant's argument is limited to the *roofing systems* and does not address HVAC, exterior or interior damage, so the ACV argument regarding *all* covered damage is not properly before the Court and summary judgment should be denied regarding the recovery of RCV benefits for covered damage to the HVAC, exterior and/or interior of Plaintiff's properties.

deprived Plaintiff of the funds needed to make permanent repairs to its property and, in fact, prevented Plaintiff from meeting those conditions.

Texas courts have consistently refused to accept a carrier's attempts to leverage its own wrongful conduct to limit recovery. In an analogous case, *Kabir Marina Grand Hotel, Ltd v. Landmark American Ins. Co.,* the policyholder claimed it had not made the repairs because it was left with no choice due to the carrier's refusal to pay the policy benefits on which the repairs were financially dependent. *Kabir Marina Grand Hotel, Ltd v. Landmark American Ins. Co.*, No. 2:18-cv-00237, 2022 WL 19517466 (S.D. Tex. Jan. 18, 2022) (citing *Ulico Casualty Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 775 (Tex. 2008)). The *Landmark* Court held that if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered. *Id*.

In other words, an insurance carrier may not breach the contract and then hide behind its malfeasance in order to preclude or otherwise limit an insured's recovery under the contract. *See State Farm Lloyds v. Fuentes*, 597 S.W.3d 925, 937 (Tex.App.—Houston [14th Dist.] 2020) (holding that since the insurer necessarily breached the policy when it failed to pay benefits for the loss, any subsequent material breach by the insureds would not qualify as a matter of law to relieve State Farm from its own breach); *Mendoza v. COMSAT Corp.*, 201 F.3d 626, 631 (5th Cir.2000) ("when a promisor wrongfully prevents a condition from occurring that condition is excused"); *Devonshire Real Estate & Asset Management, LP v. American Insurance Co*., No. 3:12-CV-2199, 2014 WL 4796967, *4-8 (N.D. Tex. Sept. 26, 2014) ("when a promisor wrongfully prevents a condition from occurring, that condition is excused"); *See cf. Del. Underwriters v. Brock*, 109 Tex. 425, 211 S.W.3d 779 (1919) (taking note of the jury's findings that when both parties' chosen appraisers were neither competent nor disinterested, the insurer had rejected the insured's offer to name another appraiser if the insurer would do the same, and concluding that the insurer could not then claim as a defense that the insured had failed to submit to the appraisal); *Texas Nat. Bank v. Sandia Mort. Corp*., 872 F.2d 692, 698-99 (5th Cir. 1989) (finding that "in every contract there exists an implied promise that a party will not do anything to prevent or delay the other party from performing the contract [but] such implied promise is narrower and less extreme than the covenant of good faith and fair dealing which the Texas Supreme Court has rejected).

In this case, Liberty Mutual made a nominal ACV payment of $298,420.14 in January 2023 for only six schools, and almost 90% of the payment was just for one school, the Intermediate School:[95]

Location	Address	RCV	Depreciation	ACV
Intermediate School	1100 W 2nd Street	$536,202.93	$54,260.44	$481,942.49
High School	1200 W. 17th Street	$644.74	$7.70	$637.04
Midland College	1309 Interstate 10	$5,373.30	$501.36	$4,871.94
Apache Elementary	208 W. 18th Street	$36,131.42	$1,282.58	$34,848.84
Maintenance Shop	802 S. Rio Street	$4,816.98	$269.96	$4,547.02
Superintendent home	1804 W. 7th Street	$30,508.87	$8,936.06	$21,572.81

To date, Defendant has not made payment for any covered damage to the following FSISD properties: Bus Barn, Transportation Shop, or Warehouse Receiving Center located at 802 S. Rio Street; the Middle School located at 2400 W 5th Street; Butz Alternative School located at 400 S Young Street; District Housing located at 502-506 Young Street and 503-507 S Valentine Street; the Recreation Department (aka Rec Center) located at 1201 W Sherer Street; and Alamo Elementary School located at 804 S US Highway 35.

