IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

STEPHEN HAHN Plaintiff, v. UNITED FIRE AND CASUALTY COMPANY, Defendant.	§ § § § § § § § §	6:15-CV-00218 RP

ORDER

Before the Court are Defendant United Fire and Casualty Company's Motion for Summary Judgment, (Dkt. 50), Motion to Exclude the Expert Testimony of Matt B. Phelps, (Dkt. 52), and Objections to Evidence Attached to Plaintiff's Response to Defendant's Motion for Summary Judgment, (Dkt. 55). After reviewing these filings, the responsive pleadings thereto, the record in this case, and the relevant case law, the Court issues the following order.

I. BACKGROUND

Plaintiff Stephen Hahn filed this action against Defendants Bettina Bowling and United Fire and Casualty Company ("United Fire") in the 146th District Court in Bell County on March 27, 2015. (Pl.'s Orig. Pet., Dkt. 1-4, at 1). Plaintiff brought claims for breach of contract, breach of duty of good faith and fair dealing, and statutory violations of the Texas Unfair Compensation and Unfair Practices Act, the Texas Prompt Payment of Claims Act, the Texas Deceptive Trade Practices Act ("DTPA"), and the Texas Insurance Code. (Pl.'s Orig. Pet, Dkt. 1-4, at 5–11). Generally, Plaintiff alleged in the petition that he had entered a contract with United Fire to provide him an insurance policy for commercial property located on Stan Schluter Loop, in Killeen, Texas, ("the Property"), and that United Fire and Defendant Bowling, an insurance adjuster for United Fire, wrongfully

denied coverage after a storm caused damage to the roof of the Property. (Pl.'s Orig. Pet, Dkt. 1-4, at 2–5).

Defendant United Fire removed the action to federal court on July 1, 2015, contending that Bowling, who, like Plaintiff, is a citizen of Texas, was fraudulently joined in the action in order to defeat diversity jurisdiction. (Def.'s Not. of Removal, Dkt. 1, ¶¶ 4–6). No motion to remand was filed, and the parties later agreed to dismiss Defendant Bowling. (Agreed Mot. Dismiss, Dkt. 39).

On January 23, 2017, Defendant United Fire filed a motion for summary judgment on all of Plaintiff's claims. (Def.'s Mot. Summ. J., Dkt. 50). United Fire makes five arguments in support of its motion for summary judgment. First, it argues that it is entitled to summary judgment on Plaintiff's breach of contract claims because Plaintiff will be unable to meet his burden to allocate between covered and non-covered damage to his property, and because Plaintiff's claim falls within the cosmetic damage exclusion in his insurance policy. Next, United Fire argues that it is entitled to summary judgment on Plaintiff's bad faith and statutory claims because Plaintiff cannot prevail on his breach of contract claims, because there was a reasonable basis for United Fire's denial of Plaintiff's claim; and because there is no evidence that United Fire knowingly violated the Texas Insurance Code.

Plaintiff filed a response to United Fire's motion for summary judgment on February 6, 2017, arguing that the damage to his roof does not fall under the cosmetic damage exclusion to his insurance policy, or that at least, he has provided sufficient evidence that the damage was not cosmetic to create a genuine issue of material fact. (Pl.'s Resp., Dkt. 54, at 6–7). Further, Plaintiff acknowledges that extra-contractual damages are barred if the insurance policy does not provide coverage of the claim, but asserts that United Fire has not denied that hail damage is covered. Plaintiff also argues that, based on the testimony of one of United Fire's adjusters, jurors could conclude United Fire "knowingly" violated the Texas Insurance Code.

Soon after it moved for summary judgment, United Fire filed a Motion to Exclude the Testimony of Plaintiff's Expert Matt B. Phelps. (Def.'s Mot. to Exclude, Dkt. 52). United Fire argues that the definition of "damage" on which Phelps relies will confuse the jury and be unduly prejudicial. It also asserts that Phelps's opinions should be excluded because they are based on data and a methodology with a high potential rate of error, that have not been peer reviewed or tested, and that are not generally accepted in the relevant scientific community.

United Fire invoked these same arguments in an objection to Plaintiff's submission of Phels' expert report as evidence in response to United Fire's motion for summary judgment. (Def.'s Obj., Dkt. 55, 1–2). It also argued that the estimate of alleged damage provided by Jerry Bird should be deemed inadmissible as unsworn hearsay evidence. It moved for both Phelps's report and the estimates from Bird to be stricken from the summary judgment record. Plaintiff responded to United Fire's motion to exclude Phelps's testimony, arguing that Phelps's report is admissible, but did not file a response to United Fire's objections.

The Court will first address Defendant United Fire's objections to Plaintiff's summary judgment evidence and its related motion to exclude Plaintiff's expert testimony. The Court will then address Defendant's motion for summary judgment.

