UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

TIM WHATLEY and SHEILA WHATLEY, Plaintiffs, *versus* GREAT LAKES INSURANCE, SE, and MCCLELLAND & HINE, INC., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 1:19-CV-444

ORDER ADOPTING REPORT AND GRANTING SUMMARY JUDGMENT

The Court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, for consideration. On January 13, 2021, the magistrate judge issued his Report and Recommendation (#54), recommending that this court fully grant Defendant Great Lakes Insurance SE's Motion for Summary Judgment on Plaintiffs' breach of contract and violations of the Texas Deceptive Trade Practices Act and Insurance Code. On January 26, 2021, Plaintiffs filed their objections (#55) to the Report.

In accordance with 28 U.S.C. § 636(b), the Court conducted a *de novo* review of the magistrate judge's findings, the record, and the applicable law in this proceeding. After review, the Court finds that Judge Giblin's findings and recommendation should be accepted.

Plaintiffs present four objections to the Report regarding their breach of contract claim. *See* Objections (#55). First, Plaintiffs object "to the court's finding and recommendation that there is no genuine issue of material fact to support the damage to the roof and interior and interior of Plaintiffs' home was caused by the windstorm conditions of Hurricane Harvey." *Id.* at 1. Second, Plaintiffs "object to the court's finding and recommendation that there are no

genuine issues of fact to support the roof and interior home damage was caused by a covered peril." *Id.* Third, Plaintiffs "object to the court's finding and recommendation that there are no genuine issues of fact supporting causation; that the damage was caused by water through an opening created by the direct force of wind and hail." *Id.* at 1–2. Finally, "Plaintiffs object to the court's finding and recommendation that expert Lester Saucier's opinions on causation are speculation." *Id.*

Plaintiffs point to a myriad of record citations to support these contentions. *Id.* at 3–7. Plaintiffs go on to state that Mr. Saucier's opinions are enough to overcome the evidence presented by Defendant. *See id.* at 7–8.

The Court disagrees. The record citations simply support the contention that the roof was damaged and that there was a hurricane. The citations do not indicate that the hurricane directly caused the damage to the roof or show that the roof was not damaged prior Hurricane Harvey. Mr. Saucier stated he "assumed that the damage was done as a result of the hurricane." *Id.* at 4. Mr. Saucier did not determine if the damage was a direct result of the hurricane, or separately, if the damage was a result of maintenance issues as Defendant's evidence shows. Instead, Mr. Saucier guesses "if they had a maintenance problem prior to the hurricane, it would have caused leaks." *Id.* Without any evidence connecting the damage of the roof to the hurricane, the opinions of Mr. Saucier are speculative. *Koerner v. CMR Constr. & Roofing, L.L.C.*, 910 F.3d 221, 228 (5th Cir. 2018) ("speculative opinion . . . cannot defeat a summary-judgment motion"); *see also Nino v. State Farm Lloyds*, No. 7:13-CV-318, 2014 U.S. Dist. LEXIS 163993, at *21–22, 2014 WL 6674418, *7 (S.D. Tex. Nov. 24, 2014). Plaintiffs objections are overruled and Judge Giblin's analysis on this issue is correct.

Plaintiffs' objections regarding their breach of contract claims are relatedly overruled based on the lack of a genuine issue of material fact on the causation of damages to their property. Plaintiffs do not specifically object to the magistrate judge's recommendation on their claims under the Texas Deceptive Trade Practices and Insurance Code. The Court accordingly agrees with the magistrate judge's findings on these causes of action.

It is therefore ORDERED that the Report and Recommendation (#54) is ADOPTED. Accordingly, Defendant's Motion for Summary Judgment (#23) is GRANTED. The Court further ORDERS that the Plaintiffs' remaining claims are DISMISSED, in their entirety, with prejudice. The Court will enter final judgment separately.

SIGNED at Beaumont, Texas, this 4th day of February, 2021.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

TIM WHATLEY and SHEILA WHATLEY, *Plaintiffs,* v. GREAT LAKES INSURANCE SE, *et al.*, *Defendants*.	§ § § § § § § § § § § § §	**CIVIL ACTION NO. 1:19-CV-444**

REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and the Local Rules for the United States District Court for the Eastern District of Texas, United States District Judge Marcia A. Crone referred this matter to the undersigned United States Magistrate Judge for entry of findings and recommendation on case-dispositive motions and determination of non-dispositive matters. Pending before the Court is *Defendant Great Lakes Insurance SE's Motion for Summary Judgment* (ECF No. 23). After review, the Court recommends fully granting the motion.

I. Procedural History

The Court received the case through Defendant Great Lakes Insurance SE's Notice of Removal (ECF No. 1). Defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 15). On June 8, 2020, Defendant Great Lakes Insurance SE filed its Motion for Summary Judgment (ECF No. 23). On July 6, 2020, the undersigned issued findings and recommendations (ECF No. 27) on Defendants 12(b)(6) Motion to Dismiss (ECF No. 15), recommending that Judge Crone partially grant Defendants' motion to dismiss, and deny in part. The Court found that Plaintiffs stated a claim for relief against Defendant Great Lakes Insurance SE for breach of contract, violations of Texas Deceptive Trade Practices Act, and Texas Insurance Code. *See generally Report and Recommendation* (ECF No. 27). The District Court later adopted the findings and recommendations (ECF No. 28). On September 11, 2020, Plaintiffs filed their Response in Opposition to Summary Judgment (ECF No. 35). Defendant filed a reply (ECF No. 39) and Plaintiff later filed a sur-reply (ECF No. 42).

II. Factual Background

A. Claims Pled in State Court

Plaintiffs Tim and Sheila Whatley ("Plaintiffs" or "the Whatleys") reside at 510 North Mayhaw Drive, Vidor, Texas. *See First Amended Complaint*, at 1 (ECF No. 12). Plaintiffs filed suit claiming the costs of repair and damages caused to their residence by Hurricane Harvey on August 25–29, 2017. *Id.* at 2. The First Amended Complaint indicates that Defendant Great Lakes Insurance SE ("Defendant" or "Great Lakes") sold the Plaintiffs a residential insurance policy, policy number GP16310748187 ("the Policy"), to insure the Plaintiffs' residence. *See id.* Plaintiffs contend their home sustained damage during Hurricane Harvey as follows: roof

shingles were lifted by wind, thereby allowing water penetration to the structure; water entered through the gables due to side-blown wind and rain; extensive water damage to the interior, including damage to the roof, insulation, ceilings, walls, floors and windows; and that water intrusion damaged most of their furniture and other personal property prior to any subsequent flood damage. *See id.* at 3.

Plaintiffs aver they notified Defendant insurer after the storm and made an "appropriate claim for all benefits afforded by the policy." *Id.* at 4. "Defendant's adjuster, or other agent, inspected the home on or about October 5, 2017[.]" *Id.* The adjuster allegedly advised Plaintiffs that the house did not sustain roof damage despite there being visible damage and water leakage. *See id.* Plaintiffs contend they continued to call Great Lakes requesting further help and an additional inspection. *See id.* Defendant thereafter denied the claim and "refused to compensate Plaintiff's [sic] for their reasonable costs of repairs." *Id.* at 5.

Plaintiffs go on to state that on or about January 16, 2018, they retained South Coast Appraisers to inspect and appraise the property and provide estimates for repairs. *Id.* That appraisal showed total estimated costs of repairs in the amount of $66,474.70, comprised of estimated costs of repairs for damages to the dwelling, insulation, ceilings and walls, flooring, windows, exterior damages, and the cost of a new roof. *See id.* The appraisal also includes repairs to other structures. *See id.* The estimate did not include personal property damage, but Plaintiffs aver that they provided an inventory and home estimate of their lost personal property. *See id.*

On or about August 17, 2018, Plaintiffs contend they sent notice of their claim to Defendant insurer requesting payment for the reasonable and necessary repairs and related losses. *Id.* Great Lakes thereafter "refused to pay appropriate monies to Plaintiffs." *Id.*

After the insurer's denial, Plaintiffs borrowed money in the form of an SBA loan to make limited repairs to their property. *See id.* at 5–6. Plaintiffs aver they have spent in excess of $90,000.00 for repairs but the necessary repairs are not completed. *See id.* at 6. Plaintiffs also contend that their personal property losses total $37,150.00, which Defendant insurer has refused to pay. *Id.*

Based on the foregoing factual allegations, Plaintiffs originally asserted the following causes of action against Defendant Great Lakes: breach of contract, negligence, and statutory causes of action for violation of Chapters 541 and 542 of the Texas Insurance Code as well as violations of the Texas Deceptive Trade Practices Act ("DTPA"). *See id.* at 6–8. Plaintiffs then state specific facts in their amended pleading for the purpose of meeting any "enhanced pleading" required by Federal Rule of Civil Procedure 12(b) (and Federal Rule of Civil Procedure 9(b)) for pleading their causes of action under the Texas Insurance Code. *See id.* at 9–13. As noted above, the Court subsequently dismissed Plaintiffs' negligence cause of action.

B. Defendant's Motion for Summary Judgment and Related Briefs

Defendant argues that summary judgment should be granted on all of Plaintiffs' claims. First, Defendant states that Plaintiffs' breach of contract claim fails because Plaintiffs cannot establish the alleged damage to the Property was a covered peril. *See Defendant Great Lakes SE's Motion for Summary Judgment*, ¶¶ 36–55 (ECF No. 23). Specifically, "Plaintiffs cannot establish the water 'coming down the walls' entered through an opening that was created by the

direct force of wind or hail as is required for Plaintiffs to meet their burden to establish the alleged damage is covered under the policy." *Id.* ¶ 36. Second, the anti-concurrent provision in "the Policy establishes that, to the extent those aspects of the Property were also damaged by flood (which is excluded from coverage), then the damage is not covered, regardless of whether an alleged covered cause of loss may have damaged it first." *Id.* ¶ 44. Defendant further contends that summary judgment should also be granted on Plaintiffs breach of contract claim because they have failed "to segregate the damage attributable solely to a covered event . . . therefore, their claims against Great Lakes fail." *Id.* ¶ 49.

