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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Jensen Shirley and Karen Shirley,
12 Plaintiffs,
13 v.
14 Allstate Insurance Co.,
15 Defendant.

Case No.: 3:18-cv-0994-AJB-BGS

ORDER GRANTING

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

16 During the Lilac Wildfire, Plaintiffs Jensen and Karen Shirley were evacuated from
17 their home. After returning, they filed a claim with their home insurance company,
18 Defendant Allstate Insurance Company, for damages related to the wildfires. Allstate now
19 moves for summary judgment arguing there is no evidence showing any damage to the
20 Shirleys' home. In fact, four expert reports state as much. The Shirleys attempt to defeat
21 the summary judgment motion by providing little contrary evidence and hypothetical
22 questions contesting Allstate's investigation. However, the Shirleys cannot win with
23 rhetoric. Because they failed to show there is a triable issue of material fact, the
24 Court **GRANTS** Allstate's motion. (Doc. No. 23.)

25 **I. BACKGROUND**

26 Plaintiffs' breach of contract and breach of implied convenient and fair dealing case
27 concerns alleged damage done to their home from the 2017 Lilac Fire. (Doc. No. 1-3 ¶ 7.)
28 After evacuating their home, Plaintiffs allege "the entire interior of the home, and all of its

1 contents, were severely smoke damaged.” (Id. ¶ 7.) Plaintiffs filed a claim with Allstate for
2 damages, which was later denied. (Id. ¶¶ 8–9.)

3 Defendants argue despite multiple stages of expert testing show no physical smoke
4 damage, soot, ash, or char, was found in the Shirleys’ home, justifying their denial of
5 Plaintiffs’ insurance claim. Plaintiffs dispute this, asserting that Allstate purposely
6 narrowed the search of their home to soot, ash, and char in order to deny their claim.
7 Plaintiffs also claim Allstate failed to test their furniture, clothing, or outside landscaping
8 for damage as well.

9 **II. LEGAL STANDARDS**

10 Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the
11 moving party demonstrates the absence of a genuine issue of material fact and entitlement
12 to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact
13 is material when, under the governing substantive law, it could affect the outcome of the
14 case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a
15 reasonable jury could return a verdict for the nonmoving party. *Id.* A party seeking
16 summary judgment bears the initial burden of establishing the absence of a genuine issue
17 of material fact. *Celotex Corp.*, 477 U.S. at 323.

18 The moving party can satisfy this burden in two ways: (1) by presenting evidence
19 that negates an essential element of the nonmoving party’s case; or (2) by demonstrating
20 the nonmoving party failed to establish an essential element of the nonmoving party’s case
21 on which the nonmoving party bears the burden of proving at trial. *Id.* at 322–23. If the
22 moving party carries its initial burden, the burden of production shifts to the nonmoving
23 party to set forth facts showing a genuine issue of a disputed fact remains. *Id.* at 330. When
24 ruling on a summary judgment motion, the court must view all inferences drawn from the
25 underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec.*
26 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

27 **III. DISCUSSION**

28 The Shirleys’ complaint brings two causes of action for breach of contract and

1 breach of implied covenant of good faith and fair dealing. (Doc. No. 1-3 at 5–6.) The
2 Shirleys also request punitive damages. (Id. at 7.) Allstate moves for summary judgment
3 on the two causes of action and the punitive damages request.

4 **A. Breach of Contract**

5 There are two issues regarding the breach of contract claim. First, Allstate argues
6 they did not breach the contract because no expert found evidence of wildfire
7 contamination in the home. Second, Allstate argues the Shirleys never submitted a claim
8 for landscaping damages, and although they try to improperly raise it later in the
9 proceedings, it does not create a triable issue of material fact and the Court should grant
10 summary judgment regarding these issues as well.

11 **1. Evidence of Wildfire Contamination**

12 Allstate asserts Plaintiffs have the burden of establishing “an event is a claim within
13 the scope of basic coverage.” (Doc. No. 23-1 at 16 (quoting *City of Vernon v. Southern*
14 *Cal. Edison Co.*, 955 F.2d 1361, 1365 (9th Cir. 1992).) Here, Allstate argues that means
15 “the Shirleys had the burden in establishing that ‘physical loss to the property,’ defined as
16 ‘physical injury to or destruction of tangible property, including loss of its use resulting
17 from such physical injury or destruction.’” (Id. at 17.) Allstate further asserts that under
18 their insurance policy, the Shirleys “cannot meet that burden by alleging the existence of
19 smoke ‘vapors, fumes’ and ‘contaminants or pollutants.’” (Id.)