II. EVIDENTIARY OBJECTIONS & MOTION TO EXCLUDE

Defendant United Fire submits objections to expert testimony of Matt B. Phelps and Jerry Bird filed by Plaintiff Hahn in response to United Fire's motion for summary judgment, and has filed a motion to exclude the testimony of Phelps at trial.

A. Objections to Phelps's Report & Motion to Exclude Phelps's Testimony

Defendant makes three objections to the Phelps Report attached to Plaintiff's summary judgment response: (1) that it is inadmissible pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); (2) that it is inadmissible "as hearsay as it is an unsworn, unverified expert

report that is not supported by affidavits;" (3) that the conclusions and opinions about whether data and weather events contained in the report should be excluded because Phelps is not a meteorologist and "he relies on unsourced, ambiguous weather data" to form conclusions about weather damage at the Property. (Def.'s Obj., Dkt. 55, at 2). Defendant has also filed a separate motion to exclude Phelps's testimony under *Daubert*, primarily arguing that Phelps's conclusions are based on a definition of "damage" that conflicts with the term as it is used in the insurance policy, and additionally contesting the methodology he uses. (Def.'s Mot. Exclude, Dkt. 52, at 1). Plaintiff suggests that the definition of "damage" Phelps relies on is substantially similar to the one at issue in the policy, and argues that Phelps's methods are generally accepted in the scientific community. (Pl.'s Resp. to Mot. Exclude, Dkt. 57, at 5). The Court will first address Defendant's objection and motion under *Daubert*, then, if it deems Phelps's testimony admissible, turn to Defendant's other objections.

Federal Rule of Evidence 702 has been amended to incorporate the principles first articulated by the Supreme Court in *Daubert*, as well as those enunciated in the many later cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). *See* Fed. R. Evid. 702 Advisory Committee Notes. Rule 702 now provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. "*Daubert* standards apply not merely at trial, but also on summary judgment." *Gen. Star Indem. Co. v. Sherry Brooke Revocable Trust*, No. CIV.A. SA-99-CA-1105, 2001 WL 34063890, at *9 (W.D. Tex. Mar. 16, 2001); *see also Kumho Tire Co.*, 526 U.S. at146 (affirming district court decision granting motion for summary judgment in light of its decision to exclude expert testimony pursuant to *Daubert*).

Federal Rule of Evidence 703 also provides guidance for the admissibility of expert testimony. Specifically, it provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703.

Following *Daubert* and its progeny, trial courts are to act as "gatekeepers," overseeing the admission of scientific and nonscientific expert testimony. *See Kumho Tire Co.*, 526 U.S. at 147. Trial courts must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93. In carrying out this task, district courts have broad latitude in weighing the reliability of expert testimony for admissibility. *See Kumho Tire Co.*, 526 U.S. at 152 (recognizing trial court must have considerable leeway in determining admissibility of expert testimony). The district court's responsibility "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* The party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method and are reliable. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

Plaintiff designated Phelps to testify "regarding the inspection, analysis, reports, investigation, and evaluation [of] Plaintiff's property damage, the cause and origin of the roof damage, [and] the scope of repairs required." (Pl.'s First Am. Rule 26(e) Designation, Dkt. 46, at 1).

Defendant first argues that Phelps's testimony should be excluded because he uses a definition of "damage" that conflicts with the term used in the policy.

The parties agree that a "Cosmetic Damage Exclusion" applies to Plaintiff's insurance policy with Defendant. It provides:

> 5. Cosmetic or Appearance Loss or Damage
>
> We will not pay for loss or damage caused by the peril of hail that alters the physical appearance of any part of any roof covering made of metal but does not result in damage that allows the penetration of water through the roof covering **or does not result in the failure of the roof covering to perform its intended function** to keep out elements over an extended period of time. This exclusion applies to roof coverings including the roofing material exposed to weather, its underlayments applied for moisture protection and all flashings required in application of the roof covering.
>
> Hail damage to roof coverings that results in damage that will allow the penetration of water through the roof covering **or that results in the failure of the roof covering to perform its intended function** to keep out elements over an extended period of time is not subject to this exclusion.

(Def.'s Mot. Summ J., Dkt 51, App. 49; Pl.'s Resp. Mot. Summ. J., Dkt. 54-1, App. 23). In other words, damage that affects the appearance, but not proper function, of the roof is expressly excluded under Plaintiff's policy. (*See id.*).

Phelps's report directly addresses the definition of "damage" he uses to form his opinions. He explains:

> To determine what is damaged we must first define what damage means. Oxford defines damage as: physical harm caused to something in such a way as to impair its value, usefulness, or normal function, and unwelcome or detrimental effects. The United States District Court of South Dakota . . . found that damage is "physical harm caused to something in such a way as to impair its value, usefulness, or normal function, commonly associated as causing unwelcome or detrimental effects." . . . . The damages described and data analysis contained within this report are based upon this definition of damage.

