IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CURT ADKISSON,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. 6:23-cv-00146**
	§	
SAFECO INSURANCE COMPANY OF INDIANA,	§	
	§	
Defendant,	§	

DEFENDANT SAFECO INSURANCE COMPANY OF INDIANA'S MOTION FOR SUMMARY JUDGMENT

Defendant Safeco Insurance Company of Indiana ("Safeco" or "Defendant"), files its Motion for Summary Judgment as to each of Plaintiff Curt Adkisson's ("Plaintiff") claims, and is support thereof respectfully shows the Court as follows:

I.
CASE OVERVIEW

Plaintiff has sued Defendant for breach of contract and bad faith related to the handling of his claim for freeze related damage to real property he owned in Longview, Texas. However, Plaintiff does not satisfy a condition precedent to coverage under his Safeco homeowner's insurance policy because he was not residing at the insured property. Alternatively, the policy excludes coverage for Plaintiff's claimed freeze damage because Plaintiff failed to take reasonable care to maintain heat at the property and/or failed to shut off the water supply and drain all systems and appliances of water, all of which was required by the applicable policy. Accordingly, Safeco is entitled to summary judgment on each of Plaintiff's claims.

II.
STATEMENT OF ISSUES

A. Under Texas law, an insured seeking to recover damages under a homeowner's insurance policy has the burden to establish coverage. Accordingly, Plaintiff must, as a threshold matter, prove that he resided at the Property which is a condition precedent to coverage. Has the Plaintiff presented viable, admissible evidence to confirm that he resided at the Property pursuant to the terms and conditions of the Policy?

B. Alternatively, the Policy excludes coverage for freeze damage. In Texas, the burden to prove a policy exclusion is on Defendant. If Defendant is able to do this, then the burden shifts back to Plaintiff to show that the claim was within an exception to the exclusion. Has Defendant proved that Plaintiff's loss was excluded, and if so, can Plaintiff proved that his claim falls within an exception to the freeze damage exclusion?

C. Plaintiff's claims for bad faith arise from Defendant's alleged failure to pay for Plaintiff's insurance claim. To the extent the Court finds that Defendant did not breach the insurance policy, can Plaintiff maintain a claim for statutory or common law bad faith against Defendant?

III.
SUMMARY JUDGMENT EVIDENCE

In support of this motion Defendant attaches the following summary judgment evidence filed herewith and incorporated by reference as if fully set forth herein:

Exhibit A: Affidavit of Lisa Seutter;

Exhibit A-1: Plaintiff's Homeowner Policy;

Exhibit A-2: Notes from Plaintiff's 2019 Theft claim bearing number 041675122;

Exhibit A-3: Notes from the claim at issue;

Exhibit A-4: Photographs provided by Plaintiff's contractor Maverick Construction ("Maverick") taken March 6, 2021;

Exhibit A-5: Photographs taken by L. Hollon dated March 16, 2021 on behalf of Safeco;

Exhibit A-6: Electric bills produced by Plaintiff;

Exhibit A-7: Water bills produced by Plaintiff; and

Exhibit A-8: Safeco coverage position letter dated March 24, 2021.

Exhibit B: Affidavit of Mark Tillman;

Exhibit B-1: Plaintiff's demand letter dated February 16, 2023;

Exhibit B-2: Plaintiff's response to Defendant's discovery requests dated July 31, 2023;

Exhibit B-3: Plaintiff's Responses to Defendant's Second Set of Discovery dated January 12, 2024;

Exhibit B-4: Plaintiff's Amended Responses to Defendant's First Set of Discovery Requests dated March 15, 2024 and interrogatory verification;

Exhibit B-5: Plaintiff's Responses to Defendant's Third Set of Requests for Production dated May 20, 2024;

Exhibit B-6: Plaintiff's production labeled ADKISSON 000041-000050, 0000054-0000056, 000065-000085, 000090-000094, 000117-000122, 000123-000126, 000129-000130, 000132-000137, 000162-000163 and 000164-000178;

Exhibit B-7: Defendant's production labeled SAFECO 000408-000417;

Exhibit B-8: Affidavit and documents produced by Southwestern Electric Power Company;

Exhibit B-9: Affidavit and documents produced by Gum Springs Water;

Exhibit B-10: Plaintiff Curt Adkisson's deposition transcript excerpts;

Exhibit B-11: Larry Hollon's deposition transcript excerpts;

Exhibit B-12: Warranty Deed dated December 2, 2016 with Michael Glen Adkisson as grantor and Curtis Vince Adkisson as grantee;

Exhibit B-13: Special Warranty Deed with Vendor's Lien dated May 27, 2020 with Riverside Homebuilders, Ltd. as grantor and Curtis V. Adkisson as grantee;

Exhibit B-14: Warranty Deed with Vendor's Lien dated July 19, 2022 with Curtis Vince Adkisson as grantor and Abby Nicole Adkisson and John Phillips as grantees;

Exhibit B-15: Warranty Deed with Vendor's Lien dated August 31, 2023 with Abby Nicole Adkisson and John Phillips as grantors and Heather Lowe, Matthew Lowe and Carrie Lowe as grantees;

Exhibit B-16: Release of Lien dated September 18, 2023 with the borrowers as Abby Adkisson and John Phillips releasing their lien on the Property; and

Exhibit B-17: Copy of a listing for the sale of the Property.

IV.
UNDISPUTED FACTS

A. THE POLICY

Defendant Safeco issued Homeowner Policy No. OY7845363 (the "Policy") to Plaintiff Curt Adkisson ("Plaintiff").[1] The Policy was effective from October 11, 2020 through October 11, 2021 and, subject to its terms, conditions, endorsements, and exclusions, covered residential property located at 3280 W. Cerliano Drive, Longview, Texas 75605-6425 (the "Property").[2] The Policy lists the Property as Plaintiff's "residence premises" and provides the following regarding Dwelling Coverage:

SECTION I – PROPERTY COVERAGES

BUILDING PROPERTY WE COVER

COVERAGE A — DWELLING

We cover:

1. the dwelling on the residence premises shown in the Declarations used principally as a private residence, including structures attached to the dwelling other than fences, driveways or walkways;
2. attached carpeting, built-in appliances; and
3. materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises.[3]

Under "Policy Definitions" the Policy provides:

[1] *See* **Exhibit A-1**.
[2] *Id*.
[3] *Id*.

17. "***Residence premises***" means:
    a. the one, two, three or four family dwelling, used principally as a private residence;
    b. other structures and grounds; or
    c. that part of any other building;

    where you reside and which is shown in the Declarations.

    Residence premises does not include the residence premises of others on the insured location who are not relatives under age 21 and in your care.[4]

Under "Section I – Conditions" the Policy provides:

13. **Vacancy.** If the insured moves from the dwelling and a substantial part of the personal property is removed from the dwelling, the dwelling will be considered vacant. Coverage that applies under Coverage A — Dwelling will be suspended effective 60 days after the dwelling becomes vacant. The coverage will remain suspended during such vacancy.[5]

The Policy also contains the following coverage provision:

SECTION I – PERILS INSURED AGAINST

PROPERTY LOSSES WE DO NOT COVER

We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of the cause of loss or any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

1. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system, or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing, while the dwelling is vacant, unoccupied or being constructed, unless you have used reasonable care to:
    a. maintain heat in the building; or
    b. shut off the water supply and drain the system and appliances of water;[6]

[4] *Id.* (highlight and underline added).
[5] *See* **Exhibit A-1**.
[6] *Id.*

B. THE PROPERTY AND PLAINTIFF'S MOVE

Plaintiff and his brother acquired the Property in 2016 from their father.[7] Plaintiff then obtained his brother's portion of the Property later that year.[8] In 2018 or 2019, Plaintiff began renting and residing at 5617 Grenada Drive, Arlington, Texas (the "Arlington Residence") as it was closer to his work (Plaintiff works for Cooks Children's Health Care System in Fort Worth, Texas.)[9] Plaintiff has acknowledged moving furniture from the Property to his Arlington Residence.[10] In December of 2019, Plaintiff reported a theft claim with Defendant and advised that while he was away at his rental property for *a few months* the theft occurred.[11] In September of that year, his neighbors advised him that someone was "taking his stuff."[12] Plaintiff advised that his cousin was supposed to be watching the Property, but was not.[13] However, he did not inspect the loss until Christmas Eve, which prompted him to make the claim.[14]

On May 27, 2020, Plaintiff purchased, moved to, and furnished 8001 Canyon Ridge Drive, Godley Texas 76044 (the "Godley Residence") as he no longer wanted to rent and still wanted to be close to work.[15] Utilities have been on at the Godley Property since Plaintiff's date of purchase.[16] He also moved furniture from both the Property and the Arlington Residence to the Godley Residence.[17] He also bought new furniture for this Property.[18]

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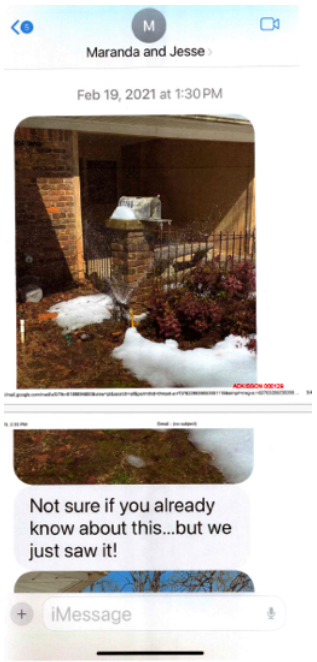
[7] **Exhibit B-10**; 13:17-25; 14:1-2.
[8] *Id.*; 14:3-25;15:1-5; *see also* **Exhibit B-12**.
[9] **Exhibit B-10**; 17:20-25;18:1-11.
[10] *Id.*; 8:13-14; 9:22-24; *see also* **Exhibit B-3** (response to Request for Admission No. 6).
[11] *See* **Exhibit A-2**; *see also* **Exbibit B-2** (response to Interrogatory No. 19).
[12] *See* **Exhibit A-2**.
[13] *Id.*
[14] *Id.*
[15] *See* **Exhibit B-3** (response to Request for Admission No.'s 7, 8, and 9); **Exhibit B-6** (ADKISSON 000132-000137); **Exhibit B-10**; 16:18-25; 17:5-25;18:1-11; 19:10-23; and **Exhibit B-13**.
[16] *See* Exhibit B-5 (response to Requests for Production No.'s 1, 2, 5, and 6); *see also* **Exhibit B-6** (ADKISSON 000164-000178).
[17] *See* **Exhibit B-3** (response to Request for Admission No.'s 7, 8, and 9*); see also* **Exhibit B-6** (ADKISSON 000132-000133).
[18] *See* **Exhibit B-6** (ADKISSON 000134).

With respect to the Property, Plaintiff testified that he initially would visit it 2-3 times a month on the weekends.[19] However, because of COVID restrictions and other reasons, Plaintiff began visiting the Property less and less.[20] As indicated above, in 2019, he was gone from the Property for months.[21] Moreover, between January 9, 2021 and February 8, 2021, Plaintiff testified that he had only been to the Property one time.[22] Concerning furnishings at the Property, Plaintiff had an air mattress, a television, a portable refrigerator that was used mostly for drinks, some clothing, and some heaters that you had to turn on to get heat.[23] He advised that he was renovating the Property to live there in the future when he retired.[24] The larger refrigerator at the Property was not working and had rat droppings, rotted food, and maggots in it.[25] Although the water was turned on at the Property, the gas was disconnected, and very little electricity was being used (Plaintiff testified that "everything was turned off").[26]

C. THE CLAIM

On February 19, 2021, Plaintiff's neighbors' sent him the following text message:

[19] *See* **Exhibit B-6** (ADKISSON 000162-000163) and **Exhibit B-10**; 16:18-25; 17:5-25;18:1-11; 19:10-23.
[20] *See* **Exhibit B-4** (responses to Amended interrogatories No. 3 and 9) **Exhibit B-10**; 24:21:25; 25:1-13.
[21] *See* **Exhibit A-2**.
[22] **Exhibit B-10**; 56:4-12.
[23] *Id.*; 37:24-25; 38:1; 39:9-12; 40:6-25; 41:1-12.
[24] *See* **Exhibit B- 2** (Response to Interrogatory No. 7) and **Exhibit B-10**; 25: 24-25; 26: 1-4; 39: 13-17;
[25] *See* Exhibit B-4 (Amended responses to Requests for Admission 21, 22, and 23); **Exhibit B-10**; 40:15-23; and **Exhibit B-11**; 56:3-4.
[26] *See* **Exhibit A**; **Exhibit A-6**; **Exhibit A-7**; **Exhibit B-2** (Response to Interrogatory No. 6); **Exhibit B-3** (Response to Request for Admission No. 10); **Exhibit B-6** (ADKISSON 000090-000094 and 000117-000122);**Exhibit B-10**; 54: 2-9; 56:2-3.



[27]

As evidenced by the photo in the text message, Plaintiff had an apparent water leak at the Property.[28] Plaintiff was not at the Property when this loss occurred.[29] Based on his neighbor's message, Plaintiff asked his cousin to go to the Property and turn off the water.[30] Thereafter Plaintiff's daughter, Abby Adkisson, went inside the Property and discovered water damage inside the Property from burst pipes.[31] Water pipes froze in the upstairs bathroom and basement ceiling, which flooded portions of the Property.[32] Plaintiff does not remember when he actually visited

[27] **Exhibit B-6** (ADKISSON 000129-000130).
[28] Dkt. 1-6; **Exhibit B-1**; **Exhibit B-6** (ADKISSON 000129-000130); **Exhibit B-10**; 21:17-22.
[29] **Exhibit B-2** (response to Request for Admission No. 6 and Interrogatory No. 21); **Exhibit B-3** (response to Request for Admission No.'s 1 & 2); **Exhibit B-10**; 21:23-25; 22:1-5.
[30] *See* **Exhibit A**; **Exhibit A-3**; **Exhibit B-10**; 21:23-25; 22:1-5.
[31] Dkt. 1-6; **Exhibit A**, **Exhibit A-3**, **Exhibit B-1**; **Exhibit B-10**; 22:1-25; 47:4-7; **Exhibit B-1**1; 39:4-17.
[32] **Exhibit A** and **Exhibit A-8**.

the Property after the loss, but believes it to be a week or two after.[33] Plaintiff retained Maverick Construction ("Maverick") who inspected the Property on March 6, 2021 and determined that the Property had been damaged by "water caused by busted pipes in walls due to freeze".[34] Plaintiff is unaware of how long the water actually sat at the Property before it was cleaned up, but the water had warped the base boards, paneling, and cabinets.[35] The claim was then reported on March 9, 2021.[36] In fact, Plaintiff contends that the hallway, living room, utility room, kitchen, half bath, foyer, entryway, master bath, master bedroom, walk-in closet, basement, bedrooms, and flooring was all damaged because the water stood for so long on the base boards.[37]

The claim was assigned to adjuster Mary Tate who spoke with Plaintiff on March 11, 2021.[38] The field adjusting portion of the claim was assigned to an independent adjuster named Larry Hollon.[39] Hollon inspected the Property on March 16, 2021 with Plaintiff's daughter present.[40] Hollon found that the house was in a state of disrepair and appeared not to have been lived in for some time.[41] The daughter advised that her father slept at the Property sometimes on weekends.[42] Hollon had to conduct his inspection with a flashlight as there was no power on at the Property and light switches did not work.[43] The thermostat was also off at the Property and Plaintiff's daughter did not know if it worked or not.[44] The following are a representation of Hollon's photograph's from his inspection:

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[33] **Exhibit B-10**; 33: 15-22.
[34] **Exhibit A-4** and **Exhibit B-6** (ADKISSON 000041-50).
[35] **Exhibit B-10**; 23:14-16; 53:5-15;73:2-16; 75:17-25; 76: 1-5.
[36] **Exhibit A**, **Exhibit A-3**; **Exhibit B-6** (ADKISSON 000124).
[37] **Exhibit B-10**; 64:13-25; 65:1-6.
[38] **Exhibit A** and **Exhibit A-3**.
[39] **Exhibit A**; **Exhibit A- 3**; **Exhibit B-11**; 55:11-25; 56:1-25.
[40] **Exhibit A**; **Exhibit A-3**, **Exhibit B-11**; 24:8-16; 31:7-9 and 16-22; 39:4-17.
[41] **Exhibit A-3** and **Exhibit B-11**; 55-15-25.
[42] **Exhibit A-3** and **Exhibit B-11;** 55:15-25; 56:1-9; 59: 16-21; 60:4-16.
[43] **Exhibit B-11**; 24: 8-16; 40:17-25; 41:1-2; 61:13-17.
[44] **Exhibit A-3**; **Exhibit A-5**; **Exhibit B-11**; 51:22-25; 52:1-3; 61:7-18

32-Bedroom empty Date Taken: 3/16/2021

Main Level/Living Room - 8-Living room Date Taken: 3/16/2021

40-Daughter didnt know if ac works Date Taken: 3/16/2021

3-Toilet froze upstairs Date Taken: 3/16/2021

[45]

Hollon reported his findings to Defendant.[46] On March 19, 2021, Tate reviewed his findings and asked Plaintiff to provide three months of water bills, electric bills and gas bills.[47] At this time, Plaintiff advised that he did not have the gas on at the Property.[48] He provided the requested water and electric bills, which showed limited use.[49] Based upon its investigation, Defendant determined that the plumbing froze while the Property was vacant, unoccupied, or being constructed and that Plaintiff did not use reasonable care to (a) maintain heat in the building or (b) shut off the water supply and drain the system and appliances of water.[50] As such, coverage was denied .[51]

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[45] **Exhibit A-5**.
[46] **Exhibit A** and **Exhibit A-3**.
[47] *Id.*
[48] *Id.*; **Exhibit B-2** (Response to Request for Admission No. 28); **Exhibit B-10**; 54:2-10.
[49] **Exhibit A**, **Exhibit A-6**, **Exhibit A-7**; **Exhibit B-2** (Responses to Interrogatory No's 4 and 6); **Exhibit B-6** (ADKISSON 000090-000094, 000117-000122).
[50] **Exhibit A**, **Exhibit A-**8; **Exhibit B-6** (ADKISSON 0000054-0000056).
[51] *Id.*

D. SALE OF PROPERTY

On July 19, 2022, Plaintiff sold the Property to his daughter and her then boyfriend, John Phillips.[52] Ms. Adkisson and Mr. Phillips began residing at the Property and significantly remodeled it.[53] The following are representative photos of the Property after the renovations:

 [54]

After remodeling the Property and living there for about a year, Ms. Adkisson and Mr. Phillips sold the Property to Heater Lowe, Matthew Lowe and Carrie Lowe.[55] A copy of the listing for the sale of the Property by Ms. Adkisson and Mr. Phillips includes additional photographs and a detailed description of the renovations made.[56] Once the Property was no longer owned by Plaintiff, there was a significant increase in utility usage at Property.[57]

E. THE LAWSUIT

On February 16, 2023, Defendant received a demand letter from Plaintiff claiming various violations of the Texas Insurance Code,[58] and on February 20, 2023 Plaintiff filed suit against Defendant and the adjusters that handled his claim in the 124th District Court of Gregg County,

[52] **Exhibit B-10**; 13:8-13; 15:9-15; **Exhibit B-14**.
[53] **Exhibit B-7**.
[54] *Id.*
[55] **Exhibit B-15** and **Exhibit B-16**.
[56] **Exhibit B-17**.
[57] **Exhibit B-8** and **Exhibit B-9**.
[58] Dkt. 1-1.

