**IN THE U. S. DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TYLER DIVISION**

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| **CURT ADKISSON** | § | |
| | § | |
| **VS.** | § | **CIVIL ACTION NO. 6:23-CV-00146** |
| | § | |
| **SAFECO INSURANCE COMPANY** | § | |
| **OF INDIANA, et al** | § | |

**PLAINTIFF'S RESPONSE TO DFENDANT SAFECO INSURANCE COMPANY OF INDIANA'S MOTION FOR SUMMARY JUDGENT**

**TO THE HONORABLE U. S. DISTRICT COURT JUDGE:**

COMES NOW, CURT ADKISSON, Plaintiff here who files this his Plaintiff's Response to Defendant SAFECO INSURANCE COMPANY OF INDIANA'S MOTION FOR SUMMARY JUDGMENT, and in support thereof, respectfully shows this Court the following:

Case Overview

The instant matter is a property damage insurance case. This case arises out of an insurance claim filed by Plaintiff against its own insurer, SAFECO INSURANCE COMPANY OF INDIANA, following water damage experienced at his property as a result of a winter storm on February 19, 2021. The freeze event is a covered occurrence under the policy.

Plaintiff has brought claims against Defendants for breach of contract, violations of the Texas Insurance Code Chapters 541 and 542, and for breach of the common law duty of good faith and fair dealing. Defendant SAFECO is seeking a Summary Judgment against Plaintiff based on loose interpretations of the policy that are disputed by the Plaintiff. As such there are genuine disputes of material facts and Defendant SAFECO's Motion for Summary Judgment should be in all things denied.

Summary Judgment Standard

Rule 56(a) provides that summary judgment may be granted if the movant proves there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[1] The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.[2] To warrant judgment in its favor, the movant "must establish beyond peradventure all of the essential elements of the claim or defense."[3]

"A fact issue is material if its resolution could affect the outcome of the action."[4] An issue is "genuine" if it is real and substantial,[5] so it would allow a reasonable jury to return a verdict for the nonmovant.[6] Put another way, a genuine fact issue is one that can be determined only by a trier of fact because it may be resolved in favor of either party.[7]

Only after a proper motion has been made is the nonmovant required to come forward with evidence presenting facts that demonstrate the existence of a genuine issue for trial.[8] The court "should review the record as a whole,"[9] and construe all evidence in the light most favorable to

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[1] Fed. R. Civ. Pro. 56(a); *Lindsey v. Bio-Medical Applications of La., L.L.C.*, 9 F.4th 317, 323 (5th Cir. 2021); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 378 (5th Cir. 2019); *Hefren v. McDermott, Inc.*, 820 F.3d 767, 771 (5th Cir. 2016).
[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019); *Mabry v. Lee Cnty.*, 849 F.3d 232, 234 (5th Cir. 2017).
[3] *Dewan v. M-I, L.L.C.*, 858 F.3d 331, 334 (5th Cir. 2017); *accord Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co.*, 662 F.3d 376, 378 (5th Cir. 2011), *cert. denied*, 568 U.S. 1194, 133 S.Ct. 1467 (2013).
[4] *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 578 U.S. 945, 136 S. Ct. 1715 (2016); *accord, Sanchez Oil & Gas Corp. v. Crescent Drilling & Production, Inc.*, 7 F.4th 301, 309 (5th Cir. 2021); *Parrish*, 917 F.3d at 378.
[5] *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 340 (5th Cir. 2019).
[6] *Lindsey*, 9 F.4th at 323; *accord, Sanchez Oil & Gas*, 7 F.4th at 309; *Hefren*, 820 F.3d at 771.
[7] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49, 106 S.Ct. 2505 (1986).
[8] *Beard v. Banks*, 548 U.S. 521, 529, 126 S.Ct. 2572 (2006); *Celotex Corp.*, 477 U.S. at 322 n.3; *Hassen v. Ruston La. Hosp. Co., L.L.C.*, 932 F.3d 353, 356 (5th Cir. 2019).
[9] *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 273 (5th Cir. 2011) (*quoting Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)); *accord, City of Alexandria v. Brown*, 740 F.3d 339, 350 (5th Cir. 2014).

the nonmovant, without doing anything to weigh the evidence or evaluate its credibility.[10] The evidence of the nonmovant is to be believed, with all justifiable inferences drawn and all reasonable doubts resolved in his favor.[11]

Statement of Facts

**Personal Background**

Mr. Adkisson has owned his home located at 3280 W. Cerliano Drive, Longview, TX 75605 ("the Property" or "home") since 2016, after inheriting it from his father.[12] Born and raised in Longview[13], Mr. Adkisson had future plans to live in the Property upon retirement,[14] as his daughter, Abby and other family and friends reside nearby.[15]

However, due to the COVID-19 pandemic and his role as the Director of Compensation and People Analytics at Cook Children's Health Care System in Fort Worth,[16] Mr. Adkisson was classified as an "essential worker"[17] and was required to work on-site 6-7 days a week.[18] During this time, he temporarily stayed at another property in Godley, Texas, due to the demands of his job,[19] but frequently returned to the Property,[20] spending 3-5 days there whenever possible, typically from Thursday through Sunday or Monday.[21] He ensured his Property was being watched after when he was away by his neighbors.[22]

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[10] *Reeves*, 530 U.S. at 150; *Nall*, 917 F.3d at 340; *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014).
[11] *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S.Ct. 1861 (2014) (*citing Anderson*); *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 167 (5th Cir. 2018); *Hemphill*, 805 F.3d at 538.
[12] Exhibit A, Deposition of Adkisson, 13:17-24.
[13] Exhibit A, Deposition of Adkisson, 25:24-26:4.
[14] Exhibit A, Deposition of Adkisson, 28: 5-11.
[15] Exhibit B, Deposition of Abby Adkisson, 27:2-21.
[16] Exhibit A, Deposition of Adkisson, 8:14-19; 9:22-24.
[17] Exhibit A, Deposition of Adkisson, 21:6-10.
[18] Exhibit A, Deposition of Adkisson, 56:17-24.
[19] Exhibit A, Deposition of Adkisson, 23:20-24:4.
[20] Exhibit B, Deposition of Abby Adkisson, 32:18-33:12.
[21] Exhibit B, Deposition of Abby Adkisson, 33:5-12.
[22] Exhibit A, Deposition of Adkisson, 25:14-20.

**The Cerliano Property is Home.**

Before the COVID pandemic, Mr. Adkisson regularly spent 2-3 weekends a month at the Property,[23] working on various house projects and maintaining the home.[24] In the months leading up to the 2021 freeze, he was in the midst of extensive renovations, including removing the popcorn ceilings and replacing paneling with sheetrock.[25] To protect his belongings during these renovations, he moved furniture to the garage and shop[26] and slept on a full-size air mattress in the room he used as a child.[27] He kept his clothes and a TV in the room[28], alongside 4-5 electric heaters (spaced throughout the house) for warmth and there was a functioning central AC system.[29]

Despite the ongoing renovations, Mr. Adkisson kept most of his personal belongings at the property, as it was his home.[30] He used a smaller refrigerator for his food and drinks[31], as the main fridge had been broken for years.[32] He also updated the electrical connections for a new washer and dryer, further demonstrating his intent to modernize the home.[33]

During visits with her father, his daughter Abby, observed "normal home items" such as clothes, soap, a toothbrush, and kitchenware, affirming that the property was used as a residence.[34] Mr. Adkisson's voter registration, credit cards, and other essential mail were also directed to the property, further establishing it as a primary residence.[35]

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[23] Exhibit A, Deposition of Adkisson, 24:19-25:13.
[24] Exhibit A, Deposition of Adkisson, 25:21-26:4
[25] Exhibit A, Deposition of Adkisson, 35:17-37-6.
[26] Exhibit A, Deposition of Adkisson, 42:24-43:2; 35:17-37-6.
[27] Exhibit A, Deposition of Adkisson, 38:23-39:17; Exhibit B, Deposition of Abby Adkisson, 25:22-26:1. Mr. Adkisson's bed was referred to as a "bean bag" by Defendant Hollon during his inspection and in his notes, but it was actually an air-mattress. Exhibit A, Deposition of Adkisson, 68:9-18.
[28] Exhibit A, Deposition of Adkisson, 39:9-17.
[29] Exhibit A, Deposition of Adkisson, 59:5-60:18.
[30] Exhibit A, Deposition of Adkisson, 28:5-16.
[31] Exhibit A, Deposition of Adkisson, 40:24-41:15.
[32] Exhibit A, Deposition of Adkisson, 40:6-23; Exhibit B, Deposition of Abby Adkisson, 28:19-29:5.
[33] Exhibit A, Deposition of Adkisson, 44:19-45:5.
[34] Exhibit B, Deposition of Abby Adkisson, 28:2-24.
[35] Exhibit A, Deposition of Adkisson, 26:21-27:9.

**February 2021 Freeze**

On February 19, 2021, a historic freeze swept across Texas. At the time of the storm, Mr. Adkisson was living at his property located at 3280 W. Cerliano Drive, Longview, TX.[36] Although he was not physically present at the Property on the date of the loss[37], he had arranged for his neighbors to monitor the home in his absence.[38] On February 19, 2021, Mr. Adkisson received a text from a neighbor informing him that the outdoor faucet was spewing water.[39] He promptly had his cousin turn off the water the following day.[40]

Due to icy road conditions, Mr. Adkisson's daughter, Abby, was the first to inspect the Property.[41] She saw significant water damage inside the home,[42] as well as heaters placed throughout the house.[43] Mr. Adkisson reported the damage to his insurer, Safeco.[44]

On March 16, 2021, Safeco sent its adjuster, Defendant Hollon, to inspect the Property.[45] Abby attended the inspection because her work schedule was more flexible than her father's.[46] According to Abby, the inspection lasted approximately ten minutes[47]. Defendant Hollon failed to thoroughly inspect the home, as he did not enter Mr. Adkisson's bedroom, the garage, or inquire about the furniture stored there.[48] He also did not examine the back patio or dining room table.[49] Defendant Hollon took interior photographs using only a flashlight[50] and employed no tools to

[36] Exhibit A, Deposition of Adkisson, 23:20-24:4 and 30:19-25.
[37] Exhibit A, Deposition of Adkisson, 30:19-25.
[38] Exhibit A, Deposition of Adkisson, 25:14-20.
[39] Exhibit A, Deposition of Adkisson, 31:10-15. *See also,* Exhibit B-6 to Defendant's Motion for Summary Judgment
[40] Exhibit A, Deposition of Adkisson, 21:21-22:5.
[41] Exhibit B, Deposition of Abby Adkisson, 19:22-24.
[42] Exhibit A, Deposition of Adkisson, 31:14-17.
[43] Exhibit B, Deposition of Abby Adkisson, 20:13-16.
[44] Exhibit C, Deposition of Safeco Corporate Representative, 43:11-20.
[45] Exhibit D, Deposition of Hollon, 52:4-14.
[46] Exhibit B, Deposition of Abby Adkisson, 26:22-27:1.
[47] Exhibit B, Deposition of Abby Adkisson, 29:15-24.
[48] Exhibit A, Deposition of Adkisson, 69: 2-13.
[49] *Id.*
[50] Exhibit D, Deposition of Hollon, 24:3-16.

assess water-related damage beyond visual inspection.[51] Notably, he did not document the heaters present in the home but did take a photograph of the thermostat.[52]

Defendant Hollon prepared two estimates for the damage. Although his second estimate included insulation costs for the basement,[53] he did not recall why it was omitted from the first estimate.[54]

During his testimony, Defendant Hollon acknowledged that he believed the home was vacant, despite Abby informing him that her father regularly stayed there on weekends.[55] His report stated that the house "appeared vacant," though he admitted he could not determine if it had been vacant for "two days or two years."[56] Despite labeling the home as "vacant," Defendant Hollon never reviewed the policy's definition of vacancy[57] and failed to ask either Abby or Mr. Adkisson any direct questions about who was living at the Property.[58]

By his own words, Defendant Hollan's "duty was to schedule the appointment, photograph it, write an estimate, send it in"[59] and he was not instructed on any claim to check on the status of the electricity or water.[60] Defendant Hollon's investigation into whether the heat had been maintained at the time of loss consisted only of taking a photograph of the thermostat.[61] He did not contact the power company to verify when the electricity was last active, nor did he request a utility bill to confirm that power was supplied before the freeze.[62] Moreover, he did not inquire

[51] Exhibit D, Deposition of Hollon 39:24-40:2.
[52] Exhibit D, Deposition of Hollon, 51:25-52:9.
[53] Exhibit D, Deposition of Hollon, 48:22-24.
[54] Exhibit D, Deposition of Hollon, 47:24-48:3.
[55] Exhibit D, Deposition of Hollon, 55:15-25.
[56] Exhibit D, Deposition of Hollon, 56:10-15; 58:18-21.
[57] Exhibit D, Deposition of Hollon, 57, 9:16.
[58] Exhibit D, Deposition of Hollon, 59:16-60:2
[59] Exhibit D, Deposition of Hollon, 63:9-14.
[60] Exhibit D, Deposition of Hollon, 63:5-14.
[61] Exhibit D, Deposition of Hollon, 61:7-17;, 62:18-25.
[62] Exhibit D, Deposition of Hollon, 62:3-25.

whether the water had been shut off on the date of the loss. [63] Despite these significant omissions, Safeco denied Mr. Adkisson's claim based on this investigation. [64]

On March 24, 2021, Safeco sent a denial letter to Mr. Adkisson.[65] Defendant Hollon has no recollection of recommending the denial on the claim and was unaware the claim had been denied.[66]

To date, Mr. Adkisson remains unclear as to why his claim was denied. He has consistently considered the Property his home, stating, "That's where I've stayed, that's where I've been for years and years. I've had heaters there. I think I was there the two weekends before the storm hit, working on the house. I remember raising the windows because I was hot." Despite regularly staying at the Property and maintaining it, the claim was denied without a clear explanation.[67]

**THE DENIAL**

Safeco denied Mr. Adkisson's claim without ever speaking to the field adjuster, Defendant Hollon, who conducted the Property inspection. [68] Defendant Hollon did not recognize the name on the denial letter and had no discussions with Safeco about his inspections or observations of the Property. [69] Safeco's corporate representative testified that the denial was based on the policy's freeze exclusion[70], which was applied after reviewing various pieces of information, including the site inspection, utility usage, photographs, and notes provided by the adjuster. [71] One reason given for the denial was a photograph showing the thermostat turned off.[72] Ironically, however, the

[63] Exhibit D, Deposition of Hollon, 63: 1-4.
[64] Exhibit C, Deposition of Safeco Corporate Representative, 34:9-36.
[65] *See* Defendant's Motion for Summary Judgment, Exhibit B-1.
[66] Exhibit D, Deposition of Hollon, 31:1-6
[67] Exhibit A, Deposition of Adkisson, 62:19-63:5.
[68] Exhibit D, Deposition of Hollon, 26:24-27:4; 28:8-12.
[69] Exhibit D, Deposition of Hollon, 37:11-16.
[70] Exhibit C, Deposition of Safeco Corporate Representative, 34:13-17.
[71] Exhibit C, Deposition of Safeco Corporate Representative, 34:24-36:6.
[72] *Id.*

adjuster's report did not note the presence of space heaters in the home, a key factor in maintaining heat. [73] Further, the inspection by Hollon took place over a month after the damage occurred and said picture has no bearing on the condition of the home on the actual date of the loss.

Safeco's review of the photographs led them to assume that the home was vacant due to the perceived lack of furniture. [74] However, Safeco admitted they did not verify whether furniture was stored in the garage or if renovations were in progress, despite drywall sheets being visible inside the living area. [75] Safeco also acknowledged that it would be reasonable for a homeowner to store furniture during renovations[76], yet neither Safeco nor Defendant Hollon inquired if thermostat-controlled space heaters were in use at the time of the freeze. [77] If they had done a reasonable investigation and asked these simple questions, it would have been clear that the house was occupied and not vacant.

Mr. Adkisson's policy includes a freeze exclusion that applies only in three situations: if the home is vacant, unoccupied, or under construction. [78] It is undisputed that the home was not under construction[79], and the policy provides no definitions for "unoccupied"[80] or "vacant," outside of the vacancy clause.[81] Even if the home were vacant or unoccupied, coverage could still be available if the insured either used reasonable care to maintain heat or shut off the water and drained the system. [82]

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[73] Exhibit C, Deposition of Safeco Corporate Representative, 37:18-21.
[74] Exhibit C, Deposition of Safeco Corporate Representative, 38:18-40:4
[75] Exhibit C, Deposition of Safeco Corporate Representative, 38:18-40:4
[76] Exhibit C, Deposition of Safeco Corporate Representative, 40:9-24.
[77] Exhibit C, Deposition of Safeco Corporate Representative, 41:1-20.
[78] Exhibit C, Deposition of Safeco Corporate Representative, 66:13-24.
[79] Exhibit C, Deposition of Safeco Corporate Representative, 67:1-4.
[80] Exhibit C, Deposition of Safeco Corporate Representative, 45:21-46:6.
[81] Exhibit C, Deposition of Safeco Corporate Representative, 67:5-7.
[82] Exhibit C, Deposition of Safeco Corporate Representative, 67:13-17; 67:18-21.

First, Mr. Adkisson testified he had 4-5 space heaters throughout the home to maintain the heat.[83] Safeco admits that if this is true, it may have been reasonable care to maintain heat, thus potentially triggering coverage.[84] Second, coverage can be afford if the insured shuts off the water supply and drains the system and appliances of water.[85] There is no definition in the policy of when the water must be shut off,[86] although Safeco "inferred" it should happen prior to the loss.[87]

Safeco based its denial on the belief that the home "did not appear to be lived in and, for the most part, was vacant and/or unoccupied."[88] However, neither term is defined in the policy.[89] The closest definition, found in the vacancy provision,[90] states that a home will be considered vacant if the insured moves out and a substantial part of the personal property is removed.[91] Safeco did not take a clear position on what constitutes "moving out" but acknowledged that a homeowner visiting once a month for at least 24 hours may not constitute moving, depending on the facts of the case.[92]

As to whether a "substantial" part of the personal property had been removed, Safeco conceded that this could refer to a percentage of the property or items essential for habitation, such as kitchen, sleeping, or bathing items,[93] but this would depend on the specific claim.[94] Safeco further admitted that if the personal property was stored in the garage, it would still be considered part of the dwelling.[95] Importantly, the vacancy clause only applies after 60 consecutive days of

[83] Exhibit A, Deposition of Adkisson, 59:13-15.
[84] Exhibit C, Deposition of Safeco Corporate Representative, 68:1-69:1
[85] Exhibit C, Deposition of Safeco Corporate Representative, 69:2-9.
[86] *See* Defendant's Motion for Summary Judgment, Exhibit A-1.
[87] Exhibit C, Deposition of Safeco Corporate Representative, 71:11-19.
[88] Exhibit C, Deposition of Safeco Corporate Representative, 44:10-13.
[89] Exhibit C, Deposition of Safeco Corporate Representative, 45:13-15; 45:21-23.
[90] Exhibit C, Deposition of Safeco Corporate Representative, 46:2-6.
[91] Exhibit C, Deposition of Safeco Corporate Representative, 47:2-5.
[92] Exhibit C, Deposition of Safeco Corporate Representative, 49:8-50:2.
[93] Exhibit C, Deposition of Safeco Corporate Representative, 52:3-17.
[94] Exhibit C, Deposition of Safeco Corporate Representative, 54:2-6.
[95] Exhibit C, Deposition of Safeco Corporate Representative, 54:9-55:3.

vacancy[96], and Safeco did not deny the claim on the basis of vacancy. [97]

The denial letter was based solely on the freeze exclusion, which Safeco claimed applied because it believed reasonable care had not been used to maintain heat or shut off the water. [98] This was the only basis communicated to Mr. Adkisson prior to litigation. [99] Safeco also testified that determining whether someone resides at a dwelling involves looking at the totality of the facts, including mailing addresses and voter registration. [100] However, the policy does not require that the insured "live" at the Property, only that they "reside" there[101], and it contains no specific time frame for how long a property must be vacant or unoccupied for the freeze exclusion to apply. [102]

## Arguments and Authorities

### A. Interpreting Insurance Policies

The Defendant's summary judgment request is based on its interpretation of the insurance policy at issue in this case. In order to understand why the Defendant's arguments are wrong, it is important to understand how insurance policies are interpreted under Texas law.

#### 1. Generally

An insurance policy is a contract wherein the insurer agrees to cover a future unknown risk in return for the receipt of premiums.[103] As such, it establishes the rights and obligations of the parties to the policy.[104] The starting point for interpreting an insurance policy is the language of the policy itself.[105] Because an insurance policy is just a written contract to cover future losses,

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[96] Exhibit C, Deposition of Safeco Corporate Representative, 55:4-14.
[97] Exhibit C, Deposition of Safeco Corporate Representative, 55:15-18.
[98] Exhibit C, Deposition of Safeco Corporate Representative, 57:4-19.
[99] Exhibit C, Deposition of Safeco Corporate Representative, 57:20-58:1; 60:2-9.
[100] Exhibit C, Deposition of Safeco Corporate Representative, 63:11-25.
[101] Exhibit C, Deposition of Safeco Corporate Representative, 65:3-10.
[102] Exhibit C, Deposition of Safeco Corporate Representative, 74:13-17.
[103] *In re Texas Assoc. of Sch. Boards, Inc*., 169 S.W.3d 653, 658 (Tex. 2005) (orig. proceeding).
[104] *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 270 (Tex. 2021) (orig. proceeding).
[105] *Progressive County Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 807 (Tex. 2009); *Taylor v. Root Ins. Co.*, 109 F.4th 806, 808 (5th Cir. 2024).

they are interpreted using the same rules that govern other contracts.[106]

Under Texas law, the construction of an unambiguous contract presents a question of law.[107] This is specifically true of insurance contracts, where the intent of the parties is determined by what was expressed in the language of the instrument.[108] Put another way, these rules require courts to use the plain language of the policy to determine its meaning[109] and require all parts of the policy must be read together, so every sentence, clause and word are given meaning, to avoid rendering any part of the policy inoperative.[110]

Language in a policy that can be given a definite or certain legal meaning is not ambiguous and must be enforced as written.[111] In contrast, policy language subject to more than one reasonable interpretation is ambiguous,[112] and should be interpreted in favor of coverage.[113] When interpreting ambiguous policy language, court are supposed to resolve the ambiguity by adopting a reasonable construction favoring the insured, even if the insurer's interpretation appears to be more reasonable.[114] If there is any uncertainty regarding the language of the policy, this uncertainty should not redound to the benefit of the insurer who wrote it, a rule justified by the special relationship between insurers and their insureds.[115]

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[106] *Dillon Gage Inc. of Dallas v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590*, 636 S.W.3d 640, 643 (Tex. 2021); *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 497 (Tex. 2020); *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892 (Tex. 2017); *Taylor*, 109 F.4th at 808; *Schnell v. State Farm Lloyds*, 98 F.4th 150, 156 (5th Cir. 2024).
[107] *Andarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2003*); Balfour Beatty Constr., L.L.C. v. Liberty Mut. Fire Ins. Co*., 968 F.3d 504, 509 (5th Cir. 2020).
[108] *Discover Property & Cas. Ins. Co. v. Blue Bell Creameries USA, Inc*., 73 F.4th 322, 328 (5th Cir. 2023); *Balfour Beatty Constr*., 968 F.3d at 509; *Texas v. American Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006).
[109] *Dillon Gage*, 636 F.3d at 643; *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017); *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015),
[110] *Primo*, 512 S.W.3d at 892-93; *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998).
[111] *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 746 (Tex. 2006); *Taylor*, 109 F.4th at 809.
[112] *Nassar*, 508 S.W.3d at 258; *RSUI Indem.*, 466 S.W.3d at 118; *Balandran*, 972 S.W.2d at 741; *Taylor*, 109 F.4th at 808; *Princeton Excess & Surplus Lines Ins. Co. v. A.H.D. Houston, Inc*., 84 F.4th 274, 281 (5th Cir. 2023).
[113] *Dillon Gage*, 636 S.W.3d at 643; *Scott v. Factory Mut. Ins. Co.*, 105 F.4th 816, 820 (5th Cir. 2024).
[114] *RSUI Indem.*, 466 S.W.3d at 118; *National Union Fire Ins. Co. v. Hudson Energy Co., Inc.*, 811 S.W.2d 552, 555 (Tex. 1991); *Buchholz v. Crestbrook Ins. Co.*, 65 F.4th 766, 769 (5th Cir. 2023); *Dillon Gage Ins. of Dallas v. Certain Underwriters at Lloyds Subscribing to Policy No. EE1701590*, 992 F.3d 401, 405 (5th Cir. 2021).
[115] *RSUI Indem.*, 466 S.W.3d at 118-19; *Balandran*, 972 S.W.2d at 741 n.1.

2. Interpreting Exclusions from Coverage

If an insurer wants to exclude a particular peril from coverage, it must do so in clear and unambiguous language.[116] This, in turn, means that when the case involves an exception or limitation to insurer's liability under a policy, a more stringent construction against the insurer is required,[117] because exceptions from liability are disfavored, and strictly construed against the insurer.[118]

When the policy in question purports to exclude something from coverage, the general rule is if the scope of this exclusion is subject to two reasonable interpretations, courts are required to interpret the exclusion narrowly and in favor of coverage, i.e., against the insurer and in favor of the insured.[119] This is true even if the interpretation offered by the insurer is seen as the more reasonable one.[120]

3. Interpreting Exceptions to Exclusions

Finally, in keeping with these rules that require insurance policies to be interpreted in favor of coverage, an exception to an exclusion is also supposed to be interpreted in the same manner, i.e., broadly in favor of coverage.[121]

B. The Vacancy Exclusion Does Not Apply because Plaintiff Resided at the Property

The first part of the Defendant's argument is based on the operation of a provision of the

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[116] *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993); *Assicurazioni Generali, S.p.A. v. Ranger Ins. Co.*, 64 F.3d 979, 983 (5th Cir. 1995).
[117] *Nassar*, 508 S.W.3d at 258; *Bitco Gen. Ins. Corp. v. Monroe Guar, Ins. Co.*, 31 F.4th 325, 331 (5th Cir. 2022); *Lawyers Title Ins. Co. v. Doubletree Partners, L.P.*, 739 F.3d 848, 859 (5th Cir. 2014); *Hallmark Specialty Ins. Co. v. Frank Winston Crum Ins*., 1:22-CV-00579-MJT, 2024 Tex. App. LEXIS 58002 * 24 (E.D. Tex. Mar. 15, 2024).
[118] *Gonzalez v. Mid-Continent Cas. Co.*, 969 F.3d 554, 561 (5th Cir. 2020); *Wells v. Minnesota Life Ins. Co.*, 885 F.3d 885, 890 (5th Cir. 2018); *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 371 (5th Cir. 2008).

[119] *Utica Nat'l Ins. Co. of Tex. v. American Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004); *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003); *see also Ticer v. Imperium Ins. Co.*, 20 F.4th 1040, 1048 (5th Cir. 2021) (describing the construction of exclusions as being "strictly construed in favor of the insured ...").
[120] *Nassar*, 508 S.W.3d at 258; *Hudson Energy Co.*, 811 S.W.2d at 555.
[121] *Gilbert Tex. Constr., L.P. v. Underwriter Lloyd's London*, 327 S.W.3d 118, 134 (Tex. 2010); *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App. — Houston [14th Dist.] 2013, pet. denied).

policy at issue which provides that coverage is "suspended" sixty days after the property becomes "vacant," which (as set forth above) only occurs if the insured "moves from the dwelling and a substantial part of the personal property is removed from the dwelling." Because this provision is an exclusion from coverage, it is interpreted under the rules set forth above, i.e., narrowly, and in favor of Adkisson.[122] Because the question of whether a given property is or is not vacant depends on the particular factual circumstances, it is usually a question of fact.[123] A property can be empty, in the sense of not having someone currently living in it, without also being "vacant." This is because the occupancy that means a property is not vacant need not be continuous, with temporary absences from the property not rendering it vacant or unoccupied.[124]

In similar cases, Texas has defined "vacant" to mean essentially abandoned, requiring proof that the property was "abandoned, deprived of contents, and empty ...,"[125] with the focus on the presence or absence of inanimate objects, rather than people. Given its ordinary meaning, a person may live in more than one place at a time, leaving neither of two properties "vacant."[126] This is in accordance with other authorities addressing the same issue.[127]

Moreover, abandonment of the property requires proving the property owner had left without intended to return. In the terms of the language of exclusion at issue, proof that the owner

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[122] *Greene v. Farmers Ins. Exch*., 446 S.W.3d 761, 766 (Tex. 2014).
[123] *Columbia Lloyds Ins. Co. v. Mao*, 02-10-00063-CV, 2011 Tex. App. LEXIS 2180 * 12-13 (Tex. App. — Fort Worth Mar. 24, 2011, pet. denied) (mem. op.); *Germania Farm Mut. Aid Ass'n v. Anderson*, 463 S.W.2d 24, 25 (Tex. App. — Waco 1971, no writ).
[124] *Blaylock v. American Guar. Bank Liab. Ins. Co.*, 632 S.W.2d 719, 721 (Tex. 1982); *Republic Ins. Co. v. Watson*, 70 S.W.2d 441, 443-44 (Tex. App. — Beaumont 1934, no writ); *Cambridge Mut. Fire Ins. Co. v. Taliaferro*, 17,937, 1987 Tex. App. LEXIS 2970 * 12 (Tex. App. — Fort Worth Feb. 23, 1978, no writ) (not designated for publication).
[125] *Phoenix Assurance Co. v. Shepherd*, 137 S.W.2d 996, 997 (Tex. 1940); Mao * 15; *Anderson*, 463 S.W.2d at 25; *Knoff v. United States Fid. & Guar. Co.*, 447 S.W.2d 497, 501 (Tex. App. — Houston [1st Dist.] 1969, no writ).
[126] *East Tex. Fire Ins. Co. v. Kempner*, 34 S.W. 393, 400 (Tex. 1896); *Farmer's Mut. Progressive Assoc. v. Wright*, 702 S.W.2d 295, 297 (Tex. App. — Eastland 1985, no writ).
[127] *See, e.g., American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378, 379 (11th Cir. 1989); *Feinstein v. Reliance Ins. Co.*, 380 N.Y.S.2d 990.992 (Dist. Ct. 1976); *Foley v. Sonoma Cnty. Famers' Mut. Fire Ins. Co.*, 115 P.2d 1, 4 (Cal. 1941); *Continental Ins. Co. v. Dunning*, 60 S.W.2d 577, 579 (Ky. 1933); *see also, generally*, APPLEMAN ON INS. (2nd ed.) § 2833.

has "mov[ed] from the dwelling" requires evidence showing an intent to leave and not to return.[128] This rule is not a new one,[129] and is in keeping with authorities from around the country.[130]

The uncontroverted evidence in the instant case, as outlined above, shows the exact opposite of abandonment with the intent of not returning. Plaintiff regularly visited the property, each month, although working away. Further, Plaintiff was beginning updates to the home at the time of the loss as it was his intent to use the home as a retirement home. Plaintiff regularly received mail at the home and maintained his voter registration at the residence. Sure, much of the contents of the living and dining area had been removed when Defendant Hollon conducted his brief inspection of the home, but they had been moved to storage on site given Plaintiff's intention to renovate the ceiling in those areas of the home. Similarly, the large old fridge was inoperable, but Plaintiff, who is a single man living alone, maintained a smaller refrigerator suitable to his needs and power and water were active to the property. The home was hardly abandoned without the intent to return and as such, the home was never "vacant" much less vacant for a period of sixty continuous days or greater.

C. There is No Applicable Exclusion for Burst Pipes

The Defendant's alternate argument is that it cannot be liable to Adkisson under the policy because of a provision saying the policy does not cover what damage from frozen pipes when the property is "vacant [or] unoccupied," unless the insured "used reasonable care" to safeguard against the danger, either heating the building or shutting off the water and draining the pipes. In support of this argument the Defendant cites no relevant Texas authority, apparently having found

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[128] *See, e.g., Greene*, 446 S.W.3d at 763 (evidence showed homeowner moved into a retirement community, changed addresses and informed insurer of intent to sell insured house); *Spates v. Republic Ins. Co.*, 756 S.W.2d 88, 90-91 (Tex. App. — San Antonio 1988, no writ) (evidence showing, inter alia, that owner had moved out of house because he had moved out of the country, and was having the house fixed up to sell, proved he had vacated the house; evidence ultimately failed to prove whether he had done so more than sixty days before house was destroyed by fire).
[129] *Westchester Fire Ins. Co. v. Redditt*, 196 S.W. 334, 337-38 (Tex. App. — Beaumont 1917, no writ),
[130] *See, e.g., Mack v. Citizens Bank of Logan*, 332, 180 Ohio App. LEXIS 12906 * 3-4 (Ohio Ct. App. Jan. 24, 1980).

none. Additionally, (as detailed above) the provision that provides for coverage if Adkisson used "reasonable care" to heat the property or drain the pipes, being an exception to an exclusion, must be interpreted broadly in Adkisson's favor.

First and foremost, this exclusion does not apply to the facts of the instant case. This exclusion would only apply if the home was vacant or unoccupied, and as outlined in detail above, the home was not vacant or unoccupied.

Assuming *arguendo*, the home is in fact somehow deemed vacant or unoccupied, this exclusion nevertheless does not apply. According to the exclusion itself, there are exceptions to the exclusion if the Plaintiff took reasonable steps to heat the home and/or shut off the water supply. Here, there is ample uncontroverted evidence that Plaintiff took such reasonable steps. Sure, the gas to the home was not hooked up, but Plaintiff has testified that he had four to five thermostat controlled electric heaters throughout the home to provide heat. This fact was further supported by the testimony of his adult daughter, who has no pecuniary interest in the home or in the outcome of the instant matter.

Although simply assumed by Defendants that the second exception requires Plaintiff to cut off the water supply before the loss, the exception does not state as much. In the instant case, Plaintiff took reasonable steps to have the water shut off at the time of the loss as soon as a leak was identified. Such heady actions greatly mitigated the potential damage and loss that would have to be paid by Safeco. By acting so reasonably, he met the requirements of the exception through his mitigation efforts. In short, the exception can reasonably be construed as a mitigation effort requirement just as easily as it is construed as a pre-loss requirement, and Plaintiff's actions reasonably meet a reading of the exception as a mitigation effort requirement.

D. Plaintiff is Entitled to Benefits Under the Policy and His Claims for Common-Law and Statutory Bad Faith Survive.

Safeco's reliance on *Menchaca's* "independent injury rule" is not applicable to this case. Safeco's contention that Plaintiff must show that it suffered an independent injury separate and apart from its wrongfully denied and/or underpaid claim is simply incorrect. While *Menchaca* does confirm the "independent injury" rule as an available basis for recovering extra-contractual benefits when the claimant is not entitled to benefits under their policy, the rule has no application in this case. Insurers such as Safeco routinely turn to the courts claiming they are insulated from liability for extra-contractual claims absent proof of a contractual breach, without pointing out to the courts that their policies often do not form the basis for a breach of contract based on an improper investigation.[131]

Here, Plaintiff contends that Defendant committed knowing violations of the Texas Insurance Code in failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which their liability was reasonably clear, refusing to pay Plaintiff's claim without conducting a reasonable investigation, and failing to make sufficient payments. Without a determination by the finder of fact that Plaintiff is *not* entitled to additional policy benefits, there is no basis in law or fact for a summary judgment ruling that Plaintiff is not entitled to extra-contractual damages.[132]

Separately, or in the alternative, by failing to provide a prompt and reasonable explanation for its denial on March 24, 2021, Safeco caused an independent injury to Plaintiff by preventing it

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[131] *See*, *e.g.*, *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

[132] *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 494-95 (Tex. 2018) ("[I]f the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation resulted in the insured not receiving those benefits, the insured can recover the benefits as 'actual damages . . . caused by' the statutory violation.") (the *Menchaca* "Entitled-to-Benefits Rule"); *Lyda Swinerton Builders, Inc. v. Oklahoma Sur.Co*., 903 F.3d 435, 451-52 (5th Cir. 2018).

from knowing how to proceed, or what actions it might take to help resolve its claim and conduct the necessary repairs to the Property. Safeco's actions also forced Plaintiff to hire an attorney to help him with its legal causes of action.[133] Further, Safeco's actions forced Plaintiff to spend his own funds to make repairs to the home.[134] Thus, Safeco's subsequent failure to provide a prompt and reasonable explanation for denial placed Plaintiff in an extremely detrimental position. Therefore, because Safeco's actions have caused Plaintiff to suffer injury independent of the subject insurance policy, Safeco's contentions are without merit.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant SAFECO's Motion for Summary Judgment be denied, and that Plaintiff be awarded such other and further relief to which he may be justly entitled, at law or in equity.

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[133] *See* Plaintiff's Original Petition
[134] Exhibit A, Deposition of Adkisson, 77:14-78:21

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record, in accordance with the Federal Rules of Civil Procedure this 4th day of October 2024.

*s/Jason M. Byrd*
Jason M. Byrd