(Pl.'s Resp. Mot. Summ. J., Dkt. 54-3, App. 109). Because Phelps's definition includes damage that impairs the "value" or otherwise causes "unwelcome or detrimental effects," it could encompass

cosmetic damage. (*See id.*). Phelps goes on to conclude in his report that "[t]he metal roof and vent caps on the subject property have been damaged and must be replaced." (*Id.* at App. 131). He further reasons that "[b]ased upon a reasonable degree of certainty, it is more likely than not that the observed damage is a result of the subject storm event." (*Id.* at App. 131). In light of Phelps's definition of damage, however, it would be impossible for the Court or a jury to determine whether the damage he is discussing in his analysis or conclusion is damage that is covered by the policy applicable in this case. In other words, under Rule 702(d), Phelps's report indicates that he has not reliably applied the principles and methods he employs to the facts of this case, which include the relevant policy.

Plaintiff points to Phelps's deposition testimony to argue that Phelps's analysis is based on the appropriate definition of damage. At his deposition, Phelps states that he did not make a determination as to whether or not the *value* of the roof was impaired, but only its *functionality* or "performance," (Phelps Dep. 171:16–24, Dkt. 57-1, at App. 11). The Court finds this testimony questionable and unreliable. First, Phelps contradicts this testimony both in his report and earlier within the same deposition. In his report he states that "[t]he damages described and data analysis contained within this report are based upon" the definition of "damage" included in his report, which includes impairment to the "value" of the roof. (Pl.'s Resp. Mot. Summ. J., Dkt. 54-3, App. 109). In his deposition, Phelps initially agreed that his conclusions were based upon the roof's "value, usefulness, or normal function," and, when pressed to differentiate between those various types of damages, explained that he could "not really address that other than what it says in the definition" he used in his report. (Phelps Dep. 171:16–24, Dkt. 57-1, at App. 11). Phelps's later suggestion that his assessment of the damage was based on the functionality of the roof came only after some suggestive questioning by Plaintiff's counsel.

Second, in his report, Phelps provides no basis for the Court to evaluate the methodology or reasoning behind his later assertion that the roof was functionally damaged by the storm at issue. Phelps's analysis employs mathematical calculations to determine the amount of energy, in joules, that would have been exerted by a 1.75 inch in diameter hailstone hitting the roof of the Property while the wind was blowing at 67 miles per hour.[1] His calculations take into account various forces and factors to make this determination, including the approximate size of the hail, its density,[2] its terminal velocity due to gravity, the effect of the wind on the hail's downward force, and the pitch of the roof. (Def.'s Mot. Exclude, Dkt. 52, at App. 21–24). Phelps also analyzed the roof of the Property. This analysis included Phelps's counts of the number of screws on various parts of the roof, the number of hail impact points on the roof, and Phelps's measurement of the approximate size of those impact points. (*Id.* at App. 26). But these two parts of Phelps's data—the calculations regarding the amount of energy with which the hail may have hit the roof, and the number and size of impact points on the roof—say little or nothing about whether the roof of the Property was functionally damaged by the hail. Phelps has not, for example, accounted for the roofing material in his calculations, nor has he indicated that he observed impact points at which water could penetrate the roof. Certainly, the roofing material itself plays a significant role in whether a certain amount of force (from falling hail) causes damage.[3] For example, bullet-proof glass might exhibit no damage whatsoever when subject to the forces at issue in Phelps's calculations, while drywall might be completely and functionally ruined when subjected to the same forces. As Defendant points out,

[1] Hailstones of 1.75 inches in diameter were the maximum observed in the general area; 67 mile per hour wind was the maximum wind speed. (Pl.'s Resp. Mot. Exclude, Dkt. 57-1, at App. 27). Defendant notes that there is little evidence that any hail 1.75 inches in diameter fell at the Property. (Def.'s Mot. Exclude, Dkt. 52, at 7).

[2] Defendant disputes the accuracy of Phelps's use of the density of water as a substitute for the density of ice (or more specifically, hail). (Def.'s Mot. Exclude, Dkt. 52, at 7). The Court concludes that it need not address that issue at this time.

[3] Defendant argues more specifically that physical testing on actual roofing materials is necessary to draw conclusions about the damage hail caused to the roof. (*See* Def.'s Mot. Exclude, Dkt. 52, at 9). While the Court agrees that physical testing would address the deficiency in Phelps's analysis, it is not convinced that, with the proper data, an appropriate analysis could not be made solely using mathematical calculations. Regardless, Phelps has not attempted such calculations here.

"whether a hailstone supposedly released 4 or 40 joules of energy is meaningless without knowing how much energy the roofs were designed to withstand." (Def.'s Reply to Mot. Exclude, Dkt. 59, at 4 n.12). Further, one can easily imagine visual or cosmetic "damage" that is not functional "damage"—most minor hail damage to the hoods of cars would fall into this category. Phelps's data, analysis, and calculations simply do not speak to whether or not the damage to the Property is cosmetic or functional damage, thus the Court cannot accept the testimony from his deposition suggesting otherwise, nor can it conclude that he has reliably applied his principles and methods to the facts of this case. The Court will thus sustain Defendant's objection to Plaintiff's use of Phelps's report in opposition to its motion for summary judgment and grant Defendant's motion to exclude the expert testimony of Matt B. Phelps.