Because Defendant failed and refused to pay for all of the reasonable and necessary repairs to Plaintiff's storm-damaged *roof surfaces*, Plaintiff is excused from complying with the repair

[95] Ex. C, Liberty Mutual Communications, at LIBERTY 211-216.

limitation identified by Defendant. *See Kabir Marina Grand Hotel LTD.* 2022 WL 19517466 (denying summary judgment based on the insured's failure to timely complete repairs when the insurer refused to pay for covered damages).[96]

Similarly, Texas courts refuse to enforce conditions precedent if performance would impose an impossible or absurd result. *Note Investment Group, Inc. v. Associates First Capital Corp.*, 83 F.Supp.3d 707 (E.D. Tex. 2015) (expressly applying Texas law governing contracts). "In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible, when the intent of the parties is doubtful, or when a condition would impose an impossible or absurd result." *Thedford Crossing, L.P. v. Tyler Rose Nursery, Inc.*, 306 S.W.3d 860, 869 (Tex.App.–Tyler 2010, pet. denied) (emphasis added) (citing *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). "Because of their harshness in operation, conditions are not favorites of the law.' " *Sanders Oil & Gas, Ltd. v. Big Lake Kay Construction, Inc.*, 554 S.W.3d 79, 91 (Tex.App.—El Paso 2018) (quoting *Criswell*, 792 S.W.2d at 948).

The position Defendant takes regarding the timing of repairs to the *roof surfaces* is entirely inconsistent with its coverage position and its position in this litigation. After arguing for years that the *roof surfaces* of FSISD's properties were not damaged beyond Liberty Mutual and Donan's evaluation, Defendant now seeks to limit (or prevent) Plaintiff's recovery in this lawsuit by attempting to require the repair or replacement of allegedly undamaged property. It is difficult to imagine a better example of an "absurd result."

A similar absurd result would be limiting Plaintiff's recovery to any of the locations Defendant made as part of its ACV payment where the amount estimated by Defendant did not

[96] *See* Doc. 1-5, Plaintiff's Original Petition.

exceed the Policy's $250,000 deductible. For example, an absurd result would be limiting Plaintiff's recovery to ACV benefits at Fort Stockton High School where Defendant's ACV payment for the High School was $637.04.[97] In contrast, Plaintiff's expert, Boutin, estimated the covered damage to the High School with October 2022 pricing at a Replacement Cost Value of $5,762,732.31 and Actual Cash Value of $4,925,800.46.[98]

The Valuation Provision upon which Defendant relies assumes the loss or damage was accepted and paid by the insurer. Specifically, the provision begins: "Loss or damage to **covered property**… **We** will not pay **replacement cost** until the lost or **damaged** property is actually repaired or replaced".[99] This provision has no application to a situation in which the carrier has committed a breach of the agreement by failing to pay. *See A&E Austin 1, Ltd. v. Nationwide Gen. Ins. Co*., No. SA-21-CV-01031, 2023 WL 4921531 (Aug. 1, 2023 – W.D. Tex. – San Antonio 2023). Because Defendant continues to deny that Plaintiff's *roof surfaces* were damaged by hail and whether that damage to the *roof surfaces* is cosmetic, there remains a genuine issue of material fact as to whether Plaintiff's damages are covered under the policy. Only after this issue is resolved, can it be determined whether the parties satisfied any obligation under the replacement cost provision. *A&E Austin 1, Ltd. v. Nationwide Gen. Ins. Co*., No. SA-21-CV-01031, 2023 WL 4921531 at *5 ("…the Policy's 'Loss Payment' provision, which Nationwide cites to support its argument for summary judgment, begins with, 'In the event of loss or damage covered by this policy:…' Based upon this language, the replacement cost provision upon which Liberty Mutual relies becomes effective only when damage is 'covered by this policy.').

[97] Ex. C, Liberty Mutual Communications, at LIBERTY 215.
[98] Ex. O-2, at Boutin 1004-1011; *see also* Def. Ex. L, at LIBERTY MSJ 600-607.
[99] Ex. A, Liberty Mutual Policy, at LIBERTY 5562.

Hence, at this time, there exists a genuine dispute whether the alleged hail damage is 'covered by this policy.' This genuine dispute of material fact must be determined first to ascertain whether Liberty Mutual wrongfully denied coverage. Only then may there be a determination whether the parties satisfied any obligation under the replacement cost provision.").

Plaintiff has brought forth legal authority and probative evidence to raise a genuine issue of material fact regarding whether Defendant is entitled to insist on performance of the condition in the policy as a prerequisite to recovery. As such, Defendant's Motion for Summary Judgment on this point must be denied.

In the alternative, the only location that should be limited to ACV is the Intermediate School. FSISD should be able to recover RCV for the remainder of covered damage its buildings, including as to the *roof surfaces*. To order otherwise would be an absurd result contrary to the prevailing case law in Texas.