In addition to the damages to Plaintiffs house, Defendant argues Plaintiffs' claims stemming from damage to their personal property and vehicles also fail because they are not covered by the Policy. *Id.* ¶¶ 56–64. Defendant states that vehicles are expressly excluded from coverage under the Policy. *Id.* ¶ 57. Additionally, the vehicles are not covered because they were damaged by flooding. *Id.* ¶ 58. Defendant also states that "Mrs. Whatley admitted at her deposition that the personal property was damaged by flood." *Id.* For these reasons the loss of personal property and vehicles "cannot form the basis of any of Plaintiffs' causes of actions." *Id.*

Defendant further argues that even assuming the personal property and vehicles were covered, their coverage is vitiated because Plaintiffs failed "to promptly notify Great Lakes of the alleged damage to the vehicles and personal property and their failure to provide access to the same for inspection constitute material breaches of the Policy by Plaintiffs, and Great Lakes was prejudiced as a result." *Id.* ¶ 59. Plaintiffs also failed to give Defendant access to the personal property and vehicles for inspection. *Id.* ¶ 62. Therefore, their failure to adhere to the notice requirement and give access for inspection "constitutes a material breach of the Policy, which

vitiates coverage as a matter of law." *Id.*

Defendant also claims that summary judgment should be granted for Plaintiffs' negligent claims handling brought under Chapters 541 and 541 of the Texas Insurance Code, and violation of DTPA because their contract claim fails. *Id.* ¶ 65. Defendant also alleges "Plaintiffs' most recent complaint does not aver that Great Lakes' alleged statutory violations caused a loss of benefits or independent injury." *Id.* ¶ 68. Thus, "because Plaintiffs cannot create a genuine issue of material facts as to their breach of contract claim, and thus a right to receive Policy benefits, Plaintiffs also cannot recover for Great Lakes' alleged extra-contractual violations, and those claims should be dismissed as well." *Id.*

In Defendant's reply in support of its motion for summary judgment, Defendant states that Plaintiffs still fail to establish "any other water that allegedly entered the Property entered through an opening in the roof that was created by the direct force of wind or hail during Harvey." *Defendant Great Lakes Insurance SE's Reply in Support of its Motion for Summary Judgment*, ¶ 1 (ECF No. 39) (emphasis in original). Defendant also states that "Plaintiffs have failed to segregate covered damage from non-covered damage as is also required under Texas law." *Id.* For various reasons, Defendant objects to the entirety or portions of Exhibits B, C, E, F, G, I, and K attached to Plaintiffs' response. *Id.* ¶¶ 2–9, 13–14.

C. Plaintiffs' Response to Motion for Summary Judgment and Related Briefs

Plaintiffs allege their claims are supported because "evidence supports that the roof failed early in the storm because numerous shingles were lifted and/or ripped off the roof by wind; allowing large amounts of water to pour into the house on all three floors; the house sustained extensive roof and interior ceilings, walls and floors damage from windborne rain before any

flooding occurred later (which flooded the 1st level only to a depth of 3-4 feet)." *Plaintiffs' Response to Defendant Great Lakes Motion for Summary Judgment*, at 2 (ECF No. 35). To establish the damage was caused by a "covered peril", Plaintiffs cite: the insurance contract; Lester A. Saucier's expert report, deposition, and affidavit; James Brann's appraisal report, deposition, and affidavit; photos taken by Mr. Brann; and the depositions of the Whatleys. *See id.* at 4–15. Plaintiffs explain how the evidence shows the damage to the home was caused by windstorm conditions and Defendant's inspector noted "water stains on the ceilings of the home." *Id.* at 15.

Plaintiffs also disagree that "all areas of the home that flooded are excluded from coverage." *Id.* at 16. Plaintiffs claim the evidence shows "the initial damage to the 1st floor was caused by water coming from the roof down the walls and trapped [sic] in the 1st floor." *Id.* Plaintiffs state the house only flooded after "Neches river authority opened the flood gates up stream on the Neches river dam a day or so into the storm flooding a large portion of Vidor, Texas." *Id.* Plaintiffs explain, "the flooding of the Whatley home (which was limited to 3-4 feet in the 1st floor) occurred from a completely separate event after the storm which had already damage all 3 floors of the home from purely windstorm conditions." *Id.* Allegedly, "[n]one of Defendants cited cases or authority as to whether or not a flood event much later caused by a completely separate reason would relieve the insurer from all damages caused by windstorm." *Id.* Additionally, Plaintiffs are not seeking damages that are below the flood line and Mr. Brann's appraisal did not include those damages. *See id.* at 17. Therefore, even if the anti-concurrent clause "prevents recovery for areas damaged by both flood and windstorm[], this does not prevent recovery for damage to the areas above the flood line." *Id.*

