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

BAIN ENTERPRISES, LLC, d/b/a BAIN CONSTRUCTION, Plaintiff,	§	
v.	§	**No. EP-14-CV-00472-ATB (by consent)**
UNITED FIRE & CASUALTY COMPANY, an Iowa Corporation, Defendant.	§	

FINDINGS OF FACT & CONCLUSIONS OF LAW

On this day, the Court commenced a Bench Trial on the Papers in the above-styled and numbered cause. Having duly considered the parties' pleadings, Agreed Stipulated Facts, trial briefs, and responses, the Court now enters its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).[1]

I. Procedural Background

On December 31, 2014, Bain Enterprises, LLC. ("Bain") filed suit against Mountain States Insurance Group ("Mountain States") and United Fire & Casualty Company ("United Fire") for declaratory judgment. (ECF. No. 1). On December 7, 2015, Mountain States filed a crossclaim against United Fire for contribution and subrogation. (ECF. No. 40). On April 29, 2016, the parties each filed Motions for Summary Judgment. (ECF. Nos. 51-53). On August 1, 2016, the District Court granted in part and denied in part the parties' Motions for Summary Judgment. (ECF. No. 67). Subsequently, on August 12, 2016, Bain and Mountain States filed a

[1] To the extent that any finding of fact is more aptly characterized as a conclusion of law, or any conclusion of law is more aptly characterized as a finding of fact, the Court adopts it as such.

joint voluntary dismissal of all of Bain's claims against Mountain States, which the District Court granted. (ECF. Nos. 69, 70).

Throughout the litigation, the parties filed numerous motions for trial date continuations. Following the District Court's denial of a fourth trial continuation, on October 25, 2016, the parties consented to magistrate judge jurisdiction pursuant to Local Rule CV-72 and 28 U.S.C § 636(c)(1). (ECF. No. 96). Thereafter, the litigation was reassigned to this Court for final disposition. (ECF. No. 97).

Subsequently, on May 2, 2017, Mountain States voluntarily dismissed its cross-claims against United Fire. (ECF. No. 126). As no claims remained that were asserted by or against Mountain States, the Court dismissed Mountain States from the litigation. (ECF. No. 128). As such, following the District Court's ruling and the parties' voluntary dismissals, the only remaining claim is for declaratory judgment that United Fire had a duty to indemnify Bain. (*See* ECF. Nos. 67, 69, 70).

The Bench Trial was originally scheduled for May 15, 2017. (ECF. No. 99). However, on May 9, 2017, the parties filed a "Joint Motion Requesting the Court to Decide the Case on Submissions by the Parties." (ECF. No. 129). Therein, the parties represented that "they [would] be able to submit an agreed statement of facts to the Court . . . such that an evidentiary trial [would] not be necessary" and "[t]he Parties also represent[ed] to the Court that only legal questions remain[ed]." (*Id.*). Accordingly, on May 11, 2017, the Court directed the parties to submit their joint statement of facts. (ECF. No. 133). After receiving the parties' Agreed Stipulated Facts on May 12, 2017, the Court vacated the trial setting and directed the filing of trial briefs. (ECF. Nos. 134, 135).

Prior to receiving the parties' trial briefs, the Court received a near 500 page lodgment in contravention of the parties' representation that "only legal questions remain."[2] (*See* ECF. Nos. 129, 136). Nevertheless, although not required to do so, the Court will consider this additional non-stipulated evidence in the alternative. (*See* ECF. Nos. 137-140). Accordingly, as the issues are fully briefed, the matter is now ripe for the Court to adjudicate.

II. Jurisdiction

The Court has jurisdiction under 28 U.S.C § 1332(a), and following the parties' consent to magistrate judge jurisdiction, the Court is empowered to enter a final disposition pursuant to 28 U.S.C § 636(c)(1) and Local Rule CV-72.