D. Menchaca's Independent Injury Rule is Not Applicable to the Present Case.

While *Menchaca* does confirm the "independent injury" rule as an available basis for recovering extra-contractual benefits when the claimant is not entitled to benefits under their policy, the rule has no application in this case. Here, the parties agree that Plaintiff's property was damaged by a covered cause of loss and that payment was owed for the reasonable and necessary cost to repair the damage. However, Plaintiff contends that Liberty Mutual's January 2023 payment was insufficient and that Defendant committed knowing violations of the Texas Insurance Code in failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which their liability was reasonably clear, refusing to pay Plaintiff's claim without conducting a reasonable investigation, and failing to make sufficient payments. Without a determination by the finder of fact that Plaintiff is *not* entitled to additional policy benefits, there is no basis in law or fact for a summary judgment ruling that Plaintiff is not entitled to extra-contractual damages. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 494-95 (Tex. 2018) ("[I]f the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation resulted in the insured not receiving those benefits, the insured can recover the benefits as 'actual damages . . . caused by' the statutory violation.") (the *Menchaca* "Entitled-to-Benefits Rule"); *Lyda Swinerton Builders, Inc. v. Oklahoma Sur. Co.*, 903 F.3d 435, 451-52 (5th Cir. 2018). *See also St. Luke's United Methodist Church v. Church Mut. Ins. Co.*, No. 2:20-CV-00053, 2022 WL 980352, at *7 (S.D. Tex. Mar. 31, 2022).

E. FSISD has Raised Multiple Fact Issues on Its Extra-Contractual Claims

FSISD has viable extra-contractual claims against Defendant under the Texas Insurance Code because Defendant grossly mismanaged the claim from the beginning and then reached a pretextual claims decision by ignoring all the information collected by its adjuster and experts during the claims process. Defendant's improper claims handling started by hiring an unlicensed engineer to inspect the FSISD properties. It compounded the problem by limiting the EIT's investigation to the FSISD roofs and not providing him with critical information from the insurance policy needed to evaluate the loss. Then, based solely on biased and unsubstantiated information from an attorney, Defendant wrongly concluded that the damage to the FSISD buildings was from storms *prior to* October 10, 2022. This conclusion was contradicted by every expert hired by Defendant to investigate the claim as well as by Defendant's own adjuster. As a result, Defendant paid less than $300,000 on a claim that their own claim experts calculated was in excess of $12,000,000. This is textbook bad faith in Texas.

1. Legal Standard for Extra-Contractual Liability

FSISD contends that Defendant violated multiple sections of 541.060 of the Texas

Insurance Code. Specifically, Defendant failed to:

- Attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which Liberty Mutual's liability has become reasonably clear, and

- make full payment on FSISD's claim without conducting a reasonable investigation with respect to the claim.

See TEX. INS. CODE §§ 541.060(a)(2)(A) and (a)(7).[100]

In Texas, extra-contractual claims under Texas Insurance Code and common law bad faith claims require the same predicate for recovery. *Higginbotham v. State Farm Mut. Auto. Ins. Co*., 103 F.3d 456, 460 (5th Cir 1997). Texas law imposes "a duty on the part of the insurer to deal fairly and in good faith with an insured in the processing of claims." *Id.* at 459. To prove that an insurer acted in bad faith in violation of Texas common law, an insured must show that the insurer failed to settle the claim even though it "knew or should have known that it was reasonably clear that the claim was covered." *Universe Life Ins. Co. v. Giles,* 950 S.W.2d 48, 54-55 (Tex. 1997). The reasonably clear standard is the same under the Texas Insurance Code. *Id.* at 55.

Texas courts consistently hold that in determining whether an insurer such as Defendant had no reasonable basis for denying a claim, a court may consider only the facts that were before the insurer at the time that the claim was denied. *Viles v. Security Nat'l Ins. Co*., 788 S.W.2d 566, 567 (Tex. 1990). This is a significant factor in this case. Most of the Defendant's motion is based on the opinions of their litigation experts that were not hired until 2025. However, those opinions are irrelevant for this motion. Defendant's claims handling and decisions were made between October 2022 and May 2023. Thus, the proper scope of the Court's analysis is the investigation by Defendant and its experts during this time period.

2. Defendant's Reliance on the Donan Reports During the Claims Process is Unreasonable

[100] *See* Doc. 1-5, Plaintiff's Original Petition; Ex. C, Liberty Mutual Communications, at LIBERTY 5350-5352.

