2017 WL 5592744 (C.A.8) (Appellate Brief)
United States Court of Appeals, Eighth Circuit.

William HATCHER, Appellant,
v.
MDOW INSURANCE COMPANY, Appellee.

No. 17-2410.
November 17, 2017.

On Appeal from the United States District Court, Eastern District of Arkansas, The Honorable Kristine G. Baker, Presiding

Brief of Appellee, MDOW Insurance Company

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*2 *SUMMARY OF THE CASE AND RESPONSE TO REQUEST FOR ORAL ARGUMENT*

Appellant mistakenly states in his Summary of the Case that the original 2011 policy was a "replacement cost" policy, and that the policy was changed in 2014 to become an "actual cash value" policy. In fact, all policies issued by MDOW Insurance Company to William Hatcher from 2011 forward were "actual cash value" policies.

If the Court believes that oral argument would be helpful, MDOW Insurance Company does not object to participating in oral argument.

*3 *CORPORATE DISCLOSURE STATEMENT*

MDOW Insurance Company, in accordance with 8th Cir. R. 26.1A, hereby states that it is a Texas corporation and is a wholly owned subsidiary of Columbia Lloyds Insurance Company. Columbia Lloyds Insurance Company is a privately held corporation.

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8 *STATEMENT OF THE CASE

The first policy issued to Appellant in 2011 was an actual cash value policy. The local agent who issued the policy, Carolyn Walker, submitted an Affidavit stating that the 2011 policy was an actual cash value policy, that she discussed the difference between replacement cost coverage and actual cash value coverage with Dottie Hatcher, Appellant's then-wife, and Mrs. Hatcher chose the actual cash value policy for cost reasons. (Aple App 54-55). [1] Ms. Walker testified that the policy renewed annually up until the present, and that every renewal policy was also an actual cash value policy. (Aple App 54). She further testified that to her knowledge, MDOW Insurance Company ("MDOW"), did not sell replacement cost policies, although the insurance agency for which she worked sold such policies issued by other insurance companies. (Aple App 54-55).

All of the policies issued by MDOW to Appellant were attached to the Affidavit of James Gerzetich, who testified that all of the policies were actual cash value policies. (Add. 8). Review of the actual policies show that the first policy, Aple App 56, included an actual cash value endorsement, Aple App 112, although ***9** the actual cash value endorsement, like several other endorsements, was not referenced on the declarations page. (Aple App 102). The same was true for the renewal policies issued in 2012 and 2013, Aple App 121, 184, although each of the policies included a form stating: "Endorsements and schedules may also be part of this policy. They are identified on the 'declarations' ". (Aple App 59, 126, 191).

John Todd, President of MDOW, explained in his Affidavit that prior to 2014, the only forms that were listed on the declarations pages of MDOW policies were optional endorsements, which were listed under a section of the declarations page titled "ADDITIONAL ENDORSEMENTS ATTACHED TO THE POLICY." (Aple App 641). Mr. Todd further explained that MDOW's actual cash value endorsement, HO 4815 (01/06), is a mandatory endorsement in Arkansas, not an optional endorsement, and therefore it was not considered an "additional endorsement." (Aple App 641).

However, beginning in 2014, the section concerning endorsements on the declarations page of MDOW policies was retitled "FORMS ATTACHED TO POLICY," and from 2014 forward, all forms and endorsements, whether mandatory or optional, were listed in the section "FORMS ATTACHED TO POLICY." (Aple App 641).

Therefore, the MDOW policy issued to Appellant in 2014, Aple App 247, included in its declarations page, Aple App 241, the retitled section "FORMS ***10** ATTACHED TO THE POLICY," in which section all attached forms were listed, including the actual cash value endorsement. The cover letter to Appellant for the 2014 policy, which was to be effective January 13, 2014 according to the declarations page, was sent on December 1, 2013. (Aple App 251). The letter advised

that two new mandatory endorsements had been added to the policy which limited or restricted certain coverages. (Aple App 251). The letter further stated:

Therefore, please review the enclosed package and referenced endorsements thoroughly, to ensure that the policy still meets your needs as an insured.

If you have any questions or concerns regarding your policy, please do not hesitate to contact your agent, whose contact information is listed on the enclosed Declarations Page. We want to be sure that you completely understand your policy and the coverages we provide.

Aple App 251.

The 2014 renewal package from MDOW to Appellant also enclosed an undated letter explaining that MDOW was offering a renewal policy to him. The undated letter stated that MDOW mails its policyholders renewal documents 45 days prior to the actual renewal date in an effort to provide the best possible service and to give policyholders such as Appellant time to speak to their insurance agent with any questions they might have. (Aple App 253). It is undisputed that Appellant renewed the policy for 2014.

In 2015, the same type of renewal policy was offered to Appellant. (Aple App 314). The declarations page for the 2015 policy reflected that an actual cash ***11** value endorsement was attached. (Aple App 316). A cover letter dated December 9, 2014, and very similar to the one for the 2014 policy dated December 1, 2013, was included in the renewal package. (Aple App 318). Also, an undated letter regarding the renewal offer, very similar to the undated letter included in the 2014 renewal package, was enclosed. (Aple App 320). It is undisputed that Appellant renewed the policy for 2015, and this policy was in effect at the time of the fire on July 14, 2015.

In his case in chief, Appellant was recalled to the witness stand as his own last witness. (Tr. Vol. 2, pp. 206-07). One of the first questions asked of Appellant by his counsel was how much he would depreciate the value of his home. Appellant answered, "No more than 10%," and at that point counsel for MDOW objected to the vagueness of the question and on the ground of the witness's competency to testify as to depreciation. (Tr. Vol. 2, p. 208). The Court stated that Appellant might be qualified, but that a basis had not yet been laid in his testimony. The Court instructed Appellant's counsel that if he could lay a foundation with Appellant, he could proceed to try to do that. (Tr. Vol. 2, p. 208). After further discussion at the bench, Appellant's counsel asked Appellant a series of questions about whether he had observed signs of deterioration in the cabinets, walls, insulation, refrigerator, other kitchen appliances, crown molding and wood paneling, to all of which Appellant answered that he had not. (Tr. Vol. 2, ***12** pp. 212-13). Appellant's counsel did not attempt to lay a foundation regarding Appellant's qualifications to calculate depreciation.

***13** *SUMMARY OF THE ARGUMENT*

There was no improper modification of the policy. It was originally issued as an actual cash value policy in 2011, and it remained an actual cash value policy on each annual renewal in 2012 through 2015. (Aple App 56). The only thing that changed during this time period was the format of the declarations page. The section of the declarations page dealing with endorsements was titled "ADDITIONAL ENDORSEMENTS ATTACHED TO THE POLICY" on the 2011 through 2013 policies, and during those years, mandatory endorsements such as the actual cash value endorsement were not listed on the declarations page. (Aple App 641). This section of the declarations page was retitled "FORMS ATTACHED TO POLICY" in 2014, and from 2014 forward, all forms and endorsements, whether mandatory of optional, were listed in the section. (Aple App 64). This included the mandatory actual cash value endorsement.

Each annual renewal policy was sent to Appellant approximately 45 days before the renewal date. (Aple App 251, 318). It is undisputed that Appellant renewed the policy in both 2014 and 2015.

The applicable Arkansas statute provides that an insurer may modify a personal lines property policy on renewal provided the insurer gives the insured an offer of renewal at least thirty days prior to the expiration of the policy's existing term. Ark. Code Ann. § 23-88-105. *See also* ***14** *Slaughter v. American Casualty Co.*, 37 F.3d 385, 387 (8th Cir. 1994) (insurer may refuse to renew except upon altered terms and conditions if proper steps are taken to make a new or altered contract with the insured).

The District Court did not err in sustaining MDOW's objection to testimony by Appellant regarding the amount by which his property had depreciated for purposes of determining the actual cash value of the loss, on the ground that no foundation was laid to establish that Appellant was qualified to testify to such an opinion. (Tr. Vol. 2, p. 221). The District Court advised Appellant's counsel that he could attempt to lay such a foundation, Tr. Vol. 2, pp. 208, 211, but counsel never attempted to do so. (Tr. Vol. 2, pp. 212-13).

Cases regarding an owner of property giving an opinion as to its value are not on point, because an opinion as to value is different from a calculation of the amount which should be depreciated in calculating a loss under an actual cash value insurance policy. Counsel for Appellant admitted to the District Court that he was asking Appellant a question different from the question of the value of his property. (Tr. Vol. 2, p. 211). Even a property owner's opinion as to value of his property is not admissible where the opinion has no relation to any fact in the record, and his figures are apparently plucked from thick air. *Arkansas State Highway Comm. v. Hammond*, 247 Ark. 683, 447 S.W.2d 664 (1969).

***15** A landowner's calculation of depreciation to his own property for purposes of insurance coverage is not admissible as lay opinion testimony. *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011). *See also* Fed. R. Evid. 701.

16** ***ARGUMENT

I. The Policy was Originally Issued as an Actual Cash Value Policy in 2011 and it Remained Such on all Renewals up until the Time of the Fire.

When Appellant filed his Complaint in this case, App. 10, he attached as an exhibit the policy of insurance from MDOW that was in effect at the time of the fire. (Aple App 1). The policy was issued in January 2015, and it included an actual cash value endorsement. In his Complaint, Appellant alleged that the policy was in full force and effect on July 14, 2015, the date of the fire. (App. 11). In its Answer to the Complaint, MDOW admitted that the policy was a true and correct copy of the policy in effect at the time of the fire. (App. 16). Early in the case, Appellant submitted his Initial Disclosures, and with the disclosures he produced another copy of the policy that had been attached to his Complaint. (Aple App 568, 571).

Prior to suit, MDOW had taken an examination under oath of Appellant. In the examination, he was asked: "[Y]ou know you had an actual cash value policy. Right?" Appellant answered, "Right, uh-huh." (Aple App 517, 535).

Prior to trial, Appellant moved for partial summary judgment, seeking to strike from the policy the actual cash value endorsement, alleging that the policy had been altered in an improper manner by MDOW. (App. 23). Appellant attached his Affidavit to the motion, stating that when he purchased insurance, he ***17** remembered being offered the policy of insurance attached to his Affidavit. (App. 28). The "policy" attached to the Affidavit was obviously incomplete, in that it did not include a declarations page or any endorsements whatsoever. (App. 28).

MDOW submitted a number of Affidavits relevant to the issue. One was from the local agent who issued the initial policy to Appellant in 2011. The agent, Carolyn Walker, stated that the 2011 policy initially issued was an actual cash value policy, that she discussed the difference between replacement cost coverage and actual cash value coverage with

Dottie Hatcher, Appellant's then-wife, and Mrs. Hatcher chose the ACV policy for cost reasons. (Aple App 54-55). Ms. Walker testified that the policy renewed annually every year up until the present, and that every renewal policy was also an actual cash value policy. (Aple App 54). Ms. Walker further testified that to her knowledge, MDOW did not sell replacement cost policies, although the insurance agency for which she worked sold such policies issued by other insurance companies. (Aple App 54-55).

A second Affidavit submitted by MDOW was that of James Gerzetich. (Add. 8). Attached to Mr. Gerzetich's Affidavit were all policies issued by MDOW to Appellant from 2011 forward. (Aple App 56). Each of the policies issued by MDOW to Appellant from 2011 forward included an actual cash value endorsement.

***18** In the policies issued 2011, 2012 and 2013, the actual cash value endorsement was not mentioned on the declarations pages. (Aple App 102, 121, 184).

MDOW also submitted the Affidavit of John Todd, President of MDOW. Mr. Todd explained in his Affidavit that prior to 2014, the only forms that were listed on the declarations pages of MDOW policies were optional endorsements, which were listed under a section of the declarations page "ADDITIONAL ENDORSEMENTS ATTACHED TO THE POLICY." (Aple App 641). Mr. Todd further explained that MDOW's actual cash value endorsement, HO4815 (01/06), is a mandatory endorsement in Arkansas, not an optional endorsement, and therefore it was not considered an "additional endorsement" to be listed in the space for "additional endorsements" on the declarations page. (Aple App 641).

However, beginning in 2014, the section concerning endorsements on the declarations page of MDOW policies was retitled "FORMS ATTACHED TO POLICY," and from 2014 forward, all forms and endorsements, whether mandatory or optional, were listed in the section "FORMS ATTACHED TO POLICY". (Aple App 641).

Therefore, the MDOW policy issued to Appellant in 2014, Aple App 247, included in its declarations page, Aple App 249, the retitled section "FORMS ATTACHED TO THE POLICY," in which section all attached forms were listed, ***19** including the actual cash value endorsement. The cover letter to Appellant sending the renewal package for the 2014 policy was sent approximately 45 days before the renewal date together with a copy of the policy and information regarding the required premium for the new policy. The cover letter advised Appellant that he should examine the policy thoroughly to ensure that it met his needs, and that he should contact his agent if he had any questions or concerns. (Aple App 251). It is undisputed that Appellant renewed the policy for 2014.

In 2015, the same type of renewal policy was offered to Appellant. (Aple App 314). The declarations page for the 2015 policy reflected that the actual cash value endorsement was attached. (Aple App 316). Again, the renewal package was sent approximately 45 days prior to the renewal date, and it included a cover letter advising Appellant he should examine the policy and all endorsements carefully and contact his agent if he had any questions or concerns. (Aple App 318). It is undisputed that Appellant renewed the policy for 2015, and this policy was in effect at the time of the fire on July 14, 2015.

The District Court entered an Opinion and Order on May 15, 2017, denying Appellant's motion for partial summary judgment. (Aple App 643). The District Court reviewed much of the evidence discussed above. (Aple App 657-59). The Court denied Appellant's motion for partial summary judgment, noting that Appellant, as plaintiff, bore the burden of proof on his claims at trial, and that in ***20** order to prevail on his motion for partial summary judgment, Appellant had to first affirmatively show that, on all the essential elements of his claim, no reasonable jury could find for MDOW. (Aple App 649).

The issue arose again in a pretrial conference held May 18, 2017. During the conference, the District Court noted that the policy at issue was the policy attached to Appellant's Complaint and produced in his Initial Disclosures, or in other

words, the policy in effect at the time of the fire, and therefore the Court was not inclined to allow Appellant to present evidence at trial regarding an alleged improper modification of the policy. (Hearing Tr. 5/18/17, pp. 8-17).

The issue arose again on the first day of trial, and counsel for the parties and the District Court discussed it at length prior to the court receiving any evidence. The District Court eventually issued its ruling that it would not allow any evidence regarding an alleged improper modification of the policy, noting again that the policy at issue was the 2015 policy attached to Appellant's Complaint and produced with his Initial Disclosures, and that Appellant had testified in his examination under oath that his policy was an actual cash value policy. Further, the Court cited the Affidavits of Carolyn Walker, James Gerzetich and John Todd for the proposition that the policy was an actual cash value policy from 2011 through the time of the fire in 2015. The Court noted that the 2011 policy, attached to the Affidavit of Mr. Gerzetich, included an actual cash value endorsement. The Court ***21** noted that although she was not convinced there had been any "change" in the policy, if there had been it occurred prior to the policy that became effective in January 2014, when Appellant was informed in advance of the renewal date, of changes in the policy, and of what the premium would be, and Appellant proceeded to renew the policy, thereby accepting its terms. The Court observed also that the same process occurred in the 2015 policy year, prior to the fire. (Tr. Vol. 1, pp. 25-30).

Arkansas follows the well-established rule that it is the responsibility of an insured to "educate himself concerning matters of insurance coverage." *Stokes v. Harrell*, 289 Ark. 179, 711 S.W.2d 755; *Continental Cas. Co. v. Didier*, 301 Ark. 159, 164, 783 S.W.2d 29, 31 (1990). Furthermore, the parol evidence rule prohibits introduction of extrinsic evidence, parol or otherwise, offered to vary the terms of a written agreement. *First Nat'l Bank v. Griffin*, 310 Ark. 164, 168-69, 832 S.W.2d 816, 818-19, (1992).

The District Court correctly found that the policy was an actual cash value policy from 2011 forward. No "change" or "modification" occurred in the policy with respect to its status as an actual cash value policy on its renewal in 2014, or on its renewal in 2015. The only difference between the policies issued in 2014 and 2015, and the three policies issued before the 2014 policy, was that the format of the declarations page was changed. Thus, as explained by John Todd in his ***22** Affidavit, while the declarations did not list mandatory endorsements prior to 2014, the declarations page for policies issued in 2014 and afterwards did reflect both mandatory and optional endorsements. The actual cash value endorsement was always a mandatory endorsement in Arkansas, and thus it was not listed as an "additional endorsement" on the declarations pages for the 2011, 2012 and 2013 policies.

Even if one assumes a "change" occurred on the renewal in 2014, the statute relied upon by Appellant, Ark. Code Ann. § 23-79-307, is not applicable. The statute only applies to insurance policies "subject to the provisions of this subchapter," which is titled "Minimum Standards - Commercial Property and Casualty Insurance Policies." Thus, the statute is only applicable to commercial lines policies, not personal lines policies such as the homeowners policy issued to Appellant. *See also* Ark. Code Ann. § 23-79-301.

Instead, the statute properly applicable to personal lines policies such as the homeowners policy issued to Appellant is Ark. Code Ann. § 23-88-105. This statute provides:
(a) Except for nonpayment of premium, the insurer shall give either a written notice of nonrenewal or an offer of renewal at least thirty (30) days prior to the expiration of the policy's existing term.

(b) The insurer shall send the insured a written notice and the insurance producer written or electronic notice of the offer of renewal under subdivision (a) of this section, indicating the new ***23** premium and providing a description of any change in deductible or policy provision in the renewal policy.

Thus, for a personal lines property policy such as the homeowners policy involved in this case, an insurer may make any change in any policy provision upon renewal, provided proper written notice is given to the insured 30 days prior to the

expiration of the existing term. As has been shown in this case, such notice was given with the renewal packages sent out by MDOW to Appellant for the 2014 and 2015 policies, although in neither policy was there a change from "no cash value endorsement" to "actual cash value endorsement added." This is so because the actual cash value endorsement was never "added," rather, it was a part of the policy from 2011 forward.

Furthermore, even if one assumes there was a "change" with the 2014 renewal, there was no "change" *during the policy term*, and therefore the case relied upon by Appellant, *Southern Farm Bureau Casualty Ins. Co. v. United States*, 395 F.2d 176, 180-81 (8th Cir. 1968), is not applicable. In the later case of *Slaughter v. American Casualty Co.*, 37 F.3d 385 (8th Cir. 1994), the court noted that in *Southern Farm Bureau*, it had made clear that its holding was limited to situations where an insurance company attempts to modify a policy during a policy period. The Court noted that in *Southern Farm Bureau*, it had stated:

> The insurance company clearly could cancel the policy upon proper notice and could if desired offer a different policy to the assured, who would be free to accept or reject the proffered policy; or *the company* ***24** *could refuse to renew except upon altered terms and conditions*. The company is not locked in for an extended period of time or *ad infinitum* so to speak in its contract obligations if proper steps are taken to make a new or altered contract with its assured.

Slaughter, 37 F.3d 385, 387 quoting *Southern Farm*, 395 F.2d at 181.

In other words, the Eighth Circuit clearly recognized that an insurance company may modify the terms of an insurance policy upon its renewal, so long as it gives notice to the insured and the insured has the opportunity to reject the offer to renew. Clearly, that occurred in this case.

In other words, under the controlling Arkansas statute and established Eighth Circuit precedent, an insurer is free to modify its policy's terms upon renewal, provided proper notice is given to the insured. In essence, the renewal policy, however modified, becomes a new policy which the insured may either accept or reject.

For this reason, the model jury instruction relied upon by Appellant, AMI (Civil) 2425 is simply inapplicable. In any event, the Note on Use following AMI (Civil) 2425 states: "This instruction should be followed by AMI 2402." That instruction simply provides that to establish a contract, a party has the burden of proving that one party made an offer to enter into a contract that was accepted by the second party, that there was an exchange of consideration, and that at the time the contract was made, its essential terms were reasonably certain and agreed to by ***25** both parties. There can be no doubt that these propositions were met to prove the making of a valid renewal contract every year when the policy renewed.

II. The Trial Court Correctly Prohibited Mr. Hatcher's Opinion Testimony regarding how much his Property had Depreciated Absent a Proper Foundation for such Testimony.

In his case in chief, Appellant was recalled to the witness stand as his own last witness. (Tr. Vol. 2, pp. 206-07). One of the first questions asked of Appellant by his counsel was how much he would depreciate the value of his home. Appellant answered, "No more than 10%," and at that point counsel for MDOW objected to the vagueness of the question, and on the ground of the witness's competency to testify as to depreciation. (Tr. Vol. 2, p. 208). The District Court stated that Appellant might be qualified, but that basis had not yet been laid in his testimony. The District Court instructed Appellant's counsel that if he could lay a foundation with Appellant, he could proceed to try to do that. (Tr. Vol. 2, p. 208). Appellant's counsel then proceeded to argue that under Arkansas law the owner of property is qualified to give an opinion as to its value. The court stated to Appellant's counsel that what he was asking Appellant was slightly different than the value of his property, and Appellant's counsel agreed. (Tr. Vol. 2, p. 211). The District Court then ruled that the

way the question was phrased was objectionable, and she would sustain the objection, but advised Appellant's counsel that he could ***26** make another run at it with a different question in an effort to get where he was trying to go. (Tr. Vol. 2, p. 211).

Appellant's counsel then asked Appellant a series of questions about whether he had observed signs of deterioration in the cabinets, walls, insulation, refrigerator, other kitchen appliances, crown molding and wood paneling, to all of which Appellant answered that he had not. (Tr. Vol. 2, pp. 212-13). Appellant's counsel did not attempt to lay a foundation regarding Appellant's qualifications to calculate depreciation under an actual cash value policy.

The policy definition of "actual cash value" is "the cost to repair or replace property using materials of like kind and quality, to the extent practical, less a deduction for depreciation, however caused." Clearly, Appellant never attempted to qualify as competent to provide testimony regarding the amount that should be deducted for depreciation in determining actual cash value as defined in the policy.

It is true that Arkansas cases have held that an owner of personal property is qualified to give an opinion as to its value. E.g., *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984); *Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980). However, an owner's opinion as to "value" is different from a calculation of the amount which should be depreciated in calculating a loss under an actual cash value policy, as the District Court pointed out in its colloquy with counsel.

***27** Similarly, an owner of real property may testify concerning the value of the real property. In *Jonesboro, L.C. & E.R. Co. v. Ashabranner*, 117 Ark. 317, 174 S.W. 548 (1915), in a tort lawsuit for alleged injury to real property caused by a tortfeasor, the Court stated that an owner of property who was familiar with it could state her opinion of the extent of the injury to the land "and the depreciation in the value thereof." Once again, however, depreciation caused by a tortfeasor's injury to one's real property is a different question than the calculation of the amount by which a loss should be depreciated in order to calculate the actual cash value of the loss. Furthermore, the Arkansas Supreme Court has also stated that even the owner of real property cannot testify to its value before and after a taking by the State, where the landowner's opinion has no relation to any fact in the record, and his figures are apparently plucked from thin air. *Arkansas State Highway Comm. v. Hammond*, 247 Ark. 683, 447 S.W.2d 664 (1969).

A similar rule was pronounced by the Missouri Court of Appeals in *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780 (Mo. App. 1992), where the court stated:

> The general rule is a property owner, while not an expert, is competent to testify to the reasonable market value of his own land. However, when an owner's opinion is based on improper elements or foundation, his opinion loses its probative value. Or, where the basis for a test as to the reliability of the testimony is not supported by a statement of facts on which it is based, or the basis of fact does not appear to be sufficient, the testimony should be rejected. Judicial liberality in permitting an owner to testify as to his opinion of the amount of the loss does not allow an unrestricted right to engage in guesswork.

***28** *Id.* at 783.

Moreover, the ruling of the District Court was correct under the Federal Rules of Evidence. Appellant was obviously not qualified to give expert testimony on the issue of depreciation under Fed. R. Evid. 702. Further, Fed. R. Evid. 701, dealing with opinion testimony by lay witnesses, clearly limits such an opinion to one that is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Id.*

An example of the type of opinion testimony by a lay witness that is prohibited is a landowner's calculation of depreciation to his own property, for purposes of insurance coverage. In *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011), the owner of real property damaged by a fire proposed to testify that the property had an actual cash value of $4.489 million. He based his valuation on a $7.145 million replacement cost estimate prepared by another party, and a 40% depreciation factor. To calculate the 40% depreciation rate, the owner "divided the amount of money it would cost to rehabilitate each unit before the fire to like new condition, $20,000, by the amount it would cost to completely replace each unit," which he stated was $50,000. *Id.* at 1211. The Court ***29** found that the testimony was inadmissible as lay opinion under Fed. R. Evid. 701. The Court found that the witness's valuation testimony was expert opinion testimony based on technical or specialized knowledge, and was therefore inadmissible under Rule 701(c). *Id.* at 1214.

The Court explained:
Unlike taking an average, calculating depreciation requires more than applying basic mathematics. Technical judgment is required in choosing among different types of depreciation. *See E.I. DuPont De Nemours & Co., Inc. v. Robin Hood Shifting & Fleeting Serv., Inc.*, 899 F.2d 377, 381-82 (5th Cir. 1990), (explaining 'straight-line' and 'progressive' depreciation); *see also Dickler v. CIGNA Prop. And Cas. Co.*, 957 F.2d 1088, 1099 (3d Cir. 1992) (explaining that "a dispute exists over whether the term depreciation implies only physical depreciation or includes a broader concept including obsolescence and economic and functional depreciation.' (quotation omitted))....Accurately accounting for the interaction between depreciation and damage requires professional experience and is beyond the scope of lay opinion testimony.

Id. at 1214-15.

The insured in *James River* argued that the proposed depreciation testimony was admissible under a Colorado common law rule that allows landowners to testify as to the value of their property. The Tenth Circuit analyzed this issue under the framework set forth in the concurring opinion of Justice Stevens in *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 176 L. Ed.2d 311 (2010). The Court noted that Justice Stevens explained that, in a diversity case, "when a situation is covered by a federal rule...the Rules Enabling Act...controls." ***30** *Id.* at 1217, citing *Shady Grove* at 1448. The Tenth Circuit then noted that part (c) of Fed. R. Evid. 701 was added to Rule 701 in the 2000 Amendments to the Federal Rules of Evidence, and the 2000 Amendments were adopted under the Rules Enabling Act. *Id.* at 1218. The Tenth Circuit then analyzed the issue according to a two-step framework set forth by Justice Stevens for resolving an alleged conflict between an Enabling Act federal rule and state law. Under this framework, the first step is determining whether the federal rule and state law conflict. *Id.* at 1218. The Tenth Circuit found that Fed. R. Evid. 701 and Colo. R. Evid. 701 were identical, so there was no conflict.

In this case, there is an apparent conflict between Fed. R. Evid. 701 and Ark. R. Evid. 701, because Ark. R. Evid. 701 does not include a provision similar to paragraph (c) of Fed. R. Evid. 701. However, even under Ark. R. Evid. 701, a lay witness's testimony must be rationally based on the perception of the witness, and helpful to a clear understanding of the testimony or the determination of a fact in issue. As has been shown, a landowner's ability to testify as to the value of his property is not unrestricted, and a witness's estimate of value should be stricken entirely when the witness is unable to give a fair and reasonable basis for his conclusions. *Arkansas State Highway Comm. v. Hammond*, 247 Ark. 683, 447 S.W.2d 664 (1969). Thus, there is arguably no conflict between Fed. R. Evid. 701 ***31** and Ark. R. Evid. 701, as the latter has been applied by the Arkansas Supreme Court.

Where there is no actual conflict between the federal rule and state law, the Court need not proceed to the second step of the framework set forth by Justice Stevens in *Shady Grove*. However, should the Court find a conflict because Fed. R. Evid. 701 and Ark. R. Evid. 701 are not identical, then it should consider the second step in the framework, which is to determine whether application of the federal rule represents a valid exercise of the rulemaking authority under the

Rules Enabling Act, which requires that the federal rules "not abridge, enlarge or modify *any* substantive right." *Shady Grove*, 130 S. Ct. at 1451, quoting the Rules Enabling Act, 28 U.S.C. § 2072(b). In this case, application of Fed. R. Evid. 701 to preclude the proposed depreciation testimony of Appellant would not abridge, enlarge or modify any substantive right of Appellant. Again, even the testimony of a landowner as to the value of his land is not allowed in Arkansas absent a reasonable basis in the evidence before the court. In the evidence before the District Court in this case, there was no reasonable basis upon which Appellant could testify as to the amount of depreciation that should be applied to determine the actual cash value of the loss.

This Court cited *James River* with approval in *Jain v. CVS Pharmacy, Inc.*, 779 F.3d 753 (8th Cir. 2015). In *Jain*, the plaintiff, a pharmacist, brought a ***32** wrongful discharge case against her employer, and, in response to a motion for summary judgment filed by the defendant, the plaintiff submitted a declaration executed by her husband in which he purported to make an arithmetic comparison of various scores which showed that the pharmacy at which plaintiff worked had improved in every performance metric after plaintiff became the pharmacist-in-charge. This Court held that the District Court did not err in striking the declaration of plaintiff's husband, stating:

The declaration at issue here does not satisfy the rule's requirements. Although Mr. Jain states that he is "married to Jain" and that Jain had asked him to "review all the KPM reports, Triple-S reports, and Execution Scorecards produced by CVS in this case," his declaration does not state that he had firsthand knowledge or personal experience analyzing CVS performance data. *Cf. Warner Bros. Entm't, Inc. v. X One X Prods.*, 644 F.3d 584, 591-92 (8th Cir. 2011). Nor does it establish that he had sufficient industry experience to synthesize hundreds of pages of metric scores in order to compare the performance of other pharmacies to the performance of Jain's pharmacy before and after she became [pharmacist-in-charge]. Because these complex calculations required more than basic mathematics, Mr. Jain's lack of personal knowledge and industry experience made him unqualified to offer lay testimony on the subject. *See U.S. Salt, Inc. [v. Broken Arrow, Inc.*, 563 F.3d 687, 690 (8th Cir. 2009)]; *see James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214-15 (10th Cir. 2011).

Jain, 779 F.3d at 758.

As Appellant's counsel admitted to the District Court in this case, he was not simply asking Appellant to testify regarding his opinion as to the value of his property. Instead, he was asking Appellant to essentially give expert testimony ***33** regarding the amount of depreciation to be applied in order to arrive at the actual cash value of his damaged property, an expert opinion which Appellant was not qualified to give.

CONCLUSION

The District Court did not err in ruling that there was no improper modification of the insurance policy by the supposed "addition" of an actual cash value endorsement. The actual cash value endorsement was on all policies from 2011 forward, and upon each annual renewal, Appellant was provided a copy of the policy and given an opportunity to examine it before deciding whether or not to renew.

The District Court also did not err in ruling that Appellant could not testify as to the amount to be applied for depreciation of his property in order to calculate the actual cash value of the loss. The Court indicated to Appellant that he could attempt to lay a foundation for the admission of such testimony, and the Appellant did not attempt to establish that foundation. The Appellant attempted to give expert testimony which he was not qualified to give.

The judgment of the District Court should be affirmed.

***34** */s/ Beverly A. Rowlett*

Beverly A. Rowlett

Footnotes

1 References to documents in the Addendum are designated Add. ___, references to documents in Appellant's Appendix are designated App ___, and references to documents in Appellee's Appendix are designated Aple App ___.