III. Findings of Fact[3]

With respect to the stipulated facts between the parties, the Court **ACCEPTS** the parties' Agreed Stipulated Facts ("ASF") (ECF. No. 134) and **ENTERS** the following findings of fact:

1. Bain is a general contractor that performs installation of utilities, earth moving, dirt work, paving, and miscellaneous concrete work.
2. Mountain States issued a Commercial General Liability Policy to Bain, Policy No. CPP 0116646 05, and a Commercial Umbrella Policy to Bain, Policy No. UMB 0116646 04, with a policy period from 12/08/2011 to 12/08/2012.
3. United Fire issued a Commercial General Liability Policy to Bain, Policy No. 85317910 ("United Policy"), with a policy period from 12/08/2012 to 12/08/2013. The United Policy provides, in part, as follows:

[2] Although the parties noted in their Agreed Stipulated Facts that "[c]itations, and corresponding exhibits" would be provided, the parties used the information in this 500 page lodgment to prove disputed facts not contained in the Agreed Stipulated Facts. (ECF. No. 134).

[3] As used herein, the "underlying lawsuit" refers to *Bond Memorial United Methodist Church, et al. v. Red Cliff, et al.*, 2012-DCV-07270 (384th District Court, El Paso County, TX, 2012).

SECTION I – COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies….

b. This insurance applies to "bodily injury" and "property damage" only if:

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed . . . , knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured . . .

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

SECTION V – DEFINITIONS

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

4. In 2011, Bain entered into a contract with the Lower Valley Water District ("LVWD"), under which Bain began construction of "Phase I" of a sanitary sewer system within the Town of Clint. Phase I required (a) the installation of a sewer main, (b) the installation of residential yard lines, and (c) the

decommissioning of septic tanks used by certain residents in specific areas of the Town of Clint.

5. Bain utilized the services of subcontractors for part of the work performed in Phase I. Specifically, Bain contracted with Double R Plumbing for plumbing work, which included installation of yard lines for residences adjacent to the streets. To install the yard lines, Double R Plumbing had to dig trenches, lay pipe and then backfill the trenches. Double R Plumbing performed the work needed starting from the street curb, connecting the sewer service lines installed by Bain, and then ran the yard lines to the houses. LVWD's representative on Phase I inspected the work that was being performed by both Bain and Double R Plumbing. Bain representatives were informed at a bi-weekly project meeting in June 2012 of deficiencies in Double R Plumbing's trench backfill soil compaction. Thereafter, Double R Plumbing changed its compaction methods and ultimately LVWD approved the overall project, which included the yard lines and work performed by Double R Plumbing. Under the plans and specifications, Bain was not required to test the soil compaction for the yard lines; instead, LVWD performed those tests, and approved the work being performed by both Bain and Double R Plumbing.

6. Bain completed Phase I work between July 28, 2011 and September 2012, at which time it received a certificate of substantial completion of Phase I from the LVWD.

7. The Town of Clint filed a lawsuit against Bain for structural damages allegedly caused by the construction of Phase I.

8. Bain tendered the Original Petition to Mountain States pursuant to its Mountain States policy. Mountain States agreed to defend Bain and hired its defense counsel, Michael McLean, in the underlying lawsuit.

9. When Bain applied for insurance coverage from United Fire, it submitted to United Fire a copy of the Mountain States Insurance Group Loss Run Report dated September 5, 2012, which listed claim number 201200289197 related to the claims made by the Town of Clint with a date of loss of February 4, 2012.

10. By the time Bain purchased the United Fire policy, Bain's work on Phase I was completed.

11. On or about September 12, 2013, a full year after LVWD issued its certificate of substantial completion for Phase I to Bain and nine months into the Town of Clint's lawsuit, a rainstorm ("the September 2013 Storm" or "the Rainstorm") occurred that caused large amounts of water to pool in the streets of the Town of Clint and the yards of homes adjacent to the streets.