Plaintiffs also claim they "showed the adjuster from Great Lakes all of the damaged property, including all personal property." *Id.* at 19. "When requested by the carrier during litigation they produced copies and lists of all damaged and lost person [sic] property." *Id.* at 20. Plaintiffs claim "Defendants already knew or should have known the scope of the lost personal property since their representative saw it." *Id.* Thus, "[a]t a minimum there is summary judgment evidence to support any delay in producing documentation until litigation was the carrier's fault for misleading the Whatleys about their claim." *Id.*

In Plaintiffs' sur-reply, they state they have presented enough evidence to show the water damage was caused by damage to the roof. *See Plaintiffs' Sur Reply to Defendant Great Lakes Insurance's Reply to Plaintiffs Response to Motion for Summary Judgment*, at 1–2 (ECF No. 42). Plaintiffs also defend the various exhibits submitted with their summary judgment response. *See id.* at 2–5. Additionally, Plaintiffs state they can recover for their personal property because "they had personal properties [sic] in all three floors of the home damaged by water from the roof failure during the hurricane; that the only flooding occurred on the 1st floor." *Id.* at 5. The "flood exclusion in the policy would not prohibit recovery for their personal property that was not flooded." *Id.* at 5–6.

III. Legal Standard

Summary judgment should only be granted if the moving party can show that "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). This rule places the initial burden on the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Stults v. Conoco, Inc.*, 76 F.3d

651, 655–56 (5th Cir. 1996) (citations omitted). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255–56 (1986). A fact is material when it is relevant or necessary to the ultimate conclusion of the case. *Id.* at 248. The movant's burden is only to point out the absence of evidence supporting the nonmovant's case. *Skotak v. Tenneco Resins, Inc*., 953 F.2d 909, 913 (5th Cir.); *cert. denied*, 506 U.S. 832 (1992).

Once the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party bears the burden of coming forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby, Inc*., 477 U.S. at 255. However, the non-movant may not rest on mere allegations or denials of its pleadings but must respond by setting forth specific facts indicating a genuine issue for trial. *Webb v. Cardiothoracic Surgery Assocs. of North Texas, P.A*., 139 F.3d 532, 536 (5th Cir. 1998). The Court must consider all the evidence but refrain from making any credibility determinations or weighing the evidence. *See Turner v. Baylor Richardson Med. Ctr*., 476 F.3d 337, 343 (5th Cir. 2007) (citation omitted).

Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The party opposing summary judgment is required to identify

specific evidence in the record and articulate the precise manner in which that evidence supports his claim. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*; *see also Skota*k, 953 F.2d at 915–16 & n.7; FED. R. CIV. P. 56(c)(3) ("the court need consider only the cited materials"). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

IV. Discussion and Analysis

As an initial matter, the Court notes that Plaintiffs' responses were difficult to discern as the record citations were unclear and did not follow well-established citation rules. Although the Court is under no obligation to do so, the undersigned has made a reasonable effort to locate the evidence upon which Plaintiffs rely. *See Ragas*, 136 F.3d at 458 ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." (quoting *Skotak*, 953 F.2d at 915–16 & n.7)).

A. Breach of Contract Claim

i. *Elements and the Applicable Terms of the Policy*

Under Texas law[1], the elements of a breach of contract claim are: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract

[1] As this matter is before the Court pursuant to the Court's diversity jurisdiction, the Court applies substantive Texas law. *See Carter Tool Co. v. United Fire & Cas. Co.*, No. 18-CV-163-DC, 2019 U.S. Dist. LEXIS 226113, at *5, 2019 WL 7759499, at *2 (W.D. Tex. Nov. 7, 2019) (citing *Holt v. State Farm Fire & Cas. Co.*, 627 F.3d 188, 191 (5th Cir. 2010)); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

by the defendant; and (4) damages to the plaintiff resulting from that breach." *Crose v. Humana Ins. Co.*, 823 F.3d 344, 347–48 (5th Cir. 2016) (quoting *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 579 (5th Cir. 2015); *cert. denied*, 577 U.S. 1031 (2015) (citing *Foley v. Daniel*, 346 S.W.3d 687, 690 (Tex. App.–El Paso 2009, no pet.)). Generally, "for an insurance company to be liable for a breach of its duty to satisfy a claim presented by its insured, the insured must prove that its claim falls within the insuring agreement of the policy." *Id*. at 348 (quoting *Data Specialties, Inc. v. Transcont'l Ins. Co.*, 125 F.3d 909, 911 (5th Cir. 1997)). "Insurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally." *Id*. (quoting *Nat. Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)).