Texas.[59] The suit was filed in Gregg County, as Plaintiff resides at the Godley Residence.[60] As against the adjusters, Plaintiff sued them for violations of the Texas Insurance Code, and as against Defendant, Plaintiff asserted claims for breach of contract, violations of the insurance code, and breach of good faith and fair dealing.[61] On March 9, 2023, Defendant elected liability for the adjusters[62] and answers were filed on behalf of all Defendants.[63] On March 24, 2023, this matter was removed to Federal Court.[64]

On March 27, 2023, Defendant filed a Motion to Dismiss the adjusters based on Defendant's election of liability, along with a Motion to Limit Plaintiff's Claim for Attorney's Fees as Plaintiff failed to properly serve pre-suit notice as mandated by section 542A.003 of the Texas Insurance Code.[65] On June 9, 2023, this Court dismissed the adjusters from the lawsuit,[66] and after approving the Report and Recommendation of U.S. Magistrate Judge K. Nicole Mitchell, Defendant's Motion to Limit Plaintiff's Claim for Attorney's Fees was granted on August 24, 2023.[67] Thereafter the Parties conducted discovery and motions related to discovery were filed that were resolved without the need of court ruling.[68]

V.
SUMMARY JUDGMENT STANDARDS

"Summary judgement is appropriate …if 'there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law."[69] A genuine dispute of

[59] Dkt. 1-6.
[60] *Id.*
[61] *Id.*
[62] Dkt. 1-2.
[63] Dkt. 1-10 and 1-11.
[64] Dkt. 1.
[65] Dkt. 1-2 and 8.
[66] Dkt. 15.
[67] Dkt. 20 and 21.
[68] Dkt. 22, 25, 26, 28 and 30.
[69] *Vann v. City of Southhaven,* 884 F.3d 307, 309 (5th Cir. 2018)(citations omitted); *see also* FED. R. CIV. P. 56(a).

material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party."[70] "The moving party 'bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate an absences of a genuine issue of material fact."[71]

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift the burden of demonstrating…that there is an issue of material fact warranting trial."[72] While the movant must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the non-movant's case.[73] A fact is material if it "might affect the outcome of the suit."[74]

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on mere allegations of its pleadings."[75] The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim.[76] "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence."[77] And in that regard, it is well-established that "[u]nsubsantiated assertions, improbable

[70] *Bennett v. Hartford Ins. Co. of Midwest,* 890 F.3d 597, 604 (5th Cir. 2018)(quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986)).
[71] *Nola Spice Designs, LLC v. Haydel Enter. Inc.,* 783 F.3d 527, 536 (5th Cir. 2015)(quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)).
[72] *Kim v. Hospira, Inc.,* 709 F. App'x 287, 288 (5th Cir. 2018)(quoting *Nola Spice Designs,* 783 F.3d at 536).
[73] *Austin v. Kroger Tex., L.P.,* 864 F.3d 326, 335 (5th Cir. 2017)(quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1076, n. 16 (5th Cir. 1994)).
[74] *Thomas v. Tregre,* 913 F.3d 458, 462 (5th Cir. 2019)(citing *Anderson,* 477 U.S. at 248).
[7575] *Jones v. Anderson,* 721 F. App'x 333, 335 (5th Cir. 2018)(quoting *Duffie v. United States,* 600 F.3d 362, 371 (5th Cir. 2010)).
[76] *Infante v. Law Office of Joseph Onwuteaka, P.C.,* 735 F. App'x 839, 843 (5th Cir. 2018)(quoting *Willis v. Cleco Corp.,* 749 F.3d 314, 317 (5th Cir. 2014)).
[77] *McCarty v. Hillstone Rest. Grp., Inc.,* 864 F.3d 354, 357 (5th Cir. 2017)(quoting *Boudreux v. Swift Transp. Co.,* 402 F.3d 536, 540 (5th Cir. 2005)).

inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment."[78]

VI.
ARGUMENT AND AUTHORITIES

A. RELEVANT BURDENS

To prevail on his cause of action for breach of the Policy, Plaintiff must show that the Policy covered the loss; that the Policy was breached; Plaintiff was damaged by the breach; and resulting damages.[79] In this regard, Plaintiff has the burden of proving that the Policy covers the loss claimed and benefits sought.[80]

While it is Plaintiff's burden to show that there is coverage, Defendant bears the burden of proof as to the applicability of any exclusions in the Policy.[81] If, however, Defendant proves that an exclusion applies, the burden shifts back to Plaintiff to show that the claim was within an exception to the exclusion.[82]

B. POLICY INTERPRETATION

In Texas, insurance contracts are interpreted under the general rules of contract construction, and the "words and phrases contained therein should be given their plain and ordinary meaning."[83] A court should interpret an insurance contract to "effectuate the intent of the parties

[78] *United States v. Renda Marine, Inc.,* 667 F.3d 651, 655 (5th Cir. 2012)(quoting *Brown v. City of Houston,* 337 F.3d 539, 541 (5th Cir. 2003)).
[79] *Metro Hosp. Partners, Ltd. v. Lexington Ins. Co.,* 84 F.Supp. 553, 569 (S.D. Tex. 2015) (citing *Block v. Employers Cas. Co.,* 723 S.W.2d 173, 178 (Tex. App. – San Antonio 1986), *aff'd,* 744 S.W.2d 940 (1988)).
[80] *Metro Hosp.,* 84 F. Supp.3d at 569 (citing *Harken Exploration Co. v. Sphere Drake Ins. PLC,* 261 F.3d 466, 471 (5th Cir. 2001)); *see also JAW The Point, LLC v. Lexington Ins. Co.,* 460 S.W.3d 597, 603 (Tex. 2015)(quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118, 124 (Tex. 2010)).
[81] *Alley Theater v. Hanover Ins. Co.,* 436 F. Supp.3d 938, 944 (S.D. Tex. 2020).
[82] *Id.*; *Telepack v. United Servs. Auto. Ass'n,* 887 S.W.2d 506, 507 (Tex. App. – San Antonio 1994, writ denied).
[83] *See Aggreko, L.L.C. v. Chartis Specialty Ins. Co.,* 942 F.3d 682, 688 (5th Cir. 2019).

at the time the contracts were formed".[84] If an insurance policy is worded so that it can only be given only one reasonable construction, it will be enforced as written.[85]

C. THE POLICY PROVIDES NO COVERAGE AS PLAINTIFF DID NOT RESIDE AT THE PROPERTY

As stated above, the burden is on the insured to show that a claim against him is potentially within the scope of coverage under the policy.[86] Texas courts have held that an insured's residing on the insured premises is a condition precedent to dwelling coverage under a standard homeowner's policy.[87]

In *Green,* the carrier denied coverage for fire damage to a home that was vacated after the insured moved to a retirement community.[88] Although the insured had provided the carrier notice of her move and change of address, the fire occurred after the property had been vacant for more than 60 days.[89] The court held that the vacancy clause of the policy automatically suspended coverage after 60 days under "the ordinary, everyday meaning of the words" in the policy.[90] Thus, the vacancy clause, "when read together with the provisions of Section 1.A.-Property Coverage (Dwelling)" constitutes "an agreement about what happens given a particular instance in which the insured no longer 'resides' in the insured dwelling . . . ."[91] Like the requirement that the insured reside at the premises, the vacancy clause "addresses the scope of coverage instead of being an exclusion."[92] For this reason, an insurance carrier's reliance on the residency requirement

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[84] *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mut. Ins. Co.,* 866 F.3d 254, 258 (5th Cir. 2017)(quoting *Mid-Continent Cas. Co. v. JHP Dev., Inc.,* 557 F.3d 207, 212 (5th Cir. 2009)).
[85] *John M. O'Quinn, P.C. v. Lexington Ins. Co.,* 906 F.3d 363, 367 (5th Cir. 2018)(quoting *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.,* 811 S.W.2d 552, 55 (Tex. 1991)); ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc., F.3d 832, 842 (5th Cir. 2012)(quoting *Gonzalez v. Dennings*, 394 F.3d 388, 392 (5th Cir. 2004)).
[86] *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.,* 197 F.3d 720, 723 (5th Cir. 1999).
[87] *Greene v. Farmers Ins. Exchange,* 446 S.W.3d 761 (Tex. 2014); *American Risk Ins. Co., Inc. v. Serpikova,* 522 S.W.3d 497 (Tex. App. – Houston [14th Dist.] 2017, pet. denied).
[88] *Greene,* 446 S.W.3d at 763.
[89] *Id.*
[90] *Id.* at 766.
[91] *Id.*
[92] *Id.* at 766-67.

embodied in the insuring agreement, the definition of "residence premises," and the vacancy clause does not require that the carrier demonstrate prejudice from the insured's absence from the property or demonstrate that the insured's absence contributed to the loss to deny coverage.[93]

Greene's holding is not limited to cases involving the vacancy clause. In *American Risk Insurance Company v. Serpikova*, the insured purchased and lived at the insured property for a period of time but then moved and rented it to tenants.[94] The policy provided coverage for "the dwelling on the residence premises shown on the page including structures attached to the dwelling."[95] The *Serpikova* policy defined "residence premises" as "the residence premises shown on the declarations page. This includes the one or two family dwelling, including other structures, and grounds where an insured resides or intends to reside within 60 days after the effective date of this policy."[96] A couple of months after the homeowner's policy renewed, a fire severely damaged the dwelling.[97] The carrier denied the claim because the insured did not reside at the property at the time of loss, precluding coverage for the dwelling.[98] The insured argued that because the property was shown on the declarations page, it was her "residence premises."[99] The court rejected this argument as circular because it "would allow full coverage of a dwelling in which the insured never resided or intended to reside."[100] The court further noted that the insured's construction would render the vacancy clause superfluous because residency at the property would not be required in the first place.[101] The court concluded that based on the policy's definition of "residence premises", "the Policy only provided dwelling coverage for a dwelling and other structures set apart

[93] *Id.* at 768-69.
[94] *Am. Risk Ins. Co. v. Serpikova*, 522 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
[95] *Id.* at 502.
[96] *Id.* at 500.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 503.
[101] *Id.* at 504.

from the dwelling by clear space 'where an *insured resides or intends to reside* within 60 days after the effective date of the [P]olicy.'"[102] The court therefore held that "the Property does not fall within the definition of 'residence premises' because Serpikova never resided on the Property during the term of the Policy nor did she intend to reside on the Property during the 60 days after the Policy's effective date." Accordingly, the court concluded that the *Greene* court's statements regarding the insured's use of the dwelling as the insured's residence were not mere obiter dicta but were binding judicial dicta on the meaning of "residence premises" [103] and there was no coverage for Serpikova's loss.[104]

Recently, the court in *Hunt v. Meridian Security Insurance Company* noted that it was the insured's burden to prove coverage and the insured's "ability to [prove coverage] boil[ed] down to one question: Was the [Shady Hill Drive property] a covered 'residence premises' under [either] insurance policy?" The court concluded that it was not because the Insured did not reside at the property on the date of loss as required by the subject policy.[105] The Court defined "reside" as "live, dwell, abide, sojourn, stay, remain, lodge" and "to settle oneself or a thing a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile."[106]

The policy in *GeoVera Specialty Insurance Company v. Joachin* covered "[t]he dwelling on the 'residence premises' shown in the Declarations" and defined "residence premises" as "[t]he one-family dwelling where you reside…on the inception date of the policy period shown in the Declarations

[102] *Id.* at 504 (emphasis in the original).
[103] *Id.* at 503-04.
[104] *Id.* at 504 (internal citations omitted).
[105] *Hunt v. Meridian Sec. Ins. Co. State Auto Ins. Companies*, No. 3:23-CV-441-G-BN, 2024 WL 386162, at *2 (N.D. Tex. Jan. 18, 2024), *report and recommendation adopted sub nom. Hunt v. Meridian Sec. Ins. Co.*, No. 3:23-CV-0441-G-BN, 2024 WL 384928 (N.D. Tex. Feb. 1, 2024).
[106] *Id.* citing *Fortenberry v. Great Divide ins. Co.,* 664 S.W.3d 807, 812 (quoting *Reside,* BLACK'S LAW DICTIONARY (5th ed. 1979).

and which is shown as the 'residence premises' in the Declarations."[107] The court held that the "plain, ordinary and generally prevailing meaning of the word 'reside' requires more than purchasing a home or intending to move into it."[108] Because the insureds in *Joachin* never resided at the Property, the court held that there was no coverage for the insured's loss because the insured's property "did not satisfy the policy's 'residence' requirement and was not a covered 'residence premises.'" The court further held that "[t]he insurer is not liable for coverage it did not agree to provide."[109]

The definition of "Insured Location" and "Residence Premises" in *Andre Huizar v. Benchmark* was very similar to the definitions in Plaintiff's Policy. In *Huizar*, the property was damaged by water when the pipes burst after a winter storm. At the time of the loss, the property was undergoing renovations and plaintiff did not reside at the property. The court initially noted that "[t]he law in Texas and this Circuit has long upheld the residence requirement."[110] The court found that the insured never resided at the home and "[c]onsequently, there was no coverage."[111] The carrier thus never breached its contract with the Insured because "no liability for loss ever arose."[112] The Court found that the insured's "principal problem is that the insurance he purchased from Benchmark only applied to the premises where he lived", "he was not living at the Property at the time of the damage", and "he only intended to live there at some time in the future."[113] "Thus, "[s]eeing as the undisputed summary

[107] *GeoVera Specialty Insurance Company v. Joachin*, 964 F.3d 390, 394 (5th Cir. 2020). Although the Fifth Circuit applied Louisiana law in *Joachin* and *Korbel*, the Fifth Circuit's analysis is those cases is instructive and applicable here. *See Aggreko, L.L.C. v. Chartis Specialty Ins. Co*., 942 F.3d 682, 688 (5th Cir. 2019) ("[W]e are unaware of, any pertinent difference between Texas law and Louisiana law with respect to interpreting insurance policies."); *RSUI Indem. Co. v. Lynd Co*., 566 S.W.3d 113, 118 (Tex. 2015) (Texas courts "strive for uniformity in construing insurance provisions, especially where . . . the contract provisions at issue are identical.").
[108] *Joachin*, 964 F.3d at 393.
[109] *Id*. at 395.
[110] *Andre Huizar, Plaintiff, v. Benchmark Insurance Company, Defendant.,* No. 4:22-CV-3404, 2024 WL 1417972, at *3 (S.D. Tex. Apr. 2, 2024).
[111] *Id.* at *3.
[112] *Id.* at *3 (internal quotations omitted).
[113] *Id.*

judgment evidence show[ed] that Huizar never resided in the Property, The Court [found] as a matter of law that Benchmark did not breach its contract."[114]

In a matter similar to the case before this Court, the policy in *Korbel v. Lexington Insurance Corporation* defined "resident premises" as "a. The one family dwelling, other structures, and grounds; or b. that party of any other building; where you reside, and which is shown as the 'residence premises' in the declarations." In determining whether the insured resided at the property within the definition of the policy, the court noted that it looked "to the generally prevailing meaning of 'reside', which is defined as 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live, *in* or *at* a particular place."[115] Given this definition, the court concluded that there was insufficient evidence that the insured resided at the Property. The court noted that:

> Korbel argues that there is sufficient evidence in the record to raise a question of fact as to whether he did in fact reside at the house. This evidence includes the following: 1) Korbel identified 430 Olivier Street (the house's address) as his address in his deposition; 2) Korbel's driver's license lists that address; 3) Lexington corresponded with Korbel at that address; 4) Korbel received his mail there before and after the hurricane; and 5) although he only slept there sometimes, he went there everyday before the storm. However, although Korbel clearly spent a great deal of time working on the house and *intended it to be his residence in the future*, this evidence is insufficient given that he *only sometimes slept at the house* when working late on renovations, *two-thirds of the house—including the kitchen, which lacked even a refrigerator—had been gutted, and he kept only a minimal amount of furniture there*. Further, beyond working on the restoration, Korbel did not engage in leisure activities at the house, but was only there if he was "[w]orking on the house, picking up mail, checking on something, [or] waiting on someone." *Moreover, many people receive mail at places other than their residences*.[116]

In this case, while Plaintiff obtained the Property in 2016, in around 2018-2019 he began residing and conducting daily activities elsewhere (the Arlington Residence) because the Property

[114] *Id.* at *4.
[115] *Korbel v. Lexington Insurance Company*, 308 F. App'x 800, 805 (5th Cir. 2009).
[116] *Id.; see also Korbel v. Republic Fire & Cas. Ins. Co*., No. 2:21-CV-2214, 2023 WL 3741125, at *3 (E.D. La. May 31, 2023) (citing *id*.) (holding the evidence discussed above, in addition to plaintiff receiving a homestead exemption, did not create a genuine fact dispute as to the residence premises provision).

was not close to his work.[117] He retained the Property and was doing renovations so that he could eventually retire at the Property, but he did not live there. Accordingly, he did not reside and did not intend to reside at the Property in the foreseeable future. Plaintiff admits that he would visit the Property infrequently and once COVID began his visits to the Property became even less frequent. Furthermore, his visits to the Property were so infrequent that items were stolen from the Property in September of 2019, but he did not actually discover what was missing from the Property until December of that year. Furniture had been moved from the Property to either the Arlington Residence or the Godley Residence, and aside from a blow up mattress, a few personal items and a small drink refrigerator, the Property was practically empty. The larger refrigerator at the Property had maggots, rat droppings, and rotted food in it. He was not at the Property on the date of loss and the claim was not reported until weeks after the storm. Importantly, the gas was not on the Property, the thermostat may or may not have worked at the Property, and there was minimal usage of other utilities. Once the Property was sold and was actually lived in by others, there was a significant increase in the utility usage. Accordingly, Plaintiff did not live, dwell, abide, sojourn, stay, remain, or lodge at the Property nor did he dwell there permanently, continuously or for a considerable amount of time. He only intended to live there at some time in the future. Thus, Plaintiff did not reside at the Property and the Policy does not provide dwelling coverage for his freeze related damage.

[117] *See Safeco Ins. Co. of Oregon v. Maryman,* No. 4:22-CV-3404, 2024 WL 1890294, at *7 (M.D. La. Apr. 92, 2024) (finding that the insureds did not reside at a property that had been damaged by a fire when analyzing similar policy language as the insureds were not present at the property when the fire occurred, there were storage boxes everywhere, there was a lack of running water and the insureds performed basic daily living activities elsewhere.)

D. IN THE ALTERNATIVE, THE POLICY EXCLUDES COVERAGE FOR THE LOSS

Alternatively, Plaintiff's loss is excluded under the Policy. As stated above, the burden is on Defendant to prove the applicability of a policy exclusion and if Defendant does so, then the burden shifts back to Plaintiff to show that the claim was within an exception to the exclusion.[118] The Policy clearly, plainly, and unequivocally excludes Plaintiff's loss caused by freezing of a plumbing system or by discharge or leaking from within the system caused by freezing because Plaintiff failed to use reasonable care to (a) maintain heat in the building, or (b) shut off the water supply and drain the system and appliances of water, while the Property was vacant, unoccupied, or being constructed.

Policy language identical to the exclusion at issue has been found by courts to be unambiguous and effective.[119] In *Dooley,* the insureds experienced a burst frozen pipe while they were away from their home for approximately 20 days. In granting the carrier's motion for summary judgment, the court held that the policy language was unambiguous, opining that the absence of a policy definition for "reasonable care" did not render the term ambiguous.[120] Rather, "an insured would not be excluded from coverage for losses caused by freezing if he objectively took reasonable steps, *i.e.,* steps an ordinary person in his position would have taken, to ensure that the temperature in his home remained above freezing."[121]

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[118] *Alley Theater*, 436 F. Supp.3d at 944; *Telepack,* 887 S.W.2d at 507.
[119] *See e.g. Dooley v. Scottsdale Ins. Co.,* No. 12-1838, 2015 WL 685811, at ** 1-2; *Fulton v. Beacon Nat'l Ins. Co.,* 416 S.W.3d 759, 762-63 (Ark. App. 2012). *See Apache Corp. v. Great Am. Ins. Co.,* 662 F. App'x 252, 255 (5th Cir. 2016) (finding that a court applying the law of a particular state does not limit itself to the cases decided under that law if the contract provisions at issue are identical).
[120] *Dooley,* 2015 WL 685811, at *6.
[121] *Id.* The court in *Dooley* ultimately denied summary judgment to the carrier, as there was evidence that the insured in *Dooley* had taken precautions that Plaintiff did not here, *e.g.,* shut off all interior water systems, drained and closed all outside water systems, and maintained actual energy usage to heat the property. The court held that this evidence created a fact issue for the jury as to whether the *Dooley* insured satisfied the policy's "reasonable care" requirement in the unambiguous policy provision.

Here, it is undisputed that Plaintiff's loss was, in fact, caused by freezing of a plumbing system or by discharge or leaking from withing the system caused by freezing.[122] Accordingly, because the unambiguous exclusion negates coverage for loss caused by freezing of a plumbing system or discharge or leaking from within a system caused by freezing, there is no coverage for Plaintiff's loss unless an exception to the exclusion applies.[123]

E. THE EXCEPTION TO THE EXCLUSION IS INAPPLICABLE

The freeze exclusion to the Policy does, admittedly, contain an exception. The exception provides that the exclusion will not apply if Plaintiff used reasonable care[124] to (a) maintain heat in the building, ***or*** (b) shut off the water supply ***and*** drain the system and appliances of water.[125] Plaintiff cannot establish that he exercised care to do either.

1. Plaintiff did not Use Reasonable Care to Shut Off the Water Supply or Drain the System

Plaintiff admits that he did not shut off the water supply to the Property or drain the system and appliances of water prior to the date of loss.[126] Accordingly, Plaintiff cannot avail himself of exception (b) to the freeze exclusion.[127]

2. Plaintiff Did Not Use Reasonable Care to Maintain Heat in the Dwelling

It must be equally acknowledged that Plaintiff cannot avail itself of exception (a) to the exclusion because the natural gas service at the Property was off at the time of the loss, thus making it impossible to maintain heat in the dwelling.[128] Plaintiff claims to have had four to five plug in

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[122] *See* Dkt. 1-F; **Exhibit A-3**; **Exhibit B-1**.
[123] *Fulton,* 416 S.W.3d at 762-3.
[124] "Reasonable" care or "ordinary" care has been defined to mean that degree of care which would be used by an owner or occupier of ordinary prudence under the same or similar circumstances. *Keetch v. Kroger*, 845 S.W. 2d 262, 267 (Tex. 1992).
[125] *See* **Exhibit A-1**; *See also Fulton,* 416 S.W.3d at 762.
[126] *See* **Exhibit B-3** (Response to Request for Admission No. 10).
[127] *See also Fulton,* 416 S.W.3d at 762 (granting summary judgment to insurer because it was undisputed that the insured took no steps to drain the water system).
[128] *See* **Exhibit A**; **Exhibit A-3**; **Exhibit B-2** (Response to Request for Admission No. 28); **Exhibit B-10**; 54:2-10.

heaters at the Property.[129] However, even if the use of such heaters could be considered "reasonable care to maintain heat in the Dwelling," which Defendant denies, Plaintiff has acknowledged that they had a thermostat button that had to be switched on in order to work.[130] Plaintiff could not testify that the heaters were actually on at the time of the loss, nor has he been able to provide any information regarding the purchase or age of such heaters.[131] Regardless, the electric bills at the Property show minimal use, which Plaintiff admits.[132]

In other instances where the policy holder did not maintain heat to the insured property, courts have summarily dismissed insured's claims based on the application of exclusionary language identical to the provision at issue here. For example, in *Pazianas v. Allstate, Ins. Co.,* the court dismissed the insured's claim at the pleading stage because the insured did not, as a matter of law, use reasonable care to maintain heat when he left his Pennsylvania home for five months in the Winter.[133] Before leaving for England, the insured set the thermostat to 55° F and noted that both the thermostat and furnace appeared to be functioning. [134] The thermostat's manual instructed users to replace the batteries once a year or before leaving the home for more than one month.[135] The insured admitted that he did not replace the batteries within the prior year, nor did he replace them before leaving for England.[136] When the insured returned home in February of 2015, the heat was off, the thermostat was blank, and water was flowing from the ceiling.[137] The thermostat turned back on when batteries were replaced.[138] The court held that there was no

[129] *See* **Exhibit A**; **Exhibit A-3**; **Exhibit B-4** (Amended Response to Interrogatory No. 5).
[130] *Id; see also* **Exhibit B-10**; 59:12-25;60:1-12.
[131] *Id. see also* **Exhibit B-3** (Response to Request for Production No. 14).
[132] **Exhibit A**, **Exhibit A-6**, **Exhibit A-7**; **Exhibit B-2** (Responses to Interrogatory No's 4 and 6); **Exhibit B-6** (ADKISSON 000090-000094, 000117-000122).
[133] *Pazianas v. Allstate, Ins. Co.* 2016 WL 3878185, at *3.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*

genuine issue of fact precluding dismissal of the complaint, specifically nothing that the facts that the insured left the property vacant for several months in the Fall and Winter, took no action to ensure that the thermostat would continue to operate, and did not shut off and drain the water to the home.[139]

In *Evangelista v. Hingham Mut. Fire Ins. Co.,* the insureds left their home in December 2022 for the remainder of the winter, set the thermostat to 63° F, did not arrange for any person or company to periodically check the home during their absence, and instructed their utility companies to forward the monthly bills to their winter residence.[140] The insureds ultimately received electric bills for billing periods of December 2002 and January 2003, showing no utility usage for the billing periods.[141] At some time between the end of January and March 11, 2003, the heat stopped functioning and the pipes froze and burst.[142] Following a bench trial, the Court ruled that the insureds' claim for breach of contract was unfounded, as the insureds "did not take reasonable care to maintain heat at their unoccupied house."[143] "Given the frigid temperatures, a reasonable person would have been alerted to a problem and would have either checked the home asked someone to do so for them."[144]

In *Landsman v. Dryden Mut. Ins. Co.,* the court found that the insured did not exercise "reasonable care" to maintain heat in the insured property when the insured "knew or should have known that he should return to the property without delay to make sure that the heat and utilities were reinstated or to drain the pipes and other plumbing fixtures.[145] Landsman had leased the

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[139] *Id.*
[140] *Evangelista v. Hingham Mut. Fire Ins. Co.,* 19 Mass.L.Rptr. 105, 2005 WL 705840, at *1 (Sup. Ct. Mass. Feb. 14, 2005).
[141] *Id.*
[142] *Id.*
[143] *Id.* at *3.
[144] *Id.* at *1.
[145] *Landsman v. Dryden Mut. Ins. Co.*, 906 N.Y.S.2d 780, at *5 (Sup. Ct. 2009).

property at issue to two tenants, but at some point, the tenants failed to pay the rent and failed to pay their utility bills.[146] As a result, the utilities were turned off for non-payment and the tenants vacated the rental property on the last day of January 31, during a New York winter. Despite knowing that there was no heat or electric utilities at the insured property, the insured nonetheless did not return to the property that day or the next.[147] The court found that the insured's knowledge that there was no heat at the property, combined with his inaction to remedy the situation, showed conclusively that the insured failed to use reasonable care to maintain heat in the property.[148]

Not having an operable heating system constitutes a lack of reasonable care to maintain heat as a matter of law.[149] Here, it is undisputed that Plaintiff did not exercise reasonable care to maintain heat at the Property. Plaintiff admits that the gas was turned off at the Property.[150] Plaintiff claims to have had electric heaters at the Property.[151] However, in his description of the heaters, Plaintiff claimed that they had a thermostat button that had to be switched on and then the heater would turn on or off depending on the setting.[152] However, he cannot say with certainty that they were actually on at the time of the loss, nor does he know how old the heaters were.[153] In fact, Plaintiff could not even specifically state how many heaters were present at the Property.[154]

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[146] *Id.* at *2-3.
[147] *Id.* at *4.
[148] *Id. See also Landsman v. Dryden Mut. Ins. Co.,* 906 N.Y.S.2d 780, at *5 (Sup. Ct. 2009)(finding that the insured did not exercise "reasonable care" to maintain heat when the insured "knew or should have known that he should return to the property without delay to make sure that the heat and utilities were reinstated or to drain the pipes and other plumbing fixtures when his tenants had vacated the property); *Elkin v. State Farm Ins. Co.,* No. 11-3653 (PAM/JJG), 2013 WL 3340126 (D. Minn. July 2, 2013)(court granted summary judgment in favor of insurer where the natural gas service was terminated and pipes froze and burst).
[149] *See Pazinas,* 2016 WL 3878185, at ** 3-5 (insured did not exercise reasonable care to maintain heat where the heating system did not work because the thermostat batteries died); *Evangelista,* 19 Mass. L. Rptr. at *1 (insured did not exercise reasonable care to maintain heat where the system became inoperable due to unknown reasons); *Landman,* 906 N.Y.S.2d 780, at *5 (insured did not exercise reasonable care to maintain heat where gas service was terminated for non-payment); *Elkin,* 2013 WL 3340126, at *5 (insured did not exercise reasonable care to maintain heat where gas service was terminated for non-payment.
[150] **Exhibit A**; **Exhibit A-3**; **Exhibit B-2** (Response to Request for Admission No. 28); **Exhibit B-10**; 54:2-10.
[151] **Exhibit B-10**; 59:12-25;60:1-12.
[152] *Id.*
[153] **Exhibit B-10**; 59:12-25;60:1-12.
[154] *Id.*; *See* **Exhibit A**; **Exhibit A-3**; **Exhibit B-4** (Amended Response to Interrogatory No. 5).

Concerning the thermostats for the home's central heating system, at the time of Defendant's inspection they were inoperable, and Plaintiff's daughter did not know whether they worked or not.[155] Additionally, Plaintiff's electric bills showed minimal usage and Plaintiff also testified that he had everything off.

Plaintiff has the burden of proving that he used reasonable care to maintain heat in the Property in order for coverage to apply. As a matter of law, he cannot meet his burden, and summary judgment is therefore proper on Plaintiff's breach of contract claim.

F. PLAINTIFF'S CLAIMS FOR COMMON-LAW AND STAUTORY BAD FAITH FAIL AS A MATTER OF LAW BECAUSE PLAINTIFF IS NOT ENTITLED TO BENEFITS UNDER THE POLICY AND THERE IS NO EVIDENCE OF AN INDEPENDENT INJURY

Plaintiff's extra-contractual claims are all grounded on the assertion that Defendant failed to pay an adequate amount for the cost to repair the claimed damage to the Property.[156] However, an insurance carrier can have no extra-contractual liability absent an insured's entitlement to policy benefits or evidence of independent injury.[157] The independent-injury rule applies "only if the damages are truly independent of the insured's right to receive policy benefits," which means that the extra-contractual claims may not be "predicated on the loss being covered under the insurance policy," nor may the damages "flow or stem" from the denial of the claim.[158] "Independent injury" occurs so rarely that the Texas Supreme Court has "yet to encounter" a successful application of the rule.[159]

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[155] **Exhibit A-5**; **Exhibit B-11**;51:22-25; 52:1-17.
[156] Dkt. 1-6.
[157] *USAA Texas Lloyds Co. v. Menchaca,* 545 S.W.3d 479, 500 (Tex. 2018)("[A]n insurer's statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury that is independent from the loss of benefits."); *Hallak v. Allstate Veh. & Prop. Ins. Co.,* 2017 WL 4182198, at *3 (N.D. Tex. Aug. 29, 2017)(applying *Menchaca*).
[158] *Kezar v. State Farm Lloyds,* 2018 WL 2271380, at *4 (W.D. Tex. May 17, 2018).
[159] *Menchaca,* 545 S.W.3d at 500.

As set forth above, Plaintiff is not entitled to benefits under the Policy. Further, Plaintiff has not identified any injury independent of his policy benefits to which he claims entitlement. Each of Plaintiff's extra contractual claims are therefore barred.[160] Indeed, Plaintiff does not even allege that he suffered an injury independent of his claim for policy benefits.[161] Plaintiff simply believes that his damages should have been covered.[162] The damages referenced by Plaintiffs – the cost to repair the Property – are the very damages that form the basis of Plaintiff's underlying breach of contract claim.[163] Such damages are not a proper part of bad faith recovery because they do not result in the insurer's alleged bad faith conduct. Therefore, Plaintiff's extra-contractual causes of action, however pled, all fail as a matter of law, and Defendant is entitled to summary judgment on these causes of action.

VII.
CONCLUSION AND PRAYER

The Policy at issue contains a clear and unambiguous condition precedent requiring the Property to be Plaintiff's "residence premises." As a matter of law, this condition precedent was not met, as Plaintiff resided elsewhere. The Policy further contains a clear and unambiguous exclusion that precludes coverage for losses caused by freezing of a plumbing system or by discharge or leaking from within the system caused by freezing unless Plaintiff used reasonable care to (a) maintain heat in the building, or (b) shut off the water supply and drain the system and

[160] *Kezar*, 2018 WL 2271380, at *5 (because plaintiffs' injuries "flow from the denial of [their] claim, the independent injury rule does not apply" and plaintiffs' extracontractual causes of action are "barred by their failure to establish a breach of contract).
[161] **Exhibit B-10**; 71:1-21.
[162] *Id.*
[163] *See, e.g., Mood v. Kronos Prods., Inc*., 245 S.W.3d 8, 12 (Tex. App.—Dallas 2007, pet. denied)(noting that the measure of damages for breach of contract is that which restores the injured party to the economic position he would have enjoyed if the contract had been performed); *Bowen v. Robinson*, 227 S.W.3d 86, 96 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)("With respect to damages in breach-of-contract cases, the general rule is that 'the complaining party is entitled to recover the amount necessary to put him in as good a position as if the contract had been performed.'").

appliances of water. As a matter of law, Plaintiff did neither of these things. Finally, Plaintiff has failed to identify any independent injury that was caused by Defendant's alleged conduct. Defendant is therefore entitled to summary judgment on each of Plaintiff's contractual and extra-contractual causes of action.

WHEREFORE, PREMISES CONSIDERED, Defendant Safeco Insurance Company of Indiana prays that the Court grant this motion, render judgement that Plaintiff takes nothing by his claims, and award Defendant Safeco Insurance Company of Indiana such other relief to which it is justly entitled.

Respectfully submitted,

/s/ Mark D. Tillman

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

In accordance with the FEDERAL RULES OF CIVIL PROCEDURE, on September 13, 2024, a true and correct copy of the above and foregoing instrument was served ***via facsimile or electronic service*** upon:

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