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

STARCO IMPEX, INC.,	§	
	§	
***Plaintiff*,**	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 1:19-CV-39**
LANDMARK AMERICAN	§	
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. #21).

I. Background

A. Plaintiff's Claims and Background Facts

On December 20, 2018, Plaintiff Starco Impex, Inc., ("Plaintiff" or "Starco") filed its Original Petition in the 60th District Court of Jefferson County Texas. In the Original Petition Plaintiff asserts claims against Defendant Landmark American Insurance Company ("Defendant" or "Landmark") arising from damages to the Plaintiff's property at 2710 & 2711 11th Street, Beaumont, Texas, ("the Property"). *See Original Petition* (doc. #1-6), at p. 2. Plaintiff contends

that the Property was covered by a policy issued by Landmark but Landmark wrongfully denied Plaintiff's claims under the policy. *See id.* In the Original Petition, Plaintiff states that on or about March 29, 2017, a storm damaged Plaintiff's Property.[1] *Id.* Plaintiff's Original Petition outlines the factual background related to Landmark's handling of the insurance claim on the Property. *See id.* at pp. 2-3. Plaintiff asserts causes of action for breach of contract, violations of the Texas Deceptive Trade Practices Act (DTPA), 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. 4-11.

On January 24, 2019, Defendant filed its Notice of Removal removing Plaintiff's suit to this federal court. *See Notice* (doc. #1). In support, Landmark cites diversity jurisdiction under 28 U.S.C. § 1332. *Id.* at p. 2.

On April 1, 2019, United States District Judge Marcia A. Crone convened a scheduling conference. At that time, the plaintiff provided information to Judge Crone suggesting that Plaintiff's claims may also relate to property damage sustained the Property due to Hurricane Harvey, which hit Jefferson County in August 2017. *See Minute Entry* (doc. #9). Based on this information, Judge Crone referred the case to the undersigned United States Magistrate Judge in concert with her policy of referring Harvey-related cases. *See Order* (doc. #10).

B. Motion for Summary Judgment and Related Briefs

On January 24, 2020, Landmark 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 because there was pre-existing and excluded damage at the Property. Defendant

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[1] On December 5, 2019, Plaintiff filed an opposed motion for leave to file an amended complaint (doc. #19) for purposes of changing the pled date of loss from March 2017 to August 2017 (Hurricane Harvey). The undersigned recently issued a Report and Recommendation (doc. #29) determining that the motion for leave should be denied. The motion remains pending until Judge Crone issues her final ruling. In the interim, the undersigned finds that the Court's analysis of the pending motion for summary judgment would be unaffected by the disputed date of loss based on the Court's findings on coverage issues, *infra*.

argues that the damages claimed by Plaintiff are not covered under the policy. Defendant goes on to specifically contend that Plaintiff's claims fail because it cannot establish that covered losses exist in this case which can be segregated from non-covered losses. *See Motion*, at pp. 9-11. Defendant points to evidence that the damages to Plaintiff's Property were pre-existing and due to deterioration rather than covered losses. *See id.* at pp. 11-12. Defendant relatedly argues that the Plaintiff cannot produce evidence which segregates the non-covered losses from any covered losses. *See id.* at pp. 13-14. Defendant therefore contends that Plaintiff's failure to allocate its damages defeats its breach of contract claim under the policy. *Id.* at p. 15. According to Defendant, it follows that Plaintiff's extra-contractual claims also fail because Plaintiff cannot establish a breach of the policy. *See id.* at pp. 15-17.

Plaintiff responded in opposition to the motion for summary judgment. *See Response* (doc. #22). In general, Starco opposes Defendant's motion by arguing that its damages were in fact due to a covered event - Hurricane Harvey. *See id.* at pp. 2; 5-7. Plaintiff avers that summary judgment evidence supports its position that "it has nothing to allocate because 100% of the damage it is claiming was caused by Hurricane Harvey." *Id.* at p. 6. Starco relatedly argues that although the Property did sustain damages and maintenance in the past, it mitigated its damages prior to the new, covered damages. *See id.* Starco contends that the evidence supports a date of loss of August 2017 and would be covered by the policy. *See id.* at p. 7. Plaintiff goes on to argue that because genuine issues of material fact exist on its claim for damages under the policy, its extra-contractual claims also survive as a matter of law. *See id.* at pp. 8-9.

Defendant also submitted a reply in support of its motion for summary judgment. *See Reply* (doc. #23). Defendant replies by contending that the Plaintiff's evidence fails to establish that a covered peril was the lone cause of its damages. *See id.* Defendant again points to evidence of

wear and tear and inadequate repairs prior to Hurricane Harvey. *See id.* It argues Plaintiff's expert witness made no effort to allocate those uncovered causes. *See id.* at p. 4. Defendant additionally attacks the methodology utilized by Plaintiff's expert, Dr. Hall. *Id.* at p. 5. Defendant also maintains that Plaintiff's evidence fails to establish that Hurricane Harvey is the sole cause of the damages at issue. *Id.* at p. 6.

Plaintiff filed a sur-reply arguing that it can meet its burden to segregate its damages and defending its expert's testimony. *See generally Sur-Reply* (doc. #24). Defendant also sought leave to file a reply to the sur-reply, which the Court granted. This reply (doc. #27) again takes issue with Dr. Hall's testimony, argues that Starco misstates case law, and states that Plaintiff cannot provide evidence of extra-contractual injury. *See id.*

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 to Plaintiff's Claims

(1). Breach of Contract

(a). *Elements and the Applicable Terms of the Policy*

Under Texas law[2], 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)). Insurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally. *Id.* Quoting *Nat. Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 (Tex. 1995).

The terms of the Policy include a Policy Period of November 12, 2016, to November 12, 2017. *See Policy Number LHD398496, Exhibit J to Motion for Summary Judgment* (doc. #21-10).

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[2] 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)).

The Policy only covers loss or damage commencing during the Policy Period. *See id.* at p. 49, "Commercial Property Conditions: H. Policy Period." The Policy also excludes deterioration and other perils, such as wear and tear; hidden or latent defects; settling, cracking, shrinking or expansion; and faulty or defective design, workmanship, repair, and maintenance. *See id.* at pp. 51-54, "Causes of Loss – Special Form: B. Exclusions"; at ¶ 2 and ¶ 3.

(b). *Record Evidence*

On November 2, 2017, upon initial investigation of the Property, Engle Martin & Associates issued its letter to Usman Akbar, Starco Impex's representative. *See November 2, 2017, Correspondence, Exhibit B to Motion* (doc. #21-2). Landmark retained Engle Martin to adjust the claim and Engle Martin inspected the Property on September 8, 2017. *Id.* at p. 1. During the inspection, Engle Martin found water damage to the interior of the building but no physical damage to the roofing material that could be attributed to Hurricane Harvey. *See id.* at p. 2. They also concluded that the roofing surface exhibited signs of wear and tear due to age and exposure over time. *Id.* The adjusters further noted a number of previous repairs. *Id.* There was also no observed wind-related damage. *Id.* Engle Martin concluded that the water damage to the interior of the Property resulted from openings caused by long-term maintenance and wear and tear as opposed to a sudden and accidental covered cause of loss. *See id.* at p. 4. Based on this determination, the adjusting firm recommended denial of coverage for the Plaintiff's claimed loss. *Id.*

On October 3, 2018, through its attorney, Starco sent a Notice and Pre-Litigation Demand Letter to Landmark. *See October 3, 2018, Correspondence, Exhibit C to Motion* (doc. #21-3). In the Notice, Plaintiff contends that it suffered severe damage to its property due to a storm that occurred on or around March 29, 2017. *Id.* at p. 2. In the Notice, Plaintiff acknowledges that it did in fact first report August 26, 2017, as its date of loss when it first "discovered" the damage to

the roof and resulting interior leaks. *Id.* at p. 2, n. 1. Plaintiff also attached a CoreLogic Wind Verification Report to its Notice, listing estimated windspeeds at the Property for dates ranging from January 1, 2009, to September 13, 2018. *See CoreLogic Report, Exhibit D to Motion* (doc. #21-4). The CoreLogic Report lists 61 mph as the wind speed on March 29, 2017, but does not include the wind speeds associated with the Hurricane Harvey loss date in August 2017. *See id.*

Plaintiff retained Dr. Neil Hall of Groundtruth Forensics to do a building damage assessment as Starco's causation expert. *See Exhibit E to Motion for Summary Judgment* (doc. #21-5); *May 31, 2019; Building Damage Assessment by Dr. Neil Hall with Groundtruth Forensics* ("Initial Hall Report") *and Exhibit F to Motion for Summary Judgment* (doc. #21-6), *October 20, 2019, Building Damage Assessment by Dr. Neil Hall with Groundtruth Forensics* ("Supplemental Hall Report"). Dr. Hall determined that based on evidence of prior roof repairs, it is likely that some water penetrated the roof causing interior damage prior to Hurricane Harvey. *See Initial Hall Report*, at p. 5. He also noted that there rust as a general condition caused by condensation and not water leaks. *See id*. Hall further found that water penetrating the roof during Hurricane Harvey followed the same path as previous intrusions, thereby re-wetting previously damaged metal building insulation. *See id.*, *see also Supplemental Hall Report*, at pp. 3-5. Dr. Hall further explains that the presence of "chronological repairs shows a concerted pattern of maintenance and repair[,] i.e.[,] every time it leaked, new patches were added." *See Supplemental Hall Report*, at p. 4. At his deposition, Hall also acknowledged that there were prior damage, leaks, and previous repairs to the Property. *See Exhibit G to Motion for Summary Judgment* (doc. #21-7), *Deposition of Dr. Hall* ("Hall Depo."); at 83:1-10;144:16-19;145:13-146:24; 247:1-7.

Usman Akbar gave his deposition as the representative for Starco. *See Exhibit H to Motion for Summary Judgment* (doc. #21-8), *Deposition of Usman Akbar* ("Akbar Depo."). He acts as the

corporate risk officer for Starco as well as overseeing some global distribution duties. *See Akbar Depo*., at 20:10-23:7. Mr. Akbar testified that employees of Starco had done repairs to the Property for leaks from the inside since 2015. *See id.* at 44:18-45:2; 45:9-13. More specifically, Starco employees have done interior repairs and changed ceiling tiles five or six times since 2015 to address interior issues such as leaks and water damages. *See id.* at 55:7-56:7. Akbar acknowledged that he could not differentiate between old roof cracks and new roof cracks caused by storms March 2017 or August 2017. *See id*. at 94:1-25.

(c). *Application and Doctrine of Concurrent Causes*

Plaintiff does not dispute that its Property had suffered prior damages and undergone maintenance in the past. *See Response*, at p. 6. Plaintiff argues, however, that all of the claimed damages to the Property are covered and, therefore, allocation is unnecessary. *See id.* at pp. 5-6. Plaintiff points to Dr. Hall's opinion and Mr. Akbar's testimony to support its position that Starco "has nothing to allocate because 100% of the damages it is claiming was caused by Hurricane Harvey." *Id.* Plaintiff relatedly contends that because it "properly mitigated" prior damage to the Property and, accordingly, the new damage is covered. *See id.* at pp. 6-7.

The doctrine of concurrent causes provides that when covered and non-covered events combine to create a loss, the insured may only recover the portion of the damage caused by the covered event. *See Carter Tool Co. v. United Fire & Cas. Co*., No. 18-CV-163-DC, 2019 WL 7759499, at *3 (W.D. Tex. Nov. 7, 2019) (citing *Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986, 994 (5th Cir. 2016)); *see also Dallas Nat'l Ins. Co. v. Calitex Corp*., 458 S.W.3d 210, 222 (Tex. App. – Dallas 2015, no pet.). An insured cannot recover under an insurance policy unless facts are pleaded and proven showing that damages are covered by its policy. *See Lopez v. Allstate Texas Lloyds*, No. 4:17-CV-00152-O-BP, 2018 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 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); *see also Calitex Corp*., at 222. Consequently, "[w]hen covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Lopez*, at *2 (quoting *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993)); *see also Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971) ("It is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy.").

Plaintiff contends that it has in fact produced *some* evidence – namely Dr. Hall's opinion and Akbar's testimony – that its claimed damages are covered. The evidence cited by Plaintiff, however, does not differentiate between covered and non-covered damages. As noted above, Dr. Hall himself acknowledged that there was pre-existing damage to the Property and that any new damages (during the applicable Policy period) resulted, at least in part, from pre-existing cracks and previously damaged areas. The evidence certainly shows that Plaintiff's Property suffered some new damage as alleged. The problem is that Plaintiff has failed to present summary judgment evident establishing what damage was caused *solely* by a covered peril, wholly separate from the

previous damages, earlier repairs, and wear and tear dating back to at least 2015 (according to Akbar's testimony). Dr. Hall does indicate that covered events contributed to the alleged damage to the Property. Even viewing the evidence presented in the most favorable light to Starco, however, Plaintiff has not pointed to any testimony in which Dr. Hall rules out all other non-covered causes of the damage to the Property. Plaintiff's own representative's testimony indicates that Starco employees made several repairs to at least the interior of the Property due to water damage prior to the alleged covered events. Mr. Akbar's testimony did not set forth specific evidence indicating damages that were caused solely by either the March 2017 storm or Hurricane Harvey in August 2017. The adjusting report from Engle Martin further supports the determination that the Plaintiff's claimed damages are excluded under the Policy because – based on the evidence presented - any damage sustained due to a covered event cannot be segregated from prior issues of wear and tear, earlier water damage, and inadequate repairs.

The burden of segregating the damage attributable solely to the coverage event is an issue on which the insured carries the burden of proof. *Calitex Corp*., at 222–23 (citing W*allis v. United Servs. Auto. Ass'n,* 2 S.W.3d 300, 303 (Tex. App.–San Antonio 1999, pet. denied)). Because the Plaintiff has not adequately responded with specific evidence affording a reasonable basis for estimating the proportionate part of damage caused by a covered event, recovery is precluded as a matter of law. *See Calitex Corp*., at 223 (citing *Travelers Indem. Co. v. McKillip,* 469 S.W.2d 160, 163 (Tex. 1971); *Texarkana Mem'l Hosp., Inc. v. Murdock,* 946 S.W.2d 836, 840 (Tex. 1997)); *see also Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.,* 130 S.W.3d 181, 198 (Tex. App. – Houston [14th Dist.] 2004, pet. denied) ("failure to segregate covered and noncovered perils is fatal to recovery.").

Plaintiff has not carried its burden of allocation on the concurrent causation doctrine. The summary judgment record establishes that any covered damages claimed by Plaintiff cannot be segregated from non-covered or excluded damages. Defendant has therefore shown an absence of any genuine issue of material fact as to whether it breached the Policy by denying Plaintiff's claim for damages. The summary judgment record supports a finding that the denial was proper under the terms of the Policy

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

(a). *Statutory Causes of Action*

Starco asserts extra-contractual claims for alleged violations of the Texas DTPA as well as unfair practices and failure to make prompt payment in violation of Chapters 541 and 542 of the Texas Insurance Code, respectively The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy. *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 490 (Tex. 2018). This rule derives from the fact that the Insurance Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. *Id.* Citing TEX. INS. CODE § 541.151; *Minn. Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006). Relatedly, in most instances, an insured may not prevail a on a bad faith claim without first showing that the insurer breached the contract. *Bernstien v. Safeco Ins. Co. of Illinois*, No. 05-13-01533-CV, 2015 WL 3958282, at *2 (Tex. App.—Dallas, June 30, 2015, no pet.) (mem. opinion) (citing *Liberty Nat. Fire Ins. Co. v. Akin,* 927 S.W.2d 627, 629 (Tex. 1996)). There are two exceptions to this rule: (1) the insurer's failure to timely investigate the insured's claim; or (2) the insurer's commission of "some act, so extreme, that would cause injury independent of the policy claim." *Bernstien*, at *2 (quoting *Republic Ins. Co. v. Stoker,* 903 S.W.2d 338, 341 (Tex.1995)). There is no evidence that either exception applies

here. The Plaintiff's statutory claims fall with its breach of contract claim. *See Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, 892 F.3d 167, 172 (5th Cir. 2018) (citing *Menchacha*, at 489); *see also United Neurology, P.A. v. Hartford Lloyd's Ins. Co*., 101 F. Supp. 3d 584, 602-603 (S.D. Tex. 2015) (citing *Wellisch v. United Services Auto. Ass'n,* 75 S.W.3d 53, 57 n. 2 (Tex. App. – San Antonio 2002, pet. denied)) (to prevail on a claim for a violation of Chapter 542.051-.061, the claimant must show that it had a claim under an insurance policy, for which the insurer is liable); *see also Underwood v. Allstate Fire and Cas. Ins. Co.,* 2017 WL 4466451, at *6 (N.D. Tex. Sept. 19, 2017). The Court therefore finds that the Defendant is entitled to summary judgment on the Plaintiff's causes of action under Chapters 541 and 542 of the Texas Insurance Code and the DTPA because there is no genuine issue of material fact on the breach of contract claim.

(b). *Breach of Duty of Good Faith and Fair Dealing*

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. *Stoke*r, 903 S.W.2d at 340). 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.

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 v. State Farm Lloyds*, 746 F. App'x 337, 341-42 (5th Cir. 2018) (per curiam) (quoting *Southland Lloyds Co. v. Cantu*, 399 S.W.3d 558, 569 (Tex. App.—San Antonio 2011, pet. denied)). "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 v. State Farm Mut. Auto Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997). Here, the Court already determined that Landmark is entitled to summary judgment on Plaintiff's breach of contract claim because no genuine issue of material fact exists as to whether Plaintiff's damages can be segregated to fall within coverage under the Policy. An insurer's denial of a claim it was not obliged to pay may nevertheless be bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim. *See JAW The Pointe, L.L.C. v. Lexington Ins.*, 460 S.W.3d 597, 602 (Tex. 2015) (citing *Stoker*, 903 S.W.2d at 341). Here, the Plaintiff has not presented summary judgment evidence supporting any such extreme conduct or independent damages. Plaintiff's response relies on the argument that because its breach of contract claim should survive summary judgment, so should its bad faith claims. *See Response*, at pp. 8. The Court finds no issue of genuine material fact on the bad faith tort claim. The denial of a claim not covered by the Policy is reasonable based on the summary judgment record. *See Bilotto v. Allied Prop. & Cas. Ins. Co.*, 79 F. Supp. 3d 660, 674 (W.D. Tex. 2015) (citing *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 253-54 (Tex. 2009) ("there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered")).

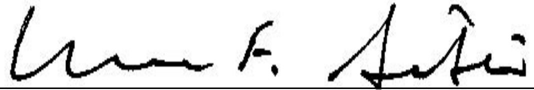
III. Recommendation and Conclusion

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 in establishing that no genuine issue of material fact exists on any of the Plaintiff's causes of action. This Court accordingly recommends that the District Judge **grant** the defendant's motion for summary judgment (doc. #21) and enter judgment in favor of Defendant Landmark American Insurance Company.

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 3rd day of June, 2020.



KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE