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

WINTERFIELD UNITED METHODIST CHURCH,	§	
	§	
	§	**CIVIL ACTION NO. 6:23-CV-00558-JDK**
Plaintiff,	§	
	§	
v.	§	
	§	
CHURCH MUTUAL INSURANCE COMPANY, S.I.,	§	
	§	
	§	
Defendant.		

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Before the court is Defendant Church Mutual Insurance Company, S.I.'s (Church Mutual) motion for summary judgment. (Doc. No. 12.) Plaintiff Winterfield United Methodist Church (Winterfield) filed a response (Doc. No. 16) to which Defendant filed a reply (Doc. No. 20). The district court referred the motion to the undersigned for findings of fact, and recommendations for disposition. (Doc. No. 17.) For the reasons stated herein, the court **RECOMMENDS** that Defendant's motion be **DENIED**.

BACKGROUND

I. Factual Background

This case involves an insurance dispute between an east Texas church and its insurance company.[1] This dispute arose out of a storm in January 2022 that caused wind and hail damage to the roofs on Plaintiff's property. (Doc. No. 12, at 9.) The property has five buildings: the

[1] Unless otherwise noted, the facts of this case are undisputed. When disputed, the facts are viewed in the light most favorable to the non-moving party, Winterfield. *Gun Barrell Jacksonville LLC v. Depositors Ins. Co.*, No. 6:20-cv-469-JDK, 2021 WL 5154218, at *1 n.1 (E.D. Tex. Oct. 9, 2021).

church/daycare; scout hut; barbeque pavilion and storage; anchor; and parsonage. *Id.* All of these buildings have shingle roofs, consisting of various individual overlapping roofing tiles. *Id.* Defendant insured Plaintiff's property during this period consistent with the conditions set out in the policy's declarations. (Doc. No. 12, at 9).

In the year prior to the dispute, Plaintiff submitted two prior insurance claims with Defendant. *Id.* at 10. The first consisted of interior water damage isolated to the ceiling of the storage closet and church's dining hall. *Id.* Defendant ultimately denied this claim because its adjusters concluded that the water damage was the result of inadequate construction of the drainage system—an excluded peril under the policy. *Id.* The second claim, approximately four months later, consisted of alleged wind damage to the church and anchor building. *Id.* Defendant again denied coverage, reasoning that although the anchor building had sustained some damage, it was attributable to unrepaired damage from the previous claim. *Id.* at 11. Further, Defendant's adjusters concluded that there was no evidence of new wind or hail damage to the building's metal roofing. *Id.*

On March 14, 2022, Defendant received notice from Plaintiff on a new claim for hail and wind damage to the property. *Id.* Defendant assigned independent adjuster Mike Hickey with Leading Edge Claim Service to assist in the investigation and adjustment of the claim. *Id.* Additionally, Defendant retained an independent engineer, Craig M. Chonko with EFI Global, to assist in evaluating the property's roofing. *Id.* Notably, Defendant does not dispute that during this period, it never provided Hickey or Chonko the property's underwriting file prior to or during their respective investigations. (Doc. No. 16, at 27).

About two weeks later, Hickey and Chonko inspected the property. *Id.* Chonko's inspection report made several conclusions, including: (1) "[h]ail of up to 0.9 of an inch in diameter was

likely at the subject property on the date of loss"; and (2) "damaging wind was not reported anywhere in Gregg County, Texas on the date of loss." *Id.* Chonko concluded that hail and wind damage occurred only to the church and daycare building:

> a. Hail: Granule loss at one location was observed due to a hail impact that caused functional damage. EFI recommends replacement of the damaged shingle. Functional damage due to hail impacts were not observed on the remaining slopes of the building.
>
> b. Wind: EFI observed sporadic and isolated areas of torn shingles consistent with wind damage at the ridges. EFI recommends replacement of the torn shingles numbering approximately ten. As previous repair shingles have been utilized at the site, replacement of the torn shingles should be an acceptable methodology.

(Doc. No. 12, at 28.) According to Chonko, no other building had hail- or wind-related damage. *Id.* at 28–30.

In April, Defendant sent correspondence to Plaintiff explaining that it needed additional time to review Chonko's report and finalize the investigation. (Doc. No. 12, at 13.) Plaintiff requested the report, but Defendant waited for over a month to issue it to Plaintiff because it was "in house." (Doc. No. 16, at 8–9.) In the meantime, Leading Edge conducted a second inspection to "scope the exterior damage identified by EFI" in order to issue an estimate of the property's covered damages. (Doc. No. 12, at 13–14.) Based on these reports, Leading Edge submitted to Defendant an estimate for the covered wind and hail damage totaling $7,451.82. *Id.* This estimate fell below the applicable deductibles; thus, Defendant informed Plaintiff that it was not going to issue any payment. *Id.* Separately, Defendant sent a letter to Plaintiff denying the remaining claim because the damages fell under several of the policy's exclusions.[2] *Id.*

II. Procedural History

[2] These exclusions included: (1) wear and tear; (2) deterioration; (3) continuous and repeated seepage or leakage of water; (4) faulty, inadequate, or defective workmanship, repair, construction, or maintenance; (5) a storm-created opening limitation; and (6) limitations on coverage for roof surfacing. (Doc. No. 12, at 14).