B. Objections to Bird Evidence

Defendant also objects to the estimate of Jerry Bird, of BMJ Estimators, Inc. ("Bird Estimate"), attached to Plaintiff's response to Defendant's motion for summary judgment. (Pl.'s Resp. Mot. Summ. J., Dkt. 54-6, App. 222–252). The Bird Estimate contains invoice-like estimates of the replacement cost of the Property's roof, along with supporting photographs. (*Id.*). First, Defendant notes that Bird was "designated . . . as a testifying expert" by Plaintiff, but argues that the Bird Estimate is an "unsworn, unverified expert report[]" and inadmissible as summary judgment evidence. (Def.'s Obj., Dkt. 55, at 2). Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B), for a witness "retained or specially employed to provide expert testimony," a party must provide a report "prepared and signed by the witness." Fed. R. Civ. P. 26(a)(2)(B).[4] This report must also contain:

[4] A witness who is "not required to provide a written report," which are generally non-retained experts, need only submit a disclosure which states "(i) the subject matter on which the witness is expected to present evidence . . . ; and (ii) a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). Plaintiff has not shown or suggested that Bird is a witness not required to provide a written report. *Beane v. Utility Trail Mfg. Co.*, No. 2:10-CV-781, 2013 WL 1344762 at *3 (W.D. La. Feb. 25, 2013) ("[T]he distinction between a 26(a)(2)(B) and a 26(a)(2)(C) expert is that 26(a)(2)(C) experts' conclusions and opinions arise from firsthand knowledge of activities they were personally involved in before the commencement of the lawsuit. . . .")

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Id. If a party fails to provide a report pursuant to Rule 26, the court must strike evidence provided by that witness unless the failure is substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). Interestingly, however, Defendant did not argue that Plaintiff failed to produce an expert report for Bird pursuant to Rule 26, only that what is attached to Plaintiff's summary judgment response was an unsigned and unsworn report. As Defendant has not argued that Bird's report was not produced, presumably Plaintiff did produce a report, he simply did not attach it to his response. (*See* Pl.'s First Am. Rule 26(e) Designation, Dkt. 46, at 2 ("Please find the reports prepared by Jerry Bird, email correspondence with invoices, curriculum vitae of Jerry Bird and other documents related to Jerry Bird's role in this case as required by Federal Rule 26 attached hereto as Exhibit B."). Because there is no suggestion that Plaintiff failed to comply with Rule 26 with respect to Bird, the Court will not exclude the Bird Estimate as summary judgment evidence on that basis.

Further, the rule governing motions for summary judgment, Federal Rule of Civil Procedure 56, does not require that summary judgment evidence be signed or sworn. Instead, it envisions that various sorts of materials and documents may be submitted as summary judgment evidence. Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions,

documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials."). While parties "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," *see* Fed. R. Civ. P. 56(c)(2), Defendant has not done so here, and it appears that the Bird Estimate could be presented in a form that would be admissible, particularly if Bird were called as a witness. Therefore, the Court overrules Defendant's objection that the Bird Estimate should be struck because it is unsworn and unsigned.

Second, Defendant explains that "Plaintiff has designated Bird as a testifying expert only as to the 'reasonable and necessary costs of repair to Plaintiff's property,'" and objects to the Bird Estimate to the extent it is used to show causation. (Def.'s Obj., Dkt. 55, at 2). Plaintiff only cites to the Bird Estimate once in his response, however, and does so to assert that the only damages he seeks are for the replacement of his roof. (Pl.'s Resp., Dkt. 54, at 6). Thus, the Court overrules Defendant's second objection to the estimate as the evidence is not used to show causation.

III. MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he moving party may [also] meet its burden by simply pointing to an absence of

evidence to support the nonmoving party's case." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005). Where the movant bears the burden of proof on an affirmative defense such as release or limitations, the movant "must establish beyond peradventure all of the essential elements of the defense to warrant judgment in his favor." *Addicks Servs., Inc. v. GGP-Bridgeland, LP*, 596 F.3d 286, 293 (5th Cir. 2010). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). The Court will view this evidence in the light most favorable to the non-movant, *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993), and should "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

III. DISCUSSION

As the Court previously explained, Defendant moves for summary judgment Plaintiff's breach of contract claim, bad faith, and statutory claims. Because Defendant argues, in part, that Plaintiff's bad faith and statutory claims are precluded because he cannot prevail on his breach of contract claim, the Court will first address Defendant's motion with respect to that claim.