An insurer cannot blindly rely on experts hired during the claims process to avoid extra-contractual liability. To the contrary, an insurer's reliance on an expert's report may support a finding of bad faith if "there is evidence that the report was not objectively prepared" or the insurer's reliance on the report was unreasonable." *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997). In other words, evidence casting doubt on the reliability of the insurer's expert's opinions may support a bad faith finding. *Id.* This is the exact situation we have in this case.

Before Alvarez was assigned to adjust FSISD's claim, a supervisor instructed him to hire an engineer and a building consultant to help him adjust the claim.[101] Significantly, the instruction was to hire an engineer, not just an engineering firm.[102] Alvarez hired Donan Engineering and Donan assigned an unlicensed EIT, Jordon Griffis, to conduct the investigation. Alvarez knew or should have known that Griffis was not a licensed engineer from the beginning. The two had a conversation prior to Griffis' inspection and Griffis even sent Alvarez an email identifying him as unlicensed EIT, before he inspected the FSISD properties.[103] Alvarez ignored his supervisor's express instructions and allowed Griffis to conduct the investigation which involved multiple buildings at eighteen locations.

Alvarez compounded this error by limiting Griffis' investigation to only roofs, even though FSISD had reported damage to exteriors, interiors, roofs and HVAC systems.[104] There was no justification for this limitation. Moreover, Griffis was asked to determine functional versus cosmetic damage to the roofs as defined by Defendant's policy. Yet, neither Alvarez nor Defendant sent Griffis the policy cosmetic endorsement or even provided him with the definitions of

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[101] Ex. B, Liberty Mutual Log Notes, at LIBERTY 90.
[102] Ex. H, Preston Dep., at 109:8-110:12.
[103] Ex. C, Liberty Mutual Communications, at LIBERTY 1394.
[104] Ex. B, Liberty Mutual Log Notes, at LIBERTY 91.

functional and cosmetic damage in the policy.[105] Instead, Griffis issued his report and opined about functional versus cosmetic damage using his own definitions.[106] Alvarez then sent the Griffis report onto DND for them to prepare an estimate.

> Q: So the process was Donan [Griffis] goes out there, looks at the roofs for cosmetic versus functional damage, they issue a report, the report goes to DND, and then DND <u>write an estimate based on that scope</u>?
>
> ***
>
> A: Yes.

Ex. G, Alvarez Dep., at 136:5-10. (Objection omitted) (emphasis added).

Alvarez relied solely on the Griffis report and his repair recommendations when he issued the payment letter in January 2023 and paid FSISD approximately $298,420.14, after taking out depreciation and the deductible.[107] The payment letter did not mention any of the other damages reported by FSISD, namely exterior, interior and HVAC systems damage.

Caselaw supports denying Defendant's motion on FSISD's extra-contractual claims on these facts alone. For example, in *Iyengar v. Liberty Mutual*, the court denied Liberty Mutual's summary judgment on extra-contractual claims because Liberty Mutual was put on notice that the plaintiff's roof leaked, yet they or their experts never investigated any leaks before denying the claim. 2023 WL 8505692 (W.D. Tex. 2023). Similarly, in *Hub Texas LLC v. Arch Specialty Ins. Co.*, the court denied the insurer's summary judgment on the plaintiff's extra-contractual claims because the evidence showed that the adjuster was supposed to hire an engineer yet only hired a building consultant and relied on the consultant to make the coverage and payment decision. 2023 WL 11859631 (N.D. Tex. 2023).

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[105] Ex. H, Preston Dep., at 113:21-115:10.
[106] *Id.*, at 118:1-119:22.
[107] Ex. C, Liberty Mutual Communications, at LIBERTY 211-216; Ex. H, Preston Dep., at 126:6-12.

Here, the facts are even more egregious. Not only did Alvarez ignore his supervisor's instructions to hire an engineer, but he also unjustifiably limited the EIT's scope of his investigation to the roofs and didn't give him the necessary information to evaluate functional versus cosmetic damages consistent with the policy. This resulted in a dramatic underpayment of the claim that didn't even address all the damage reported by FSISD.

3. Defendant's Reliance on Biased and Unsubstantiated Information Supports FSISD's Extra-Contractual Claims

Defendant's bad faith liability is not limited to the hiring and reliance on Griffis' opinions. In addition, Defendant deliberately ignored the opinions and estimates of the very experts they hired to determine the amount of hail damage from the October 10, 2022 storm.

Alvarez, the assigned adjuster, typically inspects his losses before making any coverage and payment decisions.[108] However, in this case, he did not inspect the FSISD properties when he made the coverage and payment decisions in January 2023. Nor did Defendant send any other adjuster to conduct an inspection.[109] Instead, Defendant hired experts to do the investigation on their behalf. DND was hired to evaluate the damage to the district buildings from the October 10, 2022 storm.

> Q: So DND was hired by Liberty to conduct investigation, photograph the damage to the building materials, and prepare a competitive cost estimate for damage caused by hail that occurred on or about the October 10, 2022 storm event; isn't that right, Bill?
>
> * * *
>
> A: Yes, Jarryd, that's correct.

Def. Ex. R, Bowman Dep. 27:20-28:6 (LIBERTY MSJ 1653). (Objection omitted); see also Ex. G, Alvarez Dep., at 126:21-127:1.

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[108] Ex. G, Alvarez Dep., at 96:14-21.
[109] *Id.*, at 68:12-20.

Alvarez had no experience evaluating hail damage to HVAC systems, so he hired HVACi to determine the extent of the hail damage to the HVAC systems.

> Q: So in going through the file, it's my understanding that HVACi was hired by Liberty Mutual in roughly March 2023 to evaluate damage to the Fort Stockton ISD HVAC systems from the October 10, 2022 hailstorm. Correct?
> * * *
> A: Yes.

Def Ex. Q, VanNess Dep., at 17:23-18:6 (LIBERTY MSJ 1600-1601). (Objection omitted).

Both experts conducted multi-day inspections and each was paid over $50,000 for their work.[110] Both companies also issued reports that were provided to Defendant but DND's reports were not shared with FSISD. Together, the two companies, determined the damage to the FSISD buildings from the October 10, 2022 storm exceeded $12,000,000.

> Q: Let's go through the numbers. According to the - - ROMs prepared by DND as well as the estimate prepared by HVACi, if you add those totals together, it comes to about **$12.2 million**. Do you agree with that?
>
> [Objection omitted]
>
> A: I haven't done the math, but I trust your math on that.[111]

Defendant ignored these reports and instead followed the unlicensed engineer's limited roof repair recommendations.[112]

A few weeks later, Defendant had a conversation with Steve Badger, a lawyer who represented two insurance companies in prior litigation with FSISD related to a 2012 storm and a 2015 storm and who represents Liberty Mutual in this lawsuit.[113] Defendant's corporate representative, Preston, admitted that Defendant should evaluate all information during the claims

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[110] Ex. B, Liberty Mutual Log Notes, at LIBERTY 73, 75; Ex. F, at LIBERTY 3192.
[111] Ex. H., Preston Dep., at 197:16-24 (emphasis added); see also Ex. D and Ex. F.
[112] Ex. H, Preston Dep., at 198:20-200:1.
[113] Mr. Badger also informed Defendant about FSISD's 2009 claim. *See* Ex. C, Liberty Mutual Communications, at LIBERTY 2293.

process, not just information that supports a denial.[114] More importantly, Defendant should not rely on biased information in making their claims determination.[115] However, Defendant violated both rules. Within two days of talking to Mr. Badger, Defendant opened a bogus SIU investigation into FSISD's claim which they now classified as "suspicious."[116] Without anything to back up the biased information, Defendant ultimately concluded that the damage at FSISD was from storms that had occurred seven years or more before the October 10, 2022 storm.[117]

To reach this conclusion, Defendant blindly accepted the information from Mr. Badger and did no investigation to verify his information. More troubling, they ignored essentially all the information their adjuster and the experts discovered during their claim investigation. A summary of the evidence Defendant ignored or the investigation it refused to conduct includes the following:

1. FSISD's public adjuster provided satellite imagery showing the FSISD roofs had been repaired after the prior 2015 storm.[118]

2. FSISD's public adjuster provided the name of FSISD's roofing contractor, the roof manufacturer and copies of the warranties. Defendant didn't contact the contractor or manufacturer to inquire about the prior repairs.[119]

3. Griffis, the EIT who inspected the FSISD properties on two occasions, and DND, who inspected the properties multiple times, never mentioned anything about evidence of prior or old hail damage.[120]

4. After learning about the prior lawsuit from Mr. Badger, Defendant didn't reach out to Griffis or DND, to see if they saw any issue with old hail versus new hail or any unrepaired old hail damage during their inspections.[121]