The terms of the Policy include a Policy Period of September 28, 2016 to September 28, 2017. *See Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. A-1, at 8 of 81 (ECF No. 23-1). The Policy covers the "residence premises" and personal property. *See id.* at 16–17. Motor vehicles are expressly excluded from coverage. *See id.* at 18. The Policy covers damage caused by windstorm if "the direct force of wind . . . damages the building causing an opening in a roof or wall and the rain . . . enters through this opening." *Id.* at 23. The Policy's anti-concurrent clause under the "Exclusion" of coverage section states that "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." *Id.* at 24. Flood damage is expressly excluded from coverage. *See id.* at 25. The Policy states that the insurer has "no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us." *Id.* Among other duties, the insured must: give prompt notice of a loss, protect the property from further damage, cooperate with the insurer in the

investigation of the claim, show the damaged property, and provide records upon request. *See id.* at 25–26. The Policy excludes coverage for water damage caused by a roof that is over 25-years old. *See id.* at 52.

ii. *Record Evidence*

On September 6, 2017, Defendant assigned The Littleton Group to inspect the Property. *See Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. A-3 (ECF No. 23-1). On October 28, 2017, The Littleton Group drafted its report based on its inspection of the property on October 3, 2017. *Id.* at 64. During the inspection, The Littleton Group noted various maintenance issues with the roof. *See id.* at 65–66. They also found water damage to the interior of the building but no physical damage to the roofing material that could have caused the interior water damage. *Id.* at 66; *see also id.* at 73. The report notes flood damage throughout the Property. *Id.* at 65–67. On October 28, 2017, The Littleton Group sent the Whatleys a letter titled "Below Deductible and Partial Denial Letter." *Id.* at 69. In this denial letter to the Whatleys, The Littleton Group stated they "noted no storm created openings to [the] roof or the exterior of [the] house." *Id.* at 69. Therefore, "the presence of no storm created openings or storm damage to your roof, and the policy wording . . ., there is no coverage provided for this portion of your loss, Great Lakes regret [sic] to advise that in this instance they will be unable to indemnify you for this loss." *Id.* at 71.

Plaintiffs designated Lester Saucier, a Civil and Mechanical Engineer, and James Travis Brann from South Coast Appraisers as experts in this case.[2] *See Plaintiffs' Designation of Expert Witnesses*, at 1–2 (ECF No. 17). "Mr. Saucier is expected to testify as to all damages and costs of repairs to [the] subject property caused by Hurricane Harvey." *Id.* at 2. Mr. Brann was originally retained to "testify to the reasonable and necessary damages and costs of repairs to the subject property caused by Hurricane Harvey." *Id.* at 3. The Court has limited Mr. Brann's testimony to damages for his failure to provide a written report. *See Order on Defendant's Motions to Exclude Plaintiffs' Expert Testimony*, at 12–15 (ECF No. 50).

Mr. Saucier's expert report states that "inspection revealed there was evidence of heavy water intrusion through the roof, damaging [sic] ceilings, walls, floorings throughout the house." *See Plaintiffs' Designation of Expert Witnesses*, at 7 (ECF No. 17). Mr. Saucier states "the roof revealed numerous areas of damage included pulled tab, damaged ridge line, pulled or raised roof line and soffets [sic]." *Id.* Mr. Saucier noted "wet insulation in the attic and appearing [sic] to inundate walls." *Id.* "There was apparent water damage to ceilings and walls in the bedrooms and both on the third floor; and water damage to walls and ceilings throughout the second floor and the worst damage in the areas adjacent to exterior walls." *Id.* "The flooring on second and third floor was damaged from water." *Id.* Mr. Saucier was "advised [by the Whatleys] that several hours into the storm the house experienced flooding to approximately 1 foot; and then several hours later to approximately 3-4 feet." *Id.* Although the Whatleys advised Mr. Saucier of the flooding during Hurricane Harvey, he goes on to state "the heavy flooding in their part of Vidor did not occur until after the Sam Rayburn reservoir dam opened floodgates to prevent this

[2] Plaintiffs also designated Wesley House of South Coast Appraisers as an expert (ECF No. 17), but later withdrew his designation (ECF No. 38).

dam from failing." *Id.* He states "[t]his occurred one or more days after the storm hit." *Id.* Even with the flood, "the highest level of flood waters [was] under the floors of the second level." *Id.* He concludes "[i]t is my opinion that the damages estimated by South Coast Appraisers in all areas of the house including walls, ceilings, windows, doors, and flooring (above the approximate 3-4 foot flood level) were caused by windstorm conditions from Hurricane Harvey." *Id.* Mr. Saucier goes on to state, "[i]t is my opinion the windstorm conditions of Hurricane Harvey caused the roof to fail allowing large amounts of water penetration into the home." *Id.* Mr. Saucier also submitted an affidavit further expounding on his expert report. *See Response in Opposition to Motion to Exclude the Testimony of Lester A. Saucier, Jr.*, Ex. 3 (ECF No. 34-3).

Mr. Brann submitted an appraisal report but failed to submit a written expert report as required under Federal Rule of Civil Procedure 26. *See Order on Defendant's Motions to Exclude Plaintiffs' Expert Testimony*, at 12–15 (ECF No. 50). The Court limited Mr. Brann's testimony to damages to ensure Defendant is not prejudiced from Mr. Brann's failure to submit a written expert report. *Id.* Mr. Brann's appraisal report sets forth the costs of replacement for the damaged items, excluding items "below the waterline in the 1st floor." *Plaintiffs' Response to Defendant Great Lakes Motion to Exclude Testimony and Report of James Brann*, at 2 (ECF No. 37).

Defendant designated Cory A. Walker of Walker Engineers, PLLC as an expert to "testify regarding the cause, origin, and extent of the alleged damage (or lack thereof) to the Property at issue." *Defendant's Designation of Expert Witnesses*, at 3–4 (ECF No. 21). In his expert report, Mr. Walker goes through historical data to explain the roof that Plaintiffs had during Hurricane

Harvey was installed sometime between December 31, 1997 and October 31, 2006. *Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. C-1 at 14 (ECF No. 23-3). Mr. Walker then goes through the photos taken and damage noted by The Littleton Group and South Coast Appraisers to explain the potential causes of the damage. *Id.* at 21–53. Mr. Walker notes that none of the roof photographs taken by The Littleton Group show damage created by Hurricane Harvey. *Id.* at 24–30, 33, 35, 37–39. Mr. Walker explains that the water stains noted by The Littleton Group was caused by the prior roof before it was replaced with the Hurricane Harvey roof or condensate from a broken air conditioning unit. *Id.* at 28–29, 31, 33–34, 39, 46. Mr. Walker does not explain all water stains on the ceiling. *Id.* at 30, 32. Additionally, Mr. Walker explains that some water intrusion did occur as a result of Hurricane Harvey, but this water intrusion occurred because of maintenance issues and not direct damage of Hurricane Harvey. *See id.* at 36–37. Mr. Walker then addresses Plaintiffs photographs. *Id.* at 42–44, 49. Mr. Walker explains those photographs show damage caused by pets or lack of maintenance. *Id.* The expert report also indicates that the shingles adhesive disengaged through natural wear and tear, not as a result of Hurricane Harvey. *Id.* at 47–49. Mr. Walker's inspection and photographs of the roof of the storage building (roofing which had not been replaced) did not show any wind-storm damage, however, it did show installation issues. *Id.* at 50–52.

On May 22, 2020, the Whatleys were deposed as witnesses in this case. *Defendant Great Lakes SE's Motion for Summary Judgment*, Exs. D ("T. Whatley Dep.") & E ("S. Whatley Dep.") (ECF No. 23-3). Mr. Whatley testified that a new roof was installed in 2005. *T. Whatley Dep.* 19:6–22. Mr. Whatley also testified about the need to replace some air-conditioning units in the past. *Id.* at 22:8–24:7, 25:25–26:15. Mr. Whatley stated he did not have flood insurance during

Hurricane Harvey. *Id.* at 27:7–9. Mr. Whatley confirmed the house flooded the day of the storm. *Id.* at 28:10–13; *see also id.* at 72:16–23, 73:8–23. He also confirmed the vehicles were damaged by the flooding. *Id.* at 28:18–20, 44:3–5. Mr. Whatley also testified that there "was water running down the wall of the stairwell" during Hurricane Harvey. *Id.* at 29:7–16; *see also id.* at 38:13–39:3, 70:9–19, 71:7–10, 71:15–24, 74:22–75–7. Mr. Whatley testified that the valuation he put on his personal property was him "spitballing." *Id.* at 46:22–47:8.

Mrs. Whatley also testified that a new roof was installed in 2005. *See S. Whatley Dep.* 14:15–15:10. Mrs. Whatley agreed that some air-conditioning units had to be replaced in the past. *Id.* at 20:5–18. She testified that the workshop (another permanent building on the property) had no roof damage or leaks after Hurricane Harvey and everything in that building was lost due to the flooding. *Id.* at 22:2–11. Mrs. Whatley stated water was coming down the walls during Hurricane Harvey. *Id.* at 29:1–8, 29:21–30:6, 57:7–20. Mrs. Whatley testified that Defendant insurer did not cover the Whatleys' vehicles and they in fact had a separate insurance policy for them. *Id.* at 38:25–39:5. She further testified that the Whatleys did not submit the personal property list created by Mr. Whatley, putting a value on their personal property, to Defendant insurer. *Id.* at 40:9–19. Mrs. Whatley confirmed there was flooding during Hurricane Harvey. *Id.* at 58:11–59:12.