20 Here, Allstate states of the four different experts who ran tests on the Shirleys’ home,
21 none found evidence their home suffered “ash or soot contamination from the wildfire.”
22 (Id.) Several people—hired by both parties—inspected the home. The Shirleys hired
23 several people to assist them with their insurance claim. First, they hired Marc Gross, an
24 adjuster. Gross then hired Bill Hersum, a remediation contractor. The Shirleys also hired
25 an environmental consulting firm, VERT Environmental. David Kelly, a VERT
26 representative, inspected the property. Allstate, as a part of their internal process, sent an
27 adjuster to inspect the Shirleys’ home, Andrew Ansardi. Allstate later hired an expert,
28 RiskNomics LLC, to inspect the home after litigation commenced.

1 Yet, of all the hired experts, no one found any wildfire contamination was present in
2 the Shirleys' home. Working for the Shirleys, EMSL Analytical analyzed materials VERT
3 sent them and found no wildfire contamination. VERT's report initially supported the
4 Shirleys' allegations that there were wildfire contaminants in their home. It stated VERT
5 found char damage indicative of "a combustion by-product," "as well as opaque dark
6 particles (categorized as burnt rubber), and concluded by "confirm[ing] the presence of
7 smoke contamination within the property." (Doc. No. 23-4, Exhibit 2, 35–37). However,
8 both Missy Waldman—VERT's employee who sent the email to Marc Gross with the
9 purported findings—and Nathan Borsheim—the president of VERT—contradicted these
10 initial findings.

11 First, as to the char damage, Borsheim testified that he could not confirm that the
12 two percent char finding came from the Lilac fire. (Borsheim Depo., Doc. No. 23-11 at
13 26.) Second, as to the burnt rubber, both Borsheim and Waldman confirmed the burnt
14 rubber finding was a mistake. (Borsheim Depo. at 25.) Burnt rubber is usually associated
15 with combustion by-products, (id.), thus its presence would be indicative of wildfire
16 contamination. However, Borsheim testified that the lab report erred and Waldman
17 confirmed she mis-typed. (Id.) The correct finding was "rubber dust." (Id.)

18 Third, as to the soot and ash, VERT never confirmed there was ash or soot inside the
19 Shirleys' home. (Borsheim Depo. at 20.) Regarding the Shirleys' claims regarding wildfire
20 odor, Waldman confirmed that VERT never made a finding that any odors were from the
21 wildfire and stated the company does not "do causation." (Waldman Depo., Doc. No. 23-
22 11 at 45.) Finally, regarding VERT's conclusions, Borsheim stated the report sent to Gross
23 and the Shirleys was a "limited preliminary inspection," and not a formal report. (Id. at 16–
24 17.) Borsheim stated VERT never made a determination whether the wildfire was the cause
25 of the contamination. (Id. at 19.)

26 Moreover, Ansardi, Allstate's adjuster, found no ash or soot was present in the home,
27 nor did he smell any smoke inside the home. (Andrew Ansardi Decl., Doc. No. 23-14, ¶¶
28 4–5.) Hersum, the Shirleys' remediation contractor, also found no evidence of soot or ash,

1 nor did he smell any smoke. (Bill Hersum Depo., Doc. No. 23-11 at 53; 54.) Allstate then
2 hired a new expert, RiskNomics LLC, to inspect the property again. However, they found
3 no evidence of wildfire contamination. (Doc. No. 23-10 at 5–6.) Mr. Shirley admits no
4 expert could find ash or soot in his home. (Jensen Shirley Depo., Doc. No. 23-12 at 149.)
5 After the Shirleys brought this suit, RiskNomics again tested, and again found no
6 contaminants in the home. (Doc. No. 23-13 at 75–130.)

7 Allstate argues that because no expert could find evidence of wildfire soot or ash
8 contamination in the Shirleys’ home, Allstate did not breach its contract with the Shirleys
9 by denying their insurance claim. Thus, Allstate requests the Court grant summary
10 judgment on the breach of contract claim. The Shirleys argue that Allstate “continues to
11 mischaracterize wildfire residue as involving only ‘soot,’ ‘ash,’ and ‘char,’” when it
12 “includes a wide range of particulate material.” (Doc. No. 25 at 16.) The Shirleys charge
13 that Allstate only tested for soot, ash, and char thus they could have never discovered if
14 any other contaminants existed within the home from wildfire. (Id.) The Shirleys assert
15 Allstate’s limiting tests were self-serving and “designed to withhold insurance policy
16 benefits for damage caused by smoke contamination.” However, Allstate retorts that
17 Plaintiffs’ own expert, Dan Baxter, testified that “the industry standard for determining
18 whether wildfire residue exists requires the use of analytical testing.” (Doc. No. 26 at 3.)
19 Further, the Shirleys’ never put forth any expert or other testimony challenging Allstate’s
20 methods or suggesting what the testing standards should have been. Notably, the Shirleys’
21 own experts tested for the same byproducts as Allstates; while the Shirleys’ never hired
22 one expert to test their hypothesis.

23 The Shirleys contend there was substantial evidence of contamination from an
24 “interior smoke smell” and “the occupants’ inability to breathe.” (Id.) Whether or not these
25 items can fit the definition of “contaminate,” the Shirleys argue, is a question of material
26 fact that should be left to a jury to decide. (Id. at 17.) The debate arises when defining
27 whether the contamination constitutes a physical injury and property damage under the
28 policy. However, Allstate argues that detection of an odor is not an appropriate standard to

1 measure injury. (Doc. No. 26 at 5.) Both RiskNomics and MicroLab Northwest “have
2 offered un rebutted expert testimony” reporting as such. (Id.) Allstate further argues that
3 even if odors “were a proper industry standard, plaintiffs’ expert VERT could not
4 determine the origin of the smells.” (Id.)

5 Allstate asserts that to date, the Shirleys have provided no evidence of actual
6 contamination. Through four experts and several adjusters, nothing has been confirmed
7 showing contamination or physical injury, as required by the policy. The Shirleys’
8 presentation of rhetorical questions in their brief does not amount to evidence showing a
9 genuine issue of material fact exists regarding this issue. For example, the Shirleys ask
10 “[i]s there really a conceptual difference between harmful living conditions which result
11 from smoke particles and which result from asbestos? They are both harmful irritants, and
12 are both contaminants, and both can cause cancer.” (Doc. No. 25 at 18.) The Shirleys also
13 ask “Did Mr. Ansardi’s investigation fall on its face when he looked for only soot and ash
14 and not other contaminants?” (Id. at 23.) Although the framing of these questions sounds
15 persuasive, there are no tests that suggest smoke particles existed in the home and the
16 Shirleys have presented no basis for suggesting Ansardi (or any of the other inspecting
17 experts) were under any duty to look for any other types of contaminants.

18 Thus, the Court agrees with Allstate. Based on the evidence presented, the Shirleys
19 did not carry their burden of establishing that there was physical damage to their property
20 based on contaminants from the wildfire. There is no genuine dispute of a material fact as
21 to whether there were any verifiable contaminants in the Shirleys’ home. Accordingly, the
22 Court **GRANTS** summary judgment on the breach of contract issue.

23 **2. Landscaping Claims**

24 Allstate argues the Shirleys attempt to create a triable issue of material fact based on
25 a belated assertion of burnt vegetation. (Doc. No. 23-1 at 27.) Allstate asserts the Shirleys
26 “never made an insurance claim to Allstate for policy benefits for supposedly burnt
27 vegetation.” (Id.) Moreover, Allstate notes the Shirleys did not mention any burnt
28 vegetation in their complaint, did not reference damages from burnt vegetation in their

1 Rule 26 disclosures, or in their interrogatory responses. At the motion hearing, the Shirleys
2 stated they sent Allstate a letter in March 2019 regarding this issue, nearly two months after
3 both fact and expert discovery deadlines had passed.

4 The Shirleys argue that their “alleged failure” to claim this loss is just a diversion
5 from Allstate’s inadequate investigation. (Doc. No. 25 at 21.) The Shirleys’ citation of case
6 law suggests they are arguing Allstate failed to investigate evidence which would have
7 shown there was burnt landscaping purposely to narrow their liability coverage and allow
8 them to deny the claim. (Id. at 21–22.) The Shirleys propose another hypothetical question
9 asking whether Ansardi’s investigation failed “when he never bothered to look for
10 landscape (trees and bushes) fire damage?” (Id. at 23.)

11 However, both a note in the claim notes by the adjuster and accompanying photos
12 of the exterior of the Shirleys’ house suggest he inspected the exterior of the home and
13 found no ash and/or soot damage. (Doc. No. 23-4, Ex. B, at 24.) Although the Shirleys’
14 claim they initiated a claim for these issues and that there was damage “in plain view,” the
15 Shirleys provide no evidence to support either contention. (Doc. No. 25 at 23.)

16 Again, a series of rhetorical questions designed to expose what Allstate could have
17 done differently or better in hindsight do not amount to evidence. At this stage, the Shirleys
18 have the burden to show there was physical damage to their property. Allstate has shown
19 through its evidence there was not, thus the burden shifts to the Shirleys. They have not
20 shown a triable issue of material fact exists regarding this claim, thus the Court **GRANTS**
21 summary judgment as to this claim.

22 **B. Bad Faith Claim**

23 Allstate moves for summary judgment on the Shirleys’ bad faith claim against them
24 regardless of how the Court rules on the breach of contract issue. (Doc. No. 23-1 at 19.)
25 Allstate argues this claim fails to two separate reasons. First, because “there can be no bad
26 faith where no benefits are owed.” (Id.) Second, “there is no evidence of bad faith.” (Id.)

27 As to the first argument, case law is clear that when no benefits are owed, an insurer
28 cannot be liable for bad faith. *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990)

1 (“Where benefits are withheld for proper cause, there is no breach of the implied
2 covenant.”). Here, because the Court found Allstate did not breach its contract in finding
3 the Shirleys were not entitled to any policy benefits, their claim for bad faith fails.

4 Allstate also argues that their decision to deny benefits was reasonably made as there
5 was a genuine dispute regarding whether there was contamination under the policy. In
6 California, when there is a genuine dispute and the decision to deny coverage was
7 reasonable—even if it was ultimately wrong—insurers are not liable “for breach of the
8 covenant of good faith and fair dealing.” *Morris v. Paul Revere Life Ins. Co.*, 109 Cal. App.
9 4th 966, 97 (2003). Another case states even if the insurance company is liable for breach
10 of contract, so long as there was a genuine dispute as to the existence of coverage liability,
11 then there is no bad faith. *Chateau Chamberay Homeowners Ass’n v. Associated Int’l Ins.*
12 *Co.*, 90 Cal. App. 4th 335, 347 (2001).

13 Here, Allstate argues that because four expert reports showing there was no
14 contaminant damage. First, the Shirleys’ expert coordinator, Hersum, agreed with
15 Allstate’s adjuster, Ansardi, that there was no soot or ash at the property. Second, other
16 expert reports from RiskNomics and MicroLab Northwest confirmed there was no
17 evidence of soot or ash at the property—claims which Allstate allowed the Shirleys to
18 respond to or submit additional reports to, which they did not.

19 The Shirleys allege Allstate’s actions were not mistaken, but rather were “a
20 conscious and deliberate act which unfairly frustrates the agreed common purposes and
21 disappoints the reasonable expectations of the other party thereby depriving that party of
22 the benefits of the agreement.” (Doc. No. 25 at 24.) Without citing to any supporting
23 evidence to prove their theory, the Shirleys once again posit a list of rhetorical questions
24 in an attempt to create a genuine issue of material fact. They ask:

25 Did Allstate unreasonably fail to investigate the Shirleys’ loss of
26 Landscaping? Does Allstate continue to ignore it? Did Allstate unreasonably
27 fail to investigate the Shirleys’ damage to clothing and other contents? . . . Did
28 Allstate’s environmental experts, RiskNomics and Mr. Prater, unreasonably
ignore the smell of smoke and look only for soot, ash, and char particles and

1 no other indicia of smoke contaminants? And did Allstate unreasonably rely
2 on such narrowly scoped test results?

3 (Id.)

4 However, as previously stated, simply asking these questions does not rebut
5 Allstate’s contentions—namely that they had enough evidence to reasonably rely on when
6 denying coverage. The Shirleys have not set forth any facts showing a genuine issue of
7 material fact remains. Thus, the Court **GRANTS** Allstate’s motion for summary judgment
8 on this claim

9 **C. Punitive Damages**

10 Finally, Allstate moves for summary judgment on the Shirleys’ claim for punitive
11 damages based largely on the same arguments as the bad faith claim. Allstate notes that
12 even proving bad faith does not amount to a punitive damages claim. (Doc. No. 23-1 at 24
13 (citing *Beck v. State Farm Mut. Auto Ins. Co.*, 54 Cal. App. 3d 347, 355–56 (1976) (“Proof
14 of a violation of the duty of good faith and fair dealing does not establish that the defendant
15 acted with the requisite intent” required for punitive damages).) Further, at the summary
16 judgment stage, a Court is required to look at punitive damages through the clear and
17 convincing standard. *Basich v. Allstate Ins. Co.*, 87 Cal. App. 4th 1112, 1118–21 (2001).

18 Allstate argues the Shirleys cannot meet these standards because there is no evidence
19 to show Allstate acted with bad faith, yet alone “clear and convincing evidence of malice,
20 oppression, or fraud.” (Doc. No. 23-1 at 25.) Allstate also notes that a third party, Pilot,
21 adjusted the claim and that no Allstate employee was involved with the coverage decision.
22 (Id. at 25–26.)

23 The Shirleys respond by arguing that Ansardi and Allstate’s other representatives
24 unreasonably narrowed the scope of their investigation and consciously disregarded the
25 Shirleys’ health and safety. (Doc. No. 25 at 25.) The Shirleys claim this despite the fact
26 they have no evidence to support it, not even a declaration. The Shirleys then argue “a
27 triable issue of material fact exists as to whether or not Allstate’s behavior rises to the level
28 of Malice or Oppression contemplated by the law.” (Id.)

1 Yet, as the Court has stated throughout, rhetorical questions and conclusory
2 assertions are not enough to survive summary judgment. The case is no longer at the
3 pleading stage. The Shirleys needed to provide some scintilla of evidence showing
4 “conscious disregard” other than allegations stating as such. Because the Shirleys have not
5 shown a genuine issue of material fact exists as to whether punitive damages are warranted,
6 the Court also **GRANTS** Allstate’s motion for summary judgment on this claim.

7 **IV. CONCLUSION**


8 Allstate persuasively presented a case disputing the Shirleys’ claim that smoke
9 damaged their home. Four experts, some hired by Plaintiffs themselves, could not show
10 there was any physical damage to the home or any smoke particles in the home. Although
11 the Shirleys accuse Allstate of limiting their testing to soot, ash, and charring, the Shirleys
12 have not asserted any other industry standard for testing smoke damage from a wildfire,
13 nor presented any expert testing confirming their theory.

14 There is simply no competing evidence showing that Allstate breached its contract
15 in denying coverage to the Shirleys regarding their claim that smoke from the wildfire
16 damaged their home. Further, the Shirleys have not shown beyond conclusory accusations
17 that Allstate acted in bad faith or in a way worthy of punitive damages. While the Shirleys
18 have a lot of rhetorical questions, they have no answers, evidence, or facts to support their
19 theories—a critical defect to their case.

20 Accordingly, the Court **GRANTS** Allstate’s motion for summary
21 judgment. (Doc. No. 23.) As this resolves all the claims in the Shirley’s complaint, (See
22 Doc. No. 1-3 at 3, 5–7), the Court **VACATES** all scheduling dates previously set.
23 The Court also **DIRECTS** the Court Clerk to enter judgment in favor of the
24 Defendant and against the Plaintiffs and each of them and close the case.

25 **IT IS SO ORDERED.**

26 Dated: August 12, 2019

27 
28 Hon. Anthony J. Battaglia
United States District Judge