12. During the afternoon of September 13, 2013, the Town of Clint's attorney, Mark Walker notified the counsel for the defendants in the underlying lawsuit that "there has been a good amount of damage reported in Clint today in several locations associated with the sewer line trenches washing out or sinking due to faulty construction."

13. The next day, on September 14, 2013, Mr. Walker wrote "[t]he collapsing of sewer lines and streets have been developing in greater scope yesterday and

today." Mr. Walker also noted that warning barrels were being placed in the Town of Clint as "sinkholes" developed.

14. Photographs taken shortly after the September 2013 Storm depict significant damage to the streets and surrounding areas of the Town of Clint.

15. Shortly after the September 2013 Storm, the Town of Clint filed its Second Amended Petition in the underlying lawsuit alleging additional damages observed after the September 2013 Storm. Specifically, the Second Amended Petition describes the property damage after the September 2013 Storm as follows:

> The downpour caused water to pond not only in the streets, but also in adjoining land. Almost immediately, residents on some streets in Clint observed a number of the sewer connection line trenches collapsing in yards, and water 'rushing' along the sewer connection line and downward at an angle under the street, following the sewer connection riser pipes. Within a day, there were a number of portions of [several roads] in which the repaved sewer trenches were observed caving in.
>
> …
>
> [There was] lengthy collapsing of streets where Bain excavated and then installed sewer lines [and] the cracking and collapse of pavement[.]
>
> …
>
> The total length of collapsed street in the collection system that Bain constructed . . . is at least 445 feet.

16. Since the September 2013 Storm occurred during the United Policy period of 12/08/2012 to 12/08/2013, Bain requested United Fire defend and indemnify it from the damages observed after the September 2013 Storm.

17. United Fire denied coverage and denied a duty to defend or indemnify Bain from claims arising from the September 2013 Storm, as more specifically set out in its letter, but to include language from the Insuring Agreement, *see supra*, that also follows the Fortuity Doctrine.

18. United Fire based its denial of coverage on the grounds, *inter alia*, that Bain knew the alleged damage had occurred in whole or in part prior to the United Policy because (a) it had filed a claim with Mountain States for the structural damages alleged in the underlying lawsuit prior to the United Policy period; (b) the petitions in the underlying lawsuit "are replete with allegations that [Bain was] given written or verbal demands or claims for damages long before" the United Policy period; and (c) since Bain "knew" about the damages prior to the policy period, the continuation, change, or resumption thereof is deemed to have been known prior to the policy period.

19. Bain also requested coverage from Mountain States for the damages caused by the September 2013 Storm. On April 1, 2014, Mountain States informed Bain it would not indemnify Bain for damages that arose from the September 2013 Storm, but agreed to defend Bain while reserving its right to seek recovery of defense fees and costs resulting from damages from the September 2013 Storm if it determined that its policy did not cover these damages.

20. The expert for the Town of Clint in the underlying lawsuit, Robert Ortega, P.E., opined in a report dated March 17, 2014 (updated August 25, 2014) that the September 2013 Storm flooding did not play a role in the damage to the street, but instead the damage to the street and area was caused by other

construction deficiencies, such as poor soil backfill compaction by Bain in the trenches.

21. On August 9, 2014, Bain's expert witness David A. Varela, P.E., of Amec Foster Wheeler Environment & Infrastructure, Inc., issued a report for the underlying lawsuit, and opined that the trench backfill deficiencies of Double R Plumbing, characterized as either no compaction or inadequate compaction, provided the condition that allowed a significant amount of water from the September 2013 Rainstorm to cause the subject damages by allowing water to infiltrate the trench and follow the sewer line under the streets and cause the street collapsing.

22. Bain settled all claims asserted against it in the underlying lawsuit in September 2015 for $200,000. As part of the settlement, Mountain States paid $100,000 to Bain in order to partially fund the settlements between Bain, [the] Town of Clint, and LVWD. Also as part of the settlement, Bain granted and assigned to Mountain States the right to recover defense and indemnification costs that Mountain States had paid pursuant to a provision within the Mountain States policy.

23. United Fire has not paid any portion of the $100,000 that was paid by Bain to settle the Town of Clint's claims for damages.

IV. Conclusions of Law

In light of the foregoing findings, the Court makes the following conclusions of law. As the issue of indemnification is a threshold inquiry, the Court will address it first.

a. Duty to Indemnify

Bain argues that "the language of the United Policy[,] when read as a whole, unambiguously provides coverage for the property damages resulting from the September 2013 Storm." (Bain Tr. Brief 8-9). More specifically, citing the Agreed Stipulated Facts and the deposition of David Varela, Bain claims that the damage to Main street occurred only "on or after" the date of the 2013 Rainstorm. (Bain Tr. Brief 6, 10; Bain Resp. 5-6). United Fire contends that "Bain has failed to demonstrate (and cannot show) that its insurance claim falls within the United Fire policy's coverage." (United Fire Tr. Brief 5).

"[T]he duty to indemnify only arises after an insured has been adjudicated, whether by judgment or settlement, to be legally responsible for damages in a lawsuit." *Collier v. Allstate Cty. Mut. Ins. Co.*, 64 S.W.3d 54, 62 (Tex. App. 2001) (citing *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82-83 (Tex. 1997); *Reser v. State Farm Fire & Cas. Co.*, 981 S.W.2d 260, 263 (Tex. App. 1998)). "The duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy." *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009). Particularly where, as in the immediate case, the underlying case is resolved by settlement, rather than adjudication on the merits, the trial court is authorized to make factual findings necessary to resolve coverage issues. *Id.*; *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.. v. Puget Plastics Corp.*, 532 F.3d 398, 404 (5th Cir. 2008); *Bond Memorial United Methodist Church, et al. v. Red Cliff, et al.*, 2012-DCV-07270 (384th District Court, El Paso County, TX, 2012).

The duty to indemnify is governed by a burden shifting analysis. First, the insured bears the burden of establishing that its claim is within the policy. *Liberty Surplus Ins. Corp. v. Allied Waste Sys.*, 758 F. Supp. 2d 414, 420 (S.D. Tex. 2010) (citing *Federated Mut. Ins. Co. v.*

Grapevine Excavation, Inc., 197 F.3d 720, 723 (5th Cir. 1999)); *see also W. Alliance Ins. Co. v. N. Ins. Co. of N.Y.*, 176 F.3d 825, 831 (5th Cir. 1999) ("In Texas, the insured carries the burden to establish the duty to indemnify by presenting facts sufficient to demonstrate coverage."). Then, once the insured has satisfied this burden, the insurer has the burden of showing that an exclusion applies. *Id.*

At the outset, the Court notes that it is not entirely clear what property or street damages Bain seeks to have covered under United Fire's policy. On summary judgment, the parties ostensibly proceeded on the theory that Bain's claims encompassed at least damages to Main, Brown, McKinney, and Lawson Streets. (*See* ECF. No. 52, p. 5) (referencing the Second Amended Petition from the underlying lawsuit which alleged that "several streets" caved in following the 2013 Rainstorm); (*see also* ECF. No. 67, p. 48). Similarly, Scott Bain alleges that the 2013 Rainstorm caused at least some damages to streets other than Main. (Bain Dep. 80-81, 88). However, in its trial brief, Bain now appears to assert claims only for Main Street. (Bain Tr. Brief 16). Similarly, in its response, Bain claims that Main street and "eight yards on one side of the street" makes up "*[m]ost*, if not all, of the damages from the September 2013 Storm . . . for which Bain seeks indemnification . . . ." (Bain Resp. 2) (emphasis added). In this respect, Bain leaves the Court to guess exactly what claims it asserts. This alone arguably precludes coverage as Bain bears the burden to establish that its *claim* is within United Fire's policy. *See Liberty Surplus Ins. Corp.*, 758 F. Supp. 2d at 420. Nonetheless, in an abundance of caution, the Court will consider all known damages following the 2013 Rainstorm.

First, there is nothing in the Agreed Stipulated Facts to suggest the location, extent, or most importantly, the timing of the damages. The Court stresses that, as the parties represented that the Agreed Stipulated Facts were sufficient to decide the case as a matter of law, the Court

need not look beyond these facts. (ECF. No. 129). However, nothing in the Agreed Stipulated Facts or Bain's trial brief indicates the location, extent, or timing of the damages arising from the 2013 Rainstorm. (Bain Tr. Brief 10) (Generally referencing "damages" to the "streets and adjoining land."). Rather, the stipulated facts speak to "damage" generally and reference street damage occurring to "several roads." (ASF 15). Accordingly, the Court finds that no stipulated fact suggests what damages are covered under United Fire's policy. Therefore, looking at the Agreed Stipulated Facts alone, which the parties agreed were sufficient to decide the case as a matter of law, Bain has not met its initial burden to establish its claim is covered by United Fire's policy.

Alternatively, even considering the additional non-stipulated evidence, there are still no facts to suggest the exact location, extent, or timing of the damages before and after the 2013 Rainstorm. It is unquestioned that structural damage had occurred to at least 30 different properties long before the 2013 Rainstorm. (Plaintiffs' Original Petition ¶¶ 26-27, 29; ECF. No. 51-3; Bain Exh. 9, 12). Additionally, damages existed on Main, Brown, McKinney, and Lawson Streets prior to the 2013 Rainstorm. As the District Court recognized, "the . . . evidence does demonstrate that there were some damages to Main, Brown, McKinney, and Lawson Streets before the 2013 Rainstorm." (ECF. No. 67, p. 48); (*see also* Reinhardt Dep. 64-65, ECF. No. 56-1; Zierleyn Dep. 134, ECF. No. 56-3). Indeed, Plaintiffs' Second Amended Petition in the underlying lawsuit alleged that settlement and ponding occurred on unspecified streets as early as July 2012. (Plaintiffs' Second Amended Petition ¶ 31, ECF. No 51-5). Even Scott Bain admits that a May 2012 rainstorm caused ponding in some streets, and although the dates remain unclear, that some damage may have been due to preexisting road deterioration. (Bain Dep. 46); (*see* Bain Dep. 124) ("Q. So sinkholes [are] not something you would think these people are

unaccustomed to. A. Well, a sinkhole and a pothole or something . . . It's an urban area. There's lots of dilapidated roads out there."). Consequently, the Court finds that some damages occurred to Main, Brown, McKinney, and Lawson Streets prior to the 2013 Rainstorm and prior to the applicability of United Fire's policy.[4] In this respect, Bain has failed to specify what damages occurred prior and subsequent to the 2013 Rainstorm, and consequently, which damages occurred during United Fire's policy.

Bain's reliance on the deposition testimony of David Valera to establish that no damage existed to Main Street prior to the 2013 Rainstorm is misplaced. In this respect, Mr. Valera only noted that he was not informed of damage to Main Street prior to the 2013 Rainstorm. (Valera Dep. 43, 64). Ignoring the potential hearsay issue, the failure of Mr. Valera to be informed of street damage is not dispositive of their existence. Indeed, as noted above, the District Court, Mr. Reinhardt, Mr. Zierleyn, Scott Bain, and the state court Plaintiffs in the underlying lawsuit all acknowledged some degree of preexistent street damage. Moreover, Mr. Valera made it clear that, at the time of his observations, he was only retained to analyze the property damage, not the street damage. (Valera Dep. 22, 64). Consequently, Mr. Valera's personal knowledge regarding the condition of the streets prior to the 2013 Rainstorm is dubious at best. Accordingly, the Court finds that Bain's reliance on Mr. Valera's testimony is misplaced.

Rather, because Bain's damages encompass both covered and uncovered claims, an award of damages in favor of Bain would likely result in United Fire paying for damages not covered by its policy. In this respect, the Fifth Circuit Court of Appeals has held that:

> we cannot allow an insured to settle allegations against it (some of which might be covered by its insurance, some of which might not) for its policy limits and then seek full indemnification from its insurer when some of that settled liability may be for acts clearly excluded by that policy.

[4] Although this constitutes a factual finding, the Court has included it in the above section in the interests of clarity.

Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1494 (5th Cir. 1992). Similarly here, Bain cites to its lump sum damages and seeks recovery for the full amount, some of which may not be covered by United Fire's policy. Consequently, this Court cannot allow Bain to recover for damages outside of United Fire's policy, which is likely the case in the instant matter.

In sum, because damages occurred prior and subsequent to the 2013 Rainstorm, and prior to United Fire's policy, it is unclear what is covered by United Fire's policy. Bain has consistently referred to damage generally and left the Court to guess what is covered by United Fire's policy. As the District Court recognized, "[t]his lack of clarity stems from the parties' failure to specify the exact locations on the exact streets *where damages occurred prior and subsequent to the 2013 Rainstorm*." (ECF. No. 67, p. 49) (emphasis added). Quite simply, nothing has changed. Again, the Court is left with no manner to discern exactly what damages are covered by United Fire's policy because the parties have only addressed "damages" in vague generalities. Accordingly, the Court finds that Bain has failed to meet its burden to prove any particular damage was covered by United Fire's policy. Therefore, under the case law noted above, United Fire owes no duty to indemnify Bain for claims arising from the underlying lawsuit.[5]

b. Segregation of Damages

Even assuming, *arguendo*, that Bain is entitled to indemnification, the Court finds that it has failed to segregate its damages. In this respect, Bain contends that it has segregated its damages as the $200,000 settlement was intended "primarily for additional damages resulting from the September 2013 Storm." (Bain Tr. Brief 16). Bain, citing no authority and essentially

[5] Because the Court finds that Bain has failed to meet its initial burden to establish that the claim is covered by United Fire's policy, the Court need not address the parties' remaining arguments.

admitting error, states that "lack of specific segregation . . . does not preclude a finding of damages." (Bain Resp. 8). United Fire responds that Bain has failed to segregate its damages as "[t]here is no distinguishing regardless of Bain's subjective wishes which damages were covered under the United Fire policy, which damages were covered by the Mountain States policy, which ran prior to the United Fire policy, and which damages are not covered at all." (United Fire Tr. Brief 17).

"The damages recited in either a judgment or a settlement of the underlying lawsuit must be apportioned between claims covered by the policy and those that are not." *Willcox v. Am. Home Assur. Co.*, 900 F.Supp. 850, 856 (S.D. Tex. 1995) (citing *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1495 (5th Cir. 1992)). Consequently, "[i]n the context of a settlement, indemnification is proper only when the claims settled are shown to be within the scope of policy coverage." *Id.* (citing *Winn v. Continental Casualty Co.*, 494 S.W.2d 601, 604 (Tex. App. 1973). Where, as is the case here, the insured's claims include both covered and uncovered claims, "it is appropriate for the district court to make findings necessary to apportion the settlement between damages that the insurer owes and damages for which the insured has a duty to pay." *Am. Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649, 656 (5th Cir. 2008) (citation omitted). Nonetheless, "[t]he burden of apportioning damages between covered and noncovered claims . . . rests on the insured." *Willcox,* 900 F.Supp. at 856 (citing *Maurice Pincoffs Co. v. S. Stevedoring Co., Inc.*, 489 S.W.2d 277, 278 (Tex. 1972)).