Plaintiffs two experts James Brann and Lester Saucier were also deposed as part of this case. *Defendant Great Lakes SE's Motion for Summary Judgment*, Exs. F ("Brann Dep.") & G ("Saucier Dep.") (ECF No. 23-3). The Court will disregard all of Mr. Brann's opinions and testimony regarding causation. *See Order on Defendant's Motions to Exclude Plaintiffs' Expert Testimony*, at 12–15 (ECF No. 50). Mr. Brann testified that his estimate included "damages . . .

from the roof coming down through the house, running down the walls." *Brann Dep.* 21:15–22:1; *see also id.* at 23:14–22, 23:24–24:7. Mr. Brann also testified there was flood damage. *See id.* at 22:17–23:22. Mr. Saucier testified he "observed damage to the ceilings and the walls." *Saucier Dep.* 18:11–21. Mr. Saucier did not observe any maintenance or construction issues in the interior of the house. *See id.* at 19:21–20:4, 20:23–21:8. Mr. Saucier noticed damage to the fascia and soffit with his inspection of the exterior of the house. *Id.* at 22:11–15. Mr. Saucier opines that the roof damage was a result of the wind from Hurricane Harvey and the age of the roof would not explain the damage. *See id.* at 24:19–25:23, 28:6–20. Mr. Saucier states he assumed the damages were caused by Hurricane Harvey because the damages were recent, his personal experience of living in Orange, Texas during Hurricane Harvey, and his personal experience of seeing over "100-plus" homes with wind damage throughout Orange, Texas. *Id.* at 30:22–31:17, 48:4–49:19. Mr. Saucier did not inspect the air-conditioning units at the property and did not determine whether any maintenance issues could have caused the leaks. *Id.* at 27:3–5, 29:21–25, 30:1–24.

iii. *Application of Law*

The evidence is clear that the Property flooded during Hurricane Harvey, not days later. *See Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. C-1 at 21 (ECF No. 23-3); *see Plaintiffs' Designation of Expert Witnesses*, at 7 (ECF No. 17) ("I was further advised that several hours into the storm the house experienced flooding to approximately 1 foot; and then several hours later to approximately 3-4 feet."); *see also T. Whatley Dep.* 28:10–13, 72:16–23, 73:8–23; *S. Whatley Dep.* 58:11–59:12. It is also clear that flooding is expressly excluded from coverage under the Policy. *Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. A-

1, at 25 of 81 (ECF No. 23-1) (listing flooding under exclusion section of policy). Even so, Plaintiffs do "not agree that as a matter of law, Plaintiff's [sic] are precluded from recovering for costs of repairs to areas of the home that sustained flood damage many hours after windstorm conditions caused damage to those areas within the flood level." *Plaintiffs' Response to Defendant Great Lakes Motion for Summary Judgment*, at 3 (ECF No. 35).

The doctrine of concurrent causes provides that when covered and non-covered events combine to create a loss, the insured may only recover the portion of the damage caused by the covered event. *See Carter Tool Co. v. United Fire & Cas. Co.*, No. 18-CV-163-DC, 2019 U.S. Dist. LEXIS 226113, at *6, 2019 WL 7759499, at *3 (W.D. Tex. Nov. 7, 2019) (citing *Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986, 994 (5th Cir. 2016)); *see also Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.–Dallas 2015, no pet.). An insured cannot recover under an insurance policy unless facts are pleaded and proven showing that damages are covered by its policy. *See Lopez v. Allstate Texas Lloyds*, No. 4:17-CV-00152-O-BP, 2018 U.S. Dist. LEXIS 97616, at *5, 2018 WL 2773381, at *2 (N.D. Tex. May 23, 2018), *report and recommendation adopted sub nom. Lopez v. Allstate Texas Lloyd*'s, No. 4:17-CV-00152-O-BP, 2018 U.S. Dist. LEXIS 96665, 2018 WL 2765409 (N.D. Tex. June 8, 2018) (citing *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), *overruled in part on other grounds by State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996)). "However, an insured can recover where he suffers damage from both covered and non-covered perils." *Id.* (citing *Hamilton Properties v. Am. Ins. Co.*, No. 3:12-CV-5046-B, 2014 U.S. Dist. LEXIS 91882, *9–10, 2014 WL 3055801, at *4 (N.D. Tex. July 7, 2014), *aff'd*, 643 F. App'x. 437 (5th Cir. 2016)). The doctrine is a rule which embodies the basic principle that insureds are

entitled to recover only that which is covered under their policy. *See id.*; *see also Calitex Corp.*, 458 S.W.3d at 222. Consequently, "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Lopez*, 2018 U.S. Dist. LEXIS 97616, at *5, 2018 WL 2773381, at *2 (quoting *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993)); *see also Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971) ("It is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy.").

Under the governing Policy, the flood was not a covered peril. It does not matter that the water was coming down the wall and subsequently led to flooding. The Policy states excluded losses are "excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." Therefore, summary judgment should be granted on any claim based on flood damage.

Even if Plaintiffs cannot recover flood damages, damages that were not caused by flooding could be covered. Defendant argues summary judgment should be granted because "Plaintiffs cannot establish the water 'coming down the walls' entered through an opening that was created by the direct force of wind or hail as is required for Plaintiffs to meet their burden to establish the alleged damage is covered under the Policy." *Defendant Great Lakes Insurance SE's Motion for Summary Judgment*, ¶ 36 (ECF No. 23). The Court agrees with Defendant. Mr. Saucier's opinions regarding the cause of the damages to Plaintiffs' roof are wholly speculative. Mr. Saucier did not directly inspect the shingles to determine what caused the lifted shingles; instead he guesses that Hurricane Harvey caused the lifted shingles because the damages in the house

were recent and based on his personal experience in Orange, Texas. *Saucier Dep.* 30:22–31:17, 48:4–49:19; *see also Plaintiffs' Designation of Expert Witnesses*, at 6–7 (ECF No. 17). Mr. Saucier's personal opinions and experiences are insufficient to support Plaintiffs' breach of contract claim, they are far too speculative. *Koerner v. CMR Constr. & Roofing, L.L.C.*, 910 F.3d 221, 228 (5th Cir. 2018) ("speculative opinion . . . cannot defeat a summary-judgment motion"); *see also Nino v. State Farm Lloyds*, No. 7:13-CV-318, 2014 U.S. Dist. LEXIS 163993, at *21–22, 2014 WL 6674418, *7 (S.D. Tex. Nov. 24, 2014). Without any other evidence of causation of the roof damage, summary judgment should be granted in favor of Defendant because Plaintiffs' have failed to point to sufficient summary judgment evidence in support of their breach of contract claim.

Plaintiffs further claim they are entitled to recover for damages to their vehicles. The Policy expressly excludes coverage of motor vehicles. *See Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. A-1, at 18 of 81 (ECF No. 23-1); *see also T. Whatley Dep.* 45:6–8 ("Q. So were your vehicles covered under the Great Lakes policy? A. No, ma'am."). Additionally, Plaintiffs have admitted the vehicles were lost due to flooding, which is also excluded from coverage. *T. Whatley Dep.* 28:18–19 ("we stayed here the entire time because our vehicles were underwater"); *Defendant Great Lakes SE's Motion for Summary Judgment*, Ex. A-1, at 25 of 81 (ECF No. 23-1) (listing flooding under exclusion section of policy). Therefore, there is no genuine issue of material fact on Plaintiffs' claim for damage to their vehicles and summary judgment should be granted.

B. Violations of Texas Deceptive Trade Practices Act and Insurance Code

Plaintiffs also assert extra-contractual claims for alleged violations of the Texas DTPA as well as negligent claims handling in violation of Chapters 541 and 542 of the Texas Insurance Code. The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 490 (Tex. 2018). This rule derives from the fact that the Insurance Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. *Id.* (citing TEX. INS. CODE § 541.151; *Minn. Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006)).

In this case, Plaintiffs' statutory claims fail with its breach of contract claim. *See Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, 892 F.3d 167, 172 (5th Cir. 2018) (citing *Menchacha*, 545 S.W.3d at 489); *see also United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F. Supp. 3d 584, 602–603 (S.D. Tex. 2015) (citing *Wellisch v. United Services Auto. Ass'n*, 75 S.W.3d 53, 57 n.2 (Tex. App.–San Antonio 2002, pet. denied)) (to prevail on a claim for a violation of Chapter 542.051–542.061, the claimant must show that it had a claim under an insurance policy, for which the insurer is liable); *see also Underwood v. Allstate Fire and Cas. Ins. Co.*, 2017 U.S. Dist. LEXIS 165380, *10–11, 2017 WL 4466451, at *6 (N.D. Tex. Sept. 19, 2017). The Court therefore recommends that Defendant be granted summary judgment on Plaintiffs' causes of action under Chapters 541 and 542 of the Texas Insurance Code and the DTPA because there is no genuine issue of material fact on the breach of contract claim.

V. Recommendation

Based on the findings and legal conclusions set forth above, the undersigned recommends that *Defendant Great Lakes Insurance SE's Motion for Summary Judgment* pursuant to Federal Rule of Civil Procedure 56 (ECF No. 23) be fully **GRANTED**. Specifically, the District Court should enter summary judgment on Plaintiffs' remaining (1) breach of contract claim and (2) extra-contractual claims for alleged violations of the Texas DTPA as well as negligent claims-handling in violation of Chapters 541 and 542 of the Texas Insurance Code. Final judgment should therefore be entered in favor of Defendant, and Plaintiffs' claims should be dismissed in their entirety with prejudice.

VI. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C), each party to this action has the right to file objections to this Report and Recommendation. Objections to this Report must (1) be in writing, (2) specifically identify those findings or recommendations to which the party objects, (3) be served and filed within fourteen (14) days after being served with a copy of this Report; and (4) be no more than eight pages in length. *See* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(2); E.D. Tex. Civ. R. CV-72(c). A party who objects to this Report is entitled to a de novo determination by the United States District Judge of those proposed findings and recommendations to which a specific objection is timely made. *See* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b)(3).

A party's failure to file specific, written objections to the proposed findings of fact and conclusions of law contained in this Report, within fourteen (14) days of being served with a copy of this Report, bars that party from: (1) entitlement to de novo review by the United States District

Judge of the findings of fact and conclusions of law, *see Rodriguez v. Bowen*, 857 F.2d 275, 276–77 (5th Cir. 1988), and (2) appellate review, except on grounds of plain error, of any such findings of fact and conclusions of law accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996).

SIGNED this the 13th day of January, 2021.

KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE