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

MT. JAVED VENTURES, LTD.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 1:18-CV-519**
MT. HAWLEY	§	
INSURANCE COMPANY,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION
ON MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 636(b) and the Local Rules for the United States District Court for the Eastern District of Texas, the District Court referred this proceeding the undersigned United States Magistrate Judge for consideration of pretrial matters and proceedings and entry of a report and recommendation on case-dispositive issues. Pending before the Court is the defendant's *Motion for Summary Judgment* (doc. #13).

I. Background

A. Plaintiff's Claims and Background Facts

On September 7, 2018, the plaintiff, Mt. Javed Ventures Ltd. ("Plaintiff" or "Mt. Javed") filed its Original Petition in the 58th Judicial District Court of Jefferson County, Texas. *See Original Petition* (doc. #1-3), filed with the *Notice of Removal*. In the Original Petition, the Plaintiff states that it is a "domestic company which operates a church known as Cowboy Church on the Rock." *See id*. at p. 2. Mt. Javed is a named insured under a commercial insurance company

issued by the defendant, Mt. Hawley Insurance Company ("Mt. Hawley" or "Defendant"). Plaintiff avers that on or about August 27, 2017, Hurricane Harvey hit multiple areas within Texas, including Jefferson County, where Plaintiff's property ("the Property") is located at 13803 Hwy. 90 West in Beaumont, Texas, 77713. *Id*. As a result of Hurricane Harvey, the Property sustained severe damage. *Id*. Plaintiff accordingly filed an insurance claim with the defendant insurer. *See id*.

Defendant retained the services of Vericlaim, Inc., and Lisa Fennell, an adjuster. Ms. Fennell inspected the Property. *Id*. at p. 3. The Original Petition states that Vericlaim only reported minor damage, which it estimated at $6,139.39, an amount significantly less that Plaintiff's deductible. *Id*. On December 7, 2017, Defendant sent Plaintiff written correspondence of its findings and advising Plaintiff that it would be closing the claim. *See id.*

Plaintiff then sought an opinion from BNRB Construction regarding the damage to the Property. *Id*. at p. 3. BNRB found that the total amount to perform the repairs to the Property was $482,096.47, necessitated by damages from wind and water due to the storm. *See id*. On February 9, 2018, the plaintiff provided notice to Defendant under the Texas Insurance Code and the Texas Deceptive Trade Practices Act (DTPA) as to the full extent of the damages and intent to pursue payment. *See id*.

In response to Plaintiff's demand, Defendant retained independent adjusters with Engle, Martin & Associates to reinspect the Property. *Id*. Those adjusters found no damages attributable to Hurricane Harvey. *See id*. at pp. 3-4. They did find evidence of damages but attributed it to other pre-existing problems. *See id*.

Based on the foregoing factual allegations, the Plaintiff filed suit to assert the following causes of action. Plaintiff sets forth claims for breach of contract, violations of the Texas DTPA

and its tie-in statutes, violations of Chapters 541 and 542 of the Texas Insurance Code; and breach of the duty of good faith and fair dealing. *See id*. at pp. 4-10.

On October 12, 2018, the Defendant filed its Notice of Removal removing the plaintiff's case to this court. *See Notice* (doc. #1). In support, the Defendant avers that federal jurisdiction exists under 28 U.S.C. § 1332 because the parties are diverse and the amount in controversy exceeds $75,000.00. *See id*. at pp. 2-3.

B. Motion for Summary Judgment and Related Briefs

On December 31, 2019, Mt. Hawley filed its motion for summary judgment and brief in support. In sum, the defendant argues that it is entitled to summary judgment on the Plaintiff's causes of action as follows. Mt. Hawley asserts that the evidence conclusively establishes that Plaintiff is not entitled to recover the alleged damages it seeks, which is a necessary element of any breach of contract claim. *See Motion* (doc. #13), at p. 1. Defendant specifically submits that there is no evidence that Hurricane Harvey caused any covered damage to Plaintiff's Property in excess of the Policy deductible. *Id*. Mt. Hawley relatedly argues that it is also entitled to summary judgment on Plaintiff's statutory and common law "bad faith" claims because it cannot establish a breach of contract, *i.e*., a covered loss in excess of the Policy deductible. *See id*. at pp. 1-2.

Plaintiff responded in opposition to the motion for summary judgment. *See Response* (doc. #15). Plaintiff disputes that the damages to its property were minimal and that the claim did not exceed the Policy deductible, as argued by Defendant. *See id.* at p. 2. In support, Mt. Javed points to the assessment of its retained adjuster, Phil Mayfield of PSM Consultants. *See id.* at p. 5. Mr. Mayfield found evidence consistent with severe storm damage to the roofs of the Property. *See id*. Mayfield also determined that the damage occurred in the months preceding Hurricane Harvey, during the passage of Hurricane Harvey, and all within the applicable Policy period. *See*

id. at p. 6. Plaintiff also points to the testimony of Pastor Kenny Miller his wife Traci Miller. *Id*. Both indicated that no water leaks were observed at the Property prior to Hurricane Harvey. *See id.* Plaintiff cites photographic evidence, Mr. Mayfield's recommendations, and Mike Norris's (of BNRB Construction) roofing estimate to support its contention that the damages to the Property – taken in aggregate – provide sufficient evidence supporting the damages exceed the Policy deductible. *See id*. at p. 7. Plaintiff also argues that the defendant's arguments are misplaced relating to the "bad faith" claims because Texas law provides that the "reasonableness" of the insurer's conduct is a question of fact which should be left to a jury. *See id.* Mt. Javed also relatedly argues that there is adequate evidence that Defendant acted unreasonably in handling the Plaintiff's claim. *See id.* at pp. 9-10.

Defendant also submitted a reply in support of its motion for summary judgment. *See Reply* (doc. #16). Defendant replies by addressing the evidence Plaintiff points to in its response. *See id.* a p. 2. Mt. Hawley also sets out evidence which it contends defeats Plaintiff's position that the covered and uncovered damages to the Property can be segregated. *Id*. at p. 4. Mt. Hawley finally reiterates that it is entitled to summary judgment on Plaintiff's bad faith claims because it reasonably relied on its experts. *See id.* at pp. 5-6.

II. Discussion

A. Summary Judgment Standard of Review

Summary judgment should be granted only 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, 106 S. Ct. 2548 (1986) (quoting Rule 56);

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, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). A fact is material when it is relevant or necessary to the ultimate conclusion of the case. *Anderson*, 477 U.S. 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, 113 S. Ct. 98, 121 L. Ed.2d 59 (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." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S. Ct. 2505 (1986). However, the non-movant may not rest on the 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, 115 S. Ct. 195, 130 L. Ed.2d 127 (1994). The party opposing summary

judgment is required to identify specific evidence in the record and to 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 Skotak.*, 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.

B. Application

(1). Breach of Contract

(a). *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 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) (citing *Hunn v. Dan Wilson Homes, Inc.*, 789 F.3d 573, 579 (5th Cir. 2015); *cert. denied,* — U.S. ——, 136 S. Ct. 592, 193 L.Ed.2d 470 (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)).

[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 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)).

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 minimum Named Storm Deductible of $25,000.00 ("the Deductible"). *See Policy, Declarations – Deductible Addendum, Filed with Appendix to Motion for Summary Judgment* (doc. #13-1, at p. 12). The Policy also states that the insurer will not cover loss or damage causes by wear and tear, settling, cracking, shrinking, or expansion. *See Policy, Commercial Property Conditions* (doc. #13-1, at p. 40). The Policy excludes loss resulting from the following:

-continuous or repeated seepage or leakage of water that occurs over a period of 14 days;

-neglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss;

-cosmetic damage to roof surfacing cause by wind and/or hail.

See Policy, at Causes of Loss – Special Form (doc. #13-1, at pp. 31-36).

(b). *Record Evidence and Discussion; Disputed Coverage*

In its motion, the defendant relies on the estimate of its initial adjuster, Lisa Fennell with Vericlaim, who estimated the cost to repair the damages was only $6,139.39. *See Vericlaim Report, Exhibit A-2 to Motion for Summary Judgment* (doc. #13-1). Mt. Hawley also points to the findings made by Luis Ulloa of ProNet Group, Inc., a structural engineering firm hired by Mt. Hawley for reinspection of the property in February 2018. *See Ulloa Report, Exhibit A-6 to Motion for Summary Judgment* (doc. #13-2). Ulloa's report generally found that the damage to the Property was pre-existing and no Hurricane Harvey-related damage was observed. *See id.* Defendant also argues that there is no evidence to support a finding that the winds during Harvey

were sufficient to damage the Property; no evidence that tornadic activity could have caused the damage; and no evidence of high winds during the Policy period. *See Motion for Summary Judgment*, at pp. 8-10. Mt. Hawley relatedly argues that Plaintiff's evidentiary submissions – specifically the findings of adjuster Philip Mayfield and Mike Norris's estimate – are speculative in nature given the applicable weather data. *See id*. at p. 10.

In deciding a summary judgment motion, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his or her favor." *Reyna v. State Farm Lloyds*, No. CV H-19-3726, 2020 WL 1187062, at *2 (S.D. Tex. Mar. 12, 2020) (quoting *Waste Mgmt. of La, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 972 (5th Cir. 2019)). Plaintiff points to evidence and testimony from its retained adjuster Philip Mayfield, Pastor Miller of the Cowboy Church, Mike Norris of BNRB Construction, and its corporate risk representative, Usman Akbar, as outlined below. Plaintiff has identified "specific evidence in the record" and articulated how that evidence supports its claim. *See id.* Citing *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014).

Assuming, *arguendo*, that Mt. Hawley carried its burden in demonstrating an absence of genuine material fact on the breach of contract claim with its evidence, the Court concludes that the Plaintiff has adequately responded with evidence sufficient to defeat summary judgment. Plaintiff points to record evidence within Mt. Hawley's own claim file suggesting that upon her initial inspection, adjuster Lisa Fennell found there was wind damage to the main church roof and the roofs of two outer buildings. *See October 23, 2017, Correspondence from Claims Examiner for Mt. Hawley, Exhibit A to Plaintiff's Response* (doc. #15-1). This is in direct contrast to the evidence presented by Defendant regarding Ms. Fennell's final assessment in the November 30, 2017, Vericlaim report, cited above. That correspondence also indicated that at "this time, it does appear the total damages will exceed their named Storm Deductible." *See id*. Plaintiff also cites

the findings of Phil Mayfield of PSM Consultants, retained by Plaintiff to inspect its property. Mayfield found evidence consistent with severe storm damage to the shingle roof of the church as well as the metal outer buildings. *See Roof Survey Report, Exhibit 7 to Deposition of Philip Mayfield, Exhibit 2 to Plaintiff's Response* (doc. #15-2), at p. 21. He determined that the damage occurred in June, July, and August of 2017. *See id.* at pp. 19, 21. While he was unable to conclude that all the damage occurred on the exact date(s) of Hurricane Harvey's passage, he was able to at least find that it occurred in the months immediately preceding the storm, during the Policy period. *See Mayfield Depo.*, at 82:13-83:16. The plaintiff also points to the testimony of Kenny Miller, the Pastor for the Cowboy Church, who averred that he had never noticed water stains on the ceiling tiles of the Property prior to Hurricane Harvey. *See Depo. of Kenny Miller, Exhibit H to Defendant's Motion* (doc. #13-4), at 37:4-17. Plaintiff also retained Mike Norris for purposes of estimating the cost of a shingle roof replacement, which came out to $50,273.58. *See Church Roof Estimate, Exhibit 2 to Deposition of Mike Norris, Exhibit C to Plaintiff's Response* (doc. #15-3).

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 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 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 WL 3055801, at *4 (N.D. Tex. July 7, 2014), *aff'd*, 643 F. App'x. 437 (5th Cir. 2016) (applying Texas law). The doctrine of concurrent causes provides that when covered and non-covered events

under an insurance policy 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 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)). 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.* (internal quotations omitted). 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." *Id.* 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.").

As noted above, there is certainly more than a mere scintilla of evidence in the record to support that, at a minimum, the roofs of the Property incurred damage as a result of Hurricane Harvey. Defendant argues that the evidence presented by Plaintiff is speculative, conclusory and subjective. However, "[e]xpert allocation of damages between covered and excluded risks is not, however, necessarily required; circumstantial evidence can suffice." *See Carter Tool*, at *3 (quoting *Lyons*, 866 S.W.2d at 601). Allocation of loss need not be made with mathematical precision — there simply must be some reasonable basis on which a jury can evaluate what percentage of loss was created by the covered cause of loss. *Id.* Citing *Hahn v. United Fire and Cas. Co*., 6:15-CV-00218-RP, 2017 WL 1289024, at *8 (W.D. Tex. April 6, 2017); *see also Lopez*, at *2 (citing *Nat'l Union Fire Ins. v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 669 (S.D. Tex. 2010) (applying Texas law)).

Pastor Miller's testimony also indicates that he did not notice certain damage to the Property until after Hurricane Harvey, further providing evidence upon which a jury could rely to reasonably allocate the damage to a covered incident, *i.e.* the storm. The Texas Supreme Court has held that lay testimony is sufficient to support a finding on the causal relationship between a storm and property damage in insurance coverage cases. *Lopez*, at *3 (citing *Lyons*, 866 S.W.2d at 601; *see also United States Fidelity and Guar. Co. v. Morgan*, 399 S.W.2d 537, 540 (Tex. 1966) ("[T]estimony of [the plaintiff] and her neighbors that there was no preexisting damage ... constituted some evidence of the extent of damage attributable solely to the windstorm")). "Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation." *Lopez*, at *3 (quoting *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984)); *see also Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 885 (5th Cir. 2004) ("[I]n determining whether lay testimony is sufficient to prove causation, Texas courts look at the nature of the lay testimony and the nature of the injury.") Furthermore, the Court is not permitted to weigh the evidence or make credibility determinations at the summary judgment stage; such assessment of the evidence is the province of the jury. *Carter Tool*, at *4. Quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).[2]

[2] Defendant relies on two district court cases also involving Mayfield and Norris in which the courts determined that the plaintiff was unable to defeat summary judgment by segregating the covered and non-covered losses to their property. *See Faith Temple Church of God in Christ v. Church Mut. Ins. Co*., No. 1:17-cv-435, 2018 WL 9869610 (E.D. Tex. Oct. 17, 2018) (Crone, J.) (involving Mayfield's opinion); *Sandovsky v. Nationwide Prop. & Cas. Inc. Co*., No. SA-18-cv-271-XR, 2019 WL 2165805 (W.D. Tex. May 15, 2019) (involving both) The Court has reviewed those cases and determines they are factually distinguishable based on the evidence because here, viewing the non-movant's evidence in the most favorable light, (1) the Plaintiff cites lay testimony in addition to that of Mayfield and Norris, and (2) Mayfield was able to specify with greater detail the loss as occurring at least within the months preceding Hurricane Harvey, within the Policy period.

Accordingly, the Court concludes there are genuine issues of material fact that preclude summary judgment on the grounds that Plaintiff cannot allocate damages on the breach of contract claim. Simply put, the Plaintiff has come forward with evidence creating a genuine issue of material fact on the cause of the damages to the Property. Plaintiff has pointed to evidence upon which a jury could reasonably allocate covered damages. Defendant denied that claim on the basis that the damage was not covered and likely resulted from other causes. There is sufficient summary judgment evidence to indicate that a jury could find that the damage should be covered under the terms of the Policy. In viewing the evidence in the light most favorable to the non-movant and based on the competing evidence offered by Plaintiff, summary judgment should be denied on his breach of contract claim. *See, e.g., Lopez*, at *4

(2). Extra-Contractual "Bad Faith" Claims

Mt. Javed asserts extra-contractual claims for alleged violations of the Texas DTPA, unfair practices and failure to make prompt payment in violation of Chapters 541 and 542 of the Texas Insurance Code, and breach of the common-law duty of good faith and fair dealing.

(a). *Breach of Duty of Good Faith and Fair Dealing, Chapter 541 of the Texas Insurance Code and DTPA*

Under Texas law, "[a]n insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims." *Carter Tool*, 2019 WL 7759499, at *5 (quoting *Republic Ins. Co., v. Stoke*r, 903 S.W.2d 338, 340 (Tex. 1995)). This duty is breached if: "(1) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy and (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim." *Id*. Citing *Stoker*, at 340. Whether an insurer's liability has become reasonably clear is a question of fact. *Carter Tool*, at *5 (citing *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997)). However, "[e]vidence establishing only a bona

fide coverage dispute does not demonstrate bad faith." *Id.* Quoting *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998); *see also Chavez v. State Farm Lloyd's*, 746 F. App'x 337, 341 (5th Cir. 2018) (per curiam) (citing *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997) (evidence that shows a "bona fide coverage dispute does not, standing alone, demonstrate bad faith.")).

