No. 20-35837
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERRELL STEINHAUER and JOANNE STEINHAUER,
Plaintiffs-Appellants,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon, No. 3:18-cv-01416-JR

APPELLEE'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Liberty Mutual Insurance Company is a company organized under the laws of the State of Massachusetts and for federal court jurisdiction/diversity of citizenship disclosure purposes, the principal place of business is 175 Berkeley Street, Boston, Massachusetts. The corporate structure of defendant Liberty Mutual Insurance Company is as follows:

- Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc.
- LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc.
- Liberty Mutual Group Inc. owns 100% of the stock of Liberty Mutual Insurance Company.

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I. INTRODUCTION

Appellants, Sherrell and Joanne Steinhauer (hereafter referred to as "Plaintiffs"), brought this action against Appellee, Liberty Mutual Insurance Company (hereafter referred to as "Defendant"), alleging claims for breach of a homeowners' insurance contract, declaratory relief, and breach of the contractual duty of good faith and fair dealing related to a dispute that arose following a house fire on September 3, 2017.

II. STATEMENT OF JURISDICTION

A. District court jurisdiction.

Plaintiffs filed this action in the Circuit Court for the State of Oregon for the County of Multnomah on June 25, 2018. The lawsuit was removed to the district court pursuant to 28 U.S.C. § 1446, and the district court had jurisdiction pursuant to 28 U.S.C. § 1332 (diversity of citizenship).

B. Appellate jurisdiction.

Following consideration of cross motions for summary judgment, the district court entered a final judgment in favor of Defendant and against Plaintiffs. Plaintiffs appealed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

C. Timeliness of the appeal.

Plaintiffs' notice of appeal was timely filed.

III. STATEMENT OF THE ISSUES

- Where Plaintiffs failed to establish the existence of a contractual relationship with Defendant, did the district court properly grant summary judgment dismissing Plaintiffs' claims against Defendant?
- Whether the district court correctly held that the doctrines of waiver and estoppel were inapplicable to create contractual duties Defendant allegedly owed to Plaintiffs?
- Where Plaintiffs disregarded notice that they had sued the wrong company for breach of contract in Defendant's answer and subsequent repeated reminders, whether the district court acted within its discretion when it denied Plaintiffs' motion to amend the case caption after Plaintiffs failed to timely move to join the proper defendant and did not show diligence or good cause required by Fed. R. Civ. P. 16?
- Where Plaintiffs failed to establish a contractual relationship with Defendant, whether the district court properly concluded that Plaintiffs' motions based on alleged loss measurement and the appraisal provisions of the insurance contract were moot?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

On September 3, 2017, a fire partially damaged Plaintiffs' house in Fairview, Oregon. At the time of the fire, Plaintiffs had a homeowners insurance policy. The declarations pages of the insurance policy identified the insurance policy as the "Liberty®GuardDeluxe

Homeowner Policy," policy number "H37-261-181750-70 7 4" and listed the forms and endorsements that were a part of the insurance policy. 3-ER-378.

The insuring agreement in the Liberty®GuardDeluxe Homeowner Policy stated, "We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy." 3-ER-379. The term "We" was defined, and it "'refer[red] to the Company providing this insurance." *Id.* Immediately above the signature lines in the declarations pages, the policy states that

> LibertyGuard®Deluxe Homeowners Policy
> Declarations provided and underwritten by
> Liberty Insurance Corporation (a stock insurance company), Boston, MA.

3-ER-378.

Plaintiffs served a summons and a copy of their complaint naming "Liberty Mutual Insurance Company" as the defendant and addressing all of their allegations against Defendant. The Complaint included claims for:

- breach of contract,
- declaratory relief, and
- breach of the duty of good faith and fair dealing.

The lawsuit was removed to the district court (3-ER-408), and the district court issued a Discovery and Pretrial Scheduling Order requiring, in part, that any motions to join "all claims, remedies, and parties" within 120 days of the Order. SER-6. That deadline in the Pretrial Scheduling Order remained unchanged during the subsequent proceedings. 3-ER-401-03; SER-15.

Within a week of the removal to the district court, Defendant filed and served an Answer and Affirmative Defenses on Plaintiffs. SER-8-14. The Answer denied the allegations directed at Defendant, and alleged that

> "a separate entity, Liberty Insurance Corporation, issued homeowners policy no. H37-261-181750-70 to plaintiffs"
>
> plaintiffs had "reported the loss to Liberty Insurance Corporation in a timely manner"
>
> Liberty Insurance Corporation issued a check to plaintiffs . . . based on a preliminary inspection of the damage"
>
> "there [was] an actual and justiciable controversy between plaintiffs and Liberty Insurance Corporation
>
> Defendant had "no contractual relationship with plaintiffs and is improperly named as a defendant," and

> a counterclaim asking for judicial declarations regarding "the Policy issued by Liberty Insurance Corporation."

SER-9 at ¶5; SER-11 at ¶16; SER-12 at ¶ 27; SER-13 at ¶¶ 30-32.

Notwithstanding the information regarding the proper party raised in Defendant's answer and affirmative defenses, Plaintiffs proceeded to file a motion for summary judgment against Defendant based on the loss measurement and appraisal provisions of the Policy. 3-ER-409.[1] As those issues are revisited in Plaintiff's appeal, Defendant will summarize the facts in the record here, and then return to the district court's dispositive rulings concerning Plaintiffs' failure to sue the proper party.

Prior to filing the lawsuit, Plaintiffs had been paid the Actual Cash Value ("ACV") of the fire damage to the house in accordance with the Policy terms (3-ER-388 at ¶ 3.a.(4)), and told in a February 5, 2018 letter from Liberty Insurance Corporation that "[a]fter repairs are completed and incurred for more than the actual cash value" they would be eligible to recover an amount as depreciation up to the Policy limits.

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[1] The motion included a declaration attaching excerpts of the insurance policy that identified Liberty Insurance Corporation as the entity that issued the policy and provided the insurance. 3-ER-378-79.

But if they elected to demolish and replace parts of the house that were not damaged in the fire, the Policy would not respond to the additional expense and extra time that might be required to build a new house. SER-30-31, 35-38.

When Plaintiffs sought payment before the repairs of the fire damage were completed (SER-39, 42-44, 45), they were reminded that the amounts claimed under the replacement cost provisions of the Policy would be addressed when repairs were completed (SER-39, 40, 41, 45), and "upon receipt of proper documentation" (SER-46) they would "be eligible to recover up to the full amount of recoverable depreciation, full policy limits, or [the] amount actually spent, *whichever is less*." 3-ER-370 (emphasis supplied); SER-47-49.

There were issues and disputes regarding the amounts Plaintiffs claimed and coverage for those amounts. For example, Plaintiffs decided to demolish and replace the entire foundation where an inspection had concluded that the foundation was not damaged in the fire. SER-39-40, 42-45. Instead of providing invoices for repairs of fire damage actually performed, Plaintiffs provided bids and estimates, including contractor bids that Plaintiffs had not accepted (SER-52-53, 56-64, 65), invoices for

demolition and replacement of undamaged parts of the property, costs to change and enlarge parts of the house (SER-104), and other betterments (*e.g.*, the purchase and installation of an awning where no awning existed at the time of the fire), fencing, concrete work, landscaping, and replacing the driveway. SER-54-55, 67-68, 73-77.

Plaintiffs' public adjuster insisted that records to establish the amounts actually spent on covered losses were irrelevant—claiming that amounts above the ACV payment were due and owing upon Plaintiffs' "agreement with" the estimate prepared shortly after the fire and before construction. 3-ER-354-55.

When Plaintiffs decided to demolish and rebuild the entire house and not merely portions damaged in the fire, Plaintiffs claimed that they were entitled to payment of Loss of Use benefits until the limits were exhausted or, the time required to replace by building an entirely new house "until the house [was] actually repaired." 3-ER-355-56; 3-ER-370. Unless an insured permanently relocates (not applicable here), the Policy limited Loss of Use benefits to an insured's necessary increases in living expenses for "the shortest time to repair or replace" loss related repairs for covered damage. 3-ER-370; 3-ER-392.

Shortly after Defendant filed its answer, Plaintiffs filed a motion for partial summary judgment based on an argument that the requirements of loss settlement and loss payment provisions of the Policy had waived or been rendered superfluous by Plaintiffs' agreement to accept a pre-construction estimate of the cost to repair the fire-damage to the house.

The Policy provided, in part:

> 3. **Loss Settlement**. Covered property losses are settled as follows:
>
> . . . . .
>
> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> (a) The limit of liability under this policy that applies to the buildings;

> (b) The replacement cost of that part of the building damaged for like construction and use on the premises; or
>
> (c) The necessary amount actually spent to repair or replace the damaged building.

3-ER-388.

> 3. **Loss Settlement**. Covered property losses are settled as follows:
>
> . . . . .
>
> (4) . . . Once actual repair or replacement is complete, we will settle the loss according to the provisions of **b.(1)** and **b.(2)** above.

Id.

As discussed below, the district court adopted the Findings and Recommendation to deny this first motion for partial summary judgment after finding there were unresolved questions of fact, the Policy language was not ambiguous, and Plaintiffs' interpretation of the Policy provisions was unreasonable. 1-ER-32-33; 1-ER-43-47.

Plaintiffs then filed a second motion for partial summary judgment against Defendant, where, as noted in the Findings and Recommendation, Plaintiffs "seem[ed] to simply reject the Court's previous rulings and insist[ed] on their position." 1-ER-25. Plaintiffs

also renewed a prior, unsuccessful motion to compel appraisal as part of this second motion for partial summary judgment. 1-ER-16.

Defendant filed its opposition to those issues, and a separate cross-motion based on evidence offered in support of affirmative defenses that Plaintiffs had failed to comply with their contractual duties to provide information sought regarding the loss measurement and loss payment provisions of the Policy and the fact raised in its answer that Defendant was not a party to the contract. The evidence included reminders to Plaintiffs of that fact on April 5, 2019, and again on February 19, 2020. 1-ER-21-24.

Plaintiffs' attorney had dismissed notice of the true facts, and replied to each of the prior warnings regarding the proper party as "smack[ing] of desperation," "a fraud," "a shell game," and "an attempt to defraud creditors." Plaintiffs' attorney made threats to file complaints with the bar association and with the state insurance commissioner, and to file a new lawsuit "joining the individual corporate officers." SER 90; SER 91-92; SER-95. The cross-motion did prompt Plaintiffs' attempt to respond with a belated motion to amend the case caption. 3-ER-414.

Upon completion of the written briefing, the magistrate judge made Findings and a Recommendation to deny Plaintiffs' motions (1-ER-22), to grant in part Defendant's cross-motion, and a recommendation to dismiss of Plaintiffs' lawsuit. 1-ER-9-28. After considering Plaintiffs' objections, the district court adopted the magistrate judge's Findings and Recommendation, and dismissed Plaintiffs' lawsuit with prejudice. 1-ER-3-8.

Judgment was entered in favor of Defendant and against Plaintiffs. 1-ER-2.

V. SUMMARY OF ARGUMENTS

The district court did not err when it held that Plaintiffs failed to establish the existence of a contract with Defendant. Defendant did not waive and should not be held to be estopped to assert this defense.

The district court acted within its discretion when it denied Plaintiffs' motion to amend where Plaintiffs had not complied with the requirements of Fed. R. Civ. P. 16.

The district court held Plaintiffs' interpretation of the loss measurement provisions of the insurance policy was unreasonable. The district court also found questions of fact regarding covered and

uncovered amounts spent and whether documents were provided to support the amounts Plaintiffs claimed. Plaintiffs failed to carry their burden as the movants on the first motion for partial summary judgment and Plaintiffs' motion to compel appraisal. Where those questions of fact remained when Plaintiffs re-asserted their motions, the district court correctly held those issues were moot where Plaintiffs failed to establish that Defendant entered into a contractual relationship with Plaintiffs.

VI. ARGUMENT

A. Response to Plaintiffs' Issue 1: Liberty Insurance Corporation is identified on the face of the policy as the company that issued the policy and provided the insurance, not Defendant.

The district court judge adopted the magistrate judge's Findings and Recommendation based, in part, on the language of the insuring agreement that "We will provide the insurance described in this policy, that "we" is defined as "'the Company providing this insurance,'" and the policy declarations which state that the insurance was "'provided and underwritten by Liberty Insurance Corporation.'" ER 7, n. 1.

Plaintiffs make no claim that the words used in the Declarations pages that identified that Liberty Insurance Corporation provided the

insurance policy were ambiguous. Appellants are taking issue with the district court's application of the clear and unambiguous language in the contract and insisting that a different company, Defendant, provided the insurance when, in fact, it had not.

The district court adopted the finding that "[n]owhere in the insurance agreement does it identify Defendant was a party to the contract with any legal obligation to provide insurance in the event of the loss alleged in the complaint." 1-ER-5-6. While Plaintiffs argue the district court overlooked evidence that Defendant was the proper defendant, their opening brief does not direct this Court's attention to any part of the insurance policy.

Plaintiffs' first assignment of error refers to the district court's decision as a forfeiture. The only mention of forfeiture in Plaintiffs' discussion of their first assignment of error is a reference to Plaintiffs' argument that they "moved to amend the caption to add [Liberty Insurance Corporation] as a party . . . to avoid a forfeiture." Appellants' Op. Br. at 25.

"When there is a forfeiture of coverage being effected, there is insurance coverage for the loss in the first place, but acts of the insured

nullify coverage, such as the filing of a false statement of loss . . . ." *ABCD . . . Vision, Inc. v. Fireman's Fund Ins. Companies*, 304 Or. 301, 306, 744 P.2d 998 (1987). Judgment was entered against Plaintiffs where they failed to establish an essential threshold fact, that is, the existence of a contract between Plaintiffs and Defendant. Dismissal of Plaintiffs' lawsuit was not based upon a forfeiture.

B. Response to Plaintiffs' Issue 2: The doctrines of waiver and estoppel cannot be applied to create an insurance contract with Defendant.

In this assignment, Plaintiffs contend that the district court erred and should have applied Oregon law to find post-loss conduct estopped or waived Defendant's defenses. Plaintiffs do not address the disclosure that Liberty Insurance Corporation is the contracting party identified in the insurance policy's insuring clause.

Instead, they direct attention to assertions that Defendant's conduct after the fire was inconsistent with the affirmative defense that Defendant did not enter into a contract with Plaintiffs. "Far from waiving" the defense that the policy was provided by Liberty Insurance Corporation, the district court found that Defendant "transparently and

consistently raised it throughout the course of" the proceedings." 1-ER-6.[2]

Plaintiffs chose to disregard the true facts. "Although Liberty Mutual [Insurance Company's] answer said that Liberty Insurance Corporation was the company that issued the policy," Plaintiffs' attorney simply claimed that he "saw no evidence of this." Plaintiffs' attorney did not undertake any discovery, as he viewed the identity of the parties to the contract as a "hypertechnical defense." There is no evidence from which the trier of fact could find that (1) a false representation was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon by the plaintiff and (5) that plaintiff acted upon it. *Donahoe v. Eugene Planing Mill*, 252 Or. 543, 545, 450 P.2d 762 (1969).

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[2] *See, e.g.,* 2-ER-181 (correspondence from the claims adjuster reserving the rights of Liberty Insurance Corporation); 2-ER-192 (same); 2-ER-185 (copy of a payment towards the building and dwelling loss identifying the "u/w co" [underwriting company] as "Liberty Insurance Corporation"); SER-100-101 (quoting the loss settlement provisions from the Liberty Insurance Corporation policy to Appellants' attorney); SER-89, 91 (reminding Appellants' attorney that the policy was provided by Liberty Insurance Corporation, not Liberty Mutual Insurance Company).

Plaintiffs argue that sometime after the answer and affirmative defenses were filed, their attorney had a conversation with Defendant's attorney. During that conversation, Plaintiffs' attorney says he was told "I've read the file. We will pay the RCV."

> "The 'We' was taken to mean Liberty Mutual Insurance Company, . . . [and Plaintiffs] viewed Mr. Bennett's statement as a tender or unequivocal promise the insurer would pay the rest of the claim, notwithstanding the assertion of the affirmative defense."

Appellants' Op. Br. at 13.

Plaintiffs argue that the district court erred when it did not find a verbal waiver or that Defendant was estopped to assert:

> 1. the proper defendant,
>
> 2. the Policy's requirement of completion of repairs before payment would be due,
>
> 3. the requirement that the Plaintiffs support the amounts claimed with proof of the actual payments made, and
>
> 4. the amount to be paid would be determined by a pre-construction estimate, and not proof that the amounts claimed were covered as like kind and use construction and not betterments.

As noted, "notwithstanding the answer, [Plaintiffs' attorney] viewed his conversations [with Defendant's attorney] to be a waiver of

any hyper technical defenses." 2-ER-197. When Plaintiffs argue that "Liberty Mutual conceded how much was due" (Appellants' Op. Br. at 31), they do not address the record they made when presenting the district court with their own attorney's recitation of the context of the alleged two-sentence remark. *See* 2-ER-139 (referring to the conversation as the attorney's "recommendation . . . rejected by Liberty") and 2-ER-141-42 (describing attempts to "get a handle on" how the preconstruction estimate was calculated and Plaintiffs' attorney's unsuccessful efforts to negotiate a settlement).

Next, Plaintiffs do not address Oregon's longstanding, statutory requirement that fire insurance policies provide, in part, that "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein and expressed in writing hereto." Or. Rev. Stat. § 742.222 (2020).[3]

The doctrines of waiver and estoppel cannot be employed to create

[3] *Moore v. Mutual of Enumclaw Ins. Co.*, 317 Or. 235, 242-43, 855 P.2d 626 (1993) (cited by Plaintiffs; "in cases involving fire insurance policies, the requirement of a written waiver imposed by Or. Rev. Stat. § 742.222 supersedes the common law rule recognizing oral waiver and waiver by conduct.").

a contract or contractual duties. In *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1258 (1978), the insurer denied coverage on the basis of an exclusion in its policy with the insured. At trial, the insurance company then argued that there was no coverage under the insuring clause of the policy. The trial court held that the insurer was estopped to assert a defense based on the insuring clause, and a judgment was entered for the insured.

In the appeal that followed, the Oregon Supreme Court recognized that there was a distinction where an insurer has failed to timely assert an exclusion applicable to an otherwise covered loss and where the threshold issue is whether the policy provides coverage in the first instance. Estoppel may apply in the first instance, it does not in the second.

The Oregon Supreme Court held that the insurer in *Wyoming Sawmills* had not waived, nor was it estopped from asserting the defense that the loss was not covered by the insuring clause, in part, upon the ground that "waiver or estoppel cannot be the basis for creating an original grant of coverage where no such contract previously existed." 282 Or. at 410.

The district court adopted the Findings and Recommendation holding, in part, "'[b]ecause [Plaintiffs] have failed to establish that they have a contract with [Defendant] they cannot prevail . . . for any breach of that agreement." 1-ER-22. Again, Plaintiffs mischaracterize this holding as a forfeiture. *See ABCD . . . Vision, Inc.,* 304 Or. at 306.

Plaintiffs do not argue or offer evidence that Defendant engaged in any conduct to conceal the identity of the insurer that issued the policy, or that Defendant resisted discovery or took steps to dissuade Plaintiffs from reading the policy or to prevent Plaintiffs from understanding that Liberty Insurance Corporation issued the insurance policy. 1-ER-22 n. 4.

Next, to make out a case of waiver, there must be a clear, unequivocal, and decisive act of the party showing such a purpose. *Johnson v. Swaim*, 343 Or. 423, 431-34, 172 P.3d 645 (2007). When Plaintiffs filed their lawsuit stating their allegation that Defendant issued the policy and breached duties under the policy, Defendant promptly and unequivocally denied that it was a party to the contract and identified Liberty Insurance Corporation as the party to the contract with Plaintiffs.

Plaintiffs were not misled. Plaintiffs' attorney acknowledged that he understood that the pleading "said that Liberty Insurance Corporation was the company that issued the policy" upon receipt of Defendant's Answer and Affirmative Defense. 2-ER-197.

First, while as a general proposition a party to a contract may waive its provisions, Defendant was not a party to the contract with Plaintiffs.

Second, as noted above, insurance contracts are not subject to verbal waivers. Or. Rev. Stat. § 742.222 (2020).

Third, the doctrine of waiver does not apply in circumstances where the Plaintiffs are seeking to expand the coverage of an insurance policy to add to the rights not provided by the policy—here, attempting to use the doctrine of waiver to create a claim for breach of contract and breach of the implied duty of good faith and fair dealing against a non-party. *See Day-Towne v. Progressive Halcyon Ins. Co.*, 214 Or. App. 372, 382, 164 P.3d 1205, *rev. den.*, 346 Or. 65, 204 P.3d 141 (1994) (rejecting assertion of waiver to expand coverage to allow the plaintiff/insured "additional rights it would not otherwise have under the insurance contract as written.")

Fourth, while a waiver is the intentional relinquishment of a known right, Oregon law expressly provides "none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of or estoppel to assert any provision of a policy or of any defense of the insurer thereunder: . . . (3) Investigating any loss or claim under the policy or engaging in negotiations looking toward a possible settlement of any such loss or claim." Or. Rev. Stat. § 742.056 (2020).

C. Response to Plaintiffs' Issue No. 3: The district court acted within its discretion when it denied Plaintiffs' untimely motion to amend the case caption and join new parties.

Plaintiffs' third assignment of error asserts that the district court erred as a matter of law when it denied "leave to amend" where, according to the Plaintiffs, the motion "would have simply changed the caption." Appellants' Op. Br. at 33. Plaintiffs' opening brief does not mention Fed. R. Civ. P. 16, the basis of the district court's decision to deny Plaintiffs' belated motion to amend the caption of the lawsuit.

There is no dispute that the district court entered a scheduling order following removal and at the inception of the case where "the parties were ordered to '[j]oin all claims, remedies, and parties' by November 26, 2018." 1-ER- 6. Plaintiffs did not seek to amend that

deadline. They did not file a motion attempting to join Liberty Insurance Corporation until months after the scheduling order deadline had passed.

"[T]rial courts in both federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases." *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). "Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines." *Id.*

Where the district court issued a pretrial scheduling order establishing a timetable to join additional parties or to amend the pleadings, the pretrial order controlled the subsequent course of the action and the district court applied the correct standard when it held that the pretrial order could be modified only upon a showing of good cause.

"The district court is given broad discretion in supervising the pretrial phase of litigation." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985). The district court's "decisions regarding the

preclusive effect of a pretrial order on issues of law and fact at trial will not be disturbed unless they evidence a clear abuse of discretion." *Id.*

"'[This] standard is deferential, and properly so, since the district court needs the authority to manage the cases before it efficiently and effectively.'" *Davidson v. O'Reilly Auto Enterprises, LLC*, 968 F.3d 955, 963 (9th Cir. 2020) (quoting *Wong*, 410 F.3d at 1060). "[D]isregarding a district court's "decision to honor the terms of its binding scheduling order" can "undermine the court's ability to control its docket." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992).

In the *de novo* review of Plaintiffs' subsequent objections to the magistrate judge's Findings and Recommendation, the district court noted that "[Plaintiffs] fail[ed] to account for Rule 16(b)." 1-ER-6. Instead of addressing the Rule and attempting to show the district court overlooked evidence of compliance with the standards required by Rule 16, Plaintiffs urge this Court, as they did to the district court, to simply apply the standards of Rule 15(a). Appellants' Op. Br. at 33.

District courts act within their discretion by enforcing filing deadlines; as they have "the power to establish reasonable times for the filing of documents" and to evaluate the legitimacy of an excuse for

failing to file on time. *Grandson v. Univ. of Minn.*, 272 F.3d 568, 574 (8th Cir. 2001) (citation omitted). Where case management rulings are reviewed for abuse of discretion, the district court's decision on this issue should be affirmed "unless the decision was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1264 (9th Cir. 2009) (*en banc*).

Plaintiffs named Defendant as the sole defendant in their lawsuit. In the answer and affirmative defenses served on August 3, 2018, Plaintiffs were immediately alerted that they had sued the wrong entity, and that Liberty Insurance Corporation, "a 'separate entity'" from Defendant, had issued the policy. 1-ER-4; 1-ER-7.

The district court concurred with the Findings & Recommendation that "even if, at the time they filed their complaint, they were justifiably confused as to whom to sue, 'the subsequent answer alerting [Plaintiffs] to the correct issuer of the policy negates that confusion,'"[4]

[4] Defendant and Liberty Insurance Corporation are separate corporations within the Liberty Mutual Group. SER-109 at ¶¶ 3-4. The district court noted that Plaintiffs also offered evidence acknowledging that these were separate corporations in the form of exhibits attached to their attorney's declaration. 2-ER-173; 2-ER-176.

and "certainly does not justify waiting more than a year after the filing deadline" to join new defendants. 1-ER-5, 1-ER-19.

As the district court recognized, this failure to join the proper party was a "legally cognizable defense" to Plaintiffs' claims. Yet Plaintiffs failed to move to amend their complaint. Plaintiffs initially dismissed the defense that a different company was the party to the insurance contract as "a hyper-technical defense," and later, as "a dumb position" and "grade school nonsense." 1-ER-7.

When presented with evidence that "Liberty Mutual Insurance" is a tradename used to refer to insurance companies within the Liberty Mutual Group of companies,[5] not an insurance company, Plaintiffs asserted identification of the contracting party was merely a game and that "any of the companies within the Liberty Mutual Group [could] be sued interchangeably," all while continuing to insist (as they do in this appeal) that Defendant was the proper defendant. 1-ER-19; Appellants' Op. Br. at 22 (characterizing the district court's finding that Plaintiffs

[5] "Liberty Mutual Insurance" is a trade name, not a legal entity, and it does not issue insurance contracts. "Liberty Mutual Group" is a reference to a group of insurance companies, and not an entity that issues insurance contracts. SER-109 at ¶ 5.

entered into the insurance contract with Liberty Insurance Corporation as based upon a "fiction.")

Plaintiffs finally filed their motion to amend the case caption after being served with a cross-motion for summary judgment based, in part, on the evidence that Defendant was not a party to the insurance contract. 1-ER-18. Yet Plaintiffs "fail[ed] to seek any amendment to the body of the complaint asserting claims directly against Liberty Insurance Corporation." 1-ER-18-19.

Fed. R. Civ. P. 16 provides, in relevant part, "A schedule shall not be modified except by leave of . . . [the district court] upon a showing of good cause." Only after good cause is shown, then the party must demonstrate that amendment is proper under Fed. R. Civ. P. 15. The central inquiry under Fed. R. Civ. P. 16(b)(4) is whether the requesting party was diligent in seeking the amendment. "Failing to heed clear and repeated signals that not all necessary parties had been named in the complaint does not constitute diligence." *Johnson v. Mammoth Recreations,* 975 F.2d at 609 (if the party seeking amendment "was not diligent, the inquiry should end").

Plaintiffs do not identify any facts in their opening brief that the district court purportedly overlooked during its review of the course of proceedings. Before the lawsuit was filed and thereafter, Plaintiffs disregarded a wide array of evidence that Defendant was not a party to the insurance contract. The district court concluded that Plaintiffs had "repeatedly failed to heed clear and repeated signals that they had sued the wrong party," and they did not "investigate or attempt to fix the issue." 1-ER-7.

The district court applied the proper procedural rule and the well-established standard when it denied Plaintiffs' motion to amend the case caption. "If a party seeks to amend after the deadline specified in the scheduling order, the party must satisfy Rule 16's 'good cause' standard." 1-ER-6 (quoting *Johnson v. Mammoth Recreations,* 975 F.2d at 609 and Fed. R. Civ. P. 16(b)(4)); *see also*, *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013).

Plaintiffs failed to comply with the Rule 16 order entered in the district court. They failed to show diligence or good cause to allow the proposed joinder of new defendants some 15 months after the time to

join parties had expired. The district court did not abuse its discretion when it denied Plaintiffs' motion to amend the case caption.

D. Response to Plaintiffs' Issue No. 4: Where the district court found questions of fact, it did not err when denying Plaintiffs' motion for summary judgment based on the loss measurement policy provisions.

Plaintiffs argue that the district court erred when it denied Plaintiffs' motions for partial summary judgment based upon the insurance policy's "Loss Payment" provision. The Findings and Recommendations addressed Plaintiffs' arguments regarding the policy language in their first motion for partial summary judgment and found the policy language was not ambiguous, Plaintiffs' interpretation of the contract was "not reasonable," and concluded that there were issues of fact concerning what costs were covered. 1-ER-41-46.

In its *de novo* review of the magistrate judge's Findings and Recommendation to deny Plaintiffs' first motion for summary judgment, the district court agreed that the loss payment provisions of the policy were not ambiguous, and found that the numbers in the pre-construction estimate described in the February 5, 2018 letter (SER-35-38) were estimates of the cost to replace, not evidence of amounts

actually expended to replace or repair the partially fire-damaged house with like construction and use.

The district court concluded there were questions of fact whether the numbers in the estimate were binding, adopted the Findings and Recommendation and denied Plaintiffs' summary judgment motion. 1-ER-32-33.

The disputed issues affecting coverage and measurement amounts continued throughout the litigation. When Plaintiffs renewed their motion for summary judgment, the magistrate judge reviewed the evidence that Plaintiffs had provided copies of:

- proposals and estimates, including bids that had not been accepted;
- estimates where there were no means to tie the estimates back to work actually done to repair fire damage or to payments actually made;
- payments for property not damaged by the fire (such as the cost to install a new foundation, a new lawn, a new fence, a new driveway);
- costs to install additional features that were not part of the house prior to the fire (*i.e.*, betterments); and
- change orders, including adding square footage to enlarge a bedroom.

SER 51-77, SER 104.

When served with an interrogatory requiring Plaintiffs to disclose differences in the scope, time and expense actually paid to repair the fire damage from the scope, time and expense of the pre-construction estimate that was the basis of the Complaint for breach of contract claims, they responded:

> We don't really know each difference. We do know however that the complete replacement cost was less than the repair estimates provided by Liberty, Pro-Build & NW Claims.[6]

SER-105.

The magistrate judge noted that in the prior rulings denying Plaintiffs' motions for partial summary judgment and the motion to compel appraisal, the court found "issues of fact exist[ed]," and required "submission of proper documentation" of the amount actually spent on covered repairs. The motion to compel appraisal could be "revisited following resolution of disputed issues of fact surrounding coverage issues." 1-ER-23. However, when Plaintiffs renewed these motions, the

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[6] "Pro-Build" is a reference to a contractor's bid that Plaintiffs rejected. SER-52, 56-61. The "repair estimate[ ] provided by Liberty" is a reference to the February 5, 2018 pre-construction estimate (SER-35-38), and "NW Claims" is a reference to an undisclosed estimate from Plaintiffs' public adjuster.

magistrate judge found that "the motions revisit[ed] issues previously addressed," and Plaintiffs "seem to simply reject the Court's previous ruling and insist on their position." 1-ER-25.

The Findings and Recommendation reiterated that "the actual costs were necessary" to apply the loss measurement provisions of the insurance policy, but Plaintiffs had "generally provided copies of estimates instead of the actual final costs of the repairs to the fire damaged portions of the house." 1-ER-23. "Because the actual costs are necessary [to determine] the amount owed under the policy, [Plaintiffs had] a duty to provide that information . . . [and] may have breached this contract requirement to the extent that such records exist." 1-ER-24.

After its *de novo* review, the district court adopted the Findings and Recommendation to grant summary judgment in favor of Defendant and to deny Plaintiffs' cross motions as discussed above. The district court determined that it need not reach the other issues raised in the cross-motions. 1-ER-5. If the judgment is affirmed on Plaintiffs' first three issues, that is, this Court agrees

- the district court did not err when it held that the existence of a contract had not been established,

- Defendant did not waive and should not be held to be estopped to assert this defense, and
- the district court acted within its discretion when it denied Plaintiffs' motion to amend where Plaintiffs had not complied with the requirements of Fed. R. Civ. P. 16

Plaintiffs' challenges based upon rulings denying their motions concerning the contractual measure of loss and appraisal are moot.

If this court considers Plaintiffs' other issues based on their interpretation of the loss settlement provisions of the Policy, it should reject Plaintiffs' argument that the district court "overlooked that those numbers were **agreed to** by the insureds, making this not just an estimate, but an **agreement** on the amount of loss." Appellants' Op. Br. at 38-39 (emphasis in original). The court did not overlook this contention. The district court found that this was a disputed issue of fact (1-ER-32-33), and remained as such when Plaintiffs' renewed their motion for partial summary judgment. 1-ER-10; 1-ER-7.

As noted in the Findings and Recommendation:

> [Plaintiffs] continue to maintain the amount they paid out of pocket has no bearing on the insurer's duty to pay withheld depreciation. The Court has previously determined that [Plaintiffs'] position in this respect is unreasonable and . . . declines to

> find otherwise after reviewing [Plaintiffs'] renewed motion for partial summary judgment.

1-ER-24, n. 6.

Plaintiffs fail to acknowledge the difference between the policy language ("We will pay *no more than* the actual cash value of the damage until actual repair or replacement is complete"), and their contention that this means that "[u]nder the policy the insurer is *required to pay* [an estimate of the amount to replace] when the repair or replacement is complete." Appellants' Op. Br. at 40.

The replacement cost language of the Loss Settlement provision states that the insurance company will pay "no more than the least of" the limit of liability, the replacement cost of that part of the building damaged for like construction and use, and the necessary amount actually spent to repair or replace the damaged building. SER-21.

The Oregon Supreme Court found these replacement cost provisions unambiguous. *See Higgins v. Ins. Co. of N. America*, 256 Or. 151, 166, 469 P.2d 766 (1970) (holding these provisions were "sufficiently clear, and that the intent to limit the company's liability to amounts actually expended is apparent from a careful reading of the replacement cost provision.")

The Loss Payment provision reads, as follows:

> **10. Loss Payment.** We will adjust all losses with you. . . . Loss will be payable 60 days after we receive your proof of loss and:
>
> a. Reach an agreement with you;
>
> b. There is an entry of a final judgment; or
>
> c. There is a filing of an appraisal award with us.

SER-22.

Plaintiffs are asking this Court to find that the insurance contract gives the insureds the right to unilaterally set aside express conditions of the replacement cost coverage by simply "agreeing" to the insurance company's pre-construction estimate while disputing the other requirements of replacement cost coverage.

The district court adopted the Findings and Recommendation that Plaintiffs' interpretation of the policy language was "not reasonable." 1-ER-44. There was no offer to pay being made if Plaintiffs would "agree" to the figures in the estimate. Appellants' Op. Br. at 43-44.

The district court agreed with the Findings and Recommendation to deny Plaintiffs' first motion for summary judgment where triable issues of fact remained. 1-ER-33. The Findings and Recommendation to

deny the second motion for summary judgment reiterated that Plaintiffs had failed to show the absence of questions of fact on coverage and measurement issues. 1-ER-25. The district court applied the appropriate legal standard when it adopted the Findings and Recommendation to deny Plaintiffs' second motion for summary judgment. 1-ER-7.

E. Response to Plaintiffs' Issue No. 5: Where there were unresolved coverage issues and questions of fact, the district court was correct when it denied Plaintiffs' motion to compel appraisal.

The district court addressed Plaintiffs' arguments regarding appraisal in two motions to compel appraisal. In the first instance, the magistrate judge considered evidence, found that there were unresolved "disputed issues of fact surrounding coverage issues," and denied the motion with leave to renew "following resolution of [those] disputed issues of fact." 1-ER-23, 29.

Next, Plaintiffs simply inserted a second motion to compel appraisal as part of their renewed motion for partial summary judgment. 1-ER-10. In recommending denial of Plaintiffs' renewed motions, the magistrate judge concluded that the disputed coverage

issues remained, and Plaintiffs had failed to provide documents to establish the amount of the covered loss. 1-ER-24.

The Findings and Recommendation also rejected Plaintiffs' contention that their demand for appraisal "waives a jury trial" on the issue of the measurement of a loss and issues of coverage. The Oregon Supreme Court has held that treating the award as binding on the non-demanding party would violate that party's constitutional right to a jury trial. *See Molodyh v. Truck Ins. Exch.*, 304 Or. 290, 298, 744 P.2d 992 (1987). Appraisal is not a waiver of coverage issues, and an appraisal award is not binding on the non-demanding party. 1-ER-25-26.

Here, the Findings and Recommendation recommended that Plaintiffs' claims be dismissed because Plaintiffs "failed to establish that they have a contract with defendant they cannot prevail against defendant for any breach of that agreement." 1-ER-22. The district court adopted the Findings and Recommendation. 1-ER-7.

VII. CONCLUSION

Defendant respectfully requests that this Court affirm the district court's entry of Judgment.

DATED: March 31, 2021.

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STATEMENT OF RELATED CASES

Appellee is not aware of any related cases pending in the United States Court of Appeals for the Ninth Circuit.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I certify that the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6730 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Century for text and 14-point Arial for headings.

March 31, 2021.

s/ R. Daniel Lindahl
R. Daniel Lindahl

CERTIFICATE OF SERVICE

I certify that on March 31, 2021, I electronically filed the foregoing Appellee's Brief with the clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

s/ R. Daniel Lindahl
R. Daniel Lindahl