5. HVACi never mentioned anything verbally or in their reports about old hail or unrepaired old hail damage.[122] When Defendant got questionable information from

[114] Ex. H, Preston Dep., at 88:7-89:2.
[115] *Id.*, at 90:19-25.
[116] Ex. B, Liberty Mutual Log Notes, at LIBERTY 51.
[117] Ex. C, Liberty Mutual Communications, at LIBERTY 3697-3700.
[118] Ex. C, Liberty Mutual Communications, at LIBERTY 2288-2292.
[119] *Id.* at LIBERTY 3778-3779; Preston Dep. 172:8-22.
[120] Ex. G, Alvarez Dep., at 217:19-218:13.
[121] Ex. H, Preston Dep., at 153:4-154:4.
[122] Ex. G, Alvarez Dep., at 220:23-221:9.

Mr. Badger, they didn't ask HVACi if they saw old versus new hail or unrepaired old hail during their inspection.[123]

6. **Alvarez, during his own onsite investigation in February 2023, saw no evidence of old hail or unrepaired hail damage.[124]**

7. When Defendant got the prior claims files they didn't do any sort of comparative analysis, internally or by any experts, of the alleged prior damage and the damage FSISD reported from the October 10, 2022 storm.[125]

8. Defendant never identified any prior damage FSISD had been paid for that they didn't repair.[126]

9. Defendant's SIU adjuster made a note entry in her Closing Report on July 24, 2023, stating, "It was confirmed that many of the HVAC units were replaced since 2015," and then referring to the HVACi report wrote, "It was confirmed 542 units were damaged **in this incident** and 309 can be repaired while 232 will need to be replaced." To date, Liberty Mutual has not paid to fully replace *any* HVAC units.[127]

Courts have held that this type of predetermined outcome during a claim investigation supports a finding of extra-contractual liability. *See, e.g. State Farm Fire & Cas. Co. v. Simmons*, 963, S.W.2d 42,44 (Tex. 1998) (finding an "outcome-oriented" investigation is unreasonable and therefore bad faith). Defendant did not want to pay FSISD over $12m for covered hail damage, so they latched on to favorable but questionable information, failed to investigate the questionable information and <u>ignored the finding of everyone who actually conducted an investigation</u> to dramatically underpay FSISD's claim. This is bad faith.

F. When Insureds Offer Evidence of Bad Faith, the Issue of Liability and Whether the Insurer Acted Knowingly are Questions for the Jury.

The Texas Supreme Court has "reject[ed] the suggestion that whether an insurer's liability has become reasonably clear presents a question of law for the court rather than a fact issue for the

[123] Ex. H, Preston Dep., at 154:8-18
[124] Ex. G, Alvarez Dep. at 217:11-18.
[125] Ex. H, Preston Dep., at 189:4-190:22.
[126] *Id.*, at 187:11-188:6.
[127] Ex. B, Liberty Mutual Log Notes, at LIBERTY 31.

jury." *Wall v. Safeco Ins. Co. of Indiana*, No. SA-21-CV-0622-JKP, 2023 WL 2776070 *2 (W.D. Tex. Apr. 4, 2023) (citing *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997)). Courts "may be entitled to decide an issue as a matter of law when there is no conflict in the evidence, but when there is evidence on either side, the issue is a fact question." *Id.* In other words, "whether an insurer acted in bad faith because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder." *Id.* Furthermore, when a claimant raises fact issues regarding their statutory bad faith claims against the insurer, the issue of whether the insurer knowingly violated the statutes is a fact for the jury to decide. *Giles*, 950 S.W.2d at 56. Accordingly, Liberty Mutual's summary judgement of Plaintiff's exemplary and/or treble damage claims should be denied.

CONCLUSION & PRAYER

There is no dispute the October 10, 2022 hailstorm event in question damaged Plaintiff's properties. There remains a genuine issue of material fact on the issue of whether Defendant correctly identified and paid for the repair of all of the covered storm damage, a genuine issue of material fact regarding whether the damage to the *metal roof surfaces* is merely cosmetic, and a genuine issue of material fact regarding whether Defendant violated the Texas Insurance Code in the course of its handling of Plaintiff's claim. These issues preclude summary judgment on any of the grounds asserted by Defendant. As such, Plaintiff respectfully prays that Defendant's Motion for Summary Judgment be, in all things, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served on the following counsel via electronic service on the 23rd day of January, 2026 in accordance with the Federal Rules of Civil Procedure:

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