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RE: Case No. 21-0593 DATE: 10/29/2021
COA #: 01-19-00308-CV TC#: 2017-22800
STYLE: POWELL v. USAA CIC

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

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DISTRICT CLERK HARRIS COUNTY
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SUPREME COURT OF TEXAS
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No. 21-0593

In the Supreme Court of Texas

AMY POWELL

Petitioner

v.

USAA CASUALTY INSURANCE CO.

Respondent

On Petition for Review from the First
Court of Appeals at Houston
Case No. 01-19-00308-CV

AMY POWELL'S PETITION FOR REVIEW

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Statement of the Case

NATURE OF THE CASE	This is an insurance dispute. CR.4. Following a severe storm in 2016, Amy Powell submitted a claim to her insurer, USAA Casualty Insurance Co. CR.285. For nine months USAA searched for reasons to deny the claim. CR.285-365. When USAA did, it gave just one reason: Powell's alleged misrepresentations. CR.784. Powell sued for breach of contract and Insurance Code violations. CR.4.
TRIAL COURT	The 157th District Court, Harris County, Texas, the Honorable Judge Tanya Garrison, Presiding.
DISPOSITION AT TRIAL	USAA abandoned its stated reason for denial. CR.13. Instead, USAA moved for summary judgment arguing that the claims were not covered under the policy or fell within an exclusion. CR.22. The trial court granted summary judgment, rendering judgment for USAA. CR.925.
COURT OF APPEALS	The First Court of Appeals at Houston.
DISPOSITION ON APPEAL	The First Court of Appeals affirmed the grant of summary judgment for USAA. *Powell v. USAA Cas. Ins. Co.*, No. 01-19-00308-CV, 2021 Tex. App. LEXIS 2811 (Tex. App.—Houston [1st Dist.] Apr. 15, 2021) ("*Opinion*").

Statement on Jurisdiction

This Court has jurisdiction over this appeal because it arises from a final judgment and raises issues important to the jurisprudence of the state. *See* TEX. GOV'T CODE § 22.001(a). Exercise of jurisdiction is appropriate because:

(1) This appeal presents questions of law important to the jurisprudence of the state involving the Texas Insurance Code and statutory protections for Texans. TEX. R. APP. P. 56.1(a)(5).

(2) The appeal raises issues of law about the interplay of the Texas Insurance Code and the availability of defenses at trial that present questions of first impression for this Court. TEX. R. APP. P. 56.1(a)(2).

(3) If left uncorrected, the holding, strips the Texas Insurance Code of enforcement mechanisms, creating a roadmap for abuse. TEX. R. APP. P. 56.1(a)(2).

Issues Presented

I. Can an insurer deny a claim for one reason and then use a completely different reason to defeat liability when the Insurance Code requires an insurer to state the reason for denial?

II. Did the insurer conclusively establish that claims were not covered or excluded from the policy when the evidence raises material fact issues as to timing, cause, and coverage?

Statement of Facts

Powell is a USAA customer for years.

Amy Powell bought her Houston home in 2010. CR.101. Over the next five years, Ms. Powell poured more than $100,000 into the home. CR.521. In 2014, Powell obtained a homeowner's insurance policy with USAA covering her home. CR.182, 307, 540. She obtained a new policy with USAA each of the following years. *Id.*

Powell renews her homeowner's policy.

USAA issued a new homeowners' policy on April 5, 2016, running for one year. CR.182. Before that, there was a brief lapse, in which the home was not insured from March 11 to April 5, 2016. CR.540. But on April 5, 2016, Powell re-obtained coverage for the property. CR.182. The total policy premiums were almost $4,000 per year. *Id.* Ms. Powell paid those, making sure that her home was insured. *Id.*

The Tax Day Storm damages Powell's Home.

On April 17 and 18, 2016, Houston suffered the Tax Day Storm dropping more than a foot of rain as well as wind and hail. CR.368, 525, 438-43 (detailing hail as large as a quarter, "a severe thunderstorm," and "60 mph wind gusts"). The result was widespread, catastrophic property damage. *Id.*

Powell's home was no exception. CR.368; 525; 585. The wind and hail caused substantial damage to the roof. CR.288, 526, 591-93, 675, 695-96. To this end, experts opined that the roof damage resulted from hail during the Tax Day Storm. CR.591-93. And experts concluded that the damage was "weather-related" from "a lot of rain" and hail, like that experienced during the Tax Day Storm. CR.674-75, 695-696.

Powell submits a claim to USAA.

On June 14, 2016, Ms. Powell filed a claim for USAA for water damage to her home. CR.285. Weeks after, the USAA adjuster assigned to the claim visited the home on July 14 and again on August 8. CR.301, 311, 368.

USAA divided Ms. Powell's claim into several parts: (1) damage resulting from a washing machine line backup; (2) water damage from an air conditioning unit; and (3) damage from water coming through the roof. CR.782-93. The notice stated that each claim would be subject to the $1,000 deductible and would "would be handled" under the policy. CR.305.

USAA tries everything to avoid the claim.

It quickly became apparent that USAA was searching for any reason to deny the claim. Over the next nine months, USAA tried to avoid the claim any way it could think of. *See, e.g.*, CR.285-365. USAA's "Claim Activity Log" contains 279 separate entries chronicling USAA's attempts to avoid the claim on various grounds. *Id*.

USAA claims that Powell does not own the property.

USAA first claimed that Powell was not even the owner of the property. CR.101-02, 315-16. Despite issuing three separate policies—and accepting premiums of more than $10,000—USAA claimed that Ms. Powell had no "insurable interest in the property." *Id*. For months, USAA conducted various investigations, even sending the claim to a "Special Investigation Unit" to uncover whether Ms. Powell owned the property. CR.322-30; 332-34, Finally, in October 2015, USAA concluded that it had spent almost six months chasing its tail. CR.339

USAA then informed Ms. Powell that it would "close its investigation. *Id*.[1] At that point, USAA concedes, it was reasonable for

[1] In February 2017—8 months after the water damage—USAA obtained a legal evaluation of Ms. Powell's claim. The opinion affirmed that the "no insurable interest" argument was a loser. CR.539.

Ms. Powell to believe that USAA would go ahead and pay on the claim. CR.868. Still, this was not the end of the saga.

USAA next claims that Powell lied in her application.

Switching gears, USAA next argued that Powell made "material misrepresentations" in the application process CR.454-55. This time, USAA claimed that Powell had lied when applying for the April 2016 policy. CR.882, 342-43. USAA floated this idea for the very first time on October 10, 2016. *Id.*

There was just one problem: no representation existed. CR.881. USAA concocted a story in which Ms. Powell lied in the application process. CR.454-55. And yet, USAA's representatives admit that they cannot produce, locate, or identify *any conversation* Powell had about the application for the April 2016 policy. CR.881.

When it got down to it, USAA had nothing. Frustrated with their own shortcomings, one USAA representative quizzed another, *isn't there some sort of script we use?* CR.881. Again, nothing turned up. *Id.* Still, USAA continued to press for any theory it could come up with to deny the claim.

USAA claims that Powell lied in the claims process.

In its third attempt to avoid the claim, USAA claimed that Powell made misrepresentations in the claims process. CR.66-74. Testing this theory, USAA requested a legal evaluation on the viability under the policy's "Concealment, Misrepresentation, or Fraud" provision. *Id*.

The evaluation concluded that denial was appropriate *only if* USAA could prove that Ms. Powell made a material, false representation. CR.66. At best, the opinion could merely say that USAA "had a reasonable basis to question," these issues. CR.74. That was good enough for USAA. CR.784, 789, 793.

Nine months later, USAA denies the claim because Powell "misrepresented and concealed facts."

With its third theory in hand, USAA pulled the trigger. In March 2017, USAA denied the claim because of Powell's alleged "concealment and misrepresentation." CR.360-61. The denial letters claimed that Powell "misrepresented and concealed facts" in the presentation of the claim. CR.784-93.

USAA offered a list of misrepresentations including that Powell lied about the condition of the house, lied about roof repairs, submitted false invoices, and lied about FEMA funds. CR.247, 783, 787-88, 791.

Unsurprisingly, USAA provided no documentation or evidence to support these sweeping allegations. *Id.* And for good reason. As would soon become clear, USAA could not prove any of them.

USAA abandons its misrepresentation defense.

Powell sued USAA in 2017 asserting claims for breach of contract and Insurance Code violations. CR.4. USAA moved for summary judgment. CR.22. USAA abandoned its "misrepresentation" defenses and raised different theories to defeat liability. CR.13, 22. This time, USAA argued that Powell could not prove that the claims occurred within the policy period, were covered, or did not fall within an exclusion. *Id.*

Powell objected that USAA's prior explanation for denial confined its defenses at trial. CR.794. Powell also responded, submitting additional evidence. CR.820-916. Taken together, the evidence showed that the loss occurred within the policy period and was not excluded. CR.197, 368, 438-39, 525, 585, 675-76, 695-96, 782-793.

The trial court grants summary judgment; the Court of Appeals affirms.

The trial court granted summary judgment in USAA's favor and dismissed all of Powell's claims. CR.925.

The First Court of Appeals affirmed. *See Opinion*. In its *Opinion*, the court held that whether Texas Insurance Code Section 542.056 precluded USAA's new defenses was a matter of first impression. *Id.* at pp. 18-19. But, sidestepping the issue, the Court found that the denial based on misrepresentation was close enough to USAA's later arguments about coverage and exclusions. *Id.* The Court held that USAA established these defenses and Powell failed to present evidence creating a fact issue. *Id.* at pp. 1-2. The Court denied rehearing and this Petition followed.

Summary of Argument

USAA spent nine months searching for a reason to deny Amy Powell's claim. Finally, it settled on one. USAA told Amy Powell it was denying her claim because she lied to them. But when it came time to put up evidence to support that claim, USAA couldn't. So it switched gears. To avoid liability, USAA crafted several new explanations for denying coverage.

But Texas Insurance Code Section 542.056(c) requires an insurer to tell the insured why it is denying the claim. That statute either means what it says, or it doesn't.

Allowing an insurer to offer any reason at all, then abandon that defense and avoid liability on a different basis renders the statute a nullity. Instead, an insurer defending a lawsuit is bound to the reasons stated in the insurer's letter rejecting the claim. Giving effect to Section 542.056 requires insurers to complete a reasonable investigation, fulfilling the purpose of the statutory protections.

The lower court erred in not holding USAA's feet to the fire on the claimed reasons for denial. For that reason, summary judgment was improper. And, even taking up USAA's new defenses, those claims fail.

Argument

I. An insurer cannot deny liability for one reason and then contest liability on a different basis.

Texas Insurance Code Section 542.056(c) requires an insurer to tell the insured why it is denying the claim. Here, the insurer denied the claim for one reason and then tried to avoid liability for several different reasons. And so, the question—of first impression for this Court—is whether Section 542.056(c) means anything. Giving effect to the statute, Section 542.056(c) quite reasonably binds an insurer defending a lawsuit to the reasons stated in the insurer's letter rejecting the claim.

On this legal backdrop, USAA did not establish its entitlement to summary judgment on those grounds. Nor was the lower court correct in giving USAA the benefit of the doubt and construing USAA's denial as close enough to allow it to rely on other defenses. For each reason, review is warranted.

A. Does Section 542.056 mean anything?

The Texas insurance code requires an insurer to accept or reject a claim promptly. TEX. INS. CODE. § 542.056(a). In investigating the claim, the insurer must conduct a reasonable investigation, refrain from any

misrepresentations on any coverage issue, and act in good faith. *See id.* § 541.060.

The statute also requires the insurer to provide a written notification of its decision. *Id.* § 542.056(a); *see also Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 831 (Tex. 2019) (Boyd, J., dissenting) (providing a flow-chart of the acceptance or denial process).

In the event of denial, the insurer *must* provide written notification and provide the basis for denial. *Id.* § 542.056(c). On this, the statute's text leaves little wiggle room.

> **If the insurer rejects the claim, the notice required by Subsection (a) or (b) *must* state the reasons for the rejection.**

Nor can the insurer provide just any reason for rejection or denial. Instead, the insurer must provide a "*reasonable explanation*…in relation to the facts or applicable law." TEX. INS. CODE. § 541.060(a)(3) (emph. added).

An insurer may be liable for failing to do so. *See Jaramillo v. Liberty Mut. Ins. Co.*, No. 4:18-CV-00338-Y, 2019 U.S. Dist. LEXIS 229060, at *14 (N.D. Tex. 2019) ("The Court determines that Jaramillo has successfully brought a claim under Subsection 542.056(c).").

The question before the Court is whether Section 542.056(c) means anything. Either:

- Section 542.056(c) binds an insurer defending a lawsuit to the reasons stated in the insurer's letter rejecting the claim.

- Or, despite 542.056(c)'s requirement, an insurer can provide any reason to deny the claim, but later abandon that defense and pursue judgment on a completely different basis.

The latter strips the statute of any real meaning or enforcement mechanism. The Court should not read Section 542.056(c) as a nullity. *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 248 n.35 (Tex. 2010) (courts should not read any provision as a nullity); TEX. GOV'T CODE § 311.021(2).

Instead, holding insurers to their word provides teeth to the statute. Chapters 541 and 542, in conjunction, compel a diligent, good-faith investigation and for the insurer to disclose that explanation. Tex. Ins. Code §§ 541.060, 542.056. Not holding insurers to that explanation, defangs both.

And if the statute has no teeth, why should the insurer provide any reason in the first place? If there is no consequence for providing an erroneous explanation, there is no incentive to conduct a reasonable

investigation. But doing so strips the insured of any guarantee that the insurer came to the right conclusion, or that it did any investigation at all. Reading a rule to have no recourse, is to read the statute into oblivion. *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) ("It is settled that every word in a statute is presumed to have been used for a purpose").

Finally, giving effect to Section 542.056(c) carries out to the Insurance Code's stated purpose, to promote the prompt payment of claims and to eliminate unfair insurance practices. TEX. INS. CODE §§ 542.054; 541.008; 541.001. And so, holding insurers to their stated conclusions ensures that they complete a reasonable investigation and makes sure insurers stick to what they said.

For each of these reasons, Powell asks the Court to grant review and to give effect to Section 542.056, holding insurers to what they said, and not allowing flip-flopping after the fact.

B. Whether Section 542.056 curbs the insured's defense is an issue of first impression.

The lower court suggested that this was a case of first impression. *Opinion*, p. 18. And strictly speaking, that is correct. This Court has not addressed what preclusive effect Section 542.056 has on an insured's defense.

But the Court grappled with a similar issue more than thirty years ago. *Viles v. Sec. Nat'l Ins. Co.*, 788 S.W.2d 566 (Tex. 1990). There, the Court addressed an insurer's obligation to provide a "reasonable basis for denial of the claim." *Id*. at 567-68.

In *Viles*, the Court noted that an insurer must provide a "reasonable basis for denial of a claim." *Id*. The issue was whether the insurer breached that duty. "Whether there is a reasonable basis for denial…must be judged by the facts before the insurer at the time the claim was denied." *Id*. Thus, the reasonableness of the denial, judged "at the time the claim was denied," is the relevant inquiry. *Id*.

To allow insurers to offer up new explanations after the fact subverts this analysis. Were that the law, the Court could have side-stepped the entire discussion. The reasonableness of the denial—or

whether the insurer offered any reason at all—would be irrelevant, as an insurer would be free to offer new grounds of defense at trial.

Implicit in this analysis—and express in the reasoning—is that the "special relationship" between insured and insurer imposes "a duty to investigate claims thoroughly and in good faith, and to deny those claims only after an investigation reveals there is a reasonable basis to do so." *Id.* at 567. Reading Section 542.056 to hold insurers to their word ensures that process plays out as it should.

Nor does *Stoker*, which USAA relied on below, put the issue to bed. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). In *Stoker*, this Court held that offering an "erroneous" reason for denial, when other valid reasons may exist, is not "dispositive" on the issue of bad faith. *Id.* at 340. Thus, the Court held that insurers could rely on reasons other than those first given to defend the bad faith suit. *Id.*

But the Court did not take up Section 542.056 or its predecessor, Texas Insurance Code Article 21.55.[2] Nor did the Court address the prompt-payment provisions of the Insurance Code, or how the defenses

[2] Relying on that statute, this Court has held that an insurer must provide "its reasons for the decision … in a clear writing to the insured." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 222 (Tex. 2003).

in a denial letter may curb the defenses at trial. In short, this Court has not yet addressed the interplay of case law and statute on this issue.[3]

Thus, the central question remains: how does Section 542.056 affect this analysis? And more importantly, does Section 542.056 mean anything? This case presents the opportunity to clarify this area of law.

C. USAA could not obtain summary judgment on its "misrepresentation" defense.

"Whether an insurer reasonably denied…a claim must ordinarily be resolved by a jury." *Jasso v. State Farm Lloyds*, No. 1:15-cv-203, 2018 U.S. Dist. LEXIS 73208, at *6 (S.D. Tex. 2018). A court can decide the issue *only* "when there is no conflict in the evidence, but when there is evidence on either side, the issue is a fact question." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997).

Taking up the stated reason, USAA did not come close. Still, the lower court found that USAA's "misrepresentation" defense was close enough to the defenses it later raised and granted judgment on that basis. But giving USAA the benefit of the doubt disregards statutory plain text and summary judgment standards.

[3] Nor do other cases drawing on *Stoker* take up these issues. *See, e.g.*, *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 197 (Tex. 1998).

1. USAA is bound to the misrepresentation defense.

USAA's attempt to use a different defense to defeat liability fails under Section 542.056(c). An insurer cannot deny a claim for one reason and then use a completely different reason to contest liability. *Id.*

Nor was USAA unaware of this obligation. The policy states that "Your insurance company must tell you in writing why your claim or part of your claim was denied." CR.242. The policy later acknowledges that in any suit for benefits the insurer "has the burden of proof as to any application of an exclusion…or other avoidance of coverage by the insurer." CR.245.

USAA denied Powell's insurance claim giving only one reason: material, false representation. CR.247, 783, 787, 791; *see also* CR.833 (USAA representative admitting that this was the only reason).

But, when it came time to offer proof, USAA abandoned that explanation. CR.13, 22. Instead, USAA concocted a new reason for denial: that the loss occurred outside the policy period or was not covered. *Id.* Those defenses provided no basis for summary judgment; instead, the misrepresentation defense remained the basis for denial and defense.

2. USAA did not establish its misrepresentation defense.

Thus, USAA's obligation was to come forward with proof to "conclusively establish" the fraud or misrepresentation on which it relied to deny the claim. *See Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 454 (Tex. 1969) (movant must "conclusively establish" defense).

To do so, USAA had to show a material, false representation, made with the intent to deceive, which the insurer relied on to its detriment. *Mayes v. Mass. Mut. Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex. 1980); *see also* TEX. INS. CODE 705.004, 005 (providing specific requirements for insurers that want to void policies based on the insured's misrepresentation).

There is no dispute, USAA did not carry that burden; it did not even attempt to do so. *See* CR.22-50. And so, holding USAA to the stated explanation for denial, summary judgment was improper.

3. The denial letter was not "close enough."

To sidestep this issue, the lower court reasoned that USAA's denial letter was close enough to its later defenses. *Opinion*, p. 18. USAA's letter cited fraud as the basis for denial. CR.247, 783-91, 833. But USAA sought summary judgment because: (1) the losses were not covered, or (2) occurred outside the policy period. CR.22-50

Still, the lower court gave USAA the benefit of the doubt that the "fraud," of which USAA first complained, may have pertained to coverage issues; therefore, the new defenses were close enough. That holding is wrong doubly over.

First, the Insurance Code "shall be liberally construed" to promote the prompt payment of claims and to eliminate unfair insurance practices. TEX. INS. CODE §§ 542.054; 541.008; 541.001. Reading Section 542.056(c) in an insurer's favor—to allow one reason for denial to suffice for another—cuts against the statute's mandate.

Second, giving USAA a lax interpretation and the benefit of the doubt contradicts summary judgment standards. A court must resolve all doubts and indulges all inferences in Powell's favor. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018).

USAA denied the claims because of Powell's alleged misrepresentation. The lower court had to resolve any perceived dispute or doubt about what that means in Powell's favor. Doing so, denial based on misrepresentation means denial based on misrepresentation; it does not mean something else.

Tracking both the statute's plain text and summary judgment standards, the only summary judgment basis in play was misrepresentation. Giving the insurer the benefit of the doubt that it may have meant one thing when it stated something else was error. Taking up the stated basis for denial, misrepresentation, USAA did not carry that burden, nor did it come close enough.

And so, USAA failed to establish that it was entitled to summary judgment. Because Powell's evidence established a fact issue on her claims, the court erred in dismissing Powell's causes of action. For each of these reasons, the case presents issues of importance to the jurisprudence of the state warranting further briefing and review.

II. Alternatively, USAA was not entitled to summary judgment on its other defenses.

Alternatively, even if an insurer can introduce brand new reasons to defend its denial, summary judgment was improper. Disputed, material issues of fact exist on timing, cause, and coverage. USAA did not establish that it was entitled to judgment.

A. USAA's coverage defense fails, as facts issues exist on whether the roof claims were covered.

Focusing on the roof damage and mold claims, fact issues precluded summary judgment.[4] The lower court erred in concluding that USAA prevailed on its defenses that the claims fell outside the policy period or were not covered.

For breach of contract, an insured must show the existence of a valid insurance policy covering the denied claim and entitlement to money damages on that claim. *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010). If the insured meets her initial burden, the insurer must then prove that one of the policy's exclusions applies to avoid liability. *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014).

And as this appeal arises from a grant of summary judgment, the Court accepts Powell's evidence as true, resolves all doubts, and indulges all inferences in her favor. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771.

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[4] There are also other claims at issue addressed below. For brevity, Powell addresses the roof and mold claims in this Petition, without waiving the others. TEX. R. APP. P. 53.2(i).

The policy covered windstorms and hail damage. CR.197 (covering "windstorm or hail" including damage from "an opening in a roof or wall" in which rain or hail then enters); CR.227 (specific endorsement for water damage coverage).

Powell presented evidence that the Tax Day Storm of April 17-18, 2016 (within the policy period) caused wind and hail damage to her roof, leading to resulting water intrusion and mold damage. CR.591-93, 675-76, 695-96. To this end, a roofing expert testified he observed hail damage to the roof. CR.591-93. He concluded that the damage occurred during the Tax Day Storm of 2016. *Id*.

Another expert testified that the damage to the home was weather-related, as opposed to USAA's claim that it was wear and tear. CR.675-77 (explaining the significance of raised shingles). Given the widespread nature of the resulting water intrusion and damage, yet another expert concluded that the harm was "weather-related." 695-96.

In short, Powell presented evidence that: (1) the storm damaged the roof; (2) as a result of which water entered the home; (3) which, when unrepaired, because of USAA's unreasonable delay, allowed for mold growth. CR.197, 368, 438-39, 525, 585, 675-76, 695-96, 782-793.

To avoid this evidence, USAA muddies the waters. It suggests that damage could have occurred at some time before 2016. CR.594. USAA also suggested that the damage was due to long-term wear or tear or pre-existing problems. CR.33, 61; *compare* CR 695-96 ("weather-related").

This conflicting evidence raises fact issues, not summary judgment grounds. On this disputed factual basis, summary judgment is improper. The record, construed in Powell's favor, presents more than a scintilla of evidence on the claims. Nor does USAAs contrary evidence entitle it to judgment as a matter of law. Instead, it raises a fact issue for a jury to decide.

B. USAA's exclusion defense fails, as fact issue exists that the mold damage was covered.

USAA also argued that a mold exclusion prevented coverage of the claims. But again, the evidence raised a fact issue precluding summary judgment for two reasons.

First, Powell sought coverage for roof damage and water intrusion. CR.285. The mold exclusion does not exclude those claims. CR.200. The policy provides that USAA will repair or tear out and

replace the property damage resulting from a covered loss, even if mold is present. CR.225.

USAA made *zero* attempt to discern what damage fell within this coverage and which damage was exclusively mold; nor could it. *See* 543-44. In many instances, the water damage and mold were inextricable. *Id.* (identifying pictures of "a combination of mold and water stains"). Still, USAA denied the claim in its entirety.

Second, any mold resulted from USAA's unreasonable claims handling. Because of USAA's protracted attempts to ferret out any reason to deny the claim, the covered roof damage and water intrusion sat unrepaired for months. CR.6, 529, 545-47. During that time—and well outside the time to accept or deny the claim—the harm to the home only worsened. *Id.*

If a loss occurs because an insurer fails to act, the insurer should be estopped from asserting that exclusion. Otherwise, a carrier benefits from its failure to act. *Aetna Cas. & Sur. Co. v. Naran*, No. 05-96-01486-CV, 1999 Tex. App. LEXIS 843, at *22 (Tex. App.—Dallas Feb. 10, 1999, pet. denied) ("To prevail on an estoppel theory…the insured must show he was prejudiced by the insurer's conduct.").

As this Court held, "if the insurer's statutory violations prejudice the insured, the insurer may be estopped from denying benefits…" *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 498 (Tex. 2018). "Under such circumstances, the insured may recover any damages it sustains because of the insurer's actions, even though the policy does not cover the loss." *Id*. (internal quotations omitted).

USAA did not send anyone to inspect the house until weeks after the claim. CR.291, 301. From then, USAA took more than nine months to reject the claim, because of several unreasonable attempts to find *any* basis for denial, including even that Powell did not own the home USAA had insured for years. CR.285-365. That delay only made the damage worse. CR.6; 529, 545, 628.

And so, USAA failed to establish any valid defense—whether misrepresentation, coverage, or exclusion issues—entitling it to judgment as a matter of law. Instead, Powell's evidence creates a fact issue on her breach of contract and Insurance Code claims. For these reasons, reversal and remand for trial on these disputed issues of fact is warranted.

Prayer

Amy Powell asks the Court to request additional briefing and grant review, ultimately reversing the grant of summary judgment and remanding this case for trial to a jury.

Respectfully Submitted,

By: ***/s/ Tyler Talbert***

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CERTIFICATE OF COMPLIANCE

In compliance with the Texas Rule of Appellate Procedure 9.4(i)(2)(D), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 4,456.

/s/ Tyler Talbert
Tyler Talbert

CERTIFICATE OF SERVICE

I certify that on September 17, 2021, this document was served via the electronic filing system on Tanya Dawson, lead counsel for Respondent at tdawson@raleybowick.com.

/s/ Tyler Talbert
Tyler Talbert

No. 21-0593

In the Supreme Court of Texas

AMY POWELL

Petitioner

v.

USAA CASUALTY INSURANCE CO.

Respondent

On Petition for Review from the First
Court of Appeals at Houston
Case No. 01-19-00308-CV

APPENDIX

Tab 1

Opinion issued April 15, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00308-CV

AMY POWELL, Appellant

V.

USAA CASUALTY INSURANCE CO., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2017-22800

MEMORANDUM OPINION

Appellant Amy Powell appeals the district court's order granting summary judgment in favor of appellee USAA Casualty Insurance Co., on Powell's claims for breach of insurance contract and for violations of the Insurance Code. Powell

contends that summary judgment was improper because (1) USAA did not move for summary judgment on a ground stated in its letters rejecting her insurance claims as required by the Insurance Code, and (2) genuine issues of material fact exist regarding her breach of contract claims.

We affirm.

Background

In 2010, Powell bought a house on Cypress Park Drive in Houston. She moved into the house shortly after buying it, and it is her primary residence. The house was in disrepair when Powell bought it, however, and she agreed as part of the purchase to make repairs to it. She testified that she spent at least $100,000 repairing the pool, fence, air conditioner, plumbing, roof leaks, and broken windows and doors. But Powell did not replace the roof, and she estimated that the previous owner had replaced it after a fire sometime before she bought the house.

A. Powell's USAA Homeowner's Policies

Powell obtained three homeowner's policies from USAA insuring her house between 2014 and 2016. The first policy issued in August 2014, but it was cancelled in May 2015. The second policy issued in September 2015, but it was cancelled on March 11, 2016. USAA issued a third policy on April 5, 2016, effective for one year.

The policy beginning April 5, 2016, which is the only policy in the record on appeal, provides the following coverage:

COVERAGE A – DWELLING PROTECTION COVERAGE AND COVERAGE B – OTHER STRUCTURES PROTECTION COVERAGE

We insure against **"sudden and accidental"**, direct, physical loss to tangible property described in PROPERTY WE COVER – Coverages A and B unless excluded in Section I – LOSSES WE DO NOT COVER.

COVERAGE C – PERSONAL PROPERTY PROTECTION

We insure against **"sudden and accidental"**, direct physical loss to tangible property described in PROPERTY WE COVER – Coverage C caused by a peril listed below unless the loss is excluded in **LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION, OTHER STRUCTURES PROTECTION AND PERSONAL PROPERTY PROTECTION.**

* * * *

2. Windstorm or hail.

The policy defines "sudden and accidental" as "an abrupt, fortuitous event which is unintended from the perspective of a reasonable person."

The policy expressly excludes the following from coverage:

LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION AND OTHER STRUCTURES PROTECTION.

1. Unless otherwise stated in 3. below we do not insure for damage consisting of or caused directly or indirectly by any of the following[:]

* * * *

f. Wear and tear, marring, deterioration;

* * * *

m. Vermin meaning animals, other than l. above, that access real or personal property for foraging and shelter and by their presence cause damage to such property. . . .[1]

* * * *

2. If items 1.f. through 1.o. above cause water damage which is not otherwise excluded, we cover the resulting water damage . . . .

3. If any item in 1. above directly causes a **"named peril(s)"** to occur, the resulting damage produced by the **"named peril(s)"** is covered unless otherwise excluded or excepted elsewhere in this policy.

* * * *

LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION, OTHER STRUCTURES PROTECTION AND PERSONAL PROPERTY PROTECTION

1. We do not insure for damage consisting of or caused directly or indirectly by any of the following[:]

* * * *

c. **Water Damage** arising from, caused by or resulting from human or animal forces, any act of nature, or any other source. Water damage means damage caused by or consisting of:

(1) Flood, surface water, . . . or spray from any of these, whether or not driven by wind . . . .

* * * *

i. **Microbial Organisms**, including but not limited to mold, mold spores, fungus, bacterium or parasitic

[1] This provision appears in an endorsement that deleted and replaced the language in the policy.

> microorganisms. However, we will repair or tear out and replace **"property damage"** resulting from a covered loss even if microbial organisms are present.[2]

As a condition of coverage under this section, the policy provides, "This policy applies only to loss in SECTION I . . . , which occurs during the policy period." The policy does not define "loss." After a loss, the policy requires the insured to "[p]rotect the property from further damage" and "[m]ake reasonable and necessary repairs to protect the property . . . ."

B. Powell's Claims Under the USAA Policy

On April 17 and 18, 2016, Houston flooded in the Tax Day Floods. Powell filed a claim with the Federal Emergency Management Agency (FEMA) for flood damage to her home and personal property. FEMA approved Powell's claim and paid her $13,954.13 to repair flood damage in several rooms in her house, and $947.48 for flood damage to her personal property.

On June 14, 2016, Powell filed a claim with USAA for damage to the interior of her home from an air conditioning leak and a washing machine that overflowed. The same day, USAA acknowledged receipt of Powell's claim in an email. USAA hired a plumber to inspect the leaks. According to USAA's claim notes, the plumber reported that the washing machine overflowed because of tree roots in the drain line.

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[2] This provision appears in an endorsement that deleted and replaced the language in the policy.

The plumber also determined that the air conditioning leak was caused by pin-hole leaks in the piping that were not leaking at the time of the inspection, and that condensation dripping off of uninsulated pipes may have also contributed to the water damage in Powell's house. Meanwhile, Powell hired a remediation company to dry the water from the washing machine overflow. According to USAA's claim notes, the remediation company found water damage due to a leaking drip pan under the air conditioning unit. The remediator also stated that wind blew tree limbs onto the roof, causing water damage to various ceilings in Powell's home. The remediator also stated that there was minor damage from the Tax Day Floods, which FEMA had already covered.

On July 6, 2016, a USAA adjuster inspected Powell's property with a representative from Powell's remediation company. After the inspection, USAA determined that Powell had three claims: (1) an air conditioning system leak; (2) a roof leak; and (3) a washing machine overflow that damaged the master bedroom.

USAA hired Stephens Engineering Consultants, Inc. (SEC), to inspect Powell's claimed damage and to "determine the origin and cause of [the] purported damage, if any, and determine if the damage was the result of water intrusion." SEC issued a ten-page report on July 28, 2016. The report included weather data showing that hail one inch in diameter fell at Powell's house for more than twenty minutes on April 17, 2016. SEC inspected Powell's roof for indications of hail and found

"[a]pproximately 1/4-inch spatter marks with no corresponding indentations or areas of granule loss . . . on the roof shingles[.]"

The report also made conclusions regarding Powell's interior damage in each room. The report concluded that neither wind nor hail damaged Powell's roof. The report attributed various causes to the water damage observed in Powell's home, including gaps between plumbing vent pipes and flashing, animal damage to vent pipes, repeated and ongoing condensation leaks from the air conditioning system, repeated and long-term moisture penetrating through unsealed brick veneer, lack of weep holes to drain water from behind the brick veneer, and fractured roof decking from workers walking on the roof. SEC could not "rule out an overflowed washing machine in the laundry room as a contributing factor to the moisture stains."

On August 8, 2016, USAA's adjuster inspected Powell's property a second time. According to USAA's claim notes, Powell made comments during the inspection that raised concerns that she may have misrepresented the condition of her house when applying for the USAA policy and when her claimed damage occurred.[3] Based on these concerns, Powell's claims were referred to USAA's internal investigation unit. USAA's investigator hired a third-party to obtain a statement from Powell. According to the third-party notes, Powell first noticed wet

[3] The adjuster was also concerned that Powell may have lacked an insurable interest in the house, although USAA concedes that Powell owned the house.

carpet in a closet adjacent to the overflowing washing machine in March 2016, and she first noticed damage in the wet bar in April 2016. Powell also stated that the only interior damage covered by FEMA was to a sunken den that flooded. USAA requested FEMA documentation from Powell, which she provided on September 29, 2016.

USAA's investigator also hired outside legal counsel to examine Powell under oath and to issue a legal opinion regarding coverage.[4] According to the opinion, which is dated March 6, 2017, Powell had to confirm that her home had no unrepaired damage in April 2016 when she applied for the policy. Moreover, the policy effective April 2016 upgraded the quality of the roof and listed the date of its most recent replacement as 2011, whereas the prior policies listed this date as 2009. The legal opinion stated, "There are questions regarding when the losses occurred and the condition of the home on April 5, 2016[,] when the policy issued." For example, Powell admitted that the washing machine overflowed one to four weeks prior to the Tax Day Floods and that she first noticed damage in March 2016. She did not know when the loss from the air conditioning leak occurred because the damage was hidden by a drop-down ceiling and a broken light. The opinion relied

[4] Although USAA's motion for summary judgment lists the transcript of Powell's examination under oath as Exhibit K, the transcript is not included in the record on appeal. Exhibit K instead appears to be a duplicate of USAA's Exhibit C.

on SEC's report that Powell's roof damage was caused by wear and tear and maintenance issues, not wind or hail, and that her personal property damages were caused by marred vent pipe flashing in the roof.

The opinion concluded that USAA could reasonably question whether the washing machine overflowed prior to the effective date of the policy in April 2016, whether FEMA had already reimbursed Powell for some of the damage she claimed with USAA, and whether Powell accurately described and valued her personal property damage. The opinion also stated that Powell had not protected her property from further damage or made reasonable repairs to protect it, particularly the roof, which may have affected USAA's ability to evaluate her damages.

In three letters dated March 30, 2017, USAA rejected each of Powell's claims. Each letter provided an identical claim decision: "USAA CIC has determined that you misrepresented and concealed facts in the presentation of this claim. As a result, your claim for [sic] is denied." The letters provided additional detail regarding USAA's rejection of each claim. The letter rejecting the claim for the air conditioner leak stated that Powell could not recall when the damage had occurred. The letter rejecting the claim for the washing machine overflow stated that Powell admitted the loss occurred in March 2016, several weeks before the April 2016 Tax Day Floods, leading USAA to estimate that the damage occurred between March 21 and April 11, 2016. The letter rejecting the roof leak claim stated that Powell's roof was

not damaged by wind or hail, but any leaks were instead due to wear and tear or maintenance issues, neither of which was covered under the policy. The letters denying Powell's claims for the washing machine overflow and roof leaks also stated that USAA's engineer had determined that Powell's personal property was damaged from "moisture penetration through the marred, lead plumbing vent pipe flashing on the roof." All three rejection letters also stated that, when applying for the policy, Powell confirmed there was no unrepaired damage to her house on April 5, 2016, and that the quality and age of the roof was upgraded in the most recent policy application as discussed above.

C. Powell's Lawsuit Against USAA

Powell filed the underlying lawsuit against USAA, asserting claims for breach of contract and violations of the Insurance Code. Powell alleged that USAA violated the prompt-payment provisions of the Insurance Code by inspecting her property more than fifteen days after she filed her claims and by rejecting her claims nine months after she filed them. Powell also alleged that USAA's delay caused the damage to worsen. USAA filed an answer generally denying the allegations and asserting numerous affirmative defenses, including that Powell's damages existed prior to the effective date of the policy, that the policy did not cover the damages, and that Powell failed to mitigate her damages.

1. USAA's Motion for Summary Judgment

USAA filed a traditional and no evidence motion for summary judgment. USAA argued that Powell had no evidence that her claimed losses were covered under the terms of the policy or occurred during the policy period. USAA contended that Powell's house was in disrepair when she bought it, that it incurred damage prior to the effective date of the policy, and that the damage was not covered under the policy. USAA also argued that Powell's claims for Insurance Code violations failed as a matter of law because she could not establish a breach of the insurance contract and because Powell had no evidence any harm resulted from USAA's alleged violations of the Insurance Code.

In support of its motion, USAA attached numerous exhibits, including: (1) the homeowner's policy effective in April 2016; (2) the SEC engineer's report; (3) the legal opinion regarding coverage; and (4) the three claim rejection letters, each of which is discussed above. USAA also attached its notes from Powell's claim file.

USAA also relied on two depositions of Powell: one from a prior lawsuit and one in the underlying proceedings. In the prior lawsuit, Powell testified that her house sat vacant for two years before she bought it. As part of the agreement to buy the house, Powell agreed to repair the damage to the house. She claimed to have spent at least $100,000 repairing the pool, fence, air conditioner, plumbing, roof leaks, and broken windows and doors. In her deposition in the underlying

proceeding, Powell similarly testified that she repaired the pool, fence, and some plumbing. She had also replaced some carpet. She further testified that a new roof was installed on the house prior to her purchasing it. Later, wind and hail in the Tax Day Floods damaged her home. She acknowledged that she also sustained flood damage, but FEMA covered some exterior damage and damage to a sunken den. She saw mold begin to form after the flood damage, but she had not made any efforts to remediate the mold due to a lack of financial resources.

Powell testified that she did not know her roof was leaking until the remediation company she hired discovered the damage in June 2016. Powell acknowledged that she had not made any repairs to the roof and that she had obtained three estimates from roofing contractors to replace it.

USAA also attached a second engineer's report from Insight Engineering, L.P., a company hired by USAA "to render a professional opinion as to the extent of damage to [Powell's] residence as a result of a reported overflow of the clothes washing machine drain pipe, drywall stains on the bar ceiling, and damage to the roof shingles from a tree branch impact during a June 14, 2016 weather event." Insight, hired after Powell filed the lawsuit, inspected Powell's house on May 16, 2018, and issued a report on October 18, 2018. The report concluded that Powell's washing machine overflowed due to tree roots blocking the drain. Insight determined that much of the damage to the interior of Powell's house was caused by long-term

water exposure from the washing machine, air conditioning system condensation, and gaps in roof vents. Regarding the roof, the report stated that "[t]he laminate shingles and skylight covers were in good condition and appeared to be less than 10 years old." However, the report stated that damage to the living room ceiling was "consistent with predating the present skylights/shingles as there is no evidence of an active leak, localized repairs or localized damage on the roof." The report concluded that there was no evidence of wind or hail damage.

USAA also relied on depositions of three of Powell's witnesses. Pat Raney prepared an estimate to replace Powell's roof. Raney inspected Powell's roof one to two years before his deposition in January 2019. He saw indications of hail damage to Powell's roof, and he recalled that the most recent hailstorm prior to his inspection was during the Tax Day Floods, although he could not say when the hail damage to Powell's roof occurred. Raney testified that, in his experience, he had seen dime-sized hail cause damage to a roof. He stated that, in addition to the size of hail, a longer duration and higher density of hail is more likely to cause roof damage. Raney could not recall whether he inspected Powell's attic, and he did not attempt to determine the cause of any of the water damage in Powell's home. Raney estimated Powell's roof to be fifteen years old based on wear and tear. He acknowledged that it was possible Powell's roof damage was caused by maintenance issues and that he observed animal damage to vent pipes.

Daniel Coll and Lonnie Mazzeo, Powell's other two witnesses, testified about estimates their company had prepared to remediate mold in Powell's house.[5] Coll first inspected Powell's house in late 2016, after which he prepared an estimate to remediate the mold. Mazzeo prepared a second, larger estimate after reinspecting Powell's house in December 2018 or January 2019 when the mold had worsened.

2. Powell's Response to USAA's Motion for Summary Judgment

Powell responded to USAA's motion for summary judgment, primarily arguing that USAA could not seek summary judgment on a ground not raised in its letters rejecting her claims. Powell did not refute USAA's arguments regarding the air conditioning leak, damage caused by animals, or damage caused by vent pipes. She conceded that the washing machine overflowed prior to the April 5 policy effective date. Instead, Powell argued that a fact issue existed regarding the cause of the roof leaks—whether they were caused by wind or hail during the Tax Day Floods rather than gradual, long-term leaks. Powell acknowledged that her policy excluded mold damage, but she argued that USAA was nevertheless liable for it because its failure to pay her claims in a timely manner caused the mold.

Powell relied on USAA's summary judgment evidence as well as depositions of USAA's adjuster and internal investigator, USAA's emails, and Powell's bank

[5] The estimates are not included in the record on appeal.

records. Powell primarily relied on the evidence attached to her response to show that she had not made any misrepresentations to USAA regarding her claims as stated in USAA's rejection letters.[6]

3. USAA's Reply

USAA filed a reply. It argued that Powell could not establish any damage occurred during the policy period, that mold and flood damage are not covered under the policy, and that Powell could not establish her claims for violations of the Insurance Code as a matter of law.

The trial court granted USAA's motion for summary judgment and dismissed Powell's claims with prejudice. The order did not state whether it granted USAA's motion on the no evidence or traditional basis. This appeal followed.

Summary Judgment

A. Standard of Review

We review de novo a district court's grant of summary judgment. *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When, as here, a party moves for summary judgment on both traditional and no-evidence grounds, we first consider the no-evidence motion. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). To defeat a no-evidence

[6] Powell also relied on her exhibits to show that USAA did not contest Powell's ownership in her house, the insured property.

motion, the nonmovant must produce at least a scintilla of evidence raising a genuine issue of material fact as to the challenged elements of her claims. *Id.* The evidence is considered in the light most favorable to the nonmovant, and every reasonable inference is indulged in the nonmovant's favor. *Id.* If the nonmovant does not overcome its no-evidence burden on any claim, we need not address the traditional motion on the same claim. *Id.*

A party moving for traditional summary judgment bears the burden to prove that there is no genuine issue of material fact on at least one element of the plaintiff's cause of action and that it is entitled to judgment as a matter of law. *Id.* (citing TEX. R. CIV. P. 166a(c) and *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017)). If the movant meets its burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Am. Risk Ins. Co. v. Serpikova*, 522 S.W.3d 497, 501 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000)). When reviewing a traditional motion for summary judgment, we review the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts in favor of the nonmovant. *Lightning Oil*, 520 S.W.3d at 45 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005)). The evidence raises a fact issue if reasonable and

fair-minded jurists could differ in their conclusions in light of all the summary judgment evidence. *Serpikova*, 522 S.W.3d at 501.

B. Prompt-Payment Provision of the Insurance Code

Powell argues that language in a provision of the Insurance Code requiring insurers to provide prompt, written rejection of insurance claims binds the insurer to the reasons stated in the rejection letter when later defending itself in a lawsuit. Insurance Code section 542.056 requires an insurer to accept or reject a claim in writing within fifteen business days after the insurer receives all the information the insurer requires to secure the final proof of loss. TEX. INS. CODE § 542.056(a). Subsection (c), on which Powell relies, requires the insurer's written notification to "state the reasons for the rejection." *Id.* § 542.056(c).

According to Powell, USAA denied her claims based on misrepresentation and concealment of facts, but it moved for summary judgment on the ground that her claimed losses preexisted or were excluded under the policy. Powell contends this is prohibited by section 542.056(c) and, therefore, summary judgment was improper. USAA responds that its defense in this lawsuit is consistent with the reasons stated in its rejection letters and that, in any event, summary judgment is appropriate for a reason not stated in the rejection letter if the reason was valid and existed at the time the claim was rejected.

Powell does not cite any cases to support her argument on appeal, although she contends that the issue is one of first impression. Assuming without deciding that section 542.056(c) binds an insurer defending a lawsuit filed by an insured to the reasons stated in the insurer's letter rejecting an insurance claim, we disagree with Powell that USAA's defense in this case is inconsistent with the reasons stated in its rejection letters.

Although all three letters stated the same coverage decision—rejection of Powell's claims due to misrepresentation and concealment of facts—the letters provided additional detail. The letter rejecting Powell's claim for the air conditioner leak stated that Powell could not recall when the damage occurred. Similarly, the letter rejecting the claim for the overflowed washing machine stated that Powell had admitted the loss occurred in March 2016, prior to the effective date of the policy. And the letter rejecting the roof leak claim stated that Powell's roof damage was not caused by wind or hail, but rather by wear and tear or maintenance issues that were not covered under the policy. The rejection letters for the washing machine overflow and roof leaks further stated that the cause of the damage was from "marred" vent pipes that allowed moisture to penetrate through the roof.

These additional reasons provided in the rejection letters are consistent with USAA's motion for summary judgment, which argued that Powell had no evidence her claimed losses were covered under the policy or occurred during the policy

period. Accordingly, we conclude that USAA's defense in this lawsuit is consistent with the reasons stated in its letters rejecting Powell's insurance claims.

We overrule this part of Powell's issue.

C. Breach of Contract

Powell next argues that genuine issues of material fact exist regarding whether her loss is covered under the policy effective in April 2016.

We interpret insurance contracts using well-established principles of contract construction. *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 467 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010)). The interpretation of an unambiguous contract is a matter of law for the court to determine. *Id.* "If policy language is worded so that it can be given a definite or certain legal meaning, it is not ambiguous and we construe it as a matter of law." *Id.* at 468 (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003)).

Whether a particular provision or the interaction among multiple provisions creates an ambiguity is also a question of law. *Id.* "The fact that the parties may disagree about the policy's meaning does not create an ambiguity." *Id.* (quoting *Page*, 315 S.W.3d at 527). "Only if the policy is subject to two or more reasonable interpretations may it be considered ambiguous." *Id.* (quoting *Page*, 315 S.W.3d at 527). Extrinsic evidence may not be used to contradict or vary the meaning of the

explicit language of a written contract. *Id.* "If, however, a contract is susceptible to more than one reasonable interpretation, we will resolve any ambiguity in favor of coverage." *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008).

"Our primary goal is to determine the contracting parties' intent through the policy's written language." *Davis*, 484 S.W.3d at 468 (quoting *Page*, 315 S.W.3d at 527). Reviewing courts must read all parts of the contract together, giving effect to each word, clause, and sentence, and avoid making any provisions within the policy inoperative. *Id.* Our analysis of the policy is confined to the four corners of the policy itself. *Id.*

To establish a breach of contract, a plaintiff must show: (1) the existence of a valid contract; (2) the plaintiff's performance or tender of performance; (3) the defendant's breach of contract; and (4) the plaintiff's damages as a result of the breach. *Id.* In the context of an insurance policy, a plaintiff must prove the existence of a valid insurance policy covering the denied claim and entitlement to money damages on that claim. *Id.* The insured bears the initial burden to establish coverage under the policy. *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014). If the insured meets her initial burden, the insurer must then prove that one of the policy's exclusions applies in order to avoid liability. *Id.* If the insurer shows

that a policy exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage. *Id.*

1. Actual Injury Approach Versus Manifestation Approach

As an initial matter, the parties dispute whether a loss must actually occur during the policy period or whether the damages must manifest during the policy period. Powell contends that, as a matter of law, a property loss is covered if the damage manifests during the policy period regardless of when it occurred. USAA responds that, as a matter of law, the loss must occur during the policy period for coverage to apply regardless of when the damage is discovered or manifests.

The Texas Supreme Court's opinion in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.* is instructive here. 267 S.W.3d at 22–26. In that case, the Court construed a third-party liability provision in a commercial general liability policy concerning the insurer's duty to defend. *Id.* at 22–23. The Court distinguished the "actual injury" or "injury-in-fact" approach—under which property damage occurring during the policy term is covered—from the "manifestation" approach—under which property damage that becomes evident or discoverable during the policy term is covered. *Id.* at 25–26. These "varying approaches reflect perceived differences in the policy language under review" and "different factual circumstances," such as "the difficulty encountered . . . by an alleged delay between the time of property damage and the discovery of that damage." *Id.* at 25.

The Court ultimately applied the "actual injury" approach, holding that the text of the policy afforded no other choice. The policy provided a one-year term of liability coverage for property damage or bodily injury that "occurs during the policy period." *Id.* at 24. The policy defined "property damage" to include "[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it[.]" *Id.* Based on the plain meaning of these provisions, the Court held that property damage under the policy "occurred when actual physical damage to the property occurred." *Id.* "The policy says as much, defining property damage as '[p]hysical injury to tangible property,' and explicitly stating that coverage is available if and only if '"property damage" occurs during the policy period.'" *Id.*

Here, the relevant section of the USAA policy, Section I, states: "We insure against 'sudden and accidental', direct, physical loss to tangible property described in PROPERTY WE COVER—COVERAGES A AND B [the dwelling and other structures] unless excluded in Section I—LOSSES WE DO NOT COVER." The policy contains substantially similar language regarding coverage for personal property, except that the loss must be "caused by a peril listed below[,]" including windstorm or hail. The policy defines "[s]udden and accidental" as "an abrupt, fortuitous event which is unintended from the perspective of a reasonable person." *See Don's Bldg. Supply*, 267 S.W.3d at 24 ("[A]n accident is generally understood

to be a fortuitous, unexpected, and unintended event.") (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007)). The policy further provides, "This policy applies only to loss in SECTION I . . . which occurs during the policy period."

The policy here is similar to the policy at issue in *Don's Building Supply*, which defined property damage as "physical injury to tangible property" and provided coverage only if the property damage "occurs during the policy period." The USAA policy uses the term "physical loss" and provides that the policy applies only to a loss which "occurs during the policy period." We therefore conclude that no ambiguity exists in the policy and that the only reasonable interpretation of the policy is that it covers a loss that actually "occurs during the policy period," not an earlier loss that manifests during the policy period. *See Davis*, 484 S.W.3d at 468 (stating that insurance policy is ambiguous only if policy is subject to two or more reasonable interpretations).

2. Washing Machine Overflow

Powell concedes on appeal, as she did in her response to USAA's motion for summary judgment, that the washing machine leak occurred before the effective date of the policy in April 2016. Powell did not produce a scintilla of evidence raising a genuine issue of material fact on this claim. *See Lightning Oil*, 520 S.W.3d at 45. Accordingly, we conclude that no-evidence summary judgment was proper on

Powell's claim for damage resulting from the washing machine overflow. We overrule this part of Powell's issue.

3. Air Conditioning Leak

Powell does not argue on appeal or provide any evidence showing that her air conditioning leaked during the policy period. Accordingly, she has not met her no-evidence burden on this claim, and she has waived any error regarding this claim. *See id.*; TEX. R. APP. P. 38.1(g), (i). We overrule this part of Powell's issue.

4. Roof Leaks

Powell argues that disputed facts exist regarding her roof leaks. Although she concedes in her brief that she does not know when the damage to her roof occurred, she contends that USAA's engineer, SEC, reported that hail one inch in diameter was detected at her house on April 17, 2016, and that it hailed for more than twenty minutes. She also argues that Raney testified that he observed hail damage to the shingles of Powell's roof, and that larger hail falling for a duration of fifteen to twenty minutes increases the chance of roof damage. She further argues that Raney testified that hail, rather than long-term wear and tear, caused the water damage to the interior of her home based on the significant damages.

USAA responds that Powell's roof had not been replaced since she bought the house in 2010, that USAA's engineers determined the damage was old and not from April 2016, and that no evidence shows that Powell's personal property damage

occurred as a result of rain entering through a wind or hail created opening. USAA further argues that Powell's witnesses could not state when the interior damage occurred, and it could have occurred as a result of improper maintenance or vermin. USAA also argues that the evidence shows the roof leaked as a result of vermin and damaged roof vents.

Powell's policy covered damage to her dwelling unless the policy excluded the damage, and it covered damage to her personal property from wind or hail unless the damage was excluded. The policy excluded damage to the dwelling from wear and tear and vermin unless the damage was water damage, in which case the policy covered the resulting water damage.

According to SEC, which inspected Powell's home in July 2016, weather data "reported up to 1.00-inch hail fall at the location of [Powell's house]" on April 17, 2016, and the attached weather data estimated the hail lasted for more than twenty minutes. The report additionally stated that Powell's roof showed evidence of "approximately 1/4-inch hail," although it concluded that there were "[n]o punctures, visible depressions, or randomly-patterned roughly-circular areas of missing granules consistent with hail impacts" on Powell's roof or patio structure and, accordingly, the hail "was of insufficient mass and velocity to cause damage to the roofing." The report offered numerous conclusions for the cause of the damages to the interior of Powell's house, including animal damage to vent pipes and repeated

and ongoing condensation leaks from the air conditioning system. USAA's letter rejecting Powell's roof claims relied on SEC's report to conclude that the roof damage occurred from wear and tear or maintenance issues and marred vent pipes.

Insight, the second engineer hired by USAA after Powell filed her lawsuit, inspected Powell's house two years after the Tax Day Floods. Insight determined that much of the interior damage to Powell's house was due to long-term water exposure from the washing machine, air conditioning system condensation, and roof vents. The report stated that Powell's roof was in good condition and appeared to be less than ten years old.

Powell testified that hail fell at her house during the Tax Day Floods. Raney, Powell's roofer, saw signs of hail damage when he inspected Powell's house. He testified that the most recent hailstorm prior to his inspection was during the Tax Day Floods, although he could not definitively say whether that hailstorm caused the damage he observed. He also testified that, even if the hail is smaller in size, a longer duration and higher density of hail are more likely to cause roof damage. Raney did not, however, rule out that maintenance issues or animal damage to vent pipes damaged the interior of Powell's house.

Nevertheless, Powell concedes in her brief that she does not know when the damage to her roof occurred, and that it could have been in 2013 or 2015. As stated above, the plain language of Powell's policy applies only to a loss that actually

occurs during the policy period, not an earlier loss that manifests during the policy period. *See Don's Bldg. Supply*, 267 S.W.2d at 25–26. Powell's concessions that she does not know when the damage occurred and that it may have occurred prior to the policy period preclude a genuine issue of material fact. *See Lightning Oil*, 520 S.W.3d at 45; *Serpikova*, 522 S.W.3d at 501. We therefore conclude that summary judgment was proper on Powell's claim of damage from her roof. We overrule this part of Powell's issue.

5. Mold

Powell argues that USAA is liable for mold damage to her home despite the policy's exclusion of mold damage because USAA's failure to pay her claims in a timely manner caused the mold to develop. We disagree. The policy expressly excludes "damage consisting of or caused directly or indirectly by . . . microbial organisms, including mold." The policy also provides that, after a loss, an insured must mitigate any damage by protecting the property from further damage and by making reasonable and necessary repairs to protect the property. Powell testified that she did not remediate the mold growth. Thus, not only does the policy expressly exclude mold, but Powell did not comply with her duty to mitigate her damages.[7] We conclude that Powell did not produce a scintilla of evidence raising a genuine

[7] The policy does, however, provide that USAA will repair or tear out and replace property damage resulting from a covered loss even if mold is present.

issue of material fact on this claim. *See Lightning Oil*, 520 S.W.3d at 45. We overrule this part of Powell's issue.

6. Flood Damage

USAA argues on appeal that any damage caused by flooding is not covered under the policy, an issue Powell does not address. *See id.* The policy expressly excludes water damage caused by flooding, which Powell conceded during her deposition. Thus, to the extent Powell's damage was caused by flooding, we agree with USAA that it is not covered under the policy. We overrule this part of Powell's issue.

D. Insurance Code Violations

On appeal, Powell does not argue or point to any evidence showing that USAA violated the Insurance Code. *See id.* She does not argue that USAA inspected the property after the statutorily required period, as alleged in her petition, or point to any authority supporting this claim. *See* TEX. R. APP. P. 38.1(i). And although she generally complains that USAA took nine months to reject her claim, the prompt-payment provision applies to the date "the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." TEX. INS. CODE § 542.056(a) (requiring insurer to notify claimant in writing of acceptance or rejection of claim "not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof

of loss"). If the insurer cannot accept or reject a claim with the fifteen-day period, it may notify the claimant of the reasons it needs additional time and it must accept or reject the claim within forty-five days of the notice to the claimant. *Id.* § 542.056(d).

USAA did not receive the legal opinion regarding coverage from its outside counsel until March 2017. *See id.* § 542.056(a). USAA's claim notes show that it also received an additional inventory of claimed property damage in March. A USAA representative spoke to Powell's attorney on March 23, 2017, and notified him that it needed additional time to review the new inventory. *See id.* § 542.056(a), (d) (providing that "[i]f the insurer is unable to accept or reject the claim within the period specified by Subsection (a) . . . , the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time" and insurer must accept or reject claim within forty-five days). USAA rejected Powell's claims on March 30. Powell does not argue how this timeline violated section 542.056. We conclude that Powell has not raised a genuine issue of material fact on her claims that USAA violated the Insurance Code. *See* TEX. R. CIV. P. 166a(c); *Lightning Oil*, 520 S.W.3d at 45; *Serpikova*, 522 S.W.3d at 501. We overrule this part of Powell's issue.

Conclusion

We affirm the trial court's judgment. We dismiss any pending motions as moot.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

Tab 2

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-19-00308-CV

AMY POWELL, Appellant

V.

USAA CASUALTY INSURANCE CO., Appellee

Appeal from the 157th District Court of Harris County. (Tr. Ct. No. 2017-22800).

This case is an appeal from the final judgment signed by the trial court on April 8, 2019. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court **affirms** the trial court's judgment.

The Court **orders** that the appellant, Amy Powell, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered April 15, 2021.

Panel consists of Chief Justice Radack and Justices Goodman and Farris. Opinion delivered by Justice Farris.

Tab 3

CAUSE NO. 2017-22800

7

AMY POWELL	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
USAA CASUALTY INSURANCE COMPANY	§	
Defendant.	§	157TH JUDICIAL DISTRICT

FINAL **ORDER**

On this day came to be heard Defendant USAA Casualty Insurance Company's Motion for Summary Judgment. Considering the foregoing Motion and the responses and arguments, if any, the Court finds Defendant's Motion is well taken and is hereby **GRANTED**.

Plaintiff's claims are hereby **DISMISSED WITH PREJUDICE**. This is a final judgment disposing of all claims and it is appealable.

SO ORDERED, this the _____ day of _____, 2019

Signed:
4/8/2019

Judge Tanya Garrison

Tab 4

Tex. Ins. Code § 542.056

This document is current through the 2021 Regular Session, 87th Legislature.

Texas Statutes & Codes Annotated by LexisNexis® > Insurance Code > Title 5 Protection of Consumer Interests (Subts. A — G) > Subtitle C Deceptive, Unfair, and Prohibited Practices (Chs. 541 — 600) > Chapter 542 Processing and Settlement of Claims (Subchs. A — G) > Subchapter B Prompt Payment of Claims (§§ 542.051 — 542.100)

Sec. 542.056. Notice of Acceptance or Rejection of Claim.

(a) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.

(b) If an insurer has a reasonable basis to believe that a loss resulted from arson, the insurer shall notify the claimant in writing of the acceptance or rejection of the claim not later than the 30th day after the date the insurer receives all items, statements, and forms required by the insurer.

(c) If the insurer rejects the claim, the notice required by Subsection (a) or (b) must state the reasons for the rejection.

(d) If the insurer is unable to accept or reject the claim within the period specified by Subsection (a) or (b), the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time. The insurer shall accept or reject the claim not later than the 45th day after the date the insurer notifies a claimant under this subsection.

History

Enacted by Acts 2003, 78th Leg., ch. 1274 (H.B. 2922), § 2, effective April 1, 2005.

End of Document

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Tyler Talbert on behalf of Tyler Talbert
Bar No. 24088501
talbert@scanesrouth.com
Envelope ID: 57381891
Status as of 9/20/2021 7:54 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Tyler BTalbert		talbert@scanesrouth.com	9/17/2021 10:03:15 PM	SENT
Susan Eskew		eskew@scanesrouth.com	9/17/2021 10:03:15 PM	SENT
Tanya Dawson	24072076	tdugas@raleybowick.com	9/17/2021 10:03:15 PM	SENT
Dana Scanes		dscanes@scanesrouth.com	9/17/2021 10:03:15 PM	SENT
Tanya Dawson		tdawson@raleybowick.com	9/17/2021 10:03:15 PM	SENT
Ben Yelverton		yelverton@scanesrouth.com	9/17/2021 10:03:15 PM	SENT

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MANDATE

FILED
Marilyn Burgess
District Clerk
DEC 10 2021
Time:
Harris County, Texas
By Khiela Jackson
Deputy

Court of Appeals

First District of Texas

NO. 01-19-00308-CV

AMY POWELL, Appellant

V.

USAA CASUALTY INSURANCE CO., Appellee

Appeal from the 157th District Court of Harris County. (Tr. Ct. No. 2017-22800).

TO THE 157TH DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before this Court, on the 15th day of April 2021, the case upon appeal to revise or to reverse your judgment was determined. This Court made its order in these words:

> This case is an appeal from the final judgment signed by the trial court on April 8, 2019. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court **affirms** the trial court's judgment.
>
> The Court **orders** that the appellant, Amy Powell, pay all appellate costs.
>
> The Court **orders** that this decision be certified below for observance.

Judgment rendered April 15, 2021.

RECORDER'S MEMORANDUM
This Instrument is of poor quality at the time of imaging.

Panel consists of Chief Justice Radack and Justices Goodman and Farris. Opinion delivered by Justice Farris.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things to have it duly recognized, obeyed, and executed.

December 10, 2021

Date

CHRISTOPHER A. PRINE
CLERK OF THE COURT

COURT OF APPEALS
OF THE STATE OF TEXAS

Court of Appeals
First District of Texas

BILL OF COSTS

No. 01-19-00308-CV

Amy Powell

v.

USAA CIC

NO. 2017-22800 IN THE 157TH DISTRICT COURT OF HARRIS COUNTY

TYPE OF FEE	CHARGES	PAID/DUE	STATUS	PAID BY
MT FEE	$15.00	04/28/2021	E-PAID	ANT
MT FEE	$10.00	08/21/2019	E-PAID	APE
MT FEE	$10.00	07/08/2019	E-PAID	ANT
CLK RECORD	$932.00	06/10/2019	PAID	ANT
STATEWIDE EFILING	$30.00	05/09/2019	E-PAID	ANT
FILING	$175.00	05/09/2019	E-PAID	ANT

The costs incurred on appeal to the First Court of Appeals Houston, Texas are $1,172.00.

Court costs in this case have been taxed in this Court's judgment

I, **Christopher A. Prine,** Clerk of the Court of Appeals for the First District of Texas, do hereby certify that this is a true statement of the costs of appeal in this case.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Court of Appeals for the First District of Texas, this 10th day of December, 2021.

Christopher A. Prine, Clerk
Jesse Rodriguez, Deputy Clerk IV

FILE COPY

Court of Appeals
First District
301 Fannin Street
Houston, Texas 77002-2066

Friday, December 10, 2021

Bertrand C. Moser
2415 Robinhood
Houston, TX 77005
* DELIVERED VIA E-MAIL *

Tanya Dawson
Raley & Bowick, LLP
1800 Augusta Dr Ste 300
Houston, TX 77057-3131
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 01-19-00308-CV
Trial Court Case Number: 2017-22800

Style: Amy Powell v. USAA CIC

Please be advised that on this date the mandate was issued in the above cause. You may obtain a copy of the Court's mandate and all related documents by visiting the Court's website at http://www.txcourts.gov/1stcoa. Pursuant to TEXAS GOVERNMENT CODE, Sec. 51.204(b), all exhibits on file with the court, if any, will be destroyed three years from this date. As required by the TEXAS GOVERNMENT CODE, Sec. 51.204(d)(e), we are also notifying the trial court clerk that we will destroy all records filed in respect to this case with the exception of indexes, original opinions, minutes and general court dockets, no earlier than six (6) years from the date of the mandate in all civil cases, twenty-five (25) years in criminal cases with a sentence of twenty (20) years or less.

Sincerely,

Christopher A. Prine, Clerk

Jesse Rodriguez, Deputy Clerk IV

cc: Judge 157th District Court (DELIVERED VIA E-MAIL)
The Honorable Harris County District Clerk's Office - Civil (DELIVERED VIA E-MAIL)

Opinion issued April 15, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00308-CV

AMY POWELL, Appellant

V.

USAA CASUALTY INSURANCE CO., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2017-22800

MEMORANDUM OPINION

Appellant Amy Powell appeals the district court's order granting summary judgment in favor of appellee USAA Casualty Insurance Co., on Powell's claims for breach of insurance contract and for violations of the Insurance Code. Powell

contends that summary judgment was improper because (1) USAA did not move for summary judgment on a ground stated in its letters rejecting her insurance claims as required by the Insurance Code, and (2) genuine issues of material fact exist regarding her breach of contract claims.

We affirm.

Background

In 2010, Powell bought a house on Cypress Park Drive in Houston. She moved into the house shortly after buying it, and it is her primary residence. The house was in disrepair when Powell bought it, however, and she agreed as part of the purchase to make repairs to it. She testified that she spent at least $100,000 repairing the pool, fence, air conditioner, plumbing, roof leaks, and broken windows and doors. But Powell did not replace the roof, and she estimated that the previous owner had replaced it after a fire sometime before she bought the house.

A. Powell's USAA Homeowner's Policies

Powell obtained three homeowner's policies from USAA insuring her house between 2014 and 2016. The first policy issued in August 2014, but it was cancelled in May 2015. The second policy issued in September 2015, but it was cancelled on March 11, 2016. USAA issued a third policy on April 5, 2016, effective for one year.

The policy beginning April 5, 2016, which is the only policy in the record on appeal, provides the following coverage:

COVERAGE A – DWELLING PROTECTION COVERAGE AND COVERAGE B – OTHER STRUCTURES PROTECTION COVERAGE

We insure against **"sudden and accidental"**, direct, physical loss to tangible property described in PROPERTY WE COVER – Coverages A and B unless excluded in Section I – LOSSES WE DO NOT COVER.

COVERAGE C – PERSONAL PROPERTY PROTECTION

We insure against **"sudden and accidental"**, direct physical loss to tangible property described in PROPERTY WE COVER – Coverage C caused by a peril listed below unless the loss is excluded in **LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION, OTHER STRUCTURES PROTECTION AND PERSONAL PROPERTY PROTECTION.**

* * * *

2. Windstorm or hail.

The policy defines "sudden and accidental" as "an abrupt, fortuitous event which is unintended from the perspective of a reasonable person."

The policy expressly excludes the following from coverage:

LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION AND OTHER STRUCTURES PROTECTION.

1. Unless otherwise stated in 3. below we do not insure for damage consisting of or caused directly or indirectly by any of the following[:]

* * * *

f. Wear and tear, marring, deterioration;

* * * *

m. Vermin meaning animals, other than l. above, that access real or personal property for foraging and shelter and by their presence cause damage to such property. . . .[1]

* * * *

2. If items 1.f. through 1.o. above cause water damage which is not otherwise excluded, we cover the resulting water damage . . . .

3. If any item in 1. above directly causes a **"named peril(s)"** to occur, the resulting damage produced by the **"named peril(s)"** is covered unless otherwise excluded or excepted elsewhere in this policy.

* * * *

LOSSES WE DO NOT COVER UNDER DWELLING PROTECTION, OTHER STRUCTURES PROTECTION AND PERSONAL PROPERTY PROTECTION

1. We do not insure for damage consisting of or caused directly or indirectly by any of the following[:]

* * * *

c. **Water Damage** arising from, caused by or resulting from human or animal forces, any act of nature, or any other source. Water damage means damage caused by or consisting of:

(1) Flood, surface water, . . . or spray from any of these, whether or not driven by wind . . . .

* * * *

i. **Microbial Organisms**, including but not limited to mold, mold spores, fungus, bacterium or parasitic

[1] This provision appears in an endorsement that deleted and replaced the language in the policy.

> microorganisms. However, we will repair or tear out and replace **"property damage"** resulting from a covered loss even if microbial organisms are present.[2]

As a condition of coverage under this section, the policy provides, "This policy applies only to loss in SECTION I . . . , which occurs during the policy period." The policy does not define "loss." After a loss, the policy requires the insured to "[p]rotect the property from further damage" and "[m]ake reasonable and necessary repairs to protect the property . . . ."

B. Powell's Claims Under the USAA Policy

On April 17 and 18, 2016, Houston flooded in the Tax Day Floods. Powell filed a claim with the Federal Emergency Management Agency (FEMA) for flood damage to her home and personal property. FEMA approved Powell's claim and paid her $13,954.13 to repair flood damage in several rooms in her house, and $947.48 for flood damage to her personal property.

On June 14, 2016, Powell filed a claim with USAA for damage to the interior of her home from an air conditioning leak and a washing machine that overflowed. The same day, USAA acknowledged receipt of Powell's claim in an email. USAA hired a plumber to inspect the leaks. According to USAA's claim notes, the plumber reported that the washing machine overflowed because of tree roots in the drain line.

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[2] This provision appears in an endorsement that deleted and replaced the language in the policy.

The plumber also determined that the air conditioning leak was caused by pin-hole leaks in the piping that were not leaking at the time of the inspection, and that condensation dripping off of uninsulated pipes may have also contributed to the water damage in Powell's house. Meanwhile, Powell hired a remediation company to dry the water from the washing machine overflow. According to USAA's claim notes, the remediation company found water damage due to a leaking drip pan under the air conditioning unit. The remediator also stated that wind blew tree limbs onto the roof, causing water damage to various ceilings in Powell's home. The remediator also stated that there was minor damage from the Tax Day Floods, which FEMA had already covered.

On July 6, 2016, a USAA adjuster inspected Powell's property with a representative from Powell's remediation company. After the inspection, USAA determined that Powell had three claims: (1) an air conditioning system leak; (2) a roof leak; and (3) a washing machine overflow that damaged the master bedroom.

USAA hired Stephens Engineering Consultants, Inc. (SEC), to inspect Powell's claimed damage and to "determine the origin and cause of [the] purported damage, if any, and determine if the damage was the result of water intrusion." SEC issued a ten-page report on July 28, 2016. The report included weather data showing that hail one inch in diameter fell at Powell's house for more than twenty minutes on April 17, 2016. SEC inspected Powell's roof for indications of hail and found

"[a]pproximately 1/4-inch spatter marks with no corresponding indentations or areas of granule loss . . . on the roof shingles[.]"

The report also made conclusions regarding Powell's interior damage in each room. The report concluded that neither wind nor hail damaged Powell's roof. The report attributed various causes to the water damage observed in Powell's home, including gaps between plumbing vent pipes and flashing, animal damage to vent pipes, repeated and ongoing condensation leaks from the air conditioning system, repeated and long-term moisture penetrating through unsealed brick veneer, lack of weep holes to drain water from behind the brick veneer, and fractured roof decking from workers walking on the roof. SEC could not "rule out an overflowed washing machine in the laundry room as a contributing factor to the moisture stains."

On August 8, 2016, USAA's adjuster inspected Powell's property a second time. According to USAA's claim notes, Powell made comments during the inspection that raised concerns that she may have misrepresented the condition of her house when applying for the USAA policy and when her claimed damage occurred.[3] Based on these concerns, Powell's claims were referred to USAA's internal investigation unit. USAA's investigator hired a third-party to obtain a statement from Powell. According to the third-party notes, Powell first noticed wet

[3] The adjuster was also concerned that Powell may have lacked an insurable interest in the house, although USAA concedes that Powell owned the house.

carpet in a closet adjacent to the overflowing washing machine in March 2016, and she first noticed damage in the wet bar in April 2016. Powell also stated that the only interior damage covered by FEMA was to a sunken den that flooded. USAA requested FEMA documentation from Powell, which she provided on September 29, 2016.

USAA's investigator also hired outside legal counsel to examine Powell under oath and to issue a legal opinion regarding coverage.[4] According to the opinion, which is dated March 6, 2017, Powell had to confirm that her home had no unrepaired damage in April 2016 when she applied for the policy. Moreover, the policy effective April 2016 upgraded the quality of the roof and listed the date of its most recent replacement as 2011, whereas the prior policies listed this date as 2009. The legal opinion stated, "There are questions regarding when the losses occurred and the condition of the home on April 5, 2016[,] when the policy issued." For example, Powell admitted that the washing machine overflowed one to four weeks prior to the Tax Day Floods and that she first noticed damage in March 2016. She did not know when the loss from the air conditioning leak occurred because the damage was hidden by a drop-down ceiling and a broken light. The opinion relied

[4] Although USAA's motion for summary judgment lists the transcript of Powell's examination under oath as Exhibit K, the transcript is not included in the record on appeal. Exhibit K instead appears to be a duplicate of USAA's Exhibit C.

on SEC's report that Powell's roof damage was caused by wear and tear and maintenance issues, not wind or hail, and that her personal property damages were caused by marred vent pipe flashing in the roof.

The opinion concluded that USAA could reasonably question whether the washing machine overflowed prior to the effective date of the policy in April 2016, whether FEMA had already reimbursed Powell for some of the damage she claimed with USAA, and whether Powell accurately described and valued her personal property damage. The opinion also stated that Powell had not protected her property from further damage or made reasonable repairs to protect it, particularly the roof, which may have affected USAA's ability to evaluate her damages.

In three letters dated March 30, 2017, USAA rejected each of Powell's claims. Each letter provided an identical claim decision: "USAA CIC has determined that you misrepresented and concealed facts in the presentation of this claim. As a result, your claim for [sic] is denied." The letters provided additional detail regarding USAA's rejection of each claim. The letter rejecting the claim for the air conditioner leak stated that Powell could not recall when the damage had occurred. The letter rejecting the claim for the washing machine overflow stated that Powell admitted the loss occurred in March 2016, several weeks before the April 2016 Tax Day Floods, leading USAA to estimate that the damage occurred between March 21 and April 11, 2016. The letter rejecting the roof leak claim stated that Powell's roof was

not damaged by wind or hail, but any leaks were instead due to wear and tear or maintenance issues, neither of which was covered under the policy. The letters denying Powell's claims for the washing machine overflow and roof leaks also stated that USAA's engineer had determined that Powell's personal property was damaged from "moisture penetration through the marred, lead plumbing vent pipe flashing on the roof." All three rejection letters also stated that, when applying for the policy, Powell confirmed there was no unrepaired damage to her house on April 5, 2016, and that the quality and age of the roof was upgraded in the most recent policy application as discussed above.

C. Powell's Lawsuit Against USAA

Powell filed the underlying lawsuit against USAA, asserting claims for breach of contract and violations of the Insurance Code. Powell alleged that USAA violated the prompt-payment provisions of the Insurance Code by inspecting her property more than fifteen days after she filed her claims and by rejecting her claims nine months after she filed them. Powell also alleged that USAA's delay caused the damage to worsen. USAA filed an answer generally denying the allegations and asserting numerous affirmative defenses, including that Powell's damages existed prior to the effective date of the policy, that the policy did not cover the damages, and that Powell failed to mitigate her damages.

1. USAA's Motion for Summary Judgment

USAA filed a traditional and no evidence motion for summary judgment. USAA argued that Powell had no evidence that her claimed losses were covered under the terms of the policy or occurred during the policy period. USAA contended that Powell's house was in disrepair when she bought it, that it incurred damage prior to the effective date of the policy, and that the damage was not covered under the policy. USAA also argued that Powell's claims for Insurance Code violations failed as a matter of law because she could not establish a breach of the insurance contract and because Powell had no evidence any harm resulted from USAA's alleged violations of the Insurance Code.

In support of its motion, USAA attached numerous exhibits, including: (1) the homeowner's policy effective in April 2016; (2) the SEC engineer's report; (3) the legal opinion regarding coverage; and (4) the three claim rejection letters, each of which is discussed above. USAA also attached its notes from Powell's claim file.

USAA also relied on two depositions of Powell: one from a prior lawsuit and one in the underlying proceedings. In the prior lawsuit, Powell testified that her house sat vacant for two years before she bought it. As part of the agreement to buy the house, Powell agreed to repair the damage to the house. She claimed to have spent at least $100,000 repairing the pool, fence, air conditioner, plumbing, roof leaks, and broken windows and doors. In her deposition in the underlying

proceeding, Powell similarly testified that she repaired the pool, fence, and some plumbing. She had also replaced some carpet. She further testified that a new roof was installed on the house prior to her purchasing it. Later, wind and hail in the Tax Day Floods damaged her home. She acknowledged that she also sustained flood damage, but FEMA covered some exterior damage and damage to a sunken den. She saw mold begin to form after the flood damage, but she had not made any efforts to remediate the mold due to a lack of financial resources.

Powell testified that she did not know her roof was leaking until the remediation company she hired discovered the damage in June 2016. Powell acknowledged that she had not made any repairs to the roof and that she had obtained three estimates from roofing contractors to replace it.

USAA also attached a second engineer's report from Insight Engineering, L.P., a company hired by USAA "to render a professional opinion as to the extent of damage to [Powell's] residence as a result of a reported overflow of the clothes washing machine drain pipe, drywall stains on the bar ceiling, and damage to the roof shingles from a tree branch impact during a June 14, 2016 weather event." Insight, hired after Powell filed the lawsuit, inspected Powell's house on May 16, 2018, and issued a report on October 18, 2018. The report concluded that Powell's washing machine overflowed due to tree roots blocking the drain. Insight determined that much of the damage to the interior of Powell's house was caused by long-term

water exposure from the washing machine, air conditioning system condensation, and gaps in roof vents. Regarding the roof, the report stated that "[t]he laminate shingles and skylight covers were in good condition and appeared to be less than 10 years old." However, the report stated that damage to the living room ceiling was "consistent with predating the present skylights/shingles as there is no evidence of an active leak, localized repairs or localized damage on the roof." The report concluded that there was no evidence of wind or hail damage.

USAA also relied on depositions of three of Powell's witnesses. Pat Raney prepared an estimate to replace Powell's roof. Raney inspected Powell's roof one to two years before his deposition in January 2019. He saw indications of hail damage to Powell's roof, and he recalled that the most recent hailstorm prior to his inspection was during the Tax Day Floods, although he could not say when the hail damage to Powell's roof occurred. Raney testified that, in his experience, he had seen dime-sized hail cause damage to a roof. He stated that, in addition to the size of hail, a longer duration and higher density of hail is more likely to cause roof damage. Raney could not recall whether he inspected Powell's attic, and he did not attempt to determine the cause of any of the water damage in Powell's home. Raney estimated Powell's roof to be fifteen years old based on wear and tear. He acknowledged that it was possible Powell's roof damage was caused by maintenance issues and that he observed animal damage to vent pipes.

Daniel Coll and Lonnie Mazzeo, Powell's other two witnesses, testified about estimates their company had prepared to remediate mold in Powell's house.[5] Coll first inspected Powell's house in late 2016, after which he prepared an estimate to remediate the mold. Mazzeo prepared a second, larger estimate after reinspecting Powell's house in December 2018 or January 2019 when the mold had worsened.

2. Powell's Response to USAA's Motion for Summary Judgment

Powell responded to USAA's motion for summary judgment, primarily arguing that USAA could not seek summary judgment on a ground not raised in its letters rejecting her claims. Powell did not refute USAA's arguments regarding the air conditioning leak, damage caused by animals, or damage caused by vent pipes. She conceded that the washing machine overflowed prior to the April 5 policy effective date. Instead, Powell argued that a fact issue existed regarding the cause of the roof leaks—whether they were caused by wind or hail during the Tax Day Floods rather than gradual, long-term leaks. Powell acknowledged that her policy excluded mold damage, but she argued that USAA was nevertheless liable for it because its failure to pay her claims in a timely manner caused the mold.

Powell relied on USAA's summary judgment evidence as well as depositions of USAA's adjuster and internal investigator, USAA's emails, and Powell's bank

[5] The estimates are not included in the record on appeal.

records. Powell primarily relied on the evidence attached to her response to show that she had not made any misrepresentations to USAA regarding her claims as stated in USAA's rejection letters.[6]

3. USAA's Reply

USAA filed a reply. It argued that Powell could not establish any damage occurred during the policy period, that mold and flood damage are not covered under the policy, and that Powell could not establish her claims for violations of the Insurance Code as a matter of law.

The trial court granted USAA's motion for summary judgment and dismissed Powell's claims with prejudice. The order did not state whether it granted USAA's motion on the no evidence or traditional basis. This appeal followed.

Summary Judgment

A. Standard of Review

We review de novo a district court's grant of summary judgment. *Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When, as here, a party moves for summary judgment on both traditional and no-evidence grounds, we first consider the no-evidence motion. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). To defeat a no-evidence

[6] Powell also relied on her exhibits to show that USAA did not contest Powell's ownership in her house, the insured property.

motion, the nonmovant must produce at least a scintilla of evidence raising a genuine issue of material fact as to the challenged elements of her claims. *Id.* The evidence is considered in the light most favorable to the nonmovant, and every reasonable inference is indulged in the nonmovant's favor. *Id.* If the nonmovant does not overcome its no-evidence burden on any claim, we need not address the traditional motion on the same claim. *Id.*

A party moving for traditional summary judgment bears the burden to prove that there is no genuine issue of material fact on at least one element of the plaintiff's cause of action and that it is entitled to judgment as a matter of law. *Id.* (citing TEX. R. CIV. P. 166a(c) and *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017)). If the movant meets its burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Am. Risk Ins. Co. v. Serpikova*, 522 S.W.3d 497, 501 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000)). When reviewing a traditional motion for summary judgment, we review the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts in favor of the nonmovant. *Lightning Oil*, 520 S.W.3d at 45 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005)). The evidence raises a fact issue if reasonable and

fair-minded jurists could differ in their conclusions in light of all the summary judgment evidence. *Serpikova*, 522 S.W.3d at 501.

B. Prompt-Payment Provision of the Insurance Code

Powell argues that language in a provision of the Insurance Code requiring insurers to provide prompt, written rejection of insurance claims binds the insurer to the reasons stated in the rejection letter when later defending itself in a lawsuit. Insurance Code section 542.056 requires an insurer to accept or reject a claim in writing within fifteen business days after the insurer receives all the information the insurer requires to secure the final proof of loss. TEX. INS. CODE § 542.056(a). Subsection (c), on which Powell relies, requires the insurer's written notification to "state the reasons for the rejection." *Id.* § 542.056(c).

According to Powell, USAA denied her claims based on misrepresentation and concealment of facts, but it moved for summary judgment on the ground that her claimed losses preexisted or were excluded under the policy. Powell contends this is prohibited by section 542.056(c) and, therefore, summary judgment was improper. USAA responds that its defense in this lawsuit is consistent with the reasons stated in its rejection letters and that, in any event, summary judgment is appropriate for a reason not stated in the rejection letter if the reason was valid and existed at the time the claim was rejected.

Powell does not cite any cases to support her argument on appeal, although she contends that the issue is one of first impression. Assuming without deciding that section 542.056(c) binds an insurer defending a lawsuit filed by an insured to the reasons stated in the insurer's letter rejecting an insurance claim, we disagree with Powell that USAA's defense in this case is inconsistent with the reasons stated in its rejection letters.

Although all three letters stated the same coverage decision—rejection of Powell's claims due to misrepresentation and concealment of facts—the letters provided additional detail. The letter rejecting Powell's claim for the air conditioner leak stated that Powell could not recall when the damage occurred. Similarly, the letter rejecting the claim for the overflowed washing machine stated that Powell had admitted the loss occurred in March 2016, prior to the effective date of the policy. And the letter rejecting the roof leak claim stated that Powell's roof damage was not caused by wind or hail, but rather by wear and tear or maintenance issues that were not covered under the policy. The rejection letters for the washing machine overflow and roof leaks further stated that the cause of the damage was from "marred" vent pipes that allowed moisture to penetrate through the roof.

These additional reasons provided in the rejection letters are consistent with USAA's motion for summary judgment, which argued that Powell had no evidence her claimed losses were covered under the policy or occurred during the policy

period. Accordingly, we conclude that USAA's defense in this lawsuit is consistent with the reasons stated in its letters rejecting Powell's insurance claims.

We overrule this part of Powell's issue.

C. Breach of Contract

Powell next argues that genuine issues of material fact exist regarding whether her loss is covered under the policy effective in April 2016.

We interpret insurance contracts using well-established principles of contract construction. *Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 467 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (citing *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010)). The interpretation of an unambiguous contract is a matter of law for the court to determine. *Id.* "If policy language is worded so that it can be given a definite or certain legal meaning, it is not ambiguous and we construe it as a matter of law." *Id.* at 468 (quoting *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003)).

Whether a particular provision or the interaction among multiple provisions creates an ambiguity is also a question of law. *Id.* "The fact that the parties may disagree about the policy's meaning does not create an ambiguity." *Id.* (quoting *Page*, 315 S.W.3d at 527). "Only if the policy is subject to two or more reasonable interpretations may it be considered ambiguous." *Id.* (quoting *Page*, 315 S.W.3d at 527). Extrinsic evidence may not be used to contradict or vary the meaning of the

explicit language of a written contract. *Id.* "If, however, a contract is susceptible to more than one reasonable interpretation, we will resolve any ambiguity in favor of coverage." *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008).

"Our primary goal is to determine the contracting parties' intent through the policy's written language." *Davis*, 484 S.W.3d at 468 (quoting *Page*, 315 S.W.3d at 527). Reviewing courts must read all parts of the contract together, giving effect to each word, clause, and sentence, and avoid making any provisions within the policy inoperative. *Id.* Our analysis of the policy is confined to the four corners of the policy itself. *Id.*

To establish a breach of contract, a plaintiff must show: (1) the existence of a valid contract; (2) the plaintiff's performance or tender of performance; (3) the defendant's breach of contract; and (4) the plaintiff's damages as a result of the breach. *Id.* In the context of an insurance policy, a plaintiff must prove the existence of a valid insurance policy covering the denied claim and entitlement to money damages on that claim. *Id.* The insured bears the initial burden to establish coverage under the policy. *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014). If the insured meets her initial burden, the insurer must then prove that one of the policy's exclusions applies in order to avoid liability. *Id.* If the insurer shows

that a policy exclusion applies, the burden shifts back to the insured to establish that an exception to the exclusion restores coverage. *Id.*

1. Actual Injury Approach Versus Manifestation Approach

As an initial matter, the parties dispute whether a loss must actually occur during the policy period or whether the damages must manifest during the policy period. Powell contends that, as a matter of law, a property loss is covered if the damage manifests during the policy period regardless of when it occurred. USAA responds that, as a matter of law, the loss must occur during the policy period for coverage to apply regardless of when the damage is discovered or manifests.

The Texas Supreme Court's opinion in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.* is instructive here. 267 S.W.3d at 22–26. In that case, the Court construed a third-party liability provision in a commercial general liability policy concerning the insurer's duty to defend. *Id.* at 22–23. The Court distinguished the "actual injury" or "injury-in-fact" approach—under which property damage occurring during the policy term is covered—from the "manifestation" approach—under which property damage that becomes evident or discoverable during the policy term is covered. *Id.* at 25–26. These "varying approaches reflect perceived differences in the policy language under review" and "different factual circumstances," such as "the difficulty encountered . . . by an alleged delay between the time of property damage and the discovery of that damage." *Id.* at 25.

The Court ultimately applied the "actual injury" approach, holding that the text of the policy afforded no other choice. The policy provided a one-year term of liability coverage for property damage or bodily injury that "occurs during the policy period." *Id.* at 24. The policy defined "property damage" to include "[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it[.]" *Id.* Based on the plain meaning of these provisions, the Court held that property damage under the policy "occurred when actual physical damage to the property occurred." *Id.* "The policy says as much, defining property damage as '[p]hysical injury to tangible property,' and explicitly stating that coverage is available if and only if '"property damage" occurs during the policy period.'" *Id.*

Here, the relevant section of the USAA policy, Section I, states: "We insure against 'sudden and accidental', direct, physical loss to tangible property described in PROPERTY WE COVER—COVERAGES A AND B [the dwelling and other structures] unless excluded in Section I—LOSSES WE DO NOT COVER." The policy contains substantially similar language regarding coverage for personal property, except that the loss must be "caused by a peril listed below[,]" including windstorm or hail. The policy defines "[s]udden and accidental" as "an abrupt, fortuitous event which is unintended from the perspective of a reasonable person." *See Don's Bldg. Supply*, 267 S.W.3d at 24 ("[A]n accident is generally understood

to be a fortuitous, unexpected, and unintended event.") (quoting *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007)). The policy further provides, "This policy applies only to loss in SECTION I . . . which occurs during the policy period."

The policy here is similar to the policy at issue in *Don's Building Supply*, which defined property damage as "physical injury to tangible property" and provided coverage only if the property damage "occurs during the policy period." The USAA policy uses the term "physical loss" and provides that the policy applies only to a loss which "occurs during the policy period." We therefore conclude that no ambiguity exists in the policy and that the only reasonable interpretation of the policy is that it covers a loss that actually "occurs during the policy period," not an earlier loss that manifests during the policy period. *See Davis*, 484 S.W.3d at 468 (stating that insurance policy is ambiguous only if policy is subject to two or more reasonable interpretations).

2. Washing Machine Overflow

Powell concedes on appeal, as she did in her response to USAA's motion for summary judgment, that the washing machine leak occurred before the effective date of the policy in April 2016. Powell did not produce a scintilla of evidence raising a genuine issue of material fact on this claim. *See Lightning Oil*, 520 S.W.3d at 45. Accordingly, we conclude that no-evidence summary judgment was proper on

Powell's claim for damage resulting from the washing machine overflow. We overrule this part of Powell's issue.

3. Air Conditioning Leak

Powell does not argue on appeal or provide any evidence showing that her air conditioning leaked during the policy period. Accordingly, she has not met her no-evidence burden on this claim, and she has waived any error regarding this claim. *See id.*; TEX. R. APP. P. 38.1(g), (i). We overrule this part of Powell's issue.

4. Roof Leaks

Powell argues that disputed facts exist regarding her roof leaks. Although she concedes in her brief that she does not know when the damage to her roof occurred, she contends that USAA's engineer, SEC, reported that hail one inch in diameter was detected at her house on April 17, 2016, and that it hailed for more than twenty minutes. She also argues that Raney testified that he observed hail damage to the shingles of Powell's roof, and that larger hail falling for a duration of fifteen to twenty minutes increases the chance of roof damage. She further argues that Raney testified that hail, rather than long-term wear and tear, caused the water damage to the interior of her home based on the significant damages.

USAA responds that Powell's roof had not been replaced since she bought the house in 2010, that USAA's engineers determined the damage was old and not from April 2016, and that no evidence shows that Powell's personal property damage

occurred as a result of rain entering through a wind or hail created opening. USAA further argues that Powell's witnesses could not state when the interior damage occurred, and it could have occurred as a result of improper maintenance or vermin. USAA also argues that the evidence shows the roof leaked as a result of vermin and damaged roof vents.

Powell's policy covered damage to her dwelling unless the policy excluded the damage, and it covered damage to her personal property from wind or hail unless the damage was excluded. The policy excluded damage to the dwelling from wear and tear and vermin unless the damage was water damage, in which case the policy covered the resulting water damage.

According to SEC, which inspected Powell's home in July 2016, weather data "reported up to 1.00-inch hail fall at the location of [Powell's house]" on April 17, 2016, and the attached weather data estimated the hail lasted for more than twenty minutes. The report additionally stated that Powell's roof showed evidence of "approximately 1/4-inch hail," although it concluded that there were "[n]o punctures, visible depressions, or randomly-patterned roughly-circular areas of missing granules consistent with hail impacts" on Powell's roof or patio structure and, accordingly, the hail "was of insufficient mass and velocity to cause damage to the roofing." The report offered numerous conclusions for the cause of the damages to the interior of Powell's house, including animal damage to vent pipes and repeated

and ongoing condensation leaks from the air conditioning system. USAA's letter rejecting Powell's roof claims relied on SEC's report to conclude that the roof damage occurred from wear and tear or maintenance issues and marred vent pipes.

Insight, the second engineer hired by USAA after Powell filed her lawsuit, inspected Powell's house two years after the Tax Day Floods. Insight determined that much of the interior damage to Powell's house was due to long-term water exposure from the washing machine, air conditioning system condensation, and roof vents. The report stated that Powell's roof was in good condition and appeared to be less than ten years old.

Powell testified that hail fell at her house during the Tax Day Floods. Raney, Powell's roofer, saw signs of hail damage when he inspected Powell's house. He testified that the most recent hailstorm prior to his inspection was during the Tax Day Floods, although he could not definitively say whether that hailstorm caused the damage he observed. He also testified that, even if the hail is smaller in size, a longer duration and higher density of hail are more likely to cause roof damage. Raney did not, however, rule out that maintenance issues or animal damage to vent pipes damaged the interior of Powell's house.

Nevertheless, Powell concedes in her brief that she does not know when the damage to her roof occurred, and that it could have been in 2013 or 2015. As stated above, the plain language of Powell's policy applies only to a loss that actually

occurs during the policy period, not an earlier loss that manifests during the policy period. *See Don's Bldg. Supply*, 267 S.W.2d at 25–26. Powell's concessions that she does not know when the damage occurred and that it may have occurred prior to the policy period preclude a genuine issue of material fact. *See Lightning Oil*, 520 S.W.3d at 45; *Serpikova*, 522 S.W.3d at 501. We therefore conclude that summary judgment was proper on Powell's claim of damage from her roof. We overrule this part of Powell's issue.

5. Mold

Powell argues that USAA is liable for mold damage to her home despite the policy's exclusion of mold damage because USAA's failure to pay her claims in a timely manner caused the mold to develop. We disagree. The policy expressly excludes "damage consisting of or caused directly or indirectly by . . . microbial organisms, including mold." The policy also provides that, after a loss, an insured must mitigate any damage by protecting the property from further damage and by making reasonable and necessary repairs to protect the property. Powell testified that she did not remediate the mold growth. Thus, not only does the policy expressly exclude mold, but Powell did not comply with her duty to mitigate her damages.[7] We conclude that Powell did not produce a scintilla of evidence raising a genuine

[7] The policy does, however, provide that USAA will repair or tear out and replace property damage resulting from a covered loss even if mold is present.

issue of material fact on this claim. *See Lightning Oil*, 520 S.W.3d at 45. We overrule this part of Powell's issue.

6. Flood Damage

USAA argues on appeal that any damage caused by flooding is not covered under the policy, an issue Powell does not address. *See id.* The policy expressly excludes water damage caused by flooding, which Powell conceded during her deposition. Thus, to the extent Powell's damage was caused by flooding, we agree with USAA that it is not covered under the policy. We overrule this part of Powell's issue.

D. Insurance Code Violations

On appeal, Powell does not argue or point to any evidence showing that USAA violated the Insurance Code. *See id.* She does not argue that USAA inspected the property after the statutorily required period, as alleged in her petition, or point to any authority supporting this claim. *See* TEX. R. APP. P. 38.1(i). And although she generally complains that USAA took nine months to reject her claim, the prompt-payment provision applies to the date "the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss." TEX. INS. CODE § 542.056(a) (requiring insurer to notify claimant in writing of acceptance or rejection of claim "not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof

of loss"). If the insurer cannot accept or reject a claim with the fifteen-day period, it may notify the claimant of the reasons it needs additional time and it must accept or reject the claim within forty-five days of the notice to the claimant. *Id.* § 542.056(d).

USAA did not receive the legal opinion regarding coverage from its outside counsel until March 2017. *See id.* § 542.056(a). USAA's claim notes show that it also received an additional inventory of claimed property damage in March. A USAA representative spoke to Powell's attorney on March 23, 2017, and notified him that it needed additional time to review the new inventory. *See id.* § 542.056(a), (d) (providing that "[i]f the insurer is unable to accept or reject the claim within the period specified by Subsection (a) . . . , the insurer, within that same period, shall notify the claimant of the reasons that the insurer needs additional time" and insurer must accept or reject claim within forty-five days). USAA rejected Powell's claims on March 30. Powell does not argue how this timeline violated section 542.056. We conclude that Powell has not raised a genuine issue of material fact on her claims that USAA violated the Insurance Code. *See* TEX. R. CIV. P. 166a(c); *Lightning Oil*, 520 S.W.3d at 45; *Serpikova*, 522 S.W.3d at 501. We overrule this part of Powell's issue.

Conclusion

We affirm the trial court's judgment. We dismiss any pending motions as moot.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

CAUSE NO. 2017-22800

AMY POWELL Plaintiff,	§ § §	IN THE DISTRICT COURT OF
VS.	§ §	HARRIS COUNTY, TEXAS
USAA CASUALTY INSURANCE COMPANY Defendant.	§ §	157TH JUDICIAL DISTRICT

FINAL **ORDER**

On this day came to be heard Defendant USAA Casualty Insurance Company's Motion for Summary Judgment. Considering the foregoing Motion and the responses and arguments, if any, the Court finds Defendant's Motion is well taken and is hereby **GRANTED**.

Plaintiff's claims are hereby **DISMISSED WITH PREJUDICE**. This is a final judgment disposing of all claims and it is appealable.

SO ORDERED, this the _____ day of _____, 2019

Signed:
4/8/2019

Judge Tanya Garrison