IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN KAZANJIAN and PATRICIA KAZANJIAN,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CAUSE NO. EP-22-CV-71-KC**
	§	
STATE FARM LLOYDS,	§	
	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant's Motion for Partial Summary Judgment ("Motion"), ECF No. 10. For the reasons set forth below, the Motion is **GRANTED** in part and **DENIED AS MOOT** in part.

I. BACKGROUND

This case concerns an insurance claim for hail damage to Plaintiffs' home. The essential facts are undisputed. *See* Pls.' Resp. Proposed Undisputed Facts ("PUF Resp.") (admitting all of Defendant's Proposed Undisputed Facts), ECF No. 14-2.

During the summer of 2021, Plaintiffs' home experienced two hailstorms. Def.'s Proposed Undisputed Facts ("PUF") ¶ 4, ECF No. 10-2. Following the first storm, Plaintiffs hired public adjuster Maria Lamego to assist them with reporting a claim under their homeowners' insurance policy, which was issued by Defendant. PUF ¶¶ 1–2, 4. Defendant issued a payment to Plaintiffs on the first claim, and that claim is not at issue in this lawsuit. PUF ¶¶ 5, 6.

Four days after the second storm, on July 15, 2021, Lamego reported another claim to Defendant on behalf of Plaintiffs, alleging that their home was damaged by the second storm.

PUF ¶ 2. The following day, Defendant's representative called Plaintiffs to discuss the claim. PUF ¶ 8. After a series of phone calls, the parties agreed to an inspection date. PUF ¶ 10. And on August 11, 2021, Defendant inspected the property, with Plaintiffs and Lamego present. PUF ¶ 11. On August 16, Defendant issued a claim decision, finding "covered damages to three newer roof turbines and three window screens, but no covered damages to the modified bitumen portion of Plaintiffs' roof, nor the clay tile portion of their roof." PUF ¶¶ 12–13.

On October 13, 2021, a law firm sent a letter to Defendant on Plaintiffs' behalf, together with an estimate from Lamego, demanding that Defendant pay for full replacement of the modified bitumen and tile portions of the roof. PUF ¶ 14. The total estimate in Plaintiffs' demand was $57,980.78. PUF ¶ 14. Following negotiations in November, Defendant's Claim Specialist Denice Gomez conducted a second inspection of Plaintiffs' property on December 9. PUF ¶¶ 15–17.

Gomez reaffirmed two of the key conclusions drawn from the initial inspection: (1) that there was no covered damage to the clay tile roof, and (2) that there was no hail damage to the modified bitumen roof. PUF ¶¶ 20–21. "However, Gomez concluded that coating around the damaged metal turbines meant the turbines could not be replaced without disturbing the existing modified bitumen, therefore she included replacement of the portion of the modified bitumen roof containing the damaged turbines." PUF ¶ 22.

On December 27, 2021, Defendant sent Plaintiffs a letter, explaining their revised claim decision following the second inspection. PUF ¶ 23. Defendant issued Plaintiffs a $4,731.16 payment, which represented their revised estimate of $9,858.43 in damages, less Plaintiffs' deductible and adjustments for "recoverable depreciation." PUF ¶¶ 24–25. On January 10,

2022, Defendant sent Plaintiffs an additional $150.36 payment, which Defendant determined was owed under Texas' Prompt Payment of Claims Act. PUF ¶ 26.

Plaintiffs filed this lawsuit in state court on January 27, 2022. *See* Pet., ECF No. 1-3. And the case was removed on March 1. Notice Removal, ECF No. 1. Plaintiffs and Defendant have each retained experts, who diverge significantly in their assessment of the extent of the damage to Plaintiffs' home that is attributable to the hailstorm. PUF ¶¶ 27–30. Plaintiffs' expert disagreed with Lamego's earlier estimate and identified $110,731.28 in total hail damage. PUF ¶¶ 27–28. Defendants' experts concluded that there was little to no evidence of hail impact on Plaintiffs' roof, and that the damage to the property is instead largely or exclusively the result of a "history of distress" or "age-related wear and tear." PUF ¶¶ 29–30.

Defendant filed the instant Motion on December 2, 2022, seeking partial summary judgment. *See generally* Mot. Plaintiffs originally brought claims for (1) breach of contract, (2) violations of several Unfair Settlement Practices provisions of the Texas Insurance Code ("Unfair Settlement Claims"), (3) violations of several Prompt Payment of Claims provisions of the Texas Insurance Code ("Prompt Payment Claims"), (4) breach of the duty of good faith and fair dealing, (5) violation of the Texas Deceptive Trade Practices Act ("DTPA"), and (6) fraud. Pet. ¶¶ 30–57. Defendant moved for summary judgment on most, but not all of these claims; namely, the Unfair Settlement Claims, the good faith and fair dealing claim, the DTPA claim, the fraud claim, and two of Plaintiffs' three Prompt Payment Claims. Mot. ¶¶ 1–2, 4, 21, 36. Defendant also requested a ruling that Plaintiffs may not recover exemplary or treble damages. *Id.* ¶ 35. Defendant did not seek summary judgment on the breach of contract claim or the third Prompt Payment Claim. *Id.* ¶ 4. Plaintiffs filed a Response, ECF No. 14, in which they stated their intent to voluntarily dismiss all of the claims contested in Defendant's Motion, save for the

Unfair Settlement Claims. *Id.* ¶ 1. Accordingly, the bulk of Plaintiffs' extra-contractual claims are dismissed, and the Motion is denied as moot as to those claims.[1] The only remaining issues for which Defendant seeks summary judgment are Plaintiffs' Unfair Settlement Claims and the extent to which Plaintiffs can recover exemplary and treble damages.

II. DISCUSSION

A. Standard

A court must enter summary judgment "if the movant shows 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam)). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996).

"[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*,

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[1] Plaintiffs also indicate in their response that they are pursuing claims under section 542.003(b)(5) of the Texas Insurance Code, *see* Resp. ¶ 2, although such a claim does not appear in the Petition, *see generally* Pet. Defendant argues that Plaintiffs cannot pursue a 542.003(b)(5) claim because they failed to plead it. Reply ¶ 4, ECF No. 15. Whether pleaded or not, Plaintiffs "cannot state a claim for relief under section 542.003 because it does not authorize a private cause of action." *Wheeler v. Safeco Ins. Co. of Ind.*, No. SA-21-CV-343-XR, 2022 WL 1295288, at *8 (W.D. Tex. Apr. 29, 2022); *accord Terry v. Safeco Ins. Co. of Am.*, 930 F. Supp. 2d 702, 714–15 (S.D. Tex. 2013). To the extent it was ever properly raised, Plaintiffs' 542.003 claim is dismissed.

477 U.S. at 323; *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). To show the existence of a genuine dispute, the nonmoving party must support its position with citations to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials[,]" or show "that the materials cited [by the movant] do not establish the absence . . . of a genuine dispute, or that [the moving party] cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c).

The court resolves factual controversies in favor of the nonmoving party, but factual controversies require more than "conclusory allegations," "unsubstantiated assertions," or "a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Further, when reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh evidence. *Man Roland, Inc. v. Kreitz Motor Express, Inc.*, 438 F.3d 476, 478–79 (5th Cir. 2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Thus, the ultimate inquiry in a summary judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

B. Analysis

1. Unfair Settlement Claims

Defendant argues that it is entitled to summary judgment on Plaintiffs' Unfair Settlement Claims because there is no evidence that it acted in bad faith during the course of investigating Plaintiffs' insurance claim. Mot. ¶¶ 17–30. Plaintiffs' Unfair Settlement Claims, if successful, would permit recovery under section 541.060 of the Texas Insurance Code. Pet. ¶¶ 35–41. And

"[t]o recover under [section] 541.060, the insured must prove that the insurer acted in bad faith." *Mt. Hawley Ins. Co. v. Huser Constr. Co.*, No. H-18-787, 2019 WL 1255756, at *8 (S.D. Tex. Mar. 19, 2019) (citing *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997)); *see also Collins v. State Farm Lloyds*, No. 3:21-CV-982-X, 2023 WL 1769204, at *4 & nn.31–32 (N.D. Tex. Feb. 3, 2023) (collecting cases). The bad faith requirement for claims under section 541.060 is the same as the Texas common law standard for bad faith. *Higginbotham*, 103 F.3d at 460; *Blum's Furniture Co. v. Certain Underwriters at Lloyds London*, No. H-09-3479, 2011 WL 819491, at *4 (S.D. Tex. Mar. 2, 2011) (collecting cases).

"To prove that an insurer acted in bad faith . . . an insured must show that the insurer failed to settle the claim even though it knew or should have known that it was reasonably clear that the claim was covered." *Jajou v. Safeco Ins. Co. of Ind.*, No. SA-20-CV-839-XR, 2022 WL 220391, at *5 (W.D. Tex. Jan. 24, 2022) (internal quotation marks omitted) (quoting *Lee v. Catlin Specialty Ins. Co.*, 766 F. Supp. 2d 812, 818 (S.D. Tex. 2011)). "Evidence that merely shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith." *Id.* (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994), *superseded by statute on other grounds as recognized in U-Haul Int'l v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012)).

Thus, there is no bad faith where "a reasonable investigation reveals the [insured's] claim is questionable." *Id.* (quoting *United Servs. Auto Ass'n v. Croft*, 175 S.W.3d 457, 471 (Tex. App. 2005)). Even where it is ultimately determined that the insurer was "incorrect about the factual basis for its denial of the claim, or about the proper construction of the policy," this does not, without more, suffice to establish bad faith. *Moriel*, 879 S.W.2d at 18. "[T]he issue of bad faith focuses not on whether the claim was valid, but on the reasonableness of the insurer's

conduct in rejecting the claim." *Travelers Pers. Sec. Ins. Co. v. McClelland*, 189 S.W.3d 846, 854 (Tex. App. 2006) (quoting *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993)).

Defendant argues that there is no evidence in the record that would show that this case amounts to more than a bona fide coverage dispute. Mot. ¶¶ 1, 21, 26, 30. In response, Plaintiffs point to what they view as a suspicious timeline: Defendant conducted an initial investigation and found only limited covered damages. Plaintiffs then hired attorneys, who sent Defendant a demand letter. Defendant conducted a second inspection, found additional covered damages to the property, and issued Plaintiffs a check. Resp. ¶ 13. Plaintiffs argue that this sequence of events demonstrates bad faith because it evinces "a purposeful tactic of the Defendant to shirk its statutory obligation to thoroughly investigate a claim in order to avoid its other statutory obligation to effectuate prompt and equitable payment of the claim." *Id.*

Courts have considered and rejected similar arguments. *See, e.g.*, *Kahlden v. Safeco Ins. Co. of Ind.*, No. H-10-2001, 2011 WL 13248494, at *7 (S.D. Tex. Oct. 21, 2011); *Spicewood Summit Off. Condos. Ass'n v. Am. First Lloyd's Ins. Co.*, 287 S.W.3d 461, 470 (Tex. App. 2009). "[T]he fact that an insurance company would agree to perform subsequent assessments that result in additional amounts paid under the policy . . . . standing alone does not suggest anything in the nature of bad faith. If anything, an insurer's agreeing to perform a reassessment demonstrates good faith." *Spicewood*, 287 S.W.3d at 470. Were there some additional evidence indicating that Defendant intentionally undervalued Plaintiffs' claim until they hired legal counsel, the result may be different. *See id.* at 469–70. But the fact of the reassessment, alone, does not warrant a reasonable inference of bad faith. *See id.* at 470. Plaintiffs' supposition that Defendant engaged in a "purposeful tactic" is not additional evidence, but rather, the sort of

unsubstantiated assertion that does not suffice to establish a factual controversy and avoid summary judgment. *See Little*, 37 F.3d at 1075.

The absence of a genuine dispute of material fact on the bad faith issue is underscored by Plaintiffs' admission of each of Defendant's Proposed Undisputed Facts. PUF Resp. To be sure, Plaintiffs' Response brief contains a fact section that adds detail about their expert's findings. *See* Resp. ¶ 8. But Plaintiffs admit that both of Defendant's experts take a drastically different view of the cause of the damage to Plaintiffs' home. PUF Resp. ¶¶ 29, 30. And nowhere does Plaintiffs' expert opine that Defendant's assessments were not only incorrect, but that Defendant should have known they were incorrect. *See* Resp. ¶ 8.