A. Breach of Contract

"In Texas, '[t]he essential elements of a breach of contract action 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 sustained by the plaintiff as a result of the breach.'" *Smith Int'l,*

Inc. v. Egle Grp., LLC, 490 F.3d 380, 387 (5th Cir. 2007) (quoting *Valero Mktg. & Supply Co. v. Kalama Int'l, LLC*, 51 S.W.3d 345, 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Further, "Texas courts interpret insurance policies according to the rules of contract construction." *de Laurentis v. United Services Auto. Ass'n*, 162 S.W.3d 714, 721 (Tex.App.—Houston [14th Dist.] 2005, pet. denied); *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 369 (5th Cir.1998). Thus, like with any other contract, the primary concern of the court in construing the insurance policy is to determine the parties' intentions as expressed in the contract. *See Gonzalez v. Denning*, 394 F.3d 388, 392 (5th Cir. 2004); *see also Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 311–12 (Tex. 2005). In determining the scope of coverage, the court examines the policy as a whole to ascertain the true intent of the parties. *Utica Nat. Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004).

Defendant argues that it is entitled to summary judgment on Plaintiff's breach of contract claims because Plaintiff will be unable to meet his burden to allocate between covered and non-covered damage to his property; and because Plaintiff's claim falls within the cosmetic damage exclusion in his insurance policy.

1. Allocation Between Covered and Non-Covered Perils

Defendant first argues that Plaintiff fails to provide evidence sufficient to distinguish between covered and non-covered perils—in particular, damages caused by "defective maintenance or construction," which, it asserts, are damages not covered by the policy. (Def.'s Mot. Summ J., Dkt. 50, at 9). Notably, Defendant fails to point to language in the policy that provides for such an exclusion. After the Court's review of the policy, however, it has identified two provisions that may be applicable. The first, Subsection 2, of "Exclusions" in the "Causes of Loss – Special Form" attached to the policy, provides:

> We will not pay for loss or damage caused by or resulting from any of the following. . . . (1) Wear and tear; (2) Rust or other corrosion, decay, deterioration,

> hidden or latent defect or any quality in property that causes it to damage or destroy itself.

(Def.'s Mot. Summ J., Dkt. 52-1, at App. 37). Next, in Subsection 3 of that same part of the policy the contract provides:

> We will not pay for loss or damage caused by or resulting from any of the following: . . . Faulty, inadequate or defective: . . . Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; . . . Materials used in repair, construction, renovation or remodeling; or . . . Maintenance.

(Def.'s Mot. Summ J., Dkt. 52-1, at App. 38–39). Subsection 3, however, further explains that "if an excluded cause of loss [under this subsection] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss." (*Id.*). Neither party has addressed either of these provisions in their summary judgment briefing.

Defendant argues that, under the doctrine of concurrent causes, Plaintiff has the burden to show that the loss he claims is covered, and, in turn, must be able to provide sufficient evidence to allocate between loss created by covered causes and loss created by non-covered causes. In Texas, the doctrine of concurrent causes provides that where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. *E.g., Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex.1971). The insured is therefore required "to provide evidence upon which a jury or court can allocate damages between those that resulted from covered perils and those that did not." *Nat'l Union Fire Ins. of Pittsburgh, Pa. v. Puget Plastics Corp.*, 735 F. Supp. 2d 650, 669 (S.D. Tex. 2010) (citing *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App.—San Antonio, 1999, pet. denied)). Failure to do so it fatal to an insured's claim. *Id.*

In light of evidence Defendant has attached that the loss at issue was created, at least in part, by other causes of loss (including foot crimps that dented the roof to allow water ingress, improper flashing near the front of the roof, and improper flashing where air conditioner conduits penetrated

the roof) (Def.'s Mot. Summ. J., Dkt 51-1, at App. 89), Defendant argues that Plaintiff cannot meet his burden to allocate the loss.

The Court rejects Defendant's argument for two reasons. First, Plaintiff submits evidence in support of his assertion that all claimed loss was covered. For example, Plaintiff's property manager testified that prior to the storm, all past roof leaks had been sufficiently repaired, but that after the storm, the property began experiencing significant leaks in areas that had never leaked before—suggesting the leaks were caused by the storm alone. (*See* Pl.'s Resp. Mot. Summ. J., Dkt. 54-7, at App. 270–275) (deposition of C.J. Rogers)). Plaintiff also submits as evidence a letter from the first insurance adjuster who visited the Property, who said it was "in good, well maintained condition." (*See* Pl.'s Resp. Mot. Summ. J., Dkt. 54-1, at App. 2). While Defendant has evidence to the contrary, it would be difficult to conclude from the competing evidence that Plaintiff cannot allocate his loss between covered or non-covered causes at trial—or, in other words, that there is no genuine dispute of material fact that Plaintiff cannot allocate his loss. Allocation of loss need not be made with mathematical precision—there simply must be some reasonable basis on which a jury can evaluate what percentage of loss was created by the covered cause of loss. *Wallis*, 2 S.W.3d at 304. Thus even assuming that all loss caused by faulty repairs is non-covered—and the Court turns to that assumption in a moment—the Court is unconvinced, based on the competing evidence, that Plaintiff will not be able to allocate between covered and non-covered loss, and denies Defendant's motion for summary judgment on that basis.[5]

[5] Defendant identifies three cases in which an insured lost his claim entirely due to failure to allocate. Two of these cases were decided after a trial, and after all the evidence had been heard. *See id.* ("The jury heard no testimony regarding how much of the [insureds'] damage was caused by the plumbing leaks. It learned only that plumbing leaks were found. Because there is no evidence upon which the jury could determine that thirty-five percent of the damage was caused by plumbing leaks, the trial court properly granted a take-nothing judgment in favor of [the insurer]."); *Puget Plastics Corp.*, 735 F. Supp. 2d at 677. The Court acknowledges that the third, *Hamilton Properties v. Am. Ins. Co.*, No. 3:12-CV-5046-B, 2014 WL 3055801 (N.D. Tex. July 7, 2014), has many similarities to the present case, but ultimately concludes that it is distinguishable. In *Hamilton Properties*, there was a significant question as to whether a prior storm or lack of maintenance had caused the leaks, both of which the plaintiff's witnesses acknowledged could have caused the leaks, both of which were not covered under the policy. *Id.* at *4–7. Here, while Defendant asserts that faulty repairs and design defects are

Second, however, the Court must address Defendant's assertion that the alternative causes of loss it identifies, such as improper flashing, are non-covered causes of loss. Most of these causes of loss appear to fall within the second exclusion identified by the Court—for faulty, inadequate, or defective, design, repairs or maintenance. (Def.'s Mot. Summ J., Dkt. 52-1, at App. 38–39). While the policy makes clear that loss or damage caused by faulty repairs alone, are not covered, it is less clear whether loss or damage caused by a hailstorm due to prior faulty repairs is covered. Again, the policy explains that "[i]f an excluded cause of loss [under this subsection] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss." (Def.'s Mot. Summ J., Dkt. 52-1, at App. 38–39). The parties agree that hail damage[6] is a "Covered Cause of Loss." (*See* Def.'s Mot. Summ. J., Dkt. 50, at 10; Pl.'s Resp. Mot. Summ. J., Dkt 54, at 5–6). Thus a question remains as to whether an excluded cause of loss (faulty repairs, for example) "result[ed] in a Covered Cause of Loss" (hail damage), and is therefore covered under the policy. Plaintiff notes that Texas law requires the court to adopt the construction of an exclusionary clause urged by an insured so long as that construction is not unreasonable. (*See* Pl.'s Resp. Mot. Summ. J., Dkt 54, at 4 (quoting *Glover v. Nat'l Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1997)). Here, however, neither party advanced a construction of this particular clause, nor did they even identify it. Because the parties have not addresses this exclusion, and because the Court rejects Defendant's argument that Plaintiff cannot allocate covered and non-covered causes of loss under any interpretation of the clause, it will not decide the issue at this time.

similarly not covered under the policy, they have simply failed to connect that assertion to the policy at issue, as the Court addresses below.

[6] Subject to the Cosmetic Damage Exclusion, as addressed *supra* and *infra.*

2. Cosmetic Damage Exclusion

Defendant's second argument in support of its motion for summary judgment on Plaintiff's breach of contract claim is that the Cosmetic Damage Exclusion applies to Plaintiff's claims. As the Court previously noted, the exclusion provides:

> We will not pay for loss or damage caused by the peril of hail that alters the physical appearance of any part of any roof covering made of metal but does not result in damage that allows the penetration of water through the roof covering **or does not result in the failure of the roof covering to perform its intended function** to keep out elements over an extended period of time. This exclusion applies to roof coverings including the roofing material exposed to weather, its underlayments applied for moisture protection and all flashings required in application of the roof covering.
>
> Hail damage to roof coverings that results in damage that will allow the penetration of water through the roof covering **or that results in the failure of the roof covering to perform its intended function** to keep out elements over an extended period of time is not subject to this exclusion.

(Def.'s Mot. Summ J., Dkt. 51, App. 49; Pl.'s Resp. Mot. Summ. J., Dkt. 54-1, App. 23). In support of its argument that the loss at issue is subject to the Cosmetic Damage Exclusion, Defendant submits the testimony of two experts. The first, Timothy Marshall, is an engineer whose career includes an emphasis on forensic hail analysis. (Def.'s Mot. Summ J., Dkt 51-1, App. 88). He inspected the Property multiple times and concluded that, while there were hail-caused dents on the Property, these dents "did not damage the roof coating" nor did they "reduce the watertight integrity of the [roof] panels." (Def.'s Mot. Summ J., Dkt. 51-1, App. 88). He further concluded that "[t]here was no wind damage[] to the roofs." (*Id.*). The second, Edward Cox, holds a BS in Metallurgical Engineering and a Masters and Ph.D. in Theoretical and Applied Mechanics. (Def.'s Mot. Summ. J., Dkt. 51-3, App. 214). Cox tested a section of the roof panel from the Property "to determine whether hail contact had affected the functionality of the steel substrate and Galvalume coating." (Def.'s Mot. Summ. J., Dkt. 51-3, App. 152). He concluded that "[n]o loss of integrity,

functionality or corrosion resistance was found in either of the two largest hail indents" he examined. (Def.'s Mot. Summ. J., Dkt. 51-3, App. 154).

In light of the Court's exclusion of Plaintiff's expert testimony from Matt Phelps, Plaintiff's evidence is circumstantial—in other words he has no testimony from an expert who can opine that hail or wind caused functional damage (or damage not excluded by the Cosmetic Loss Exclusion) to the roof of the Property. Yet that circumstantial evidence suggests that the damage caused by the hail storm was not merely cosmetic. Plaintiff submits the testimony of the property manager, who explains that prior to the storm at issue, the Property had "had perimeter leaks," but that after the hailstorm, he "observed interior leaks" for the first time. (Pl.'s Resp. Mot. Summ J., Dkt. 54-7, at App. 269). He further explains that he "had pretty much addressed almost everything on the perimeter of these buildings that would have had to do with flashing," before the storm, and drew a diagram at his deposition of places where he observed new leaks following the storm. (Pl.'s Resp. Mot. Summ J., Dkt. 54-3, at App. 102–103). He also notes that he had a close relationship with the tenants at the property, so he learned about leaks soon after they occurred, suggesting that he would know when they first occurred. (Pl.'s Resp. Mot. Summ J., Dkt. 54-7, at App. 271)

Defendant claims that the "only credible sources of causation evidence" are from their experts, (Def.'s Mot. Summ J., Dkt 50, at 11), that "there is no evidence or testimony [that] a single hail[stone] created penetration in any of the roofs, which would be required in order to cause leaks immediately after the storm" and that "there is no evidence that the leak was caused by hail." (Def.'s Reply Mot. Summ J., Dkt. 56, at 6–7). The Court rejects these arguments. At summary judgment, "[t]he 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 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed

verdict." *Id.* While the Defendant would like to completely discount Plaintiff's evidence, circumstantial evidence is still evidence—the timing of the new leaks creates an inference that the storm may have caused or contributed to those new leaks. Plaintiff need not point to a particular hole in the roof to make his case. The Court therefore finds that there is a genuine issue of material fact as to whether Plaintiff has a claim for covered damages, and denies Defendant's motion for summary judgment on Plaintiff's breach of contract claim.

B. Statutory & Bad Faith Claims

Next, United Fire argues that it is entitled to summary judgment on Plaintiff's bad faith and statutory claims because: (1) Plaintiff cannot prevail on his breach of contract claims; (2) there was a reasonable basis for Defendant's denial of Plaintiff's claim; and (3) there is no evidence that Defendant knowingly violated the Texas Insurance code.

Because the Court has not granted Defendant summary judgment on Plaintiff's breach of contract claim, it will not address Defendant's argument that Plaintiff's statutory and bad faith claims fail on the basis that summary judgment on the breach of contract should be granted.[7] The Court concludes, however, that Defendant's second argument—that there was a reasonable basis for United Fire's denial of Plaintiff's claim—warrants summary judgment on Plaintiff's remaining claims.

In Texas, "[a] breach of the duty of good faith and fair dealing is established when: (1) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy and

[7] In reply to Plaintiff's opposition to its motion, Defendant argues that even where an insured might prevail on its breach of contract claim, it may not succeed on extra-contractual claims unless there is an independent injury arising from those claims. Indeed, the Fifth Circuit, applying Texas law, has repeatedly indicated that "[t]here can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits." *Parkans Int'l LLC v. Zurich Ins. Co.*, 299 F.3d 514, 519 (5th Cir. 2002); s*ee also Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 808 (5th Cir. 2010). But some Texas Courts of Appeals have reached the opposite conclusion—holding that so long as a claim is for a covered cause of loss under the policy, extra-contractual claims survive regardless of whether there is evidence of an independent injury. *See, e.g., USAA Texas Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602, at *7 (Tex. App.—Corpus Christi-Edinburg, July 31, 2014). Because the Court finds that summary judgment is warranted on other grounds, it will not take a position on this issue.

(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." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995) (citing *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988)).

Here, Defendant has presented ample evidence that there was a reasonable basis for denying Plaintiff's claim. First, it sent an insurance adjuster, Ms. Bowling, to the Property on April 9, 2014. (Def.'s Mot. Summ. J., Dkt. 51-1, at App. 68). She explained that:

> There was no visible hail damage seen at the time of the inspection to the roof, metal fencing, windows, awning, or stucco finish on the front of the building. There was also no evidence of hail impacts to the outside air conditioner condenser units and exterior doors.

(*Id.*). After Defendant learned that Plaintiff had retained a public adjuster to represent him related to the alleged property damage, Defendant retained a licensed professional engineer, Mr. Marshall, to re-inspect those buildings. (Def.'s Mot. Summ. J., Dkt. 51-1, at App. 80). Marshall inspected the Property with Plaintiff's public adjuster and roofing contractor, and found that while "[w]idely scattered hail dents were found in the roof panels[, t]he dents were difficult to detect even when looking obliquely at the reflection of the sun on the panels." (*Id.* at App. 87). In order to see and measure the dents, they rubbed chalk on the surface of the metal roof. (*Id.*).

Marshall further explained that the public adjuster and roofing contractor "believed that hail had damaged the coating which will shorten the life of the roof." (*Id.* at App. 85). They suggested that the roofing manufacturer had informed them of this, and although Marshall asked for a letter from the manufacturer stating that, there is no evidence in the record that one was ever provided. (*Id.*). Instead, Defendant employed its own expert to test the roof to see if hail-caused dents would damage the coating of the roof, and he concluded that they would not. (*See* Def.'s Mot. Summ. J., Dkt. 51-3, at App.152–154). Defendant has presented ample evidence that it reviewed and considered Plaintiff's claim, including by employing two experts to look at the alleged damage to

Plaintiff's roof who concluded that the roof was not damaged by hail. This evidence indicates that Defendant had a reasonable basis for denying Plaintiff's claim.

Although Plaintiff responds that "[a]n insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pre-textual basis for denial," (Pl.'s Resp. Mot. Summ. J., Dkt. 54, at 8 (quoting *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998)), he has no evidence that Defendant's basis for denial was pre-textual. Plaintiff asserts that Marshall's report failed to include certain critical information, such as the timing and age of certain leaks, and "only included dates of leaks which fit into Defendant's narrative that all the leaks pre-date the storm." (*Id.* at 9). That Marshall manipulated the data, however, is mere speculation. Plaintiff provides no evidence that Marshall was provided those other dates or that he manipulated the data to support a particular conclusion.

Further, Plaintiff has not demonstrated that Defendant's liability for the claim has become reasonably clear. As another court in this district explained, "[a]n insured . . . cannot establish a claim for bad faith without offering evidence that the insurer's liability on the claim had become reasonably clear, or that there was no reasonable basis for denying the claim." *Tesoro Ref. & Mktg. Co. LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 96 F. Supp. 3d 638, 652 (W.D. Tex. 2015)(citing *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 198 (Tex. 1998)), *aff'd on other grounds*, 833 F.3d 470 (5th Cir. 2016). Here, Plaintiff offers only circumstantial evidence that it is entitled to relief on its claim. While this evidence is sufficient to create a bona fide dispute regarding whether Plaintiff's claim should be covered, it is not reasonably clear evidence that Defendant has liability.

Based on the forgoing, the Court concludes that there is no genuine issue of material fact as to whether Defendant had a reasonable basis for denying Plaintiff's claim, and will therefore grant Defendant summary judgment on Plaintiff's claim for breach of the duty of good faith and fair dealing.

Turning to Plaintiff's claims under the Texas Insurance Code and the DTPA, the Court similarly finds that summary judgment is warranted. As the Fifth Circuit explained, "Texas courts have clearly ruled that these extra-contractual tort claims" for violations of the DTPA and the Texas Insurance Code "require the same predicate for recovery as bad faith causes of action in Texas." *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997). "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." *Id.* As the Court has already concluded that there is no genuine dispute of material fact as to whether there was a reasonable basis for the denial of Plaintiff's insurance claims, it similarly concludes that summary judgment is warranted on Plaintiff's statutory claims under the DTPA and Texas Insurance Code.[8]

[8] The Court notes that while Plaintiff submitted deposition testimony from Defendant's corporate representative in support of his statutory claim against Defendant for a knowing violation of the Texas Insurance Code, the evidence fails to support their claim. In his deposition, the representative explains that he has never been personally involved in a claim on a metal roof that was compensated when a cosmetic damage exclusion was in place. (Pl.'s Resp. Mot. Summ J., Dkt. 54-7, at App. 305). On that basis Plaintiff asserts that Defendant uses "the cosmetic exclusion endorsement as an absolute shield from liability." (Pl.'s Resp. Mot. Summ J., Dkt. 54, at 11). But the representative's involvement in some claim denials based on a particular exclusion does not mean or suggest that those denials were not warranted. It would be unreasonable to infer from the representative's testimony that Defendant knowingly denied valid claims.

IV. CONCLUSION

Based on the foregoing, the Court **DENIES** Defendant's Motion for Summary Judgment on Plaintiff's claim for breach of contract and **GRANTS** Defendant's Motion for Summary Judgment on Plaintiff's claim for breach of the duty of good faith and fair dealing and each of his statutory claims (Dkt. 50).

In addition, the Court **GRANTS** Defendant's Motion to Exclude Testimony of Plaintiff's Expert Matt B. Phelps (Dkt. 52).

SIGNED on April 6, 2017.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE