

CASE NO. 23-30779

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FIRST UNITED PENTECOSTAL CHURCH, Plaintiff - Appellee

VERSUS

CHURCH MUTUAL INSURANCE COMPANY, Defendant - Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION, NO.
2:21-CV-4014, THE HONORABLE JAMES D. CAIN, JR. PRESIDING

ORIGINAL BRIEF OF PLAINTIFF - APPELLEE, FIRST UNITED
PENTECOSTAL CHURCH

Respectfully Submitted:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate a possible disqualification or recusal.

1. First United Pentecostal Church, Plaintiff – Appellee, its counsel, David H. Hanchey and Townsley Law Firm, L.L.P., and its former counsel, Robichaux, Mize, Wadsack, Richardson & Watson, LLC, Matthew B. Mize, and Pandit Law Firm, LLC, Rajan Pandit; and
2. Church Mutual Insurance Company, Defendant – Appellant, and its counsel, Degan, Blanchard & Nash, Sidney W. Degan, III, Travis L. Bourgeois, Candace C. Chauvin, Larry E. Mobley, Steve K. Schilling

/s/ David H. Hanchey _____
David H. Hanchey,
Attorney of Record for Plaintiff,
Appellee, First United Pentecostal
Church

February 5, 2024

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff - Appellee, First United Pentecostal Church (“First United”), does not believe oral argument is necessary. The issues on appeal, both factual and legal, raised by Defendant-Appellant, Church Mutual Insurance Company (“Church Mutual”), are not novel or complicated, and the burden for Church Mutual to prevail on them is high. In the simplest of terms, this appeal involves nothing more than disputed factual issues properly decided under well-established law by a trial judge extremely experienced in insurance litigation involving property damage caused by Hurricane Laura and Hurricane Delta, Judge James David Cain, Jr., but these issues simply were not resolved to Church Mutual’s satisfaction. This provides no basis for appellate relief.

Importantly, this case is among three cases already tried, lost, and appealed by Church Mutual to this Court involving claims for policy damages, penalties, and attorney’s fees due to its failure to fully and promptly pay policy losses following Hurricane Laura and Hurricane Delta. The first, *Sugartown United Pentecostal Church, Incorporated v. Church Mutual Insurance Company*, 2024 WL 62947 (5th Cir. 2024), was affirmed by this Court on January 5, 2024. The second, *First Baptist Church of Iowa, Louisiana v. Church Mutual Insurance Company*, No. 23-30514, is set for oral argument with this Court on March 4, 2024. These other appeals, like

this one, involve similar complaints about the factual findings of the judge or jury, evidentiary rulings, and findings of bad faith. There is no need to continue to expend this Court's valuable time and resources for another oral argument involving similar complaints by Church Mutual involving factual issues and well-settled precedent that will already have been considered twice before this case is decided.

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Louisiana had subject-matter jurisdiction under 28 U.S.C. § 1332(a), because the matter in controversy exceeds \$75,000.00, and the case is between citizens of different states. First United, is a citizen of the State of Louisiana. Church Mutual, is a foreign insurance company domiciled in the State of Wisconsin.

This Court has jurisdiction over this case under 28 U.S.C § 1291, because this is an appeal from a final judgment of the United States District Court of the Western District of Louisiana.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly denied Church Mutual's objection to the testimony of Kermith Sonnier, First United's expert in construction and insurance adjusting, when Church Mutual did not file a *Daubert* motion, when Mr. Sonnier's report was admitted into evidence without objection, and when the trial court provided sound reasons why Mr. Sonnier's methodology and opinions were proper.
2. Whether the trial court properly considered Kermith Sonnier's report to award damages when Church Mutual did not object to the introduction of that report, when Church Mutual has not appealed any item included in the trial court's award of policy damages based upon that report, and when

Church Mutual did not call a witness to contradict Mr. Sonnier's damage estimates.

3. Whether Church Mutual's claim that that the trial court improperly awarded bad-faith penalties and attorney's fees is credible, when Church Mutual's own corporate representative admitted that Church Mutual made its first payment late and in violation of Louisiana law and that additional undisputed sums were still owed by Church Mutual that had not been paid as of the time of trial, and when Church Mutual's own counsel tried to stipulate that Church Mutual's first payment was untimely to prevent First United from introducing evidence on this issue.
4. Whether the trial court properly awarded penalties and attorney's fees on the entire amount of the award when Church Mutual admitted its first payment was untimely, and when Fifth Circuit jurisprudence is well settled that penalties and attorney's fees are due on the entire amount found to be due at trial without deducting prior payments if the first undisputed payment is made untimely.
5. Whether Church Mutual waived its right to appeal the repair cost pricing used by First United's expert, Kermith Sonnier, in his estimate when Church Mutual did not object to the estimate, did not call any witnesses to

refute the pricing used in the estimate, and did not introduce its own evidence of the pricing that it believed should have been used.

STATEMENT OF THE CASE

A. Procedural History

On September 8, 2023, the trial court entered a judgment in favor of First United and against Church Mutual in the amount of \$2,073,838.96, with pre-judgment interest from the date of judicial demand to the date of entry of judgment and post-judgment interest pursuant to 28 U.S.C. § 1961 from the date of entry of judgment until paid. ROA.538. The judgment consisted of policy damages of \$909,290.59, penalties of \$646,477.58, and attorney's fees of \$518,070.80. ROA.536.

On September 11, 2023, First United filed a motion to alter or amend the judgment seeking to eliminate the trial court's inadvertent award of penalties and attorney's fees twice on Church Mutual's pre-trial payments of \$191,832.28, to eliminate pre-judgment interest on the penalties and attorney's fees portion of the award, and to reflect that pre-judgment interest on policy damages should run from the date of the breach of the insurance contract rather than from the date of judicial demand. ROA.539-548. The trial court granted the motion and entered an amended judgment on September 12, 2023, in favor of First United and against Church Mutual in the amount of \$2,052,335.09, consisting of policy damages of \$909,290.59,

penalties of \$550,561.43, attorney's fees of \$486,617.34, and pre-judgment interest of \$105,865.73. ROA.549-551.

On September 27, 2023, Church Mutual filed a motion for new trial/motion for judgment as a matter of law. ROA.608-611. This motion was denied by the trial court on October 17, 2023. ROA.662. On November 2, 2023, Church Mutual filed a notice of appeal from the original and amended judgments, as well as from the judgment denying its motion for new trial/motion for judgment as a matter of law. ROA.667-669.

B. Facts of the Case

1. The Hurricanes and the Damaged Property

On August 27, 2020, and October 9, 2020, Hurricane Laura and Hurricane Delta, respectively, made landfall on the gulf coast of Southwest Louisiana, traveled north, and struck DeQuincy, Louisiana. ROA.3058, 3066. At the time of Hurricane Laura and Hurricane Delta, First United had an insurance policy with Church Mutual insuring First United's property located at 230 Smith Street, DeQuincy, Louisiana 70633 ("the property"). ROA.2149-2374.

When Hurricane Laura struck the property, it had wind gusts up to 126 miles per hour and rainfall of five to six inches. ROA 836-837, 843. When Hurricane Delta struck the property, it had wind gusts up to 79 miles per hour and rainfall of eight to ten inches. ROA 836-837, 843.

2. The Property Details

At the time of Hurricane Laura and Hurricane Delta, the property had various buildings laid out as shown on this Google Earth image taken on December 1, 2017:



ROA.3052, 830-831. This exhibit was prepared by First United's engineering expert, Robert L. Wright, and the layout shown on it was the same at the time of Hurricane Laura and Hurricane Delta. ROA.808, 831.

As a result of Hurricane Laura and Hurricane Delta, the buildings on the property sustained significant damages.

3. Church Mutual's Insurance Policy

Church Mutual provided replacement cost coverage for First United's

buildings as follows:

1. Building No. 1 under the policy, identified as Bldg. #1 Sanctuary in the aerial photograph above, was the new church sanctuary building and was insured for \$2,750,000.00 (hereinafter “BUILDING 1”). ROA.2151-2153.
2. Building No. 2 under the policy, identified as Bldg. #5 T.D. Cardwell Center in the aerial photograph above, was the family life center and was insured for \$720,000.00 (hereinafter “BUILDING 2”). ROA.2151-2153.
3. Building No. 3 under the policy, identified as Bldg. #6 in the aerial photograph above, was used to house First United’s vehicles and was insured for \$60,000.00 (hereinafter “BUILDING 3”).¹ ROA.2151-2153.
4. Building No. 4 under the policy, consisting collectively of sub-buildings identified as Bldg. #2 East Wing Sunday School, Bldg. #3 Old Sanctuary, and Bldg. #4 West Sunday School Wing in the aerial photograph above, was primarily used for Sunday School and was insured for \$1,360,000.00 (hereinafter “BUILDING 4”). ROA.2151-2153.

These buildings all had a 2% hurricane deductible, except the bus barn, which had a \$5,000.00 deductible. (Policy 6). ROA.2154.

¹At trial, First United advised the trial court that it was dropping its claims for Building 6 and Building 7 on the aerial photograph shown above, because the claims were very small and not worth fighting about in the big scheme of the claims at issue. ROA.710.

4. Church Mutual's Claims-Handling Obligations and Its Admission of Bad Faith

At trial, Church Mutual did not call a single adjuster who actually worked on First United's claim to try to justify Church Mutual's handling of the claim. In that regard, Church Mutual's corporate representative, Lynn Renland, testified that the two desk adjusters who worked on First United's claim, Nikki Gerdes and Christopher Vander Pluym, their supervisor, Shannon Mikunda, and the field adjuster, Tony Bunn, would not testify at trial, and thus none of the individuals involved in handling the claim or making claims decisions would be at trial. ROA.738-739. Instead, only Ms. Renland, who had no role in handling First United's claim, testified at trial to try to justify the actions of the absent adjusters. ROA.728.

Importantly, Ms. Renland testified she had no involvement at all in First United's case until one month before trial, when she was designated by Church Mutual as its 30(b)(6) corporate deposition representative. ROA.727-729. The only things Ms. Renland did in connection with her testimony were to review the claims file, claims notes, photographs, insurance policy, damage photographs, and Church Mutual claims handling guidelines, and then to provide testimony about the actions of the absent adjusters who actually participated in the handling of First United's claims. ROA.729-732. In sum, no one at Church Mutual with personal knowledge of First United's claim testified about what happened during Church Mutual's

handling of the claim, the actions it took, and why it took them.

Ms. Renland's testimony, however, was extremely important, because she admitted Church Mutual failed to pay First United's undisputed losses timely and that this failure was arbitrary, capricious or without probable cause so as to subject Church Mutual to penalties and attorney's fees. By way of background, Ms. Renland has been a licensed adjuster for over twenty years. ROA.732-733. She had adjusted claims in Louisiana for Church Mutual well before Hurricane Laura, going all the way back to Hurricane Katrina and Hurricane Rita. ROA. 732. As a result, she was familiar with Church Mutual's policies and procedures for compliance with Louisiana law, because Church Mutual knew its failure to comply with Louisiana law could render it liable for penalties and attorney's fees on top of policy damages. ROA.732-733. Ms. Renland admitted that Church Mutual's adjusters were taught the following rules concerning Church Mutual's obligations under Louisiana law (ROA.733-734):

1. An insurance company is required to pay undisputed amounts of losses within 30 days of receipt of satisfactory proof of loss. ROA.738
2. An insurance company which fails to pay an undisputed amount is by definition arbitrary, capricious, and without probable cause. ROA.738
3. Satisfactory proof of loss is what triggers time for an insurance company to pay. ROA.736
4. Satisfactory proof of loss is a flexible standard not required to be in any formal style. ROA.736

5. Satisfactory proof of loss can be as simple as an adjuster's inspection, receipt of estimates from the insured, receipt of invoices from the insured, or receipt of photographs. ROA.737-738
6. An insurance company's duties of good faith and fair dealing are continuing duties throughout the life of the claim, even after a lawsuit is filed. ROA.734-735

Church Mutual's violations of these principles will be discussed in more detail later, but it is important to point out from the outset that Ms. Renland admitted that Church Mutual's first payment was made late and in violation of Louisiana's bad-faith laws, because Church Mutual failed to make an undisputed payment within 30 days of receipt of satisfactory proof of loss. Ms. Renland testified about that as follows:

- Q. You agree that on November 20th, 2020, Church Mutual's adjuster, Mr. Bunn, recommended an undisputed payment of \$169,592.87?
- A. That sounds about the right date, yes.
- Q. Ok. You agree the first payment was not made until January 14, 2021? We talked about that.
- A. Yes.

ROA.744.

- Q. All right. Let's talk about the first payment, okay.
- A. Okay.
- Q. That was the one that was made on January 14th of 2021 for \$166,090.81. I want to be clear on that.
- A. Yes.
- Q. You agree that payment was late.
- A. Yes.
- Q. You agree that payment was made in violation of Louisiana law.
- A. Yes.

ROA.765.

5. Timeline of the Claims

Church Mutual did not inspect the property until October 12, 2020, after both Hurricane Laura and Hurricane Delta struck the property. ROA.740, 744. This was over 30 days after First United reported its Hurricane Laura claim to Church Mutual on September 7, 2020. ROA.740. The field adjuster who inspected the property for Church Mutual was Tony Bunn. ROA.739-740.

Prior to Mr. Bunn's inspection, on September 9, 2020, First United sent multiple photographs of the extensive damage to the property caused by the hurricane, specifically broken down by building location and the areas damaged in each building. ROA.760-764. Lynn Renland admitted at trial that these photographs were received by Church Mutual and were in its claims file, which is specifically documented in Church Mutual's claims notes. ROA.761-765.

On October 13, 2020, Tony Bunn provided a report to Church Mutual advising that the entire asphalt shingle roof on BUILDING 4 needed to be replaced, specifically the roofs on Building #2 East Wing Sunday School, Building #3 Old Sanctuary, and Building #4 West Sunday School Wing. ROA.766, 769-774, 3052. Mr. Bunn's report also advised Church Mutual that there was damage to vinyl soffit systems around the perimeter of the building and carport, and water damage to interior walls, ceilings, drywall, and ceiling tiles throughout the building. ROA.766-

767. Ms. Renland agreed at trial that, as Mr. Bunn reported and due to the damage from the hurricanes, the asphalt shingle roofs on BUILDING 4 all needed to be replaced in their entirety and that there was significant water damage throughout the buildings due to the compromised roofs. ROA.801-802.

In addition, Mr. Bunn reported that, with respect to BUILDING 1 (the new sanctuary), the metal roof had sustained more than cosmetic damage, specifically separation of the roof panels and displacement of insulation from the roof panel seams. ROA.776-777. Mr. Bunn also advised that the damage to the metal roof allowed water intrusion into the first and second levels of the building. ROA.777. Mr. Bunn further reported that BUILDING 1 had sustained damage to the steeple and cross. ROA.777. Church Mutual admitted that it knew about this extensive damage for over three months before it issued its first payment to First United. ROA.777.

On October 15, 2020, Church Mutual promised an advance of \$25,000.00 for First United to tarp its roofs, but those funds were never issued. ROA.743, 1059.

On November 5, 2020, Chris Vander Pluym, a Church Mutual desk adjuster, made a note that he had spoken to an engineer retained by Church Mutual to inspect the property. ROA.783-784. In that note, Mr. Vander Pluym documented that the engineer advised him that the roof panels on BUILDING 1 (the new sanctuary) were lifted and would most likely have to be replaced. ROA.784.

On November 20, 2020, Church Mutual's field adjuster, Mr. Bunn, recommended that Church Mutual make an undisputed payment of \$169,592.87 to First United, but Church Mutual did not make any payments until January 14, 2021. ROA.744. That first payment was in the amount of \$166,090.81. ROA.742. On March 14, 2021, Church made its second and final payment in the amount of \$25,741.47 to First United. ROA.742. These payments did not include a single penny for damage to BUILDING 1 (the new sanctuary), because Church Mutual claimed the damages to that building were below the deductible. ROA.1157. No further payments were ever made by Church Mutual to First United after March 14, 2021. ROA.742.

Church Mutual's corporate representative, Ms. Renland, admitted that First United exhausted all funds paid by Church Mutual for repairs. ROA.742-743. This was confirmed by Carlton Jackson, the Pastor of First United, who testified that not only were all funds paid by Church Mutual spent by First United on repairs to the property, but also that the funds were not nearly enough to complete the repairs. ROA.1068-1069. Instead, First United did the best it could to make repairs with the money paid by Church Mutual. ROA.1064, 1080, 1084. Pastor Jackson's testimony was confirmed by Bryan Millican, the owner of Millican Construction, the contractor for First United, who testified that his company only performed the work it could for what Church Mutual had paid. ROA. 4098, 4110-4112. Like Pastor

Jackson, Mr. Millican testified that there were “nowhere near” enough funds paid by Church Mutual to complete the repairs that needed to be done. ROA.4112.

On November 18, 2021, First United filed suit against Church Mutual alleging that it had underpaid First United’s hurricane claims and that First United was owed policy damages plus penalties and attorney’s fees due to Church Mutual’s improper handling of First United’s claims. ROA.15-25. Thereafter, on February 28, 2022, as part of the trial court’s mandatory initial disclosures for litigation involving Hurricane Laura and Hurricane Delta, counsel for First United provided an estimate of damages from a public adjuster, Integrity Claims Consultants, LLC, in the amount of \$1,332,957.59 to Church Mutual’s counsel. ROA.331-336, item 2e; ROA.5745-5793. This estimate was again provided to Church Mutual’s counsel on June 14, 2022. ROA.263-312.

Importantly, Church Mutual never sent a single person to reinspect the property for over a year and a half after First United filed its lawsuit despite knowing that First United disputed the amounts of Church Mutual’s prior payments and despite Church Mutual having received an estimate from First United by Integrity Claims Consultants, LLC of over \$1.3 million.

On May 18, 2023, in compliance with the trial court’s expert report disclosure deadlines, First United provided Church Mutual with expert reports from Kermith Sonnier, a licensed adjuster and contractor with many years of experience in both

fields, and Robert Wright, a licensed professional structural engineer, demonstrating that Church Mutual's field adjuster, Tony Bunn, had missed numerous items of damage in his inspection over two years earlier and that the claim had been woefully underpaid. ROA.744-745. Mr. Sonnier itemized damages totaling \$1,771,741.98, broken down as \$767,087.28 to the BUILDING 1, \$745,555.10 to BUILDING 4, \$233,643.04 to BUILDING 2, \$11,318.80 to BUILDING 3, and \$14,137.76 to other structures. ROA.3535, 3690.

On May 31, 2023, over two and a half years after Church Mutual's first inspection by Mr. Bunn, Church Mutual had an engineer, Lori Cox, and a building consultant, Neil Wright, re-inspect the property. ROA.1312, 1314. During that inspection, however, neither the engineer nor the building inspector got on any of the roofs. ROA.1312. They did finally get on the roof of BUILDING 1, the new sanctuary, to inspect it on August 9, 2023, only a week before trial began. ROA.1312.

Importantly, Church Mutual's engineer admitted that she did not address any of the damages to BUILDING 4, because she erroneously attributed those damages to a tornado several years before the hurricanes. ROA.1338, 1343-1345.² Instead,

² In its brief, Church Mutual references the prior tornado claim made by First United in an apparent attempt to imply that some of the damages at issue on appeal were attributable to a tornado rather than Hurricane Laura and Hurricane Delta. This is disingenuous to say the least. In that regard, as noted by the trial court, during the trial Church Mutual withdrew its defense that the tornado caused pre-existing damage. ROA.534. Moreover, Church Mutual's own file for the tornado claim reveals that it did not find any damage caused by the tornado during its initial inspection on

the only damage estimates attached to her report, prepared by her coworker, Neil Wright, were limited to damages to BUILDING 1(the new sanctuary). ROA.1342.

After Lori Cox and Neil Wright finally inspected the property on May 31, 2023, they issued reports to Church Mutual on June 5, 2023, advising Church Mutual that its field adjuster, Tony Bunn, had omitted visible items of damage in his adjustment for which additional payment was owed and which should have been paid from the beginning. ROA.746, 1354-1355, 4354-4393, 4394-4470, 4486-4494. Mr. Wright's damage estimate for interior damage to BUILDING 1 (the new sanctuary) was over \$263,000.00 alone, completely discrediting Mr. Bunn's estimate for BUILDING 1 that was below the deductible. ROA.1352-1354, 2002-2003, 4394-4470. Additionally, Neil Wright's estimate to replace the metal roof on BUILDING 1 was \$518,817.26. ROA.532-533, 4486-4494. Church Mutual did not issue any payments to First United following receipt of its own experts' reports.

At trial, Ms. Renland agreed that more money was still owed to First United based on the findings of Church Mutual's experts. ROA.806-807. Despite this, Church Mutual did not make any additional payments to First United by the time of trial. ROA.744, 806-807. This was over two months after Church Mutual received

February 18, 2018. ROA.792-793. Later, when Church Mutual had an engineer inspect for tornado damage, the engineer found the combined damage to all buildings on the property combined was below the deductible amount. ROA.795-796. The engineer also found that the only damage to any of the asphalt roofs was a single missing shingle, and that the only damage to the metal roofs was a small area on one roof that was dented and scuffed. ROA.795.

its own experts' reports and estimates on June 5, 2023, showing that additional, undisputed damages were owed to First United. ROA.4354-4393, 4394-4470, 4486-4494.

SUMMARY OF ARGUMENT

Argument Number 1

The trial court properly accepted Kermith Sonnier as an expert witness. First, Church Mutual did not file a pre-trial *Daubert* motion to exclude Mr. Sonnier's testimony within the Court's deadline to do so. The trial court was perfectly justified in rejecting Church Mutual's challenge to Mr. Sonnier's testimony for this reason alone under well-established case law.

Second, the trial court also properly denied Church Mutual's untimely challenge to Mr. Sonnier's testimony on the merits. In that regard, Church Mutual did not object to Mr. Sonnier's qualifications. Nor did Church Mutual call a single witness, expert or fact, to challenge Mr. Sonnier's methodology. Rather, Church Mutual simply cited an inapposite case decided by a Magistrate Judge involving a challenge to Mr. Sonnier's methodology. The trial court, however, fully considered, distinguished, and rejected that case as a basis to disqualify Mr. Sonnier.

Third, the trial court properly found that Mr. Sonnier's use of Xactimate software was the accepted methodology for an adjuster to prepare a damage estimate. Xactimate is the industry standard for both public adjusters and insurance

companies, and it is used about 95% of the time by insurance companies.

Fourth, in addition to preparing his Xactimate estimate, Mr. Sonnier personally inspected the property inside and out, met onsite with the pastor of the church and the engineer retained by First United, spent four days on the property to scope out the damages, and reviewed 670 photographs of the property taken by Church Mutual's adjuster before any repairs were made. Mr. Sonnier also consulted with First United's engineer as Mr. Sonnier was preparing his report to make sure everything included as part of his report was properly due to damage from the hurricanes, and he reviewed the engineer's report before he completed his estimate.

Accordingly, the trial court was well within its vast discretion to admit Mr. Sonnier's testimony. In fact, the trial court went above and beyond by considering the merits of Church Mutual's objection to Mr. Sonnier's testimony when Church Mutual did not timely file a *Daubert* motion.

Argument Number 2

The trial court properly considered Kermith Sonnier's damage estimate and Robert Wright's engineering report in awarding damages, penalties, and attorney's fees. First, Church Mutual has not appealed the amount of the trial court's policy damage award nor pointed out any specific item of damage which the trial court improperly awarded. Nor has Church Mutual requested any relief from the trial court's award of policy damages. Instead, Church Mutual only complains about

portions of Mr. Sonnier's and Mr. Wright's findings that the trial court already considered, excluded, and did not rely upon when making its award of policy damages. Therefore, it is unclear what error Church Mutual is claiming was made by the trial court with respect to Mr. Sonnier's and Mr. Wright's reports or what relief it is seeking.

Second, Church Mutual did not object to the introduction of either Mr. Sonnier's report or Mr. Wright's report, and its failure to object to the admission of these reports resulted in a waiver of its right to contest the consideration of that evidence as an error.

Third, Church Mutual did not call a single witness to dispute Mr. Sonnier's damage estimate. In fact, Church Mutual did not dispute the vast majority of the damages ultimately awarded by the trial court.

Fourth, Church Mutual's counsel pointed out only one error in Mr. Sonnier's estimate, which was over 500 pages long, constituting only a small percentage of his damage estimate, and this error was considered and corrected by the trial court. Likewise, with respect to Robert Wright's engineering report, which is almost 400 pages long, Church Mutual did not point out any errors in his report, but instead it simply disagreed that all of the items contained in Mr. Wright's report were caused by the hurricanes. The trial court accepted Mr. Wright's causation analysis for all damages except for the roof on the BUILDING 2 and the cracks in the masonry and

EFIS on the buildings, and these items were also deducted from and did not constitute part of the trial court's policy damage award.

Fifth, the trial court correctly considered Mr. Sonnier's and Mr. Wright's reports, even though the trial court found that First United did not carry its burden of proof on a small portion of the items included in those reports. The trier of fact has the right to credit or discredit all or part of testimony or evidence as it sees fit.

Accordingly, Church Mutual's complaints about Mr. Sonnier's and Mr. Wright's reports, and the trial court's consideration of them, are unfounded. Further, its complaints are not appealable issues considering Church Mutual did not take the proper procedural steps to preserve those complaints for appeal. There is simply no basis for relief for this claim of error.

Argument Number 3

The trial court properly found that Church Mutual violated La. R.S. 22:1892 and properly awarded penalties and attorney's fees as a result. La. R.S. 22:1892 provides for a mandatory penalty of 50% of the amount found to be due from the insurer, plus attorney's fees, if the insurer fails to pay that amount within 30 days of receipt of satisfactory proof of loss and the insurer's failure to pay in a timely manner was arbitrary, capricious or without probable cause. An insurer's failure to make an undisputed payment within 30 days of receipt of satisfactory proof of loss is by definition, arbitrary, capricious or without probable cause. Church Mutual's

corporate representative, Lynn Renland, admitted that Church Mutual breached this provision as a matter of law when it failed to pay an undisputed amount in a timely manner.

Church Mutual also violated La. R.S. 22:1892 when it failed to perform a good-faith adjustment of First United's claims. The insurer's duty under La. R.S. 22:1892 mandates more than merely sending an adjuster to the insured's property to take pictures and calculate numbers on less than all of the damage. It defeats the purpose of the statute to allow an inadequate and unreasonably low adjustment, done within the requisite time delays, to satisfy the insurer's obligation to the insured.

In this case, Church Mutual's own expert, Lori Cox, prepared a report and provided testimony showing that Church Mutual's field adjuster missed hundreds of thousands of dollars of visibly damaged items during his initial inspection that should have been paid. This further supports the trial court's decision to find Church Mutual liable for penalties and attorney's fees.

Church Mutual is further liable for penalties and attorney's fees under La. R.S. 22:1892, because it failed to evaluate new information as received during the course of First United's claims. The duties of good faith and fair dealing imposed on insurers by R.S. 22:1892 are continuing duties that do not end during litigation. Church Mutual breached these duties when it made no payments after receipt of the written estimate of Integrity Claims Consultants, LLC from First United, the expert

reports of Kermith Sonnier and Robert Wright from First United, and the reports of its own experts, Lori Cox and Neil Wright. Church Mutual's failure to re-evaluate its prior inadequate payments based on its receipt of new proofs of loss also supports the trial court's award of penalties and attorney's fees.

Argument 4

Church Mutual incorrectly asserts that proof of loss is sufficient only if it is in writing and comes from the insured. Church Mutual's same argument was previously rejected by this Court in *Sugartown United Pentecostal Church Incorporated v. Church Mutual Insurance Company*, 2024 WL 62947 (5th Cir. 2024). Church Mutual's claim that the trial court erred in finding that Church Mutual had received satisfactory proof of loss based on an erroneous and unsupported interpretation of the law should be rejected.

Argument 5

Penalties and attorney's fees are owed on the entire amount found to be due by the trial court without a reduction for amounts previously paid before trial. Church Mutual has no authority for its position that the trial court should not have cast Church Mutual in judgment for penalties and attorney's fees on the entire amount found to be due by the trial court or, alternatively, on only the proceeds that had not been paid as of the time of trial. These arguments were previously rejected by this Court in *Grilletta v. Lexington Insurance Company*, 558 F.3d 359 (5th Cir.

2009) and *French v. Allstate Indemnity Co.*, 637 F.3d 571 (5th Cir. 2011). This claim of error should thus be rejected.

Argument 6

The trial court properly considered the pricing in Kermith Sonnier's report in making its award of policy damages. Church Mutual did not object to the introduction of Mr. Sonnier's estimate. Nor did Church Mutual ever object to the pricing used in Mr. Sonnier's report, call a witness to challenge the pricing in Mr. Sonnier's report, or call a witness to establish what Church Mutual believed the pricing should be.

A party who fails to object to the admission of evidence at trial waives the right to contest the admission of that evidence as error. Church Mutual's claim of error concerning the pricing used in Mr. Sonnier's report has thus been waived on appeal. Even if it were not waived, Church Mutual did not put on any evidence to challenge the appropriateness of the pricing used by Mr. Sonnier nor did it call any witness to establish the pricing it believed should be used. Accordingly, Church Mutual's claim of error concerning Mr. Sonnier's pricing has no merit and should be denied.

ARGUMENT

A. Standards of Review

1. The Standard for Findings of the Trial Court

Factual determinations made by a trial court in a bench trial are reviewed for clear error. *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015). This is explained in greater detail by the *Guzman* court as follows:

The Supreme Court and this circuit have stressed certain principles governing the application of the clearly erroneous standard of review following a bench trial. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573–75, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *In re Luhr Bros., Inc.*, 157 F.3d 333, 337–39 (5th Cir.1998). A finding of the trial judge “is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson*, 470 U.S. at 573, 105 S.Ct. 1504 (internal quotation marks and citation omitted). This standard plainly does not entitle this court to reverse the findings of the trial judge simply because we are convinced that we would or could decide the case differently. *Luhr Bros.*, 157 F.3d at 337. Indeed, the great deference owed to the trial judge's findings compels the conclusion that “[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.” *Id.* at 338 (alteration in original) (quoting *Anderson*, 470 U.S. at 574, 105 S.Ct. 1504).

Moreover, and of particular relevance here, the clearly erroneous standard of review following a bench trial requires even “greater deference to the trial court's findings when they are based upon determinations of credibility.” *Id.*; *see also* Fed.R.Civ.P. 52(a)(6) (stating that, following a bench trial, “the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility”). As the Supreme Court unequivocally stated in *Anderson*, “when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.” 470 U.S. at 575, 105 S.Ct. 1504. The “trial judge's credibility determinations are due this extra deference because only [he] can be aware of the variations in demeanor and tone

of voice that bear so heavily on the listener's understanding of and belief in what is said.” *Estate of Lisle v. Comm'r*, 541 F.3d 595, 601 (5th Cir.2008) (quoting *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504).

Id. at 1036.

2. The Standard for Admission of Expert Testimony

A district court’s decision to exclude or admit expert testimony is reviewed only for an abuse of discretion. *Kim v. American Honda Motor Company, Inc.*, 86 F.4th 150, 158-159 (5th Cir. 2023); *General Electric Co. v. Joiner*, 522 U.S. 136, 142, 118 S.Ct. 512, 139 L.Ed.2d 508, 517 (1997). Moreover, the Court’s “review of expert testimony for the sufficiency of the evidence is not as rigorous as it would be under a properly preserved challenge to the admissibility of the testimony under *Daubert*.” *U.S. S.E.C. v. Snyder*, 292 Fed.Appx. 391, 400 at fn 1 (5th Cir. 2008).

3. The Standard for Motions for Directed Verdict, Judgment as a Matter of Law, and New Trial

A trial court’s ruling on a motion for directed verdict is reviewed under the abuse of discretion standard. *Robinson v. Bump*, 894 F.2d 758, 761 (5th Cir. 1990).

The denial of a motion for a judgment as a matter of law is reviewed *de novo*, applying the same deferential standard as the district court in reviewing a jury’s verdict. *Kim v. Am. Honda Motor Co.*, 86 F.4th 150, 159 (5th Cir. 2023). A judgment as a matter of law is proper only if there is not a legally sufficient basis for the party on that issue. *Id.* This standard is not met unless the facts and inferences point so strongly and overwhelmingly in the movant’s favor that the factfinder could not have

reached a contrary conclusion. *Id.*

A motion for a new trial is reviewed for an abuse of discretion which occurs only when there is an absolute absence of evidence to support the fact finder's decision. *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647, 653 (5th Cir. 2019).³

B. The Trial Court Properly Accepted Kermith Sonnier's Expert Testimony.

Church Mutual first complains that the trial court erred in accepting the testimony of Kermith Sonnier, plaintiff's expert in adjusting and construction. Church Mutual's complaints about Mr. Sonnier should be rejected.

Importantly, Church Mutual did not file a pre-trial *Daubert* motion to exclude Mr. Sonnier's testimony. The trial court's Scheduling Order, however, specifically stated that, "Motions to compel discovery, **Daubert motions** and motions *in limine* **shall be filed** no later than July 18, 2023 (30 days before trial)." (Emphasis added). ROA.143. The trial judge was perfectly justified in rejecting Church Mutual's challenge to Mr. Sonnier's testimony raised for the first time at trial on this basis alone under well-established case law. For example, in *Total Rebuild, Inc. v. PHC Fluid Power, L.L.C.*, 2019 WL 4247338 (W.D. La. 2019), the trial court denied as

³ Church Mutual did not brief the specific reasons for its claim that the trial court erred in denying its motions for directed verdict, for judgment as a matter of law, or for a new trial. Church Mutual brief, p. 56. Therefore, First United will not waste the Court's time guessing how Church Mutual believes these legal standards should apply to the facts in this case or briefing that issue.

untimely a challenge to an expert witness testifying, explaining as follows:

It is well established that “a party who ignores any case management deadline does so at his own peril.” *Id.* More specifically, “challenges to expert testimony may be waived for failure to adhere to deadlines” set forth in a scheduling order. *Id.*; *see also, Queen Trucking, Inc. v. GMC*, Civil Action No. 1:06-CV-052-C ECF, 2007 WL 4458919, at *2, 2007 U.S. Dist. LEXIS 95082, at *6 (N.D. Tex. June 8, 2007); *Vienne v. Am. Honda Motor Co.*, Civil Action No. 99-3716 Section “N”, 2001 U.S. Dist. LEXIS 1301, at *5, 2001 WL 83260 (E.D. La. Jan. 26, 2001). Based on this line of cases and further considering Defendant's explanation for missing the motion *in limine* deadline, the Court will not entertain Defendant's untimely *Daubert* challenge.

See also, Bedingfield v. Deen, 2011 WL 2712950 (W.D. La. 2011) (“a party who ignores any case-management deadline does so at its own peril’ . . . Based on this line of cases and further considering that Plaintiffs have failed to even acknowledge their untimeliness and/or offer a good faith explanation for missing the *Daubert* motion deadline set forth in the Amended Scheduling Order, the Court will not entertain Plaintiffs' untimely *Daubert* challenge”).

Although the trial court could have simply denied Church Mutual’s untimely challenge to Mr. Sonnier’s testimony, the trial court instead considered and rejected the merits of Church Mutual’s objection to Mr. Sonnier. Of note, Church Mutual did not object to Mr. Sonnier’s qualifications. Instead, Church Mutual only claimed that Mr. Sonnier’s methodology was improper. ROA.1193-1194. Church Mutual, however, did not call a single witness, expert or fact, to challenge Mr. Sonnier’s

methodology. Rather, Church Mutual simply cited an inapposite case decided by a Magistrate Judge involving a challenge to Mr. Sonnier's methodology.

Specifically, Church Mutual tried to disqualify Mr. Sonnier based on *AWM Sports d/b/a The Athletes Foot v. State Farm Fire and Casualty Company*, an unpublished decision by a Magistrate Judge in the United States District Court for the Middle District of Louisiana (No. 10-561-SCR 1/9/12), where Mr. Sonnier was purportedly excluded for using an improper methodology. ROA.1182-1198.

As the trial judge explained as part of his ruling overruling Church Mutual's objection to Mr. Sonnier's testimony, that case is completely distinguishable from the case at bar. Specifically, the trial judge explained:

THE COURT: I hear what you're saying and I'll let you continue, but I'm going to help you short-circuit this a little bit. Okay. This case - -

MR. MOBLEY: Yes.

THE COURT: - - is very distinguishable from what he's here for in this case. In this particular case in the Middle District Mr. Sonnier was asked to opine on how - in the manner in which State Farm adjusted the claim, and he was also going to be asked would he have recommended that the claim be paid. That was what he was asked to do in this case. He wrote a two-page report. The magistrate judge, and I agree to be quite honest with you in this case, said, hey, that's two pages and how he came up with that opinion doesn't satisfy, I'm assuming, the *Daubert* standard under the federal rules. Okay.

MR. MOBLEY: Yeah.

ROA.1186-1187.

THE COURT: From what I've gathered looking in these binders, that's not what he was asked to do in this case. He was asked to do an adjustment and estimate on the damages to the church . . . that's his report though. Come on. Every adjuster - - I don't even make adjusters in these cases - - I think it's been very common and everyone knows I don't make adjuster (sic) - - it's sort like treating physicians in personal injury cases. I don't make them write reports because the Xactimate - - we all - - I think we all agree the Xactimate software is the methodology that is accepted in the field of adjusting to use. He's certainly qualified to use Xactimate. That is the report. That is the very heart of the report . . . No, no, but my point is you're trying to say he wrote a one-page report in this case and I'm telling you he wrote - - a one page narrative, but I've got a 500-page Xactimate estimate over here . . . I know. Look, all of them use Xactimate. I understand what Mr. Mobley is referring to. There are certain parameters and variables you can plug into Xactimate. You can - - the pricing date, pricing data, you know, there's a lot of variables like that and those are all, Mr. Mobley, subject to cross-examination. It does not in and of itself render the opinion inadmissible under *Daubert*. Okay. I think we can agree on that.

ROA.1187-1190.

As noted by the trial judge, the use of Xactimate software is the accepted methodology for an adjuster to prepare a damage estimate. Mr. Sonnier testified that he did in fact use Xactimate to prepare his estimate, and his detailed Xactimate estimate was introduced into evidence without objection. ROA.1215-1217, 3536-4095. With respect to Xactimate, Mr. Sonnier testified that it is the industry standard for both public adjusters and insurance companies to prepare estimates. ROA.1215. In fact, it is used about 95% of the time by insurance companies. ROA.1215.

It is important to point out that, prior to Mr. Sonnier preparing his Xactimate estimate, he personally inspected the property inside and out and observed the

damage included in his Xactimate estimate. ROA.1207-1208. He also met onsite with the pastor of the church and the engineer retained by First United. ROA.1207. He and his staff then spent four days on the property to scope out the damages included in his estimate. ROA.1213. They also reviewed 670 photographs of the property taken by Church Mutual's field adjuster before any repairs were made. ROA.1213.

Mr. Sonnier also consulted with First United's engineer, Robert Wright, as he was preparing his report, including four to five conversations with him to make sure everything that was included as part of his report was properly included as damage caused by the hurricanes. ROA.1214-1215. Additionally, Mr. Sonnier reviewed Mr. Wright's engineering report before he completed his estimate. ROA.1215.

In light of the above, the trial court was well within its vast discretion to admit Mr. Sonnier's testimony, especially when this Court's review is less rigorous than it would be had Church Mutual properly challenged Mr. Sonnier in a timely *Daubert* motion. *Kim v. American Honda Motor Company, Inc.*, 86 F.4th 150, 158-159 (5th Cir. 2023); *U.S. S.E.C. v. Snyder*, 292 Fed.Appx. 391, 400 at fn 1 (5th Cir. 2008). In fact, the trial court went above and beyond in this case by considering the merits of Church Mutual's objection to Mr. Sonnier's testimony when Church Mutual did not timely file a *Daubert* motion.

Lastly, it is important to note that, even though Church Mutual objected to

Mr. Sonnier testifying, it did not object to his report being introduced into evidence. ROA.1216-1217, 3535-4095. Thus, Mr. Sonnier's damage estimate was properly considered by the trial court in awarding damages regardless of the admissibility of Mr. Sonnier's testimony.

C. The Trial Court Properly Admitted and Relied Upon the Reports of Kermith Sonnier and Robert Wright.

Church Mutual's second complaint in its appeal is that the trial court erred in considering Kermith Sonnier's damage estimate and Robert Wright's engineering report in awarding damages, penalties, and attorney's fees. As an initial matter, Church Mutual has not appealed the amount of the trial court's policy damage award nor pointed out any specific item of damage which the trial court may have improperly awarded. In fact, Church Mutual has not requested any relief from the trial court's award of policy damages. Instead, Church Mutual only complains about portions of Mr. Sonnier's and Mr. Wright's findings that the trial court agreed should be excluded and did not rely upon when making its award of policy damages. Therefore, it is unclear what error Church Mutual is claiming the trial court made with respect to Mr. Sonnier's and Mr. Wright's reports or what relief it is seeking.

In any event, addressing Church Mutual's complaints about the reports of Mr. Sonnier and Mr. Wright, it is important to note that Church Mutual did not object to the introduction of either Mr. Sonnier's report or Mr. Wright's report at trial. ROA.829, 1216-1217. A party who fails to object to the admission of evidence at

trial waives the right to contest the admission of that evidence as error. This Court has explained that rule as follows:

In order to preserve the admission of evidence as error for appellate review, an objection must be made at trial. Fed.R.Evid. 103(a)(1). A motion in limine is insufficient to meet this requirement. A party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial.

Wilson v. Waggener, 837 F.2d 220, 222 (5th Cir. 1988); *Foradori v. Harris*, 523 F.3d 477, 507 at fn 26 (5th Cir. 2008).

Moreover, Church Mutual did not call a single witness to dispute Mr. Sonnier's damage estimate. In fact, Church Mutual did not dispute the vast majority of the damages ultimately awarded by the trial court. In that regard, Church Mutual's own experts found that there was unpaid interior damage to BUILDING 1 (the new sanctuary) of over \$263,000, and that the cost to replace the roof on the new sanctuary was \$518,817.26 ROA.532-533, 1352, 4394-4426, 4486-4489. As noted earlier above, Church Mutual has paid zero for this undisputed damage of nearly \$800,000, despite clearly knowing that its original finding that the damage to the new sanctuary was below the policy deductible of \$55,000.00 was completely unsupported. ROA.2002-2003. In addition to the undisputed damage to BUILDING 1 (the new sanctuary), Church Mutual did not call any witnesses to dispute the unpaid damage to BUILDING 4 (the old church) other than the exterior cracking. The undisputed, unpaid damage to BUILDING 4, after deduction for the exterior

cracking, was still hundreds of thousands of dollars. ROA.536.

At trial, Church Mutual's counsel pointed out only one error in Mr. Sonnier's estimate, which was over 500 pages long, constituting only a small percentage of his damage estimate. Specifically, there was an error in the Xactimate input for scaffolding cost, which Mr. Sonnier acknowledged at trial, resulting in a reduction in his estimate of \$52,459.70. ROA.535-536, 1267-1268. This reduction was made by the trial court and constituted less than 4% of its calculation of the total unpaid policy losses (\$52,459.79 divided by \$1,475,157.45). ROA.536.

Likewise, with respect to Robert Wright's engineering report, which is almost 400 pages long, Church Mutual did not point out any errors in his report, but instead simply disagreed that all of the items contained in his report were caused by the hurricanes. The trial court, however, accepted Mr. Wright's causation analysis for all damages except for the roof on BUILDING 2 (the T.D. Cardwell Center) and the cracks in the masonry and EFIS on the buildings, which the trial court concluded were pre-existing. ROA.535-536. These items were deducted from and did not constitute part of the trial court's policy damage award. ROA.535-536.

Although it is unclear what relief Church Mutual is seeking with respect to Mr. Sonnier's and Mr. Wright's reports, Church Mutual apparently is asking this Court to find that the trial court should have disregarded their reports entirely, because it found First United did not prove a small portion of the damages in those

reports were caused by Hurricane Laura and Hurricane Delta. This position is not supported by well-established jurisprudence. In that regard, the trier of fact has the right to credit or discredit all or part of testimony or evidence as it sees fit. *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576, 71 S.Ct. 428, 429, 95 L.Ed. 547 (1951); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609, 613 at fn 7 (5th Cir. 1966). See also, *Guzman, supra*, which requires “even ‘greater deference to the trial court’s findings when they are based upon determinations of credibility.’” 808 F.3d at 1036.

Considering that the trial court did in fact exclude some items in Mr. Sonnier’s report that Church Mutual disagreed with, Church Mutual’s complaints about Mr. Sonnier’s and Mr. Wright’s reports and the trial court’s consideration of them are unfounded. There is no basis for relief for this claim of error.

D. The Trial Court’s Award of Penalties and Attorney’s Fees Was Fully Supported by the Evidence and the Admissions of Church Mutual and Its Counsel.

- 1. The law mandates an award of penalties and attorney’s fees, when an insurance company fails to pay timely after receipt of satisfactory proof of loss and that failure is arbitrary, capricious, or without probable cause.**

Church Mutual’s next complaint on appeal is that the trial court erroneously found it violated La. R.S. 22:1892. La. R.S. 22:1892 provides for a mandatory penalty of 50% of the amount found to be due from the insurer, plus attorney’s fees, if the insurer fails to pay that amount within 30 days of receipt of satisfactory proof

of loss and the insurer's failure to pay in a timely manner was arbitrary, capricious or without probable cause. The pertinent parts of the statute provide:

All insurers issuing any type of contract . . . shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured . . .

Failure to make such payment within thirty days after satisfactory written proofs and demand therefor or failure to make a written offer to settle any property damage claim . . . within thirty days after receipt of such satisfactory proofs of loss of that claim . . . when such failure is found to be arbitrary, capricious, or without probable cause, **shall** subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater, payable to the insured . . . or in the event a partial payment or tender has been made, fifty percent of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs.

With respect to the satisfactory proof of loss requirement to trigger penalties, attorney's fees, and reasonable costs, the timeliness of an insurance company's payment after receipt of satisfactory proof of loss is the key to either avoiding or incurring penalties and attorney's fees. To that end, as Church Mutual's corporate representative, Lynn Renland, agreed, an "insurer's receipt of satisfactory proof of loss is what triggers the running of the applicable statutory time limits" within which an insurance company is required to pay. *Boudreaux v. State Farm Mutual Automobile Insurance Company*, 896 So.2d 230, 234, 2004-1339 (La. App. 4 Cir.


2/2/05); ROA.736.

As Ms. Renland further admitted, proof of loss is a flexible requirement and is not required to be in any formal style. *Louisiana Bag Company, Inc. v. Audubon Indemnity Company*, 975 So.2d 187, 190, 2007-1103 (La. App. 3 Cir. 1/30/08), *affirmed*, 999 So.2d 1104, 2008-0453 (La. 12/02/08); ROA.736. And, as Ms. Renland further admitted, proof of loss can be as simple as: (1) a handwritten estimate of the cost of repairs (*Sevier v. United States Fid. & Guar. Co.*, 497 So.2d 1380 (La. 1986)); (2) personal inspection of an insured's property by an independent adjuster (*J.R.A. Inc. v. Essex Ins. Co.*, 2010-0797 (La. App. 4 Cir. 5/27/11), 72 So.3d 862, 881)); (3) proof of insurance, photographs, and salvage information (*State Farm Mut. Auto. Ins. Co. v. Norcold, Inc.*, 2011-1355 (La. App. 3 Cir. 4/4/12), 88 So.3d 1245)); and (4) an independent adjuster's opportunity to discover damages but failure to do so (*Aghighi v. Louisiana Citizens Prop. Ins. Corp.*, 2012-1096 (La. App. 4 Cir. 6/19/13), 119 So.3d 930, 934, *writ denied*, 2013-1737 (La. 10/20/13), 124 So.3d 1102)); ROA.737-738.

2. Church Mutual's failure to timely pay undisputed damages rendered it liable for penalties and attorney's fees as a matter of law.

The Louisiana Supreme Court has unequivocally stated that "any insurer who fails to pay [an] undisputed amount has acted in manner that is, by definition, arbitrary, capricious or without probable cause. . ." *Louisiana Bag Co. v. Audubon*

Indemnity Co., 2008-0453 (La. 12/2/08), 999 So.2d 1104, 1116. As stated in the “Facts” section earlier in this brief, on November 20, 2020, Church Mutual’s field adjuster, Tony Bunn, provided Church Mutual with an “undisputed estimate” and advised Church Mutual that it owed an “undisputed payment” of \$169,592.87, yet Church Mutual did not make a single payment to First United until almost two months later, on January 14, 2021. ROA.744, 765.



Claim File
11/20/2020

CLAIM CONSULTANT GROUP
SERVICES REPORT

11/20/2020
Claim Consultant Group
500 N. Goodpasture Street
Falmouth, VA 23042

Automatic Claims Number Prefix
Policy Number : 002907-00-00022
Claim Number : 11/20/2020
Date of Loss : 08/11/2020
Event : Fire/Lightning/Explosion/Chimney
Event Location : 200 South W. DeLoach, VA Beach

ADJUSTER:
This will acknowledge that we received this assignment on October 5, 2020.
Date of Contact with Insured: October 5, 2020
Assignment Date: October 12, 2020

REMARKS:

CMCG CLAIM FILE 0450
Page 1 of 2

Undisputed Estimate:
\$ 15,050.04 RC
\$ 562.50 Depreciation
\$ 14,487.54 ACV
\$ 0.00 Deductible
\$ 14,487.54 Loss

GENERAL REMARKS:
The fire and explosion investigations with EFI Global have been completed on October 09/2020. The fire, light, chimney and explosion claims, chimney, as per understanding that they will be inspecting the subject metal roofing systems and reported water intrusion.

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REMARKS/PLAN:
As per the report of damage to make available, we will review, make the necessary adjustments, if not satisfied, and return to you as soon as possible with the Check and Cash Advance. Please feel free to contact us with any questions or concerns during the process.

Sincerely,
Tony Bunn
General Adjuster

STATUS REPORT

11/20/2020

Claim Consultant Group

Undisputed Estimate:

\$ 15,050.04	RC
\$ 562.50	Depreciation
\$ 14,487.54	ACV
\$ 0.00	Deductible
\$ 14,487.54	Loss

GENERAL REMARKS:

As you are aware, representatives with EFI Global have been retained to further inspect 001/002 (Family Life Center) and 001/004 (New Church); it is our understanding that they will be inspecting the subject metal roofing systems and reported water intrusion.

Per your earlier instruction, we have prepared an attached an undisputed estimate for known damages. **Our undisputed recommendations conclude at \$169,592.87 and pertain to repairs associated with 001/001 (Old Church) and SOP. Pending your review and authority we recommend that an undisputed payment be issued in your usual manner. Please refer to the attached undisputed estimate and supporting documents for additional details.**

ROA.1868,1872.

Church Mutual’s failure to make an undisputed payment within 30 days of receipt of this information was “by definition, arbitrary, capricious or without probable cause.” Ms. Renland specifically admitted this and that, as a result, Church Mutual’s first payment was late and made in violation of Louisiana law. She testified:

Q. All right. Thank you. And I'm making sure one last time because I think that's the last - - well, let me go to one more. Board 26. You agree that Church Mutual taught its adjusters before Hurricane Laura that the insurance company, Church Mutual, had to pay the undisputed amounts owed within 30 days from receipt of satisfactory proof of loss?

A. Yes.

Q. Go to the next one, please. And Church Mutual emphasized and told its employees that if you don't do that, the failure to pay an undisputed amount is by definition arbitrary, capricious, and without probable cause?

A. Yes.

ROA.738.

Q. You agree that on November 20th, 2020, Church Mutual's adjuster, Mr. Bunn, recommended an undisputed payment of \$169,592.87?

A. That sounds about the right date, yes.

Q. Ok. You agree the first payment was not made until January 14, 2021? We talked about that.

A. Yes.

ROA.744.

Q. All right. Let's talk about the first payment, okay.

A. Okay.

Q. That was the one that was made on January 14th of 2021 for \$166,090.81. I want to be clear on that.

A. Yes.

Q. You agree that payment was late.

A. Yes.

Q. You agree that payment was made in violation of Louisiana law.

A. Yes.

ROA.765.

Accordingly, by Church Mutual's own admission, it violated La. R.S. 22:1892, thus mandating an award of penalties and attorney's fees. In fact, Church

Mutual's counsel offered to stipulate that Church Mutual's first payment was late rather than have its corporate representative's testimony about this be put on the record. In that regard, Church Mutual's counsel stated:

MR. MOBLEY: I'm going to object, Your Honor, to that. I mean the inspection was timely. The payment was - - the payment was untimely. I've offered to stipulate to that with Mr. Hanchey.

ROA.741. Church Mutual's attempt to contest the trial court's bad-faith determination in light of the testimony of its own corporate representative and the proposed stipulation of its counsel is troubling at best and should be rejected out of hand by this Court.

Also troubling is Church Mutual's repeated contention in its brief that it did not receive a written estimate of damages from First United until three months before trial, which apparently Church Mutual somehow believes should relieve it from the trial court's finding of bad faith. Church Mutual's contention that it did not receive a written estimate from First United until three months prior to trial, however, simply is not true. As part of the trial court's mandatory initial disclosures for litigation involving Hurricane Laura and Hurricane Delta, counsel for First United provided an estimate of damages from a public adjuster, Integrity Claims Consultants, LLC, in the amount of \$1,332,957.59 to Church Mutual's counsel. ROA.331-336, item 2e; ROA.5745-5793. This estimate was again provided to Church Mutual's counsel on June 14, 2022. ROA.263-312. Again, that estimate included items of damage

that Church Mutual did not dispute at trial.

Moreover, Church Mutual's actions violated La. R.S. 22:1892 long before its receipt of a damage estimate three months before trial. As shown previously in the "Facts" section of this brief, Church Mutual received numerous photographs of the property damage from First United on September 9, 2020, inspected the property on October 12, 2020, and received a report and extensive photographs from its field adjuster, Tony Bunn, property on October 13, 2020, documenting extensive, undisputed damage to the property, all of which constituted satisfactory proof of loss as admitted by Lynn Renland and as set forth in the jurisprudence cited above. ROA.740, 744, 760-765, 769-774.

Furthermore, Church Mutual's own experts, Lori Cox and Neil Wright, provided reports to Church Mutual on June 5, 2023, showing that undisputed damages of over \$263,000.00 to BUILDING 1 (the new sanctuary) were missed by Mr. Bunn during his inspection and that it would cost over \$500,000.00 to replace the roof of BUILDING 1. ROA.746, 1352, 1354-1355, 4354-4393, 4394-4470, 4486-4489. Despite this, at the time of trial, well over 30 days after Church Mutual received these reports from its experts, those undisputed sums remained unpaid – again a clear violation of La. R.S. 22:1892.

Despite the extensive evidence above that Church Mutual repeatedly failed to pay undisputed amounts to First United, Church Mutual boldly states on page 29 of

its brief that, “First United never showed any ‘undisputed’ amount that was due.” Church Mutual’s appeal of the trial court’s determination that it violated La. R.S. 22:1892 is completely without merit.

3. Church Mutual’s failure to perform a good-faith adjustment of First United’s claims after its inspection also rendered it liable for penalties and attorney’s fees.

An adjuster’s inspection charges an insurance company with knowledge of all reasonably discoverable damages, including those damages the insurer’s adjuster omits from his first report. *Aghighi v. Louisiana Citizens Property Ins. Corp.*, 2012-1096 (La. App. 4 Cir. 6/19/13), 119 So.3d 930, *writ denied*, 2013-1737 (La. 10/20/13), 124 So.3d 1102. In *Aghighi*, the court discussed an insurance company’s improper initial adjustment and stated:

Likewise, in this case, the initial adjuster, hired by [the insurer], failed to properly adjust a substantial amount of damages and repair costs in his report. The damage was not excluded from the report because it was in dispute; it was excluded because the adjuster did not have the requisite knowledge to adjust the claim or simply chose not to do so The insurer’s duty under La. R.S. 22:1892 mandates more than merely sending an adjuster to the insured’s property to take pictures and calculate numbers on less than all the damage. It would defeat the purpose of the statute to allow an inadequate and unreasonably low adjustment, done within the requisite time delays, to satisfy the insurer’s obligation to the insured. Likewise, allowing a “readjustment” done approximately six months later to cure the original bad conduct without any penalty would be condoning the insurer’s actions.

Id. at 935. Based on this reasoning, the court in *Aghighi* found the insured was entitled to penalties and attorney’s fees, because the insurer’s actions were arbitrary,

capricious, and without probable cause due to its inadequate initial inspection and adjustment.

In this case, Church Mutual's own expert, Lori Cox, prepared a report and provided testimony showing that Church Mutual's field adjuster missed hundreds of thousands of dollars of visible damage items during his initial inspection that should have been paid. ROA.746, 1352, 1354-1355, 4354-4393, 4394-4470, 4486-4489. This further supports the trial court's ruling that Church Mutual is liable for penalties and attorney's fees.

4. Church Mutual's failure to evaluate additional information as received, even after the filing of a lawsuit, renders it liable for penalties and attorney's fees.

Church Mutual makes repeated reference in its brief to the fact that it did not receive some of First United's proofs of loss until after a lawsuit was filed. That does not save Church Mutual from the fact that it had already violated La. R.S. 22:1892 prior to suit being filed by failing to pay the undisputed damages reported by its own field adjuster.

Moreover, in *Sher v. Lafayette Insurance Company*, 07-2441 (La. 4/8/08), 988 So.2d 186, 198, the Louisiana Supreme Court referred to the long-standing rule that "the duties of good faith and fair dealing imposed on insurers by R.S. 22:1892 are continuing duties that do not end during litigation." Accordingly, Church Mutual had a duty to evaluate new information as received during the course of First

United's claims, even after a lawsuit was filed, and to make unconditional tenders within 30 days based on that new information. As demonstrated above, Church Mutual failed to do so when it made no payments after receipt of the written estimate of Integrity Claims Consultants, LLC from First United, the expert reports of Kermith Sonnier and Robert Wright from First United, and the reports of its own experts, Lori Cox and Neil Wright. Church Mutual's failure to re-evaluate its prior inadequate payments based on its receipt of new proofs of loss also supports the trial court's award of penalties and attorney's fees.

E. Written Proof of Loss from the Insured Is Not Required

Church Mutual makes an unsupported argument that proof of loss is only sufficient if it is in writing and comes from the insured, and that First United "submitted *no sufficient proof of loss* prior to May 2023." (Emphasis original). Church Mutual's brief, p. 35. Church Mutual's argument that the only proof of loss sufficient to trigger penalties and attorney's fees is one in writing from the insured has never been the law. Rather, Church Mutual makes a contorted argument that written proof of loss from the insured is required based on its incorrect interpretation of the 1989 amendment to the prior version of La. R.S. 22:1892. This Court rejected Church Mutual's same argument in *Sugartown United Pentecostal Church Incorporated v. Church Mutual Insurance Company*, 2024 WL 62947 (5th Cir. 2024), yet Church Mutual raised this argument again here without reference to that

ruling. In *Sugartown*, this Court stated:

CM contends the jury had no evidence to support a bad faith finding. Based on § 22:1892, which requires written proofs of loss “from the insured or any party in interest,” CM claims such proofs could have come only from Sugartown. Thus, it claims this occurred only when Sugartown sent its statements to CM on May 25, 2021 well *after* CM's payment on November 16, 2020. Alternatively, even if proofs need not come from Sugartown, the proper trigger date should have been October 20, 2020, when it received Montano's final report. Finally, CM claims its good faith reliance on experts should have insulated it from a finding that it acted in an arbitrary and capricious manner.

Like the district court, we reject these arguments. First, CM points to no authority that § 22:1892 requires written proof of loss from the insured alone. *Cf. Sevier v. U.S. Fid. & Guar. Co.*, 497 So. 2d 1380, 1384 (La. 1986) (holding repair estimate by the insurance adjuster's contractor was satisfactory proof of loss); *J.R.A. Inc. v. Essex Ins. Co.*, 72 So. 3d 862, 881 (La. Ct. App. 2011) (“A personal inspection of an insured's property by an adjuster for the insurance company also constitutes satisfactory proof of loss.”).

In addition to the *Sugartown* decision, in *Anco Insulations, Inc. v. National Union First Ins. Co. of Pittsburgh, Pennsylvania*, 787 F.3d 276, 286 (5th Cir. 2015), this Court stated that, “Louisiana has ‘adopted liberal rules concerning the lack of formality relative to proof of loss.’ So long as the insurer obtains sufficient information to act on the claim, the manner in which it obtains the information is immaterial.” Even Church Mutual’s own representative, Lynn Renland, agreed that this was the rule. ROA.736-738.

Church Mutual’s claim that the trial court erred in finding that Church Mutual received satisfactory proof of loss is unsupported and should be rejected.

F. Penalties and Attorney's Fees Are Owed on the Entire Amount of the Court's Award as a Matter of Law.

In addition to claiming that it was not in bad faith at all, Church Mutual, without citing any authority, alternatively contends that the trial court should not have cast Church Mutual in judgment for penalties and attorney's fees on the entire amount found to be due by the trial court or, alternatively, on only the proceeds that had not been paid as of the time of trial. These arguments were previously rejected by this Court.

In *Grilletta v. Lexington Insurance Company*, 558 F.3d 359 (5th Cir. 2009), the insurance company made an untimely payment to its insured of an undisputed amount before trial. At trial, the district court awarded penalties and attorney's fees on the untimely payment of the undisputed amount. The district court also found that an additional amount was still due and owing under the policy at the time of trial. The district court, however, declined to award penalties and attorney's fees on that additional amount, because it found there was a reasonable dispute as to that additional amount. This Court reversed and found that penalties and attorney's fees were due on the entire amount of the claim. In making ruling, this Court relied upon a line of cases holding that:

[I]f part of a claim for property damages is not disputed, the failure of the insurer to pay the undisputed portion within the statutory delay will subject the insurer to penalties on the entire claim.

Id. at 370.

Likewise, in *French v. Allstate Indemnity Co.*, 637 F.3d 571, 589-590 (5th Cir. 2011), this Court stated:

We also noted that while the insurer in *Louisiana Bag* had timely made partial payment, the insurer in *Grilletta* “did not pay or tender anything to the Plaintiffs within the statutory deadline.” *Id.* at 371. **We therefore concluded the insurer was liable for penalties on the entire amount found to be due, without any subtraction for amounts paid.** *Id.* In light of our prior decision in *Grilletta*, we conclude that the district court was correct to interpret ‘amount to be due in’ in § 22:658 as the entire amount ultimately found to be due to the Plaintiffs. (Emphasis added).

Church Mutual’s argument that penalties and attorney’s fees should not have been awarded on the entire amount found to be due by the trial court is incorrect and without legal support. To the contrary, the cases cited above are clear that if the insurance company fails to make an undisputed payment in a timely manner, penalties and attorney’s fees are owed on the entire amount found to be due without subtraction for prior payments. This claim of error should thus be rejected.

G. Church Mutual’s Complaints About the Pricing in Mr. Sonnier’s Report and the Trial Court’s Award Have Been Waived.

Church Mutual’s last complaint of error is that First United’s expert, Kermith Sonnier, allegedly used improper pricing in his estimate and that the trial’s award was based on that improper pricing. As noted previously, however, Church Mutual did not object to the introduction of Mr. Sonnier’s estimate. ROA.1216-1217, 3535-4095. Although Church Mutual did file a motion in limine with respect to the pricing

that should be used, among other things, the trial court deferred all evidentiary rulings until trial. ROA.165-173, 232-234. When First United moved to introduce Mr. Sonnier's report, Church Mutual did not re-urge its objection. ROA.1216-1217. Nor did Church Mutual ever object to the pricing used in Mr. Sonnier's report, call a witness to challenge the pricing in Mr. Sonnier's report, or call a witness to establish what the pricing should allegedly be.

As noted previously, a party who fails to object to the admission of evidence at trial waives the right to contest the admission of that evidence as error.

That rule is as follows:

In order to preserve the admission of evidence as error for appellate review, an objection must be made at trial. Fed.R.Evid. 103(a)(1). A motion in limine is insufficient to meet this requirement. A party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial.

Wilson v. Waggener, 837 F.2d 220, 222 (5th Cir. 1988). See also, *Foradori v. Harris*, 523 F.3d 477, 507 at fn 26 (5th Cir. 2008) (“ . . . although a defendant filed a motion *in limine* on an evidentiary issue, a failure to object to the evidence at trial waives the issue for appeal”).

Church Mutual's claim of error concerning the pricing used in Mr. Sonnier's report has thus been waived. Even if it were not waived, however, Church Mutual did not put on any evidence to challenge the appropriateness of the pricing used by Mr. Sonnier nor did it call any witness to establish the pricing it believed should be

used. Accordingly, Church Mutual's claim of error concerning the pricing used by Mr. Sonnier has no merit and should be denied.

CONCLUSION

This appeal involves nothing more than disputed factual issues properly resolved by the trial court using well-settled law that were simply not resolved to Church Mutual's satisfaction. That is not a basis for appellate relief. First United respectfully requests that the trial court's judgments and rulings be affirmed at Church Mutual's cost.

Respectfully submitted,

THE TOWNSLEY LAW FIRM

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***Counsel for Plaintiff-Appellee, First United
Pentecostal Church***

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, a copy of appellee’s brief was served upon counsel for appellant, Church Mutual Insurance Company, specifically Sidney W. Degan, III, Travis L. Bourgeois, Candace C. Chauvin, Larry E. Mobley, and Steve K. Schilling through the Court’s electronic filing system, and by email to, sdegan@degan.com, to tbourgeois@degan.com, to cchauvin@degan.com, and to lmobley@degan.com and by United States Mail, Postage Prepaid, to Sidney W. Degan, Travis L. Bourgeois, and Candace C. Chauvin at Degan, Blanchard & Nash, 400 Poydras Street, Suite 2600, New Orleans, Louisiana 70130, to Larry E. Mobley at Degan, Blanchard & Nash, 600 Jefferson Street, Suite 800, Lafayette, Louisiana 70501, and to Steven K. Schilling at Degan Blanchard & Nash, 555 Hilton Avenue, Suite 620, Baton Rouge, Louisiana 70808.

/s/ David H. Hanchey

DAVID H. HANCHEY

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 11,465 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14 font Times New Roman.

/s/David H. Hanchey

DAVID H. HANCHEY

Attorney for Plaintiff – Appellee,
First United Pentecostal Church

Dated: February 5, 2024