Bain's argument regarding segregation of damages is essentially that Bain's payment of $200,000 was intended "primarily for additional damages resulting from the September 2013 Storm."[6] (Bain Tr. Brief 16). Beyond this statement, Bain offers no evidence regarding the proportional amount of damages it alleges were covered by United Fire's policy. As United Fire

[6] $100,000 of this figure was reimbursed by Mountain States. (ASF 22).

correctly observes, this leaves the Court to guess what amount was intended to encompass United Fire's policy, what amount was intended to encompass Mountain State's policy, and what amount encompasses claims uncovered by either policy. Consequently, Bain's covered damages could range anywhere from nothing to the full $100,000 amount.

Indeed, the District Court previously rejected this identical argument and warned Bain that:

> While [Bain asserts] . . . that the settlement . . . was intended primarily to settle the claims resulting from the 2013 Rainstorm, this does not prove the proportionate amount that either Mountain States or United Fire should pay pursuant to their respective policies.

(ECF. No. 67, p. 54-55). Bain makes this error again. Bain has failed to differentiate the proportional damages covered by Mountain State's policy, United Fire's policy, or any potentially uncovered claims. Without more, Bain leaves the Court to guess regarding the appropriate amount of damages.

Similarly, the Court finds that Bain's argument that the "lack of specific segregation . . . does not preclude a finding of damages," has no merit. (Bain Resp. 8). Because Bain has cited no factual or legal authority for this proposition, the Court deems the argument waived. *Castro v. McCord*, 259 F. App'x 664, 666 (5th Cir. 2007) ("We will decline to address an issue where an argument lacks citation to authority or references to the record."); *Tsolmon v. United States*, 2015 U.S. Dist. LEXIS 114988, at *47 (S.D. Tex. 2015) (collecting cases). Therefore, the Court finds that this argument is waived due to inadequate briefing. *See id*.

Accordingly, the Court finds that Bain has failed to meet its burden to segregate its damages. Therefore, even assuming that Bain could establish coverage, Bain's failure to segregate its damages bars the recovery of damages.

c. Attorney's Fees

Because the Court has ruled in favor of United Fire, it will address the issue of attorney's fees with respect to United Fire. Citing no authority, United Fire avers that it is entitled to reasonable attorney's fees, although United Fire previously clarified that it was entitled to attorney's fees under Texas Civil Practice and Remedies Code § 38.001(8). (United Fire Tr. Brief 18; ECF. No. 52, p. 20).

However, it appears that § 38.001(8) does not permit United Fire to recover attorney's fees in the instant case because United Fire has asserted no cause of action. *See Whitton v. Loescher*, 2010 Tex. App. LEXIS 2728, at *19 (Tex. App. 2010) (citing *Thottumkal v. McDougal*, 251 S.W.3d 715, 719 (Tex. App. 2008)). Accordingly, the Court finds that United Fire should submit a brief on the sole issue of their legal entitlement to attorney's fees. Should the Court agree with United Fire, the Court will direct the filing of a motion for attorney's fees in compliance with Local Rule CV-7(j)(1) and Fed. R. Civ. P. 54(d)(2).

V. Conclusion

Based on the foregoing, **IT IS HEREBY ORDERED** that **UNITED FIRE HAS NO DUTY TO INDEMNIFY BAIN** for claims arising from the underlying lawsuit.

IT IS THEREFORE ORDERED that **JUDGMENT IS ENTERED** in favor of United Fire with respect to Bain's duty to indemnify claims.

IT IS ALSO ORDERED that United Fire shall submit a brief **solely** on the issue of whether attorney's fees are recoverable **within seven (7) days** of the entry of this order. Bain shall file their response, if any, **within seven (7) days** of the filing of United Fire's brief.

IT IS LASTLY ORDERED that the Court will render a final and appealable judgment once the Court determines the appropriate amount of attorney's fees and costs, if any.

SIGNED and **ENTERED** this 25th day of July, 2017.

ANNE T. BERTON
UNITED STATES MAGISTRATE JUDGE