IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0052

Gary & Carolyn Kaul,

Plaintiffs and Appellants,

v.

State Farm Mutual Automobile Insurance Company,

Defendant and Appellee.

On Appeal from the Fourth Judicial District Court, Missoula County
DV-18-830
The Honorable Shane A. Vannatta

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE REPLY

Efficient Proximate Cause

State Farm asks this Court to adopt a distinction between excluded losses and non-covered losses. This novel theory would modify the doctrine. State Farm cites no court that has adopted or even *considered* this distinction. Further, such a distinction is inconsistent with the doctrine and this Court's precedent. The doctrine should not be expanded or limited. It is already limited by its own terms. It should be left intact.

Similarly, State Farm presents no authority holding that a "sudden damage" clause renders the doctrine inapplicable.

"Sudden Damage"

State Farm now questions Hurst's expertise for the first time. State Farm also changes Hurst's words so they carry less force. Neither tactic overcomes the simple truth that the RV lost substantial value in 34 minutes.

Kauls' Duty to Mitigate Damages

State Farm's first defense, that the wall repair did not arise from a covered loss, runs contrary to the District Court's finding that the roof tear caused the wall damage. For its second defense State Farm simply denies Hurst's opinions, without support or citation.

Neither defense holds water.

ARGUMENT

This Court should look with skepticism upon State Farm's widespread lack of authority supporting its assertions.

I. The wall damage is covered under the efficient proximate cause doctrine.

A. Clarification

State Farm obscures the manner in which the efficient proximate cause doctrine operates. It is thus necessary to clarify the doctrine's fundamental structure. The inquiry involves two simple steps:

(1) Is the *initial* loss covered under the policy language?

(2) If so, is the *subsequent or concurrent* loss causally linked to the initial loss by an unbroken chain of events?

See Couch on Ins. 3d § 101:55 (2005); *see McDonald v. State Farm*, 837 P.2d 1000, 1004 (Wash. 1992) (describing a two step process but reversing the order). This approach is embodied in Montana precedent.

The current dispute concerns the proper way to analyze causation, the second step. It is necessary, however, to specify the parameters of each step. The first step of this inquiry depends solely on policy language. Critically, the second step depends solely on causation principles, and policy language plays no role. In other words, the policy language is superceded by causation analysis in step two,

and *only* in that step. For example, a clear and explicit explosion exclusion is entirely superceded after it is established that a covered fire caused the explosion.[1]

The reason for conducting the inquiry this way is clear. If the policy language (exclusions, limitations) is incorporated into the second step of this inquiry, then this step becomes duplicative of the first. This, however, is the District Court's holding. If that approach is correct, then the doctrine is meaningless – one would simply ask whether the policy language covers each event. Looking to the merits of the wall damage on its own here would only be the correct inquiry if wall damage occurred on its own, not as the result of a covered loss.

To reiterate, if this Court agrees with State Farm's unprecedented theory that the doctrine requires applying policy limitation or exclusion language in step one, and then *again* in step two – causation, the Kauls lose this argument and the Court need go no further.

Here, the initial event (roof tear), subject solely to analysis under the Policy, is a covered loss. State Farm paid for its repair and admits it was covered. Ans. Br. at 6. Moving to step two, the undisputed facts, subject solely to causation analysis, establish the wall damage is causally linked to the roof tear through an unbroken

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[1] *Frontline Processing Corp. V. Am. Econ Ins.*, 2006 MT 344, ¶ 30, 335 Mont. 192, 149 P.3d 906 (citing *Green v. Milwaukee Mechanics' Ins. Co*, 77 Mont. 505, 252 P.310, 311 (1926)).

chain of events. Order at 10-11 ("the water damage to the RV wall would not have happened but for the tear in the roof"). The analysis ends after step two, resulting in coverage for the second event, the wall damage.

B. The doctrine mandates coverage even where an exclusion is not at issue.

State Farm argues the efficient proximate cause doctrine only applies to supercede subsequent excluded events, not subsequent non-covered events. A distinction between non-covered and excluded events matters in some circumstances. It is irrelevant here for two reasons. First, this distinction concerns policy language, which plays no role in causation analysis. Second, both types of loss fall outside the scope of coverage.

Specifically, State Farm claims that because the RV wall damage was non-covered,[2] rather than excluded, the doctrine does not apply. The source of State Farm's distinction between excluded and non-covered losses, as applied to the doctrine, is a mystery; it cites no case, no statute, no legal encyclopedia, or law review article. Further, this unsupported view conflicts with Couch on Insurance, courts across the United States, and this Court.

"Stated alternately, coverage will exist where a covered and *noncovered* peril join to cause the loss provided that the covered peril is the efficient and

[2] For this Section I argument only, Kauls will refer to the wall damage as "non-covered."

dominant cause." Couch on Ins. 3d § 148:61 (emphasis added).

Many courts explain the doctrine applies to mandate coverage "even if" the later loss is excluded. *See Findlay v. United P. Ins. Co.*, 895 P.2d 32, 33 (Wash. App. Div. 1 1995), aff'd, 917 P.2d 116 (Wash. 1996) (emphasis added). Other courts describe it as applying even if the later loss is non-covered. Some interchange the two terms in the same opinion. *E.g., Hiller v. Allstate*, 11-CV-0291- TOR, 2012 WL 2325603, at *5 (E.D. Wash. June 19, 2012); *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1243–44 (Nev. 2011), as modified on reh'g (May 23, 2012) ("where covered and noncovered perils contribute" . . . . "this doctrine prevents the absurd result that would occur if coverage was denied 'even though an insured peril 'proximately' caused the loss simply because a subsequent, excepted peril was also part of the chain of causation'" (citation omitted)).

Persuasive common law addresses this issue. "An even more basic formulation of the rule is that a covered event which directly causes a non-covered loss will result in the loss being covered." *Hiller*, at *5. The Kauls quoted this sentence, and similar wording from *Murray v. State Farm*, in their Opening Brief. 509 S.E.2d 1, 11 (W.Va 1998). State Farm declined to rebut it.[3]

[3] Dozens of courts around the country note the doctrine applies to overcome non-covered losses. *See*, *e.g.*, *Shelter Mut. Ins. Co. v. Maples*, 309 F.3d 1068, 1071 (8th Cir. 2002) ("where covered and non-covered perils join"); *McDonald*, 837 P.2d at 1004 (the "rule operates when an 'insured risk' or

More importantly, this Court's longstanding precedent on the efficient proximate cause doctrine directly contradicts State Farm's position. In *Park Saddle*, a guide negligently misguided a tourist party into the mountains and, while on foot, "negligently fail[ed] to help [a] tourist down the steep slope," leading to the tourist injuring her leg. *Park Saddle Horse Co. v. Royal Indem. Co.*, 81 Mont. 99, 261 P. 880, 881-883 (1927). This Court described the accident as "having been caused by the negligence of the plaintiff." *Id.* 81 Mont., 261 P. at 882.

Negligence was not excluded by the policy, rather it was simply non-covered. *Id.* 81 Mont., 261 P. at 882-884. The policy covered "liability . . . arising by reason of the maintenance and/or use of saddle and pack horses." *Id.* 81 Mont., 261 P. at 883. "Counsel for defendant insist[ed] that the proximate cause [of the loss] was the negligence of the guide in losing his way and conducting the party to a place of danger." *Id.* 81 Mont., 261 P. at 884.

State Farm even recognizes no exclusions were at issue. Ans. Br. at 14-15. This Court nevertheless used the efficient proximate cause doctrine to determine

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covered peril sets into motion a chain of causation which leads to an uncovered loss"); *State Farm Fire and Cas. Co. v. Bongen*, 925 P.2d 1042, 1044 (Alaska 1996) ("the loss is covered even if an uncovered loss is involved"); *Fabozzi v. Lexington Ins. Co.*, 639 Fed. Appx. 758, 762 (2d Cir. 2016) (unpublished) ("where a covered and [non-covered] peril combine")(brackets in original); *see also* Couch on Insurance 3d § 153:14 – "If a windstorm, as a covered peril, is the dominant, efficient, or proximate cause of the loss, the insured may recover even though another peril, **whether expressly excluded or not**, contributed to or concurrently caused the damage" (emphasis added).

the cause that set events into motion was the covered use of saddle and pack horses. *Park Saddle*, 81 Mont., 261 P. at 884. Therefore, even though a link in the causation chain was non-covered negligence, the doctrine mandated coverage. State Farm's completely unsupported argument that the doctrine only applies to cases involving exclusions fails with one look at *Park Saddle*.[4]

State Farm endorses the doctrine's application to supercede exclusions, yet argues against applying the doctrine to non-covered losses. State Farm separates the two by claiming once the doctrine is applied to cover a non-covered loss, it would provide coverage for a loss "clearly beyond the scope of the purchased protections in the Policy." Ans. Br. at 17. State Farm also argues applying the doctrine will "modify" the Kauls' Policy. *Id* at 21.

First, the argument's premise is flawed. The Policy incorporates Montana law, which includes the doctrine. Dkt. # 22 at ex. A - 31. Thus, when the Kauls paid for coverage for direct, sudden and accidental damage, they paid for coverage for any loss proximately resulting from direct, sudden and accidental damage.

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[4] State Farm claims, without citation, that *Oltz* characterized *Park Saddle* as "narrow in its holding and application" of the doctrine. Ans. Br. at 14. The *Oltz* court did no such thing. In fact, the court quoted the US Supreme Court's reference that the doctrine applies "in the insurance field." *Oltz v. Safeco Ins. Co. of Am.*, 306 F. Supp. 3d 1243, 1251 (D. Mont. 2018).

State Farm also mistakenly asserts the *Oltz* court found that because of the clear policy language, the cause of the loss did not matter. Ans. Br. at 15. Again, State Farm does not cite the opinion. *Id.* In actuality, the court began to apply the doctrine by finding an excluded loss, and asking if a covered loss caused that excluded loss. *Oltz*, 306 F. Supp. 3d at 1251. The court went on to find the "initial event," the efficient proximate cause, was itself excluded. *Id.* 306 F. Supp. 3d at 1252.

Further, State Farm misses that applying the doctrine to supercede exclusions produces an identical result to superceding non-covered losses. A natural function of the doctrine is that losses outside the scope of coverage are covered by virtue of being caused by a covered loss.

State Farm characterizes the doctrine's application here as "limitless." Ans. Br. at 3. On the contrary, step one of the doctrine is strictly limited by the Policy. Step two is limited by the rules of proximate causation.

State Farm repeatedly advances a near identical argument to the dissent in *Xia*. *Xia v. ProBuilders Specialty Ins. Co.* 400 P.3d 1234, 1246 (Wash. 2017), as modified (Aug. 16, 2017) (Madsen, J. dissenting). In *Xia*, the insureds claimed coverage for carbon monoxide release from a water heater vent despite a clear pollution exclusion. *Id.* 400 P.3d at 1236. The majority held that because the efficient proximate cause of the excluded loss was covered negligence, the excluded loss was covered. *Id.* 400 P.3d at 1244. The dissent unsuccessfully argued:

> [The insureds] bargained for these terms. They agreed to the coverage. And this coverage was all that they paid premiums for. . . . This court should not interfere and hold an insurer responsible for more than the coverage that the insured has paid for. We should enforce the unambiguous, broad, absolute pollution exclusion as it was bargained for and written by the parties.

Id. 400 P.3d at 1246 (Madsen, J. dissenting). Despite this argument, the majority

found coverage, writing in conclusion: "Pollution exclusion clauses are an important tool for insurers to avoid liability . . . where the insured has paid no premiums for such coverage . . . ." "However . . . [t]he efficient proximate cause rule continues to serve the underlying purpose of insurance policies and applies just as effectively to these facts as it has in prior cases." *Id.* 400 P.3d at 1244. Here, too, the insureds did not specifically pay for coverage of non-sudden wall damage, but they did pay for direct, sudden, and accidental damage, and any damage proximately caused by that covered damage.

Taking a "zoomed-out" view: No case holds the doctrine applies only to supercede exclusions and not non-covered losses. *Green* establishes the doctrine in Montana, and makes clear it operates to supercede exclusions. The next year *Park Saddle* establishes that the doctrine applies equally when no exclusion is at issue. In *Oltz*,[5] apparently overlooking *Green*, the Federal District Court makes this point even clearer by stating that if only *Park Saddle* was a case where the doctrine overcame an exclusion, the Oltzs would have a stronger argument. *Oltz*, 306 F. Supp. 3d at 1252.

C. State Farm provides no authority supporting the District Court's holding.

State Farm defends the District Court's conclusion that the doctrine does not

[5] State Farm mistakenly refers to the *Oltz* decision as "*Tafford.*" The rule requires surnames, not first names. *ALWD Guide to Legal Citation*, Rule 12.2(d)(1) (5th ed. 2014).

apply here because the Policy requires "sudden" damage. State Farm argues "the application of the efficient proximate cause doctrine in *Green* only addresses whether damage is 'direct,' it did not contain the requirement that the loss be 'sudden' as the Policy at issue here requires." Ans. Br. at 12. The District Court found applying the doctrine "would remove the requirement of sudden and accidental from consideration." Order at 11.

This approach is incorrect because once policy language is fulfilled in step one application of the doctrine, it plays no role in the second question of whether the covered loss proximately caused another loss. The doctrine never extends coverage to subsequent events without first taking into account, and applying, the policy's requirements.

State Farm cites no on-point authority in support of this argument, and ignores the persuasive ruling in *Kelly v. Farmers*: "the efficient proximate cause doctrine is not restricted in its application to cases involving specific policy language . . . ." 281 F. Supp. 2d 1290, 1298 (W.D. Okla. 2003). State Farm dismisses *Kelly* as distinguishable because the *Kelly* policy did not require the loss to be "sudden," like the Kauls' Policy. Ans. Br. at 18. This powerful irony should not be lost on the Court: State Farm claims *Kelly's* findings on the doctrine are irrelevant here because the Policy at issue and the *Kelly* policy differ – this when *Kelly* is the very case holding the doctrine applies universally, regardless of

particular policy language.

State Farm next attempts to distinguish *Burgess v. Allstate* on the grounds that there, summary judgment was improper. Ans. Br. at 19; 334 F. Supp. 2d 1351, 1364 (N.D. Ga. 2003). This completely misses the point. The *Burgess* court found the doctrine would apply to mandate coverage if a covered loss caused the damage at issue. *Burgess*, 334 F. Supp. 2d at 1360-1364. This, even though the initial grant of coverage required "sudden" loss. *Id.* The fact that summary judgment was denied so a jury could determine exactly what proximately caused the second loss does not mean the doctrine is inapplicable. The true distinguishing factor between *Burgess* and the instant case is that here the proximate cause of the wall damage is undisputed – it was the covered roof tear.

State Farm also ignores and fails to distinguish *Johnson*, *Babai*, and *Murray.*[6] These cases, wherein the doctrine was applied to "sudden" policies, stand unchallenged by State Farm.

State Farm goes on to cite *Tuepker* and *Kane*, arguing the doctrine "must yield" to the principle that courts will not rewrite contracts. Ans. Br. at 9; *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 356 (5th Cir. 2007); *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 685 (Colo. 1989). State Farm discloses that *Tuepker*

[6] *Johnson v. Allstate Ins. Co.*, 845 F. Supp. 2d 1170 (W.D. Wash. 2012); *Babai v. Allstate Ins. Co.*, C12-1518 JCC, 2013 WL 6564353 (W.D. Wash. Dec. 13, 2013); *Murray*, 509 S.E.2d 1.

only concerns the efficient proximate cause doctrine as modified by an anti-concurrent cause ("ACC") clause, but does not do the same with *Kane*. In fact, both turn exclusively on ACC clause language, and are thus inapposite. Both cases have virtually nothing to do with the question here: whether specific language ("sudden") in the grant of coverage changes the applicability of the doctrine. There is no ACC clause at issue here. Moreover, The *Oltz* court appropriately held Montana law mandates any anti-concurrent cause clause must give way to the efficient proximate cause doctrine. 306 F. Supp. 3d at 1257.

This Court should hold as did the Washington Supreme Court in *McDonald*: "State Farm requests this court to discard the efficient proximate cause rule. We decline to do so and reaffirm our commitment to the rule and our decisions applying it." 837 P.2d at 1004.

State Farm returns, over and over again, to its refrain that applying the doctrine here would rewrite the Policy. State Farm misses that the coverage criteria are not being ignored; they were fulfilled via the step one coverage analysis. State Farm simply advocates that every loss must be covered on its own merit. This is nothing more than a lament that the efficient proximate cause doctrine exists.

D. *Blankenship's* treatment of similar facts contradicts State Farm's proposed approach.

State Farm asserts when a policy requires sudden damage, and a covered loss causes another loss, both losses must be covered on their own merit. This is incorrect.

Blankenship is distinguishable, but contains several striking similarities. In late 2019 the Kentucky Federal District Court found no coverage for water damage to an RV insured under an identical State Farm RV policy requiring "direct, sudden and accidental damage." *Blankenship v. State Farm Mut. Automobile Ins. Co.*, 618CV241GFVT, 2019 WL 5653203, at *1 (E.D. Ky. Oct. 31, 2019). There, State Farm correctly argued the damage at issue did not fall under the definition of "loss" because, *inter alia*, it was not "sudden." *Id.* at *2. The only expert opined the cold-water "supply line suffered wear and tear and slowly leaked water over a period of months or years." *Id.* at *1.

The *Blankenship* court started its analysis by determining if a covered loss caused the non-covered water leak. The court thus implicitly engaged in an efficient proximate cause analysis. *Id.* at *1-2.

State Farm argued the non-sudden water damage was *not* ultimately caused by covered damage from, for example, being struck by a tree. *Id.* Based on that argument, the court found "the RV was never involved in any sort of roadway

accident, nor suffered any damage from a failing tree or something similar, that **could have caused the leak** and resultant fungi." *Id.* (emphasis added).

Here, too, when presented with arguably non-covered wall damage, before looking at the merits of the subsequent loss the Court should first apply the efficient proximate cause doctrine's two steps.

E. Conclusion

This doctrine is equitable and longstanding. As explained by amicus, the doctrine's purpose is to provide fair results within the reasonable expectations of the insured. The Kauls reasonably expected the wall damage to be covered because it was caused by the roof damage. The doctrine should not be abandoned. Nor should it be limited by State Farm's novel theories.

This Court should hold the efficient proximate cause doctrine is still good law, and that it applies to extend coverage to the wall damage here.

II. The wall damage is covered under the terms of the Policy.

The Policy does not define "damage," thus two categories of wall damage have emerged. The dictionary definition of damage, meaning loss of value, and the insurer's definition of damage, meaning visible harm. State Farm focuses on visible harm which occurred over time as the wall panel bubbled. If the Policy defined damage to exclude "impairment of value," the Kauls concede State Farm might have a colorable argument.

There is no doubt the visible damage occurred gradually over time. There is also no doubt the RV lost $10,669 of value between 4:31 P.M. and 5:05 P.M. on April 20, sustaining sudden, covered damage.

A. The RV sustained "sudden" damage.

State Farm asserts "sudden" "connotes a sense of immediacy." Ans. Br. at 28-30. The Kauls agree.

B. The wall was "damaged" in 34 minutes.

i. Damage means "loss of value."

State Farm offers no serious rebuttal to the Kauls' assertion that damage means "loss of value." Instead it advocates that no damage exists unless and until is it visible to the naked eye. Ans. Br. at 26-27. Thus, it urges the rain entry is not a covered loss until it manifests as slow visible bubbling, regardless of the RV's loss of value. The District Court accepted the insurer's artificially limited definition over an insured's reasonable understanding – an understanding consistent dictionary definitions and with the Corpus of Contemporary American English, which defines "damage" as "the occurrence of a change for the worse." https://www.english-corpora.org/coca/ (last visited Sept. 4, 2020).

State Farm misstates the record, arguing (without citation) "[b]y the Kauls' own admission, the value . . . of the RV was unimpaired until weeks, if not months after the initial rain event . . . ." Ans. Br. at 33-34. The opposite is true. Hurst's

affidavit proves the value of the wall was impaired instantly upon the first rain. This constitutes a sudden decrease in value, i.e. a sudden "change for the worse."

ii. Mr. Hurst's affidavit is dispositive.

State Farm engages two new strategies on appeal.

Initially, State Farm disputes, now for the first time, Hurst's qualification to opine on "what amount of water is required to cause damage." Ans. Br. at 31. This argument is categorically barred because it was not raised below. *Pilgeram v. GreenPoint Mortg.*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. Below, the court accepted Hurst's testimony; State Farm challenged the relevance of his opinions, but never contested his qualifications. Nevertheless, this brief addresses the new theory.

Hurst has built and repaired RVs for over 43 years and owned a repair shop for 15 years. He is located close to Northwood's Manufacturing plant and is familiar with their manufacturing process. He is also "completely familiar with the components and construction of the Kauls' 2014 Northwood Arctic Fox 5th Wheel RV." Hurst was able to repair the wall of the Kauls' RV when the Montana dealer in Kalispell lacked the expertise. He also repaired the roof at a significant discount from the Montana dealer's bid. App. p. 34-35, ¶ 1-4. Because Northwood focuses on construction instead of repair, Hurst may be the most qualified individual in the world to opine on damage to and repair of Northwood RVs.

Expert testimony concerning factual causation, that is unopposed by another expert, is dispositive. *Schwabe ex rel. Est. of Schwabe v. Custer's Inn Associates, LLP*, 2000 MT 325, ¶ 49, 303 Mont. 15, 15 P.3d 903 (overruled in part on other grounds). State Farm makes the remarkable claim that Hurst's affidavit must be rejected because it creates fact issues. Ans. Br. at 31. The Kauls wonder how uncontested expert testimony could ever create a fact issue.

Note how State Farm's view on uncontested expert testimony changes based on who the testimony favors. In its *Blankenship* brief, State Farm argued: "As the Plaintiffs have failed to identify any expert opinions that would contradict Mr. Goff, his conclusions as to the cause of the conditions found in the RV are undisputed and incontrovertible at this time." State Farm Memo. in Support of Mtn. for Summ. Judg., Doc. # 14-1, at 6, 6:18-cv-241-GFVT.

Here, State Farm questions whether the tear was large enough for water to flow into, and whether the rain would penetrate the wall or just overflow. Ans. Br. at 27. State Farm need not wonder - Hurst answers these questions.

Hurst provides his expert opinion formed after studying the tear, the roof and its angle, and after repairing the tear. Hurst opines: "rain that fell on the roof above the length of the tear would have drained into the tear." App. p. 35, ¶ 6. He continues: "[w]hen the roof membrane tore, it created an opening for water to **freely** flow into . . . . [m]ore likely than not, water in that ditch naturally flowed to

the path of least resistance and drained into those numerous cavities. The wiring tracks would have accepted water until full." *Id.* ¶ 7 (emphasis added).

State Farm's second strategy is to misrepresent Hurst's opinion. Hurst states "as little as one gallon of water entering the tear . . . **would have** caused" the damage he observed and required repairs. *Id.* ¶ 13 (emphasis added). State Farm tells the Court that Hurst opines "'as little as one gallon of water entering the tear' **could have** caused the damage he observed." Ans. Br. at 32 (emphasis added). The impact of this change is all-important: "would have" secures summary judgment while "could-have" fails.

This Court should reject State Farm's attempt to paint Hurst as unqualified, and repudiate State Farm's outright misrepresentation of the only expert opinion.

C. *Blankenship* provides an example of non-sudden RV water damage.

Blankenship weighs against State Farm's coverage argument as well. In *Blankenship*, the court found no "direct, sudden and accidental damage" because the water entered the RV through a "slow, but persistent, leak." *Blankenship*, at *2. Only after the slow leak allowed water infiltration over time did the "RV bec[o]me infested with black mold and mushrooms."

Similar to the smoke damage in *Sokoloski*, the water damage in *Blankenship* was not sudden. As in *Sokoloski*, if the Blankenships had found the slow leak

within hours or even days, the RV would not have been a total loss, i.e. there was no significant "sudden damage." Contrast the instant facts requiring wall panel removal after 34 minutes of rain. This is the difference between gradual and sudden damage.

In conclusion, the unopposed exert testimony makes clear the mere presence of water in the watertight wall, before any bubbling, corrosion, or rot even began, immediately impaired the RV's value by requiring wall removal. This Court should find coverage for sudden damage here under the Policy's plain language.

III. Opening the wall/the wall repair is a covered mitigation expense.

A. Kauls raised this issue.

State Farm claims the Kauls did not raise this issue below. Ans. Br. at 36. The record proves otherwise. The Kauls specifically argued the mitigation clause as a separate basis for coverage of the wall repair, and State Farm responded. Dkt. # 24 at 6, 14-15; Dkt. # 32 at 12. The arguments below are mirrored, in several instances word-for-word, in the appellate briefs. Opening Br. at 30; Ans. Br. at 40.

The District Court ruled on this argument at pages 3 and 15 of the Order. The court did not address the issue *sua sponte*, but rather because the Kauls raised it. State Farm's waiver argument should be rejected.

B. Kauls' arguments are not internally inconsistent.

State Farm claims the Kauls take inconsistent positions regarding mitigation

and "sudden" damage. Ans. Br. at 37. This claim is inaccurate. Kauls argue the initial damage to the wall was sudden because the first 34-minute rainfall resulted immediately in the need for a $10,669 wall repair. As to mitigation, Kauls argue the water damage would have progressed over time if left untended – i.e., seepage into the floor, corrosion of electronics, spreading rot, etc. This is the progressive nature of water damage in a watertight wall panel. It triggered the duty to mitigate. Kauls' arguments are not inconsistent.

C. The wall repair arose from a "loss" and was mitigation.

State Farm posits three arguments against liability here. For its first two arguments, State Farm asserts "[t]he physical repairs to the side wall did not arise out of a covered 'loss' as required by the provision at issue, nor did those repairs constitute mitigation." Ans. Br. at 40.

First, State Farm contradicts the District Court, arguing the wall damage and repairs did not "arise" from a covered loss. *Id*. This is incorrect and contradicts basic notions of causation. The District Court correctly held "the water damage to the RV wall would not have happened but for the tear in the roof." Order at 10-11.

Second, State Farm claims the wall repairs did not "constitute mitigation," i.e., they were not necessary to protect the RV from additional damage. Here, State Farm takes a critical expert opinion of Hurst (". . . it was necessary to remove the wall panel and repair the wall panel in order to check for moisture and to protect

the RV from additional damage") and simply writes the exact opposite conclusion in its brief – without citing any source. *See* app. pp. 36-37, ¶ 14. State Farm cannot support or defend summary judgment by mere denial.

Finally, State Farm defends the District Court's mitigation provision holding, claiming it should not be liable to pay for mitigation costs "unequivocally outside the scope of coverage." Ans. Br. at 38. This is logically inconsistent. The mitigation provision necessarily operates to reimburse insureds for costs not covered elsewhere in the Policy – so long as those costs protect against additional loss. For example, the Kauls travel expenses were certainly not a covered direct, sudden, and accidental "loss," yet State Farm admits, and the lower court held, the mitigation provision requires their payment.

CONCLUSION

The Kauls seek reversal of the District Court's order on all three arguments. This Court should order the District Court to enter summary judgment for the Kauls.

DATED this 2nd day of October, 2020.

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By: /s/ Lincoln Palmer
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellants' Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted and indented material, headings, the Table of Contents, and the Table of Authorities; and the word count calculated by WordPerfect is 4,998 words, excluding certificate of service, certificate of compliance, title page, Table of Contents, and Table of Authorities.

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Service Method: eService

Electronically signed by Judith Martin on behalf of Lincoln Palmer
Dated: 10-02-2020