Courts have consistently held that "[a] simple disagreement among experts about whether the cause of the loss is one covered by the policy will not support a judgment for bad faith." *Moriel*, 879 S.W.2d at 18; *accord Nino v. State Farm Lloyds*, No. 7:13-cv-318, 2014 WL 6674418, at *5 (S.D. Tex. Nov. 24, 2014) ("[A] finding of hail damage by one expert [does not] prove another expert's contrary finding was based on an inadequate inspection" and is "not evidence of bad faith"); *Certain Underwriters at Lloyd's, London v. Prime Nat. Res., Inc.*, 634 S.W.3d 54, 80 (Tex. App. 2019). "In addition to the conflicting expert opinion, the party alleging bad faith must also bring direct or circumstantial evidence showing that the carrier's expert's opinion was questionable and that the carrier knew or should have known that the opinion was questionable." *Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 571 (Tex. App. 2011) (quoting *Guajardo v. Liberty Mut. Ins. Co.*, 831 S.W.2d 358, 365 (Tex. App. 1992)).

Here, the evidence shows nothing more than a disagreement among experts. *See id.*; PUF Resp. ¶¶ 29, 30; Resp. ¶ 8. A jury may credit Plaintiffs' expert over Defendant's experts. But if they were to do so, it would only support a finding that Defendant was "incorrect about the

factual basis for its denial of the claim, or about the proper construction of the policy." *See Moriel*, 879 S.W.2d at 18. This may sustain a breach of contract action, but it does not suffice to establish bad faith. *See id.* Because Plaintiffs have presented no evidence of bad faith, Defendant is entitled to summary judgment on Plaintiffs' Unfair Settlement Claims. *See Mt. Hawley*, 2019 WL 1255756, at *8.

2. Exemplary and Treble Damages

Defendant also requests a ruling that Plaintiffs may not recover exemplary or treble damages. Mot. ¶ 35. In their Response, Plaintiffs do not contest the issue, arguing only that they are entitled to attorneys' fees and statutory interest damages for the extra-contractual claims that they have not abandoned. *See* Resp. ¶¶ 19, 25. Indeed, the only claims proceeding past summary judgment are the breach of contract and section 542.058 Prompt Payment Claim. And neither of those causes of action permit Plaintiffs to recover exemplary or treble damages. *See Tex. Friends Chabad-Lubavitch, Inc. v. Nova Cas. Co.*, 539 F. Supp. 3d 669, 681 (S.D. Tex. 2021) (describing limited damages available for Prompt Payment Claims (citing Tex. Ins. Code §§ 542.058, 542.060(a))); *Signal Peak Enters. of Tex., Inc. v. Bettina Invs., Inc.*, 138 S.W.3d 915, 928 (Tex. App. 2004) ("Exemplary damages are not recoverable in a breach of contract action." (citing *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995))). Accordingly, Defendant's request for judgment as a matter of law that Plaintiffs cannot obtain treble or exemplary damages is granted.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion, ECF No. 10, is **GRANTED** in part and **DENIED AS MOOT** in part. The Motion is **GRANTED** as to Plaintiffs' Unfair Settlement Claims and Defendant's request for a ruling that Plaintiffs cannot recover treble or exemplary

damages. The Motion is **DENIED AS MOOT** as to Plaintiffs' claims for breach of the duty of good faith and fair dealing, fraud, violations of the DTPA, and violations of sections 542.055 and 542.056 of the Texas Insurance Code.

IT IS FURTHER ORDERED that Plaintiffs' claims for breach of the duty of good faith and fair dealing, fraud, violations of the DTPA, and violations of sections 542.055 and 542.056 of the Texas Insurance Code are **DISMISSED WITH PREJUDICE**, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that, to the extent a claim for violation of Section 542.003(b)(5) of the Texas Insurance Code was ever properly before the Court, it is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs **SHALL NOT** recover exemplary or treble damages.

Plaintiffs' claims for breach of contract and violation of section 542.058 of the Texas Insurance Code remain pending.

SO ORDERED.

SIGNED this 15th day of February, 2023.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE