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SUPREME COURT OF TEXAS
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NO. 21-0757

IN THE

SUPREME COURT OF TEXAS

FRYMIRE HOME SERVICES, INC. AND WHITFIELD CAPITAL, LLC

Plaintiffs-Appellants

v.

OHIO SECURITY INSURANCE COMPANY

Defendant-Appellee

On Certified Questions from the United States Court of Appeals for the Fifth Circuit

Cause No. No. 21-10012

BRIEF OF AMICI CURIAE UNITED POLICYHOLDERS AND EDINBURG CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

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Amici curiae United Policyholders and Edinburg Consolidated Independent School District ("Amici") file this amicus brief.

STATEMENT OF INTEREST OF UNITED POLICYHOLDERS

Effectuating the purpose of insurance and interpreting insurance contracts, laws, and regulations requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Texas residents and businesses through three programs: *Roadmap to Recovery* (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and

Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP has provided resource libraries and educational programs for Texas policyholders following local disasters such as Hurricane Harvey, the Central Memorial Day Flood of 2015, and the 2011 Central Texas Wildfires.

UP communicates with the Texas Department of Insurance on a regular basis at the tri-annual meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative. United Policyholders also works with the Texas Office of Public Insurance Counsel on consumer initiatives.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. *Amicus curiae* briefs filed by UP have been expressly and favorably cited in the opinions of multiple state supreme courts as well

as the U.S. Supreme Court.[1] United Policyholders has also weighed in on important insurance issues affecting homeowners and businesses in matters adjudicated before this Court, Texas appellate courts, and the United States Court of Appeals for the Fifth Circuit.[2]

Here, UP seeks to assist the Court in clarifying important issues of concurrent causation in Texas insurance law, namely whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by plaintiffs. Incidental wear and tear is of course often relevant to

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[1] *See, e.g. Humana, Inc. v. Forsyth,* No. 97-303, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 at 25 ¶53 (Ill. Sep. 23, 2021); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

[2] *See, e.g., Hinojos v. State Farm Lloyds,* 619 S.W.3d 651 (Tex. 2021); *In re State Farm Lloyds,* 520 S.W.3d 595, 2017 Tex. LEXIS 482, 60 Tex. Sup. J. 1114, 2017 WL 2323099; *US Metals, Inc. v. Liberty Mut. Ins. Co.,* 490 S.W.3d 20 (Tex. 2016); *In re Universal Underwriters of Tex. Ins. Co.,* 345 S.W.3d 404 (Tex. 2011); *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118 (Tex. 2010); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker,* 246 S.W.3d 603 (Tex. 2008); *Excess Underwriters at Lloyds, London v. Franks Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42 (Tex. 2008); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); *Pendergest-Holt v. Certain Underwriters at Lloyds of London,* 600 F.3d 562 (5th Cir. 2010); *Citigroup Inc. v. Fed. Ins. Co.,* 649 F.3d 367 (5th Cir. 2011); *Advanced Env. Recycling Tech. Inc. v. Am. Int'l Specialty Lines Ins. Co.,* 399 F. App'x 869 (5th Cir. 2010); *Motiva Enters., LLC v. St. Paul Fire & Marine Ins. Co.,* 445 F.3d 381 (5th Cir. 2006).

determining the value of benefits owed to an insured with a policy that covers the cost to replace damage or lost property less depreciation. But that is very different than the question of whether the concurrent cause doctrine automatically applies whenever there is any wear and tear to insured property. If the Court answers "yes" to certified question 1, this will drastically and negatively affect policyholders throughout the state by making every roof more than a day old subject to the concurrent cause doctrine, an absurd result.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of the general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)). UP seeks to assist this Court in helping preserve policyholders' rights and more appropriately level the playing field beyond just this case.

STATEMENT OF INTEREST FOR EDINBURG CONSOLIDATED INDEPENDENT SCHOOL DISTRICT

Amicus curiae Edinburg Consolidated Independent School District (ECISD) is located in the educational center of the Rio Grande Valley of South Texas. Its campuses, comprising 40 schools and 631 different buildings, span 945 square miles, making it one of the largest districts in the country. The value of the real estate owned by ECISD exceeds $823 million.

As is typical with school districts in Texas, the age of the school buildings varies greatly. Some buildings are only a few years old; others were built in the 1920s. But all of the buildings, regardless of their age, are insured. The insurance carriers who provide property coverage for ECISD engage in a pre-policy underwriting inspection of each of the covered buildings. The purpose of this is to assess the various risk factors in determining how much coverage to offer, what premiums to charge, deductible and co-insurance provisions, and other important factors that go into insuring a property. Given the great variance in age and property conditions, insurers understandably place great emphasis on those underwriting inspections.

Another factor that goes into underwriting is the geographic

location of the buildings. ECISD is located in an area of the state that, unfortunately, has been susceptible to significant hurricane and hailstorm activity in recent years. Just last year, Hurricane Hanna struck the Rio Grande Valley region, causing significant damage to many of the district's school buildings. ECISD has filed insurance claims for that damage, which are ongoing.

Given all of the issues noted above, ECISD found it important to join as an amicus curiae in this case. If the Court answers "yes" to the Fifth Circuit's first certified question, finding that the concurrent cause doctrine applies when there is the mere presence of any non-covered damage, this would have a profoundly negative effect on ECISD, and all school districts in Texas. ECISD freely acknowledges that every one of its buildings has some degree of wear and tear, aging, and obsolescence; all buildings do. But its insurers are well aware of this, and chose to insure the property anyway.

If those same insurers can weaponize the concurrent cause doctrine to apply it to every situation involving the mere *presence* of wear and tear, as a "yes" answer to the Fifth Circuit's first certified question would do, this would have devastating effects for all Texas public schools'

insurance policies. The inevitable result would be fewer covered claims. And with fewer covered claims, the school districts themselves – and thus, Texas taxpayers – would be left footing the bill for critical repairs and replacement. This is not a result that would benefit anyone but the insurance companies. ECISD respectfully asks this Court to reject such a result.

DISCLOSURE PURSUANT TO TRAP 11(C)

Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, neither Amici nor the undersigned counsel are being paid, nor will they be paid, any fee to prepare this brief.

I. INTRODUCTION

Within the span of less than three years, this Court has issued decisions that have substantially reduced confusion in Texas first-party insurance law. The Court understood the need to "clarify [the] issues" governing an insured's recovery of damages from its insurer, and did so in 2018 in *USAA Texas Lloyds Company v. Menchaca*. 545 S.W.3d 479, 489 (Tex. 2018). The Court held there that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under [the Insurance Code] if the insurer's

statutory violation causes the loss of the benefits." *Id.* at 495.

A year later in *Barbara Technologies Corporation v. State Farm Lloyds,* the Court held that payment of an appraisal award does not, as a matter of law, absolve an insurer of liability for damages under the Texas Prompt Payment of Claims Act (TPPCA). *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 829 (Tex. 2019). The Court expressly "disapproved" of intermediate appellate opinions holding that the mere payment of an appraisal award foreclosed any TPPCA liability for an insurer.[3]

Then, in March 2021, the Court decided another important TPPCA case. *See Hinojos v. State Farm Lloyds,* 619 S.W.3d 651 (Tex. 2021). Citing its opinion in *Barbara Technologies,* the Court held in *Hinojos* that the "payment of an appraisal award does not absolve the insurer of statutory liability when an insurer accepts a claim but pays only part of the amount it owes within the statutory deadline." *Hinojos v. State Farm Lloyds*, 619 S.W.3d at 653. The Court expressly rejected State Farm's invocation of the so-called "reasonableness" exception to TPPCA liability

[3] *See id.* at 819 (*citing Garcia v. State Farm Lloyds*, 514 S.W.3d 257, 275 (Tex. App.—San Antonio 2016, pet. denied)); *In re Slavonic Mut. Fire Ins. Ass'n,* 308 S.W.3d 556, 563 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

grounded in the Fifth Circuit's opinion in *Mainali Corp. v. Covington Specialty Insurance Co.*, 872 F.3d 255 (5th Cir. 2017). *Hinojos*, 619 S.W.3d at 658, n.34 (citing *Mainali*, 872 F.3d at 257, 259). *Barbara Technologies* and *Hinojos* provided much-needed clarity on the TPPCA after years (and in some cases, decades) of misinterpretation by lower courts.

Barely eight months after deciding *Hinojos,* the Court has yet another opportunity for clarification, this time on certified questions from the Fifth Circuit, and in the context of the "concurrent cause" doctrine. The black-letter recitation of the doctrine, dating back to as early as 1965, is that "[w]hen covered and excluded **perils** combine to **cause** an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993) (emphasis added); *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex. 1965). The classic example of the doctrine, as recognized by this Court in *Paulson,* manifests when a hurricane causes property damage. A typical property policy will cover wind damage, but will not cover flood damage. Both wind and flood are "perils," but one is covered and one is not. In a hurricane, those "perils" are "concurrent,"

i.e., they cause damage to the property at the same time.[4] The Court held in *Paulson*, applying the doctrine, that the plaintiff-insured was required to provide the jury with evidence permitting it to allocate between covered wind damage and excluded flood damage caused by Hurricane Carla. *See Paulson,* 393 S.W.2d at 319.

Unfortunately, over the years and especially in the last decade, intermediate appellate courts have misinterpreted and unreasonably expanded what was initially a very simple rule of law, applying the doctrine to situations that were neither "concurrent" nor relative to "causation." And although there are dozens, if not hundreds, of cases on the matter, one case – *Wallis v. United Services Automobile Association,* 2 S.W.3d 300 (Tex. App.—San Antonio 1999, pet. denied) – has been particularly problematic. *Wallis* has been cited at least 18 times for the proposition, in dicta, that "the doctrine of concurrent causation is not an affirmative defense or an avoidance issue."[5] 2 S.W.3d at 303. The Fifth Circuit specifically referenced *Wallis* in its order certifying questions in making the observation that "aspects of concurrent cause doctrines are

[4] *See Concurrent*, BLACK'S LAW DICTIONARY 234 (7th abridged ed. 2000) (defining "concurrent" as "[o]perating at the same time").

[5] *See* Appendix A, Shepard's report of *Wallis*.

unsettled." (*See* 5th Cir. Order at 6). Unsurprisingly, Appellee relies heavily on *Wallis*. (*See* Brief of Appellee, Table of Contents).

Courts continue to cite *Wallis* – without analysis – for this proposition even though the Texas Insurance Code unequivocally dictates that insurers bear the burden of proof at trial as to "any affirmative defense," including "language of exclusion" or an "exception to coverage" in an insurance policy. *See* TEX. INS. CODE § 554.002. Despite that statutory mandate, lower courts have relied on the San Antonio court's dicta in *Wallis* to justify saddling the insured with the burden of *disproving* any potential non-covered cause of its damage, including policy exclusions on which the insurer will have the burden of proof at trial. This is incompatible with section 554.002. The *Wallis* dicta has effectively reversed the substantive burdens of proof in insurance cases. Additionally, even when an insurer cites the mere *presence* of prior damage or some other condition for denying a claim that might not fit into the "exclusion" or "exception" bucket, this too flies in the face of the purpose of the concurrent cause doctrine: to differentiate between covered and uncovered **perils.**

A brief history of the Court's concurrent cause doctrine explains

some of the confusion. The doctrine was first recognized at a time when insureds bore the burden not only to prove a covered loss, but also to *disprove* any potential non-covered causes of that loss. That changed in 1991, when the Texas Legislature amended the Insurance Code to place the burden to prove any matters of avoidance or affirmative defenses on the *insurer*, not the insured. After that legislative change, this Court's jurisprudence adapted accordingly. Nonetheless, this Court has never – even before the legislative amendment in 1991 – required an insured to disprove all potential non-covered causes of loss at the summary judgment stage. This includes both excluded damages (such as wear and tear), and damage that purportedly occurred before the inception of the policy. The district court here transgressed both of those dictates, instead substituting itself as factfinder.

Given the history of the concurrent cause doctrine and the confusion that has evolved since its inception (with a legislative change in the interim), this is another important first-party insurance case. Amici respectfully urge this Court to answer "no" to the Fifth Circuit's

first certified question.[6] The concurrent cause doctrine has never been intended to encompass situations like the one posed by this case, especially at the summary judgment stage. The Court should not even reach certified question two[7], but if it does, it should answer "no." A plaintiff, especially in opposing a summary judgment, bears no attribution burden like the one posed by the Fifth Circuit. Lastly, even if the Court answers "yes" to question 2, it should answer "yes" to question 3.[8] Evidence attributing 100% of a loss to a covered peril is sufficient.

II. ARGUMENT

A. "All-risks" insurance policies cover fortuitous risks and perils, not mere conditions.

For decades, this Court has recognized that "[w]hen covered and excluded **perils**[9] combine to **cause** an injury, the insured must present

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[6] 5th Cir. Order at 7-8 ("Whether the concurrent cause doctrine applies where there is any non-covered damage, including 'wear and tear' to an insured property, but such damage does not directly cause the particular loss eventually experience by the plaintiffs").

[7] *Id.* at 8 ("If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss").

[8] *Id.* ("If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril)").

[9] A "peril" is "[t]he cause of a risk of loss to person or property; esp., the cause of a

some evidence affording the jury a reasonable basis on which to allocate the damage." *Lyons*, 866 S.W.2d at 601 (emphasis added); *Paulson*, 393 S.W.2d at 319. That remains black-letter law to this day. But a comprehensive overview of this Court's cases makes clear that the concurrent cause doctrine was never meant to apply to situations involving the mere "presence of preexisting damage" such as wear and tear. (*See* 5th Cir. Order at 5-6).

Before delving into that history, which Amici do below, it is important to note the basic purpose, function, and policy considerations underlying all-risks policy coverage. It is axiomatic that insurance under an all-risks policy like the one in this case is designed to protect insureds against "fortuitous" risks. *See Two Pesos, Inc. v. Gulf Ins. Co.,* 901 S.W.2d 495, 502 (Tex. App.—Houston [14th Dist.] 1995, no writ), citing *Burch v. Commonwealth Mut. Ins. Co.,* 450 S.W.2d 838, 840-41 (Tex. 1970). The so-called "fortuity doctrine" precludes coverage for a "known loss," or a loss "the insured knew had occurred prior to making the insurance contract." *Id.* In fact, it is "contrary to public policy for an insurance

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risk such as fire, accident, theft, forgery, earthquake, flood, or illness." BLACK'S LAW DICTIONARY 1174 (8th ed. 2004). Wind and hail, too, are perils. *Six Flags Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 956 (5th Cir. 2009).

company knowingly to assume a loss occurring prior to its contract." *Id.* Consistent with the fortuity doctrine, a property condition such as wear and tear is "not an insurable risk, but a certainty." *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 47 (2d Cir. 2003). Nor is wear and tear a "peril" as contemplated by an all-risks policy. *See Mellon v. Fed. Ins. Co.*, 14 F.2d 997, 1002 (S.D.N.Y. 1926). All of this is why "even in an all-risk policy, there must be a fortuitous event – a casualty – to give rise to any liability for insurance." *City of Burlington,* 332 F.3d at 47 (citing *Mellon,* 14 F.2d at 1004.

It follows, then, that the concurrent cause doctrine was never intended to address situations involving the mere "*presence* of any preexisting damage." (*See* 5th Cir. Order at 5-6) (emphasis in original). In this case, according to the district court's opinion, the insurer's retained engineer performed a 2017 underwriting inspection of the Property. An underwriting inspection is an industry standard practice that permits the insurer to assess the property's insurability. During the underwriting inspection, the engineer identified what it deemed "two areas of significant roof leaks." (*See* Memorandum Opinion and Order of District Court ("Dist. Ct. Op.") at 2). That report "recommended that the

roof … be replaced within two years." *Id.* But despite those findings, the report also noted that the roof "appeared to be in fair overall condition." (*See id.* at 2). Fully aware of what its own retained engineer identified as preexisting damage, the insurer nonetheless insured the property, warts and all, dutifully accepting premium payments in exchange for providing an all-risks policy.

B. Wear and tear, even though excluded as a *cause of loss* under the policy, affects the actual cash value of benefits owed.

If the Court were to answer the Fifth Circuit's certified question 1 "yes," any condition such as wear and tear or other damage predating the policy period would automatically trigger the concurrent cause doctrine. The practical effect here, as flagged by the Fifth Circuit, is that the concurrent cause doctrine would automatically apply in every case where the insured roof at issue was not brand new. (*See* 5th Cir. Order at 5) ("…it would be a rare roof that lacks wear and tear…").

This would be highly problematic because even though wear and tear is excluded as a *cause of loss,* it is always relevant to the determination of the amount of benefits owed under the policy. As the Appellee correctly acknowledges:

- "[A]n insured may be entitled to the full cost of a roof replacement following a hail event causing damage, even if there is incidental wear and tear or non-covered damage." (Appellee's Brief at 29); and

- "[I]n the concurrent causation context, courts should look to whether the claimed *damage* (as opposed to the value) was caused by non-covered wear and tear." (*Id.* at 36) (emphasis in original).

Wear and tear, as a component of depreciation, is relevant to the calculation of the actual cash value (ACV) of a covered property, such as a building's roof. *See, e.g., Ghoman v. N.H. Ins. Co.*, 159 F. Supp. 2d 928, 934 (N.D. Tex. 2001) (*citing Religious of the Sacred Heart of Texas v. City of Houston,* 836 S.W.2d 606, 615-16 (Tex. 1992)) ("actual cash value" under a policy defined to mean or replacement costs less depreciation"). A replacement cost value (RCV) policy typically provides that the insured is not entitled to recover withheld depreciation until after it makes the necessary repairs. *See Ghoman,* 159 F. Supp. 2d at 932. In other words, under an RCV policy, the insurer is only obligated to pay ACV until the insured repairs the property damage, at which time the insurer releases the withheld depreciation. But even for an insured who did not purchase RCV coverage, the concept of wear and tear is subsumed within the concept of depreciation for ACV purposes. *See* BLACK'S LAW DICTIONARY

506 (9th ed. 2009) ("depreciation" defined as the "decline in an asset's value because of use, **wear,** obsolescence, or age") (emphasis added); *Tolar v. Allstate Tex. Lloyd's Co.*, 772 F. Supp. 2d 825, 829 (N.D. Tex. 2011) (depreciation defined as "the decrease of the property's value due to age, **wear and tear (condition)** or obsolescence, except where otherwise noted") (emphasis added); *see also* Texas Department of Insurance, Commercial Property Insurance Guide, *available at* https://www.tdi.texas.gov/pubs/consumer/cb021.html (last accessed November 17, 2021) ("[a]ctual cash value coverage pays replacement cost minus depreciation. Depreciation is a decrease in value because of **wear and tear** or age") (emphasis added).

The concept of wear and tear in the context of valuation of policy benefits, therefore, will always be relevant to the amount of loss. The mere presence of wear and tear or, to use the Appellee's phrasing, the "incidental" condition alone, without some showing that this was a cause of damage, cannot be enough to trigger the concurrent cause doctrine. (*See* Appellee's Brief at 29, 36).

C. This Court's precedent does not apply the concurrent cause doctrine to mere wear and tear or preexisting damage, let alone at the summary judgment stage.

Additionally, this Court's precedent resolves the Court's first certified question: the mere "presence" of preexisting damage, including wear and tear, has never sufficed to trigger the concurrent cause doctrine.

1. Until 1991, insureds bore the burden in Texas to *negate* the application of any non-covered cause of loss, including a policy exclusion.

In its certification order, the Fifth Circuit cited this Court's decision in *Lyons*, 866 S.W.2d at 601 as this Court's "primary authority" for the concurrent cause doctrine. (5th Cir. Order at 5). In *Lyons,* this Court observed that when "covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* (citing *Paulson*, 393 S.W.2d at 319). The facts of the case this Court cited, *Paulson,* mirrored the "typical concurrent cause case" described by the Fifth Circuit in its order: one involving "two simultaneous perils – say, water and wind from a hurricane." (*See* 5th Cir. Order at 6, n.3); *see also Huynh v. State*, No. 03-17-00645-CR, 2018 Tex. App. LEXIS 6931, at *26 (Tex.

App.—Austin Aug. 29, 2018, pet. denied) (a "concurrent cause is '[o]ne of two or more causes that simultaneously create a condition that no single cause could have brought about,'" *citing Concurrent Cause*, BLACK'S LAW DICTIONARY 173 (7th abridged ed. 2000); *Concurrent,* BLACK'S LAW DICTIONARY 234 (7th abridged ed. 2000) (defining "concurrent" as "[o]perating at the same time"). Indeed, in *Paulson,* the Court held that the plaintiff failed to introduce sufficient evidence permitting the jury to allocate between covered wind damage and excluded flood damage caused to its property by Hurricane Carla. *See Paulson,* 393 S.W.2d at 319.

Lyons remains good law today. But the legislative context in which the Court decided *Paulson* and, later, *Lyons*, illuminates why intermediate state courts, federal district courts, and the Fifth Circuit have unreasonably extended and broadened the doctrine.

In 1991, the Texas legislature enacted what is now section 554 of the Texas Insurance Code. *See* Act of May 27, 1991, 72nd Leg., R.S., ch. 242, § 11.03, 1991 TEX. GEN. LAWS 939, 1046 (repealed and recodified

2003) (current version at TEX. INS. CODE ANN. § 554.002)[10]. Section 554.002 provides, in whole:

> In a suit to recover under an insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer or health maintenance organization constitutes an avoidance or an affirmative defense.

This statute effected a sea change in Texas insurance litigation. Before the enactment of 554.002, the insured bore the burden to *negate* the application of an exclusion, exception to coverage, or policy limitation. *See Telepak v. United Servs. Auto. Ass'n,* 887 S.W.2d 506, 507 (Tex. App.—San Antonio 1994, writ denied) ("Prior to September 1, 1991, an insurer claiming that the loss was excluded by the policy only needed to plead the applicability of the exclusion. Plaintiffs then had the burden to negate that exclusion"). Section 554.002 changed that burden.

2. In *Lyons*, this Court found that the plaintiff had presented enough evidence to permit the jury to allocate between covered and non-covered losses.

It was under the pre-1991 legislative framework that this Court

[10] For consistency and clarity, Amici will refer to the statute under its current stylization, section 554.

decided *Lyons*. In *Lyons,* the "essence of [the] controversy" was whether the damage to the insured's house was caused by "windstorm, a covered peril" or by "settling of the foundation, an excluded peril." *Lyons*, 866 S.W.2d at 598. At trial, the jury found in the insured's favor. *See id.* The court of appeals reversed and remanded as to breach of contract and, finding no evidence to support the verdict on the insured's bad faith and DTPA claims, reversed and rendered as to those causes of action.[11] *See id.* This Court affirmed the judgment of the court of appeals. *See id.* at 602. Where *Lyons* is relevant here is in (1) the Court's recitation of the substantive burdens of proof in an insurance lawsuit that were applicable at the time of the decision, and (2) what constitutes sufficient evidence to allocate between "covered and excluded risks."

In that vein, the timeline of the *Lyons* case is important. The court of appeals released its opinion on September 13, 1990, before the enactment of current section 554.002. *See Millers Cas. Ins. Co. v. Lyons*, 798 S.W.2d 339 (Tex. App.—Eastland 1990), *aff'd,* 866 S.W.2d 597 (Tex. 1993). The court held, in reversing and remanding as to breach of

[11] The court of appeals' bad faith analysis and holding is immaterial to the case at bar or, for that matter, any discussion of the concurrent cause doctrine. *See id.* at 598.

contract, that the "[t]he trial court erred, over [the insurer's] objection, in not placing the **burden of proof on plaintiff to prove that her damages were not caused by the exclusion** provisions" of the policy. *Id.* at 345 (emphasis added).

On cross-appeal, the insurer argued that the intermediate court should have rendered a take-nothing judgment as it did on the insured's extra-contractual claims instead of remanding for a proper jury instruction. *See Lyons*, 866 S.W.2d at 601. Although this Court did not decide the case until 1993, it applied the pre-1991 version of the Insurance Code because the lawsuit was filed before those amendments went into effect. *See id.* at 599 (suit filed in "February 1986"). Even with that heightened burden in place, this Court disagreed, finding that "the evidence offered by Lyons…supports the jury's finding that Lyons's damage was caused in part by the wind, and therefore her claim was covered by Millers' policy." *Id.* at 600-01. The Court said:

> In other words, Millers was mistaken as to its contract liability. The jury was entitled to resolve the conflict between Lyons' evidence that the windstorm caused the damage and Millers' evidence that the settling of the foundation caused the damage. If the jury concluded that the former is more credible, and some evidence supports that finding, our inquiry as to contractual liability is concluded.

Id. at 601. Thus, even when the law still required the plaintiff to *disprove* the applicability of an exclusion, this Court still found that where there is conflicting evidence as to causation, the jury must evaluate its credibility. *See id.*

3. After the 1991 amendments to the Insurance Code placing the burden on insurers to prove policy exclusions, this Court's concurrent cause doctrine evolved to account for the legislature's change.

Decisions issued by this Court since section 554.002 went into effect in 1993 reflect an evolution of the concurrent cause doctrine: namely, to account for the statutory requirement that an insurer bear the burden to prove a policy exclusion or limitation.

a. *Utica National v. American Indemnity:* a carrier's affirmative defense of a policy exclusion alone is insufficient to trigger the concurrent cause doctrine.

In 2004, under the new legislative burden scheme, the Court decided another concurrent cause case, this one in the third-party insurance context. *See Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004). In *Utica,* an employee at a surgical center contaminated syringes with Hepatitis C that later infected patients of the center, which was run by a doctors' association. *See id.* at 200. The infected patients sued the doctors' association, which invoked both its professional liability

and general liability policies to defend the suit and, if necessary, provide indemnity. *See id.*

One of the carriers, Utica, invoked the "professional services exclusion" to avoid both the defense and indemnity obligations under the policy. *See id.* at 204. The Court recognized that because that policy "treats the professional services exclusion as an exception to coverage," the carrier "bears the burden of proof to establish that the exclusion applies." *Id.* The Court explained that "without a finding that the doctors did or did not breach a professional standard of care, we cannot determine whether this case involves concurrent causes." *Id.* Continuing, the Court reasoned:

> A **determination by the finder of fact** that the infection was caused by the breach of a professional standard of care - for example, a finding that the infection was caused by the doctors' negligent administration of the anesthetic - would negate Utica's duty to indemnify. If the **factfinder determines** that the center breached both professional and non-professional standards of care by failing to properly supervise Thomas and by exposing the plaintiffs to contaminated fentanyl, then the covered and excluded events would have concurrently caused the harm the plaintiffs suffered, and the exclusion would apply. If, however, the professional services were rendered with due care, then the exclusion would not apply.

Id. at 204-05 (emphasis added).

Although the case at bar is a first-party property damage case,

Utica's reasoning is still instructive to this Court's determination of certified question no. 1. Notably, the Court emphasized that a "determination by the finder of fact" that the exclusion applied was necessary before the Court could even invoke the concurrent cause doctrine. *See id.* at 204. Under *Utica,* merely pleading the exclusion, or offering summary judgment evidence in support of the exclusion (as the carrier did in *Frymire*), is not, and cannot, be enough. (*See* Dist. Ct Op. at 6-7).

b. *JAW The Pointe v. Lexington*: even when an anti-concurrent cause clause applies, the Court requires evidence that a non-covered event "caused" a loss.

This Court's next concurrent cause opinion after *Utica* was issued in 2015. *See JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597 (Tex. 2015). Unlike *Utica,* which involved a summary judgment proceeding and a liability policy, *JAW The Pointe* was a first-party property damage case involving an appeal from a jury trial. *See JAW The Pointe*, 460 S.W.3d at 602. The central issue was whether the insured could recover the costs of complying with city ordinances triggered by damage to its apartment complex from Hurricane Ike. *Id.* at 599. The policy covered such costs, but "only if the policy cover[ed] the property

damage that triggered the enforcement of the ordinances." *Id.* It did not cover such costs, however, if the property damage that triggered the enforcement was "loss or damage caused directly or indirectly" by an excluded cause of loss, in this case, flooding. *Id.*

In *JAW The Pointe,* the facts "conclusively established" at trial were that the property damage "sustained included both wind damage and flood damage, and that the city based its decision to enforce the ordinances on the combined total of the two." *Id.* at 607. This Court found there was no coverage for the costs to comply with the ordinances because even though the evidence established that wind damage had triggered the costs, flood damage had also triggered those costs. *See id.* The policy's anti-concurrent cause clause excluded coverage for any "loss or damage caused *directly or indirectly* by any" excluded cause or event, "regardless of any other cause or event that contribute[d] concurrently or in any sequence to the loss." *Id.* (emphasis in original).[12] That clause, read in conjunction with the facts established at a jury trial, compelled this Court's conclusion that there was no coverage for the compliance costs.

[12] In this case, none of the parties (either at trial or in their primary briefing before this Court), the district court, or the Fifth Circuit have briefed the applicability of an anti-concurrent cause clause in the policy at issue. Amici therefore do not brief it either.

Id. Even when an anti-concurrent cause provision is present, the Court's holding in *JAW The Pointe* makes clear that causation – and not the mere "presence" of some condition – is insufficient to trigger the doctrine.

The reasoning in *JAW* illustrates why the mere presence of wear and tear or other mere property conditions, without more, cannot trigger the concurrent cause doctrine. If it did, then, the "directly or indirectly" language in the clause would mean there is no coverage for any roof that had weathered even a single rainstorm or sustained even a single hail hit prior to the storm at issue. This would render all insurance policies with such clauses illusory, a result this Court has always sought to avoid. *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997) (avoiding any construction of an insurance policy that would "render insurance coverage illusory for many of the things for which insureds commonly purchase insurance").

c. *Allen v. State Farm Lloyds*: court of appeals rejects argument that *JAW* requires insured to disprove exclusion.

One Texas court of appeals case decided shortly after *JAW The Pointe* provides proper guidance. *See Allen v. State Farm Lloyds,* No. 05-16-00108-CV, 2017 Tex. App. LEXIS 7211, at *33 (Tex. App.—Dallas Aug. 1, 2017, pet. denied). In *Allen*, State Farm argued that because the

insured "did not rebut alternative theories of causation or address the contributing-causation clause," there was no evidence to support the breach of contract claim, and thus the directed verdict was warranted. *See id.* at *32-33.

State Farm cited this Court's opinion in *JAW The Pointe* for the proposition that the plaintiff was "required to 'show that the loss was *not* caused in part by this non-covered peril.'" *Id.* at *33 (emphasis in original), citing *JAW The Pointe,* 460 S.W.3d at 610. The Dallas Court of Appeals rejected the argument, observing that in *JAW The Pointe* this Court found that the carrier had "sustained its burden" to show that the anti-concurrent cause clause excluded coverage. *See Allen,* 2017 Tex. App. LEXIS 7211, at *33, citing *JAW The Pointe,* 460 S.W.3d at 610. The court held, properly applying *JAW The Pointe*, that "it was not the [plaintiffs'] burden to 'rule out rainwater, surface runoff, and groundwater as contributing causes of their claimed property loss.'" *Id.* at *34. This was a proper application of the statutory burden scheme laid out in section 554.002 of the Insurance Code.

To summarize the analysis above, this Court has only decided three concurrent cause insurance cases since 1993:

Lyons v. Millers Casualty Insurance Co. of Texas
866 S.W.2d 597 (Tex. 1993)

When "covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage." *Id.* at 601.

"The **jury was entitled to resolve the conflict** between Lyons' evidence that the windstorm caused the damage and Millers' evidence that the settling of the foundation caused the damage." *Id.* (emphasis added).

After a **jury trial**, the Court reversed and remanded for the trial court to submit a jury instruction that placed the **burden on the insured to negate the insurer's exclusion**. *See id.* (emphasis added).

***Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004)**

A "**determination by the finder of fact**" that a policy exclusion applied was necessary to trigger the concurrent cause doctrine. The mere assertion of the affirmative defense of the policy exclusion was insufficient. *Id.* at 204-05 (emphasis added).

Court reversed and remanded for a **factual determination** on applicability of the exclusion. *Id.*

***JAW The Pointe, L.L.C. v. Lexington Ins. Co.*,**
460 S.W.3d 597 (Tex. 2015)

Evidence at a **jury trial "conclusively established"** the property "sustained included both [covered] wind damage and [excluded] flood damage," and thus code compliance coverage was barred due to anti-concurrent cause clause. *Id.* at 607 (emphasis added).

In sum, nothing in this Court's history would indicate that the mere presence of wear and tear, existing prior damage, or any other "condition"

would trigger the concurrent cause doctrine. The consistent themes here in all three cases are the requirement of (1) a full factual record (in *Lyons* and *JAW The Pointe,* a full trial, and in *Utica,* the reversal and remand of an improperly granted summary judgment) to render its decision; and (2) a showing of causation, and not merely a "condition", in order to trigger the doctrine.

D. Summary judgment will rarely be the proper vehicle for deciding cases where the plaintiff presents some evidence of a covered cause of loss.

In the case at bar, the district court granted summary judgment even though, as the Fifth Circuit acknowledged, the plaintiff "*did* produce some evidence … suggesting that the roof damage was solely caused by the covered hailstorm." (5th Cir. Order at 7).[13] Although it is not within this Court's purview to decide matters of federal procedure, the summary judgment posture of this case provides important context.

[13] Amici express no opinion on the admissibility of the plaintiff's proffered summary judgment evidence, which the insurer sought to strike via motions to exclude expert testimony. (*See* Dist. Ct. Op. at 9). If, of course, a plaintiff fails to proffer any competent summary judgment evidence in opposition, a court should grant the motion. (*See* 5th Cir. Order at 5-6, *citing Lowen Valley*, 892 F.3d at 171). This is true even if, as in *Lowen Valley,* the court did not even specifically decide whether the concurrent cause doctrine applied or not. (*See* 5th Cir. Order at 7 (*citing Lowen Valley,* 832 F.3d at 171-72) ("the case was (**at best**) a concurrent cause case") (emphasis added)).

As briefed extensively above, this Court has never (or not since *Lyons*, at least) affirmed a grant of a summary judgment in a concurrent cause case, as the district court did here. To reiterate, in *Utica,* the Court held that without a finding of fact that a policy exclusion did or did not apply, "we cannot determine whether this case involves concurrent causes." *Id.* at 204.

There has been no finding of fact to trigger the concurrent cause doctrine here. *See id.* But if the doctrine were to apply, one federal district court has recently laid out the analytical framework for the summary judgment context:

> At the summary judgment stage, [the concurrent cause] doctrine plays out as follows. First, [a]n insurer moves for summary judgment, arguing that an insured cannot produce evidence to satisfy the insured's ultimate burden to allocate its covered loss from its non-covered loss. Then, the insured . . . must produce evidence that the insured's alleged loss is covered. To satisfy this burden of production, the insured may present either: (1) **evidence that all the claimed loss resulted from a covered event** or (2) evidence that provides a jury a reasonable basis to segregate covered from non-covered loss.

Labourdette v. State Farm Lloyds, No. 4:19-CV-2551, 2021 U.S. Dist. LEXIS 97155, at *12-13 (S.D. Tex. 2021) (emphasis added).[14] In

[14] *See also, e.g., Generation Trade, Inc. v. Ohio Sec. Ins. Co.*, No. 3:18-CV-434, 2019 WL 3716427, at *18 (N.D. Tex. Aug. 6, 2019) (insured may meet its burden of

Labourdette, State Farm argued that "all of the claimed loss is attributable to wear and tear." *Id.* at *13. The insured submitted an expert affidavit that satisfied the "former option," *i.e.*, that attributed all of the claimed loss to a covered hail event. *See id.* The court denied the insurer's motion for summary judgment, finding that that evidence satisfied the plaintiff's burden of production. *See id.* Critically, the court held that "the jury will not be required to 'guess what percentage of the damage was caused by the hailstorm; instead, the jury [will be faced with a] credibility question as between Labourdette and State Farm's witnesses.'" *Id.*

The district court here should have reached the same result as in *Labourdette*. As in *Labourdette*, the insured in this case proffered evidence that "all of the claimed loss was attributable to a covered hail event" – here, a June 2018 hailstorm. *See id.; see* Dist. Ct. Op. at 2-3. Instead, the court substituted itself as the arbiter of the "credibility question" between the plaintiff's proffered evidence and the insurer's. *See Labourdette*, 2021 U.S. Dist. LEXIS 97155, at *12-13; Dist. Ct. Op. at 6.

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production at summary judgment by introducing "(1) evidence that *all* the claimed loss resulted from a covered event or (2) evidence that provides a jury a reasonable basis to segregate covered from non-covered loss.")

E. Courts have continued to improperly cite *Wallis v. United Services* under the concurrent cause doctrine, and this Court should limit or clarify that case's applicability.

One concurrent cause case that courts have consistently continued to cite is *Wallis,* 2 S.W.3d at 303*,* wherein the San Antonio Court of Appeals observed in dicta– ***after a full jury trial on the merits*** – that "the doctrine of concurrent causation is not an affirmative defense or an avoidance issue." *Wallis,* which like this Court's decisions in *Lyons* and *JAW The Pointe* had the benefit of a full trial record, also recited the axiomatic principle that "insureds are entitled to recover only that which is covered under their policy." *Id.*

That last proposition, of course, remains good law. But unfortunately, courts continue to spin the dicta from *Wallis* – that the doctrine "is not an affirmative defense or an avoidance issue" – in a manner that is completely inconsistent with the purpose of the doctrine. *See id.* For example, one federal court has spun that passage in *Wallis* to mean, "[t]he allocation burden remains with the insured party, even if the allocation is being made between covered perils and *excluded* perils, the type of which the insurer normally has the burden of proving." *Nat'l Union Fire Ins. of Pittsburgh v. Puget Plastics Corp.*, 735 F. Supp. 2d 650,

669 n.23 (S.D. Tex. 2010) (emphasis in original) (*citing Wallis,* 2 S.W.3d 300). This reasoning, with citations to *Wallis,* has pervaded both state and federal opinions. *See also, e.g.*, *State Farm Lloyds v. Kaip*, No. 05-99-01363-CV, 2001 Tex. App. LEXIS 3997, at *11 n.5 (Tex. App.—Dallas June 15, 2001, pet. denied) (agreeing that the burden shift to the insurer in 554.002 does not apply in a concurrent causation case because the doctrine is "not an affirmative defense or an avoidance issue"); *Day Comm'l Mgmt. v. Royal Ins. Co. of Am.*, No. 3:00-CV-0689-P, 2002 U.S. Dist. LEXIS 514, at *27 (N.D. Tex. 2002) (same).

To Amici's knowledge, this Court has never endorsed the proposition stated by the cases citing *Wallis*: that section 554.002 of the Texas Insurance Code does not apply to a concurrent cause case.[15] The Court should take this opportunity to disavow that proposition. The reasoning employed by *Wallis* and its progeny is unsound. Assume, for example, that an insurer denies a claim outright, determining that policy

[15] Appellee cites the Court's silence on *Wallis* in its *Utica* decision to suggest tacit approval of *Wallis*. *See* Appellee's Brief at 32 ("**But this Court did not overrule *Wallis* or reverse the insured's burden to provide evidence allowing a factfinder to apportion covered and non-covered damage")** (citing *Utica,* 141 S.W.3d at 204) (emphasis in Appellee's brief). As Amici brief extensively above, though, the Court said in *Utica*, "we cannot determine whether this case involves concurrent causes." *Id.* at 204. The Court thus had no occasion to even address *Wallis*.

exclusions bar any coverage at all. That is, either the insured is 100% correct (that its loss was covered), or the insurer is 100% correct (that the loss was excluded). In such an instance, there is no "concurrent cause" scenario where covered and uncovered causes combine to cause a loss; in the mind of the insurer, this is a "no covered cause" scenario.[16] In that scenario, the insurer would unquestionably bear the burden to prove its exclusion at trial, under section 554.002, whereas the insured would continue to bear the burden to show a covered cause of loss.

Why, then, should an insurer benefit from acknowledging *some* covered cause of loss combined with an exclusion, and completely sidestep the burden mechanism set up by the Texas legislature under section 554.002 of the Insurance Code? In such a scenario, if *Wallis* and its progeny are given credence, then section 554.002 is rendered a nullity because it effectively places the burden back on the insured to *negate* an insurer's exclusion. The Court should avoid that interpretation of section 554.002. *See KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 184 (Tex. 2019) ("[W]e consider the statute as a whole, giving effect

[16] *See* Fifth Circuit Order at 7, n. 4 ("Simply stated, it is possible that we have put some cases in that bucket that are more appropriately characterized as sole cause (or no cause) cases, or possible that we have otherwise misconstrued the concurrent cause attribution requirement in some way.")

to each provision so that none is rendered meaningless or mere surplusage.")

Even the Fourth Court of Appeals – the same court that decided *Wallis* – has limited or distinguished the decision's applicability multiple times. In *State Farm Fire & Cas. Co. v. Rodriguez*, for example, the court distinguished *Wallis* because "the jury heard *no* testimony regarding how much damage was caused by the [covered] plumbing leaks," while in *Rodriguez,* the plaintiff "testified that 100% of the damage was caused by the [covered] plumbing leaks." 88 S.W.3d 313, 321 (Tex. App.—San Antonio 2002, pet. denied). There was thus "some reasonable basis upon which the jury's finding [of damage attributable to the plumbing leaks] rest[ed]." *Id.* Then in *Southland Lloyds Ins. Co. v. Cantu*, the court again distinguished *Wallis*:

> Unlike in *Wallis*, the jury here was not required to guess what percentage of the damage was caused by the hailstorm; instead, the jury was faced with a credibility question: the Cantus claimed all the damage itemized in Barton's report was due to hail, while Southland claimed some of the damage was caused by ordinary wear and tear. The jury apparently believed the Cantus and their expert, and we defer to that determination.

399 S.W.3d 558, 574-75 (Tex. App.—San Antonio 2011, pet. denied).

It is bedrock Fifth Circuit law that when a defendant moves for

summary judgment on an affirmative defense, for which it bears the burden of proof at trial, it "must establish beyond peradventure *all* of the essential elements of the defense to warrant judgment in his favor." *Addicks Servs. v. GGP-Bridgeland, LP*, 596 F.3d 286, 293 (5th Cir. 2010). And yet, based on one line of dicta in *Wallis,* courts continue to absolve insurers of this requirement at the summary judgment stage:

> Recognizing that concurrent causation is not an affirmative defense is important in the summary-judgment analysis because it means that a defendant does *not* have to establish beyond peradventure *all* of the essential elements of the . . . defense to warrant [summary] judgment in [the movant's] favor.

Generation Trade, Civil Action No. 3:18-CV-0434-K, 2019 U.S. Dist. LEXIS 132019, at *16 (N.D. Tex. 2019) (emphasis in original). But why? This reasoning has no basis in the Insurance Code or this Court's precedent.

F. If the Court reaches the second question, it should answer "no."

The Court should answer "no" to the first certified question, thereby ceasing its analysis there. But if the Court reaches the second question, "whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did

not cause the particular loss," **it should answer "no" to that question**. A plaintiff should not at the summary judgment stage, be required to "parcel out covered and not-covered damages." *Nasti v. State Farm Lloyds*, No. 4:13-CV-1413, 2015 U.S. Dist. LEXIS 3009, at *10 (S.D. Tex. 2015). "Requiring such evidence of proportionate causation in terms of precise percentages for the purposes of summary judgment, **extending state appeals court rulings based on jury verdicts**, would be premature and introduce needless complication." *Id.* (emphasis added).[17]

This analysis hits the nail on the head. At summary judgment, plaintiff need only introduce enough evidence to provide a "reasonable basis for the jury to apportion damage." *Id.*, (citing *Paulson,* 393 S.W.2d at 319). As analyzed in great detail throughout this brief, this Court has never required a plaintiff to disprove other excluded or non-covered causes of loss at the summary judgment stage. The answer to the second question, should the Court reach it, is "no."

G. If the Court reaches the third question, it should answer "yes."

Finally, should the Court reach the third question, "If so, whether

[17] Earlier in the opinion, the *Nasti* court had analyzed *Wallis,* one of the "state appeals court rulings based on jury verdicts." *See Nasti*, 2015 U.S. Dist. LEXIS 3009, at *8-9.

plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril)," it should answer "Yes." Appellee concedes this, but only if the evidence is "competent":

> Accordingly, while it is possible for an insured to meet its burden to allocate between covered and non-covered causes of loss by allocating 100% of the damage to the covered cause of loss, it must do so with competent evidence, backed up by more than conclusory allegations, unsubstantiated assertions, improbable

(Appellee's Brief at 50). Without expressing any opinion on the competence of the plaintiff's evidence in this case, Amici fully agree with the highlighted text above. "Yes" is the only logical answer to question 3. *See, e.g., Rodriguez*, 88 S.W.3d at 321-22 ("[W]ith regard to the segregation of damages attributable to a covered cause, so long as the jury's finding is within the range of testimony presented, the jury's finding will be upheld. . . . In this case, the testimony regarding the percent of damage attributable to the plumbing leaks ranged from 0% to 100%."); *see also Fiess v. State Farm Lloyds*, 392 F.3d 802, 808 (5th Cir. 2004) ("While the Fiesses have not presented overwhelming evidence that would allow a jury to flawlessly segregate covered mold

contamination from non-covered mold contamination, the evidence they have presented constitutes a reasonable basis upon which a jury could reasonably allocate damages. . . . This is all that the doctrine of concurrent causation requires.").

CONCLUSION/PRAYER

The court has never applied the concurrent cause doctrine to mere conditions present at a property before a covered loss causes damage to that property. It should not do so here, either. Amici respectfully request that the Court answer "no" to the Fifth Circuit's certified question no. 1. This is the only result that is consistent with Texas law, and which will provide clarity going forward.

If the Court answers "yes" to question 1, then it should answer "no" to question 2. A plaintiff alleging its loss was "entirely caused by a single, covered peril" does not have the burden of attributing losses between that covered peril, and any other non-covered or excluded loss, especially at the summary judgment stage.

But if the Court answers "yes" to question 2, it should answer "yes" to question 3. A plaintiff putting forth competent evidence that one hundred percent of the loss was due to a covered peril will give the

factfinder sufficient evidence from which to allocate covered from non-covered damages.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because this document is generated in Microsoft Word. The brief contains 8,971 words, not including the parts of the brief excluded by Rule 9.4(i).

/s/ Ben Wickert
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CERTIFICATE OF SERVICE

I certify that on November 17, 2021, a true and correct copy of this Amicus Brief was served on the persons listed below by electronic filing:

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***Shepard's*®:** Wallis v. United Servs. Auto. Ass'n 2 S.W.3d 300,1999 Tex. App. LEXIS 812,99:08 Tex. Civil Op. Serv. 85: (Tex. App. San Antonio February 10, 1999)

No negative **subsequent appellate history**

Citing Decisions (18)

Narrow by: Focus: "avoidance issue"; Headnotes: HN4

Analysis: Followed by (3), "Cited by" (16)

Headnotes:HN4 (18), HN2 (15), HN5 (4)

Texas Court of Appeals

1. Prime Time Family Entm't Ctr., Inc. v. Axis Ins. Co., 630 S.W.3d 226, 2020 Tex. App. LEXIS 8216, 2020 WL 6108263

Cited by:
Under the doctrine of concurrent causes, where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causes is not an affirmative defense or an **avoidance issue**; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. The burden is on the insured ...

Discussion: | **Court:** Tex. App. Eastland | **Date:** October 16, 2020 | **Headnotes:**: HN2, HN4

2. Seim v. Allstate Tex. Lloyds, 2018 Tex. App. LEXIS 9190, 2018 WL 5832106

Cited by:
When covered and noncovered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril and must present some evidence to allow the jury to allocate the damage attributable to the covered peril. The doctrine of concurrent causes is not an affirmative defense or an **avoidance issue**; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove ...

Court: Tex. App. Fort Worth | **Date:** November 8, 2018 | **Headnotes:**: HN2, HN4

3. Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist., 561 S.W.3d 263, 2018 Tex. App. LEXIS 8083, 2018 WL 4781526

[redacted]

APPENDIX A

LB **Cited by:** 561 S.W.3d 263 p.273
An insured is not entitled to recover under an insurance policy unless it proves its damages are covered by the policy. Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. This doctrine is not an affirmative defense or an **avoidance issue**; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance ...
Court: Tex. App. Houston 14th District Court | **Date:** October 4, 2018 | **Headnotes:**: HN4

4. Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist., 2018 Tex. App. LEXIS 3856, 2018 WL 2436924

LB **Cited by:**
Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, an insured is entitled to recover that portion of the damage caused solely by the covered peril. This doctrine is not an affirmative defense or an **avoidance issue**; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove the damage is covered by the policy. An insured must present some evidence upon which a jury ...
Court: Tex. App. Houston 14th District Court | **Date:** May 31, 2018 | **Headnotes:**: HN4

5. Dallas Nat'l Ins. Co. v. Calitex Corp., 458 S.W.3d 210, 2015 Tex. App. LEXIS 2002

G **Followed by:** 458 S.W.3d 210 p.227

LB **Cited by:** 458 S.W.3d 210 p.222
Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**. Rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. Because an insured can recover ...
Discussion: | **Court:** Tex. App. Dallas | **Date:** March 3, 2015 | **Headnotes:**: HN4, HN5

6. Fire Ins. Exch. v. Kennedy, 2013 Tex. App. LEXIS 955, 2013 WL 441088

LB **Cited by:**
... Commercial General Liability Insurance, Concurrent Causes Doctrine HN4 Under the doctrine of concurrent causation, where covered and noncovered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless ...
Discussion: | **Court:** Tex. App. Fort Worth | **Date:** January 31, 2013 | **Headnotes:**: HN2, HN4

7. Markel Am. Ins. Co. v. Lennar Corp., 342 S.W.3d 704, 2011 Tex. App. LEXIS 2902

LB **Cited by:** 342 S.W.3d 704 p.709
... Causes Doctrine HN4 The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**. Instead, it is a rule embodying the basic principle that the insured is entitled to recover

[redacted]

APPENDIX A

only that which is covered under its policy, that is, that for which it paid premiums. Under well-settled Texas law, the insured bears the burden of segregating its covered losses from its uncovered losses. the doctrine of concurrent causation is not an affirmative defense or an **avoidance issue** ...

Discussion: | **Court:** Tex. App. Houston 14th District Court | **Date:** April 19, 2011 | **Headnotes:**: HN2, HN4, HN5

8. All Saints Catholic Church v. United Nat'l Ins. Co., 257 S.W.3d 800, 2008 Tex. App. LEXIS 4406

Cited by: 257 S.W.3d 800 p.802
Under the doctrine of concurrent causation, where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. The burden is on the ...

Discussion: | **Court:** Tex. App. Dallas | **Date:** June 17, 2008 | **Headnotes:**: HN2, HN4

9. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749, 2007 WL 4371359

Cited by:
... **avoidance issue**; rather, it is a rule embodying the basic principle that the insureds are not entitled to recover under their insurance policies unless they prove the damage is covered by the policy. Thus, it follows that insureds can recover damages only for a loss that is covered under the policy. Because allocation is central to the claim for coverage, an insured's failure to carry the burden of proof on allocation is fatal to the claim. Although a plaintiff is not required to establish the amount ...

Discussion: | **Court:** Tex. App. Fort Worth | **Date:** December 13, 2007 | **Headnotes:**: HN2, HN4

10. Kelly v. Travelers Lloyds of Tex. Ins. Co., 2007 Tex. App. LEXIS 1320, 2007 WL 527911

Cited by:
... **avoidance issue**; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove the damage is covered by the policy. The insured must present some evidence upon which the jury can allocate the damages attributable to the covered peril. Because the insured can recover only for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries ...

Discussion: | **Court:** Tex. App. Houston 14th District Court | **Date:** February 22, 2007 | **Headnotes:**: HN2, HN4

11. USAA v. Mainwaring, 2005 Tex. App. LEXIS 2161, 2005 WL 667683

Followed by:
Under the doctrine of concurrent causes, when covered and non-covered events combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. Thus, an insured may recover ...

Discussion: | **Court:** Tex. App. Dallas | **Date:** March 23, 2005 | **Headnotes:**: HN2, HN4,

[redacted]

APPENDIX A

HN5

12. Comsys Info. Tech. Servs. v. Twin City Fire Ins. Co., 130 S.W.3d 181, 2003 Tex. App. LEXIS 10312

Cited by: 130 S.W.3d 181 p.198
Under the doctrine of concurrent causes, when covered and non-covered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; instead, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy. The insured must present some ...

Discussion: | **Court:** Tex. App. Houston 14th District Court | **Date:** December 4, 2003 | **Headnotes:**: HN2, HN4

13. Allison v. Fire Ins. Exch., 98 S.W.3d 227, 2002 Tex. App. LEXIS 8957

Cited by: 98 S.W.3d 227 p.258
Under the doctrine of concurrent causation, when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather, it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that their damage is covered by the policy. Thus, an insured ...

Discussion: | **Court:** Tex. App. Austin | **Date:** December 19, 2002 | **Headnotes:**: HN2, HN4

14. State Farm Lloyds v. Kaip, 2001 Tex. App. LEXIS 3997

Cited by:
... court held, and we agree, that Exclusions, Contractual Liabilities Causation, Concurrent Causation HN6 Tex. Ins. Code Ann. art. 21.58 (b) (Vernon Supp. 2001) does not apply in a concurrent causation case because the doctrine is not an affirmative defense or an **avoidance issue**. article 21.58(b) does not apply in a concurrent causation case because the doctrine is "not an affirmative defense or an **avoidance issue**." Wallis , 2 S.W.3d at 303 . Kaip did not attempt to segregate the damage caused ...

Discussion: | **Court:** Tex. App. Dallas | **Date:** June 15, 2001 | **Headnotes:**: HN2, HN4

5th Circuit - U.S. District Courts

15. Generation Trade, Inc. v. Ohio Sec. Ins. Co., 2019 U.S. Dist. LEXIS 132019, 2019 WL 3716427

Cited by:
... **avoidance issue**. Because an insured can only recover for covered events, the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the insured carries the burden of proof. Recognizing that concurrent causation is not an affirmative defense is important in the summary-judgment analysis because it means that a defendant does not have to establish beyond peradventure all of the essential elements of the defense to warrant summary judgment in the movant's ...

Discussion: | **Court:** Northern Dist. Tex. | **Date:** August 6, 2019 | **Headnotes:**: HN2, HN4

16. Salinas v. State Farm Fire & Cas. Co., 2011 U.S. Dist. LEXIS 171228

[redacted]

APPENDIX A

LB **Cited by:**
... (Tex.App.-Houston [14th Dist.] 2003, pet. denied) ; Wallis v. United Servs. Auto Ass'n , 2 S.W.3d 300 , 303 (Tex.App.-San Antonio 1999, pet denied) . "The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy." Markel American Ins. Co. , 342 S.W.3d at 709 (citing All Saints Catholic ...
Court: Southern Dist. Tex. | **Date:** December 27, 2011 | **Headnotes:**: HN2, HN4

17. Fiess v. State Farm Lloyds, 2003 U.S. Dist. LEXIS 10962

G **Followed by:**
recognizes the doctrine of concurrent causes. This doctrine provides that when covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The doctrine of concurrent causation is not an affirmative defense or an **avoidance issue**; rather it is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove that their damage is covered ...
Discussion: | **Court:** Southern Dist. Tex. | **Date:** June 3, 2003 | **Headnotes:**: HN2, HN4

18. Day Commer. Mgmt. v. Royal Ins. Co. of Am., 2002 U.S. Dist. LEXIS 514

LB **Cited by:**
... Causation, Concurrent Causation HN9 Under the doctrine of concurrent causation, where covered and non-covered causes of action combine to create a loss, an insured is entitled to recover for only that portion of the damage caused solely by the covered perils. And since it is not viewed as an affirmative defense or an **avoidance issue**, the burden of segregating the damages attributable solely to a covered event constitutes an issue of coverage, for which the ultimately the insured carries the burden ...
Discussion: | **Court:** Northern Dist. Tex. | **Date:** January 15, 2002 | **Headnotes:**: HN2, HN4, HN5

Legend

	Warning - Negative Treatment is Indicated	R	Red - Warning Level Phrase
Q	Questioned - Validity questioned by citing references	O	Orange - Questioned Level Phrase
	Caution - Possible negative treatment	Y	Yellow - Caution Level Phrase
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I	Cited - Citation information available	LB	Light Blue - No Analysis Phrase
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APPENDIX A

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