On October 12, 2023, Plaintiff brought suit against Defendant in Texas state court, asserting claims for breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act (DTPA), and violations of Defendant's common law duty of good faith and fair dealing. (Doc. No. 3, at 7–16.) One month later, Defendant removed the case to federal court based on diversity jurisdiction. (Doc. No. 1.) Plaintiff seeks relief in the form of actual, consequential, and exemplary damages, statutory interest, attorneys' fees, costs of court, pre- and post-judgment interest, and such other and further relief to which Plaintiff is entitled. (Doc. No. 3, at 17).

On the same day it removed this case, Defendant filed an answer (Doc. No. 4), asserting various affirmative defenses, including among others, failure to mitigate damages, excluded damages, failure to satisfy conditions precedent, prior material breach, bona fide controversy, and deductible offset.

On September 23, 2024, Defendant filed this motion for summary judgment (Doc. No. 12) on Plaintiff's breach of contract and extracontractual claims for violations of the Texas Insurance Code, the DTPA, and the common law duty of good faith and fair dealing.

III. Summary Judgment Evidence

Attached to its motion (Doc. No. 12), Defendant submits the following evidence in support of its request for summary judgment:

Exhibit A: Church Mutual Insurance Policy No. 0214433-02-273960;

Exhibit B: Leading Edge Claim Services' Loss Report for Claim No. 1445785;

Exhibit C: May 10, 2021, Denial Letter for Claim No. 1445785;

Exhibit D: Leading Edge Claim Services' Loss Report for Claim No. 1457915;

Exhibit E: September 6, 2021, Denial Letter for Claim No. 1457915;

Exhibit F: January 19, 2022, Notice of New Claim No. 1473244;

Exhibit G: Leading Edge Claim Services' Loss Report for Claim No. 1473244;

Exhibit H: Engineer Craig M. Chonko's Roof Storm Damage Assessment;

Exhibit I: Notice of Extension of Time to Complete Investigation;

Exhibit J: Second Leading Edge Claim Services' Loss Report for Claim No. 1473244;

Exhibit K: August 18, 2022, Denial Letter for Claim No. 1473244;

Exhibit L: Plaintiff Expert Dallas Kaemmerling's Property Inspection Report;

Exhibit M: Photos of Property from Dallas Kaemmerling's Inspection;

Exhibit N: Photos of Property from Leading Edge Claim Services' Inspection on May 26, 2021; and

Exhibit O: Photos of Property from Leading Edge Claim Services' Inspection on October 14, 2021.

(Doc. No. 12).

Attached to its response (Doc. No. 16), Plaintiff submits the following evidence in support of its response to Defendant's motion:

Exhibit A: Defendant's Claim Investigation Notes;

Exhibit B: Unsworn Declaration of Plaintiff Expert Dallas Kaemmerling and Expert Report;

Exhibit C: August 18, 2022, Denial Letter for Claim No. 1473244;

Exhibit D: Leading Edge Claim Services' Loss Report for Claim No. 1473244; and

Exhibit E: Engineer Craig M. Chonko's Roof Storm Damage Assessment.

(Doc. No. 16).

In its reply (Doc. No. 20), Defendant submits the following additional evidence in support of its motion for summary judgment:

Exhibit P: Church Mutual Insurance Policy No. 0214433-02-273960; and

Exhibit Q: Defendant's Claim Investigation Notes.

(Doc. No. 20.) Neither Plaintiff nor Defendant has objected to the respective summary judgment evidence.[3]

LEGAL STANDARD

A motion for summary judgment should be granted if the record, taken as a whole, "shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56. The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"[T]he party moving for summary judgment must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323–25). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Issues of material fact are genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the moving party does not have the ultimate burden of persuasion, the party "must either produce

[3] Defendant seems to argue that Plaintiff expert Dallas Kaemmerling's expert report is deficient under Federal Rule of Evidence 702 on page 20 of its motion. (Doc. No. 12, at 26.) To the extent that Defendant is attempting to object or challenge Kaemmerling's report, as explained below, the court finds such arguments unpersuasive. *See infra* pg. 12.

evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir. 1991).

If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075. If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the Court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. However, the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Wash. Cap. Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995).

DISCUSSION

I. Segregation of Damages

The parties first disagree as to whether the concurrent causation doctrine applies to Plaintiff's breach of contract claim. *Compare* (Doc. No. 16, at 13) (arguing the doctrine does not

apply because Plaintiff has put forth evidence demonstrating the claimed damage solely resulted from the covered storm), *with* (Doc. No. 12, at 18–19) (arguing that the doctrine applies because Defendant has put forth evidence showing pre-existing damage to the roof predating the date of loss). As explained below, Plaintiff has met its burden at this stage.

