UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

JAMES MCPHERSON and
VICKI MCPHERSON,

Plaintiffs,

v. **Case No. 5:20cv318-TKW-MJF**

LEXINGTON INSURANCE COMPANY,

Defendant.
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ORDER GRANTING SUMMARY JUDGMENT

This case is before the Court based on Defendant's motion for summary judgment (Doc. 64). Upon due consideration of the motion, Plaintiff's amended response in opposition (Doc. 73), Defendant's reply (Doc. 74), and the evidence submitted by the parties (attachments to Docs. 63, 65 through 71, and 74), the Court finds that the motion is due to be granted.

Facts

Plaintiffs' house in Panama City Beach, Florida, was insured under a homeowners' insurance policy issued by Defendant. The house suffered damage from Hurricane Michael in October 2018.

Plaintiffs made a timely claim under the policy and Defendant determined that a covered loss occurred. Defendant paid Plaintiffs a total of $457,000 for hurricane damage, including more than $25,000 for damage to windows and doors.

Plaintiffs claim that they are owed additional insurance proceeds for windows and doors that suffered hurricane damage, but they do not identify which specific windows and doors allegedly suffered that damage.

Plaintiffs initially took the position that all the windows and doors needed to be replaced even if they had not been damaged by the hurricane so they would all "match," but they have since abandoned that position.[1] *See* Doc. 73 at 2 (¶3).

Defendant's experts opined that Plaintiffs' windows and doors do not require replacement due to damage from Hurricane Michael and that the water intrusion and interior damage that was observed in and around some of the windows was caused by design and construction defects and not the hurricane.

Plaintiffs did not present any conflicting expert opinions, but rather they attempt to establish causation through lay testimony of Plaintiff Vicki McPherson and a handyman who performed work on the house before the hurricane.[2] The

[1] Plaintiffs also initially sought payment under the "ordinance and law" provision of the policy, but they have since abandoned that position as well. *See* Doc. 73 at 2 (¶4).

[2] Plaintiffs also rely on a statement by Defendant's field adjuster that "[s]everal of the windows and doors showed their seals broke due to the wind force," Doc. 65-5 at 2, and the fact that Defendant paid for damage to some of the windows and doors. This evidence merely corroborates the undisputed fact that some of Plaintiffs' windows and doors suffered hurricane

handyman testified that he did not recall Plaintiffs complaining about "leaky windows" before the hurricane, and Mrs. McPherson testified that she "believe[d]" that "the majority" of the windows and "all exterior doors" suffered hurricane damage because she "[h]ad no issues with [her] windows and doors prior to Hurricane Michael" and she "know[s] what [the] windows looked like before Hurricane Michael, and [she] know[s] what they look like now."

Plaintiffs also did not present any expert testimony on damages, but they did disclose two repair estimates during discovery—one for almost $720,000 (from LJB Restoration Services) and the other for more than $802,000 (from CMR Construction and Roofing). Both estimates are replacement cost value (RCV) estimates, not actual cost value (ACV) estimates, and both estimates are for replacing all the windows and doors in the house. Neither estimate is supported by an expert's report or other admissible evidence showing which of the windows and doors listed in the estimate actually suffered hurricane damage.[3]

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damage, but it does not contradict the opinions of Defendant's experts that the damage observed to other windows and doors was not attributable to the hurricane.

[3] The LJB estimate was purportedly based on testing that showed that some of the windows suffered hurricane damage, *see* Doc. 63-9 at 38-40, but the individual who did that testing (Chase Mixon) never prepared a report and was allegedly unable to do so due to an injury—although his circumstances apparently changed after Plaintiffs' "replacement" causation expert was stricken, *see* Doc. 62 at 4-5. The CMR estimate simply provided the cost of replacing all the windows and did not purport to determine whether the windows were damaged by the hurricane. *See* Doc. 74-1 at 82 ("Q. Did CMR perform any testing of the windows to determine what needed to be replaced? A. No. We are not a cause and origin expert, nor would we get involved with that. That would be left to far smarter people than a contractor.").

Procedural History

In October 2020, Plaintiffs filed suit against Defendant in state court. The complaint (Doc. 1-1) alleged that Defendant failed to pay Plaintiffs the full amount they were owed under the insurance policy for the damages caused by Hurricane Michael and sought a declaratory judgment[4] to that effect as well as damages for breach of the insurance policy. Defendant removed the case to this Court based on diversity jurisdiction and filed an answer (Doc. 6)[5] denying the allegations in the complaint and raising various affirmative defenses, including defenses asserting that the damages claimed by Plaintiffs were excluded from coverage because they were caused by defective design or construction.

The parties engaged in an extended period of discovery, which included numerous discovery disputes that required judicial resolution. *See* Docs. 35. 37, 45, 48, 49, 54, 62. The discovery disputes culminated in orders striking Plaintiffs' expert witnesses based on Plaintiffs' failure to comply with their disclosure obligations under Fed. R. Civ. P. 26(a)(2). *See* Docs. 54, 62.

Defendant thereafter filed its motion for summary judgment. The motion is fully briefed and is ripe for a ruling. No hearing is necessary.

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[4] The Court dismissed the declaratory judgment count as duplicative. *See* Doc. 9.

[5] Defendant subsequently filed an amended answer (Doc. 21) raising an additional affirmative defense, but that defense has no bearing on the issues framed by Defendant's motion for summary judgment.

Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is "material" if it would change the outcome of the litigation, and a dispute about a material fact is "genuine" if the record evidence could lead a reasonable jury to find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), and where (as here) the nonmoving party bears the burden of proof on an issue at trial, the moving party may meet its initial burden by simply "showing … that there is an absence of evidence to support the nonmoving party's case," *id.* at 325 (internal quotation omitted). Once the moving party meets its burden, the non-movant must go beyond the pleadings and identify evidence of record showing a genuine factual dispute for trial. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (footnote omitted).

When reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Pennington v. City of*

Huntsville, 261 F.3d 1262, 1265 (11th Cir. 2001). The Court's role at the summary judgment stage is not to weigh the evidence, but rather to "conclude whether [the evidence] is so one-sided that the result of any trial is inevitable." *Turner v. Phillips*, 2022 WL 458238, at *4 (11th Cir. Feb. 15, 2022).

Analysis

Plaintiff's insurance policy provides coverage for "direct physical loss" to the insured property, *see* Doc. 63-2 at 26, but it excludes coverage for damage caused by latent defects or faulty design or construction, *id.* at 27, 30.

It is undisputed that some of Plaintiffs' windows and doors were damaged by Hurricane Michael and that Defendant fully paid Plaintiffs for the windows and doors that it determined to have suffered hurricane damage. Plaintiffs contend that they are entitled to additional payments under the policy because other windows and doors also suffered hurricane damage. Plaintiffs have the burden of proof on this claim.

Expert testimony is generally required to establish the cause and scope of damage in a case like this. *See Porben v. Atain Specialty Ins. Co.*, 546 F. Supp. 3d 1325, 1330 (S.D. Fla. 2021) ("In insurance coverage disputes such as this, it is well-settled that expert evidence is generally necessary to establish the cause and scope of damage."); *cf. Morales v. Citizens Prop. Ins. Corp.*, 2022 WL 790294 (Fla. 3d DCA Mar. 16, 2022) (reversing summary judgment in favor of insurer because the

evidence presented by the insured's "expert" contractor created a factual dispute regarding the cause of the damage to the insured property); *Fredrick v. Citizens Prop. Ins. Corp.*, 314 So.3d 539 (Fla. 3d DCA 2020) (reversing summary judgment in favor of insured because the inspection report and deposition testimony of the insured's general contractor—an expert—established a factual dispute regarding the cause of the damage to the insured's property).

Here, Plaintiffs failed to present any evidence from which a jury could find that Defendant did not pay all that Plaintiff was due under the policy for hurricane damage to their windows and doors. Significantly, Plaintiffs presented no expert testimony refuting the opinion of Defendant's expert that the "windows and doors at [Plaintiffs'] property do not require replacement due to any damage from Hurricane Michael." Doc. 63-4 at 2 (¶8.a.); *see also id.* at 7; Doc. 63-5 at 2, 4; Doc. 63-6 at 13-17, 94.

The Court recognizes that causation can be established by lay testimony in some cases. *See, e.g., Greater Hall Temple Church of God v. S. Mut. Church Ins. Co.*, 820 F. App'x 915, 921-22 (11th Cir. 2020) (finding that observations by the insured and other lay witnesses about the condition of the insured property and surrounding areas after a hurricane provided enough circumstantial evidence for a jury to infer that the damage to the insured property's roof was caused by a windstorm); *Ortega v. Citizens Prop. Ins. Corp.*, 257 So.3d 1171, 1173 (Fla. 3d DCA

2018) (finding that lay testimony of insured's son that he observed a tree limb sticking out of the insured property's roof on the day of a storm was sufficient to create a factual dispute as to whether the water damage inside home was caused by a covered peril). However, this is not one of those cases because as Defendant argues in its reply, the causation issue in this case—i.e., "whether Hurricane Michael caused specific damage to any additional windows and doors than what [Defendant] paid for, or whether a design defect allowed for water intrusion during Hurricane Michael"—is beyond the purview of lay witnesses. *See* Doc. 74 at 12. Indeed, the lay testimony of Mrs. McPherson establishes (at most) that water intrusion was first observed in and around some windows and doors after the hurricane, but that testimony is not probative of whether the water intrusion was caused by the hurricane rather than design and construction defects. Likewise, the handyman's testimony is not probative of the cause and extent of the damage to Plaintiffs' windows and doors because he has no personal knowledge of the post-hurricane condition of the windows since he has not been to Plaintiffs' house since the hurricane. *See* Doc. 66-1 at 21, 28.

Moreover, even if a jury could infer causation from the lay testimony relied on by Plaintiffs, there is no evidence from which a jury could determine the extent of Plaintiffs' damages. Plaintiffs have not presented any evidence as to which specific windows and doors were damaged by the hurricane beyond those already

paid for by Defendant, nor did they present any evidence as to the extent of the damage to those windows and doors. Without such evidence, there would be no basis for the jury to find that Plaintiffs have not received what they are due under the insurance policy.

The Court did not overlook Plaintiffs' argument that they can use the LJB and CMR estimates to establish the amount of damages, but the Court finds this argument unpersuasive for two reasons. First, both estimates are RCV estimates for replacing all windows and doors, not ACV estimates for repairing or replacing only those windows and doors that allegedly suffered hurricane damage.[6] Second, as the magistrate judge explained when Plaintiffs attempted to designate a damage expert as a "fact witness" to circumvent the expert disclosure deadline, testimony about the amount required to repair or replace Plaintiffs' windows and doors is expert testimony since it requires knowledge as a specialist in the field of building construction and repairs. *See* Doc. 54 at 6-7 (citing cases).[7]

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[6] The Court did not overlook Plaintiffs' argument that this issue is not necessarily dispositive, *see* Doc. 73 at 27-33 (relying primarily on *St. Michaels Anglican Cath. Church of Panama City Fla. Inc. v. Church Mut. Ins. Co.*, 2021 WL 6882431 (N.D. Fla. Nov. 24, 2021), and *Marquez v. Nat'l Fire & Marine Ins. Co.*, 551 F. Supp. 3d 1313 (S.D. Fla. 2021)), but as Defendant points out in its reply (Doc. 74 at 6-9), there are other problems with the estimates that Plaintiffs cannot overcome.

[7] This ruling—which Plaintiffs conceded was correct, *see* Doc. 56 at 10—undercuts the argument in their response (Doc. 73 at 22-23) that representatives of LJB and CMR can testify about the repair estimates because such testimony is "based on the damages they perceived" and "would not be based on scientific or other specialized knowledge."

Conclusion

In sum, based on the unrebutted expert testimony that any damage to the windows and doors that Defendant has not already paid for was attributable design and construction defects, not Hurricane Michael, the Court finds that Defendant is entitled to judgment as a matter of law on Plaintiffs' breach of contract claim seeking additional insurance proceeds. Accordingly, it is **ORDERED** that:

1. Defendant's motion for summary judgment (Doc. 64) is **GRANTED**.
2. The Clerk shall enter judgment in favor of Defendant and close the case file.

DONE and ORDERED this 6th day of July, 2022.

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE