IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

ANTHONY and KIMBERLY HILTON,

Plaintiffs,

v.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

Case No. 2:16-cv-00301-SU

OPINION AND ORDER

SULLIVAN, United States Magistrate Judge:

Plaintiffs Anthony and Kimberly Hilton purchased an insurance policy from defendant Indemnity Insurance Company of North America, covering, inter alia, a horse arena on their La Grande, Oregon property. After a windstorm damaged the arena, including by blowing off two metal roof panels, plaintiffs filed a claim for replacement of the roof. Defendant declined to cover replacement of the entire roof and claimed the policy required paying to repair only the

damage to the two panels. The replacement cost of the two panels and a temporary fix of some of the screws on the roof was below the policy's deductible. Plaintiffs filed a claim for breach of the insurance contract. The Court has removal diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441. Defendant has moved for summary judgment (Docket No. 13), which plaintiffs oppose (Docket No. 22). Defendant has also moved to strike the testimony of plaintiffs' expert John Lackey (Docket No. 15), which plaintiffs oppose in part (Docket No. 20). The Court heard oral argument on March 20, 2017. (Docket No. 35). After review of the parties' arguments and submissions, the Court DENIES defendant's Motion for Summary Judgment, and GRANTS IN PART AND DENIES IN PART, without prejudice, defendant's Motion to Strike.[1]

FACTUAL BACKGROUND

Plaintiffs own a house with several outbuildings in La Grande, Oregon. One outbuilding is a horse arena with open sides and a metal roof. Clark Decl. (Docket No. 14) ¶ 3, Ex. B (Docket No. 14-1), at 12-14. Defendant issued plaintiffs a farmowners insurance policy that insured the main house and outbuildings, with a policy period of December 5, 2014, to December 5, 2015. Hilton Decl. (Docket No. 23) ¶ 2; Clark Decl. (Docket No. 14) ¶ 2, Ex. A (Docket Nos. 14-8 & 14-9), at 8-11 (the insurance policy). The arena was subject to a $1,000 deductible. Id. at 9. The policy covered the horse arena with "broad" form covered causes of loss, id. at 8 & 9, which included coverage for windstorm damage, id. at 111 B.2. Broad form coverage did not explicitly list as included, nor did it explicitly state as excluded, damage from faulty workmanship or construction defects. See Pls.' Resp. (Docket No. 22), at 7(x).

[1] The parties have consented to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636. (Docket No. 17).

On April 15, 2015, a windstorm damaged the arena and blew off two metal roof panels. Pls.' Resp. (Docket No. 22), at 2 (plaintiffs' statement of "Undisputed material facts provided in defendant's summary judgment motion"). Defendant agreed to cover only the damage to these two panels. Id. at 3. Because defendant's adjuster estimated the cost of the work at $952.98, less than the $1,000 deductible, defendant refused to pay for replacement. Clark Decl. (Docket No. 14) ¶ 3, Ex. B (Docket No. 14-1), at 2, & ¶ 6, Ex. E (Docket No. 14-4), at 3.[2]

Defendant had an insurance adjuster and an engineer investigate the damage. Clark Decl. (Docket No. 14) ¶¶ 3 & 4, Ex. B (Docket No. 14-1) (adjuster report) & Ex. C (Docket No. 14-2) (engineer report). Both concluded that the roof had been improperly constructed, for several reasons. The adjuster reported that roofing screws were drilled through the oriented strand board ("OSB," similar to particle board) sheathing only, instead of into joists, allowing the screws to come loose and leave holes in the sheathing. Clark Decl. (Docket No. 14) ¶ 3, Ex. B (Docket No. 14-1), at 1. Water was able to penetrate the roof at these holes. Id. The engineer reported three construction defects with the roof: overdriven (overtightened) fasteners, inadequate fastener penetration depth, and lack of felt paper underlayment between the panels and the OSB sheathing. Clark Decl. (Docket No. 14) ¶ 4, Ex. C (Docket No. 14-2), at 6-7. These defects, plus weakened sheathing at fastener locations, allowed wind at otherwise "non-damaging" speeds to pull the fasteners loose. Id. at 6. Overdriven fasteners also allowed water leakage. Id.