A. Sole Causation Evidence

Defendant argues that Plaintiff cannot produce evidence segregating non-covered losses from its claimed damage or, alternatively, demonstrate that Plaintiff's claimed damages are attributable solely to a covered peril. (Doc. No. 12, at 16.) Defendant contends that evidence produced both by its expert and Plaintiff's expert, Dallas Kaemmerling, show pre-existing damages to the church's roofing and thus, Plaintiff has the burden of producing a mechanism to segregate such non-covered damage from Plaintiff's claimed damage resulting from the storm. *Id.* at 18–25. Defendant reasons that because Kaemmerling's report lacks rebuttal explanations to the Defendant's evidence of non-covered perils, it is entitled to summary judgment for a failure to segregate. *Id.* at 25–26.

Plaintiff argues that it has produced sufficient summary judgment evidence indicating that its claimed damages arose solely from the January 2022 storm. It points to Plaintiff's expert's testimony opining that the covered storm caused all of the claimed damage and several recorded roof inspections prior to the date of loss. (Doc. No. 16, at 12–13.) Alternatively, Plaintiff argues that a jury could segregate damages by comparing pre- and post-date of loss reports and photographs of the roofs' condition prior to January 2022. *Id.* at 16–17.

Under the concurrent causation doctrine, where a covered and non-covered peril combine to create a loss, "the insured is entitled to recover that portion of the damage caused solely by the covered peril." *Adv. Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 477 (5th Cir. 2022)

(quoting *Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.—Dall. 2015, no pet.)). "Because an insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof." *Dall. Nat'l*, 458 S.W.3d at 222 (citing *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App—San Antonio 1999, pet. denied)). Under certain circumstances, a plaintiff's failure to segregate is fatal on summary judgment. *See id.* at 223 (quoting *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App.—Hous. [14th Dist.] 2003, pet. denied)). An insured may carry its burden by producing evidence demonstrating that the loss came solely from a covered loss or producing evidence that a jury could use to reasonably segregate covered and non-covered losses. *Adv. Indicator*, 50 F.4th at 477 (citing *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971)).

Plaintiff has satisfied its burden to show that a genuine dispute of material fact exists as to whether the claimed roof damage was caused solely by the January 2022 storm. *See Hub Tex., LLC v. Arch Specialty Ins. Co.*, No. 5:21-cv-180-H-BQ, 2023 WL 11859631, at *10 (N.D. Tex. Mar. 21, 2023) ("Application of the doctrine in this case initially hinges on whether Hub has submitted sufficient summary judgment evidence showing 100% of the claimed damage to the Property was caused by the March and/or May 2020 storms."). Plaintiff produces testimony from its expert, Dallas Kaemmerling, who opined that the roof damage was caused "solely to the hail damage" caused by the covered January 2022 storm. (Doc. No. 16, at 13 (citing Exb. B).) In Kaemmerling's report, he opined that "a storm event on January 19th, 2022 more likely than not caused damage to the Property, to the exclusion of other potential storm events and causes." (Doc. No. 12-12, at 4.) After reviewing weather data dating back to 2009, Kaemmerling opined that "the damage from hail to this property could not have been caused by any storm event" other than the January 2022

storm. *Id.* at 5. The weather data on which Kaemmerling relied shows that on January 19, 2022, a storm produced hail between 1–1.25 inches. *Id.* at 5. No other recent storm produced hail of a comparable size. *Id.* Additionally, Kaemmerling explained that he considered and ruled out "any other potential cause of loss, such as foot traffic, wear and tear, lack of maintenance, or other causes." *Id.* at 19 (listing several reasons why he could rule out several exclusions Defendant raises in their denial letter).

Plaintiff also produces the testimony of Defendant's adjuster, engineer Craig M. Chonko, which indicates hail damage was nonexistent on portions of the roof just three months prior to the covered storm. *Id.* at 14 (citing Doc. No. 12-15, at 2). According to Plaintiff, this evidence, along with several inspection reports conducted by Defendant prior to the date of loss showing the differences in the roof condition prior to and after the covered storm, raises a genuine issue of material fact on whether the January 2022 storm was the sole cause of its damages. *Id.* at 18–19. Viewing all of this evidence in light most favorable to Plaintiff, the Court finds that a jury could conclude that the January 2022 storm solely caused the damage to Plaintiff's property. *See, e.g.*, *Adv. Indicator*, 50 F.4th at 476–77 (holding where an insured's summary judgment evidence, including the insured's experts' testimony, demonstrated "hurricane was the sole cause of [insured's] loss," "the concurrent causation doctrine [did] not bar recovery").

Defendant attempts to invoke the doctrine by producing a multitude of photos and other evidence showing "preexisting damage." (Doc. No. 12, at 19–25.) Defendant submits that its summary judgment evidence exhibits signs of wear and tear, deterioration, and faulty/inadequate repair, construction, or renovation—all of which are excluded under the policy. (Doc. No. 12, at 18.) Defendant further contends that Plaintiff's expert included various photos of damage that existed prior to the January 2022 storm. *Id.* at 19–25. The photos relate to wind damaged shingles

on the anchor building; several tarped areas of the church's roof; hail damage to portions of the roof; and interior damage. *Id.* at 19–25. Because some of these photos were taken prior to the January 2022 storm, Defendant contends that this evidence suggests that at least some of the damage Plaintiff attributes to the covered storm existed prior to any covered loss.

Even accepting Defendant's evidence, "this competing evidence demonstrates the existence of a fact dispute that cannot be resolved on summary judgment." *Hub Tex.*, 2023 WL 11859631, at *13. While Defendant's evidence indicates the existence of some pre-existing damage, which undoubtably, if proven, is excluded from coverage, Plaintiff need not supply segregation evidence here because it has produced evidence suggesting that its claimed damages stem solely from the covered storm. *Id.* (citing *Adv. Indicator*, 50 F.4th at 476).

Another court's decision in the Eastern District of Texas provides a helpful analog to this case. In *Marshall Mall Investors LP v. Allied Property & Casualty Insurance Co.*, an insurance claim arose from a roof that was allegedly damaged by storm events covered by an insurance policy. No. 2:21-cv-00109-RWS, 2023 WL 5682412, at *1 (E.D. Tex. July 5, 2023). The defendant insurance company denied coverage claiming that the roof damaged was caused by non-covered "normal wear and tear and improper maintenance." *Id.* On summary judgment, the defendant argued that it was entitled to summary judgment because the plaintiff could not produce evidence to segregate covered storm losses from non-covered wear and tear or improper maintenance or show that the claimed damage arose solely from a covered loss. *Id.* at 3. Plaintiff submitted evidence pointing to "(1) expert testimony that the covered storms caused the damage, and (2) roof inspections occurring before the claimed dates of loss that Plaintiff contends show no noncovered damage." *Id.* The court ultimately denied summary judgment, reasoning that Plaintiff had pointed to enough evidence to show a genuine dispute of material fact on whether the claimed damage was

caused solely by a covered event even though Defendant submitted evidence detailing pre-date of loss damages. *Id.*

To be sure, Defendant argues that because Kaemmerling's opinion does not comport with Federal Rule of Evidence 702, Plaintiff has failed to meet its burden. (Doc. No. 12, at 26.) Defendant argues that if it has raised other "plausible causes of the plaintiff's injury or damage," then the plaintiff "must" offer evidence that excludes those causes. *Id.* Referring to Kaemmerling's report, Defendant argues that Kaemmerling neglected to demonstrate "with any reasonable certainty" that improper construction or inadequate repairs did not contribute to the roofs' damage. *Id.* And because of this neglection, Defendant argues that Plaintiff has failed to produce evidence that (1) segregates damage to the property between covered and non-covered—or excluded—causes of loss and (2) fails to point to evidence showing that the January 2022 storm caused the need for full replacement of all of the property's roofing. *Id.* at 26.

First, because the court concludes that Plaintiff has raised a genuine issue of material fact on whether the January 2022 storm was the sole cause of its claimed damages, the court need not address Defendant's argument that Plaintiff has failed to meet its burden of segregation. *See Adv. Indicator*, 50 F.4th at 476. Second, Defendant relies on Federal Rule of Evidence 702, which governs testimony given by expert witnesses, but has not presented a motion to strike the expert in this case. Even so, Defendant fails to cite any precedent from the Fifth Circuit or the Supreme Court of Texas that places an affirmative duty on Plaintiff's expert to provide an explanation addressing each of Defendant's raised exclusions in a property insurance context.[4] Such an

[4] Defendant cites three cases that purportedly stand for the proposition that "if there are other plausible causes of the plaintiff's injury or damage, the plaintiff must offer evidence excluding those causes with reasonable certainty." *See* (Doc. No. 12, at n.52 (citing *Cotroneo v. Shaw Env't & Infrastructure, Inc.*, 639 F.3d 186, 193 (5th Cir. 2011); *Omni USA, Inc. v. Parker-Hannifin Corp.*, 964 F. Supp. 2d 805, 837 (S.D. Tex. 2013); *McNabney v. Lab. Corp. of Am.*, 153 F. App'x 293, 295 (5th Cir. 2005)). However, two of these cases are in a different context with different precedential

argument is particularly unpersuasive, where here, Plaintiff's expert's evidence and other reports attribute the claimed damage solely to a singular, covered event. *See Hub Tex.*, 2023 WL 11859631, at *12. It is the jury's role to assess both the credibility of Mr. Kaemmerling's testimony and whether a non-covered peril contributed to the church's claimed damages. *See B&L Env't v. Travelers Lloyds Ins. Co.*, No. 1:22-cv-00083, 2023 WL 4707995, at *4 (E.D. Tex. July 24, 2023); *Marshall Mall*, 2023 WL 5682412, at *3 ("While Defendant's citations to the record challenge Plaintiff's allegations and expert testimony, weighing the evidence is a task left to the trier of fact.").

For these reasons, the court finds that Plaintiff has produced sufficient evidence attributing the church's claimed damage to solely the January 2022 storm to survive summary judgment.

B. Segregation Principle

Alternatively, even if the court were to apply the concurrent causation doctrine, Plaintiff has submitted sufficient evidence from which a jury could segregate damages. As Plaintiff argues, a jury can compare the prior inspection reports and photographs with that post-date of loss. (Doc. No. 16, at 16–17.) Moreover, Kaemmerling "provided a detailed line-item estimate of damages to the Property" detailing "nearly 100 specific line items identifying individual materials or labor, a separate column for the quantity of each item listed, and . . . line items out by each building . . . ."

---

standards. For example, in *Cotroneo*, the Fifth Circuit explained that when a plaintiff attempts to use epidemiological studies to establish that the plaintiff's overexposure to radiation caused their physical harms, courts have placed an affirmative duty on an expert using such a study to explain: "[I]f there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty." *Cotroneo*, 639 F.3d 186, at 193 (citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997) (emphasis removed)); *see also McNabney*, 153 F. App'x at 295 (explaining that for *medical causation experts*, the expert must have "considered and excluded other possible causes of injury" (emphasis removed)). As far as the court is aware, there is no similar affirmative duty on an expert in a Texas insurance case to do the same. The third case, *Omni USA, Inc. v. Parker-Hannifin Corp.*, is likewise, distinguishable. There, the expert report admitted that there were "a number of possible causes why" certain gearboxes were leaking, but did not explain why such causes were the cause of the leaking because "he was not asked to rule any out." 964 F. Supp. 2d at 836–37. Here, the expert opines that the claimed damages can be attributed to "100 %" of the covered peril. *See Hub Tex.*, 2023 WL 11859631, at *12. Further, Kaemmerling did test and provide analysis on several of Defendant's excluded causes. *See* (Doc. No. 12-12, at 19).

Id. at 19. Thus, even if Plaintiff had not provided evidence showing all of the claimed damage was caused by a covered storm, the Court would still recommend denial of summary judgment because Plaintiff has provided a principle that a jury could use to segregate damages. *See Hub Tex.*, 2023 WL 11859631, at *13; *Fiess v. State Farm Lloyds*, 392 F.3d 802, 808–09 (5th Cir. 2004).

II. Extracontractual Claims

Defendant further seeks summary judgment as to Plaintiff's extracontractual claims for common law bad faith, violations of the Chapters 541 and 542 of the Texas Insurance Code, and violations of the Texas DTPA. (Doc. No. 12, at 29.) First, Defendant argues that the failure of Plaintiff's breach of contract claims requires dismissal of Plaintiff's extracontractual claims on summary judgment because Plaintiff does not allege an independent injury. *Id.* at 12. Second, Defendant argues that even if Plaintiff's contractual claims survive, summary judgment is appropriate because the evidence shows nothing more than a bona fide dispute as to coverage. *Id.* at 13. The court addresses each argument in turn.

A. Independent Injury

Defendant argues that because it is entitled to summary judgment on Plaintiff's contractual claims, Plaintiff must prove an independent injury beyond alleged entitlement to policy benefits. *Id.* at 31. Although Defendant is correct on the law, *see USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 490 (Tex. 2018), here, Plaintiff's contractual claims survive summary judgment. Thus, Defendant's independent injury argument does not succeed. *Marshall Mall*, 2023 WL 5682412, at *4.

B. Statutory and Common Law Bad Faith Claims

Defendant next argues that the summary judgment evidence shows nothing more than a bona fide dispute as to the presence of covered damages. (Doc. No. 12, at 31.) Defendant argues

that there is no evidence that Defendant "engaged in any unreasonable conduct during its claim investigation and coverage determination." *Id.* at 33. Specifically, Defendant argues that Defendant relied on its independent adjuster and engineering expert when assessing Plaintiff's claim and that the evidence "shows that the parties simply have a bona fide dispute about [Defendant's] liability under the Policy." *Id.* at 33.

Plaintiff argues that under Texas law, an insurer cannot investigate a claim in a manner calculated to construct a pretextual, "outcome oriented" basis to deny the claim. (Doc. No. 16 at 20.) Plaintiff explains several ways that Defendant engaged in such conduct, including: (1) Defendant ordered its engineer to perform a second inspection even though the first inspection identified hail damage; (2) Defendant withheld the engineer report from Plaintiff for several weeks; (3) Defendant retained an engineer to "rubberstamp" its predetermined outcome without first inspecting the property himself even though its independent adjuster had already found covered damages; (4) Defendant intentionally minimized the adjuster's findings of hail damage; (5) Defendant continued to send out its engineer to reinspect the property until the estimated damages fell below the deductible amount; and (6) Defendant withheld the underwriting file of the property from the independent adjuster and engineer. *Id.* at 20–27.

In its reply, Defendant argues that it performed a reasonable investigation of the loss, relied on its engineering expert when assessing Plaintiff's claim, and paid Plaintiff accordingly. (Doc. No. 20, at 6.) Defendant submits that, contrary to Plaintiff's assertions, it has never contested that some covered hail damage occurred at the property. *Id.* That amount of damage, however, fell below the applicable deductibles, which Defendant contends was reasonably explained to Plaintiff. *Id.* at 7. Furthermore, Defendant argues that there is no requirement in the law that required Defendant to send Plaintiff the engineer report, let alone obtain an engineer in the first place. *Id.*

Additionally, Defendant notes that Plaintiff neglects to mention that during this "four month" period where Plaintiff alleges Defendant intentionally withheld the engineer's report, Defendant requested additional time to complete its investigation (Doc. No. 12-9, at 2) and that the adjuster needed an additional inspection "to get an exterior scope at the Property." *Id.*

Under Texas Insurance Code § 541.060(a)(2) & (7), an insurer may be held liable for "failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim" when "the insurer's liability has become reasonably clear," or "refusing to pay a claim without conducting a reasonable investigation with respect to the claim." Both the Insurance Code and the DTPA provide private causes of action for violations of these insurance code provisions. *See* TEX. INS. CODE § 541.151; TEX. BUS. & COMM. CODE § 17.50(a). Additionally, an insurer has a common law duty "to deal fairly and in good faith with its insured in the processing and payment of claims." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995). Together, these are generally referred to as statutory and common law "bad faith" claims. *First Christian Church (Disciples of Christ) of Tyler v. Church Mutual Ins. Co., S.I.*, No. 6:23-cv-00342, 2024 WL 3631080, at *4 (E.D. Tex. July 10, 2024), *report and recommendation adopted*, No. 6:23-cv-00342, 2024 WL 3625833 (E.D. Tex. July 31, 2024).

Under both the common law and the Insurance Code, "an insurer violates its duty of good faith and fair dealing by denying or delaying payment of a claim if the insurer 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, 49 (Tex. 1997). However, "insurance carriers maintain the right to deny questionable claims without being subject to liability for an erroneous denial of the claim." *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 459 (5th Cir. 1997). Evidence which only shows a bona fide dispute as to coverage is insufficient to sustain a claim for bad faith.

Id.; *see also State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997). Whether the insurer's liability has become reasonably clear is a fact issue for the jury. *Giles*, 950 S.W.2d at 56.

The mere fact that the insurer relies on an expert's report to deny a claim does not foreclose the possibility of bad faith. *Nicolau*, 951 S.W.2d at 448. "[A]n insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual basis for denial." *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998). For instance, in *Simmons*, the Texas Supreme Court upheld a jury's finding of bad faith because there was evidence at trial that the insurer "knowingly and repeatedly ignored evidence that the insureds did not burn down their home and that they had no motive for arson." *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 198 (Tex. 1998) (discussing *Simmons*, 963 S.W.2d at 45–47).

Here, as an initial matter, the court finds it appropriate to clarify some of Plaintiff's assertions about the viability of these claims in relation to coverage.[5] First, Plaintiff claims that "'because the coverage question remains unsettled, the Court cannot resolve Plaintiff's extracontractual claims' at summary judgment." (Doc. No. 16, at 30 (citing *Valleyview Church v. Church Mutual Ins. Co.*, No. 2:20-cv-222-Z-BR, 2022 WL 1460208, at *14 (N.D. Tex. May 9, 2022)). However, as this court explained in *First Christian*, while "coverage is generally a pre-condition for bad faith . . . , coverage alone will not save an otherwise meritless bad faith claim." *First Christian*, 2024 WL 3631080, at *5; *see also Menchaca*, 545 S.W.3d at 497 ("[E]ven assuming that there was coverage, the mere existence of coverage would not prove that the insurer violated the statute or its common-law duties by denying the claim.").

Second, Plaintiff states that "even if Defendant has shown a bona fide coverage dispute . . . Plaintiff's DTPA cause of action remains viable because a DTPA claim may be predicated upon

[5] This is the second time this court has had to clarify these exact legal principles to Plaintiff's counsel. *See First Christian*, 2024 WL 3631080, at *5–6.

any violation of section 541.060(a) of the Texas Insurance Code." *See* (Doc. No. 16, at 25) (emphasis added). This is too broad. As the court explained in *First Christian*, "[w]hen an insured joins claims under the Texas Insurance Code and the DTPA with a bad faith claim, all asserting a wrongful denial of policy benefits, if there is no merit to the bad faith claim, there can be no liability on either statutory claim." *First Christian*, 2024 WL 3631080, at *6 (quoting *Nat'l Sec. Fire & Cas. Co v. Hurst*, 523 S.W.3d 840, 848 (Tex. App.—Hous. [14th Dist.] 2017, pet. denied)). To the extent that Plaintiff's DTPA claim does not rely on the same predicate as the bad faith claims, the DTPA claim of course remains viable. *Id.* However, Plaintiff's complaint does not clearly articulate a basis for a DTPA claim separate from the bad faith claims and thus, if Defendant demonstrates that a bona fide coverage dispute exists, Plaintiff's DTPA cause of action no longer remains viable. *Id.*

Nonetheless, here, the court is satisfied that Plaintiff has demonstrated that material fact issues exist which preclude summary judgment on Plaintiff's statutory and common law bad faith claims. As was the case in *First Christian*, Defendant did not provide the underwriting report or independent adjuster report to Plaintiff or to its engineer during the adjustment of the claim. *First Christian*, 2024 WL 3631080, at *6. Although Defendant contends that it was not required to disclose the report to Plaintiff, let alone the engineer and adjuster, "whether it was required to make the disclosure is not the issue." *Id.* "A jury could reasonably infer that only disclosing favorable information about a claim when the insurer knows of potentially unfavorable information is evidence of bias." *Id.*

Because the court finds that a genuine issue of material fact exists on Plaintiff's statutory and common law bad faith claims, the court will not parse through Plaintiff's remaining alleged

evidence of bad faith[6]—such a task is better suited in the hands of the jury. Accordingly, Defendant's motion for summary judgment on Plaintiff's statutory and common law bad faith claims should be denied. *Id.*

C. Material Misrepresentations under the Insurance Code

Plaintiff has plainly asserted a material misrepresentation claim under the Insurance Code (Doc. No. 3, at 10), and argues in response to summary judgment that Defendant has misrepresented several material facts regarding "the cause of the roof damage from the storm, the cost of necessary repairs, and the completion of any investigation into Plaintiff's claim." (Doc. No. 16, at 23.) Plaintiff claims that Defendant misrepresented: (1) that the roofing system at the property was not damaged enough to meet the deductible; (2) that the hail damaged shingles were the result of wear, tear, and deterioration or improper installation; (3) that repairing the roof would require all necessary materials which would have been more than the deductible; (4) that the size of the hail that fell on the property and contradicted its own photographic evidence of larger hailstones; (5) the scope of damages by failing to account for the EFI's report that concludes that there is either hail dents, spatter, or indentations at both of the buildings; and (6) that all interior water damage was not due to a covered loss despite also admitting "[o]penings were observed" at the buildings. *Id.* at 22. Defendant did not move for summary judgment on this claim and does not address Plaintiff's argument at all—only summarily concluding "there is no evidence that Church Mutual engaged in any unreasonable conduct during its claim investigation and coverage determination." (Doc. No. 12, at 33).

"An affirmative misrepresentation of insurance coverage may give rise to claims" pursuant to these Insurance Code provisions. *Ramirez v. GEICO*, 548 S.W.3d 761, 774 (Tex. App.—El Paso

[6] As shown in Plaintiff's briefing, Plaintiff provides a chart listing over seventeen specific allegations of common law and statutory bad faith committed by Defendant. (Doc. No. 16, at 22–23).

2018, pet. denied). However, numerous courts have held that these provisions only apply to misrepresentations about the terms and benefits of the policy itself—not the facts giving rise to a claim for coverage. *Carr Enters. Inc. v. Acadia Ins. Co.*, No. 6:21-cv-00129, 2022 WL 965031, at *4 (E.D. Tex. Mar. 30, 2022).

Here, Defendant does not attempt to rebut Plaintiff's proffered "misrepresentations" and presents no legal principles, case authority, or evidence to demonstrate that it is entitled to judgment as a matter of law. *First Christian*, 2024 WL 3631080, at *7 (citing FED. R. CIV. P. 56). Instead, Defendant's only arguments on the matter seem to be that there is "no evidence that Church Mutual engaged in any unreasonable conduct during its claim investigation and coverage determination." (Doc. No. 12, at 33.) Because Defendant has neglected to address the arguments and point to evidence demonstrating that it is entitled to judgment as a matter of law, it has failed to satisfy its burden at this stage in the litigation. *See Wireless All., LLC v. AT&T Mobility LLC*, No. 2:23-cv-00095, 2024 WL 4999568, at *1 (E.D. Tex. Oct. 23, 2024), *report and recommendation adopted*, No. 2:23-cv-00095, 2024 WL 4648154 (E.D. Tex. Nov. 1, 2024) ("The moving party *must* identify the basis for granting summary judgment and evidence demonstrating the absence of a genuine dispute of material fact." (emphasis added)).

Accordingly, summary judgment on Plaintiff's claims under § 541.060(a)(1) should be denied. *See First Christian*, 2024 WL 3631080, at *7 (denying summary judgment because of the movant's failure to proffer sufficient evidence or case authority pursuant to Federal Rule of Civil Procedure 56).

D. Reasonable Explanation for Denial of Coverage

Plaintiff also alleges that Defendant failed to promptly offer a reasonable explanation for its denial of the claim in violation of Texas Insurance Code § 541.060(a)(3). Specifically, Plaintiff

argues that Defendant (1) sent out a misleading denial letter, excluding several material facts; (2) based its denial letter solely on its outcome-oriented report from Leading Edge and EFI Global, which failed to explain how the damages sustained by a covered cause of loss fell below the deductible; (3) failed to explain how damage at the property was from wear and tear and improper installation; (4) failed to explain how missing shingles were the result of improper installation; (5) merely regurgitated policy language and the "excuses its management constructed in order to deny the claim"; and (6) sent out a biased engineer and reinspected the property to determine an estimate for repairs after Defendant was sent his findings. (Doc. No. 16, at 22–23).

Defendant, again, does not address or rebut Plaintiff's arguments beyond asserting that "Church Mutual's investigation of the claim was reasonable and conducted in good faith." (Doc. No. 12, at 33.) Although Defendant explains its basis for concluding that no payment was issued (Plaintiff's misunderstanding of the policy's deductible provisions), Defendant does not identify any evidence supporting a conclusion that it issued a "reasonable" explanation for denial of coverage or what a "reasonable explanation" is in order to show entitlement to judgment as a matter of law.

An insurer violates Texas Insurance Code § 541.060(a)(3) when it fails to promptly "provide to the policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim." This law, however, "does not obligate an insurer to provide an insured every piece of information . . . the insurer has regarding the offer or the investigation." *Chamberlin v. GEICO Indem. Co.*, No. 3:19-CV-02036-L, 2020 WL 5922072, at *7 (N.D. Tex. May 26, 2020) (citing *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 795 F. Supp. 2d 493, 534 (N.D. Tex. 2011), *report*

and recommendation adopted, No. 3:19-CV-2036-L, 2020 WL 3887845 (N.D. Tex. July 10, 2020)).

Although Defendant issued a denial letter that seemingly explained its basis for denial with supporting documentation,[7] Defendant has not presented any case law on what a reasonable explanation is for a denial of coverage, let alone even addressed Plaintiff's claims. *See Wireless All.*, 2024 WL 4999568, at *1; *First Christian*, 2024 WL 3631080, at *7 (citing FED. R. CIV. P. 56). Without making the effort to address Plaintiff's arguments, Defendant has failed to meet its burden in signifying that it is entitled to judgment as a matter of law. *First Christian*, 2024 WL 3631080, at *7. Accordingly, the court recommends that Defendant's motion for summary judgment on Plaintiff's claim for failure to provide a reasonable explanation for the denial of the claim in violation of Texas Insurance Code § 541.060(a)(3) be denied.

E. Prompt Affirmance or Denial of Coverage

Lastly, Plaintiff alleges that Defendant failed to promptly affirm or deny coverage of the claim in violation of Texas Insurance Code § 541.060(a)(4). Specifically, Plaintiff argues that Defendant issued a denial letter to Plaintiff on August 18, 2022, even though Defendant's had the engineer's report four months earlier. (Doc. No. 16, at 23.) Defendant replies that it sent Plaintiff a letter requesting an additional thirty days to complete its investigation and that it needed to schedule an additional inspection because the adjuster needed to get an exterior scope at the property. (Doc. No. 20, at 7).

[7] Defendant's denial letter stated that Defendant's investigation "revealed minor wind and hail damage to several buildings at the property . . . however, the loss does not exceed your policy deductible." (Doc. No. 12-11, at 2.) Further, Defendant's inspection found: (1) interior water damage related to leaks from the mechanical or plumbing systems; (2) age-related deterioration and granule loss to the roofing of the Church/Daycare, Anchor building and the Parsonage; and (3) minor hail impact indentations to the metal roofing of several buildings, but no functional damage. *Id.* The letter goes on to explain that Engineer Craig Chonko concluded that beyond these findings, "[n]o additional damage was found from a covered cause of loss." *Id.* Defendant also attached a copy of Chonko's report to the denial letter along with a copy of the exclusion provision in the policy. *Id.* at 2–5.

An insurer violates Texas Insurance Code § 541.060(a)(4) if it fails within a reasonable time to "affirm or deny coverage of a claim to a policyholder" or "submit a reservation of rights to a policy holder." Here, once more, Defendant has not presented any case law on what a reasonable period of time is for affirming or denying a claim. *See First Christian*, 2024 WL 3631080, at *7 (citing FED. R. CIV. P. 56). Although the court can appreciate from the evidence that Defendant's "delay in payment" may have been due to multiple potentially reasonable circumstances—requesting additional investigation time and the need for an additional inspection—"a rational jury could find otherwise, given that there are material fact issues concerning Plaintiff's other bad faith claims." *Id.* at 8.

Accordingly, Defendant's motion for summary judgment should be denied on Plaintiff's claim for failure to promptly affirm or deny coverage in violation of Texas Insurance Code § 541.060(a)(4). *Id.*

CONCLUSION

For the reasons stated above, the court **RECOMMENDS** that Defendant's motion for summary judgment (Doc. No. 12) be **DENIED**. Plaintiff's claims for statutory and common law bad faith, failure to promptly affirm or deny coverage, misrepresentation, failure to provide a reasonable explanation for the denial of the claim, violations of the Prompt Payment of Claims Statute, and attorney's fees under Chapter 542A remain pending.[8]

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report. A party's failure to file written objections to the findings, conclusions, and recommendations

[8] Defendant does not address Plaintiff's Chapter 542 claims for violations of the Prompt Payment of Claims Statute. (Doc. No. 3, at 8–9.) Thus, the court construes such omission as uncontested to Plaintiff's Chapter 542 claims, and thus, they proceed to trial.

contained in this Report within 14 days after service shall bar that party from de novo review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc), superseded on other grounds by statute, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 17th day of December, 2024.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE