STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF DAKOTA **FIRST JUDICIAL DISTRICT**

File No: 43-CV-19-326

Judge Joseph T. Carter

William Miller, Shelly Miller,

Plaintiffs,

v.

RAM Mutual Insurance Company,

Defendant.

ORDER GRANTING LEAVE TO PLAINTIFFS TO AMEND THEIR COMPLAINT AND MEMORANDUM

The above-entitled proceeding came on for hearing before Joseph T. Carter, Judge of District Court, on May 3, 2019, at the McLeod County Courthouse, in Glencoe, Minnesota. Alexander M. Jadin, Esq., represented Plaintiffs, who appeared in person. Kafi C. Linville, Esq., represented Defendant RAM Mutual Insurance Company. Plaintiffs moved for an Order giving them leave to amend the Complaint.

Based upon the files, records, and proceedings, including the arguments of counsel, the Court makes the following:

ORDER

1. Plaintiffs' Motion to amend the Complaint under Minn. Stat. § 604.18 is granted.
2. Any motion not specifically addressed herein is denied.

July 23, 2019

BY THE COURT

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Joseph T. Carter
Judge of District Court

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MEMORANDUM

Plaintiffs own a home in Hutchinson, McLeod County, Minnesota. Defendant RAM Mutual Insurance Company ("RAM") insured Plaintiffs' ("the Millers") home under a Direct Home Multi-Peril Policy ("the policy"). On May 28, 2018, the Millers' home was damaged by a tornado that caused a large tree to slam onto the roof of the Millers' home. The Millers claim that the property was structurally damaged and was ultimately condemned by the city building inspector. The Millers are dissatisfied with their insurance company, RAM, which resulted in their suing RAM. The Complaint seeks a declaratory judgment that the Millers' home suffered a total loss and that RAM breached its contract with the Millers. Presently, the Millers are seeking leave to amend their complaint to assert a claim recovery of taxable costs under Minn. Stat. § 604.18. In other words, the Millers want to claim that RAM acted in bad faith throughout this matter.

On or about May 29, 2018, a storm moved through Hutchinson, which brought strong winds. These winds caused a tree to fall onto the roof of the property, which damaged it. The Millers reported this loss to RAM, who accepted the report of loss and hired Brinkman Claims, LLC, ("Brinkman") to investigate and adjust the loss. Brinkman hired RCL Engineering Group ("RCL") to investigate the property and to determine the scope of the damage and necessary repairs. The Millers hired Bear Lake Builders ("Bear Lake") as the contractor responsible for performing the actual repairs to the property.

On June 4, 2018, RCL engineer Alan Kyro and Market Manager Dwayne Sawyer met with Bear Lake to inspect the property. On June 14, 2018, RCL completed its initial

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report, titled “Tree Impact Investigation.” The report summarized the damage as contained to the west end of the property, which would require repairing or replacing the framing components in the kitchen and possibly attic areas. According to the report, there is no evidence that the basement or foundation was damaged by the tree. The report also noted that the west and south facing walls of the kitchen and some of the attic walls would need to be exposed to allow for a thorough inspection. The report included the following disclaimer:

1. This report was based upon an investigation that included visual, manual and limited destructive evaluation as well as information provided by others. If new information is presented at a later date, RCL Engineering Group reserves the right to review that information and amend the opinions presented in this report as deemed appropriate.
2. This investigation did not involve a formal structural load analysis. Structural plans were not made available for review. Load capacities were not calculated.
3. The recommended work listed above is general in nature. It is not intended to represent detailed specifications suitable for bidding or construction. Drawings for the required work will be provided once all structural framing members have been exposed and a full and accurate scope of work can be determined.

On June 18, Brinkman emailed Bear Lake to discuss a repair estimate and scope of damages based upon the initial report. Bear Lake replied, basically, that it was not comfortable giving an estimate because of variables present to make repairs. Bear Lake wanted to bill the project as time and material plus 20%.

In August of 2018, after plaster had been removed from the south and west walls of the kitchen, RCL and Bear Lake conducted two more inspections. The first was conducted on August 2, 2018, and focused on the structural and framing members. The result of this inspection was a set of five engineering schematics, labeled A1-A5 that show a proposed scope of repair work. The second was conducted on August 8, 2018, and focused on the cracks throughout the home, which the Millers claimed had

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increased over time since the wind storm. The result of that inspection was a second report by RCL (the "Crack Investigation Report"). According to the report, all of the second floor cracks outside of the kitchen and attic impact area and those located on the first floor ceiling were unrelated to the tree impact; however, the majority of the cracks located on the first floor walls did appear related to the tree impact. This second report included a disclaimer similar to the first report:

1. This report was based upon an investigation that included visual, manual and limited destructive evaluation as well as information provided by others. If new information is presented at a later date, RCL Engineering Group reserves the right to review that information and amend the opinions presented in this report as deemed appropriate.

2. This investigation did not involve a formal structural analysis. Structural plans were not made available for review. Load capacities were not calculated.

4. Formal wind calculations have not been performed. Design uplift pressures for the field, perimeters and corners have not been calculated.

6. The Recommended work listed above is general in nature. It is not intended to represent detailed specifications suitable for bidding or construction.

On August 9, 2018, the engineering schematics were sent to Bear Lake. On August 20, 2018, Bear Lake emailed Brinkman inquiring on the status of the Crack Investigation Report and stated that they could not make a submission to the city of Hutchinson (the "city") without it. Later that day, Brinkman sent the Crack Investigation Report to Bear Lake, which forwarded it, and the engineering schematics, to the city. In the same email, Brinkman informed Bear Lake that they had completed an estimate, presumably based upon the inspections and reports completed as of that date. Crack repair costs were specifically not included in the estimate; Brinkman stated that they would "be leaving that open for the time being until things are framed up."

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On August 22, 2018, Kyle Dimler, City of Hutchinson building inspector, sent Bear Lake a list of 13 items that required revision, clarification, or additional information. In part, Dimler sought the following:

- An explanation of why the engineering analysis was not completed until 75 days after the damage had occurred.
- An explanation as to why the engineer's inspection goal had not been to determine the extent of the damage to the dwelling caused by the tree.
- An explanation as to what he saw as inconsistencies in crack causation analysis made in the report.
- An explanation of how a full analysis had been completed when plaster was not removed outside of the kitchen and attic locations to observe the framing members and relatedly, how RCL had made some conclusions on scope of damages without this structural analysis.
- Added specificity on several of the engineering schematic specifications.

On August 23, RCL responded to Dimler, first by stating that temporary repairs should be completed as soon as possible and then by answering his queries in a follow-up email the following day. In response to the notion of temporary repairs, Dimler stated "I would strongly encourage you to define clearly what the temporary repairs you've alluded to are to consist of so that they may be permitted and implemented properly as soon as possible."

On August 25, 2018, Plaintiff Shelly Miller wrote to Dimler directly to voice her concerns that the property was experiencing on-going movement since the tree struck it, and to express her doubt regarding the accuracy of the scope of damage and proposed repairs contained in RCL's engineering reports.

On August 28, 2018, Dimler responded with a list of six new inquiries and concerns. He was concerned about the engineering specs listing a ridge board or ridge beam when none existed. He also doubted some of RCL's conclusions about cracking and structural movement "without any further exploratory or destructive investigation to

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confirm causation," especially in light of the ridge board or beam oversight or error. He ended his letter by stating that the house was in danger of being cited as a Hazardous Building.

On August 29, RCL responded to Dimler with answers to three of his six questions. RAM asserts that the remaining concerns were answered substantively in subsequent emails, although these do not appear to have been entered into the record.

In early September 2018, the Millers hired their own engineering firm, Guy Engineering ("Guy"), to inspect the property to determine the scope of damage and repairs. On September 1, 2018, GUY inspected the property. On September 17, after discovering that the Millers had hired their own engineers, Jeremy Schafer, Brinkman's claim adjuster, emailed the Millers the following:

> It has come to my attention . . . that you have hired an engineer to obtain a second opinion. This is ok with us, however, we just want to inform you that any additional living expenses would not be paid as a result of your engineer's delays. Typically restoration times are completed 5-6 months after the date of loss.

GUY engineering completed their report on October 10, 2018 (the "GUY Report"). According to the GUY Report, the damage is more extensive than that found in the RCL reports and the plaster on the walls and ceilings throughout the house needs to be removed to allow the framing members to be inspected.

The Millers retained Smith Jadin Johnson, PLLC, in early November of 2018. On November 12, 2018, the Millers' counsel sent a letter to RAM to notify them that they were disputing the scope of loss and furnished the GUY Report. On November 20, 2018, RAM's underwriter Missy Romano emailed the Millers' insurance agent Matt Evers the following: "Hi Matt. The Millers have not made repairs following the May 29,

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2018 tree damage claim. Because of the potential for future losses, I've been advised to cancel their policy. I'd like to send the attached letter out to them today. Please review. Thank you." In response, Evers replied: "The claim is still in progress, you are out of line. I would not do that if I were you. Please talk to Al in claims prior to proceeding. He can catch you up on their claim." Romano responded by stating that RAM would hold off cancelling with the understanding that repairs would begin soon.

On November 21, 2018, RAM sent the Millers' counsel a revised proof of loss, which included an additional $16,457.49 and was based on Brinkman's November 19, 2018 repair costs estimate. In the letter, RAM stated that the Millers must complete the repairs to their home within 180 days of the loss in order to recoup their recoverable depreciation, or by November 29, 2018.[1] On December 6, Romano wrote Evers to follow-up on the status of the repairs. Evers replied that the Millers were awaiting a final estimate and had not begun the repair work.

On December 14, Romano advised the Millers that RAM would cancel their insurance policy if the repairs were not completed by January 17, 2019. RAM cited Minn. Stat. § 65A.01, Subd. 3a, (d) as the reason for the cancellation; the statute states that "physical changes in the insured property which are not corrected or restored within

[1] In the November 21, 2018 correspondence, RAM states that in order for Plaintiffs to recover their depreciation "[Plaintiff's] policy requires that repairs/replacement be completed before these benefits may be claimed." This statement is echoed in RAM's brief. Neither document points to a specific provision of the policy. It appears that RAM refers to Paragraphs 5 and 6 of the REPLACEMENT COST ENDORSEMENT section of the policy. If this is the case, it is far from clear that this is what the policy states. The sections state: "5. When the replacement cost is more than the 'actual cash value' of the damaged property, 'we' are not liable for more than the 'actual cash value' of the loss until actual repair or replacement is completed. 6. 'You' may make a claim for the 'actual cash value' of the loss before repairs are made or replacement is completed. A claim for any additional amount payable under this provision must be made within 180 days after the loss."

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a reasonable time after they occur and which result in the property becoming uninsurable" is a valid reason to cancel a policy.

On January 8, 2019, a final inspection of the property took place; RCL, GUY, Bear Lake, Kyle Dimler, the Millers' attorney, and RAM representatives were present for the inspection. On January 11, Dimler notified the Millers of his decision to classify the property as a Hazardous Building. In describing his reasoning he wrote:

> In addition to the very obvious damage that can be seen from the street, I've observed numerous cracks in the plaster on the ceilings and walls throughout this house worsen each of the three times I've performed a site visit to this property. I've also noted increasing separation between the floor assembly in the center of the house from the adjacent walls. It is in consideration of this continued observable movement of this structure and the fact that in nearly 8 months the structure has not been repaired, that in accordance with Hutchinson City Code Section 150.051(d) I find this dwelling to be a Hazardous Building and shall not be occupied until such time that all necessary repairs have been completed.

Later that day, the Millers' counsel wrote RAM concerning the Dimler "no occupancy" order and demanded the policy limits, or $237,000,[2] citing Dimler's conclusion that the structure of the property exhibited continued movement. On January 21, the Millers' attorney wrote RAM to notify them that he believed RAM's tactics in refusing to pay out more additional living expense benefits and threatening to cancel the Millers' policy violated Minnesota's Fair Claims Practices Act. *See* Minn. Stat. § 72A.201 *et seq.* On January 28, 2019, the Millers commenced this lawsuit against RAM. On February 5, 2019, RAM notified the Millers that effective March 10, 2019, their policy would be cancelled for "physical changes in the insured property which are not corrected or restored within a reasonable time after they occur and which result in the property

[2] The Millers have received total payments of $85,969.90, of which $5,510.06 was for Additional Living Expense, or ALE.

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becoming uninsurable." The Millers have appealed the cancellation of their insurance to the Commissioner of Insurance.

The Millers are entitled to amend their complaint under Minn. Stat. § 604.18

Minn. Stat. § 604.18 allows for an award of taxable costs against an insurer when the insurer fails to handle a claim in good faith. Specifically, an insured must show:

1. the absence of a reasonable basis for denying the benefits of the insurance policy; and
2. that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy. Minn. Stat. § 604.18 Subd. 2(a)

The first prong is an objective standard, measuring the insurer's conduct against what a reasonable insurer would have done. *See Peterson v. W. Nat'l Mut. Ins. Co.*, No. A18-1081, 2019 WL 2332400, at *4; *Friedberg v. Chubb and Son, Inc.*, 800 F.Supp.2d 1020, 1025 (D.Minn. 2011). Specifically, "an insurer must conduct a reasonable investigation and fairly evaluate the results to have a reasonable basis for denying an insured's first-party insurance-benefits claim." *Peterson*, No. A18-1081, 2019 WL 2332400, at *5. "If, after a reasonable investigation and fair evaluation, a claim is fairly debatable, an insurer does not act in bad-faith by denying the claim." *Id.* The second prong is subjective and turns on what the insurer knew and when. *Friedberg*, 800 F.Supp.2d at 1025.

An insured cannot seek recovery under Minn. Stat. § 604.18 in its initial complaint; rather, the insured must motion the court to amend its pleadings to add such a claim. *See* Minn. Stat. § 604.18 subd. 4. "[I]f the court finds prima facie evidence in support of the motion, the court may grant the moving party permission to amend the pleadings to claim taxable costs under this section." *Id.*

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There is prima facie evidence that RAM did not conduct a reasonable investigation.

The Millers maintain that RAM denied them benefits in three ways: by denying payment of the full policy limit, by declining to continue paying additional living expense benefits ("ALE"), and by denying recoverable depreciation benefits. To satisfy their burden under the first prong, the Millers must establish a prima facie case that RAM did not have a reasonable basis to deny the benefits. To reiterate, an insurer has a reasonable basis to deny benefits upon conducting a reasonable investigation and upon fairly evaluating the results of that investigation. Accordingly, the Millers must make a prima facie showing that RAM's investigation was unreasonable or that they unfairly evaluated the results of their investigation. The standard is what a reasonable insurer would have done.

The Millers have shown that RAM failed to reasonably investigate their claim. A jury could conclude that RAM should not have relied on the RCL reports and the related set of schematics A1-A6 in determining the scope of damages or repairs. The reports constitute the majority of RAM's investigation of the Millers' claim. Both RCL reports include significant disclaimers. For example, both state that the recommended work was general in nature and was "not intended to represent detailed specifications suitable for bidding or construction;" both state that they did not conduct a formal structural analysis; and the crack investigation report states that a formal wind analysis was not conducted.

Moreover, Bear Lake was unwilling to provide an estimate based upon RCL's first report. Hutchinson's building inspector, Kyle Dimler, was clearly dissatisfied with the level of thoroughness, attention to detail, and professionalism of the reports and

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schematics. Notably, he wondered how RAM was able to make structural and movement related conclusions about the property when only the kitchen-area framing members had been exposed for an inspection. No evidence exists that RAM ever inspected the framing members outside of the kitchen and attic area or that RAM ever performed a formal structural analysis of the property. This is especially notable given that the movement related conclusions of the RCL reports are at odds with Dimler's conclusion in his *no occupancy order* that there was ongoing movement of the property. RAM claims that they were able to dissuade Dimler of each of his concerns, but a permit allowing construction on the property was never issued. A jury could conclude that no reasonable insurer would have relied on this level of inspection and these schematics to establish a scope of damages and repairs or to create an estimate. Accordingly, the Millers have made a prima facie showing that RAM lacked a reasonable basis to deny their claim under the policy. *See* Minn. Stat. § 604.18 Subd. 2(a)(1); *Peterson*, No. A18-1081, 2019 WL 2332400, at *5.

RAM relies on *Friedberg* to argue that their basis for denying the claim was *fairly debatable*, and therefore reasonable. *See Friedberg v. Chubb and Son, Inc*, 800 F.Supp.2d 1020,1025 (D.Minn. 2011). Specifically, they point to the court's finding in *Friedberg* that the insurer did not seek to shield itself from the facts or otherwise refuse to learn the true nature of the insured's case. But in this case, some of the evidence shows that RAM shielded itself from the facts by failing to engage in a more thorough investigation of the property. And, unlike *Friedberg*, this is not a case in which the insurer took a clearly reasonable position that happened to be wrong. Here, a jury

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could conclude that RAM's investigation was inadequate, and that therefore their positions were unreasonable.

RAM also relies on *Homestead Hills v. American Family Mut. Ins. Co.*, and several other cases, for the proposition that a mere disagreement between experts regarding the cause and extent of the damage is insufficient to establish bad faith. *Homestead Hills v. American Family Mut. Ins. Co.*, 2012 WL 5896829 (Minn. Ct. App. November 26, 2012) (Unpublished). But the competing-expert-opinion cases are not applicable to this case; here, the Millers have made enough of a showing that RAM's engineers' investigations and conclusions were unreliable.

Finally, RAM maintains that the Millers have failed to identify any evidence that a reasonable insurer would have acted differently from RAM under the circumstances, *citing Borchardt v. State Farm Fire and Cas. Co.*, 2017 WL 8315883. In *Borchardt*, the Court, in denying plaintiff's request to amend the complaint pursuant to Minn. Stat. § 604.18, was critical of the lack of evidence plaintiff provided that the insurer had acted outside of the industry standard. The Court stated that "plaintiffs ask the Court to measure the reasonableness of State Farm's claims investigation against the plaintiffs' attorneys' assertions that the investigation was insufficient. Attorney rhetoric, however persuasive, is not prima facie evidence." But here, there is ample evidence that RAM acted outside of reasonable insurer standards. There were also third-party critiques of RAM's behavior throughout the claims process, including: Bear Lake's hesitance to create an estimate based upon RCL's initial report; Dimler's critiques of RAM's reports; and Matt Evers telling RAM's employee Romano that she was "out of line" when she stated that she had been told to cancel Plaintiff's policy. These third parties work with

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insurance companies regularly, and therefore their statements regarding RAM's behavior are probative of what a reasonable insurer would have done.

> *There is prima facie evidence that RAM knew it lacked a reasonable basis to deny the policy benefits to the Millers or recklessly disregarded the lack of a reasonable basis.*

To satisfy their burden on the second prong of the test, the Millers must show "that the insurer knew of the lack of a reasonable basis for denying the benefits of the insurance policy or acted in reckless disregard of the lack of a reasonable basis for denying the benefits of the insurance policy." Minn. Stat. § 604.18 Subd. 2(a)(2). This prong is subjective and turns on what the insurer knew and when. *Friedberg*, 800 F.Supp.2d at 1025.

In this case, RAM has not really challenged that it was aware of the evidence regarding its lack of an investigation, but maintains that because its denial of benefits was reasonable, it did not violate the second prong. But RAM received the RCL reports and was also aware of Dimler's critique of the reports. Accordingly, RAM was aware of or should have been aware of all of the potential issues with their investigation.

Specifically to ALE benefits, RAM's stated reason for denying these benefits was that damaged properties are typically restored within five to six months and that the Millers caused a delay by hiring their own engineer. The letter does not refer to any specific provisions of the Millers' policy, and it is unclear either from the record or from RAM's brief which provisions of the policy apply, if any. The Millers claim that five to six months was an unreasonable time to restore the property. Although RAM maintains that the property was ready to be repaired by September 2018, it continued to update its estimates and revise

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its proof of loss in late November 2018. Additionally, the property has presumably never been ready to be granted a permit to begin construction work.

As to recoverable depreciation benefits, on November 21, 2018, RAM informed the Millers that it would not pay these benefits after November 29, 2018. It concluded that all repairs or replacements must be completed within 180 days of the loss for the benefits to be recovered. RAM's letter does not reference any specific provision of the Millers' policy; accordingly, it is unclear whether RAM was acting in accordance with the provisions of the policy. Furthermore, the November 21, 2018 letter correlated with RAM's final revised proof of loss and repair estimates, which were completed within days of the letter.

Because the Millers have established a prima facie case that RAM lacked a reasonable basis to deny them benefits and that RAM either knew or acted in reckless disregard of denying the benefits, the Millers have satisfied their burden and may amend their complaint under Minn. Stat. § 604.18.

J.T.C.