NO. 25-1485

United States Court of Appeals

for the

Fourth Circuit

WAKE CHAPEL CHURCH, INC.,

Plaintiff-Appellee,

– v. –

CHURCH MUTUAL INSURANCE COMPANY, S.I.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH IN CASE NO. 5:21-CV-00114-M, RICHARD E. MYERS, CHIEF U.S. DISTRICT COURT JUDGE

REPLY BRIEF FOR DEFENDANT-APPELLANT

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REPLY ARGUMENT

The plaintiff-appellee, Wake Chapel Church, Inc., maintains that its property insurance policy, written by the defendant-appellant Church Mutual Insurance Company (or CMIC), covers scratching and peeling to its sanctuary roof. The church's public adjuster noticed these conditions following a December 2018 snowfall.

In maintaining this position, Wake Chapel argues the policy covers any loss of any kind unless an excluded cause was the "sole" reason for the loss. That is not what the policy says. That is not what North Carolina law says. And Wake Chapel's evidence, in any event, did not prove that snow in December 2018 joined and concurred with excluded risks to cause more than $1 million in damage to the sanctuary roof.

Lost in Wake Chapel's brief are critical and undisputed truths. The roof's installers scratched the sanctuary roof during construction in the early 2000s. These scratches compromised the coating on the roof panels. The coating then peeled and worsened over the next 18 years. (JA3573, JA3577, JA3596, JA3598, JA3609)

These truths were not CMIC's argument to the jury. Rather, these truths came from Wake Chapel's retained expert, engineer Lyle Hogan.

(JA3573, JA3577, JA3596, JA3598, JA3609) Hogan further testified that had the laborers used the coating product specified in the design plans, the roof would not be scratching and peeling. (JA3577, JA3585-3587, JA3607-3608, JA3618) He also testified that scratching and peeling "might very well have begun with the first snowfall received since construction." (JA3578)

To put a finer point on that idea, Hogan testified that he could not "scientifically date with reliability" when scratching or peeling occurred, and that the roof's "condition is the culmination of everything that's happened to it since it was installed." (JA3616-3617, JA3609)

* * *

The district court used the wrong causation standard in this case. To prove coverage, Wake Chapel had to show that the December 2018 snow was the "direct" cause of the loss, meaning that the snow was enough on its own to cause scratching and peeling to the roof, even if other excluded causes played a role too. Wake Chapel's argument for a lesser causation standard is based on third-party liability cases. Those cases insure a different risk, under different terms, than a property policy. For that reason, courts have recognized it is inappropriate to use

a "sole" causation standard in first party cases because that standard transforms an "all-risk" policy into an "all-loss" policy. This Court should reverse the district court on this point and direct JNOV for CMIC.

In addition, Wake Chapel cannot sustain its verdict even under the concurrent causation standard applied by the district court. That standard required Wake Chapel to prove that the loss did not result "wholly from an inherent quality or defect in the insured property," and that the damage "commence[d]" during the policy period. (JA3996, JA3999) Hogan's testimony did not meet either criteria, and instead, invited speculation as to when and under what circumstances the scratching and peeling occurred. This Court should reverse and direct JNOV for CMIC on this ground too.

I. The standard for coverage in first-party property cases is the efficient and predominant cause standard.

When a first-party property policy gives coverage for a "direct" loss, the policy only responds if the covered loss "was the efficient and predominating cause" meaning the cause "which produced the damage without any new or intervening cause sufficient of itself to produce the damage." *Wood v. Michigan Millers Mut. Fire Ins. Co.*, 96 S.E. 28, 30 (N.C. 1957). *See also Miller v. Farmers' Mut. Fire Ins. Ass'n of North*

Carolina, 152 S.E. 684 (N.C. 1930) and *Harrison v. Glens Falls Ins. Co.*, 181 S.E.2d 2538 (N.C. 1971).

North Carolina has never abandoned this standard in first-party cases. To the contrary, the North Carolina Court of Appeals has recognized that *Wood*, *Miller*, and *Harrison* "do rightfully uphold a 'dominant or efficient cause' standard." *Erie Ins. Exchange v. Bledsoe*, 540 S.E.2d 57, 62 (N.C. Ct. App. 2000).

Wake Chapel maintains that North Carolina jettisoned the "efficient and predominant" cause standard when the Supreme Court decided *Avis v. Hartford First Insurance Company*, 195 S.E.2d 545 (N.C. 1973) and *State Capital Insurance Company v. Nationwide Mutual Insurance Company*, 350 S.E.2d 66 (N.C. 1986). Wake Chapel fails to back its requested outcome with critical analysis, arguing instead that *Avis* and *State Capital* control because they are more recent than *Wood* and its brethren. This oversimplistic take overlooks the fact that neither *Avis* nor *State Capital*: (1) considered whether a loss was "direct" under a first-party policy; (2) referenced the "efficient and predominant" cause standard in any form; or (3) mentioned *Wood*, *Miller*, or *Harrison* at all.

Avis analyzed whether shoddy workmanship could be "fortuitous." 195 S.E.2d at 546. The *Avis* court did not comment on whether a cause was "direct." *See generally id*. The best Wake Chapel can say about *Avis* is that the court recognized that a policy may respond if a covered risk and an excluded risk both play a causal roll in a loss. *Id*. That is still true under an efficient and predominant cause standard though. If a "direct" risk was enough on its own to cause a loss, the policy must respond even if an excluded risk played a role too.

State Capital involved a third-party liability policy, not a first party property policy. 350 S.E.2d at 68, 73-74. And *State Capital* relied on *State Farm v. Partridge*, 514 P.2d 123 (Cal. 1978), a California decision that its Supreme Court later held had been "misinterpreted and misapplied" in first-party property cases. *Garvey v. State Farm*, 770 P.2d 704, 705 (1989).

Wake Chapel makes no attempt to disprove *Garvey's* discussion or its holding. And this is really the whole issue here. An "all-risk" policy is not an "all-loss" policy. A covered risk "can be asserted to exist somewhere in the chain of causation in cases involving multiple causes," and if this assertion creates coverage, then policy exclusions and limitations are

"nullifie[d]." *Garvey*, 770 P.2d at 705. That is why *Garvey* cautioned against using a "sole" cause standard in first-party cases. *Id.*

Wake Chapel has no response to this analysis. Rather, it writes that "[w]hat is missing in CMIC's argument [about *Garvey*] is a recognition that CMIC wrote the policy language at issue." (Appellee's Brief p. 23) That is a non-sequitur. *Garvey* did not turn on policy authorship. The *Garvey* court made a plain recognition that first-party policies cover different risks than third-party policies, so courts must treat the two differently. *See generally,* 770 P.2d at 709-11.

The December 2018 snow, on its own, was not enough to cause the coating on the sanctuary's metal roof to scratch and peel. Wake Chapel makes no contrary argument. As a result, this Court should hold that the district court applied the incorrect causation standard, and reverse and direct JNOV for CMIC.

II. This Court should direct JNOV for CMIC even under the district court's concurrent causation instruction.

For reference, the district court instructed the jury as follows:

> Plaintiff must prove by the greater weight of the evidence that the damages claimed by plaintiff for the hurricane claim and the snow claim are covered under this insuring language.

> In order for loss or damage to be covered under the policy it must be fortuitous. In other words, it must be caused by a fortuitous event. An event is not fortuitous if it is certain to occur.
>
> Additionally, in order for loss or damage to be covered under the policy it must not result wholly from an inherent quality or defect in the insured property. If there is at least one extraneous force, without which the loss or damage would not have occurred, the loss or damage does not result wholly from an inherent quality or defect in the insured property. Coverage exists if an inherent quality or defect in the insured property is made active and destructive by a cause of loss that is covered under the policy.
>
> Finally, in order for loss or damage to be covered under the policy, it must commence during the policy period. The policy period for the insurance policy issued by the defendant to plaintiff is May 31st, 2016, through May 31st, 2019.

(JA3996)

Wake Chapel contends that Hogan's testimony satisfied its burden because he couched his opinions as "given to a reasonable degree of engineering certainty." That verbiage does not arm his opinions with foundation. Nor does it make speculative opinions concrete.

To be sure, this Court has recognized that an expert witness must give their opinion to a "reasonable degree" of professional certainty before a jury may rely on it. *Fitzgerald v. Manning*, 679 F.2d 341, 350 (4th Cir. 1982). Still, this Court does not accept an expert witness' affirmation at

face value. *Id*. Instead, it must examine the substantive content of the witness' testimony to decide whether the expert has grounded their opinion in fact, technical knowledge, and substance. *Id*.

Hogan agreed that he held his opinions to "reasonable degree of engineering certainty." (*See e.g.,* JA3580) This testimony, however, does not override his concession which disqualify his opinions. That is not a matter of "cherry picking" Hogan's testimony, as Wake Chapel would have it. It is a matter of critically judging Hogan's testimony for foundation and substance.

A. The scratching and peeling resulted wholly from an inherent quality or defect in the property.

Hogan testified that the laborers did not coat the sanctuary roof with the product specified in the construction plans. (JA3585-3586) Had the laborers used the specified product, then the sanctuary roof would not suffer from scratching and peeling. (JA3586-3587)

Despite this testimony, Wake Chapel argues that Hogan characterized the snow as "an extraneous force without which the loss or damage would not have occurred." But that is not what Hogan said. He testified that the laborers scratched the roof during construction, that the scratched coating delaminated and peeled away, and that this condition

worsened with time. (JA3573, JA3577, JA3596, JA3598, JA3609) And Hogan testified that this never would have happened had the laborers used the coating product called for in the design. (JA3585-3587)

The reason the roof panels are scratching and peeling isn't because snow fell in December 2018. The reason the roof panels are scratching and peeling is because the install laborers scratched the panels 18 years earlier. And the laborers were able to scratch the panels either because the builders used the wrong product to coat the panels, or because the coating did not perform as it should have. But either way, Hogan's testimony on this point is an admission that the roof is scratching and peeling "wholly from an inherent quality or defect" in the product. Hogan even doubled down on this point when asked "whether Kynar 500 roof panels would be exhibiting the type of damage we've seen?," and he responded, "[t]hey would not. Witness the building next door" (referring to another church structure with a similar roof that had no scratches or peeling). (JA3586-3587)

On this testimony alone, this Court should reverse and direct JNOV for Wake Chapel.

B. The damage to the sanctuary's standing seem metal roofs did not commence during the policy period.

The policy affords coverage for damage "commencing" during the policy period, which was from May 1, 2016 to May 1, 2019.

Hogan testified that he could not say when sliding snow and ice caused scratching and peeling to the sanctuary roof panels. (JA3577, JA3616) He explained that because the clear coat on the metal panels is "vulnerable," the scratching "might very well have begun with the first snowfall received since construction." (JA3578) The best Hogan could offer was that the "worst" storms led to the "worst" scratching. (JA3616-3617) Hogan conceded that to do this analysis, he would need to know when it snowed, what each snow looked like, and the "characteristics of the snowpack." (JA3617)

Wake Chapel, nonetheless, argues that Hogan's testimony satisfies its burden because he testified that the scratches were "characteristic scratching and abrasions from sliding ice and snow." (JA3564) But Hogan disqualified this opinion right after he gave it, when he explained that the "nine or ten" times he witnessed this phenomenon in the past, "frankly were -- I think were from hail event, hail damage claims." (JA3566-3567)

Back to "commencing." Hogan testified that he could not "scientifically date with reliability" when the scratching or peeling occurred. (JA3616-3617) That concession alone undermines the idea that the jury could hear Hogan's testimony and use it to decide that Wake Chapel proved that damage to the sanctuary roof commenced during the policy period. For that reason, this Court should reverse and direct JNOV for Wake Chapel.

C. Hogan's testimony invited the jury to speculate.

JNOV is appropriate if causation rests on speculation. *Johnson v. Town of Elizabethtown*, 800 F.2d 404, 406 (4th Cir. 1986). This is apparent when the evidence allows the jury to speculate as to which of two potential causes brought about the damage. *See e.g., Prudential Ins. Co. of Am. v. Bialkowski*, 85 F.2d 880, 885 (4th Cir. 1936).

The fundamental problem with Hogan's testimony is that it invited unfettered jury speculation on whether snow in December 2018 caused scratching or peeling to the sanctuary roof. Wake Chapel did not meet this argument in its appellee's brief.

Hogan gave a two-fold explanation for his opinion that sliding snow and ice caused vertical scratches to the sanctuary roof: (1) that belief was

"reasonable," and (2) he did not think installers would cause vertical scratches. (JA3575, JA3567) From there, Hogan admitted that he had never seen sliding ice and snow cause vertical scratches to roof panels (JA3566-3567), but he had seen roof installation tools cause vertical scratches to panels. (JA3610)

Wake Chapel never elicited any testimony from Hogan to explain why the vertical scratches were due to sliding snow – something Hogan had *never* personally seen before – as opposed to a roll former or robotic seamer – a cause Hogan had seen before. As such, the jury had to speculate as to which of these two causes, a sliding snowpack or a construction tool, caused vertical scratches to the roof.

And as to the peeling, Hogan testified that "the roof's condition is the culmination of everything that's happened to it since it was installed." (JA3609) So, again, all the jury could do with Hogan's testimony was speculate as to whether sliding snowpack caused the coating to peel, or whether the peeling occurred due to other factors, including rain and the freeze-thaw cycle, two phenomena that Hogan testified caused the peeling to worsen. (JA3598, JA3609)

This Court should reverse and direct JNOV because Wake Chapel's evidence caused the jury to speculate between two different causes. *Bialkowski*, 85 F.2d at 885.

III. Wake Chapel did not sustain its burden to prove the nature and extent of any covered loss.

Wake Chapel had the burden to prove its covered damages. Given the nature of this loss, that required Wake Chapel to separate damages from the December 2018 snow storm from pre-existing damages. It did not do that, instead electing to present evidence of the cost to replace its roof altogether. That is not the coverage given by the policy though.

Again, the policy gives coverage for damage "commencing" during the policy period. (JA220) Wake Chapel did not put in evidence to prove these damages, versus the pre-existing construction scratches that undeniably did not "commence" during the policy period.

Even Wake Chapel's concurrent causation theory does not help them on this point. Concurrent causation refers to two or more forces that join at the same time to cause the damage. If property is already damaged, and a separate cause later makes the damage worse, that does not transform existing and uncovered damage into a covered loss. At most, the policy may cover aggravation to the pre-existing damage. Wake

Chapel, however, put in no evidence to this effect. And Wake Chapel did not put in any evidence from which the jury could reasonably conclude that the sliding ice or snow caused enough damage, in quality or quantity, to mandate roof replacement.

As it stands, the verdict requires CMIC to pay for excluded damages. This Court must reverse that verdict because CMIC did not agree to pay for uncovered damages. *Park Ctr. III Ltd. P'ship v. Pa. Mfrs. Ass'n Ins. Co.,* 30 Fed. Appx. 64, 69 (4th Cir. 2002) (recognizing that first-party property insurance did not cover repairs needed prior to a covered loss).

Last, Wake Chapel argues that once it presented replacement costs, the policy put the onus on CMIC to determine the actual cash value and replacement costs for the reported damage. No. An insured's decision to pursue RCV rather than ACV does not shift its burden to prove coverage. That burden remains with the insured.

This argument does not override the shortcomings in Wake Chapel's evidence. To recover ACV, Wake Chapel had to present evidence of this damage at the time of loss. (JA217). Wake Chapel presented a May 2019 ACV estimate that was based on pricing as of April 2019, which

does not satisfy the policy. (JA3506, JA4429) To recover RCV, Wake Chapel had to show that the "loss or damaged property is actually repaired or replaced." (JA217) Wake Chapel did not replace the roof. (JA3403, JA3704) As such, Wake Chapel did not meet its burden to show damages on an RCV basis either.

CONCLUSION

Wake Chapel's evidence does not sustain its verdict for first-party property coverage. The December 2018 snow was not the efficient and predominant cause of the scratching and peeling to the coating on the sanctuary's roof panels. And even if the district court's concurrent causation instruction was correct, Wake Chapel's evidence still does not support the verdict.

This Court should reverse the district court's decision denying CMIC's motion for JNOV, or in the alternative, a new trial.

This the 11th day of September 2025.

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