An engineering expert and a construction expert plaintiffs hired disagreed with defendant's experts regarding the roof damage. Leslie Tipton, plaintiffs' engineering expert,

[2] Chris Loman Construction LLC ultimately repaired the two roof panels, screwed in some loose screws on the roof, and charged plaintiffs $948.99 for the work. Clark Decl. ¶ 5 (Docket No. 14), Ex. D (Docket No. 14-3).

reported that the two metal roofing panels' displacement during the windstorm "appeared to have been caused mainly by wind pulling the roofing screws up and out of the OSB" sheathing which underlay the metal roofing, and which was fastened directly to the purlins (horizontal roofing beams). Williams Decl. (Docket No. 25) ¶ 3, Ex. 2 (Docket No. 25-1), at 2 I.B.2-3 (Tipton expert report). He concluded that "it is apparent . . . there are other metal roofing panels in jeopardy of blowing off the same roof in a windstorm." Id. at 2 I.C; see also Williams Decl. (Docket No. 25) ¶ 6, Ex. 5 (Docket No. 25-1), Tipton Dep. 10:21-24 ("Once the roofing starts to blow off, then it's very likely that more panels would get blown off. And if these two panels had gotten blown off, there is the likelihood that more panels would get blown off."). This is because the "metal roofing panels are subject to significant expansion and contraction," specifically at the fastening screws, and "over time, will likely result in a looser connection with the screw threads in the OSB." Williams Decl. (Docket No. 25) ¶ 3, Ex. 2 (Docket No. 25-1), at 2 I.C. Additionally, moisture could enter the screw threads, softening the OSB and making screws easier to pull out. Id. Installing screws into sawn lumber (instead of into OSB) and installing an underlayment of building paper beneath the metal roof panels to keep moisture out would prevent these problems. Id. Tipton disputed that the screws were fastened to an insufficient depth, based on his reading of an apparent contradiction in the metal roofing panel installation guide, which stated a required minimum penetration into wood of 5/8 inches, but also allowed for installation into 1/2 inch wood panels, suggesting that shallower fastener penetration was acceptable. Id. at 3 I.C; see also Clark Decl. (Docket No. 14) ¶ 7, Ex. F (Docket No. 14-5), at 10. At deposition, Tipton testified that the roofing panels could be fastened directly to the OSB, and that fastening to the purlins, though "probably recommended," was not "required." Williams

Decl. (Docket No. 25) ¶ 6, Ex. 5 (Docket No. 25-1), Tipton Dep. 12:18-22. Tipton concluded his report by saying that preventing additional panels from blowing off would require removing the existing panels, installing building paper over the OSB sheathing, and fastening new panels with screws through the OSB into the purlins (instead of just into the OSB). Williams Decl. (Docket No. 25) ¶ 3, Ex. 2 (Docket No. 25-1), at 3 I.C.

Plaintiffs' construction expert, Bret Wheeler, reported that "[t]here were several roof panels that have blown off completely and others that appear to have been bent from wind."[3] Williams Decl. (Docket No. 25) ¶ 4, Ex. 3 (Docket No. 25-1), at 2 I.B.1 (Wheeler expert report). He stated that "[t]he installation of the metal roofing is typical of how this product is installed in our area and appears to be installed per the manufacture specifications . . . ." Id. at 2 I.B.2. He repeated Tipton's analysis of the required screw penetration depth and reported that the screws were properly installed. Id. At his deposition, Wheeler conceded that some fasteners were overtightened, damaging the washers, but testified that a majority were not overtightened. Williams Decl. (Docket No. 25) ¶ 5, Ex. 4 (Docket No. 25-1), Wheeler Dep. 12:16-13:7; see also Williams Decl. (Docket No. 25) ¶ 4, Ex. 3 (Docket No. 25-1), at 2 I.B.3 ("Generally the fasteners do not appear to be over tightened or under tightened."). Wheeler testified at deposition that the roofing panels could be installed directly into plywood (i.e., OSB), and that installation guidelines did not require attachment to the purlins. Williams Decl. (Docket No. 25) ¶ 5, Ex. 4 (Docket No. 25-1), Wheeler Dep. 15:2-7. Wheeler's report also stated that he "did not observe any workmanship that appeared to be defective or substandard." Williams Decl. (Docket No.

[3] Defendant does not address whether it must pay for replacement of these bent roof panels in addition to the two displaced panels; defendant argues it must pay only for the two damaged panels, and plaintiff argues that defendant must pay to replace the entire roof.

25) ¶ 4, Ex. 3 (Docket No. 25-1), at 2 I.B.4. In his Conclusions section, Wheeler stated that, to his knowledge, there was no "prior damage" to the roof before the April 2015 wind event. Id. at 2 I.C. He continued, "there is no way to determine which panels were compromised by the wind event." Id. He stated that the "manufacturer recommended installation specifications for fastening the panels in this application were inadequate." Id. Like Tipton, he stated that the "only long term fix" was to completely replace the metal roofing panels, with screws fastened directly to the purlins, at a depth greater than the manufacturer's specifications. Id. at 2-3 I.C.

Of defendant's asserted construction defects, the only one plaintiffs arguably acknowledge is the lack of underlayment building paper. Pls.' Resp. (Docket No. 22), at 6(s).[4] But plaintiffs argue, based on Tipton's deposition, that this paper underlayment too was "not typically required, only recommended," for the purpose of facilitating expansion and contraction of the metal roofing panels and preventing water penetration. Id.; see also Williams Decl. (Docket No. 25) ¶ 6, Ex. 5 (Docket No. 25-1), Tipton Dep. 13:16-14:20 (testifying that felt or building paper was probably not required, only recommended, for easing expansion and contraction and preventing water penetration).

Based on their expert reports that state that all the metal roofing panels must be replaced, plaintiffs seek to have defendant pay to replace the entire arena roof. Wheeler estimated the replacement cost at $123,903.53. Williams Decl. (Docket No. 25) ¶ 4, Ex. 3 (Docket No. 25-1), at 7. Defendants' insurance adjuster estimated that the replacement cost (which he described as the "long-term fix for the roof") would exceed $60,000, without overhead or profit. Clark Decl. (Docket No. 14) ¶ 3, Ex. B (Docket No. 14-1), at 2.

[4] From plaintiffs' "Material facts accepted by plaintiffs, but may genuinely be at issue" section. Pls.' Resp. (Docket No. 22), at 4-7.

PROCEDURAL BACKGROUND

I. Plaintiffs' Claims for Relief

In their Complaint, plaintiffs originally brought two claims for relief under Oregon state law: (1) breach of contract, for defendant's failure to pay for plaintiffs' claim for water damage to roof sheathing, which damage was revealed when wind blew a roof panel off; and (2) breach of contract, for defendant's failure to pay plaintiffs' claim for windstorm damage to the arena roof. Notice of Removal (Docket No. 1) ¶ 3, Ex. A (Docket No. 1-1). The first breach of contract claim incorporated an allegation that "a construction defect was the cause of the water damage to the roof," id. ¶ 6, but the second cause of action excluded any allegation of construction defect. In their Response to defendant's Motion for Summary Judgment, plaintiffs elect to pursue only their second claim. Pls.' Resp. (Docket No. 22), at 2. The Court considers plaintiffs to have abandoned their first cause of action, proceeding only on their second.

II. Defendant's Motion to Strike

Defendant filed a Motion to Strike the expert report of John Lackey. A portion of Lackey's report includes his opinions on insurance contract interpretation and insurance law. See Clark Oct. 4, 2016 Decl. (Docket No. 16) ¶ 2, Ex. A (Docket No. 16-1) (Lackey Expert Witness Report). Lackey's report comments on the construction of plaintiffs' horse arena as well. See id. at 5-6. Defendant moves to strike the Lackey report's testimony regarding the interpretation of plaintiffs' insurance policy. Defendant argues such an interpretation is a question of law exclusively for the Court's determination. Def.'s Mot. Strike (Docket No. 15), at 2. In their Response, plaintiffs concede that Lackey cannot "offer legal conclusions as to the proper interpretation of the policy," and agree to strike those portions of Lackey's report and not

have Lackey testify thereon. Pls.' Resp. (Docket No. 20), at 1. However, plaintiffs argue that the Court should permit Lackey's testimony regarding construction issues, specifically the need to repair the entire arena roof, and assert that Lackey is qualified "as an expert in the construction and repair of metal roofs of the type installed on plaintiffs' arena." Id. at 3. Defendant, in its Reply, questions Lackey's qualifications to testify on construction issues. However, defendant states that it would be difficult to adjudicate the admissibility of Lackey's proffered construction expert testimony by a motion to strike, and asks instead to defer resolution of the issue until a later stage of the proceedings. Def.'s Reply (Docket No. 28), at 2. Plaintiffs have agreed to strike Lackey's legal opinions and insurance-related testimony. Defendant has agreed to withdraw its Motion to Strike as to Lackey's qualifications and construction-related testimony, and requests leave to raise its objections at a later time.

Accordingly, the Court GRANTS IN PART defendant's Motion to Strike Lackey's report (Docket No. 15) to the extent it concerns insurance policies, insurance law, or interpretation of plaintiffs' insurance policy; and DENIES IN PART, without prejudice, the Motion to Strike Lackey's testimony to the extent it concerns construction or engineering. Defendant may renew its objection to Lackey's qualifications and testimony at a later stage of the litigation.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The initial burden is on the moving party to point out the absence of any genuine issue of material fact; once that burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v.

Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. Robi v. Reed, 173 F.3d 736, 739 (9th Cir.1999). "A fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) (quotation omitted). "The non-moving party has failed to meet its burden if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quotation omitted). In evaluating a motion for summary judgment, the Court must draw all reasonable inferences in favor of the nonmoving party, and may neither make credibility determinations nor weigh any evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

DISCUSSION

The court's goal in construing an insurance policy is to "determine the intent of the parties . . . from the terms and conditions of the policy." Groshong v. Mut. of Enumclaw Ins. Co., 329 Or. 303, 307 (1999) (citations omitted). "[T]he insured . . . has the burden to prove coverage while the insurer . . . has the burden to prove an exclusion from coverage." ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co., 349 Or. 117, 127 (2010), adhered to as modified on reconsideration, 349 Or. 657 (2011). In construing an insurance policy, a court must not add exclusionary language that the insurer could have, but did not, include. Nw. Agr. Co-*op. Ass'n., Inc. v. Cont'l Ins. Co*., 95 Or. App. 285, 289 (1989).

The April 15, 2015, windstorm damaged the horse arena roof. The policy defendant issued to plaintiffs includes wind as a covered peril. Clark Decl. (Docket No. 14) ¶ 2, Ex. A (Docket No. 14-9), at 111 B.2 ("Windstorm or Hail"). Two roof panels blew off and defendant

indicated that plaintiffs' loss of the two panels was covered. Because the cost to replace the two panels was below the $1,000 deductible, defendant denied payment. The remainder of the roof was compromised. Defendant presents evidence that a number of construction defects afflict the roof, due to faulty initial installation. Plaintiffs present conflicting evidence that there are no defects, arguing that while each of the alleged defects defendant identifies may contravene "recommended" installation guidelines, nothing "required" construction in the way defendant contends, and the roofing was properly installed. Plaintiffs acknowledge that the roof in its present state may be insufficient for the La Grande weather, and that the roof is susceptible to future damage. However, whether any allegedly improper installation or faulty construction may have contributed to the two panels blowing off or any other damage to the roof, the policy contains no exclusion for faulty or defective construction. Plaintiffs claim that, as insured, they are covered for damage to the entire roof. Indeed, plaintiffs claim that the wind caused damage which, if it remains unrepaired, will put the entire roof in jeopardy.

When the cause of a loss is disputed and the cause is potentially a covered peril under an insurance policy, the issue is that of "efficient proximate cause."

> The "efficient proximate cause" of a loss is the active and efficient cause that sets in motion a train of events which bring about a result without the intervention of any force, starting and working actively and efficiently from a new and independent source. If there are multiple causes of a single loss, the "efficient proximate cause" is the relevant cause for determining coverage under an insurance contract.

Naumes, Inc. v. Landmark Ins. Co., 119 Or. App. 79, 82 (1993) (quotation and citations omitted); *Nw. Agric. Coop. Ass'n*, 95 Or. App. at 288-89 ("[I]t is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not

mentioned in the contract." (quotation omitted)). Typically, efficient proximate cause is a jury question. Naumes, 119 Or. App. at 82-83.

The policy here covers actual, present, currently-realized damage, including from windstorm. It does not cover preventative repair to protect against future windstorms. There is evidence that wind loosened the screws holding the panels to the roof, including the two panels that blew off. Windstorm, therefore, may be the efficient proximate cause of whatever state the rest of the roof is in. Plaintiffs' construction expert, Wheeler, testified that "there is no way to determine which panels were compromised by the wind event . . . ." Williams Decl. (Docket No. 25) ¶ 4, Ex. 3 (Docket No. 25-1), at 2 I.C. While the rest of the roof may be damaged as a result of a construction defect, or faulty construction may be the efficient proximate cause, the Court will not make such a determination on summary judgment.

Plaintiffs have presented evidence that, beyond the two wind-damaged panels, the windstorm compromised other panels or roofing elements (even if still attached), with replacement of the entire roof as the only fix. The evidence offered by plaintiffs' experts disputes defendant's. See, e.g., Williams Decl. (Docket No. 25) ¶ 6, Ex. 5 (Docket No. 25-1), Tipton Dep. 10:21-22 ("Once the roofing starts to blow off, then it's very likely that more panels would get blown off."). Tipton explained in his expert report that "it is apparent to me there are other metal roofing panels in jeopardy of blowing off the same roof in a windstorm." Williams Decl. (Docket No. 25) ¶ 3, Ex. 2 (Docket No. 25-1), at 2 I.C; see also Williams Decl. (Docket No. 25) ¶ 6, Ex. 5 (Docket No. 25-1), Tipton Dep. 11:4-8 ("[B]ecause of the OSB being used underneath and then water getting into the screws, that the screws were weakened, and the wind blew off the panels because of that."). Tipton can reasonably be read to have testified that the

same issues that led to the windstorm's blowing away the two panels are also present throughout the remainder of the roof.

Thus, plaintiffs have presented evidence that the April 15, 2015, windstorm "set[] in motion a train of events," Naumes, 119 Or. App. at 82, that caused the rest of the roof to be damaged, and have sufficiently raised questions of fact whether the windstorm or initial faulty construction was the efficient proximate cause of the roof's compromised condition. Id. at 82-83 (holding that the trial court erred in granting summary judgment for defendant insurer, because a genuine issue of material fact existed whether mudflow, a covered peril, or surface waters, an excluded peril, was the efficient proximate cause of plaintiff's property damage); Shinrone, Inc. v. Ins. Co. of N. Am., 570 F.2d 715, 719 (8th Cir. 1978) (holding that, under Iowa law, the district court properly submitted to the jury the fact question of whether windstorm, a covered cause of loss, or dampness or temperature extremes, two excluded causes of loss, among other factors, was the efficient proximate cause, where multiple factors had combined to cause cattle death); see also Queen Ins. Co. of Am. v. Larson, 225 F.2d 46, 52 (9th Cir. 1955); Estate of Konell v. Allied Prop. & Cas. Ins. Co., No. 3:10-cv-955-ST, 2013 WL 3791141, at *1-5 (D. Or. July 19, 2013); Koory v. W. Cas. & Sur. Co., 153 Ariz. 412, 416 (1987).

Defendant's argument that the roof's allegedly faulty construction absolves it of any obligation to cover damage to the entire roof is belied by its own actions in agreeing to cover the replacement cost of the two displaced panels. If only faulty construction was the efficient proximate cause of the roof damage, including the two panels that blew off, then no coverage to those panels should have been forthcoming from defendant. There is evidence that the windstorm loosened screws on those two panels as well as on the panels on the remainder of the

roof. Defendant appears to want it both ways by accepting the windstorm as the cause of the damage to the two panels but claiming faulty construction as the cause of the damage to the rest of the roof.

In the present case, plaintiffs have presented evidence sufficient to raise fact questions that damage to the roof, including the two panels, resulted from windstorm and that the policy they purchased from defendant should cover their loss to the entire roof.

CONCLUSION

For the above reasons, plaintiffs have created a genuine issue of material fact that a covered cause of loss, such as the April 15, 2015, windstorm, damaged their horse arena roof beyond the two roof panels, and so have created a genuine issue of material fact that their insurance policy requires defendant to pay to replace the entire roof. Accordingly, the Court DENIES defendant's Motion for Summary Judgment (Docket No. 13). Also, for the reasons stated above, the Court GRANTS IN PART AND DENIES IN PART, without prejudice, defendant's Motion to Strike (Docket No. 15).

IT IS SO ORDERED.

DATED this 6th day of April, 2017.

/s/ Patricia Sullivan
PATRICIA SULLIVAN
United States Magistrate Judge