In reviewing a bad-faith claim, the court "must distinguish between the evidence supporting the contract issue and the tort issue," because the bad-faith tort issue "does not focus on whether the [property-damage] claim was valid." *Chavez*, at 341 (quoting *Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 569 (Tex. App.—San Antonio 2011, pet. denied)). Accordingly, summary-judgment evidence must relate to whether liability had become reasonably clear, not merely the existence of liability. *Id.* at 342 (citing *Lyons*, 866 S.W.2d at 600). As an initial matter, however, "[t]he 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). Under Texas law, claims of unfair settlement practices in violation of the DTPA and the Texas Insurance Code "require the same predicate for recovery" as a claim for a violation of the common-law duty of good faith. *Henry v. Mut. of Omaha Ins. Co.*, 503 F.3d 425, 429 (5th Cir. 2007) (quoting *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997)); *see also National Sec. Fire & Cas. Co. v. Hurst*, 523 S.W.3d 840, 848 (Tex. App.–Houston [14th Dist.] 2017)). When an insured joins claims under the Texas Insurance Code 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. *See Cano v. State Farm Lloyds*, 276 F. Supp. 3d 620, 626–27 (N.D. Tex. 2017). The court, therefore, examines Plaintiff's extra-contractual claims for violation of Chapter 541 of the Texas Insurance Code, the DTPA, and breach of the common law duty of good faith and fair dealing simultaneously. *See id.* "Plainly put, an insurer will not be faced with a tort suit for challenging a claim of coverage if there was any reasonable basis for denial of that coverage." *Higginbotham*, 103 F.3d at 460.

Defendant argues that it had a reasonable basis supporting its determination that the Property did not sustained covered damage in excess of the deductible. Mt. Hawley points to the opinions of its adjusters and experts who adjusted the loss. Mt. Hawley also avers that the Plaintiff also initially instructed the insurer to close its claim file because the damage to the Property was minimal. *See October and November 2017 E-Mail Correspondence, Exhibit A-3 to Motion for Summary Judgment, and December 7, 2017, Correspondence, Exhibit A-4 to Motion for Summary Judgment* (doc. #13-1). The Court finds that the Mt. Hawley has established that it acted reasonably under the circumstances for summary judgment purposes.

Plaintiff responds by citing Luis Ulloa's opinion that there were no dents, scratches, or wind-born debris damage to the roof covering system. *See Response*, at pp. 8-9 (citing *ProNet Group Report*, at p. 7). Plaintiff also points to Ulloa's finding that there were no missing, torn, or creased shingles or evidence of wind-related damage to the roof. *See id.* Plaintiff compares this to Philip Mayfield's report (1) finding hundreds of instances of scrapes, gouges, tears and impact marks that are not typical of wear and tear as well as Mayfield's opinion (2) that the ProNet report limited weather data and excluded relevant severe weather. *See Response*, at p. 9 (citing *PSM Consultants Roof Survey Report*). Plaintiff also cites the deposition testimony of the corporate risk representative for the Property, Usman Akbar, who stated his opinions regarding the insurer's

conduct, alleged failure to properly investigate, and "bad faith." *See Response*, at pp. 9-10 (citing *Deposition of Usman Akbar*, at pp. 62-63, *Filed as Exhibit I to Defendant's Motion for Summary Judgment* (doc. #13-4)).

Based on the evidence presented, the Plaintiff has not presented a genuine issue of material fact as to whether the denial of its claim was more than a "bona fide" coverage dispute. There is certainly conflicting evidence regarding the amount of damages, the cause of the damage, and Mt. Hawley's handling of the claim, as expressed by the parties' respective adjusters, experts, and lay witnesses. There is not, however, summary judgment evidence showing that "liability had become reasonably clear" to the insurer. *See Chavez*, at 342 (citing *Lyons*, at 600); *see also Underwood v. Allstate Fire & Cas. Ins. Co*., No. 4:16-cv-00962-O-BP; 2017 WL 4466451, at *6 (N.D. Tex. Sept. 19, 2017); *adopted by* 2017 WL 4422368 (N.D. Tex. Oct. 05, 2017) (to show breach of the duty of good faith and fair dealing, "the evidence of bad faith needs to show that there was no reasonable basis for denial of the claim 'by the facts before the insurer at the time the claim was denied.'") (quoting *Viles v. Sec. Nat. Ins. Co*., 788 S.W.2d 566, 567 (Tex. 1990)). The Plaintiff's supporting evidence suggests only a factual dispute over covered damage under the Policy, not that Mt. Hawley engaged in false, deceptive, or unfair practices. *See Lopez*, 2018 WL 2773381 at *4 (granting summary judgment on DTPA, Texas Insurance Code, and common law bad faith claims against insurer). A "bona fide dispute" regarding insurance coverage precludes liability for breach of the duty of good faith and fair dealing and violations of the Texas Insurance Code and DTPA. *Id*. Citing *Higginbotham*, 103 F.3d at 460.

The record evidence also indicates that Mt. Hawley responded to the plaintiff's claim within a reasonable time, initially inspecting and closing the claim within four (4) months. The

insurer also reopened the claims process and conducted a second inspection at Plaintiff's request. *See, e.g., Lopez*, at *5 (finding similar actions by insurer in claims-handling to be reasonable).

The Court therefore finds that Defendant is entitled to summary judgment on the Plaintiff's bad faith claims asserted pursuant to the Texas DTPA, the Texas Insurance Code, and for the breach of the duty of good faith and fair dealing. As the Court has determined that there is no genuine issue of material fact with respect to the reasonable basis for the denial of coverage, summary judgment is appropriate as to these claims.

(b). *Prompt Payment of Claims Under Chapter 542*

Mt. Javed further sues for violations of the Texas Insurance Code, specifically Section 542.051, part of the Texas Prompt Payment of Claims Act ("TPPCA"). *See Underwood*, at *5. Defendant argues that it is entitled to summary judgment on Plaintiff's claim for damages under the prompt payment provisions of the Texas Insurance Code because the Plaintiff cannot establish liability for any covered damages to its Property in excess of the deductible. *See Motion for Summary Judgment*, at p. 22. Defendant is accordingly relying on its position that it is entitled to summary judgment on the breach of contract and insurance coverage issues, with which the Court disagreed, *supra*. The Texas Insurance Code provision that imposes liability for the failure to make a prompt payment provides "if an insurer that is *liable for a claim under an insurance policy* is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy..[.]" *See* TEX. INS. CODE ANN. § 542.060 (emphasis added)); *Carter Tool*, at *6. Accordingly, whether Defendant wrongfully delayed payment is dependent upon the Defendant's liability under the insurance policy. *See id.*

As the Court has already determined that genuine issues of material fact exist as to Mt. Hawley's liability on the breach of contract claim, the Court concludes that summary judgment on

prompt payment claim under the Code is relatedly premature. *See id.*; *compare USAA Texas Lloyds v. Menchacha*, 545 S.W.3d 479, 491 (Tex. 2018) ("addressing the statutory prompt-payment claim, we explained that there can be no liability [under the Code] if the insurance claim is not covered by the policy") (quoting *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam)); *see also Underwood* at *6 (the Texas Supreme Court has "include[ed] prompt payment of claims in the general rule that extra-contractual claims do not survive *a failure* of a breach of contract claim unless they prove an independent injury") (emphasis in original).

III. Recommendation and Conclusion

Based upon the findings and legal conclusions stated herein, the undersigned United States Magistrate Judge concludes that the Defendant has carried its summary judgment burden on the Plaintiff's bad faith claims, but genuine issues of material fact are present on the Plaintiff's claims that Mt. Hawley breached the applicable insurance policy and that Defendant violated the prompt payment provisions of Chapter 542 of the Texas Insurance Code. This Court accordingly recommends that the District Judge **grant in part and deny in part** the defendant's motion for summary judgment (doc. #13). Specifically, summary judgment should be entered in favor of the defendant on the plaintiff's extra-contractual and bad faith claims sounding under the Texas Insurance Code, the Texas DTPA and the common law duty of good faith and fair dealing. The breach of contract and Chapter 542 prompt payment of claims causes of action should remain pending with genuine issues of material fact for trial.

IV. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(c), all parties are entitled to serve and file written objections to the report and recommendation of the magistrate judge within fourteen (14) days of

service. Failure to file specific, written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report shall bar an aggrieved party from *de novo* review by the District Judge of the proposed findings, conclusions and recommendations, and from appellate review of factual findings and legal conclusions accepted by the District Court except on grounds of plain error. *See Thomas v. Arn,* 474 U.S. 140, 155 (1985); *Douglass v. United Serv. Auto. Ass'n.*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*); 28 U.S.C. § 636(b)(1).

SIGNED this the 7th day of April, 2020.

KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE